STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of General Sessions
R. Knox McMahon, Circuit Court Judge

The State, Respondent,

v.

Alexander L. Hunsberger, Petitioner.

Appellate Case No. 2012-206608

Unpublished Opinion No: 2014-UP-381

RETURN TO PETITION FOR REHEARING

This Court issued an opinion in the captioned case on November 5, 2014, affirming Petitioner's murder conviction. *State v. Hunsberger (Alexander),* Unpublished Opinion No. 2014-UP-381 (S.C.Ct.App. filed November 5, 2014). On November 20, 2014, Petitioner filed a petition for rehearing. By letter dated November 21, 2014, this Court requested Respondent file a return to the petition. Pursuant to Rules 221 and 240, SCACR, and at the request of the Court, Respondent now makes a return to the petition, and submits the petition for rehearing should be denied. In support of this position, Respondent would respectfully show the Court:

1. In the referenced opinion, the Court concluded:

> ... looking at the *Barker* factors and the case as a whole, we find the trial court did not abuse its discretion in finding Hunsberger's constitutional right to a speedy trial was not violated and denying his motion to dismiss.

Petitioner apparently contends the Court erred in its legal conclusion based on the facts of the delay, particularly the Court's consideration of the time Petitioner was in Georgia. He argues "[w]hether a person is incarcerated, the length of that incarceration, and the location of that incarceration, is irrelevant...." (Petition, p. 2). Further, he argues "he was not required to demonstrate any prejudice at all because the length of time required a presumption of prejudice, though he did so by showing the passage of time dimmed memories, and the hovering threat of capital proceedings resulted in sustained angst. (Petition, pp. 2-5).[1] These are arguments forwarded in his brief to this Court. (FBOA, pp. 18-19). However, both Judge Newman and this Court in review of Judge Newman's ruling were obligated to consider the time in Georgia in a fair weighing of factors, along with the lack of prejudice. The *Barker*[2] test directs consideration of various aspects, with the assigning of weight to a number of circumstances and facts to effect a

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[1] Petitioner also asserted as a basis for finding prejudice, that he may not receive credit for all the time served. (FBOA, p. 19). He again references that argument in petition for rehearing. (Petition, p. 4). However, as Respondent asserted in its brief, (see FBOR, pp. 23-24), this argument was not raised as a ground for the speedy trial motion and is procedurally barred. *See, e.g. State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (appellant's failure to raise constitutional issue to the trial court barred review on appeal); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."). Further, the factual basis for this argument was not developed below and should not be heard at this time. Defense counsel requested at sentencing credit for time served and a sentence that would run concurrent with the Georgia sentence. (See R. p. 204, lines 11-18). The transcript closes with the State attempting to confirm the steps for a concurrent sentence and defense counsel providing information for the case number and date of sentencing. (R. p. 218, line 6 – p. 221 line 2). The very fact the record is not fully developed on this point is another reason the argument should not be reached. *See State v. Tyndall*, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999) ("An appellant has a duty to provide this Court with a record sufficient for review of the issues on appeal."); Rule 210, SCACR (in general, "the appellate court will not consider any fact which does not appear in the Record on Appeal.").

[2] *Barker v. Wingo*, 407 U.S. 514 (1972).

fair result. This Court carefully considered the particular facts of the delay period from the time of arrest to trial to the time of trial in relationship to the findings supporting Judge Newman's ruling. (See Opinion, [unnumbered] pp. 5-7). Additionally, this Court pressed the parties in oral argument on application of the law to these facts. In short, this issue was thoroughly reviewed, and Petitioner's position rejected. Petitioner has shown no cause for rehearing. See Rule 221 (a), SCACR ("petition for rehearing ... shall state with particularity the points supposed to have been overlooked or misapprehended by the court." *See also Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not ... to have the case tried in the appellate court a second time.") (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)). At any rate, his argument fails.

2. Judge Newman denied relief, noting the number of trials for all the co-defendants, the time for "sorting out that process," and the fact that Petitioner was incarcerated in Georgia pursuant to the Georgia conviction since 2006, as factors that did not support the State was at fault such that relief was warranted. Further, he found no prejudice otherwise, noting that there were transcripts available for impeachment that were used at trial, and that "everyone seems to have a pretty vivid memory" of this most serious matter. (R. p. 196, line 9 – p. 197, line 12). The record fully and fairly supports Judge Newman's finding that, in these discrete circumstances, delay was justifiable based on the complexity of the case and the multiple prosecutions in separate jurisdictions, and did not result in actual prejudice to Petitioner. Petitioner does not contend these facts do not exist, rather, he contests the legal significance of these facts. However, his arguments for error run contrary to the required analysis of the facts pursuant to *Barker*.

