

STATE OF SOUTH CAROLINA  
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

The Honorable Alison Renee Lee, Circuit Court Judge  
Case No. 2001-CP-40-03299

ROBERT ANTHONY JAMES, ..... PETITIONER,

v.

STATE OF SOUTH CAROLINA, .....RESPONDENT.

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**BRIEF OF RESPONDENT**

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## ISSUES PRESENTED

1. Probative evidence supports the PCR court's findings that Petitioner failed to carry his burden in proving that counsel's arguments in support of the motion constitute deficient performance and in proving such alleged deficient performance resulted in prejudice.
2. The argument raised through *Amicus Curiae* in this matter improperly diverts the actual issue before this Court as argued on appeal and therefore does not meet the requirements under Rule 213, SCACR, as it is not "limited to ... the issues...as presented by the parties"; further, the issue is not preserved for appellate review as the PCR court did not rule on whether counsel was ineffective in failing to challenge the constitutionality of S.C. Code § 1-7-330 (1976), nor was the issue raised to the PCR court.

## STATEMENT OF THE CASE

Petitioner was indicted at the August 1999 term of the Richland County Grand Jury for two counts of Armed Robbery, two counts of Possession of a Firearm or Knife During the Commission of or Attempt to Commit a Violent Crime, Assault with Intent to Kill, two counts of Kidnapping, and Criminal Sexual Conduct in the First Degree. He was represented by John Shupper, Esquire, on the charges. On September 20, 1999, Applicant proceeded to jury trial before the Honorable Costa M. Pleicones and on September 24, 1999, the jury found Petitioner guilty of all charges as indicted. Applicant was sentenced to thirty years imprisonment for Criminal Sexual Conduct and concurrent terms as follows: thirty years for count two of Armed Robbery, thirty years on each count of Kidnapping, ten years for Assault with Intent to Kill and five years on each count of Possession of a Weapon, all to be followed consecutively by ten years imprisonment for count one of Armed Robbery, resulting in a forty year aggregate sentence.

A Notice of Appeal was filed and an appeal was perfected. By order dated March 21, 2001, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Petitioner subsequently filed an application for post-conviction relief on August 8, 2001. The State made its Return on March 26, 2002. An evidentiary hearing was convened on January 14, 2005, at the Richland County Courthouse. Applicant was present and represented by counsel, Tara Shurling, Esquire. The State was represented by Arie D. Bax, Esquire, of the South Carolina Attorney General's Office. At the hearing, Petitioner testified on his own behalf. Also testifying was John B. Shupper, Esquire, Petitioner's former trial counsel. By order dated August 19, 2005, and filed August 22,

2005, The Honorable Alison Renee Lee denied and dismissed Petitioner's PCR application with prejudice.

Thereafter, Petitioner filed a Petition for Writ of Certiorari on February 27, 2008. On January 6, 2009, the South Carolina Supreme Court transferred the matter, per Rule 227(l), SCACR, to the Court of Appeals.<sup>1</sup> The Court of Appeals granted certiorari on December 14, 2009, and the matter proceeded to briefing. On October 19, 2011, the Court heard oral arguments and subsequently issued an unpublished opinion on October 27, 2011, affirming the convictions and sentences. James v. State, 2011-UP-480 (S.C. Ct. App. filed October 27, 2011). The petition for rehearing was denied on December 20, 2011.

Petitioner filed a petition for writ of certiorari to this Court. The State made its return to the petition and this Court granted the petition to review this matter. The State's Brief of Respondent follows.

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<sup>1</sup> Now cited as Rule 243(l), SCACR.

## STATEMENT OF FACTS

On the evening of May 28, 1996, Victim and Winfred Bull met at Bull's house at roughly nine o'clock in the evening. (App. pp. 566, ln 25 – p. 567, ln 6). The two left Bull's house shortly after and drove to T.S. Martin Park where they watched an on-going softball game. (App. pp. 569, ln 13 – 570, ln 25). At the end of the game, they left to get food at a fast food restaurant, then returned to the park to a nearby picnic bench to talk. (App. pp. 571, ln 1 – p. 573, ln 24).

After several minutes, they were approached by two men walking through the park, one of whom stopped and asked to borrow a lighter. (App. pp. 574, ln 18 – p. 575, ln 4). As Bull reached into his pocket to pull out his lighter, the man requesting the lighter pulled out a gun and grabbed Bull, placing the gun against Bull's head. (App. p. 575, lns 8 – 13; p. 577, lns 9 – 20). Victim would later identify this first perpetrator as Petitioner. (App. p.p 576, ln 23 – p. 577, ln 6). At that instant, three additional men ran out of the bushes to the picnic table where one of the men grabbed Victim and began to demand money from the two. (App. p. 577, lns 11 – 12; p 578, 1 – 5). Victim would later identify this suspect as Petitioner's co-defendant brother, Kenneth James (hereafter "James"). (App. p. 580, lns 2 – 7). After being told by the victims they did not have any money, the perpetrators stripped Victim and Bull of their clothes and began to demand car keys. While stripping Victim of her clothes, James found Victim's car keys hidden in Victim's dress. (App. p. 578, lns 1 – 5; p. 580, lns 19 – 22). James passed the keys to two of the perpetrators who then began to search Victim's car, eventually taking several purses from her trunk. (App. p. 581, lns 15 – 16). During that time, James threw Victim against the back of a chair and began to rape her. (App. pp. 582, ln 2 – p. 583, ln 23).

When he was finished, the perpetrators dragged Victim and Bull to a nearby wooded area, where four of the five perpetrators “took turns” sexually assaulting Victim, raping her and forcing her to perform fellatio. (App. pp. 584, ln 4 – p. 585, ln 24). Victim testified Petitioner was the second of the group to assault her with all of the remaining men either raping or attempting to rape her, she was adamant that James never left her side during the entirety of the attack. (App. p. 586, lns 11 – 24; p. 623, lns 4 - 20). Several of the men were wearing condoms during the assault, and ultimately two used condoms. Four condom wrappers were found at the scene by police. (App. p. 590, lns 15 – 19; App. p. 539, lns 11 – 13).

