

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Alison Renee Lee, Circuit Court Judge

ROBERT ANTHONY JAMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Brief of *Amicus Curiae* South Carolina Public Defender Association

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Issue on Appeal

Was trial counsel ineffective for failing to argue that petitioner's indictments should be dismissed because the state violated his Sixth Amendment right to a speedy trial when petitioner was prejudiced by this deficiency because the indictments would have been dismissed had the issue been properly raised to the trial judge?

Statement of Case

The state arrested petitioner, Robert James, on December 30, 1996 and charged him with two counts of armed robbery, two counts of possession of a weapon during the commission of a violent crime, two counts of kidnapping, first degree criminal sexual conduct, and assault with intent to kill. The Richland County grand jury finally indicted these offenses on August 11, 1999. The state tried petitioner before the Honorable Costa M. Pleicones and a jury between September 20 and 24, 1999. The jury convicted petitioner, and the trial court sentenced him to forty years.

Petitioner appealed his convictions and sentences. The South Carolina Court of Appeals affirmed on March 21, 2001. *State v. James*, Ct. App. Op. No. 2001-UP-082.

Petitioner filed an application for post-conviction relief (PCR) on August 8, 2001. He filed an amended PCR application on June 7, 2005. The Honorable Alison Rene Lee convened an evidentiary hearing on January 14, 2005. The PCR court dismissed the amended application by written order filed on August 19, 2005.

Petitioner filed a petition for writ of *certiorari* on February 27, 2008. The South Carolina Court of Appeals granted the petition on December 14, 2009. The Court of Appeals affirmed the trial court on October 27, 2011. *James v. State*, Ct. App. Op. No. 2011-UP-480.

James petitioned this Court for *certiorari*.

Statement of Facts

South Carolina held the petitioner, Robert James, in jail for 993 days before calling his case to trial.

Petitioner filed *pro se* speedy trial motions in 1998 and 1999. When his case was finally called to trial, petitioner moved to dismiss the charges because the state failed to provide him a speedy trial. Though trial counsel and the trial judge were confused about the law pertaining to the right to a speedy trial, Judge Pleicones made three significant factual findings. First, petitioner wanted a speedy trial. Second, the delay was “horrendous.” Third, prosecution’s justification for the delay was “not terribly well explained.” App. 31, 32, 34, 35, 39, 41, and 44.

Trial counsel failed to argue prejudice or cite then-existing United States Supreme Court precedent requiring dismissal of the charges, leading the trial judge to conclude, “I don’t think the situation in our state requires dismissal of the charges.” Thus, the trial court denied petitioner’s motion to dismiss. App. 44.

Argument

Trial counsel was ineffective for failing to argue that petitioner's indictments should be dismissed because the state violated his Sixth Amendment right to a speedy trial and petitioner was prejudiced by this deficiency because the indictments would have been dismissed had the issue been properly raised to the trial judge.

Tension exists between the South Carolina Supreme Court's constitutional authority to oversee the unified court system and the sixteen elected solicitors' statutorily authorized control of the criminal docket. Our Supreme Court has the exclusive authority to "make rules governing the administration of all the courts" and "[s]ubject to the statutory law . . . make rules governing the practice and procedure in all such courts." S.C. Const. Art. V, §4. Yet, solicitors have exclusive authority to prepare criminal dockets and to "determine the order in which cases on the docket are called for trial." S.C. Code Ann. §1-7-330 (1976). The solicitors cite public policy to justify their authority:

[H]istorically, solicitors have published and administered the criminal dockets in South Carolina, and in turn, solicitors have been called to explain burgeoning caseloads, decide whether to concentrate on jail cases in hopes of obviating the need for jail expansion construction, or call the cases of defendants out on bond before they reoffend. Solicitors are expected to schedule guilty pleas as well as explain to crime victims when their case will be reached and why it has taken so long.

"Criminal Dockets Administered by Prosecutors: Past, Present and Future," by Solicitor Trey Gowdy, *The South Carolina Lawyer*, March 2010, p. 28.

As seen in petitioner's case, the actual practice can be quite different. This justification fails to consider a defendant's right to a speedy trial. To fully understand how the systemic shortcomings prejudiced petitioner, it is necessary to: (1) review the evolution of the Supreme Court's and solicitors' roles in administering General Sessions Court, (2) identify the potential for solicitors to abuse control of the docket, (3) consider the

constitutional doctrine of Separation of Powers, and (4) argue why this Court should order petitioner's case be dismissed.

I. Review of the evolution of the South Carolina Supreme Court's and solicitors' roles in administering General Sessions Court.

