ORIGINAL

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SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED
APR 27 2012
S.C. Supreme Court

April 27, 2012

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Robert Anthony James v. State

Dear Mr. Shearouse:

Elizabeth Franklin-Best is currently on the Supreme Court roster to argue Robert Anthony James on June 20, 2012. Please be advised that Elizabeth Franklin-Best has left our office and I will be arguing Robert Anthony James. My name should be added on the case as counsel at this time. Warren Todd Ferguson from our office will add labels to the Brief of Petitioner and Appendix.

Should you have any questions, please do not hesitate to contact our office.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH:kam

cc: Robert D. Corney, Esquire

Hopkins, Debbie

From: Robert M. Dudek <RDudek@sccid.sc.gov>
Sent: Thursday, April 26, 2012 3:36 PM
To: Hopkins, Debbie
Cc: Susan Hackett; Kimberly McCall
Subject: Robert James v. State

Debbie:

Susan Barber Hackett will argue this case before the Court for our office on June 20, 2012. We will send over labels and attach them to the brief of petitioner and the Appendix. We will obviously send a cover letter explaining this adjustment also. Please let me know if you have any questions or concerns. Thank you –

Bob
734-1955

Robert M. Dudek
Chief Appellate Defender
Commission on Indigent Defense
Appellate Division
PO Box 11589
Columbia, South Carolina 29211
(803) 734-1330

The Supreme Court of South Carolina

Robert Anthony James, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

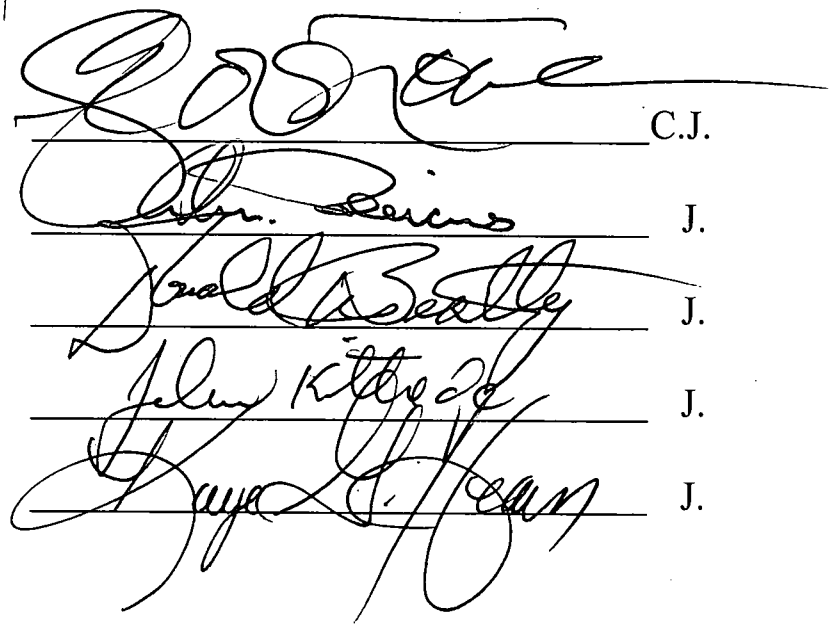
Petitioner seeks a writ of certiorari to review the decision of the South Carolina Court of Appeals in this case. The petition is granted, and petitioner shall file thirteen (13) additional copies of the appendix with this Court by April 20, 2012.

This case is hereby scheduled for oral argument on June 20, 2012. To ensure that this matter is ready for argument, the brief of petitioner shall be served and filed by April 20, 2012, and the brief of respondent shall be served and filed by May 10, 2012. Any reply brief must be served and filed by May 15, 2012.

Finally, the parties to this appeal are warned that no extensions of these time periods will be granted except for the most exceptional of

circumstances. Counsel for the petitioner and respondent should ensure that they are available to conduct arguments on June 20, 2012.

IT IS SO ORDERED.



C.J.

J.

J.

J.

J.

