

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

APPELLATE CASE NO. 2012-207290

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343
ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial judge err in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial when the State failed to call the case for trial until January 9, 2012, almost ten years after the arrest and indictment of appellant for murder?

STATEMENT OF THE CASE

In March¹ of 2002, the Edgefield County Grand Jury indicted Appellant for murder, indictment #2002-GS-19-110. On January 9, 2012, Appellant proceeded to jury trial before the Honorable R. Knox McMahan. Attorney Randall D. Williams represented appellant at trial. Attorneys Ervin J. Maye and H. Franklin Young, III prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge McMahan sentenced Appellant to life in prison without parole. A timely notice of intent to appeal was filed on January 19, 2012. This appeal follows.

¹ The indictment states the March 2002, term but the date under the signature of foreperson of the Grand Jury appears to be May 25, 2002.

ARGUMENT

The trial judge erred in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial when the State failed to call the case for trial until January 9, 2012, almost ten years after the arrest and indictment of appellant for murder.

On January 25, 2002, Appellant was served with arrest warrant #G-679758 for the murder of Samuel J. Sturup on September 3, 2001. (Arrest warrant and affidavit, R. p. 555.) In either March or May (see footnote #1) the Edgefield County Grand Jury indicted Appellant for the murder of Sturup, indictment #2002-GS-19-110. It is unclear from the transcript when the public defender office was appointed to represent Appellant. R. p. 35, lines 7-9. Records from the Edgefield Clerk of Court's Office reflect that attorney O. Lee Sturkey was appointed to represent Appellant on January 29, 2002. (Defense of Indigent Act Appointment, R. p. 562). On February 16, 2005, over three years after his arrest in South Carolina, Appellant was transferred to Georgia to face charges connected to the South Carolina murder charge. R. p. 37, lines 14-25. The trial judge noted that during that three year period former tri-county public defender Lee Sturkey represented Appellant. R. p. 38, lines 1-11.

On September 12, 2006, Appellant and his co-defendant and brother, Alex Hunsburger, were convicted in Georgia for kidnapping with bodily injury. R. p. 27, lines 5-9. Appellant received a sentence of life in prison with the possibility of parole. R. p. 27, lines 9-13. At some point in time, another public defender, Mr. Siegler, was appointed to represent Appellant for the South Carolina charge. R. p. 39, lines 2-6. On May 18, 2010, Mr. Siegler moved to be relieved as counsel for Appellant based on a conflict. R. p. 39, lines 6-9. Mr. Siegler's motion to be relieved was granted and on June 14, 2010, trial counsel, Randall D. Williams, was appointed to represent Appellant. R. p. 39, lines 10-18; (Order of appointment, R. p. 559). Appellant remained incarcerated in Georgia.

On September 30, 2011, Appellant was returned to South Carolina pursuant to the Interstate Agreement on Detainers [IAD]. On October 3, 2011, the State called Appellant's case for trial. Appellant moved for a continuance which was granted by the Honorable William P. Keesley in a written order signed October 18, 2011. R. p. 559. In the order granting the continuance, Judge Keesley wrote, "There is no such motion for speedy trial now before the Court. 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." R. p. 563. On January 9, 2012, the State again called the case for trial before the Honorable R. Knox McMahon.

Prior to trial, Appellant moved to dismiss the charges based on the State's failure to bring the case to trial in a timely manner. R. p. 10, lines 11 – p. 11, lines 1-13. Appellant specifically argued a violation of the right to a speedy trial pursuant to both the United States and South Carolina Constitutions. R. pp. 21 – 26. Appellant acknowledged that the right to a speedy trial had not previously been asserted but argued that this was merely a factor for the judge to consider under Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed2d 101 (1972). R. p. 22, lines 8 – pp. 23 – 26, lines 1-18. Counsel for Appellant attributed the failure to assert the right to a speedy trial, in some degree, to the fact that Appellant's initial attorney, Lee Sturkey, was suspended from the practice of law prior to his death. Counsel stated, "Now, the position I simply take is his failure to assert his right, I think, is coupled with the fact that he was basically in a flux, did not have an attorney. I was not representing him until leading into the Barnes trial. I was - - didn't even know what his circumstances were until I was appointed some, I guess, eight years after his arrest, eight and a half years to him after his arrest." R. p. 25, lines 3-11.

Counsel further argued that his motion for a continuance should not preclude assertion of Appellant'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 trial judge denied the motion to dismiss. R. pp. 44 – 49. The judge stated, "I think once you get past the – you look at the right to a speedy trial and you look at those factors under Barker versus Wingo, and there is some indication that there is somewhat of a presumed prejudice because of the length of delay, I find based on the totality of the circumstances here of what's been presented, that the defendant would not be prejudiced." R. p. 48, lines 14-21. The judge went on to state, "I think given the fact that he was a sentenced prisoner in Georgia and that he was, for that length of time, that he would not have been released, that it was not unreasonable for the State to take the position that they wanted to try the one defendant that they sought the death penalty on in the case first and disposed of that case first." R. p. 49, lines 6-12. At the close of the State's case, Appellant again moved for dismissal based on violation of the speedy trial right. R. p. 455, lines 12-24. The judge again denied the motion. R. p. 455, lines 25 – p. 456, line 1. The trial judge erred.

In State v. Langford, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012) the South Carolina Supreme wrote:

The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy ... trial." S.C. Const. art. I, § 14. The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense. State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

The speedy trial right "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, 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." United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 155 (2007).

In determining whether a defendant has been deprived of the right to a speedy trial, the court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary and unreasonable. State v. Waites, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978). In a footnote in Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) the Court wrote, "Depending on the nature

of the charges, the lower courts have generally found post accusation delay 'presumptively prejudicial' at least as it approaches one year." Doggett Fn. 1

In Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) the Court wrote:

We begin our analysis with the "triggering mechanism" of a speedy trial claim, which is the length of the delay. Barker, 407 U.S. at 530, 92 S.Ct. 2182. We should not even examine the remaining factors "[u]ntil there is some delay which is presumptively prejudicial." Id. The clock starts running on a defendant's speedy trial right when he is "indicted, arrested, or otherwise officially accused," and therefore we are to include the time between arrest and indictment. United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

The almost ten year delay in the present case is presumptively prejudicial. Appellant remained in pre-trial detention in South Carolina for over three years from the time of his arrest on January 25, 2002, until the time he was transferred to Georgia for trial in February 16, 2005. On September 12, 2006, Appellant was convicted and sentenced in Georgia. The State did not seek extradition under the IAD until August of 2011, almost five years after the Georgia conviction. There is no evidence in the record that the State was unable to extradite Appellant from Georgia. Prejudice should be presumed. The excessive delay was unreasonable and without valid reason by the State.

As to the second factor from Barker, the reason for the delay, the State argued that they waited to call Appellant's case to trial until after the capital trial of co-defendant, Steven Barnes in November of 2010. R. p. 27, lines 21 – p. 28, p. 29 lines 1-5. As the trial judge correctly noted, "The reason for the delay, again, I take that balancing, for whatever reason, Mr. Barnes was not tried for eight years and some months. And I don't think you can say, well, I'm not going to try the co-defendant until I try Mr. Barnes. I

think Mr. Hunsburger's due process rights are separate and distinct from the State's prosecutorial plan so to speak on the defendants and the co-defendants involved in the Sturup homicide." R. p. 48, lines 22 – p. 49, lines 1-5. In a letter, dated October 11, 2010, to Appellant from trial counsel marked as Court's exhibit #1, counsel for Appellant writes, "It was a pleasure meeting you on September 22, 2010. After meeting with you, I informed the prosecutor here in this county, that you did not have any information regarding the facts and circumstances of the alleged murder. He then informed that he intends to try all parties who have chosen not to cooperate with the prosecution of one, Steven Barnes. Furthermore, he has asserted that he will call your case to trial at the next available opportunity." R. p. 558.