Some version of §1-7-330 has appeared in the South Carolina code since at least the 1932 edition of the code of laws. The cases challenging solicitor control of the docket can be grouped into two general categories: (1) requests for continuances and (2) speedy trial motions.

First, prosecutors might attempt to call a case to trial before a defendant or defense counsel is prepared to defend the charges. Because "[t]he solicitor has a broad discretion deciding the order in which cases are called," the fact that much older cases remaining on the docket does not show prejudice or establish grounds to continue the newer case, and a defendant must show an inadequate opportunity to prepare. *State v. Flood*, 257 S.C. 141, 145-45, 184 S.E.2d 549, 552 (1971). The solicitor's discretion is "subject to the overall broad supervision of the trial judge. If a defendant feels that his rights are prejudiced by reason of the calling of his case at any particular time, he may apply to the judge for a continuance." *State v. Mikell*, 257 S.C. 315, 322, 185 S.E.2d 814, 817 (1971). As practitioners can attest, trial courts routinely continue cases when a defendant demonstrates a need for additional time to prepare a defense. The trial court's supervisory authority to continue cases is codified by Rule 7, SCRCrimP.

Second, the solicitor might intentionally delay calling a case, thereby denying someone a speedy trial. In these situations, our courts are reluctant to exercise supervisory power. In fact, neither the Supreme Court nor the Court of Appeals has ever

dismissed a case because the solicitor denied a defendant a speedy trial.¹ See *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (Both state and defense gave reasonable explanations for the delay); *State v. Kennedy*, 339 S.C. 243, 251, 528 S.E.2d 700, 704-05 (Ct. App. 2000) (“Given the complexity of the case, supplying the State with a legitimate reason for the delay, and the lack of prejudice to the defendant, we conclude the trial court properly denied Kennedy’s motion to dismiss based on his assertion of a speedy trial violation.”); *State v. Robinson*, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999) (“There is no evidence the delay was wilful or intentional,” and appellant did not assert right until ten months before trial); *State v. Smith*, 307 S.C. 376, 415 S.E.2d 409 (C. App. 1992) (delay resulted from state’s decision to try defendant on another charge for which he was sentenced to death, and state dismissed this charge until Supreme Court vacated the other conviction); *State v. Brazell*, 325 S.C. 65, 480 S.E.2d 64 (1997) (“Although the delay was lengthy and the justification was unsatisfactory,” appellant did not establish prejudice.); *State v. Chapman*, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) (“The delay was not caused by any willful neglect on the state’s part.”); *State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (“there is no record of an actual demand by Waites for a speedy trial”); *State v. Tyson*, 283 S.C. 375, 378, 323 S.E.2d 770, 770 (1984) (“Nothing in the record suggests the State caused unnecessary delay. It appears that everything possible was done to expedite the case while protecting appellant’s rights considering the serious nature of the charges. Furthermore, part of the delay was caused by his initial failure to accept appointed counsel.”).

¹ The Supreme Court recently dismissed a case based on pre-indictment delay. *State v. Lee*, 375 S.C. 394, 653 S.E.2d 259 (2007).

There is not a court rule authorizing the trial court to dismiss charges for a denial of the right to a speedy trial. Our Supreme Court traditionally attempted other means to oversee the orderly disposition of General Sessions Court cases. For almost three decades, the Supreme Court has been urging solicitors to resolve cases within 180 days of arrest.

On August 17, 1983, Chief Justice Lewis ordered “all criminal cases in the State of South Carolina shall be disposed within 180 days from the date of the defendant’s arrest.” The order provided that a case could be continued by written order “if the Court determines that exceptional circumstances exist in the case.” To accomplish the purpose of the order, the Chief Justice provided:

[T]he Chief Circuit Court Judge for Administrative Purposes shall be in overall charge of and responsible for the criminal roster in order to develop a procedure for expediting the disposition of criminal cases, including the setting of rosters of cases for disposition, if such be necessary to accomplish the timely disposition of criminal cases.

This order also required the trial courts to continue cases pending for less than 180 days until such time no cases older than 180 days were pending for trial. “The order [did] not create or define a right of a defendant to a speedy trial.” By order dated January 13, 1984, Chief Justice Lewis would clarify that orders continuing cases beyond 180 days for exceptional circumstances “shall not be valid for more than thirty (30) days from the date of issuance.”²

Illustrating the tension between the Supreme Court’s constitutional oversight of the courts and the solicitors’ statutorily authorized control of the criminal dockets, Chief Justice Lewis’ orders, very arguably, were in direct conflict with Supreme Court precedent that seemingly supported solicitor docket control. *See Flood, supra.*

² Copies of Chief Justice Lewis’ orders dated August 17, 1983 and January 13, 1984 are attached as Appendices A and B.