Columbia, South Carolina

April 3, 2012

cc: Appellate Defender Elizabeth A. Franklin-Best
Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General Robert D. Corney
Ernest Charles Grose, Jr, Esquire
Tara Marie Schultz, Esquire

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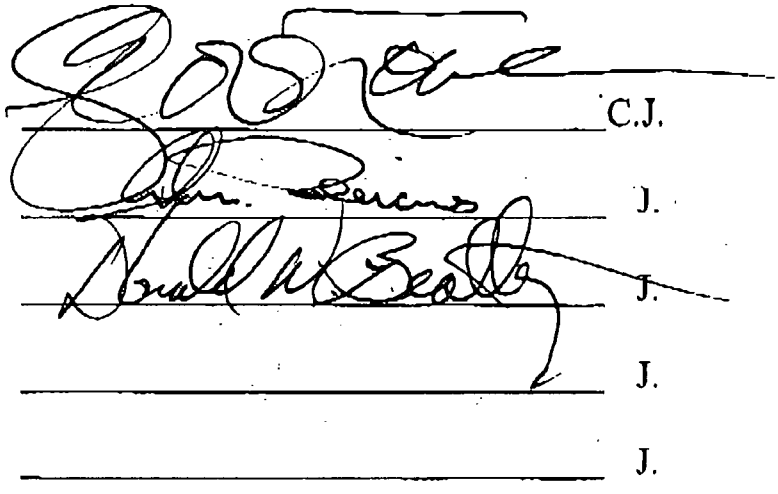

C.J.

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Columbia, South Carolina

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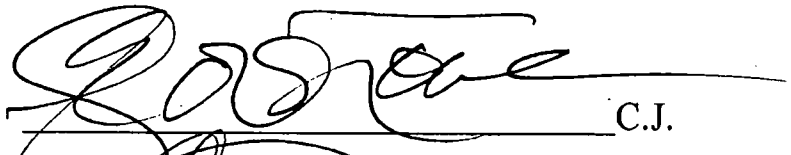

C.J.

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Columbia, South Carolina

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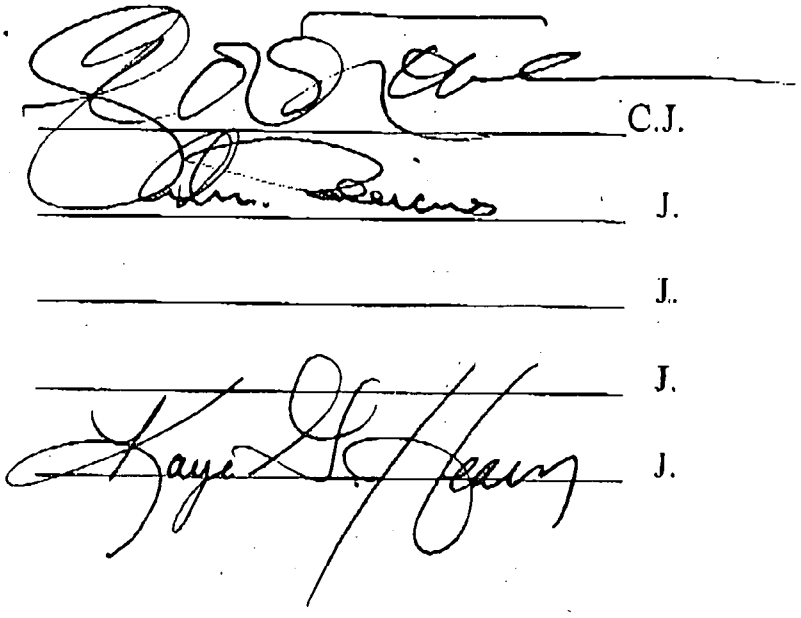

C.J.

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Columbia, South Carolina

ORIGINAL

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

PETITION FOR WRIT OF CERTIORARI

ELIZABETH A. FRANKLIN-BEST
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ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether the Court of Appeals incorrectly found that petitioner did not receive ineffective assistance of counsel when his attorney failed to raise a violation of his right to a speedy trial under the Sixth Amendment and when petitioner was prejudiced because, had a proper motion been made, it would have been granted by the trial court judge?

