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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2014-UP-382 (S.C. Ct. App. filed 11/5/2014)

2002-GS-19-00110

THE STATE,

RESPONDENT,

V.

JULIO ANGELO HUNSBERGER,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Julio Angelo Hunsberger, Appellant.

Appellate Case No. 2012-207290

Appeal From Edgefield County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2014-UP-382
Heard September 9, 2014 – Filed November 5, 2014

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General Melody Jane Brown, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

PER CURIAM: Julio Angelo Hunsberger appeals his conviction for murder, arguing the trial court erred in denying his motion to dismiss the charge against him because his constitutional right to a speedy trial was violated as a result of the almost ten-year delay in bringing his case to trial. We affirm.

FACTS

On September 3, 2001, Samuel J. Sturrup was shot and killed in South Carolina. Hunsberger was arrested for his murder on January 25, 2002. Hunsberger's brother, Alexander, and Steven Louis Barnes were also charged with Sturrup's murder.[1]

On February 16, 2005, Hunsberger was transferred to Georgia to face charges in connection to the South Carolina murder charge. Hunsberger was tried and convicted in Georgia for kidnapping with bodily injury on September 12, 2006. He was sentenced to life in prison in Georgia. Hunsberger was returned to South Carolina on September 30, 2011, pursuant to the Interstate Agreement on Detainers (IAD). Hunsberger never moved for a speedy trial. The State wanted to try Barnes' capital case before it tried any of the co-defendants' cases. After Barnes was convicted, the State sought to bring Hunsberger's case to trial in October 2011; however, he moved for a continuance. The court granted his motion for a continuance in an order dated October 18, 2011. The order stated there was "no such motion for speedy trial now before the [c]ourt. Therefore, no part of this Order is intended to apply or address any matter of speedy trial. Likewise, this order is not intended to prejudice any future right the defendant may have to make such a motion."

Hunsberger's South Carolina trial began on January 9, 2012. At the beginning of trial, Hunsberger moved to dismiss his case, asserting his right to a speedy trial was violated. Hunsberger initially admitted he had a "hurdle" in making his argument because he had not previously asserted his right to speedy trial, which is a factor in determining whether his rights have been violated. He argued the State failed to bring his case within a reasonable time and was dilatory in its duty. Hunsberger stated the ten-year delay was a significant passage of time for the court to find his right to a speedy trial was violated. Furthermore, Hunsberger asserted

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[1] Three additional defendants were convicted in Georgia of charges involving the kidnapping and assault of Sturrup.

he was effectively without counsel for a time.[2] Hunsberger's current attorney stated he did not file a motion for speedy trial when he was first appointed in June 2010, eight and a half years after Hunsberger's arrest, because he was not certain Hunsberger would be tried in the case based on his life sentence in Georgia and some assertions made to him by the solicitor. Hunsberger argued he was prejudiced by the witnesses' varied stories over the years. He also argued the prosecution was vindictive or selective because other individuals were similarly situated to him. He further argued he was being punished for exercising his right to remain silent and not assist the State in the prosecution of Barnes. Finally, he asserted there was an identification issue related to three of the State's witnesses.

The State responded it always intended to dispose of Barnes' case prior to bringing any of the co-defendants to trial. The State called Hunsberger's case in October 2011, as soon as it completed Barnes' trial; however, Hunsberger moved for a continuance, which the court granted. The State asserted Hunsberger did not file a motion for speedy trial at that time. Hunsberger's counsel responded he requested the continuance because he had only met with Hunsberger one time before he was moved to Georgia and he "thought it was fundamentally unfair for me to proceed to trial having only met with him on that one occasion and that one occasion was actually regarding his consideration to testify for the State in the Barnes case."

The court denied Hunsberger's motion to dismiss, explaining that based on the totality of the circumstances in this case, Hunsberger would not be prejudiced. The court continued, "I think given the fact that [Hunsberger] was a sentenced prisoner in Georgia and . . . , for that length of time, . . . he would not have been released, . . . it was not unreasonable for the State to take the position that [it] wanted to try the one defendant that [it] sought the death penalty on in the case first and dispose of that case first."