On March 5, 1999, Chief Justice Finney rescinded Chief Justice Lewis' orders dated August 17, 1983 and January 13, 1984. Chief Justice Finney retained the 180 day benchmark, ordering "all criminal cases in the State of South Carolina [to] be disposed of within 180 days from the date of the defendant's arrest." Similar to Chief Justice Lewis' orders, Chief Justice Finney's order provided for cases to be continued "beyond 180 days by written order if the court determines that exceptional circumstances exist in the case" and explicitly "[did] not create or define a right of a defendant to a speedy trial." However, in apparent deference to the solicitors, Chief Justice Finney's order deleted language regarding the trial court's oversight of criminal dockets and authority to set rosters.³

Chief Justice Toal implemented oversight of her predecessor's order by tracking whether the solicitors dispose of eighty percent (80%) of the cases within 180 days. Each month, the Judicial Department publishes reports including a graph of circuits meeting this benchmark.⁴ None of the sixteen solicitors currently meet the benchmark. The Sixteenth Circuit Solicitor is most successful, disposing of sixty-seven percent (67%) of the cases within 180 days. The other fifteen solicitors disposed of forty-four percent (44%) or less of the cases within 180 days.

In addition, in 2002 Chief Justice Toal began a differentiated case management pilot program in Richland County. Each case was assigned to one of three tracks, 120 days, 180 days or 270 days, based on the complexity of the case. Circuit Court Judge Henry Floyd

³ Order of Chief Justice Earnest A. Finney, Jr. dated March 5, 1999, <http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=1999-03-05-01> (last viewed Jan. 30, 2012)

⁴ The graph for December 31, 2011 is attached in Appendix C.

managed the tracks with the goal of processing the cases within the deadline. During calendar year 2002, the criminal case backlog in Richland County was reduced by nearly one third. Based on the success of the program, the system was adapted for use in Greenville, Horry, and Orangeburg Counties.⁵ The program has spread state-wide. On March 1, 2007, “[T]he sixteen Judicial Circuit Solicitors agree[d] to develop with the Chief Justice and implement criminal case management systems in each county throughout the State of South Carolina.”⁶

The Supreme Court continues to exercise more supervision of the criminal dockets. In the February 25, 2009 State of the Judiciary address, Chief Justice Toal discussed the backlog of General Sessions Court cases. While the Solicitors control the docket, she told the General Assembly there should be deadlines for disposition of cases. The Chief Justice acknowledged a practice of some solicitors allowing defendant’s to linger in jail until the solicitor determines the person has served enough time before offering a time served plea.⁷

Also in 2009, Chief Justice Toal formed a task force to draft proposed South Carolina Criminal Rules (SCCR). Retired Circuit Court Judge Howard King chaired the task force that included prosecutors, public defenders, and private criminal defense

⁵ Efficient South Carolina Court Management Produces Result, Press Release for 1/22/2003, <http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=132> (last viewed Jan. 30, 2012)

⁶ See Consent Order of Chief Justice Toal, March 1, 2007 and sixteen Circuit Solicitors, <http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=371> (last viewed Jan. 30, 2012).

⁷ <http://www.judicial.state.sc.us/whatsnew/displayWhatsNew.cfm?indexId=503> (last viewed Jan. 30, 2012).

lawyers. The proposed rules were published on December 2, 2009.⁸ The proposed rules provide for all cases to “be governed by a docket management system pursuant to Supreme Court docket management orders that now exist or may be implemented or amended by the Supreme Court.” Proposed Rule 101, SCCR. Continuing the current system, a defendant would receive discovery and a plea offer at the initial appearance. Proposed Rule 119, SCCR. By the second appearance, a defendant would have to accept the offer or be placed on a trial docket. Proposed Rule 120, SCCR. The proposed rules provide for judicial oversight, allowing the Chief Administrative Judge to hold status conferences to monitor the progress of the case. *See* Proposed Rules 121 and 122, SCCR.

The proposed rules, however, only minimally enforce a defendant’s right to a speedy trial. Rule 121(b) would provide:

Cases should be disposed of within the track to which they are assigned. **Failure to dispose of a case within the track is not grounds for dismissal** but may be considered by the chief administrative judge in determining remedies or sanctions.

(Emphasis added). The proposed rules, furthermore, do not specify the proposed remedies or sanctions. Reconsideration of bond is the only remedy listed anywhere in the proposed rules, but “unreasonable delay” is only one factor the court “may” consider. Proposed Rule 106(g), SCCR. The chief administrative judge or the presiding judge is also authorized to hold status conferences for any pretrial detainees whose case is not disposed of during the track. Proposed Rule 124, SCCR. However, the proposed rules expressly exclude dismissal as a remedy.