A prosecutor acts improperly if he intentionally delays a trial to gain some tactical advantage over a defendant or to harass a defendant. Barker, 407 U.S. at 531, n. 32 (citing United States v. Marion, 404 U.S. 307, 325 (1971); Pollard v. United States, 352 U.S. 354, 361 (1957)). Such a reason should be weighted heavily against the prosecution. Even neutral reasons weigh against the State because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Barker, 407 U.S. at 531.

Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply

encourage the government to gamble with the interests of criminal suspects assigned to a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

Doggett, 505 U.S. at 657.

The State's purported reason for the delay, because the State wished to try co-defendant Barnes first, does not justify the almost ten year delay, especially in light of the fact that Appellant was not a witness for the State in the prosecution of co-defendant Barnes. 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 Appellant in the trial of the co-defendant, Barnes. The present case is distinguished from State v. Evans, 386 S.C. 418, 688 S.E.2d 583 (Ct. App. 2009) where the South Carolina Court of Appeals, finding no speedy trial violation, found that a twelve year delay was troubling but justified based on an appeal taken by the State and the case being transferred to different prosecuting offices. There was no appeal involved in the present case and the case was never transferred out of the Eleventh Circuit Solicitor's Office. The reason for the delay in the present case is unjustified.

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 day 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. Additionally, in Judge Keesley's order granting the continuance, he specifically wrote, "There is no such motion for speedy trial now before the Court. 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." R. p. 559. The continuance motion should not weigh against Appellant.

As to the third factor from Barker, Appellant's assertion of the right to a speedy trial, Appellant acknowledged that the speedy trial right had not previously been asserted. In Barker the Court wrote:

We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.

Barker v. Wingo, 407 U.S. 514, 528-529, 92 S.Ct. 2182, 2191 (1972).

The status of Appellant's appointed counsel during the first three years after his arrest and while he remained in pre-trial detention in South Carolina is in question. While the transcript in the present case fails to reflect when the public defender was appointed, documents from the Edgefield Clerk of Court's Office reflect that attorney O. Lee Sturkey was appointed to represent Appellant on January 29, 2002. R. p.35, lines 7-9; R. p. 562. As noted by the trial judge, Mr. Sturkey failed to appear at a bond hearing on Appellant's behalf. R. p. 38, lines 1-15.

On May 3, 2004, Appellant wrote to Judge Keesley with concerns that he was unable to obtain access to his counselor and specifically referred to his co-defendant/brother's motion for a speedy trial. R. p. 567. Judge Keesley responded to Appellant's letter in a document filed May 11, 2004. R. p.570. On May 4, 2004, Appellant wrote a letter to the Edgefield County Clerk of Court asking that Mr. Sturkey be relieved as counsel. R. p. 567. On January 4, 2005, Appellant wrote another letter to the Edgefield County Clerk of Court asking to relieve Mr. Sturkey as counsel because Appellant has never met his court appointed attorney since the time of his arrest on January 22, 2002. R. p. 572. As noted by trial counsel, Mr. Sturkey was suspended from the practice of law. In re Sturkey, 657 S.E.2d 465 (2008). R. p. 24, lines 7-12. The fact that Appellant did not previously assert his right to a speedy trial, when, it appears Appellant was effectively without counsel from 2002 until at least 2005, should not weigh against appellant.

As to the fourth factor from Barker, prejudice, a defendant is not required to show prejudice affirmatively to win a speedy trial claim. 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.

In Langford, 400 S.C. 421, 441-442, 735 S.E.2d 471, 482 (2012) the Court wrote:

The Supreme Court has counseled further that none of these factors is “either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.” Barker, 407 U.S. at 533, 92 S.Ct. 2182. Instead, they are all related and must be considered along “with such other circumstances as may be relevant.” Id. Thus, the Supreme Court created a balancing test which is a rejection of “inflexible approaches” and weighs “the conduct of both the prosecution and the defense.” Id. at 529-30, 92 S.Ct. 2182. If a court concludes that this right has been violated, dismissal of the charges “is the only possible remedy.” Id. at 522, 92 S.Ct. 2182. A court’s decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. See State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct.App.2007) (applying abuse of discretion standard to speedy trial claim), *rev’d on other*

grounds, 384 S.C. 504, 682 S.E.2d 820 (2009); see also State v. Redding, 274 Ga. 831, 561 S.E.2d 79, 80 (2002) (noting the inquiry is whether court abused its discretion under Barker). “An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support.” Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008).

Appellant's speedy trial rights were violated in the present case and dismissal is the only possible remedy. The trial judge abused his discretion in refusing to dismiss the charges. The trial judge failed to properly balance the presumptively prejudicial almost ten year delay, attaching undue significance to the fact that Appellant was incarcerated in Georgia and the State wanted to try Barnes first, against a finding that Appellant was not prejudiced by the delay. Properly balancing the Barker factors, the excessive delay, the fact that the State provided no other explanation for failing to call the case to trial for three years before extradition to Georgia and then failing to call the case for trial for another five years after conviction in Georgia on September 12, 2006, until October of 2011, and the fact that the status of Appellant's appointed representation was in question far outweigh a finding that no prejudice was demonstrated by the delay.

CONCLUSION

Appellant respectfully requests this Court reverse the decision of the lower court, hold that Appellant's federal and state constitutional rights to a speedy trial were violated, and dismiss the charge of murder against him.

Respectfully submitted,



Kathrine H. Hudgins

Appellate Defender

E-Mail: khudgins@sccid.sc.gov

1330 Lady Street, Suite 401

Columbia, South Carolina 29201

(803) 734-1343

ATTORNEY FOR APPELLANT

This 8th day of October, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

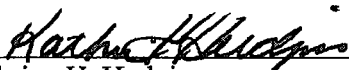
V.

JULIO ANGELO HUNSBERGER,

APPELLANT

CERTIFICATE OF SERVICE

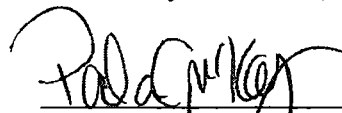
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of October, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of October, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

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,

vs.

Julio Angelo Hunsberger

Appellant

Appellate Case No. 2014-001545

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, S.C. 29211
(803) 734- 3727

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit
205 E. Main Street
Lexington, SC 29072
(803) 785-8352

ATTORNEYS FOR RESPONDENT

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ARGUMENT9

 The trial judge fairly denied Appellant’s motion to dismiss the 2002 charge of murder where Appellant never made a demand for a speedy trial; he was tried and convicted of the kidnapping of the murder victim by a separate sovereign and was serving a life sentence in that jurisdiction while the murder charge was pending in this jurisdiction; and, where there was no allegation of lost witnesses or other prejudice to Appellant..... 9

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial when the State failed to call the case for trial until January 9, 2012, almost ten years after the arrest and indictment of appellant for murder?

(FBOA, p. 3).

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

Did the trial court fairly deny Appellant's motion to dismiss the 2002 charge of murder where Appellant never made a demand for a speedy trial; he was tried and convicted of the kidnapping of the murder victim by a separate sovereign and was serving a life sentence in that jurisdiction while the murder charge was pending in this jurisdiction; and, where there was no allegation of lost witnesses or other prejudice to Appellant?

