STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

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

On Petition for Writ of Certiorari to the Court of Appeals
Unpublished Opinion No. 2014-UP-381 (S.C.Ct.App. filed Nov. 5, 2014)

The State, Respondent,

v.

Alexander L. Hunsberger, Petitioner.

Appellate Case No. 2015-000083

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PETITIONER'S QUESTION PRESENTED

> Did the Court of Appeals err in affirming the trial court's failure to dismiss the pending criminal charge against Petitioner where he was arrested on January 25, 2002, but the case was not called for trial until January 3, 2012, almost a decade after Petitioner's arrest, violating his state and federal constitutional rights to a speedy trial?

(Cert. Pet., p. 3).

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

> Did the Court of Appeals err in affirming the trial court's ruling that fairly deny Petitioner's motion to dismiss the 2002 charge of murder pending in South Carolina based on the complexity of the case involving multiple co-defendants and pending charges in separate jurisdictions, and where there was no prejudice to Petitioner.

SUMMARY OF THE ARGUMENTS

Petitioner argues the Court of Appeals erred in failing to consider all the time that lapsed between arrest and trial. (Cert. Pet. p. 18). Respondent submits the Court of Appeals, in reviewing Judge Newman's ruling from trial, did consider the entire time. (See App. pp. 6-7). Respondent further submits Petitioner's argument actually contests the legal significance of certain facts within the passage of time, not that certain portions of the time were overlooked. These facts, however, show the particular circumstances of the case which a reviewing court should consider. The Court of Appeals properly considered the circumstances of the case and applied the correct test pursuant to *Barker v. Wingo*, 407 U.S. 514 (1972), in reviewing Judge Newman's ruling. There is no error.

Petitioner further argues the Court of Appeals erred in considering Petitioner's refusal to return to South Carolina in its analysis of the facts and circumstances for the delay. (Petition, p. 18). This argument is barred from review as it was not raised in the petition for rehearing. (See App. pp. 9-14). Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the

petition...."). At any rate, Respondent would submit, regardless of the reason, the refusal to consent is an uncontested fact. There is no error in considering same.

RESPONDENT'S STATEMENT OF THE CASE

Sixteen-year-old Samuel J. Sturrup was murdered in Edgefield County in September 2001. Petitioner, Alexander L. Hunsberger, was arrested on January 25, 2002. (R. p. 8, line 3). In March 2002, an Edgefield County Grand Jury indicted Petitioner for murder. (R. pp. 232). Petitioner remained in custody in South Carolina until released to Georgia in or around January 2005 to stand trial for the kidnapping of the murder victim. (R. p. 226). On September 12, 2006, after a Georgia jury convicted Petitioner and brother Julio Hunsberger,[1] of kidnapping with bodily injury, Petitioner was sentenced to life imprisonment. (R. p. 3, line 16- p. 4, line 13).

In early 2011, the State attempted to obtain custody for trial. Petitioner did not consent which resulted in continuance of any 2011 hearing dates. (R. p. 25, line 21 – p. 26, line 9). Petitioner eventually stood trial January 4-6, 2012, before the Honorable Clifton Newman and a jury. Michael Chesser, Esq., represented Petitioner. In a pre-trial motion hearing held January 3, 2012, defense counsel moved to dismiss the pending murder charge in South Carolina for violation of the right to a speedy trial, which the trial judge denied. (R. p. 41, line 7–p. 43, line 11). The jury convicted as charged. (R. p. 198, lines 9-15). Judge Newman sentenced Petitioner to thirty-three (33) years imprisonment. (R. p. 219, line 25 – p. 220, line 2). Petitioner appealed.

The South Carolina Court of Appeals heard argument on September 9, 2014, and subsequently affirmed in an unpublished opinion on November 5, 2014. (App. p. 1).

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[1] The brother, tried separately, also raised a speedy trial issue on appeal, and has similarly filed a petition with this Court. Appellate Case No.: 2015-000085.

Petitioner's petition for rehearing was denied on December 17, 2014. (App. p. 28). Petitioner filed a petition for writ of certiorari on January 16, 2015. This return follows.