⁸ *See* Request for Written Comments and Notice of Public Hearing on Proposed SCCR <http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=602> (last viewed Jan. 30, 2012).

The rules, likewise, would not provide for a meaningful trial order. Although the solicitor would be required to prepare a trial roster fourteen (14) days before a term of court, the solicitor is not required to specify the order the cases would be called for trial. Defendants would be required to be in court within two hours of oral notification, and failure to appear would result in a bond revocation. Proposed Rule 123, SCCR.

The Supreme Court received comments on the proposed criminal rules.⁹ The Court convened a public hearing on the proposed rules on January 5, 2010.¹⁰ Although the solicitors did not provide written comments concerning the proposed rules, the President of the Solicitors' Association appeared and opposed the Supreme Court being able to issue docket management orders pursuant to Rule 101, SCCR without the solicitor's consent.

The Supreme Court is conducted a "comprehensive review" and "full vetting" of the proposed rules in 2010.¹¹ In February 2011, the Supreme Court announced the formation of a Docket Management Task Force chaired by the Honorable Kaye Hearn with a General Sessions Court Committee chaired by the Honorable Costa Pleicones.¹²

II. Identify the potential for solicitors to abuse control of the docket.

⁹ Comments received by Supreme Court on Proposed SCCR, <http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=612> (last viewed Jan. 30, 2012).

¹⁰ See Request for Written Comments and Notice of Public Hearing on Proposed SCCR, <http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=602> (last viewed Jan. 30, 2012).

¹¹ Chief Justice Toal's Presentation to the SC Bar, January 22, 2010, PowerPoint slide 12, <http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=621> (last viewed Jan. 30, 2012)

¹² <http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=714> (last viewed Jan. 30, 2012).

Unchecked authority to control the flow of criminal cases through General Sessions court hands solicitors a license to exploit this control to disadvantage defendants in several ways.¹³ First, solicitors use their control of the docket to call cases to trial when the defense is ill-prepared or unable to present the most complete defense possible. Second, docket control allows the solicitors to “judge shop.” Third, solicitors use their control to leverage guilty pleas from those who would otherwise exercise their rights to a jury trial. Fourth, solicitors can repeatedly and unnecessarily request the presence of defendants who have made bond. Finally, solicitor docket control essentially cuts off judicial involvement with trial cases until the morning of trial. Each of these abuses will be discussed in detail below, along with the abuses petitioner suffered.

A. Solicitors use their control of the docket to call cases to trial when the defense is ill-prepared or unable to present the most complete defense possible.

Whether they are public defenders or members of the private bar, criminal defense lawyers juggle dozens, even hundreds, of clients at any given time, and the solicitors are adept in using this to their advantage. There is no method to be used in guessing which cases solicitors will call to trial during any term of court.

Since solicitors have total discretion in formulating a trial docket, they have the ability to stack the list with a number of cases all handled by a specific defense lawyer. That lawyer would then have a choice to make: divide time between all of their cases appearing on the trial docket or attempt to prioritize and prepare a select few. Neither of these options provides the defendant with effective assistance of counsel. Under the

¹³ For a discussion of these abuses, see Siegel, Andrew M., *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 Am. J. Crim. L. 325 (2005).

first scenario, the lawyer is unable to devote the necessary time and attention to each case, falling short of being fully prepared for each case. Under the second scenario, some cases will be neglected, and since the lawyer does not know which cases will actually be called to trial, it is possible the lawyer would be wholly unprepared for the right case. Further, solicitors may call cases of one lawyer to trial in consecutive weeks which would wear down that lawyer and leave little time to prepare for upcoming trial cases or manage other clients. This is not the only way solicitors can use their docket control to sabotage the defense. Solicitors can also schedule trials when strong defense witnesses may not be unavailable. The defense would be in a position to utilize weaker witnesses, who may not present well to a jury or be highly impeachable, or forgo presenting crucial evidence all-together.

While each of the scenarios above lend themselves to a request for a continuance, that is not a surefire way to combat solicitor docket control. A continuance is never automatic because the decision of whether or not to reschedule to trial lies solely within the discretion of the presiding judge. This problem is often exacerbated by the fact that in our current judicial rotation system, a motion for continuance may not be heard until the proposed trial judge is on the bench, on the date the trial is slated to start. Defense lawyers seeking a continuance due to unpreparedness or unavailable witnesses may still have to spend precious time doing their best to get ready for a trial that may later be continued. That time could surely be spent tending to other matters.