STATEMENT OF THE CASE

Sixteen-year-old Samuel J. Sturrup was murdered in Edgefield County in September 2001. (R. p. 27, lines 21-22). Appellant, Julio Angelo Hunsberger, was arrested on January 25, 2002. (R. p. 34, lines 23- p. 35, line 6; p. 37, lines 14-20). An Edgefield County Grand Jury indicted Appellant in March 2002 for Samuel's murder. (R. p. 7, lines 5-9; R. p. 555). Appellant remained in custody in South Carolina until released to Georgia on February 16, 2005 to stand trial for Samuel's kidnapping. (R. p. 36, line 5 – p. 37, line 25).

On September 12, 2006, after a Georgia jury convicted Appellant and his brother Alexander Hunsburger¹ of kidnapping with bodily injury, Appellant was sentenced to life imprisonment.² Appellant remained in custody in Georgia on the life sentence until South Carolina requested custody under the Interstate Agreement on Detainers. Appellant was returned to South Carolina on September 30, 2011. Upon Appellant's return, defense counsel requested a continuance both for the week of October 3 and the week of October 10, 2011, which was granted over the State's objection. (R. p. 27, lines 1-13; p. 40, lines 11-16; p. 40, line 20-p. 42, line 20; R. p. 559 [Order Upon Motion for Continuance]).

Appellant eventually stood trial on the murder charge January 9-11, 2012, before the Honorable R. Knox McMahon and a jury. The jury convicted as charged. (R. p. 538, line 25 – p. 539, line 4). Judge McMahon sentenced Appellant to life imprisonment. (R. p. 552, line 21 – p. 553, line 1). This appeal follows.

¹ The brothers were tried separately in this State. Alexander Hunsberger stood trial January 4-6, 2012, the week prior to Appellant's trial. His direct appeal is also before this Court, and he also raises a speedy trial issue. *See State v. Alexander L. Hunsberger*, Appellate Case No.: 2012-206608.

² Appellant's conviction was affirmed by the Georgia Court of Appeals on August 6, 2009. *Hunsberger v. State*, 683 S.E.2d 150 (Ga.App. 2009).

RESPONDENT'S STATEMENT OF FACTS

The victim in this case was sixteen-year-old Samuel J. Sturrup. The evidence demonstrated that Steven Barnes, as head of a criminal enterprise involving robbery and prostitution in Georgia, repeatedly beat and caused others to beat Samuel over missing money. Barnes, with the help of Appellant and Appellant's brother, Alexander Hunsberger, and with co-defendants Charlene Thatcher, Richard Cave, and Antonio Griffin, took Samuel across the state line from Georgia into Edgefield, South Carolina. Barnes marched Samuel to an open field to be shot by the others, before Barnes personally fired a bullet into the back of Samuel's head inflicting the fatal wound.

Discovery of the Remains and Evidence at the Scene

On November 19, 2001, investigators from the Edgefield County Sheriff's Department were called to a rural area upon report of local residence Grover Dais Jr., finding a human skull on his property. (R. p. 146, lines 14-24; p. 161, line 22-p. 162, line 17). A search of the surrounding areas resulting in finding other bones and a pair of jeans with a belt displaying the name "Samuel." The pockets yielded two grocery store savings cards, a keychain with two keys, and a dollar bill. In the same area, investigators found a .40 caliber Smith & Wesson shell casing. (R.p. 169, lines 2-7; p. 173, line 21 - p. 175, line 20; p. 181, line 1-p. 183, line 20; p. 187, lines 2-3; p. 189, line 15-p. 190, line 13; p. 204, line 2- p. 205, line 7). During a later search in January 2002, investigators also recovered two bullets from the ground. (R. p. 208, line 5 - p. 210, line 16).

Identification and Cause of Death

Information from the grocery cards discovered with the jeans gave investigators the name "Sturrup." Searching records in neighboring jurisdictions, officers found a

missing person report for Samuel Sturup. (R. p. 205, line 13 – p. 206, line 10). The autopsy and review of dental records resulted in a positive identification of the remains as the remains of Samuel Sturup. Examination of the skull indicated a gunshot wound to the head. (R. p. 283, line 10 – p. 284, line 20; p. 296, lines 4-14). Entry was “high on the back of the head” with a downward path. (R. p. 285, lines 14-17; p. 290, lines 8-16). The bullet was recovered still lodged at the base of the skull along with some of the brain tissue. (R. p. 284, line 21 – p. 285, line 10). The brain tissue showed a contusion which indicated Samuel was alive at the time the wound was inflicted. (R. p. 285, lines 5-10). The cause of death “was the destruction of brain tissue and fracture of the bone due to the gunshot wound to the back of his head.” (R. p. 296, lines 15-22). The gunshot wound “would have immediately caused unconsciousness and probably would have caused death in a very short period of time.” Other injury was impossible to determine due to the condition of the remains. (R. p. 294, line 14 – p. 296, line 3; p. 296, line 23 – p. 297, line 25).

Co-Defendant Testimony

Richard Cave testified that he, along with his friend, Antonio Griffin, went to Barnes' home in Georgia after a call from Barnes. It was Labor Day weekend 2001. Barnes was arguing with Samuel about missing money. (R. p. 234, line 14 – p. 236, line 25). When Samuel denied having the money, Barnes grabbed a shock absorber and hit Samuel, and also beat him with his fist. (R. p. 237, line 21 – p. 240, line 12). Cave recalled that Charlene Thatcher, who worked with Barnes and was also his girlfriend, was present as well, and was also, at one point, blamed for the missing money. (R. p. 239, lines 15-22; p. 242, lines 18 -23). Cave testified that Barnes eventually made a telephone

call. After the call, Alexander and Julio Hunsberger arrived. (R. p. 239, line 21 – p. 240, line 12). Barnes and the Hunsbergers spoke to each other. (R. p. 240, lines 13-19). After they spoke, Barnes ordered the group to leave. They split up and left in two cars. Barnes drove one car. Cave, Griffin and Thatcher were in the car with Barnes. The Hunsbergers' left in their own car. (R. p. 241, lines 9-10; p. 243, lines 2-18). Cave testified they followed the Hunsbergers. (R. p. 244, line 9 – p. 245, line 1). The Hunsbergers led them to a remote field. Barnes directed the people in his car to get out, then went to the Hunsberger's car and opened the trunk. Samuel got out of the trunk. (R. p. 245, line 9 – p. 246, line 14). Cave testified that Samuel had a "busted up arm" and a bruised face as a result of the prior beating. (R. p. 246, lines 21-24). According to Cave, Barnes marched the group further into the remote area, again demanded the return of money from Samuel, and, again, Samuel denied having the money. (R. p. 247, line 11 – p. 248, line 18). Cave testified that Barnes then pulled a gun and announced they would all shoot Samuel. (R. p. 248, lines 20 – 23). Cave testified that Thatcher shot Samuel at Barnes' direction, then gave the gun to him. He shot and gave the gun to Griffin. Cave testified he returned to the car with Thatcher, but heard four more shots. (R. p. 249, line 20 – p. 250, line 6). Cave testified that Barnes and the Hunsbergers returned, and the Hunsbergers led the group to a nearby trailer. They spoke separately with Barnes, before Barnes returned and instructed the group – except for the Hunsbergers' – to leave. Cave testified that he did not see either Julio or Alexander Hunsberger leave the trailer. (R. p. 250, line 7 – p. 252, line 6; p. 252, line 19 – p. 253, line 2). Cave also testified that at one point prior to leaving the trailer, Griffin asked Barnes "how did he know that Sam wasn't going to get

up and go to the neighbors,” and Cave heard Barnes reply, because “he shot him in the head.” (R. p. 252, lines 12-15).