3. As both Judge Newman and this Court noted, *Barker* provides not only should the reason for the delay be considered, but also that those reasons should be examined as to relative justification:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker v. Wingo, 407 U.S. at 531.

Judge Newman correctly found the reason for the delay here is multifaceted. There were at the outset of the prosecution two jurisdictions vying for the opportunity to pursue charges against a minimum of six individuals who participated in varying respects with the assault, kidnapping and murder. Further, the murder with aggravating circumstance(s) allowed for consideration of capital proceedings. In fact, capital proceedings were sought against co-defendant Steven Barnes. The State expressed its intent to try Barnes first, and the delay in Barnes' capital case caused additional delays in the subsequent trials. (R. p. 30, lines 17-24).[3] The record well supports Judge Newman's findings on the complexity of the case. *See State v. Pittman*, 373 S.C. 527, 552, 647

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[3] The capital proceedings against Barnes carry their own delays and restrictions; thus, there is no unexplained delay in those proceedings which negatively affected the prosecutorial plan at issue here. While the prosecutorial plan alone may not completely justify delay, it is inescapable that the "main goals" of limiting "pretrial incarceration, minimiz[ing] the anxiety stemming from public accusation of the crime" and "long delays impairing an accused's defense" were not negatively affected here where Petitioner was serving a life sentence for the kidnapping of the murder victim. *See State v. Langford*, 400 S.C. at 440, 735 S.E.2d at 481.

S.E.2d 144, 157 (2007) ("Although it took a long time for the case to come to trial, any delay was the result of the complexities of this case."); *Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (noting "complexity of the case and the amount of time required to prepare for trial" in assessing justification for the delay).

4. As to Petitioner's complaint about the treatment of the time in Georgia, the State had relinquished custody in early 2005. [4] Georgia did not try the case until September 2006. The State could not seek simultaneous trials as these are separate sovereigns. This nearly two-year period may not be attributed directly to the State. *See United States v. Battis*, 589 F.3d 673, 679-680 (3rd Cir. 2009) (separating federal and state charges for purposes of speedy trial analysis, but finding decision to wait on state prosecution weighed against federal government, though not heavily as the federal government was not "intentionally undermining the defense"); *United States v. Seltzer*, 595 F.3d 1170, 1178 (10th Cir. 2010) ("We agree with our sister circuits that awaiting the

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[4] Of note, the offense was committed in September 2001, Petitioner was arrested in January 2002, and released to Georgia in February 2005, to stand trial; however, he was not convicted and sentenced in Georgia until September 12, 2006. (Opinion, [unnumbered] p. 2). Incarceration in South Carolina thus accounted for some of the delay in Georgia, with well-over a year delay even after the return. This shows a distinct disadvantage to both sovereigns and underscores the effect of the separate sovereigns issue in the instant case. *See United States v. Grimmond,* 137 F.3d at 828 ("When a defendant violates the laws of several different sovereigns, as was the case here, at least one sovereign, and perhaps more, will have to wait its turn at the prosecutorial turnstile. Simply waiting for another sovereign to finish prosecuting a defendant is without question a valid reason for the delay."). While Petitioner essentially argues the case could have been tried before relinquishing custody to Georgia, this assumes much in regard to the necessary preparations for trial and, at any rate, would simply shift the wait to the Georgia conviction. It is inescapable that both sovereigns have the right to prosecute Petitioner for his crimes. It is also inescapable that Petitioner was legitimately incarcerated on his life sentence in Georgia and could not be simply released from incarceration upon disposition of the South Carolina charges. This is a different posture than one held merely in pre-trial detainment.

completion of another sovereign's prosecution may be a plausible reason for delay in some circumstances..."). *Cf. State v. Robbins*, 590 A.2d 1133, 1136-1137 (N.J. 1991), *quoting State v. Williams*, 224 A.2d 331 (N.J. 1966) ("Inasmuch as it is impossible for a person to be in two places at the same time, where one owes penalties to two separate sovereigns, one sovereign must relinquish its claim and allow the other to exact its penalty first."). After conviction, Petitioner began service of his Georgia sentence in Georgia. (See R. p. 24, line 12-25). In fact, he testified at the pre-trial hearing on the motion to dismiss that one of his reasons for not agreeing to extradition was he "needed to find out" how leaving Georgia would affect his Georgia appeal. (R. p. 36, lines 16-23). This marked hesitancy in returning to the State fails to show a desire for a speedy trial here. Again, this time should not count against the State. This is most assuredly so where Petitioner simply did nothing to force prosecution in South Carolina, though he had the ability to do so under the Interstate Agreement on Detainers.[5] Without question, Petitioner asserted his right in late 2004 and again January 2005. This resulted in a bond that allowed Georgia to obtain custody and subsequently try him on the kidnapping charge. (R. p.226 [January 28, 2005 Order]). Essentially, Petitioner moved for relief under Section 17-23-90 and appropriate relief was granted at that time. (R. p. 222 [Notice of Motion and Motion for Speedy Trial]). *See generally State v. Campbell*, 277 S.C. 408, 288 S.E.2d 395 (1982) (denying speedy trial claim pursuant to statute where S.C. Code § 17-23-90 provides for release if not indicted and tried within certain time frame, not dismissal of the charge). After this grant of relief, however, Petitioner failed to