RESPONDENT'S STATEMENT OF FACTS

The victim in this case was sixteen-year-old Samuel J. Sturrup. The evidence presented at trial 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 the suggestion of missing money. Barnes, with the help of Petitioner, Petitioner's brother, Julio Hunsberger, 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 remote field upon report of the discovery of a human skull. (R. p. 50, line 2 – p. 51, line 3). A search of the surrounding areas resulted in finding other bones and a pair of jeans with a belt displaying the name "Samuel." One of his leg bones was still in the pants leg. The pockets yielded two grocery store savings cards, a keychain with two keys, and a dollar bill. In the same area, investigators found a cigarette lighter, a .40 caliber shell casing, and extracted two bullets from the ground. (R. p. 52, line 4 – p. 55, line 24; p. 61, lines 4-7; p. 62, lines 2-8; p. 63, lines 7-16; p. 66, line 1 – p. 67, line 9).

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 Sturrup. (R. p. 64, line 8 – p. 65, line 8). The autopsy and review

of dental records resulted in a positive identification of the remains as the remains of Samuel Sturrup. (R. p. 118, lines 11-24). An examination of the skull indicated a gunshot wound to the head. Entry was "high on the back of the head" with a downward path. The bullet was recovered still lodged at the base of the skull along with some of the brain tissue. The brain tissue showed a contusion which indicated Samuel was alive at the time the wound was inflicted. (R. p. 119, lines 2-17). The cause of death was the gunshot wound to the head. (R. p. 120, lines 6-8). Other injury was impossible to determine due to the condition of the remains. (R. p. 121, lines 6-14).

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. 73, line 8 – p. 75, line 6). Charlene Thatcher, who worked with Barnes and was also his girlfriend, was present, as well. (R. p. 75, lines 9-18). When Samuel denied having the money, Barnes grabbed a shock absorber and hit Samuel, and also beat him with his fist. (R. p. 76, line 9 – p. 77, line 9). Barnes threatened to kill Samuel. (R. p. 78, lines 22-23). Barnes made a telephone call. After the call, Alexander and Julio Hunsberger arrived. (R. p. 79, lines 7-14). Barnes and the Hunsbergers spoke to each other. The group then left in two cars. Cave testified they followed the Hunsbergers. After stopping, the Hunsbergers stood with Barnes and they got Samuel out of the trunk of the Hunsbergers' car. (R. p. 81, line 20 – p. 83, line 10; p. 110, lines 18-25). After directing everyone into a remote field, Barnes announced everyone would have to shoot Samuel or he would shoot them. (R. p. 88, line 19 – p. 89, line 1). Cave testified that he and Thatcher both shot Samuel and left the field. Cave heard four more shots and noted Barnes was the last one to leave the field. (R. p. 89, line 3 – p. 90,

line 4). The Hunsbergers led the group to a nearby trailer before the group scattered. (R. p. 90, line 5 – p. 91, line 17; p. 111, lines 1-21).

Antonio Griffin testified similarly. Griffin testified that after the Hunsbergers arrived at the Georgia House, the Hunsbergers and Barnes spoke apart from the group. (R. p. 132, lines 6 –18). Shortly thereafter, the group left in two cars, with the Hunsbergers in the lead. (R. p. 132, line 18 – p. 133, line 8). Griffin testified that after arriving in the field, Barnes instructed everyone to shoot Samuel or Barnes would kill them. (R. p. 137, lines 1-11). Thatcher shot Samuel. (R. p. 137, lines 14-19). One of the Hunsbergers (Griffin did not recall which one) grabbed the gun from Thatcher and fired. (R. p. 137, line 22 – p. 138, line 4). As they all gathered to leave, Barnes told Griffin that Barnes had shot Samuel in the head. (R. p. 138, lines 15-21).

Charlene Thatcher also testified at Petitioner's trial. She testified that the Hunsbergers led the way to the remote field, and the Hunsbergers were with Barnes when taking Samuel out of the trunk of the Hunsbergers' car. (R. p. 163, line 7- p. 164, line 15). Thatcher admitted to shooting Samuel first in the stomach. She testified Barnes shot Samuel in the head. (R. p. 165, line 15 – p. 166, line 6). After returning to the cars, the Hunsbergers lead the way to a nearby trailer. (R. p. 166, line 25 – p. 167, line 1). In the trailer, the Hunsbergers looked for materials to clean the guns, and wiped the guns down. (R. p. 167, lines 9-19).