Hunsberger renewed his motion to dismiss again at the close of the State's case, arguing the inconsistencies in witnesses' testimony provided an example of the prejudice he suffered from the delay in bringing his case to trial. The court again

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[2] Hunsberger's first attorney was appointed in 2002. After several complaints from Hunsberger in 2004 and 2005 that he had not seen his attorney, another public defender was appointed, but he was then relieved on June 14, 2010. Hunsberger's current attorney was appointed in June 2010 and represented Hunsberger during his 2012 trial in South Carolina.

denied the motion. The jury convicted Hunsberger of murder, and the court sentenced him to life in prison without parole. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009); *see State v. Evans*, 386 S.C. 418, 422, 688 S.E.2d 583, 585 (Ct. App. 2009) (applying the standard of review to speedy trial cases). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

LAW/ANALYSIS

Hunsberger argues the trial court erred in denying his motion to dismiss the charge against him because the almost ten-year delay in bringing his case to trial violated his constitutional right to a speedy trial. We disagree.

A criminal defendant is guaranteed the right to a speedy trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14. "This right 'is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.'" *State v. Pittman*, 373 S.C. 527, 548-49, 647 S.E.2d 144, 155 (2007) (quoting *United States v. MacDonald*, 456 U.S. 1, 8 (1982)). A "'speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay.'" *State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012) (quoting *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)). "There is no universal test to determine whether a defendant's right to a speedy trial has been violated." *Evans*, 386 S.C. at 423, 688 S.E.2d at 586.

When determining whether a defendant has been deprived of his or her right to a speedy trial, this court should consider four factors: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant. *State v. Brazell*, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). These four factors are related and must be considered together with any other relevant circumstances. *Barker*, 407 U.S. at 533. "Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155. However, in *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992), the United States Supreme Court suggested in dicta that a delay of more than a year is "presumptively prejudicial." Also, in *State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978), our supreme court found a two-year-and-four-month delay was sufficient to trigger further review. "[A] delay may be so lengthy as to require a finding of presumptive prejudice, and thus trigger the analysis of the other factors." *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155.

In *State v. Evans*, 386 S.C. at 424-26, 688 S.E.2d at 586-87, this court found a twelve-year delay in bringing a case to trial did not violate the defendant's speedy trial right when the defendant's statement to police was suppressed; the appeals of the suppression order lasted five years; after the appeals, the case was transferred to an assistant solicitor and the solicitor was later elected solicitor of another circuit; and the defendant failed to establish she was prejudiced by the delay. In *State v. Cooper*, 386 S.C. 210, 217-18, 687 S.E.2d 62, 67 (Ct. App. 2009), this court held a delay of forty-four months did not violate the defendant's constitutional right to speedy trial even though the delay was to some degree the result of prosecutorial and governmental negligence because any presumption of prejudice was persuasively rebutted when the State withdrew its notice to seek the death penalty. Thus, the court found the withdrawal could be construed as a benefit to the defendant resulting from the delay. *Id.*

On appeal, Hunsberger argues the ten-year delay was presumptively prejudicial, unreasonable, and without a valid reason by the State. Hunsberger also asserts the State's purported reason for the delay, that it wanted to try Barnes' case first, does not justify the almost ten-year delay. He asserts the "State's refusal to call the case for trial for almost ten years, without sufficient cause, gives the appearance that the State was using the delay as a tactical advantage to coerce cooperation from [him] in the trial of the co-defendant, Barnes." Hunsberger admitted he had not

previously asserted his speedy trial right but argued it should not weigh against him because he was effectively without counsel from 2002 until at least 2005. Finally, he asserts prejudice should be presumed from the almost ten-year delay. He argues the trial court attached undue significance to his incarceration in Georgia and the State's assertion it wanted to try Barnes first.

Although almost ten years passed between Hunsberger's arrest and his trial, the trial court noted that Hunsberger was only detained in South Carolina from January 25, 2002, to February 16, 2005, before he was released to Georgia. This three-year period would have been sufficient to trigger further review of his speedy trial rights; however, he never asserted them. *See Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (determining a two-year-and-four-month delay was sufficient to trigger further review). Hunsberger was then tried, convicted, and sentenced in Georgia on September 12, 2006, to life for the crime of kidnapping with bodily injury. He was incarcerated in Georgia and returned to South Carolina on September 30, 2011.