B. Docket control allows the solicitors to “judge shop.”

Because cases may be called for plea or trial entirely at the whim of the solicitor, the prosecution has the unique ability to unilaterally select which judge will hear a given

case. With the increased ability to communicate with other prosecutors around the state, especially those who practice regularly in front of a particular judge, prosecutors can learn which judges will be likely to rule favorably on evidentiary issues and sentence defendants to the maximum allowed by statute.

Defendants can do little to escape the wrath of an unfavorable judge. If there is a plea offer extended by the solicitor, they have the unfettered ability to revoke the offer at any time, leaving the defendant with no choice but to plead guilty in front of the state's judge of choice. If the defendant has elected to exercise his or her right to a jury trial, their case will be tried in front of the judge selected by the state unless a continuance is granted. However, a continuance can only be sought if meritorious grounds exist and even then, the sole discretion in granting the continuance lies with the trial judge.

C. Solicitors use their control to leverage guilty pleas from those who would otherwise exercise their rights to a jury trial.

Not all defendants make bond after being arrested. Those who remain in pretrial detention face a difficult decision – remain in jail until the solicitor sees fit to call their case to trial or take a plea offer that would either release them or send them to the more comfortable confines of the Department of Corrections. In many situations, there is no true choice to be made; the plea offer is taken.

Each day people are arrested for things they are not guilty of and cases full of legal or evidentiary issues come into being. Unless the solicitor exercises his or her discretion and dismisses the charge, the only way to raise legal or evidentiary challenges or assert claims of actual innocence is to take the case to a jury trial. The right to a jury trial is central to our system of justice, yet cannot be freely exercised in South Carolina because the power to schedule the trial lies solely with the prosecution.

Often defendants request a jury trial but have to wait months, sometimes even years, for the solicitor to call the case to trial. In the interim, many defendants decide, regardless of how strong their case may be, to take a plea offer rather than languish in jail. The solicitor's power to refuse to call a case trial goes unchecked by the judiciary and sends a message to the defendant that the only way to resolve the pending charges is a guilty plea.

D. Solicitors can repeatedly and unnecessarily request the presence of defendants who have made bond.

Prior to the implementation of county or circuit-wide case management systems, it was common for the state to require that all defendants with pending charges to appear each and every term of court. These mass roll calls served little purpose other than harassing the defendants who were fortunate enough to make bond and jeopardize employment that the defendants may have secured.

Even after these case management orders have been put into place, the solicitors can, and have, compelled the appearance of defendants under threat of bench warrant. Most times, these appearances are used merely to insure that the defendants are available at the beck and call of the state.

E. Solicitor docket control essentially cuts off judicial involvement with trial cases until the morning of trial.

Under the current system of solicitor docket control, judges are not assigned to cases prior to the case being called for trial.¹⁴ Thus, it is nearly impossible to address

¹⁴ However, judges are assigned to capital cases once the defendant is served with notice of the state's intention to seek the death penalty. In fact, our Supreme Court recently observed, "[T]he practice of the prosecutor selecting the trial judge is inappropriate and troubling" and "is no longer possible . . . in death penalty cases."

pretrial matters, such as exclusion of evidence, in advance of trial. In a case where there is a strong argument for the exclusion of evidence the state will heavily rely on, the defendant has no choice but to request a jury trial, wait for the state to call the case to trial, and then gamble away any plea offer by pressing forward with jury selection and pretrial hearings. If the defendant loses and the evidence in question is found to be admissible, the defendant has often lost any favorable plea offers that may have previously been extended and must either plead guilty and receive a harsher sentence or continue on with trial and risk the maximum punishment.

The absence of a judge who will be familiar with the peculiarities of a given case and be in a position to rule on pretrial matters removes options from the defendant's menu of possible resolutions to his or her case.

III. The constitutional doctrine of Separation of Powers.

The South Carolina Constitution explicitly divides the government into three branches and prohibits encroachment of one branch into the purview of another:

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties or any other.

S. C. Const., Art. I, §8.

Judges are inherently members of the judicial branch and solicitors are statutorily defined as members of the executive branch. S.C. Code Ann. §1-1-110 (Supp.). However, the South Carolina Code of Laws bestows on the solicitor the power to control dockets for General Sessions Court:

Rosemond v. Catoe, 383 S.C. 320, 326, fn. 1, 680 S.E.2d 5, 8, fn. 1 (2009). This practice is just as inappropriate and troubling in non-capital cases.

The solicitors shall attend the courts of general sessions for their respective circuits. Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial.

S.C. Code Ann. §1-7-330 (Supp.).