Antonio Griffin testified similarly. Griffin added that he actually fought with Samuel at the Georgia house, and that Barnes threatened, at one point, to have both Thatcher and Samuel shot. (R. p. 330, line 17 – p. 332, line 10; p. 335, line 12 – p. 336, line 9). Like Cave, Griffin testified that the two Hunsberger brothers came to the Georgia house after a phone call by Barnes. (R. p. 336, lines 15-25). The Hunsbergers and Barnes spoke to each other, then the group left in two cars with the Hunsbergers’ car leading. (R. p. 337, lines 14-19; p. 338, lines 20-22; p. 339, lines 1-10). Griffin testified the Hunsbergers led the group to a remote field. (R. p. 339, lines 11-24). Samuel was in the Hunsbergers’ trunk. Griffin testified that Barnes had a gun, and one of the Hunsbergers had another gun. (R. p. 340, line 20 – p. 341, line 12). He recalled that after getting Samuel out of the trunk, Barnes marched Samuel farther into the remote area, going through woods to another open area away from the cars. (R. p. 341, lines 13-19). Griffin testified Barnes stopped the group and instructed that “everybody fixing to shoot” beginning with Thatcher. (R. p. 342, lines 6-12). Barnes forced Thatcher to shoot Samuel, then “one of the brothers” took the gun from Thatcher and gave it Griffin. Griffin testified that he “shot at the ground,” then Cave “got the gun.” (R. p. 342, line 18 – p. 343, line 3). Griffin testified that “the last one who shot had his own gun.” (R. p. 343, lines 3-4). Griffin testified he returned to the car. When Barnes came back to the car, Griffin testified he asked, “how you know this man ain’t fixing to get up and go get some help,” to which Barnes replied, “He ain’t going to get up ... I shot him in the head, he ain’t going to get back up. (R. p. 343, line 22 – p. 344, line 5). Griffin also testified that

it was the Hunsbergers who led the group out of the area to a nearby trailer and opened the door to the trailer. Griffin testified that inside the trailer, Barnes and the Hunsbergers had another conversation, again, away from the group, (R. p. 344, line 7 – p. 345, line 8), and the group eventually dispersed with the Hunsbergers staying at the trailer, (R. 345, line 22 – p. 346, line 4). In related testimony, Griffin also testified Barnes would later call, after discovery of the remains, and instruct Griffin not to say anything. Griffin further testified that Barnes also told him that Samuel really didn't steal the money (apparently Barnes' dogs dug up money he buried in the yard at the Georgia house and shredded it), but stated "what's done is done...." (R. p. 349, line 19- p. 351, line 4).

Charlene Thatcher also testified at Appellant's trial. She similarly testified that the Hunsbergers arrived at the Georgia House after Barnes' call. (R. p. 403, lines 3-7). She testified that Barnes ordered Samuel to get inside the Hunsbergers' car in the trunk, (R. p. 403, lines 20-25), and the Hunsbergers led the way to the remote field area. (R. p. 404, lines 10-25). Thatcher testified that Samuel got out of the trunk and Barnes ordered him to march further into the remote area. Thatcher testified "Barnes told Sam to stop and pick a place to die." (R. p. 405, line 12 – p. 406, line 3). When Samuel stopped, "everybody surrounded him." (R. p. 406, lines 3-4). Thatcher admitted that at Barnes' direction she shot Samuel first. She shot him the stomach. (R. p. 406, lines 7-17). Thatcher also testified Barnes thereafter shot Samuel in the head. (R. p. 406, lines 19-20). She also testified that other people fired at Samuel. (R. p. 406, lines 21-23). Her testimony reflected that everyone shot Samuel including Thatcher, Barnes, Griffin, Cave, Alexander Hunsberger, and Appellant. (R. p. 407, lines 4-11). Thatcher testified the group then followed the Hunsbergers to a trailer. According to Thatcher, "[t]he

Hunsbergers went in the back of the trailer to find something to clean the guns with to take the fingerprints off.” (R. p. 407, lines 20-25). She could positively identify Appellant as she not only knew him from the crime but also from “sexual dealings” with him. She testified that she had seen him “numerous times” after the murder. (R. p. 409, line 9 – p. 410, line 10).

Other Evidence At Trial

Gerald Richardson testified that he was formerly married to Appellant’s mother. Richardson owned property in Edgefield County and maintained mobile homes on the property. Appellant had access of one of those mobile homes. (R. p. 309, line 10 – p. 312, line 18). Appellant was arrested at that mobile home in January 2002. The home was a “couple of hundred yards” from the crime scene. (R. p. 172, lines 3-22; p. 215, line 17 – p. 216, line 1; p. 219, lines 11-14; p. 226, line 14 – p. 227, line 13).

Mr. Dias, who initially discovered the skull and called officers, was subsequently charged with unrelated offenses and shared a cell with Appellant in the Edgefield County Detention Center. Mr. Dias testified Appellant spoke about the murder and the crime scene. Appellant admitted living near the crime scene. He further indicated knowledge of the crime scene and the possible available evidence. (R. p. 151, line 4 – p. 154, line 9).

As noted above, the jury convicted after hearing the evidence.

ARGUMENT

The trial judge fairly denied Appellant's motion to dismiss the 2002 charge of murder where Appellant never made a demand for a speedy trial; he was tried and convicted of the kidnapping of the murder victim by a separate sovereign and was serving a life sentence in that jurisdiction while the murder charge was pending in this jurisdiction; and, where there was no allegation of lost witnesses or other prejudice to Appellant.

Relevant Facts:

On January 25, 2002, Appellant was arrested in Edgefield, South Carolina, for Samuel's murder. (R. p. 34, line 23 – p. 35, line 6). On January 29, 2002, Public Defender O. Lee Sturkey was appointed to represent Appellant. (R. p. 38, lines 1-11; p. 564, [Order of Appointment of Legal Counsel for Indigent Defendant]).

By letter dated May 3, 2004, Appellant wrote to Judge Keesley and complained that he had not seen his attorney. He also requested the appointment of two attorneys for his case. (R. 565, [May 3, 2004 Letter]). By letter dated May 4, 2004, Appellant wrote to the Clerk of Court and again reported Mr. Sturkey had not communicated with him, and similarly requested the appointment of two attorneys. (R. p. 567, [May 4, 2004 Letter]). By letter dated May 10, 2004, Judge Keesley acknowledged the correspondence and advised that Appellant or Mr. Sturkey would need to file appropriate motions to gain relief. (R. p. 570, [May 10, 2004 Letter]). Judge Keesley advised Appellant that he could file a motion to relieve counsel, though hybrid representation on other matters was not allowed. (R. p. 570, [May 10, 2004 Letter]).

By letter dated May 11, 2004, private counsel, John Delgado, wrote the Court to request a bond hearing. Mr. Delgado wrote in a February letter that he would not be representing Appellant. (R. p. 35, lines 10-25).

By letter dated January 4, 2005, Appellant wrote the Clerk of Court and again complained he had not seen Mr. Sturkey, and complained that Mr. Sturkey had been reassigned to him in June 2004. Appellant asked for Mr. Sturkey to be relieved of appointment. (R. p. 572, [January 4, 2005 Letter]).

On February 16, 2005, Appellant was released to Georgia to stand trial for the kidnapping. (R. p. 37, lines 2-3).

On September 12, 2006, Appellant was convicted after a jury trial in Georgia and sentenced to life imprisonment. He thereafter began service of that sentence in Georgia. (R. p. 38, line 12 – p. 39, line 1).

Public Defender Seigler assumed representation from Mr. Sturkey. On or about May 18, 2010, Mr. Seigler moved to be relieved of appointment as Mr. Seigler represented co-defendant Barnes on a separate, throwing bodily fluids matter. Judge McMahon signed an order on June 14, 2010 relieving Mr. Seigler from appointment. Judge McMahon appointed Mr. Williams, defense counsel at trial, in June of 2010 after Mr. Seigler was relieved. (R. p. 39, line 2 – p. 40, line 6).