STATEMENT

Petitioner Robert James was indicted by the Richland County grand jury in August 1999 for armed robbery, possession of a firearm or knife during commission of a violent crime, assault with intent to kill, two counts of kidnapping, and first-degree criminal sexual conduct. After a September 1999 trial before the Honorable Costa M. Pleicones and a jury, petitioner was sentenced to forty years in prison.

Petitioner appealed and Wanda H. Carter submitted a brief to the Court of Appeals pursuant to Anders v. California, 386 U.S 738, 87 S.Ct. 1396 (1967), briefing one arguable issue and moving to be relieved as counsel. The Court of Appeals affirmed petitioner's conviction on March 21, 2001 and granted the petition to be relieved.

Petitioner filed an application for post-conviction relief on August 8, 2001, alleging his trial counsel and appellate counsel were ineffective. The state filed its return on March 26, 2002 and requested an evidentiary hearing. Petitioner, represented by Tara D. Shurling, filed an amended application on January 7, 2005.

The Honorable Alison R. Lee convened an evidentiary hearing on January 14, 2005 in Columbia, South Carolina. Shurling represented petitioner and Arie Bax represented the state. At the hearing, petitioner alleged his trial counsel was ineffective for failing to hire an expert to refute the state's DNA evidence that tied his brother, and thus petitioner, to the rape; improperly advising him not to testify; failing to object to improper jury instructions; failing to move to quash the indictment for failing to comply with Rule 3(c), SCRCrimP; failing to object to prosecutors being sole witness before the grand jury; failing to object to application of amended armed robbery statute; failing to argue his motion for a speedy trial; failing to move for a mistrial when jurors slept;

failing to challenge state's theory that petitioner lived with his brother (who was connected by DNA to the rape); and failing to impeach the medical doctor on the inconsistencies between his report and his testimony. PCR counsel also argued that appellate counsel was ineffective for failing to petition the South Carolina Supreme Court for review of the denial of his direct appeal.

Petitioner and his trial counsel, John Shupper, both testified at the PCR hearing. Petitioner submitted several exhibits as well. Judge Lee denied and dismissed the application in a written order filed August 22, 2005. The order did not address the issue of ineffective assistance of appellate counsel and PCR counsel did not file a motion to alter/amend judgment under SCRCP Rule 59 (e).

Counsel timely filed a petition for writ of certiorari which was granted by the Court of Appeals. After oral argument on October 19, 2011, the Court of Appeals issued its unpublished opinion on October 27, 2011. Counsel then filed a petition for rehearing that was denied on December 20, 2011.

This petition for writ of certiorari now follows.

ARGUMENT

The Court of Appeals incorrectly found that petitioner did not receive ineffective assistance of counsel when his attorney failed to raise a violation of his right to a speedy trial under the Sixth Amendment and when petitioner was prejudiced because, had a proper motion been made, it would have been granted by the trial court judge.

RELEVANT FACTS

Petitioner, Robert James, spent 993 days in pre-trial detention, awaiting his trial on criminal sexual conduct, 1st degree, armed robbery, kidnapping, assault with intent to kill, and possession of a firearm during commission of a violent crime charges, alleged to have occurred on or about May 29, 1996. He was served with his first arrest warrant on December 30, 1996 and placed in jail. He informed his attorney in 1997 that he wanted his case speedily resolved. Later, he filed two *pro se* motions asking for a speedy trial. The court and his lawyer ignored his wishes, although his lawyer did file for a bond reduction motion in April 1999, over 820 days after his arrest. He was still unable to make bond and continued to sit in the detention center. On the day of his trial, his lawyer asked to dismiss the charges for the state's failure to grant him a speedy trial, although he conceded that he was unaware of any authority that would entitle his client to that relief. The judge denied the motion. Petitioner continued to trial, rejected a mid-trial plea offer of 15 years, was convicted and sentenced to 40 years in prison.