As for the reason for the delay, the trial court found that "given the fact that [Hunsberger] was a sentenced prisoner in Georgia and . . . , for that length of time, . . . he would not have been released, . . . it was not unreasonable for the State to take the position that [it] wanted to try the one defendant that [it] sought the death penalty on in the case first and dispose of that case first." *See United States v. Grimmond*, 137 F.3d 823, 828 (4th Cir. 1998) ("When a defendant violates the laws of several different sovereigns, . . . 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 delay."); *Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (holding the "constitutional guarantee of a speedy trial is protection only against delay which is arbitrary or unreasonable"); *State v. Kennedy*, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) (finding no violation of the defendant's right to a speedy trial, even though the delay was two years and two months, when the case was clearly complicated and required substantial time to investigate and prepare and there was no evidence the State purposefully delayed the trial); *State v. Smith*, 307 S.C. 376, 380, 415 S.E.2d 409, 411 (Ct. App. 1992) (holding the burden was on the defendant to show the delay was due to the neglect and willfulness of the State's prosecution). The State called Hunsberger's case in October 2011, as soon as it

completed Barnes' trial.[3] Hunsberger did not move for a speedy trial. The trial was then delayed until January 2012 because Hunsberger moved for and was granted a continuance. Thus, Hunsberger's case was called to trial very shortly after being returned to South Carolina and was only delayed at his request.

Hunsberger first asserted his right to speedy trial at the beginning of his South Carolina trial on January 9, 2012. *See Waites*, 270 S.C. at 109, 240 S.E.2d at 653 (citing to *Commonwealth v. Watson*, 360 A.2d 710 (Pa. Super. 1976), in which the court concluded a delay of more than three years between the defendant's arrest and the trial did not deny the defendant his constitutional right to a speedy trial when he did not assert the right until three days prior to trial). His counsel testified he did not think it was appropriate to file a speedy trial motion prior to that time because he did not know the State was going to try Hunsberger due to his life sentence in Georgia. Counsel testified, "Sometimes that can be a dangerous proposition. You may get just what you ask for."

Further, at trial, Hunsberger argued he was prejudiced by the witnesses' varied stories over the years. On appeal, he only argues prejudice should be presumed from the excessive almost ten-year delay. The trial court noted Hunsberger did not allege any witnesses were unavailable. All the witnesses were available to testify, and the transcripts from the previous trials were available to Hunsberger to use to impeach the witnesses. Hunsberger did not allege any witnesses or evidence were lost, the delay impacted his case, or an earlier trial would have resulted in a different verdict and sentence. *See Brazell*, 325 S.C. at 76, 480 S.E.2d at 70-71 (noting the three-year-and-five-month delay was negated by the lack of prejudice to the defense); *Kennedy*, 339 S.C. at 251, 528 S.E.2d at 704 ("While Kennedy may have been slightly prejudiced by the twenty-six month pretrial incarceration, the more important question is whether he was prejudiced because the delay impaired his defense."); *State v. Langford*, 400 S.C. 421, 445, 735 S.E.2d 471, 484 (2012) (finding a two-year delay in bringing the case to trial did not amount to a constitutional violation in the absence of any actual prejudice to the defendant's case).

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[3] The State sought Capital proceedings against Barnes, who was sentenced to death for Sturrup's murder.