Co-defendant Steven Barnes was tried and convicted in capital proceedings in November 2010. Judge McMahon also presided over the Barnes trial. (R. p. 27, lines 2-13). The solicitor determined that the capital proceedings should proceed first; however, there were marked delays in capital proceedings which were eventually resolved when Judge McMahon was assigned. (R. p. 28, lines 5-11). The prosecution noted they were "waiting certainly to prosecute that case prior to dealing with any of the co-defendants' case[s]." (R. p. 28, lines 11-13). The State offered Appellant the opportunity to be a witness against Mr. Barnes in the capital proceedings. Defense counsel confirmed that

Appellant was considering same during this time. (R. p. 25, lines 6-16). (See also R. p. 558, [Court Exhibit 1]).

On or about August 12, 2011, the State requested custody under the Interstate Agreement on Detainers ("IAD"). (R. p. 40, line 11 – p. 41, line 3). Pursuant to the State's request, Appellant was returned to the State on September 30, 2011. (R. p. 41, lines 17-19).

The State stood ready to call the case both for the week of October 3, 2011 and/or the week of October 10, 2011. Defense counsel moved for a continuance for each date. The continuances were granted over the State's objection. (R. p. 28, line 25 – p. 29, line 13; p. 41, line 13 – p. 42, line 20). In granting the continuance, Judge Keesley noted that counsel had little time to consult with Appellant due to Appellant's incarceration in Georgia. Judge Keesley also noted that there was no motion for a speedy trial, though the Order for continuance was "not intended to prejudice any future right the defendant may have to make such a motion." (R. pp. 560 - 561, [Order Upon Motion for Continuance, pp. 2-3]). However, Judge Keesley found that the defendant's request for continuance tolled the 180 day time period in which the State was required to try Appellant pursuant to the terms of the IAD. (R. p. 561, [Order Upon Motion for Continuance, p. 3]).

On January 9, 2012, the State called the case to trial. In pre-trial motions, Appellant moved to dismiss the murder charge for failure to bring the charge to trial in a timely fashion. Defense counsel for Appellant admitted there was a "hurdle" to his motion to dismiss based on a violation of right to a speedy trial in that Appellant never demanded a trial. (R. p. 22, line 8 – p. 23, line 4). Defense counsel argued, though, that the passage of time should prompt review. (R. p. 23, lines 5-8). Defense counsel also

suggested that, due to the length of time at issue, "the Court could, on its own motion, find that that is a violation of his right to a speedy trial." (R. p. 23, lines 5-8). Counsel further argued that the failure to request a trial should not be weighed heavily against Appellant when there was fluctuation in representation, and where there was a question of whether Appellant may decide to be a witness against co-defendant Steven Barnes in the capital case:

... I was not representing him until leading into the Barnes trial. I was - - didn't even know what his circumstances were until I was appointed some, I guess, eight years after his arrest, eight and a half years to him after his arrest.

And quite honestly, Judge, as I indicated to you, when I was appointed to him, it was under the guise of, well, what's going to happen with him? Is he going to cooperate in the prosecution of Steven Barnes? How do we address that issue?

And, essentially, I did not consider the filing of a speedy trial motion immediately because, again, with him doing a life sentence and based on some assertions made to me by the Solicitor, I wasn't certain that he would be tried in this case, did not believe he would be, did not believe it was appropriate to file a speedy trial motion. Sometimes that can be a dangerous proposition. You may get just what you ask for. And, essentially, we didn't file it.

(R. p. 25, lines 6 - p. 26, line 1).

Defense counsel also asserted that prejudice would be shown "by the conflicting evidence that will come from the varying witnesses based on prior testimonies they've given over the last six, seven years and last week." (R. p. 26, lines 6-9). Counsel argued "[t]heir stories have varied over time and we believe that that's an obvious demonstration of prejudice." (R. p. 26, lines 10-11). Counsel asserted "that the State's own role in failing to bring him to trial is solely on the State and its not on him" and "the fact that he

failed to assert it, I don't think should necessarily defeat our claim that his rights have been violated ... on the basis of this substantial delay." (R. p. 26, lines 12-18).

The solicitor asserted in response:

There's just a lot of circumstances that went into this. There certainly was no intentional delay of this case on the part of the State. They were extradited and returned - I mean, they were given over to Georgia, a separate sovereign, who initiated a prosecution. They have been serving time over there.

(R. p. 30, line 20 - p. 31, line 1).

The solicitor argued it was the consistent intent of the State to try the capital case against Steven Barnes first before turning to the other defendants. (R. p. 27, line 21-p. 28, line 1). The solicitor asserted that the State moved to prosecute the Hunsbergers after the Barnes conviction. However, the matter was then delayed when Alexander Hunsberger contested extradition and Appellant moved for a continuance. (R. p. 28, line 17- p. 30, line 10).

The trial judge, considering the facts presented and the argument of counsel, found that neither the failure to assert the right previously nor defense counsel's motion for continuance would be a bar to asserting the motion to dismiss; however, the fact that Appellant did not request a trial may be a factor to consider. Further, the entire period of approximately ten (10) years should not be assessed against the State, as Appellant was held in Georgia, tried, convicted and sentenced in Georgia, then began service of his sentence in Georgia. This distinguished the matter from one of pre-trial detainment alone. Lastly, the judge found that "the fact that years have passed may be to [Appellant's] advantage, or at least not to his disadvantage." He noted the witnesses may be impeached with any inconsistent statements, and there was no allegation of a missing

or unavailable witness. (R. p. 44, line 11 – p. 48, line 13). In regard to the State's determination to try Barnes first, the trial judge noted that Appellant's "due process rights are separate and distinct from the State's prosecutorial plan," but "given the fact that he was a sentenced prisoner in Georgia and that he was, for that length of time, that he would not have been released, that it was not unreasonable for the State to take the position that they wanted to try the one defendant that they sought the death penalty on in the case first and disposed of that case first." (R. p. 48, line 24 – p. 49, line 12). Considering all the facts and upon finding a lack of prejudice, the judge denied the motion. (R. p. 49, lines 13-18). Counsel renewed his motion to dismiss at the close of the State's case, adding that cross-examination demonstrated the "inconsistencies of the memories of the witnesses" and the prejudice to Appellant. (R. p. 455, lines 12-24). The judge again denied the motion referencing his prior ruling. (R. p. 455, line 25 – p. 456, line 1).

On appeal, Appellant complains that the trial judge erred in that the State was at fault in failing to bring the case to trial for nearly ten (10) years. (FBOA, p. 9).

Discussion:

"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). It is well established that an abuse of discretion occurs either of two ways, "when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Id* (quoting *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008)). 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 Appellant to the extent dismissal was warranted. There was no demand for a speedy trial, and there was no allegation of lost witnesses or other prejudice to Appellant. 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 should affirm the denial of the motion to dismiss.

The right to a speedy trial is guaranteed by the United States Constitution and the State Constitution. *State v. Langford*, 400 S.C. at 440, 735 S.E.2d at 481. *See also State v. Cooper*, 386 S.C. at 216, 687 S.E.2d at 66, *citing* U.S. Const. amend. VI; S.C. Const. art. I, § 14. “The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused’s defense.” *Langford*, 400 S.C. at 440, 735 S.E.2d at 481, *citing State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978). As the trial judge found, pre-trial detention in South Carolina was limited to the period of January 25, 2002 to February 16, 2005. Appellant was then released to Georgia and subsequently stood trial, was 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, it was not unreasonable for the State to pursue a capital case against co-defendant Steven Barnes first before trying Appellant. The “main goals” of preventing “undue pretrial incarceration,” concerning over accusation of crime, and unduly limited the ability to gather evidence by incarceration are not offended in these circumstances.