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[5] It is clear from the record that the State immediately set out to bring the Hunsbergers back to this jurisdiction for trial upon completion of the capital proceedings against Barnes. (R. p. 25, line 21 – p. 26, line 6). There was no delay of any consequence in seeking Petitioner's return after the capital proceedings concluded.

reassert or pursue his constitutional right to a speedy trial at any point until immediately before his January 2012 trial. (See R. p. 17, lines 21-25, acknowledging no request during six to seven years of the delay). In fact, he declined to allow extradition in 2011. (R. p. 36, lines 13-23). Simply, during the time that Petitioner argues the "cross-border" jurisdiction issues were resolved and the trial, (see FBOA, p. 18), he did not request return or trial. This must weigh heavily against him. *Barker v. Wingo*, 407 U.S. at 536 ("barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial.").

5. Petitioner's assertion of *per se* prejudice from length of time alone is contrary to precedent. *Pittman*, 373 S.C. at 551, 647 S.E.2d at 156) (rejecting Pittman's argument "that the delay of his trial was so lengthy that it not only meets the requisite finding of delay, but also that the delay is presumptively prejudicial"). Other courts have examined similar delays and declined to find presumptive prejudice. *See United States v. Blanco*, 861 F.2d 773, 778 (2nd Cir. 1988) (rejecting general assertion of prejudice in ten year delay between indictment and trial where defendant at fault in delay and where "delay can just as easily hurt the government's case"); *United States v. Tchibassa,* 452 F.3d 918, 925-927 (D.C.Cir. 2006) (finding no presumptive prejudice where defendant more at fault than government in eleven year delay). *Accord United States v. Mendoza*, 530 F.3d 758, 764-765 (9th Cir. 2008) (noting that if government had "exercised due diligence," for speedy trial claim on delay of eight years, defendant would have had to have shown "specific prejudice to his defense" rather than assessing presumptive prejudice). The list of cases cited by Petitioner, (see Petition, p. 2), actually reflect cases

holding that the balancing test is proper, and do not support mere passage of time is dispositive as to a *per se* violation of the right.[6] Even though Petitioner was tried for the 2002 charge in January of 2012, he had ample opportunity to thoroughly cross-examine the witnesses against him, including making use of prior sworn testimony – testimony that was available as a result of multiple actions both in South Carolina and Georgia. (See R. p. 19, line 24 – p. 21, line 9; p. 22, lines 18-25). Further, he does not contend any exculpatory witness or testimony is not unavailable. (See Petition, pp. 3-4). Petitioner has twice been convicted (once in Georgia, once here) on evidence of participation in the events that led to Samuel's murder, and readily admits his presence during the crime. (See R. p. 187, line 8 – p. 193, line 5; p. 216, lines 8-13). Petitioner argues, though, that the passage of time affected extent of memory and credibility of the witnesses against

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[6] For example, a quote from the unpublished case *United States v. Frith* cited by Petitioner, (see Petition, [unnumbered] p. 5) is particularly illustrative: "... the district court misunderstood the holding and rational of *Doggett*. Although the court was correct that a showing of actual prejudice is not required in all speedy trial cases ... *Doggett* specifically noted that 'presumptive prejudice cannot alone carry a Sixth Amendment claim,' but rather must be considered in the context of the other factors, particularly the reason for the delay...." 1999 WL 387849, * 4 (4th Cir. 1999). Bad faith in a lengthy delay may occasion dismissal, but not simply a lengthy delay. *Id.* The Fourth Circuit concluded, "*Doggett* did not hold, as the district court apparently believed, that a sufficiently lengthy delay may be dispositive of a speedy trial claim irrespective of the other criteria for evaluating such a claim." *Id.* In sum, the case actually supports a detailed analysis of facts as reflected in the trial judge's ruling in balancing relevant factors, including a lack of prejudice and the absence of bad faith. Respondent notes the Fourth Circuit reversed the dismissal in *Frith* for "presuming prejudice" in the delay: "Because we conclude that the district court erred in conclusively presuming prejudice to Frith as a result of the seven-year delay between indictment and trial, we reverse the dismissal of the indictment as to Frith." *Id* at 6. The same is true of *United States v. Clark*, 83 F.3d 1350, 1354 (11th Cir. 1996), also cited by Petitioner, where the Court reversed dismissal of an indictment noting "each case must be decided on its own facts." The Court resolved "mere conclusory allegations of impairment are insufficient to constitute proof of actual prejudice" and did not support relief where delay by government was unintentional. *Id.* The listed cases simply do not clearly support the proposition offered.