During the attack on Victim, a struggle ensued between Bull and the perpetrators restraining him, during which Bull was able to get free and flee the scene. The perpetrators fired several shots at Bull as he ran away but all shots missed. At the end of the assault, three of the men then ran from the scene, leaving only Petitioner and James with Victim. (App. p. 592, lns 5 – 7). The two men dragged Victim to a mausoleum in the nearby cemetery where James again raped Victim before leaving her alone inside the structure. (App. p. 593, ln 3 – 21).

After several minutes, Victim came out of the mausoleum almost entirely nude and made her way to her car. (App. pp. 594, ln 17 – p. 595, ln 9). Once there, she was met by a police cruiser carrying Bull. (App. p. 595, lns 18 – 24). Victim was taken to Richland Memorial Hospital where she was fully examined and tested by doctors. (App. p. 596, ln 7 – p. 598, ln 16). A Sexual Assault Kit was performed on Victim at that time as well. (App. pp. 890 – 903). Later that morning, Victim was also shown a photo-lineup from which she picked Kenneth James, Petitioner’s brother, as one of the perpetrators.

(App. pp. 599, ln 23 – p. 603, ln 6; p. 826, lns 10 - 21). A search warrant was executed on James' house on May 30, 1999. (App. pp. 831, ln 17 – p. 835, ln 5). On June 18, 1996, Victim was again presented with a photo-lineup, at which time she identified Petitioner as a second participant in the brutal attack. (App. pp. 603, ln 7 – p. 605, ln 14; p. 841, lns 3 - 18).

At trial, Charles Murray testified he was preparing to ride his bike home from his mother's house on Germany Street on the night in question when he was approached by a scared, bloody, and paranoid Bull on the house's front porch. (App. p. 667, lns 2 – 14). Bull ran up to him asking him to call the police because his girlfriend was being raped in a nearby park. (App. p. 667, lns 9 – 20). Murray's mother allowed Bull to use the phone to call police, after which Murray, his stepfather and Bull waited outside. While outside waiting for police to arrive, the group saw five black men walk by Murray's mother's house in two groups from the direction of the park, at which time Bull identified them as the perpetrators of the assault. (App. p. 672, lns 6 – 25; p.711, ln 18 – p. 712, ln 14). Murray, as a long-time resident of the neighborhood, recognized three of the men in the group, two of whom were Petitioner and James. (App. p. 673, ln 11 – p. 674, ln 24).

Additionally, Ira Jeffcoat ("Jeffcoat"), the DNA Lab Supervisor for South Carolina Law Enforcement testified he oversaw the DNA testing performed as a result of Victim's Rape Kit in this case. Jeffcoat received the initial Rape Kit on May 31, 1996 at which time it was logged and stored for later testing (App. pp. 937, ln 16 – p. 941, ln 3). Due to SLED policy, the samples were sent back to the submitting agency six months later on March 1997 as no suspect DNA was available at that time. (App. p. 942, lns 8 – 25). The materials in Victim's Rape Kit were returned back to SLED for DNA analysis

on May 15, 1997, at which time Jeffcoat was made aware that the State would be moving to have the suspects' DNA samples drawn to be used in testing. (App. p. 943, lns 7 – 25; p. 948, lns 18 - 25). The Schmerber hearing to have such blood drawn was eventually convened in April of 1998. (App. p. 38, lns 9 – 11). Jeffcoat received Petitioner and James' blood samples for testing shortly thereafter on May 14, 1998. (App. p. 951, lns 3 – 12). Ultimately, James was a DNA match for the semen found as a result of the Rape Kit, while Petitioner was excluded as a potential donor. (App. pp. 956, ln 1 – 957, ln 20).<sup>2</sup>

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<sup>2</sup> While the record does not establish an actual DNA Analysis Report date issued by SLED, Jeffcoat testified to performing DNA analysis testing at least through August 12, 1998. (App. p. 997, ln 6).

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence’ of probative value” exists to sustain the PCR judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

## ARGUMENT

**1. Probative evidence supports the PCR court's findings that Petitioner failed to carry his burden in proving that counsel's arguments in support of the motion constitute deficient performance and that such alleged deficient performance resulted in prejudice.**

**A. Probative evidence supports the PCR court's finding that Petitioner failed to carry his burden in proving counsel's arguments in support of the speedy trial motion constitute deficient performance.**<sup>3</sup>

Petitioner alleges counsel was ineffective in raising the speedy trial motion and not achieving dismissal of the indictments. However, the motion was raised only five days before trial, so no speedy trial violation occurred. Further, any delay incurred was beneficial to Petitioner. Additionally, counsel articulated the motion reasonably, and his performance was not deficient.

Under the deficiency prong of an ineffectiveness claim, attorney performance is measured by reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Evidence of probative value supports the PCR court's finding that counsel's articulation of Petitioner's speedy trial motion was reasonable under professional norms.

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<sup>3</sup> Petitioner did not set forth any allegation that counsel was deficient in his performance for failing to raise the speedy trial issue at some earlier point in his representation; therefore, this issue has been abandoned for appellate review. See State v. Tyndall, 336 S.C. 8, 17, 518 S.E.2d 278, 282 (Ct. App. 1999); See also 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).