Therefore, 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.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

HUFF, SHORT, and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JULIO ANGELO HUNSBERGER,

APPELLANT

Appeal from Edgefield County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2014-UP-382

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Julio Angelo Hunsberger petitions the Court for rehearing. Counsel respectfully submits that the Court, in considering the four Barker-Doggett[1] factors and finding that Hunsberger's constitutional right to a speedy trial was not violated, overlooked several important factors. First, in regard to the length of the delay, while this Court acknowledges the almost ten year delay between arrest and trial, the Court fails to address the fact that during eight years of the ten year delay the State could have readily called the case for trial but simply refused to do so. This Court correctly notes

[1] Barker v. Wingo, 407 U.S. 514 (1972); Doggett v. United States, 505 U.S. 647 (1992).

that Petitioner was incarcerated in South Carolina for three years prior to being released to Georgia. This Court wrote, "Although almost ten years passed between Hunsberger's arrest and his trial, the trial court noted that Hunsberger was only detained in South Carolina from January 25, 2002, to February 16, 2005, before he was released to Georgia. This three year period would have been sufficient to trigger further review of his speedy trial rights; however, he never asserted them." This Court then correctly notes that Petitioner was convicted and sentenced in Georgia in on September 12, 2006 and returned to South Carolina on September 30, 2011. Counsel respectfully submits that this Court overlooked the important five year time frame between when Petitioner was convicted in Georgia in September of 2006, and the time when the State of South Carolina finally sought extradition in August of 2011. The additional five year time frame after the Georgia conviction resulted in a cumulative eight year time frame where the State could have called the case for trial but refused to do so.

Second, as for the reason for the delay, this Court wrote, "As for the reason for the delay, the trial court found that 'given the fact that [Hunsberger] was a sentenced prisoner in Georgia and . . . , for that length of time, . . . he would not have been released, . . . it was not unreasonable for the state to take the position that [it[wanted to try the one defendant that [it] sought the death penalty on in the case first and dispose of that case first.'" The Court then cites United States v. Grimmond, 137 F.3d 823 (4th cir. 1998) for the proposition that, "When a defendant violates the laws of several different sovereigns, . . . 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 delay." Counsel respectfully submits that the Court overlooked the fact that South Carolina was not simply waiting its turn at the prosecutorial turnstile. The State of South Carolina refused to extradite Petitioner for five years following the conviction in Georgia.

This Court also cites State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), for the proposition that the "constitutional guarantee of a speedy trial is protection only against delay which is arbitrary or unreasonable." Counsel respectfully submits that the delay in the case was unreasonable and can not be justified by the Georgia prosecution and conviction or the fact that the State simply wanted to try the capital case against co-defendant Barnes first. This Court also cites State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct.App. 2000), for the proposition that a two year and two month delay did not violate speedy trial rights when the case was complicated and required substantial time to investigate and prepare. There is nothing in the record to indicate that Petitioner's case was complicated to the extent to justify the ten year delay.

The opinion notes that when the State finally called the case for trial in October of 2011, Hunsberger did not move for a speedy trial and in fact moved for a continuance. This factor should not weigh against Petitioner when the State did not seek extradition under the IAD until August of 2011, almost five years after the Georgia conviction. When counsel was finally appointed to represent Petitioner in 2010, Petitioner was still incarcerated in Gerogia and it was difficult for counsel to meet with his client. Counsel argued that his motion for a continuance should not preclude assertion of Petitioner's right to a speedy trial. Counsel stated, " . . . as it relates to the issue of us requesting the continuance, my client got to South Carolina on September 30th of 2011. I had not had an opportunity to

meet with him but on one prior occasion before he was moved back away from Augusta, back to some part of lower Georgia on the other side – well on the other side of Savannah and Dublin and had only met with him on one occasion. And I did request a continuance because I thought it was fundamentally unfair for me to proceed to trial having only met with him on that one occasion and that one occasion was actually regarding his consideration to testify for the State in the Barnes case." (R. p. 32, lines 22 - p. 33, lines 1-10; p. 42, lines 13-20).

The final delay, nine years after arrest and indictment, between October 2011, and the trial date of January 9, 2012, was based on the proper granting of the continuance motion. As noted by the trial judge, "Upon his return, I also do not think that you could look at the – Mr. Williams' [trial counsel's] motion for a continuance and then foreclose his right to make that motion for a speedy trial or it could have any weight and value added to it whatsoever. I just feel like a defense attorney if he stood up and says, well, we demand a speedy trial, and the State's over there ready to try the case and he's got three to five days to try a major case like this, it would be a recipe for a disaster in my opinion. I think an attorney has to have proper time to prepare, meet with his client and talk with his client." (R. p. 47, lines 1-13). The continuance motion should not weight against Petitioner. Neither the trial and conviction in Georgia nor the State's decision to wait and call Petitioner's case after the Barnes case justify the almost ten year delay.