Other Evidence At Trial

Gerald Richardson testified that he was formerly married to Petitioner's mother. Richardson owns property in Edgefield County and maintains mobile homes on the property. Petitioner lived at one of those homes from 1999 to 2001. (R. p. 114, line 21 –

p. 117, line 24). That home was near the gated field where Samuel's jeans and bones were found. (See R. p. 56, line 8 – p. 60, line 4).

In a statement to investigating officers, Petitioner admitted to being present when Samuel was taken from Georgia into South Carolina, and admitted shooting at Samuel but stated he "shot off to the side." (R. p. 187, line 8 – p. 193, line 5).

ARGUMENT

> The trial judge fairly denied Petitioner's motion to dismiss the 2002 charge of murder pending in South Carolina based on the complexity of the case involving multiple co-defendants and pending charges in separate jurisdictions, and where there was no prejudice to Petitioner. Consequently, the Court of Appeals properly affirmed.

Relevant Facts:

On November 16, 2004, defense counsel moved for an order setting the "case [to] be tried during the November 8th, 2004 term of Court, or at the next succeeding term of Court, or, in the event the Defendant is not so tried, that the Defendant be released from confinement on his own recognizance." (R. p. 222). Counsel advised:

> The Defendant has been incarcerated since January 25th, 2002 without bail. Bail was denied by written order of the Court dated June 14th, 2002. On April 29th, 2004, a bond hearing was held before the Honorable William P. Keesley, at which time bond was again denied by oral order, but with the provision that the issue of bond could be brought before the Court again if the State failed to try the Defendant at the next term of Court in Edgefield. The State has failed to so try the Defendant, and upon information and belief the State has no plans to try the Defendant in the foreseeable future.

(R. p. 222). Petitioner also asked, in the alternative, "for a bond for the release of the Defendant pending the trial of this matter, on such terms and conditions as the Court shall deem appropriate." (R. p. 222).

On December 2, 2004, the Honorable William P. Keesley issued an Order denying the requested relief. However, Judge Keesley found the length of time troubling, and offered to attempt to "establish a special term of court to handle this case during February"

2005. (R. p. 224). Judge Keesley also recognized that "[p]art of the problem in disposing of these cases is the fact that multiple defendants and different jurisdictions are involved, and there is the possibility that the State of South Carolina could seek the death penalty." (R. p. 224). Judge Keesley also further recognized that "Georgia has placed a hold on the defendant, so if he were granted bail in South Carolina, he would still be incarcerated in Georgia." (R. p. 224).

Defense counsel renewed the motions in January 2005. By Order dated January 28, 2005, Judge Keesley noted the State declined the Court's offer for a special term. (R. p. 226). He again denied the motion, but granted bond with the caveat: "DEFENDANT IS NOT TO BE RELEASED FROM CUSTODY UNLESS THE HOLDS PLACED BY THE STATE OF GEORGIA ARE LIFTED." (R. p. 226 (emphasis in original)).

Petitioner was released to Georgia in 2005, for trial on a charge of kidnapping of the same victim. On September 12, 2006, upon conviction of the kidnapping charge, a Georgia court sentenced Petitioner to life imprisonment (which, apparently, carries parole eligibility within a few years). Petitioner thereafter began service of that sentence in Georgia. (R. p. 3, line 16- p. 4, line 4; p. 8, line 22 – p. 9, line 22; p. 16, lines 3-8; p. 18, lines 16-18; p. 23, line 17 – p. 24, line 13).