Petitioner appeared for the start of trial before The Honorable Costa Pleicones on September 25, 1999, represented by counsel. During pre-trial motions, counsel presented Petitioner's motion for dismissal of the indictments due to an alleged speedy trial violation under S.C. Code § 17-23-90 (1976), requesting "the Court...take the matter under consideration and...in a light most favorable to [Petitioner] take [Chief Justice Finney's] order literally and dismiss the charge[s]." (App. p. 35, lns 14 – 17). In support of the motion, counsel advised the Court Petitioner was arrested on December 30, 1996, and appointed an attorney from the Public Defender's Office roughly two months later. (App. p. 28, lns 13 – 17). Counsel testified that due to the Office's on-going representation of Petitioner's co-defendant brother, Petitioner's appointed attorney was relieved and Nathaniel Roberson, Esquire, was appointed as new counsel. (App. p. 28, lns 17 – 20; p. 38, lns 1 – 4). Counsel went on to say in September of 1997, a personal conflict arose between Roberson and Petitioner, at which time Roberson was relieved and counsel took over representation of Petitioner. (App. p. 28, lns 18 – 21; p. 38, lns 2 – 5; p. 43, lns 20 – 24). Counsel stated Petitioner filed a *pro se* motion for speedy trial on April 26, 1999, which he was not aware of until just prior to the start of the September 25<sup>th</sup> trial. (App. p. 33, lns 18 – 20; lns 1 - 2).

Counsel presented the motion to the Court, articulating Petitioner's grounds for dismissal of the indictment premised on the fact that "[Petitioner] clearly [had] been incarcerated since December of 1996," and, because there were no orders continuing the case beyond the statutory time period of one-hundred and eighty days, "the State should have proceeded to trial and disposed of [the] charges" long before the September 1999 trial date. (App. p. 35, lns 3 – 8). After allowing Petitioner the opportunity to add any

information and/or argument in support of the motion, the Court denied Petitioner's request finding that although Petitioner suffered a "horrendous delay" caused by factors "not terribly well explained" by either side, there had been insufficient evidence "relating to prejudice to the defense" presented to prove a speedy trial violation had occurred. (App. p. 44, lns 17 – 18, 22 – 24).

Counsel was reasonable in his presentation of the speedy trial motion despite little reference to resulting prejudice as there was no prejudice to Petitioner's defense which counsel could have presented. In fact, the alleged "undue delay" between Petitioner's arrest and eventual trial was advantageous to Petitioner's defense. Counsel's testimony at the PCR hearing supports this theory and, therefore, counsel's failure to point to specific instances of prejudice as part of his argument during the motion hearing was reasonable.

First, the delay allowed Petitioner the opportunity to vie for an independent trial where he could present his case without the burden of a highly incriminating sibling co-defendant to whom Petitioner could be linked through circumstantial evidence. According to counsel's PCR testimony, he and Petitioner were operating under a specific defense strategy to allow Petitioner's co-defendant, Kenneth James (hereafter "James"), the opportunity to accept an outstanding plea offer from the State prior to Petitioner's case being called for trial in an effort to guarantee Petitioner avoided a joint-trial. While the State initially represented its intention to try the co-defendants separately, counsel used the delay to try and ensure the State would not try Petitioner with James as it would be devastating to Petitioner's chances at trial. As stated by counsel, he and Petitioner "were proceeding under a theory that...the State had announced intentions from the time of [his] involvement that they were going to plead [James]...and [he] felt [that] was to

[Petitioner]’s advantage.” (App. p. 1411, lns 11 – 17). Further, counsel “felt the weight of the evidence, the greater weight, the quality and quantity of the evidence, was directed to [James] and there was circumstantial evidence linking [Petitioner] to [James].” (App. pp. 1412, ln 22 – p. 1413, ln 20). The evidence against James included a positive DNA match, the victim’s unwavering identification of James, and eyewitness identifications from a nearby gas station shortly after the attack where James allegedly requested change for a one-hundred dollar bill (the same denomination of money stolen from victim’s boyfriend during the attack).

In counsel’s view, the disparity in incriminating evidence between the co-defendants, having Petitioner’s case tried separately was the most critical concern for counsel in the months leading to trial. Waiting for James to enter a plea prior to Petitioner proceeding to trial was the only way counsel could be absolutely certain Petitioner would not be subjected to a joint-trial. Counsel made a reasonable strategic decision to allow the matter to be delayed from trial in an effort to guarantee Petitioner proceeded to an independent trial. See Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992)(Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective), *citing Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (S.C. 1992); see also Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992)(Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective). Although James ultimately chose not to accept the State’s plea offer in August of 1999, counsel’s sound strategy was valid and reasonable, and other benefits were gained by the trial being delayed.

Once James rejected the plea offer and the State gave notice that the co-defendants would in fact be tried jointly, counsel began to prepare a motion for severance, further stressing the importance of separate trials to Petitioner's defense. A motion for severance was filed by counsel and presented to the court through a pre-trial motion hearing, but was denied by the trial court. Counsel testified he became "very, very concerned" once his "efforts to get the trial severed had failed", and opined he "still believe[d] the outcome might have been different had there been separate trials" for James and Petitioner. (App. p. 1412, lns 14 – 16; p. 1432, lns 11 – 12). In light of the magnitude of incriminating evidence against James, counsel undertook reasonable strategic steps to avoid Petitioner being subjected to a joint-trial including allowing Petitioner's trial date to be severely delayed. This strategy limited counsel's ability to later present a prejudice argument to the trial court as Petitioner fully intended to take advantage of the delay to strengthen his chances of acquittal at trial.