See United States v. Grimmond, 137 F.3d 823, 830 (4th Cir. 1998) (“When, as here, a defendant is lawfully incarcerated for reasons not related to the pending charges and makes no credible showing that either his present or potential sentence will be substantially affected by the delay... we hold that there is simply no way the pretrial incarceration can be deemed oppressive.”) (internal citation omitted). Even so, the right to a speedy trial is still preserved, and any alleged violation is resolved by balancing a number of factors.

“There is no universal test to determine whether a defendant’s right to a speedy trial has been violated.” *State v. Cooper*, 386 S.C. at 216, 687 S.E.2d at 66 (citing *State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)). Rather, a two-step inquiry has emerged. The first step is to determine whether the delay was of such length to require analysis. *See Doggett v. United States*, 505 U.S. 647, 652 (1992) (“Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay, ... , since, by definition, he cannot complain that the government has denied him a ‘speedy’ trial if it has, in fact, prosecuted his case with customary promptness.”) (internal citation omitted). Once that triggering presumption is shown, a court may then consider any number of facts to understand the cause of the delay. *State v. Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (“The two year four month delay between arrest and preliminary hearing is disturbing” and “[w]hile length of delay alone is not dispositive” the “two year four month delay between arrest and preliminary hearing” in that case was “sufficient to trigger ... review of the other three factors enumerated in *Barker v. Wingo*, and our consideration of ‘such other circumstances as may be relevant’”).

The leading case setting out various factors to consider is *Barker v. Wingo*, 407 U.S. 514 (1972). The Supreme Court, acknowledging that each case turns on its own facts, provided the following guidance:

A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Barker v. Wingo, 407 U.S. 514, 530 (1972).

South Carolina courts generally follow these factors in assessing whether a violation has occurred. See, e.g., *State v. Langford*, *supra*; *State v. Evans*, 386 S.C. 418, 688 S.E.2d 583, 586 (Ct.App. 2009). Considering the facts of this case within that framework, as the trial judge did, (see R. p. 48, line 14 – p. 49, line 18), the record well supports the denial of relief. Respondent will address each of the *Barker* factor separately as they apply here.

The Length of Delay

The time of ten years from arrest³ to trial is unusual when compared to delays referenced in a survey of published cases on speedy trial issues in this jurisdiction. See, for example, *State v. Langford*, *supra* (twenty-three month delay reviewed in armed robbery, first degree burglary and kidnapping case); *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (reviewing three year delay between arrest and trial in murder case);

³ “The clock starts running on a defendant’s speedy trial right when he is ‘indicted, arrested, or otherwise officially accused,’ and therefore we are to include the time between arrest and indictment.” *State v. Langford*, 400 S.C. at 442, 735 S.E.2d at 482.

State v. Waites, supra (reviewing two year four month delay in assault and battery of a high and aggravated nature and pointing and presenting a firearm); *State v. Cooper, supra* (reviewing forty-four month delay on murder re-trial). *See also State v. Brazell*, 325 S.C. 65, 480 S.E.2d 64 (1997) (reviewing three years and five months delay in armed robbery and murder case); *State v. Kennedy*, 339 S.C. 243, 528 S.E.2d 700 (Ct.App. 2000), *affirmed by State v. Kennedy*, 348 S.C. 32, 558 S.E.2d 527 (2002) (reviewing two year and two month delay in grand larceny, first degree burglary and financial transaction card fraud case); *State v. Smith*, 307 S.C. 376, 415 S.E.2d 409 (Ct.App. 1992) (reviewing three year delay in murder case). But it is not the outer limit. *See State v. Evans*, 386 S.C. 418, 688 S.E.2d 583 (Ct.App. 2009) (reviewing twelve year delay in manslaughter case). *Cf. State v. Lee*, 360 S.C. 530, 602 S.E.2d 113 (Ct.App. 2004) (reviewing twelve-year pre-indictment delay in CSC first degree and lewd act case). Even so, there is little question such time as reflected here – a period just shy of ten years – could trigger the further evaluation of whether a violation has occurred. *See Doggett v. United States*, 505 U.S. 647, 652 n. 1 (1992) (“Depending on the nature of the charges, the lower courts have generally found postaccusation delay ‘presumptively prejudicial’”). The State did not argue otherwise before the trial judge and the trial judge apparently found the time sufficient to trigger the presumption as he continued his analysis of additional factors.

However, the trial judge properly found that not all the time that passed may be counted against the State. (See R. p. 46, line 8- p. 47, line 13). For instance, defense counsel moved for a continuance in October 2011. Though not a bar to making his claim, the fact of this delay is directly attributable to Appellant and should be weighed against Appellant 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.”). See also *State v. Pittman*, 373 S.C. at 549, 647 S.E.2d at 155 (“the Court must also consider and weigh the defendant’s contribution to the delay in determining whether the defendant’s Sixth Amendment rights have been violated.”). 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 he specifically did not request a trial because he did not want a trial. He hoped that the State may not prosecute Appellant at all depending on how the prosecution of co-defendant Barnes would resolve:

And quite honestly, Judge, as I indicated to you, when I was appointed to him, it was under the guise of, well, what’s going to happen with him? Is he going to cooperate in the prosecution of Steven Barnes? How do we address that issue?

And, essentially, I did not consider the filing of a speedy trial motion immediately because, again, with him doing a life sentence and based on some assertions made to me by the Solicitor, I wasn’t certain that he would be tried in this case, did not believe he would be, did not believe it was appropriate to file a speedy trial motion. Sometimes that can be a dangerous proposition. You may get just what you ask for. And, essentially, we didn’t file it.

(R. p. 25, line 12 – p. 26, line 1).

At bottom, there is no indication on this record that Appellant ever wanted a trial. At any rate, as in the case of any delay, the reasons for the delay are more dispositive than the block of time Appellant relies upon. See *Doggett*, 505 U.S. at 652 n. 1 (“We note that, as the term is used in this threshold context, ‘presumptive prejudice’ does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry.”); *State v. Cooper*, 386 S.C. at 217, 687 S.E.2d at 66, 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 Reason for the Delay

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.

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 (Barnes, Cave, Griffin, Thatcher, Appellant 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. In fact, capital proceedings were sought against Steven Barnes who is now sentenced to death for Samuel's murder. 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). See also *United States v. Brown*, 498 F.3d 523, 531 (6th Cir. 2007) (“the reasons for the delay weigh against finding a Sixth Amendment violation. First, the charges were complex, involving multiple defendants and” multiple charges); *United States v. Bass*, 460 F.3d 830, 837 (6th Cir. 2006) (“With regard to the five-year period between Bass’s arraignment and trial, it is apparent that the government was not any more to blame than Bass for this delay either. Bass’s case was complex, involving a large-scale drug and murder conspiracy that, at one point, encompassed seventeen defendants. That the delay was caused by the case’s complexity favors a finding of no constitutional violation.”); *United States v. King*, 483 F.3d 969, 976 (9th Cir. 2007) (noting complex cases with “numerous defendants and alleged co-conspirators”); *United States v. Register*, 182 F.3d 820, 827 (11th Cir. 1999) (noting “the complex nature of the charges and sheer number of defendants and issues involved also account for some of the delay”).

Further, attempting to “collect witnesses” is a valid cause for delay. See *Doggett v. United States*, 505 U.S. at 656 (“Our speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable. The government may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down. We attach great weight to such considerations when balancing them against the costs of going forward with a trial whose probative accuracy the passage of time has begun by degrees to throw into question.”). See also *Barker v. Wingo*, 407 U.S. at 531 (“a valid reason, such as a missing witness, should serve to justify appropriate delay.”).