Third, as to Petitioner's assertion of the right to a speedy trial, counsel respectfully submits that this Court overlooked the fact that Petitioner Julio Hunsberger was effectively without counsel for the South Carolina charges from the time of his arrest in South Carolina on January 25, 2002, until June 14, 2010, when trial counsel, Randall D. Williams, was

appointed to represent Petitioner. (R. p. 39, lines 10-18). Petitioner's failure to assert his right to a speedy trial prior to the 2012 trial should not weigh against Petitioner when the State failed to provide Petitioner, an indigent defendant charged with murder, with competent legal counsel until June of 2010, eight years after his arrest.

Fourth and finally, in regard to the prejudice, counsel respectfully submits that this Court overlooked the fact that a finding of actual prejudice need not be shown in order to find a speedy trial violation. Moore v. Arizona, 414 U.S. 25, 26 (1973); see also United States v. Ferreira, 665 F.3d 701, 706-707 (6th Cir. 2011); U.S. v. Molina-Solorio, 577 F.3d 300, 307-308 (5th Cir. 2009); United States v. Frith, 181 F.3d 92 (4th Cir. 1999); United States v. Clark, 83 F.3d 1350, 1353-1354 (11th Cir. 1996). The Court granted relief to Doggett while noting that he "did indeed come up short" in making "any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." As a result, the Court explained "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." In light of the difficult nature of proving prejudice, the Court held that the importance of presumptive prejudice increases with the length of delay. Doggett, 505 U.S. at 655-656. In the absence of proof of particularized prejudice, the state's negligence and a substantial delay will compel relief unless the presumption of prejudice is either "extenuated, as by the defendant's acquiescence, or persuasively rebutted" by the prosecution. Id. at 658. Prejudice should be presumed because of the excessive almost ten year delay.

For the above reasons, Petitioner seeks rehearing.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

This 20th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Edgefield County
R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JULIO ANGELO HUNSBERGER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 20th day of November, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 20th day
of November, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The State, Respondent,

v.

Julio Angelo Hunsberger, Petitioner.

Appellate Case No. 2012-207290

Unpublished Opinion No: 2014-UP-382

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 (Julio),* Unpublished Opinion No. 2014-UP-382 (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[1] based on the facts of the delay. However, this is not *de novo* review, but review of the trial judge's ruling: "A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion." *State v. Langford*, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012). In essence, "the court is bound by the findings of the trial court unless they are unsupported by the evidence, clearly wrong, or controlled by an error of law." *State v. Cooper*, 386 S.C. 210, 216, 687 S.E.2d 62, 66 (Ct. App. 2009). The record here fully and fairly supports Judge McMahon's finding that, in these discrete circumstances, the delay did not offend the right to a speedy trial nor prejudice Petitioner to the extent dismissal was warranted. There was no demand for a speedy trial, Petitioner was tried and convicted by the State of Georgia in the interim, and there was no allegation of lost witnesses or other prejudice to Petitioner. The trial judge carefully balanced the competing factors under the appropriate legal framework. The record does not support an abuse of discretion. Thus, this Court properly and reasonably affirmed the denial of the motion to dismiss.

2. Further, the opinion demonstrates that this Court carefully considered the particular varied facts of the delay period from the time of arrest to the time of trial in relationship to the findings supporting the ruling of the trial judge. Additionally, the Court pressed the parties in oral argument on application of the law to these facts. This issue was thoroughly reviewed. In fact, Petitioner does not submit any particular fact was overlooked. Rather, Petitioner argues the Court erred in failing to agree with his position

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[1] *Barker v. Wingo*, 407 U.S. 514 (1972). Petitioner does not contend there was any error in the structure of the review under the *Barker* factors, but only that the facts supported relief, not denial of the motion to dismiss.

that (1) the delay in bringing Petitioner back from Georgia was unreasonable – the State, he argues, could have sought return immediately after conviction in Georgia; (2) Petitioner was "effectively without counsel for the South Carolina charges from the time of his arrest ... on January 25, 2002, until June 14, 2010," thus his failure to assert his right should be excused, (3) his request for continuance for trial counsel's preparation should also be excused, and, finally, argues (4) "[p]rejudice should be presumed because of the excessive almost ten year delay." 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, such argument fails.