Petitioner contends counsel should have pointed to an alibi witness' fading memory as a specific instance of prejudice to support the pre-trial motion. Specifically, Petitioner alleges his defense was prejudiced by the delay as his former girlfriend, Henretta Jordan, was not able to testify on his behalf as an alibi witness because she could no longer be certain whether she had been with Petitioner on the night of the incident due to her fading memory. However, when asked about witnesses' fading memories at the PCR hearing, counsel testified that although there were "certainly lapses in [witnesses'] recollections when [he] got involved in the case" in September of 1997, Jordan's "memory" of the night in question seemed influenced by the victim's positive identification of Petitioner as one of the assailants and not by the passage of time or fading of memory. (App. pp. 1436,

In 19 – p. 1437, ln 2). Based on counsel’s testimony regarding this alleged alibi witness, it would have been unreasonable, and perhaps unethical, for counsel to argue Petitioner’s defense was prejudiced as a result of Jordan’s fading memory, when counsel perceived Jordan’s changed recollection was the result of her learning her boyfriend was positively identified as a rapist.

Petitioner also contends counsel could have pointed to potential changes in witness and victim testimony as a ground for prejudice in presenting the motion. Again, counsel was not unreasonable in not presenting this argument as any inconsistencies between witnesses’ testimonies and their prior statements would prejudice the State’s ability to prosecute the charges, not Petitioner’s ability to defend against them.

There is evidence of probative value to support the PCR court’s finding that counsel acted reasonably and within the range of competence required by attorneys in articulating Petitioner’s speedy trial motion. Therefore, his performance was not deficient. Counsel was unable to present specific instances of prejudice to Petitioner’s defense because the delay between Petitioner’s arrest and trial was beneficial rather than prejudicial to Petitioner.

- B. Probative evidence exists to support the PCR court’s finding that Petitioner failed to prove, had counsel argued the speedy trial motion as Petitioner alleges he should, the trial court would have granted the speedy trial motion and dismissed the indictments.

The PCR court properly found counsel was not ineffective in his articulation of Petitioner’s speedy trial motion because Petitioner could not establish sufficient resulting prejudice to make a finding of ineffectiveness pursuant to Strickland v. Washington, *supra*. Specifically, even if counsel had set forth the arguments Petitioner alleges he should have, Petitioner’s motion still would have been denied as he failed to meet the

requirements for a speedy trial violation. Further, because Petitioner's right to speedy trial was asserted for the first time only five days before trial, dismissal of the indictments would have been an inappropriate remedy. State v. Robinson, 335 S.C. 620, 626, 518 S.C. 269, 272 (Ct. App. 1999)(finding a one year delay between filing of formal motion and trial date is insufficient to warrant dismissal of indictments).

As a preliminary matter, it is important to note the four relevant factors to be considered by a court when assessing an alleged violation of right to speedy trial are as follows: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of the right and (4) resulting prejudice to the defendant. Barker v. Wingo, 407 U.S. 514 at 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Because Petitioner cannot satisfy the four prongs of Barker, he is unable to prove resulting prejudice based on counsel's alleged deficiency in arguing the motion.

#### *Length of Delay*

The record indicates Petitioner was arrested for the charges on December 30, 1996, and held in custody until his case was called for trial roughly two years and nine months later on September 20, 1999.<sup>4</sup> The South Carolina Supreme Court has held, while not dispositive standing alone, a three year and five month delay between arrest and trial is sufficient to trigger a full speedy trial violation review as set forth under the four-part balancing test in Barker. See State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997). The Court in Brazell went on to note that although a delay in calling the matter to trial may be lengthy, the Court must balance the remaining Barker factors in making its determination,

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<sup>4</sup> A portion of the six month delay between the actual incident (May 29, 1996) and Petitioner's arrest (December 30, 1996) may be attributable to Petitioner's on-going incarceration for Receiving Stolen Goods, according to counsel's PCR testimony. (App. p. 1423, lns 15 - 20).

specifically with regard to when the defendant asserted the right and any alleged resulting prejudice. Brazell 325 S.C. at 75, 480 S.E.2d at 70.

*Assertion of Right to Speedy Trial*

The delay incurred after counsel asserted Petitioner's right to speedy trial was minimal. Petitioner drafted a *pro se* motion for speedy trial on April 26, 1999, which trial counsel was not aware of until September 15, 1999, less than one week before the start of Petitioner's trial. (App. pp. 32, ln 24 – p. 33, ln 2).<sup>5</sup> The PCR court found counsel's PCR testimony to be credible regarding his knowledge of Petitioner's *pro se* motion, saying "counsel was not aware of the motion until after [Petitioner] filed it" and "there is no evidence that Applicant discussed any concerns about the timeliness of the trial with his attorney". (App. p. 1498, lns 4 – 5; lns 8 - 9).<sup>6</sup> On September 20, 1999, Petitioner appeared before Judge Costa Pleicones, at which time his case was called for jury trial. During the pre-trial motion hearing, counsel was able to articulate a violation of Petitioner's right to speedy trial for the first time. Trial counsel informed the Court that, although Petitioner alleged he also filed a *pro se* speedy trial motion sometime in 1998, he was unable to obtain a copy of the motion to present to the court, nor was there any

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<sup>5</sup> State law does not permit or recognize "hybrid representation," that is, representation that is partially by counsel and partially *pro se*. See, e.g., Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). The transcript shows counsel was appointed roughly in September 1997, and this motion was submitted *pro se* well after counsel took over representation; therefore, the motion was clearly impermissible hybrid representation.

<sup>6</sup> Petitioner's contention that counsel "knew from speaking with...prior counsel" that Petitioner wanted a speedy trial is a mischaracterization of the testimony presented at the PCR. In fact, counsel testified that based on his discussions with prior counsel, he knew "there may have been a motion and [he] didn't recall whether it was on a speedy trial or a bond reduction". (App. p. 1416, ln 24 – p. 1417, ln 2). Further, there is no mention of when this conversation took place to impute such knowledge to counsel.

other evidence presented to indicate such a motion was in fact filed. (App. p. 35, lns 9 – 13).