The South Carolina Supreme Court has held that managing the court docket is an inherently judicial function, at least in the Court of Common Pleas.¹⁵ Section 1-7-330 takes a judicial function, control of the court docket, and places it in the hands of an executive officer. This statute, very arguably, is unconstitutional under the separation of powers clause of the South Carolina Constitution. As discussed in Section IV. C, *infra.*, judicial oversight should include the authority for the trial court to dismiss cases to prevent solicitors from abusing their control of the docket.

IV. This Court should order petitioner's case be dismissed.

The Court should order petitioner's case be dismissed. This section will review the law applicable to speedy trial claims, discuss trial counsel's ineffectiveness, and argue why dismissal is necessary for judicial supervision of the criminal docket.

A. Law applicable to speedy trial claims.

There is a four part test for analyzing a speedy trial claim: (1) whether delay before trial was uncommonly long, (2) whether the government or defendant is more to blame for the delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether the defendant suffered any prejudice as to the delay's result. *Doggett v. United States*, 505 U.S. 647, 651 (1992).

Regarding the first three prongs, the trial judge made factual findings favorable to petitioner. First, the delay was "horrendous." Second, the prosecution's justification for

¹⁵ See *Williams v. Bordon's, Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980).

the delay was “not terribly well explained.” Third, petitioner wanted a speedy trial. Each of these will be analyzed in more detail.

The delay was before trial was uncommonly long. “[B]ecause of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.” *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972). “[A] delay of nine months [is] overly long, absent a good reason, in a case that depended on eyewitness testimony.” *Id.* at 531 (fn. 31) (citing *U.S. v. Butler*, 426 F.2d 1275 (1970)). The South Carolina Supreme Court has held a twenty-eight month delay triggers further review. *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978). The 993 day in petitioner’s case, therefore, is uncommonly long, and likewise, triggers further review.

The government was solely at fault for the delay in petitioner’s case. The state delayed indicting petitioner until August 11, 1999, which is over thirty-one months after the state arrested him. A grand jury indictment is required to prosecute these offenses.¹⁶ S.C. Const. Art. I, §11 and S.C. Code Ann. §17-19-10. The prosecution alone decides when a case is presented to the grand jury. Thus, the entire delay is attributable to the state. *Vermont v. Brillon*, ___ U.S. ___, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009). Indicating a complete disregard for the speedy trial right, the solicitor told the trial court the “180-day rule is literally violated in 85 percent of the criminal cases in South Carolina.” App. 41. Because of this admitted indifference to the speedy trial right and the prosecutor’s failure to explain the delay, the state must have hoped to gain a tactical advantage by the

¹⁶ Respondent argued in the Court of Appeals, “[T]he state had been attempting to try the case for close to ten months.” Brief of Respondent, 8. Given the extraordinary delay in seeking an indictment, this assertion is meritless.

horrendous delay. “Deliberate delay to hamper the defense weighs heavily against the prosecution.” *Id.* 129 S.Ct. at 1290.

The state created additional delays in petitioner’s case. It took nine months for the state to appoint petitioner conflict-free counsel.¹⁷ App. 43. The state delayed an additional seven months before requesting a DNA sample from petitioner to compare with evidence in the case. App. 38. Petitioner asserted his right to a speedy trial. Petitioner filed his first *pro se* speedy trial motions sometime in 1998 and renewed the motion on April 26, 1999. Based on these motions, the trial court found petitioner wanted a speedy trial. App. 32, 25, and 41.

Turing to the fourth prong, petitioner was prejudiced by the state’s intentional delay. With DNA evidence excluding petitioner,¹⁸ the prosecution relied exclusively on eyewitness identification. As the First Circuit pointed out in *Butler*, eyewitness identifications “necessarily became less reliable with the passage of time.” In fact, the alleged victim’s account in this case significantly changed between the time of the crime and trial. The

¹⁷ Respondent argued below the state is not at fault in obtaining petitioner conflict-free counsel. Brief of Respondent, 8. This position ignores the state’s obligation to appoint counsel “as soon as practicable.” Rule 602, SCACR. Rather, the failure to provide conflict-free counsel represents a systemic breakdown of the public defender system, and that delay is attributable to the state. *Brillon*, 129 S.Ct. at 1292.

¹⁸ The state argued below since “the DNA testing cleared the Petitioner of any connection to the DNA specimen(s) recovered via the Rape Kit, the Petitioner benefited significantly from any delay due to scheduling the *Schmerber* hearing with new counsel and awaiting the results.” Respondent’s Brief, 9. This contention is wrong for two reasons. First, the state, not petitioner, is obligated to ensure conflict-free counsel. Second, the state’s obligation to timely process the evidence is independent of the state’s obligation to provide counsel. Under the case management administrative orders, law enforcement it required to provide the solicitor all the evidence at the onset of the case, typically within twenty-one days. When evidence, such as DNA test results, is not available, law enforcement is supposed to list these items. Outstanding matters, such as motions for DNA samples can be addressed at the initial appearance.