Steven Barnes was also indicted for the murder of Samuel J. Sturrup. Barnes was tried in November 2010, convicted, and sentenced to death. (R. p. 23, lines 3-16; p. 41, lines 15-17).[2]

As noted, this matter actually involved multiple defendants facing various charges both in South Carolina and Georgia. The Hunsbergers and Barnes were released to Georgia

[2] Conviction reversed on direct appeal for infringement of right to on self-representation. *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014). Mr. Barnes has declined to pursue his right to self-representation on remand and the State has asked this Court to reinstate his conviction and death sentence. Appellate Case No. 2014-001966.

to stand trial prior to their trials in South Carolina. (R. p. 23, line 17 – p. 24, line 11). Georgia convicted Barnes of matters relating to his criminal enterprise separate from the murder and sentenced him to life imprisonment. (R. p. 24, lines 3-8; p. 28, lines 16-22). As noted, the Hunsbergers were convicted and received a life sentence. (R. p. 24, lines 9-13). Additionally, Richard Cave pled guilty in Georgia to aggravated assault and received an eighteen year sentence. (R. p. 28, lines 5-6; p. 95, lines 16-25). Antonio Griffin also pled guilty to assault in Georgia and received an eighteen year sentence. (R. p. 28, lines 5-6; p. 143, lines 1-5). Charlene Thatcher pled guilty to aggravated assault, as well. She also received an eighteen year sentence. Further, she pled guilty to an unrelated armed robbery in Georgia (as a result of her participation in Barnes' criminal enterprise), received another eighteen year sentence, and was also convicted in 2002 of prostitution. (R. p. 28, lines 7-10; p. 168, lines 1 – 24; p. 170, lines 6-21).

The State attempted to try Petitioner in early 2011, after conclusion of the capital trial for Barnes in November 2010. However, Petitioner did not consent to the State's request for his return to South Carolina which resulted in a continuance. (R. p. 25, line 21 – p. 26, line 9). (See also R. p. 36, lines 13-23). The prosecuting attorney noted that the Solicitor had not determined whether to seek death on Petitioner's murder charge until after Barnes' conviction. (R. p. 23, lines 3-16). The State also acknowledged that it extended the offer to have Petitioner testify against Barnes in the capital case, but Petitioner declined. The State further acknowledged that was his absolute right, but again asserted that he had the same opportunity to cooperate as other co-defendants. (R. 4, lines 14-25; p. 6, lines 12-17; p. 26, line 10- p. 27, line 3; p. 29, lines 12-15).

The State was able to secure Petitioner's presence and a jury trial was held in January 2012. (R. p. 25, line 21 – p. 26, line 9). Petitioner argued that the charges should

be dismissed for failure to provide a speedy trial. (See R. p. 41, line 7–p. 43, line 11). The trial judge, after hearing lengthy argument, and having received testimony on same from Petitioner, denied the motion. In denying the motion, Judge Newman noted that since Petitioner's release back to Georgia, there were a number of cases resolved in Georgia for the co-defendants, a trial was held for Petitioner and his brother, and co-defendant Barnes was tried in a capital case in this State. (R. p. 40, line 1 – p. 41, line 20). He found this particular case was "unique in the sense that you have cross-border issues, you have Georgia wanting to pursue Georgia's case, but South Carolina wanting to pursue South Carolina's cases, each defendant asserting their individual constitutional rights and the State having a capital case that they're wanting to pursue and have successfully pursued." (R. p. 41, line 25 – p. 42, line 6). Judge Newman concluded:

> ... this case doesn't follow the normal framework of cases where a person is - - has a charge outstanding and simply wants to get it tried, wants to get it over with. This is a case that has a number of complicated factors that bring us to this moment in time.

(R. p. 42, lines 7-11).

He then turned to evaluating prejudice and addressed Applicant's assertion that prejudice should be assumed. Judge Newman concluded:

> ... I don't think that prejudice can be assumed given the facts that I've heard. I think the State has demonstrated legitimate reasons for the delay given the complex nature of the cases, the problems involving prosecutions in multiple jurisdictions in this state as well as the State of Georgia.
>
> Who knows what may develop during the course of the trial. We may get some indication that the defendant's due process rights have been violated or right to a fair trial has been violated. Due to the length of time involved, but I believe that the - - based on what I've heard *the State has shown that it has acted properly under the circumstances and the defendant has not shown any prejudice* that might affect his right to a fair trial or his due process rights. I therefore, deny the motion.