Trial counsel was ineffective for failing to argue to the trial court judge that petitioner's case should be dismissed because the state violated his rights to a speedy trial, as guaranteed by the Sixth Amendment and S.C. Constitution, article I, § 14. Instead, he argued that under S.C. Code §17-23-

90 (1976), and a South Carolina Supreme Court order, it was unclear that a dismissal of the charges would even be an appropriate remedy for his client's complaint:

> MR. SHUPPER: Okay. If your Honor please. This was defendant's *pro se* motion which I was just recently given a copy of. I on behalf of Mr. James would just assert that the constitutional section reference gives the Chief Justice the authority to set the dockets. And I must admit that there is seemingly a great deal of confusion as to whether the speedy trial act, section 17-23-90, in fact gives a right to a dismissal. Although the language of the statute seems to say that, the Chief Justice directive and order dated March 5th of 1999 seems to conflict with that by clearly stating, "This order does not create or define a right of defendant to a speedy trial." I've tried to explain that to my client. . . .[1]
>
> But I would ask that the court, that this court take the matter under consideration and respectfully request that in a light most favorable to Mr. James take the order literally and dismiss the charge.

App. 33, l. 18—35, l. 17. *Cf.* Barker v. Wingo, 407 U.S. 514, 522 (1972) (Dismissal . . . "is the only possible remedy.")

S.C. Code Ann. §17-23-90 (1976) addresses the failure of the state to indict a defendant for an offense, and states:

> If any person committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term to be brought to his trial shall not be indicted some time in the next term after such commitment, the judge of the circuit court shall, upon motion made in open court the last day of the term either by the prisoner or anyone in his behalf, set at liberty the prisoner upon bail, unless it appear to him, upon oath, made, that the witnesses for the State could not be produced at the same term. And if any person committed as aforesaid, upon his prayer or petition in open court the first week of the term to be brought to his trial, shall not be indicted and tried the

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[1] Counsel is referring to a South Carolina Supreme Court Order that states: Pursuant to Article V, §4 of the South Carolina Constitution, IT IS ORDERED that all criminal cases in the State of South Carolina shall be disposed of 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. This order does not create or define a right of a defendant to a speedy trial." /s/ Ernest A. Finney, Jr., Chief Justice, dated March 5, 1999.

second term after his commitment or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

The judge denied petitioner's speedy trial motion:

> THE COURT: Yeah. Well, you know, I'd be a lot more inclined had this been in front of a judge and the judge had ordered a trial date to—I'm not unsympathetic to you now, because this is a horrendous delay and it's really not terribly well explained. But I don't think that the situation in our state requires dismissal of the charges. So I'm not going to dismiss the charges based on the arguments that I've heard thus far.
>
> And particularly owing to the fact that I have heard no argument relating to prejudice to the defense in this case. So, in any event, the motions are denied. We'll proceed with the trial.

App. 44, ll. 14-25.

At the PCR hearing, counsel testified that he knew, from speaking with petitioner's prior counsel, that his client expressed a desire for a speedy trial. App. 1416, l. 24- 1417, l. 8. Still, it was not until April 1999 that he even filed a motion for a bond reduction on his client's behalf. Counsel testified at the hearing that he could not find any legal authority that would have required dismissal of petitioner's charges for failing to provide his client with a speedy trial. App. 1418, l. 24- 1419, l. 5.

The Order of Dismissal made the following findings regarding the issue:

> The record also reflects that the applicant filed a *pro se* motion for a speedy trial approximately four to six months before the trial. Counsel was not aware of the motion until after Applicant filed it. The record does not reflect that Applicant discussed the motion with his attorney before he filed it. Once filed, trial counsel argued the motion on behalf of his client articulating all the issues of concern to his client. There is no evidence of any concern about a speedy trial until Applicant filed the motion himself. There is no evidence that Applicant discussed any concerns about the timeliness of the trial with his attorney before filing the motion.

App. 1498.