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In reality, at the time of petitioner's trial, *Baker* supported dismissal as the only remedy. Trial counsel's failure to cite *Baker* was based on his misunderstanding of the law and not a valid strategic consideration. See *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002) (counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial); *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002) (counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness). Had trial counsel cited the appropriate cases, then the result would have been different and the trial court would have dismissed the charges. Petitioner was prejudiced by counsel's failure to properly argue the motion and provide the trial court with the appropriate case law to warrant dismissal the charges.

C. Dismissal is necessary for judicial supervision of the criminal docket.

The state argued below that petitioner's request for dismissal is unprecedented. Respondent's Brief, 13-14. Dismissal may be unprecedented in South Carolina, but it is not unprecedented in Sixth Amendment jurisprudence. As the United States Supreme Court observed in *Baker*:

The amorphous quality of the [speedy trial] right also leads to the unsatisfactorily severe remedy of **dismissal of the indictment** when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is **the only possible remedy**.

Baker, 407 U.S. at 522 (emphasis added).

The prosecution's flagrant disregard for petitioner's right to a speedy trial is exactly what the Sixth Amendment was designed to prohibit. Judicial oversight and intervention is not only appropriate but also constitutionally required.

Generally, dismissal is a necessary remedy for the courts in South Carolina to provide meaningful oversight of General Session Court. As discussed in Section II, *supra.*, solicitor control of the docket may lead to unacceptable abuses of defendants' rights. The threat of dismissal will ensure solicitors do not use their control of the criminal docket to deny the right to a speedy trial. Based on the proposed South Carolina Criminal Rules, it appears this state will retain solicitor control of the docket with increased judicial oversight. Oversight of the constitutional right to a speedy trial is an essential addition to the case management orders and the proposed rules of criminal procedure. As a result, the courts exercise the authority to administer the criminal dockets, and the separation of powers is preserved. *See* Section III, *supra.*

This Court, therefore, should dismiss petitioner's charges with prejudice.

Conclusion

For the forgoing reasons, this Court should grant *certiorari*, reverse the Court of Appeals, and order petitioner's charges dismissed with prejudice.

By 

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January 31, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Alison Renee Lee, Circuit Court Judge

ROBERT ANTHONY JAMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that I served two copies of the proposed initial *amicus curie* brief of the South Carolina Public Defender Association on the date reflected below on counsel by United States Mail, postage prepaid, addressed as follows:

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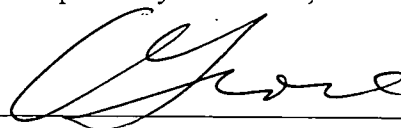
RESPONDENT

Rule 211(b), SCACR Certification

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR as there was not an initial brief, and this proposed brief is being submitted in final form.

Respectfully submitted,

By _____



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January 31, 2012

Attachment A

The Supreme Court of South Carolina

O R D E R

Effective Date: October 1, 1983

Pursuant to the provisions of Section 4, Article V, South Carolina Constitution,

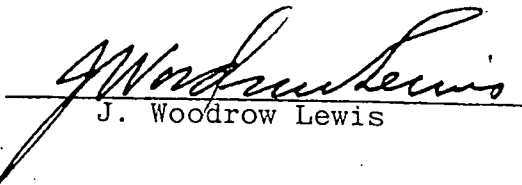
IT IS ORDERED that all criminal cases in the State of South Carolina shall be disposed within 180 days from the date of the defendant's arrest. Provided, however, that the Circuit Court may continue a criminal case beyond 180 days by written order if the Court determines that exceptional circumstances exist in the case.

IT IS FURTHER ORDERED that the Chief Circuit Court Judge for Administrative Purposes shall be in overall charge of and responsible for the criminal roster in order to develop a procedure for expediting the disposition of criminal cases, including the setting of the roster of cases for disposition, if such be necessary to accomplish the timely disposition of criminal cases.

IT IS FURTHER ORDERED that each circuit court judge is to continue any and all criminal matters which have been pending for a period of less than 180 days from date of arrest until such time as there are no cases exceeding 180 days from date of arrest pending and awaiting trial. This shall not include the taking of guilty pleas nor cases in which capital punishment is being sought or cases

gwh

in which the circuit court judge by written order determines that exceptional circumstances exist which require the disposition of the case in advance of a case pending for more than 180 days. This order does not create or define a right of a defendant to a speedy trial.