3. As a first point, it is clear from Petitioner's own arguments that there are multiple moving parts to the situation. Though he asserts the record does not reflect a "case [that] was complicated to the extent to justify the ten year delay," (Petition, [unnumbered] p. 3), this fails to account for the separate sovereigns, the multiple co-defendants and the multiple prosecutions of those co-defendants. The *Barker* test allows a Court to consider those various aspects, and the trial judge did so fairly and reasonably.

4. As a second point, Petitioner misconstrues the trial judge's consideration of the time in Georgia. Petitioner was held in Georgia, tried, convicted and sentenced in

Georgia, then began service of his sentence in Georgia.[2] Petitioner argues there was no justifiable reason to refuse to extradite Petitioner after the September 2006 conviction in Georgia. However, the State provided a substantial reason – that it wished to try co-defendant Barnes in capital proceedings first. Petitioner disagrees that was a valid reason, but does not go so far as to actually assert it was pretextual.[3] Essentially, he argues it was not a good enough reason. However, 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. *State v. Langford*, 400 S.C. at 440, 735 S.E.2d at 481. In fact, Petitioner was

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[2] Of note, the offense was committed in September 2001, Petitioner was arrested in January 2002, and released to Georgia on February 16, 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. 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. 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 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.

[3] Further, there were capital proceedings against Barnes which carry their own delays and restrictions; thus, there is no unexplained delay in those proceedings which negatively affected the prosecutorial plan at issue here.

convicted and sentenced *for the kidnapping of the murder victim.* In light of that incarceration, and the beginning of service of the life sentence in Georgia, which he was required to do regardless of the subsequent South Carolina conviction, it was not unreasonable for the State to pursue a capital case against co-defendant Steven Barnes first before trying Petitioner.[4] The cited "main goals" are not offended in these circumstances.

5. The factual basis for Petitioner's complaint that he essentially did not have an attorney for the charges here is somewhat murky. From arrest to release to Georgia, there are multiple complaints of lack of communication with appointed counsel. By letter dated May 3, 2004, Petitioner wrote to Judge Keesley and complained that he had not seen his attorney, Mr. Sturkey. (R. 565). By letter dated May 4, 2004, Petitioner wrote to the Clerk of Court and again reported Mr. Sturkey had not communicated with him. (R. p. 567). By letter dated May 10, 2004, Judge Keesley acknowledged the correspondence and advised that Petitioner or Mr. Sturkey would need to file appropriate motions to gain relief. (R. p. 570). Judge Keesley advised Petitioner that he could file a motion to relieve counsel, though hybrid representation on other matters was not allowed. (R. p. 570). Even so, it was approximately nine months before Petitioner, by letter dated January 4, 2005, requested Mr. Sturkey be relieved of appointment. (R. p. 572). Perhaps more troubling, though, is Petitioner's assertion that the request for continuance by trial counsel should not "count" against him. It is not a plain "count against" or "count for" analysis at issue; rather, a trial judge is called upon to delicately weigh the relative

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[4] Further still, it is clear from the record that the State immediately set out to bring both Hunsbergers back to this jurisdiction for trial upon completion of the capital proceedings against Barnes. There was no delay of any consequence in seeking Petitioner's return after the capital proceedings concluded.