To review, briefly. On the day that trial was scheduled to begin, petitioner's counsel made a motion before the judge to have his client's charges dismissed based on a South Carolina statute and a court administrative order. Counsel conceded that he did not believe his client's motion was meritorious, but argued it nevertheless on his client's behalf. The trial court judge, based on that less-than-vigorous argument, and especially considering that counsel did not make any argument concerning prejudice, denied the motion. Counsel testified at the PCR hearing that he was unaware of any legal authority that would have provided his client with dismissal of the charges for the state's failure to provide him with a speedy trial. Then, in reviewing the allegation of ineffectiveness for failing to raise a federal speedy trial or state constitutional claim, the PCR judge found that counsel articulated "all the issues of concern" that petitioner had about his lengthy, and inexplicable, nearly 3 year pre-trial detention and denied relief.

Petitioner was denied his right to a speedy trial, and counsel should have made the argument to the trial court. If he had, it would have been granted because there is ample authority requiring the dismissal of charges for a violation of the right. Respectfully, trial counsel's performance fell well below the standard of reasonableness under professional norms, and petitioner was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The PCR judge's order is predicated upon an error of law, and should be reversed. Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009); Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009).

In assessing petitioner's speedy trial claim, the following dates are relevant:

Date	**Action**	**Citation**

May 29, 1996	Crime date	Indictment
December 30, 1996	Served with armed robbery arrest warrant	App. 32, ll. 23-24
February 17, 1997	Public defender appointed	App. 43, ll. 20-23
September, 1997	Trial counsel appointed	App. 43, ll. 20-24
April, 1998	*Schmerber* hearing	App. 38, ll. 9-11
July 13, 1998	Case docketed for trial	App. 33, ll. 10-13
Specific date unknown, 1998	*Pro se* speedy trial motion filed	App. 35, ll. 9-13.
April 26, 1999	*Pro se* speedy trial motion filed	App. 32, l. 25
April, 1999	Bond reduction motion. Discussion of trial in 30-60 days	App. 37, ll. 8-17
August 11, 1999	Indicted	Indictment
September 29, 1999	Trial date	
From arrest to trial, **993 days**.		

In Doggett v. United States, 505 U.S. 647 (1992), the United States Supreme Court outlined the analytical framework for assessing speedy trial claims. There are four relevant inquires: (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. Id. at 651. See Barker v. Wingo, 407 U.S. 514 (1972); State v. Evans, Op. No. 4641 (filed December 30, 2009); State v.

Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). And see Vermont v. Brillon, 556 U.S. ___ (2009).

In order 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." Id. at 652 (*quoting* Barker at 530-531). The Supreme Court notes in footnote 1 that, depending on the nature of the charges, lower courts have generally found post-accusation delay "presumptively prejudicial" as it approaches one year. Id. The South Carolina Supreme Court found, in State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), a two-year and four-month delay sufficient to trigger further review. Under both federal and state standards, petitioner's 993 days suffices to trigger a review of his claim.

A review of the relevant facts relative to the second criterion compels the conclusion that the state is wholly responsible for the delay. The state initially served its warrant on petitioner on December 30, 1996. Forty-nine days later, petitioner was assigned a public defender. Through no fault of his own, his case was conflicted out of the public defenders office, and trial counsel was appointed on his case on some date in September, 1997. Seven months after trial counsel was appointed, and 16 months after he was arrested, the state scheduled a *Schmerber*[2] hearing to extract petitioner's DNA. The state did not show, nor did it argue, that this was a contested hearing, requiring, perhaps, a delay to respond to petitioner's objections. The state made no such showing in this case. Indeed, the hearing was necessary for the state's prosecution of its case, so any time that may have been involved with the hearing's scheduling is attributable to the state. The DNA analysis in this case excluded petitioner as being a source of the semen found in the victim.

The state then scheduled this case for trial since, in South Carolina, it controls the docket, and it was scheduled for trial for the week of July 13, 1998. App. 33, ll. 10-13. See S.C. Code Ann. §1-7-330 (1976):

> **Attendance at circuit courts; preparation and publication of docket.** The solicitors shall attend the courts of general sessions for their respective circuits. Preparations of the docket 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. *Provided*, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term. (emphasis in original).