Contrary to Appellant's assertion that the State acted improperly in offering Appellant the opportunity to testify against Barnes, (FBOA, pp. 10-11), this offer actually shows the State did not place isolated or undue pressure on Appellant. The State had success in securing many of the co-defendants to testify against Barnes, and, the offer to allow the Hunsbergers to testify may have been a benefit to either or both. It was, undoubtedly, Appellant's right to decline that offer. Even so, he 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.

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 Appellant's return after the capital proceedings concluded. Judge McMahon correctly noted that this alone would not necessarily be reasonable in light of the protection of each individual's rights; however, in these particular circumstances, Appellant was already serving a life sentence in another jurisdiction for the kidnapping of the murder victim. His hope was not to be prosecuted here. There was no pressing need for a trial date from Appellant's perspective and he didn't ask for one.

It should be noted the State relinquished custody in early 2005. 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 simply 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. 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.”); *United States v. Seltzer*, 595 F.3d 1170, 1178 (10th Cir. 2010) (“We agree with our sister circuits that awaiting the 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.”).

Further, after conviction, Appellant began service of his Georgia sentence in Georgia. Again, as asserted previously, this time should not count against the State, or, at the least, not be counted heavily against the State. This is most assuredly so where Appellant simply did nothing to force prosecution in South Carolina, though he had the ability to do so.

The Defendant's Assertion of the Right

“[T]he defendant’s assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.” *Barker v. Wingo*, 407 U.S. at 528. Multiple assertions of the right will weigh heavily in a defendant’s favor. *See, for example, United States v. Bass*, 460 F.3d at 837 (“Between his arraignment and trial, Bass filed three motions to dismiss based upon speedy trial

grounds: (1) in January 1999, two months after the arraignment; (2) in March 2000; and (3) in March 2002. Accordingly, Bass asserted his right to a speedy trial, and this factor weighs in his favor.”).

Appellant failed to ever demand a trial. Further, and unlike his co-defendant Steven Barnes, he did not seek return and prosecution under the IAD.⁴ The State clearly informed the trial judge that it was the State that had to institute proceedings to gain custody. (See R. p. 40, lines 17-19). Further, though Appellant cites the Order Upon Motion for Continuance as noting the motion for continuance should not apply to the matter of a speedy trial, (see FBOA, p. 12), the Order also specifically includes a finding that the IAD compact terms were tolled *due directly to Appellant's request for continuance*. (R. p. 561, [Order Upon Motion for Continuance, p. 3]). Thus, in assessing the delay, the fact that Appellant failed to assert his right to a speedy trial is significant, especially in light of the fact that he never attempted to force a trial by any means, and actually waived his right to force trial within 180 days under the interstate compact. See *Weems v. State*, 714 S.E.2d 119, 124 (Ga.App. 2011) (“while a defendant can assert his or her right to a speedy trial at any time before trial, this does not mean the trial court cannot and should not consider the timing of the defendant’s assertion of that right ... Here, Weems—who has had the benefit of counsel since shortly after his arrest—did not file a statutory demand for speedy trial pursuant to OCGA § 17-7-170 and did not assert his constitutional right to a speedy trial until 38 months after his arrest, waiting to do so

⁴ Barnes’ case, as of this writing, is pending on direct appeal in the Supreme Court of South Carolina. (Appellate Case No. 2010-178247, argued February 5, 2013). Barnes does not raise a speedy trial issue in his direct appeal, but has argued that the IAD provided for dismissal of the murder charge where he was not tried within the statutorily set one hundred and eighty (180) days.

on the day of his trial's calendar call. Weems's failure to assert this right in a timely manner can certainly be weighed heavily against him"). Moreover, 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. During that time, Appellant apparently considered whether he, 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 Appellant 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 Appellant 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"). See also *United States v. Wanigasinghe*, 545 F.3d 595, 599 (7th Cir. 2008) (in review of eleven year delay after indictment but before arrest: "Wanigasinghe did not request a speedy trial during the time he was out of the country. We agree with the district court's finding that he likely knew he had been charged with a crime but nevertheless did nothing to take care of the charges; quite the opposite. His failure to request a speedy trial is also a factor which weighs against him."). Further, the suggestion that counsel "status" was "in question," during part of the time, (see FBOA, p. 12), seems to be of little bearing. As the trial judge found, Appellant was represented. (See R. p. 40, lines 8-10). In fact, counsel at trial was appointed in June 2010, well before the January 2012 trial. (R. p. 40, lines 5-7). He stated that he did not at that time wish to secure a trial. (See R. p. 25, line 12 – p. 26, line 1). Further still, the trial judge logically found that the request for continuance in October 2011 was reasonable as Appellant had been incarcerated in Georgia until September 30, 2011. (See R. p. 47, lines

1-13). Nothing shows a lack of counsel at a crucial time. Interestingly, though, trial counsel's request for continuance due to Appellant's absence from the State strengthens the finding that the custody in another jurisdiction added additional delays. Again, this should not count against the State. Even so, it remains that Appellant never requested a trial, nor did he want one. 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.").

Whether There Is Prejudice to the Defendant

As noted above, the delay itself is not dispositive of whether a violation has occurred. Neither is the time at issue dispositive of prejudice. *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," 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). Further, the Supreme Court in

Barker specifically noted the damage that may very well be done to the prosecution's case:

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.

The trial judge 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 Appellant 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, Appellant 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 Appellant's use to his benefit.⁵

Further, the trial judge correctly found that Appellant does not contend any exculpatory witness or testimony is not unavailable. "Prejudice, of course, should be

⁵ 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 Appellant and the multiple co-defendants. (Id. See also R. p. 25, lines 12-16).

assessed in the light of the interests of defendants which the speedy trial right was 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.⁶ *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 Appellant 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, Appellant did not allege there was any lost evidence or testimony.

Lastly, the passage of time alone evidences one further benefit to Appellant. 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

⁶ 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.”).

delay in this aspect certainly holds no prejudice to Appellant. *See Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (“Judge Pieper noted 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.”).

In sum, the record well supports Judge McMahon’s factual findings which he correctly analyzed in the appropriate legal framework. Therefore, this ruling should be upheld on appeal. *Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (affirming denial of motion to dismiss where appellate court found trial judge’s “decision was supported by the evidence”).

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

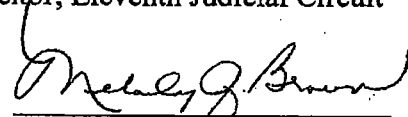
JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY:



MELODY J. BROWN
S.C. Bar No. 14244

Office of the Attorney General
Post office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

October 8, 2013.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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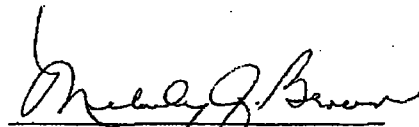
Julio Angelo Hunsberger,

Appellant.

Appellate Case No. 2012-207290

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



MELODY J. BROWN
S.C. Bar No. 14244

Office of the Attorney General
Post office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

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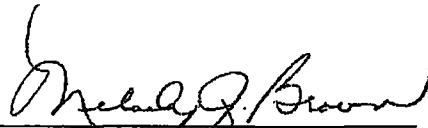
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PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Final Brief of Respondent* and *Certificate of Compliance* on Appellant by depositing two copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Kathrine H. Hudgins, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

This 8th day of October, 2013.


MELODY J. BROWN
Senior Assistant Attorney General
S.C. Bar No. 14244

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

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

APPELLATE CASE NO. 2012-207290

FINAL REPLY BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

The trial judge erred in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial when the State failed to call the case for trial until January 9, 2012, almost ten years after the arrest and indictment of appellant for murder.