(R. p. 42, line 22 – p. 43, line 11) (emphasis added).

Defense counsel renewed his motion at the close of the State's case. Defense counsel complained that the trial testimony well supported his earlier assertion that the passage of time dimmed memories and created prejudice, though, he argued, he need not show prejudice where the State was at fault in delaying the trial. (R. p. 194, line 22 – p. 195, line 21). Judge Newman again denied relief, noting the number of trials for all the co-defendants, the time for "sorting out that process," and the fact that Petitioner was incarcerated in Georgia pursuant to the Georgia conviction since 2006, as factors that did not support the State was at fault such that relief was warranted. Further, he found no prejudice otherwise, noting that there were transcripts available for impeachment that were used at trial, and that "everyone seems to have a pretty vivid memory" of this most serious matter. (R. p. 196, line 9 – p. 197, line 12).

In the Court of Appeals, Petitioner argued that Judge Newman erred in denying the motion where the facts supported that the prosecution deliberately delayed for advantage in attempt to "force Petitioner to testify against Barnes." (FBOA, p. 18). Further, he argued his trial in Georgia was completed in 2006: "Therefore, any cross-border issues were resolved by the end of 2006." (FBOA, p. 18). Petitioner asserted "[t]here is no argument that the state can present except that Petitioner's trial was delayed deliberately by the state in order for the state to gain an advantage in the trial of Steven Barnes." (FBOA, p. 18). As to prejudice, he argued "the outrageous length of the delay and the admitted reason for the delay" renders "the presumption of prejudice to Petitioner is great." (FBOA, p. 19). Petitioner also asserted that "memories of the witnesses were impaired by the passage of time," and he suffered "mental and emotional anguish" having to wait for the State to determine whether to seek the death penalty against him. (FBOA, p. 19).

The Court of Appeals, after a detailed review of the relevant facts of record, concluded:

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

(App. p. 8).

In his petition, Petitioner again the Court of Appeals erred in not considering the whole of the time at issue, (Petition, p. 18), and erred in considering Petitioner's refusal of consent to return to South Carolina, (Petition, p. 18).

Discussion:

The record fully and fairly supports Judge Newman's finding that, in these discrete circumstances, delay was justifiable based on the complexity of the case and the multiple prosecutions in separate jurisdictions, and showed no prejudice to Petitioner. The Court of Appeals properly affirmed. Petitioner failed to argue error in regard to the Court of Appeal's consideration of his refusal of consent to return to South Carolina in the petition for rehearing. (See App. pp. 9-14). Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition...."). At any rate, Respondent would submit, regardless of the reason, the refusal to consent is an uncontested fact. There is no error in considering same.

"A criminal defendant is guaranteed the right to a speedy trial." *State v. Cooper*, 386 S.C. 210, 216, 687 S.E.2d 62, 66 (Ct. App. 2009), *citing* U.S. Const. amend. VI; S.C. Const. art. I, § 14; *State v. Pittman,* 373 S.C. 527, 548, 647 S.E.2d 144, 155 (2007). Yet, "[t]here is no universal test to determine whether a defendant's right to a speedy trial has been violated." *Id, 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 is

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'"). *See also State v. Cooper*, 386 S.C. 210, 216, 687 S.E.2d 62, 66 (Ct.App. 2009), *citing State v. Waites*, 270 S.C. at 107, 240 S.E.2d at 653 ("There is no universal test to determine whether a defendant's right to a speedy trial has been violated.").

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 has generally followed these factors in assessing whether a violation has occurred. *See, e.g., State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012); *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, the record well supports the denial of relief. Respondent will address each of the *Barker* factors separately as they apply here.

The Length of Delay

The time of ten years from arrest and indictment[3] 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, supra* (reviewing three year delay between arrest and trial in murder case); *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

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[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.

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 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'"). Yet, the factual background shows certain breaks in the time period. Such breaks undermine a blanket assertion that the whole of the delay falls at the feet of the prosecution.