Petitioner explained to the trial court he waited “seven to eight months” after trial counsel took over his representation to file the *pro se* speedy trial motion.<sup>7</sup> (App. p. 42, lns 21 – 23).<sup>8</sup> The Court in Barker stressed the importance of a defendant’s assertion of the right to a speedy trial saying, “failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.” Id. at 532, 92 S.Ct. 2182. In State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), the Court noted it was “significant that [defendant], represented by counsel, waited approximately twenty-eight months” before asserting his right to speedy trial and/or claiming such a right had been violated. Waites 270 S.C. at 109, 240 S.E.2d at 653. In this instance, Petitioner also waited approximately twenty-eight months to assert his right to speedy trial through an improper *pro se* motion (i.e. December 30, 1996 until April 26, 1999). In fact, it wasn’t until a full thirty-two months after Petitioner’s arrest that counsel became aware of Petitioner’s *pro se* motion requesting a speedy trial and was thereafter able to properly bring the matter before the Court. (App. p. 32, ln 24 – 25).

Based on the above, Petitioner did not validly “assert his right” to speedy trial until September 15, 1999, when counsel learned of Petitioner’s desire for a speedy trial and was able to present the formal motion to the Court. Petitioner’s case was called for

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<sup>7</sup> Solicitor Gasser specifically noted the State’s problem with Petitioner’s *pro se* speedy trial motion: “When a defendant has counsel, we are not allowed to – under the Rules, we are not allowed to communicate with the defendant. So these defendants have consistently had counsel since December of 1996.” (App. p. 40, lns 6 – 9).

<sup>8</sup> Judge Pleicones commented on Petitioner’s statements regarding the *pro se* motion for speedy trial, saying “You should have let [counsel] know about [your *pro se* motion]... That would be helpful.” (App. p. 42, lns 24 – 25).

trial within five days and, therefore, the delay between Petitioner's assertion of the right and the time at which the matter was called for trial was minimal. State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999)(finding speedy trial rights were not violated where the case was tried within ten months after the first formal motion was filed, even though it took five years to go to trial.) Even scrutinizing the delay incurred between Petitioner's *pro se* filing of the improper *pro se* motion on April 26, 1999, and the start of trial, Petitioner suffered only a five month delay between assertion of the right and the case being called for trial. Therefore, the delay incurred between Petitioner's assertion of the right and the matter being called for trial was minimal.

*Reason for the Delay*

Even assuming Petitioner's right to speedy trial was asserted sometime prior to September, 1999, Petitioner has failed to prove the delay in calling the matter to trial was attributable to the State in any way. Petitioner's assertion that the "entire delay...is attributable to the State" is an unfounded and unsupported conclusion, inconsistent with the facts contained in the record before this Court.

First, nothing in the record suggests the State played any role in Petitioner having two previously appointed attorneys relieved from their representation during the first year of Petitioner's incarceration.<sup>9</sup> Petitioner's assertion that "any time that may have been

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<sup>9</sup> Of particular interest to this point is the Public Defender Association's contention that the initial nine month delay incurred during the appointment process is attributable to the State as it has an "obligation to appoint" "conflict-free counsel" as soon as practicable for a defendant. (Brief of *Amicus Curiae* of the Public Defender Association, p. 21, fns 17 & 18). This implication of the States' "duties" appears to be both ironic and paradoxical in light of the Association's ultimate conclusion that the State should not, and cannot, be charged with the duty of manging the General Sessions Court docket and/or case load. Further, the PDA's footnote goes on to assert the nine-month delay was caused by a "breakdown of the Public Defender system" (i.e. the very entity they represent), but then attempts to

involved with the [Schmerber] hearing's scheduling is attributable to the State" fails to take into account the repeated changes in counsel during the first nine months of Petitioner's incarceration. The record reveals the Public Defender's office was relieved from its representation of Petitioner after alleging a conflict of interest arising from its simultaneous representation of Petitioner's co-defendant brother.<sup>10</sup> Identifying and remedying such conflict situations is the responsibility of solely the Public Defender's office. Additionally, subsequently appointed counsel, Nathaniel Roberson, had a personal conflict with Petitioner for which he was relieved sometime around September of 1997. (App. p. 28, lns 13 – 21; p. 1428, lns 13 – 18). Because of this continuous turnover in representation, the State found scheduling the Schmerber v. California hearing difficult.<sup>11</sup> Ultimately, the Schmerber hearing was convened in April of 1998, at which time the State was finally able to obtain court permission to draw a sample of Petitioner's DNA for analysis. (App. p. 38, lns 1 – 11). "A valid reason [for the delay] presented by the State may justify an appropriate delay." State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007); citing Barker, *supra*. The State articulated an entirely valid and logical reason why there was extreme difficulty in moving the case to trial during the first year of Petitioner's incarceration. Further, once the blood standards were taken from Petitioner

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link such a breakdown to state action/inaction. Respondent submits it is in fact the duty of the Public Defender, not the State, to determine if a conflict exists within the office due to dual representation. Any delay incurred as a result of failing to identify or otherwise manage that conflict is attributable to the Public Defender's Office.

10 The fact that the same county Public Defender's Office was appointed to represent co-defendants does not, in and of itself, support Petitioner's contention that a conflict of interest existed sufficient to be relieved from Petitioner's representation. See for example Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). (No actual conflict of interest resulted from Public Defender's representation of defendant while others in county Public Defender's office represented defendant's co-defendants.)