As the case was not indicted-- and would not be for the next 17 months—the case was obviously not called for trial on that date. At some point in 1998, petitioner asserted his right to a speedy trial by filing a *pro se* motion. He made another request on April 26, 1999. A bond reduction motion was held at that time and the parties discussed trying the case within 30-60 days, suggesting the case could have been tried at the end of June, 1999. Again, this did not occur because the case was not indicted for another 2 months. The state finally indicted the case, and thus was able to try the case, on August 11th, 1999, 953 days after petitioner was served with an arrest warrant.

This entire delay in bringing petitioner to trial is attributable to the state because the state controls the docket in South Carolina, and because the petitioner did not take a single step to delay his case. Vermont v. Brillon, 556 U.S. ____ (2009). *Cf.* State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978) (finding that defendant contributed to the delay and did not assert his right to a speedy trial.) The state did not even bother to have petitioner's case indicted until nearly 2 and half years

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[2] Schmerber v. California, 384 U.S. 757 (1966).

had elapsed from the time of his arrest. Knowing that the DNA test it conducted excluded petitioner as a source of the semen in the victim, it took no steps to quicken the resolution of his case. App. 949, 1.14- 956, l. 22. These facts militate in favor of dismissing petitioner's charges for failing to grant him his right to a speedy trial:

> *Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. 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 at 657.

It is a relevant consideration for petitioner's speedy trial claim that the state sought DNA evidence from him in April 1998, which then *excluded him,* and then the state waited an additional 17 months to try his case. Perhaps fearing a possible acquittal, the state—since it controls the trial docket—then assigned his case a lower priority. There being no judicial oversight, the state was free to leave petitioner in the county jail until whenever it wanted to give him a trial. This fact weighs heavily in favor of granting petitioner's speedy trial claim. And see Chief Justice Toal Delivered State of Judiciary Address on February 25, 2009 at 15:15 (available at http://www.judicial.state.sc.us/whatsnew/displayWhatsNew.cfm?indexId=503 (*last visited* January

11, 2010) (acknowledging that some solicitors manage weaker cases by allowing defendants to sit in jail until they plead).

Petitioner asserted his right to a speedy trial. It is undisputed that counsel knew that petitioner wanted his case speedily resolved. The record shows that former counsel informed him of that fact:

> Q: Did you file a motion for a speedy trial in this case?
>
> A: My client had filed one *pro se* which I was not advised of until sometime after he had done it, and I—we had talked about it as I had—I had concerns about the time that he had been in jail without being called to trial, and the—what I found from the—in my investigation of the facts and circumstances related to these accusations were that the victims had—both had criminal histories, and a lot of the focus of the investigation was on the victim's background, was also I believe—talked to Mr. Roberson (petitioner's former counsel) and was told that at some point there had been a—there may have been a motion and I don't recall whether it was on a speedy trial or a bond reduction motion but that I recall that there was some discussion that should the case not come to trial soon that a bond reduction motion would be appropriate and that I'm not absolutely certain but I think that it was something to the effect that the judge said if the case isn't brought to trial in such and such a period, then we'll revisit the issue of reduction in bond.

App. 1416, l. 15- p. 1417, l. 8 (emphasis added).

Trial counsel knew, then, that at some point during February 17, 1997 to September, 1997 (the time during which Roberson was representing petitioner) that his client was attempting to have his case speedily resolved. Also, petitioner's brief in support of his post-conviction relief claim on this issue states that he told his attorney repeatedly that the wanted a speedy trial, but that his attorney told him he needed to continue to be patient. App. 1485, para. 2. At the PCR hearing, the state did not refute this claim. Additionally, petitioner filed two motions for a speedy trial. Then, counsel requested a hearing for a bond reduction motion based on the length of his incarceration. At that time, it was discussed that the case would be tried within 30-60 days. That did not occur. Petitioner