strengths and weaknesses of the argued positions. The fact that counsel had acceptable cause to request delay does not mean the delay did not occur at Petitioner's request. Though not a bar to making his claim, the fact of this delay is directly attributable to Petitioner and should be weighed against Petitioner in a speedy trial analysis. *State v. Langford*, 400 S.C. at 443, 735 S.E.2d at 483, *citing Vermont v. Brillon,* 556 U.S. 81 (2009) ("Delays occasioned by the defendant ... weigh against him."). The trial judge properly treated this fact as such within the balancing of competing interests. (See R. p. 47, lines 1-13). Further, there is a significant matter of the strategy which counsel admitted. Essentially, counsel expressed that Petitioner specifically did not request a trial because he did not want a trial. Petitioner hoped that the State may not prosecute Petitioner at all depending on how the prosecution of co-defendant Barnes would resolve. (See R. p. 25, line 12 – p. 26, line 1). This is consistent with Petitioner's failure to compel the State to try him earlier by filing under the Instate Agreement on Detainers (as his co-defendant Barnes did). These circumstances well-support that the Petitioner did not wish to be tried earlier, thus, not all the time should be counted heavily against the State. Interestingly, these facts regarding the failure to request a trial closely track the facts of the *Barker* case where the United States Supreme Court found the defendant "was not deprived of his due process right to a speedy trial." *Barker v. Wingo*, 407 U.S. at 536.

In *Barker,* the defendant failed to object to a series of continuances in a probable gamble that a co-defendant would be acquitted in a separate trial that was likewise delayed. The Supreme Court explained the basis for this thought:

> ... an elderly couple was beaten to death by intruders wielding an iron tire tool. Two suspects, Silas Manning and Willie Barker, the petitioner, were

> arrested shortly thereafter. The grand jury indicted them on September 15. Counsel was appointed on September 17, and Barker's trial was set for October 21. The Commonwealth had a stronger case against Manning, and it believed that Barker could not be convicted unless Manning testified against him. Manning was naturally unwilling to incriminate himself. Accordingly, on October 23, the day Silas Manning was brought to trial, the Commonwealth sought and obtained the first of what was to be a series of 16 continuances of Barker's trial. Barker made no objection. By first convicting Manning, the Commonwealth would remove possible problems of self-incrimination and would be able to assure his testimony against Barker.

Id, 407 U.S. at 516.

The Supreme Court found that "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." *Id* at 536. The situation is much the same here. The State indicated a desire to try Barnes first, and that capital prosecution was delayed for various reasons. There was a question whether Petitioner, like other co-defendants, would testify against Barnes. (See R. p. 25, lines 12-16; R. p. 558 [Court Exhibit 1]). Counsel, admittedly, did not move for a trial as he might have "gotten what he asked for," and he did not want to secure a trial. (R. p. 25, lines 17-25). Respondent notes that this was fourth counsel, and Petitioner was well aware of how to file a motion to relieve counsel and that he could receive another attorney who would press for his rights if he was not in agreement with counsel. (See R. p. 570 , [May 10, 2004 Letter]). Like *Barker*, the record supports Petitioner did not want a trial. And, also like *Barker*, a reviewing court should be "reluctant indeed to rule" there is a violation of his constitutional right. *Id*. *See also State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) (finding no violation where during five of the seven year delay at issue, neither the State nor defendants "pursued the matter" and a "failure to assert the

right will make it difficult for the defendants to prove that they were denied a speedy trial").

6. Petitioner's reliance on time alone to show prejudice is misplaced. As in the case of any delay, the reasons for the delay are more dispositive than the block of time Petitioner relies upon. *State v. Cooper*, 386 S.C. 210, 217, 687 S.E.2d 62, 66 (Ct.App. 2009) (*quoting State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007)) ("'...the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.'"). The list of cases cited by Petitioner, (see Petition, [unnumbered] p. 5), 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.[5] The reason for the delay here is multifaceted. There

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[5] 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

were at the outset of the prosecution two jurisdictions vying for the opportunity to pursue charges against a minimum of six individuals (Barnes, Cave, Griffin, Thatcher, Petitioner and Alexander Hunsburger) who participated in varying respect with the assault, kidnapping and murder. Further, the murder with aggravating circumstance(s) allowed for consideration of capital proceedings. The State expressed its intent to try Barnes first, and delay in Barnes' capital case caused additional delays in the subsequent trials. (R. p. 28, lines 2-13). Certainly, complexity in the case is a valid reason for delay in the proceedings. *Pittman*, 373 S.C. at 552, 647 S.E.2d at 157 ("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). At any rate, 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," 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 Supreme Court in *Barker* specifically noted the damage that may very well be done to the prosecution's case when delay occurs:

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government was unintentional. *Id.* The listed cases simply do not clearly support the proposition offered.