11 Schmerber v. California, 384 U.S. 757 (1966).

and James for DNA analysis, the case was at a standstill for several months in anticipation of the results. The record reflects that, following the Schmerber hearing, Petitioner's blood standards were transported to SLED for DNA analysis on June 24, 1998. (App. p. 951, lns 3 – 7). While the record fails to set forth a date on which SLED issued its finalized report and findings from the testing, it is clear it was sometime after August 12, 1998, as the testing was still on-going at that time. (App. p. 997, lns 5 – 6; p. 999, lns 18 – 19).<sup>12</sup>

Petitioner's assertion that any delay due to the on-going DNA testing is attributable exclusively to the State as it "was necessary for [its] prosecution" manifestly ignores key facts set forth in the record. While the State may have been relying on the pending DNA results as a seemingly crucial part of its prosecution, counsel was also relying on the results to be used as the very foundation of Petitioner's defense to show he was **not** one of the assailants in the attack. At the PCR, counsel testified it was his recollection, based on his discussions with Petitioner, that "Petitioner never indicated he was around, that he was involved, that he was a part of [the crimes]...[Petitioner] maintained his innocence". (App. p. 1425, ln 24 – p. 1426, ln 1). Counsel went on to say he "was operating under the theory that [Petitioner] wasn't there" during the commission of the crimes. (App. p. 1426, lns 3 – 4). Counsel also noted he and the State "had frequent discussions" and attempted to try the case for "close to ten months", but that because of the on-going DNA testing, the bond reduction hearing, and other "various and sundry

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<sup>12</sup> With this date in mind, it is clear that Petitioner's case was not tried during the July 13, 1998, term as scheduled because the results of the DNA analysis had not yet been returned at that time. (App. p. 33, lns 10 – 13). Petitioner's claim that the case was "obviously not called for trial" in July, 1998, because the charges had not been indicted is erroneous in light of counsel's desire to receive the results of the DNA test prior to proceeding to trial.

reasons”, the case was delayed until the September, 1999, term. (App. p. 1425, ln 4; p. 37, lns 8 – 17). Clearly, where counsel was preparing a defense under the theory that Petitioner was not present and played no part in the crimes, DNA results conclusively excluding Petitioner would be critical to support that theory at trial. Counsel was relying on the Petitioner’s assertions that he was not present at the incident in the hopes that the DNA results would be beneficial to the defense. Counsel was reasonable in waiting for the results of the test as this was evidence he was attempting to utilize in Petitioner’s defense.

Further, it appears some delay in the trial(s) going forward is attributable to co-defendant counsel’s inability to appear at the earlier scheduled August 1999 trial date due to a scheduling conflict. In the pre-trial motion hearing, counsel stated, “Mr. Strickler had a [conflicting] trial at the time when these trials were originally scheduled”, necessitating the matter be continued and rescheduled. (App. p. 12, lns 6 – 10). This delay is not attributable to either the State or Petitioner.

Nothing in the record establishes this alleged “unreasonable” delay was in any way caused by the state stalling or otherwise manipulating the trial docket. As in Pittman, the record before this Court “does not reflect any intentional or malicious delays by the prosecution, nor does the record reflect any negligent prosecutorial behavior in connection with this case” Pittman at 552, 647 S.E.2d 144, 157. Further, the record does not support Petitioner’s assertion that the State is “more to blame” than Petitioner for the delay incurred between arrest and trial.

*Resulting Prejudice to Defendant*

Finally, Petitioner's allegations do not meet the fourth prong of the Barker test for a speedy trial violation. "The United States Supreme Court has said the most serious interest to be protected by the guarantee to a speedy trial is the possibility of impairment to the defense." State v. Pittman, *supra* at 550, 155 – 156. It is important to note this Court has held that even a delay of five years was sufficient to trigger a speedy trial analysis **without** finding a presumption of prejudice; therefore, the trial and PCR courts did not err in finding the same. Pittman at 551, 156 (2007); *citing* State v. Foster, 260 S.C. 511, 515, 197 S.E.2d 280, 281 (1973). The trial court relied heavily on this prong in denying the pre-trial motion, saying Petitioner failed entirely to demonstrate any resulting prejudice to his defense based on the delay and, therefore, was not entitled the relief requested. (App. p. 44, lns 23 – 25). Further, 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.). As explained below, any arguments Petitioner alleges counsel should have made at the motion hearing would not have altered the outcome of the motion. Therefore, Petitioner cannot prove resulting prejudice.

Petitioner's allegation that he "did not receive any benefit from the delay", but rather had his defense prejudiced, is a mischaracterization of the evidence and facts before this Court. Considering the results of the DNA test cleared Petitioner of any connection to the DNA specimen(s) recovered from Victim via the Rape Kit, the Petitioner benefited significantly from any delay caused by awaiting the DNA test results.

The DNA test results explicitly excluding Petitioner as a donor of the semen found was a key point stressed by counsel at trial to bolster Petitioner's defense and place reasonable doubt in the jurors' minds. (App. p. 1262, lns 3 – 10; p. 1263, lns 10 – 12; p. 1264, lns 10 – 16).

Petitioner also sets forth the supposed testimony of the alleged "alibi" witness, Henretta Jordan. Petitioner states Jordan was no longer able to testify on his behalf at trial as she could not be certain of whether she was with Petitioner on the night of the incident due to the passage of time. Jordan ultimately did not testify at trial, nor did she testify at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998)(This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.) Without her testimony at the PCR, there is no way to substantiate that she was willing to provide testimony at trial, that she would have ever been able to establish an alibi, or that she was ever even involved in this case. Therefore, Respondent submits Petitioner cannot prove prejudice based on this supposed alibi witness' fading memory.<sup>13</sup>

Further, Petitioner claims he was specifically prejudiced by the delay as victim's story changed "significantly from the time of the events until the time of trial". Any inconsistencies in the victim's testimony prejudiced the State's ability to prosecute, not Petitioner's ability to defend. Counsel testified the fading memories of the parties created inconsistencies in state witnesses' testimony which allowed him to effectively challenge

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<sup>13</sup> As mentioned previously, counsel testified Jordan's alleged "fading memory" was due to the victim's positive identification of Petitioner and not necessarily the passage of time. (App. p. 1436 - 1437). Petitioner has failed to submit any evidence/testimony to prove this alibi witness' testimony would have established an alibi or otherwise made any difference at trial.