employed every device at his disposal to assert his right. See Barker at 531 ("The more serious the deprivation, the more likely a defendant is to complain.") To the extent that counsel did not act on his client's wishes, that fact buttresses petitioner's ineffectiveness claim. And see Barker at 529 ("[T]he rule we announce today, which comports with constitutional principles, places the *primary burden* on the courts and the prosecutors to assure that cases are brought to trial.") (emphasis added). If this Court holds that it is not ineffectiveness on the part of counsel to have failed to bring petitioner's speedy trial claim in an appropriate manner, then an additional burden is being placed on defendants to assert the speedy trial right. If it is not sufficient for a defendant to have notified counsel of his desire, filed two *pro se* motions, and had a bond reduction hearing, in order to sufficiently invoke the right, then South Carolina is not providing sufficient procedures for defendants to protect the right, and is denying them meaningful access to the court system. Indeed, in many other states, statutes provide the mechanism by which these claims can be raised.[3] South

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[3] See Alaska Rule Crim. Pro. 45(d); Arkansas Rules of Criminal Procedure 27-30. Speedy trial; California Penal Code Ann. §1381. Imprisonment or commitment; time for trial of other offenses, dismissal.; Colorado Revised Statutes Annotated §18-1-405. Speedy trial; Connecticut General Statues Annotated §43-39. Speedy trial- time limitations; Georgia Code Annotated §17-7-170: Demand in noncapital cases; Idaho Code Annotated §19-3501. When action may be dismissed; 725 Illinois Compiled Statutes 5/103-5. Speedy trial; Indiana Revised Code §2941.401; Iowa Code Ann. Rule 2.33. Dismissal of prosecutions; right to speedy trial; Kansas Statutes Annotated 22-34-02. Discharge of persons not brought promptly to trial; Kentucky Penal Code §500.110. Trial of prisoners on untried indictment within 180 days after prisoner's request for final disposition; Louisiana Code of Criminal Procedure, Article 701. Right to speedy trial; Mississippi Code Ann. §99-17-1; Vernon's Annotated Missouri Statutes 545.780. Speedy trial, when—what constitutes—failure to comply not grounds for dismissal; exceptions. Montana Code Annotated §46-13-401. Dismissal at instance of court or prosecution; Nebraska Revised Statute §29-1207. Trial within six months; time; how computed; New York Criminal Procedure Law §30.30. Speedy trial; time limitations; Ohio Revised Code §2945.71(c), provides for trial within 270 days; Oregon Revised Statute §135-747. Dismissal for delay in bringing to trial; Utah Code §77-1-6. Rights of defendants; West Virginia Trial Court Rule 16.04. Time

Carolina, by contrast, does not have such a statute, and thus criminal defendants are even more reliant on their attorneys to appropriately assert their rights in this respect.

Petitioner was prejudiced by the delay between his arrest and trial dates. As the United States Supreme Court has observed, unreasonable delay threatens to produce more than one sort of harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by the loss of memories and exculpatory evidence. Doggett at 2692 (*quoting* Barker at 532). Petitioner was significantly prejudiced because he was incarcerated for 993 days before he was brought to trial. And see United States v. Loud Hawk, 474 U.S. 302, 312 (1986) ("[T]he Speedy Trial Clause's *core concern* is impairment of liberty.") (emphasis added). And see Doggett (defendant granted relief even though he was released on bond and the Court found that Doggett "did indeed come up short" with respect to showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence.) Petitioner's inexplicable three year pre-trial detention is ample prejudice under a speedy trial analysis, especially when taken in conjunction with other factors. It is not fatal to his claim that he cannot now-- three years after his arrest-- pinpoint precisely the manner in which his defense was compromised by the delay. "[W]e 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." Id. at 655 (emphasis added). Courts presume the prejudice to the accused "intensifies over time." Id. at 652.

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standards for criminal cases; Virginia Code Annotated §19.2-243: Limitation on prosecution of felony due to lapse of time after finding probable cause; misdemeanors; exceptions.