The State argues that the trial judge fairly denied Appellant's motion to dismiss the 2002, charge of murder where Appellant never made a demand for a speedy trial; he was tried and convicted of the kidnapping of the murder victim by a separate sovereign and was serving a life sentence in that jurisdiction while the murder charge was still pending in this jurisdiction; and where there was no allegation of lost witnesses or other prejudice to Appellant. (FBOR p. 9). First, although Appellant did not formally move for a speedy trial, Appellant 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 Appellant. R. p. 39, lines 10-18; R. p. 559. The fact that Appellant did not previously assert his right to a speedy trial should not weigh against Appellant.

Second, Appellant was not transferred to Georgia to face charges connected to the South Carolina murder charge until February 16, 2005, over three years after his arrest in South Carolina. R. p. 37, lines 14-25. The State refused to call the case for trial for the over three year period between January 25, 2002, when Appellant was arrested on the South Carolina murder charge and February 16, 2005, when Appellant was transferred to Georgia to stand trial on the Georgia charges. On September 12, 2006, Appellant and his co-defendant and brother, Alex Hunsburger, were convicted in Georgia for kidnapping with bodily injury. R. p. 27, lines 5-9. The State did not seek extradition under the IAD until August of 2011, almost five years after the Georgia conviction. The State refused to call the case for trial for the additional five year period between September 12,

2006, and September 30, 2011. The trial and conviction in Georgia do not justify the tree year delay in the state calling the case prior to the Georgia trial or the five year delay after the Georgia conviction.

Third, as to prejudice, a defendant is not required to show prejudice affirmatively to win a speedy trial claim. 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). In Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) 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 in the present case because of the excessive almost ten year delay.

In the brief the State argues that there is no indication in the record that Appellant wanted a trial. (FBOR p. 19). This assertion by the State is contradicted by the letters Appellant wrote to Judge Keesley dated May 3, 2004, and May 4, 2004, and a letter to the Edgefield County Clerk of Court dated January 4, 2005, in which Appellant states that he has never met his appointed attorney

and has not been able to prepare his defense. R. p. 565, R. p. 567; R. p. 572. The State asserts that complexity in the case is a valid reason for delay in the proceedings. (FBOR p. 20). The record, however, reflects that the present case was not particularly complex. The State additionally argues that attempting to collect witnesses is a valid cause for delay but the record does not support that the almost ten year delay in the present case was due to a problem with the State collecting witnesses. (FBOR p. 21).

The prosecution delayed Appellant's trial because it wanted to try co-defendant Barnes first. R. p. 27, line 21 – p. 28, line 20 – p. 31, line 1. The prosecution, however, offered no explanation to justify why Appellant's trial and his constitutional rights would be dependent upon the trial of another. The prosecutor offered no reason for wanting to try Barnes first; he simply stated that the prosecutor wanted to do so.

Recently, the Supreme Court of Georgia dismissed capital murder charges against a defendant based upon a delay of fifty-three months between indictment and the defendant's motion to dismiss. Buckner was indicted in December 2007 for kidnapping, molestation, and murder of a minor. Four years later, when Buckner had not been tried yet, he filed a motion to dismiss based upon his speedy trial right. State v. Buckner, 738 S.E.2d 65, 68 (Ga. 2013). Buckner's case had been set for trial on April 4, 2011, but the prosecution announced its intent to seek the death penalty on that date. In light of the announcement, the trial was continued and new lawyers were appointed to represent Buckner. Then, on August 25, 2011, the prosecution decided it would not seek death after all. Buckner's trial was set for February 2012. Buckner filed his motion to dismiss in December 2011. Id. at 69.

The Supreme Court of Georgia initially determined, and the prosecution conceded, that the delay of over fifty-three months (over four years), raised a presumption of prejudice. Id. The

Court then examined the Barker-Doggett¹ factors. The Court acknowledged that the charge was serious, but found the prosecution had completed its investigation by the time Buckner was indicted. The case against Buckner was “no more complicated than most other cases involving such serious crimes.” Therefore, the fifty-three month delay was uncommonly long and weighed against the state. Id. at 70.

The reasons for the delay were the negligent inaction of the prosecuting attorneys and the reassignment of the case among prosecuting attorneys. This delay of approximately thirty months weighed benignly against the state. Id. The Court attributed three months of the delay to the defense submitting a notice of conflict, which weighed benignly against Buckner. Id. However, the Court weighed more heavily the delay of ten months in which the prosecuting attorneys intended to seek the death penalty. The Court explained the announcement occurred late in the already delayed case and was unnecessary in light of the prosecutor’s subsequent withdrawal of the notice. The prosecution must exercise its discretion to seek the punishment it deems appropriate in each case; however, the Court could not ignore that the state chose not to exercise its discretion until the eve of trial in a case that had been pending for forty months. The late decision was not based on the discovery of new evidence or other notable newly acquired information that would cause a reasonable prosecutor to reconsider the issue of punishment. The ten-month delay due to the death penalty announcement was the result of a deliberate decision by the prosecution and was something more than mere negligence. Id. at 71. The Court explained that seeking death in the case – one “involving a convicted sex offender accused of murder, kidnapping, and sexually abusing a child” –

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

was hardly novel. Thus, the prosecuting agency should have reviewed the file and made its discretionary determination long before December 2010. Id.

Buckner did not assert his right to a speedy trial until almost four years after his indictment; therefore, this factor weighed heavily against him. However, his repeated insistence that the state comply with his discovery requests somewhat mitigated his late assertion. Id. at 72.

The Court further found Buckner suffered prejudice because his defense was impaired by evidence tampering. A 2003 investigation revealed that two police officers and one retired police officer entered the deceased's bedroom before it was secured by the investigating officers. At least one of the officers tampered with evidence, including removing potential evidence from the bedroom. The officer instructed the deceased's family not to tell anyone about the police entering the bedroom. Id. at 73. Also, the officer who investigated the evidence tampering in 2003 was no longer able to recall important and material details of his investigation, the recordings of witnesses to the tampering had been lost, and the witnesses were either deceased or unable to recall important details. Therefore, Buckner was unable to explore what evidence at the crime scene was altered. Id.

Finally, in balancing the factors, the Court concluded that although Buckner's late assertion weighed heavily against him, the other factors weighed against the state. Therefore, the Court affirmed the dismissal of all charges against Buckner based upon the fifty-three month delay. Id.


Appellant's trial was delayed by the prosecution significantly longer than fifty-three months. In fact, the prosecution delayed calling Appellant's case to trial for ten years, or one hundred and twenty months, over double the delay in Buckner. In the brief the State argues that the prosecution's ultimate decision not to seek the death penalty against Appellant served as a benefit to Appellant. (FBOR pp. 29-30). The prosecutor must not be permitted to hide behind its right to

exercise discretion concerning punishment and its control of the docket to delay unreasonably Appellant's trial and then characterize the improper delay as a benefit.

CONCLUSION

Appellant respectfully requests this Court reverse the decision of the lower court, hold that Appellant's federal and state constitutional rights to a speedy trial were violated, and dismiss the charge of murder against him.

Respectfully submitted,



Kathrine H. Hudgins

Appellate Defender

E-Mail: khudgins@sccid.sc.gov

1330 Lady Street, Suite 401

Columbia, South Carolina 29201

(803) 734-1343

ATTORNEY FOR APPELLANT.

This 30th day of October, 2013.

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

Appellate Case No. 2012-207290

CERTIFICATE OF SERVICE

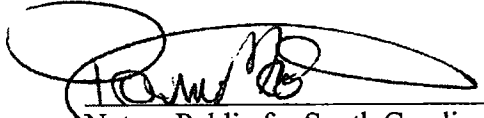
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of October, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.