him. (See FBOA, p. 19; R. p. 194, line 22 – p. 195, line 13; Petition, p. 3). In effective rebuttal, the trial transcript demonstrates credibility was challenged by use of prior transcripts which preserved sworn testimony, (See R. p. 97, line 14 – p. 100, line 19; p. 144, line 25 – p. 145, line 5), and that contemporaneous notes were used to refresh memories, (See R. p. 144, lines 2-24; p. 172, line 7 – p. 173, line 13). The multiple trials and statements in essence preserved and/or created testimony for this Petitioner's use to his benefit. Judge Newman fairly and reasonably found no evidence of prejudice to Petitioner based on the passage of time:

> Regarding ... problems the witnesses had remembering, Counsel did an effective job at pointing out to the witnesses in cross-examining them and impeaching them on prior inconsistent statements. The fact that there is a transcript to go over your testimony available, it accounts the opportunity to refresh the witness' recollection and to impeach where needed[.]
>
> In looking at it, the trial to this point - - looking back I indicated in retrospectively on a position of prejudice, I don't see where the defendant has been prejudiced in any way. Based on the lapse of time, for the most part, everyone seems to have a pretty vivid memory. Of course, these matters will probably - - probably be forever etched in the memories and minds of people who were there involved, eye witnesses.

(R. p. 196, line 22 – p. 197, line 11).

As this Court found, his factual findings are well-supported and his reasoning sound. (Opinion, [unnumbered] p. 7). Further, the State ultimately decided against seeking the death penalty for Petitioner. (R. p. 23, lines 3-16). As such, the length of the delay in this aspect certainly holds no prejudice to Petitioner. (Opinion, [unnumbered], p. 7). *See Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 ("the State withdrew its notice to seek the death penalty; thus, the withdrawal could be construed as a benefit to Cooper resulting from the delay.").

6. Lastly, as to Petitioner's argument on deliberate delay to force cooperation, contrary to Petitioner's assertion that the State acted improperly in offering Petitioner the opportunity to testify against Barnes, (FBOA, p. 18; Petition, p. 5), this offer actually shows the State did not place isolated or undue pressure on Petitioner. The State had success in securing many of the co-defendants to testify against Barnes, and, the offer to allow the Hunsbergers to testify "might [have] go[ne] toward their benefit." (See R. p. 4, lines 14- 25; p. 26, lines 10-16). As the State acknowledged, it was their right to decide not to testify against Barnes. (R. p. 26, line 17 – p. 27, line 6). Even so, they had the same opportunities as the other co-defendants. This even treatment does not lend itself to attack here as evidence of an attempt to harm the defense. It is, however, a facet of the complexity.

7. In sum, the record well supports Judge Newman's factual findings which he correctly analyzed in the appropriate legal framework. This Court properly affirmed upon carefully reviewing the supporting facts of record and finding no abuse of discretion. (Opinion, [unnumbered] pp. 5-8). *See also State v. Cooper*, 386 S.C. 210, 218, 687 S.E.2d 62, 67 (Ct.App. 2009) (affirming denial of motion to dismiss finding trial judge's "decision was supported by the evidence"). Petitioner has failed to show rehearing is warranted.

CONCLUSION

Based on the forgoing, Respondent submits Petitioner has failed to show that rehearing is warranted. The petition should be denied.

Respectfully submitted,

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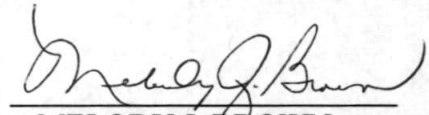
BY: 
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Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of General Sessions
Clifton Newman, Circuit Court Judge

The State, Respondent,

v.

Alexander L. Hunsberger, Appellant.

Appellate Case No. 2012-206608

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Rehearing* on Appellant by depositing two copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
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This 1st day of December, 2014.

MELODY J. BROWN
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ALAN WILSON
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December 1, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Alexander L. Hunsberger
Appeal from Edgefield County
Appellate Case No. 2012-206608

Dear Ms. Kitchings:

Enclosed please find the original plus six (6) copies of the ***Return to Petition for Rehearing***, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv
Enclosures

cc: Susan B. Hackett, Appellate Defender
The Honorable Donald V. Myers, Eleventh Circuit Solicitor
Trisha Allen, Victim Services

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