For instance, the prosecution requested to obtain custody in early 2011 after the Barnes trial had been completed. Petitioner did not consent to extradition. Therefore, extradition proceedings could not be completed for a trial date in 2011. (R. p. 25, line 21 – p. 26, line 9). This nearly year-long delay may be directly attributed to Petitioner and should not be assessed to the State. *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.").

At any rate, the reasons for the delay are more dispositive of the lack of a violation than the block of time Petitioner 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 who participated in varying respects with the assault, kidnapping and murder. Further, the murder with aggravating circumstance(s) allowed for consideration of capital proceedings. In fact, capital proceedings were sought against Steven Barnes. The State expressed its intent to try Barnes first, and the delay in Barnes' capital case caused additional delays in the subsequent trials. (R. p. 30, lines 17-24). The record well supports Judge Newman's findings on the complexity of the case.

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"). Judge Newman correctly identified the complexity of the case in the number of defendants, the number of trials, the prosecutions in two States, and the capital proceedings for co-defendant Barnes.

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 Petitioner's assertion that the State acted improperly in offering Petitioner the opportunity

to testify against Barnes, (FBOA, p. 18; Cert. Pet., p. 20), this offer actually shows the State did not place isolated or undue pressure on Petitioner. The State had success in securing many of the co-defendants to testify against Barnes, and, the offer to allow the Hunsbergers to testify "might [have] go[ne] toward their benefit." (See R. p. 4, lines 14-25; p. 26, lines 10-16). As the State acknowledged, it was their right to decide not to testify against Barnes. (R. p. 26, line 17 – p. 27, line 6). Even so, they had the same opportunities as the other co-defendants. This even treatment does not lend itself to attack here as evidence of an attempt to harm the defense. It is, however, a facet of the complexity.

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

It should be noted, as well, that the State had 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 may not be attributed directly to the State. *See United States v. Battis*, 589 F.3d 673, 679-680 (3rd Cir. 2009) (separating federal and state charges for purposes of speedy trial analysis, but finding decision to wait on state prosecution weighed against federal government, though not heavily as the federal government was not "intentionally undermining the defense"); *United States v. Seltzer*, 595 F.3d 1170, 1178 (10th Cir. 2010) ("We agree with our sister circuits that awaiting the completion of another sovereign's prosecution may be a plausible reason for delay in some circumstances..."). *Cf. State v. Robbins*, 590 A.2d 1133, 1136-1137 (N.J. 1991), *quoting State v. Williams*, 224 A.2d 331 (N.J. 1966) ("Inasmuch as it is

impossible for a person to be in two places at the same time, where one owes penalties to two separate sovereigns, one sovereign must relinquish its claim and allow the other to exact its penalty first."). After conviction, Petitioner began service of his Georgia sentence in Georgia. (See R. p. 24, line 12-25). In fact, Petitioner testified at the pre-trial hearing on the motion to dismiss that one of his reasons for not agreeing to extradition was he "needed to find out" how leaving Georgia would affect his Georgia appeal. (R. p. 36, lines 16-23). This marked hesitancy in returning to the State fails to show a desire for a speedy trial here. Again, this time should not count against the State. This is most assuredly so where Petitioner simply did nothing to force prosecution in South Carolina, though he had the ability to do so.

The Defendant's Assertion of the Right

Without question, Petitioner asserted his right in late 2004 and again January 2005. This resulted in a bond that allowed Georgia to obtain custody and subsequently try Petitioner on the kidnapping charge. (R. p. 226). Essentially, Petitioner moved for relief under Section 17-23-90 and appropriate relief was granted at that time. (R. p. 222). *See generally State v. Campbell*, 277 S.C. 408, 288 S.E.2d 395 (1982) (denying speedy trial claim pursuant to statute where S.C. Code § 17-23-90 provides for release if not indicted and tried within certain time frame, not dismissal of the charge). After this grant of relief, however, Petitioner failed to reassert or pursue his constitutional right to a speedy trial at any point until immediately before his January 2012 trial.

"[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.").