J. Woodrow Lewis

Columbia, South Carolina

August 10, 1983

Attachment B

The Supreme Court of South Carolina

O R D E R

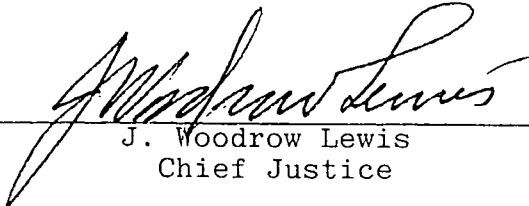
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S.C. SUPREME COURT

I find that there currently exists some misunderstanding concerning the scope and compliance requirements of my August 17, 1983 order establishing a 180-day time limitation for the disposition of criminal cases, particularly as it relates to the contingent docket and the duration of an exceptional circumstances order.

Therefore, pursuant to the provisions of Section 4, Article V, South Carolina Constitution,

IT IS ORDERED that all criminal cases, including contingent docket cases, are subject to the requirements of my August 17, 1983 order, a copy of which is attached to and made a part of this Order.

IT IS FURTHER ORDERED that any exceptional circumstances orders shall not be valid for more than thirty (30) days from the date of issuance.

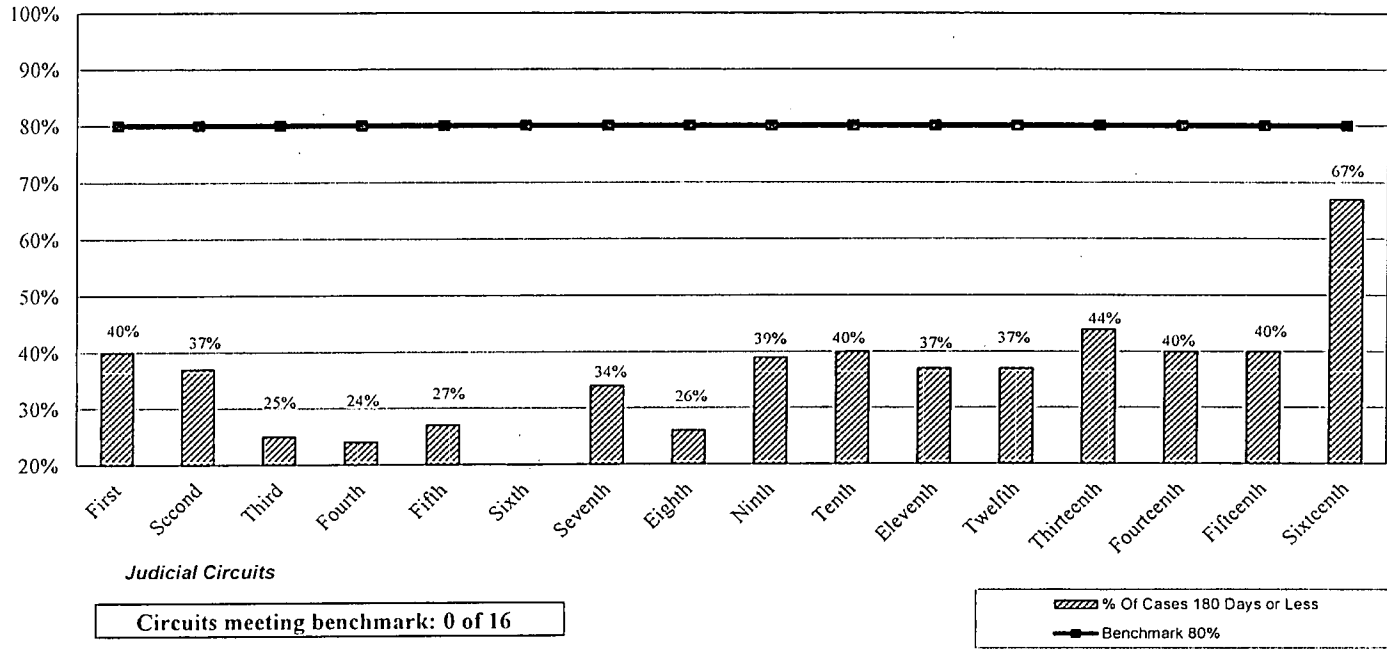


J. Woodrow Lewis
Chief Justice

Darlington, South Carolina

January 13, 1984

**S. C. Criminal/General Sessions Court
Circuits Meeting Benchmark
80% of Pending Docket 180 days or Less
as of December 31, 2011**



Source: S.C. Court Administration, CRM75, December 31, 2011. Run Date: January 11, 2012.