“the validity of the [state’s] eyewitness identification” through cross-examination. (App. p. 1437, lns 3 – 9). The victim and eyewitness identifications were key pieces of evidence for the defense to overcome during the trial; the inconsistencies that arose in their testimony allowed counsel to call into question the accuracy and reliability of their identifications of Petitioner. In fact, during closing arguments counsel used these inconsistencies to stress the defense theory that this was a case of mistaken identification, using the fading memories of the states’ witnesses to Petitioner’s advantage. (App. pp. 1252, ln 7 – p. 1261, ln 3).

Based on this analysis, Petitioner did not, and cannot, satisfy his burden in proving that had counsel articulated the speedy trial motion in a different way, the trial court would have granted it and dismissed the indictments against Petitioner.

2. **The argument raised through *Amicus Curiae* in this matter improperly diverts the actual issue before this Court as argued on appeal and therefore does not meet the requirements under Rule 213, SCACR, as it is not “limited to ... the issues...as presented by the parties”. Further, the issue is not preserved for appellate review as the PCR court did not rule on whether counsel was ineffective in failing to challenge the constitutionality of S.C. Code § 1-7-330 (1976).**
- A. The argument raised by the Public Defender’s Association through *Amicus Curiae* improperly diverts the actual issue before this Court as it attempts to raise an issue not properly preserved for appellate review.<sup>14</sup>

The *Amicus Curie* brief filed by the South Carolina Public Defender’s Association is of little consequence to the matter presented before this Court as it attempts to divert the issue currently raised on appeal to one of counsel’s deficiency in failing to present a criticism of existing S.C. Code § 1-7-330 at the pre-trial motion hearing. Further, the

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<sup>14</sup> Also worth noting, direct appeal issues are inappropriate for post-conviction relief actions. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974); see also *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973); S.C. Code § 17-27-20(b) (1976).

issue was not raised or ruled upon at the PCR hearing, and there was no Rule 59(e), SCRPC, motion filed suggesting the PCR judge failed to rule on the issue of the constitutionality of S.C. Code § 1-7-330. Accordingly, the *amicus curiae* brief goes beyond the issue raised on appeal herein and is therefore improper under Rule 213, SCACR. An issue not raised or ruled upon by the PCR court is not preserved for review. Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

B. Counsel was not deficient in failing to challenge the constitutionality of S.C. Code § 1-7-330 as counsel is not required to be clairvoyant or anticipate future changes in the law.

Should this court deem it proper to turn to the merits of the *Amicus Curiae*, counsel was not deficient in his performance for failing to challenge the constitutionality of S.C. Code § 1-7-330 (1976). The South Carolina Supreme Court has repeatedly held “[w]e never require an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.” Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); See also Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993); see also Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992); Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1992); Kirkpatrick v. State, 306 S.C. 359, 412 S.E.2d 389 (1991). At this juncture, S.C. Code § 1-7-330 is valid, controlling state law under which preparation of the dockets for general sessions courts is vested in the circuit solicitor. As set forth in Gilmore, counsel was not required to be clairvoyant or anticipate such a law would be changed at some future point in time, especially in light of the fact that such a change in

law has not occurred regarding S.C. Code § 1-7-330 to date. Therefore, even if this Court turns to the merits of the *Amicus Curiae*, counsel was clearly not deficient in this regard.

- C. Petitioner has failed to prove that, had counsel challenged the constitutionality of S.C. Code 1-7-330 during Petitioner's speedy trial motion hearing, the Court would have agreed that the statute is unconstitutional and dismissed Petitioner's indictments.

Counsel was not ineffective in failing to present an argument on the constitutionality of S.C. Code § 1-7-330 during Petitioner's speedy trial motion hearing as the statute is constitutional and, therefore, Petitioner cannot prove the necessary prejudice to validate such a finding. The statute is constitutional as it is necessary to carry out the principles set forth in the Article I, Section 8, separation of powers clause of the South Carolina Constitution.

When a statute is being challenged as unconstitutional, the reviewing court will construe the statute, if possible, to render it valid. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). “[E]very presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.” Id. (quoting Moseley v. Welch, 209 S.C. 19, 26-27, 39 S.E.2d 133, 137 (1946)).

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

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 as follows:

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 Solicitors function in their role in the executive branch to carry the laws into effect by deciding the cases to be brought to trial and when. Further, the courts of the state maintain their right to oversee and provide the necessary check of the executive power through judicial remedies such as continuances, sanctions, and dismissal of cases.

As this Court pronounced:

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

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

This provision related to the administrative functions of the Supreme Court and the Chief Justice clearly presupposes the “rules governing the practice and procedure in all such courts” to be subject to statutory law, which would include the statutory rule under section 1-7-330 granting the power to Solicitors to decide which cases should be

called for trial. See e.g., State v. Flood, 257 S.C. 141, 146, 184 S.E.2d 549, 552 (1971) (“The solicitor has a broad discretion deciding the order in which cases are called”).

Further, S.C. Const. Art. V, Section 4 empowers the Chief Justice to set the terms of court that are available within a particular county and the judges to sit in any court. The *amicus* claims there is a potential for judge shopping by the solicitor under the current system where solicitors can “learn which judges will be likely to rule favorably” for the State and ensure certain cases are presented before those judges. The brief goes on to note that, in this particular case, even the trial judge “acknowledged being confused about the [speedy trial] issue”, perhaps attempting to point to such an improper motive by the solicitors in this case. Petitioner’s trial was convened before the Honorable Costa Pleicones during his time on the circuit court bench. The record is devoid of any indication that the prosecution was judge shopping when it called Petitioner’s case during a term of court over which then-Judge Pleicones was presiding.<sup>15</sup>

In United States v. Pearson, 203 F.3d 1243 (10<sup>th</sup> Cir. 2000), the Tenth Circuit Court of Appeals observed as follows:

First, a prosecutor’s choice of judges is limited. Even if a case assignment system allows the prosecutor to select the judge, the prosecutor must still choose from a group who have undergone the process of selection and appointment, who have sworn to uphold the law and defend the constitution, and whose conduct can be scrutinized through appellate review. There is a presumption of honesty and integrity in those serving as adjudicators. . . . Additionally, we note that a prosecutor may want the case assigned to a particular judge for a variety of reasons, some of which may not involve any disadvantage to defendant at all; a

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<sup>15</sup> Further, neither the Petition for Writ of Certiorari nor the *Amicus Curiae* set forth any instance where the any of the five alleged “potentials for abuse” occurred in Petitioner’s case. In fact, an overview of the record conclusively refutes that any one of the five alleged improper motives was carried out in Petitioner’s case.

prosecutor may simply make a random selection or he or she may seek out the most intelligent or the most experienced judge, or the one most familiar with a particular area of law.

Id., at 1261-1262 (internal quotations and citations omitted).

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 S.C. Code § 1-7-330 prohibits, requires, or in any way affects the trial court's control and final say on whether a case goes forward through the grant or denial of a continuance. This check inherent to the judiciary remains intact and remains a strong device for curbing any possible abuse by the solicitor in calling a case to trial before the defendant 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 a grant of the motion, the judicial discretion to grant the motion can serve as deterrence to the prosecutor who clearly delays a trial for vindictive or other improper purposes.

Robinson suggests another remedy employed in that case.<sup>16</sup> Robinson notes that the Administrative Judge ordered the case set for trial after "the last of several status conferences." An administrative judge could require a scheduling order or status conferences where delays become troubling, either *sua sponte*, or on motion made by

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<sup>16</sup> State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999), cited previously.

defense counsel, that properly demonstrates the need for such judicial monitoring in a specific instance. This certainly seems a less drastic drain on limited judicial resources than complete administration of the docket by the judiciary, presumably the remedy put forward by counsel for the Public Defender's Association.

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

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

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

other matters that are not subject to the solicitor's docketing discretion but are matters solely with the control of the courts.

Further, there is no valid due process violation argument to be made against 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 (S.C. 1935). The United States Supreme Court has stated:

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

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

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

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

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

The principal reasons prosecutors have been called upon to administer the dockets are fourfold: (1) neither circuit court judges nor clerks of court have the personnel, time or infrastructure to organize, publish and administer a criminal docket; (2) solicitors are elected to represent a hybrid of public safety and justice balanced with efficiency within their circuits; (3) prosecutors are uniquely well suited to know the nuances of individual cases and the availability of lay witnesses, law enforcement witnesses, as well as expert witnesses they routinely share with other circuits; and (4)

since prosecutors are the ones called upon to provide an explanation for the current state of the criminal justice system, the muses thought it only fair to provide them with a few tools to actually impact the administration of the justice.

Gowdy, Trey, Criminal Dockets Administered by Prosecutors: Past Present and Future, *The South Carolina Lawyer*, (January 2010) at 24. Solicitors are responsive and held accountable by two groups – the public who elects them and the judges before whom they practice. The Solicitor faces reelection and as such, his record in moving cases efficiently and without abuses is an issue for the public's consideration.

Further, as discussed above, the Solicitor must operate without abusing the system or the judge before whom he brings the case has numerous remedies at his disposal to provide a check on the Solicitor's actions. No other entity has such checks and balances in place to provide for the administration of the docket.

Accordingly, Petitioner has failed to demonstrate he was entitled to dismissal of the charges against him based on a violation of speedy trial even if counsel had set forth a constitutional argument against S.C. Code § 1-7-330. The delay in this case was reasonable in light of Petitioner's turnover in appointed counsel, counsel's defense strategies and theories, and Petitioner's failure to properly assert his right to speedy trial **through counsel** at an earlier juncture. Further, Petitioner cannot establish any resulting prejudice to his defense based on the delay. Finally, although the unrelated issue set forth in the *Amicus Curiae* Brief is not preserved for appellate review in this instance, the solicitor's duties in setting the docket did not result in the denial of a fair trial for Petitioner. Therefore, this Court should deny the Petition for Writ of Certiorari and affirm the findings set forth in the PCR court's Order of Dismissal.

**CONCLUSION**

For all of the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

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By:

  
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May 11, 2012

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal From Richland County  
Honorable Alison R. Lee, Circuit Court Judge

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Robert A. James, 261393,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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CERTIFICATE OF SERVICE

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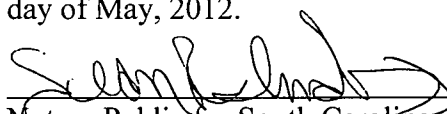
The undersigned hereby certifies that a true copy of the Brief of Respondent has been served upon opposing counsel, Robert M. Dudek by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 11<sup>th</sup> day of May, 2012.



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DAVID SPENCER  
ATTORNEY FOR RESPONDENT

SWORN to before me this 11<sup>th</sup>  
day of May, 2012.



(L.S.)  
Notary Public for South Carolina.

My Commission Expires: ~~My Commission Expires~~  
**January 30, 2013**



ALAN WILSON  
ATTORNEY GENERAL

May 11, 2010

RECEIVED

MAY 11 2012

S.C. Supreme Court

Honorable Daniel E. Shearouse  
Clerk of the Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Robert A. James, 261393 v. State of South Carolina  
2001-CP-40-3299

Dear Mr. Shearouse:

Enclosed please find the original and fifteen (15) copies of the Brief of Respondent in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Brief today.

Sincerely,

David Spencer  
Assistant Deputy Attorney General

Enclosures

cc: Robert M. Dudek, Office of Appellate Defense  
E. Charles Grose, Jr., Esquire  
Tara M. Schultz, Esquire