As noted, Petitioner failed to do anything to assert a speedy trial issue after he was released to Georgia in early 2005 until the time of his trial in January 2012. (See R. p. 17, lines 21-25, acknowledging no request during six to seven years of the delay). As noted above, he actually declined to allow extradition in 2011. (R. p. 36, lines 13-23). Unlike his co-defendant Steven Barnes, he did not seek return and prosecution under the Interstate Detainer Act. Thus, in assessing the delay, the fact that Petitioner failed to assert his right to a speedy trial after his release to Georgia is significant. *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.").

Simply, during the time that Petitioner now argues the "cross-border" jurisdiction issues were resolved and the trial, (see FBOA, p. 18), Petitioner did not request return or trial. This must weigh heavily against him. *Barker v. Wingo*, 407 U.S. at 536 ("barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was

denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial.").

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," for speedy trial claim on delay of eight years, defendant would have had to have shown "specific prejudice to his defense" rather than assessing presumptive prejudice). The 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.

Even though Petitioner was tried for the 2002 charge in January of 2012, he had ample opportunity to thoroughly cross-examine the witnesses against him, including making use of prior sworn testimony – testimony that was available as a result of multiple actions both in South Carolina and Georgia. (See R. p. 19, line 24 – p. 21, line 9; p. 22, lines 18-25). Further, he does not contend any exculpatory witness or testimony is not unavailable. *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). Petitioner has twice been convicted (once in Georgia, once here) on evidence of participation in the events that led to Samuel's murder, and readily admits his presence during the crime. (See R. p. 187, line 8 – p. 193, line 5; p. 216, lines 8-13). Petitioner argues, though, that the passage of time affected extent of memory and credibility of the witnesses against him. (See FBOA, p. 19; R. p. 194, line 22 – p. 195, line 13). In effective rebuttal, the trial transcript demonstrates credibility was challenged by use of prior transcripts which preserved sworn testimony, (See R. p. 97, line 14 – p. 100, line 19; p. 144, line 25 – p. 145, line 5), and that contemporaneous notes were used to refresh memories, (See R. p. 144, lines 2-24; p. 172, line 7 – p. 173, line 13). The multiple trials and statements in essence preserved and/or created records of testimony for this Petitioner's use to his benefit. At any rate, as Judge Newman found, there was no evidence of prejudice to Petitioner based on the passage of time:

> Regarding ... problems the witnesses had remembering, Counsel did an effective job at pointing out to the witnesses in cross-examining them

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

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

His ruling is well supported and his reasoning sound.

Further, though Petitioner's case was considered for capital proceedings, the State ultimately decided against seeking the death penalty for Petitioner. (R. p. 23, lines 3-16). As such, the length of the delay in this aspect certainly holds no prejudice to Petitioner. *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.").

At any rate, as more fully set out above, the record well supports Judge Newman's factual findings which he correctly analyzed in the appropriate legal framework. Therefore, his ruling was properly 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 Court of Appeals properly affirmed. The petition for writ of certiorari should be denied.

Respectfully submitted,

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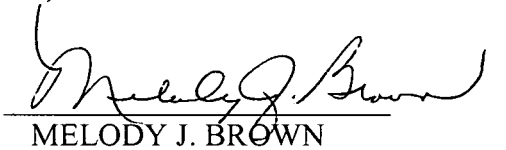
BY: 
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February 17, 2015.
Columbia, South Carolina.

RECEIVED
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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

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

On Petition for Writ of Certiorari to the Court of Appeals
Unpublished Opinion No. 2014-UP-381 (S.C.Ct.App. filed Nov. 5, 2014)

The State, Respondent,

v.

Alexander L. Hunsberger, Petitioner.

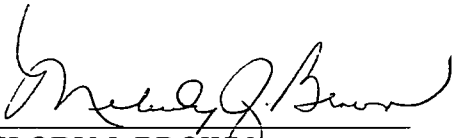
Appellate Case No. 2015-000083

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

This 17th of February, 2015.



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ATTORNEY GENERAL

RECEIVED
FEB 17 2015
S.C. Supreme Court

February 17, 2015

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

Re: The State v. Alexander L. Hunsberger
Appeal from Edgefield County
Appellate Case No. 2015-000083

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari, dated February 17, 2015, together with a Proof of Service in the above-referenced matter.

Thank you for your assistance in this matter. Please call this office if you need any additional information.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

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