> A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-in-crimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

Barker v. Wingo, 407 U.S. at 521.

Judge McMahon appeared to have considered this very passage in weighing the factors in this case. (See R. p. 44, line 11 – p. 46, line 7). Moreover, the trial judge correctly noted that Petitioner would have the opportunity to test and challenge memories in his cross-examination. (R. p. 47, lines 14-19). The record well demonstrates that, in fact, Petitioner did have ample opportunity for full and effective cross-examination, including making use of prior sworn testimony – testimony that was available as a result of multiple actions both in South Carolina and Georgia. (See, for example, R. p. 260, line 8 – p. 264, line 15; p. 276, lines 2-25; p. 327, lines 20-25; p. 356, line 22 – p. 358, line 17; p. 362, line 10; p. 442, line 14 – p. 445, line 1). The multiple trials in essence preserved testimony for this Petitioner's use to his benefit.[6]

Further, the trial judge correctly found that Petitioner does not contend any exculpatory witness or testimony is not unavailable. "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was

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[6] In fact, defense counsel noted not only having the transcripts, but also that he had observed some of the prior proceeding (it would appear he was referencing the trial against Alexander, but the record is not clear). (See R. p. 536, lines 8-17). At any rate counsel was familiar with the development of the case against Petitioner and the multiple co-defendants. (Id. See also R. p. 25, lines 12-16).

designed to protect ... (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker v. Wingo*, 407 U.S. at 532. "[T]he most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* The complete failure here to show any impairment in the defense could not support a finding of prejudice.[7] *Id. Compare State v. Buckner*, 738 S.E.2d 65 (Ga. 2013) (affirming finding of prejudice and dismissal where defendant "'was in the unique position of not just speculating, but knowing there was tampering with the evidence at the ... crime scene, but being prevented from identifying and showing what aspects of the scene and what specific pieces of evidence, have been altered or manipulated'" due to dimming memories and lack of recorded statements). Respondent notes that, contrary to showing any exculpatory evidence was previously available, the record supports that Petitioner has twice been convicted (once in Georgia in 2006, and once here in 2012) on evidence of participation in the events that led to Samuel's murder. At any rate, Petitioner did not show there was any lost evidence or testimony. The passage of time did, however, yield one distinct benefit to Petitioner. Though there were circumstances of aggravation connected to the murder, the State ultimately decided only to seek the death penalty for Barnes. As such, the length of the delay in this aspect certainly holds no prejudice to Petitioner. *See Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 ("Judge Pieper noted the State

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[7] Further, as noted previously, the pre-trial "societal disadvantages" were effectively ended with the Georgia conviction for kidnapping, as loss of employment or other life disruptions are attributed to that conviction – not waiting for another conviction in another jurisdiction. *Barker v. Wingo*, 407 U.S. at 533 (noting the various "societal disadvantages and reasoning: "Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.").

withdrew its notice to seek the death penalty; thus, the withdrawal could be construed as a benefit to Cooper resulting from the delay.").

7. In sum, the record well supports Judge McMahon's factual findings which he correctly analyzed in the appropriate legal framework. Therefore, this Court properly affirmed on appeal. *Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (affirming denial of motion to dismiss finding trial judge's "decision was supported by the evidence").

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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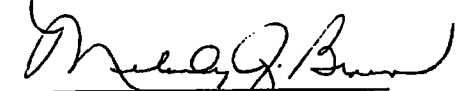
BY: 
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December 1, 2014.
Columbia, South Carolina.

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.

Julio A. Hunsberger, Appellant.

Appellate Case No. 2012-207290

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:

Kathrine B. Hudgins, Appellate Defender
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This 1st day of December, 2014.

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The South Carolina Court of Appeals

The State, Respondent,

v.

Julio Angelo Hunsberger, Appellant.

Appellate Case No. 2012-207290

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paul E. Short, Jr. J.

J.

Columbia, South Carolina

cc:
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FILED
December 17, 2014

DEC 18 2014

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