Nevertheless, petitioner can show that he was prejudiced by the state's failure to call his case to trial. As petitioner outlines in his application for post-conviction relief, the victim changed her story significantly from the time of the events until the time of trial. Also, petitioner was prejudiced because his would-be alibi witness, Henretta Jordan, was no longer certain of the date or time she was with him. App. 1484- 1491.

It is also relevant, in considering petitioner's claim, that, although the charges are serious, the prosecution of this case was not complex. Indeed, the state, for the most part, called percipient witnesses and law enforcement witnesses. The state also called Dr. Smithson, a local doctor. App. 889, l. 21- 890, l. 2. It called a paralegal from the parent company of South Carolina Electric & Gas to testify to a utility bill. App. 887, l. 6- p.888, l. 15. This was not a difficult case to prosecute, in the sense that there were out of state witnesses or professional expert witnesses whose schedules needed to be taken into account. See Barker, 407 U.S. at 530- 531: "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." The nature of this case then, militates in favor of granting petitioner's speedy trial claim.

Additionally, the defense did not call any expert witnesses, did not request any competency evaluations, nor make any continuance motions. See State v. Pittman, 373 S.C. 527, S.E.2d 144 (2008). These facts militate in favor of granting petitioner relief.

The state did not extend plea offers until close to the time of trial. During the trial itself, the state offered petitioner 15 years. App. 1411, l. 8-1412, l. 16. This was not, then, a case where petitioner had led the state to believe he was going to plead, but then changed his mind. The state never had any reason to suppose this was anything other than a trial. Additionally, the offer, during trial, of 15 years, supports petitioner's claim that the state perceived this to be a weak case against

him. These facts militate in favor of petitioner's grant of relief. Also, petitioner did not receive any benefit from the delay, a fact which, too, militates in favor of granting him relief. *Cf.* State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2001).

It is also relevant to the Court's analysis that the state was not prepared to try the case until August 11th, 1999—953 days after the arrest warrant was served-- when it finally had the case indicted. The state simply allowed petitioner to languish in the county jail for nearly 3 years before it even indicted his case. This fact is especially egregious in light of the fact that, in South Carolina, the state controls the docket system. Without judicial oversight to ensure that defendants are not left to do "solicitor time" in the county jail, it weighs heavily against the state that they attached no priority at all to petitioner's case until nearly three years after the first warrant was served. The solicitor's response, at trial, was essentially that this is just the way things operate in South Carolina:

> [Solicitor]: And this is the first time that either of the defense attorneys or any of the defense attorneys for these defendants have requested to enforce the speedy trial law in South Carolina. In that regard, I believe that neither side has shown any undue prejudice.
>
> My understanding, the only way I know it- I agree that it's difficult to interpret Chief Justice Finney's written order. We all know as all of us practicing members of the bar that cases, that probably less than ten percent of our case load in Richland County or Greenville County or in Charleston County, your major counties; and if you look at court administration statistics, some of your smaller counties, are disposed of within 120 days.
>
> So based on my interpretation of that, is that if a defense attorney makes a motion to enforce the procedural 180-day rule and that if a circuit court judge then sets the trial date, that is when this whole idea of a specific written order continuing the criminal case for exceptional circumstances kicks in. That's my only way I can interpret that since we all know as officers of the court that that 180-day rule is literally violated in 85 percent of the criminal cases in South Carolina, not this circuit.

So if they would attempt—and I don't know very many private bar or public defenders want their case to come to court within 180 days.

THE COURT: Well, these guys did though.

App. 40, l. 14- p. 41, l. 14. (emphasis added).

In other words, the solicitor argued that it is up to the defendant to insist that he have his day in court, and he has to invoke the power of a circuit court judge to do so. Not only is this in violation of South Carolina's statute regarding solicitor control of the docket, but the United States Supreme Court has expressly rejected the argument that it is the defendant's burden to bring himself to trial in both Doggett and Barker. These facts militate in favor of granting petitioner the relief that he requests.

Recently, the 6th Circuit Court of Appeals in United States v. Ferreira, No. 09-5903 (filed November 30, 2011), 2011 WL 5965835 (C.A.6 (Tenn.)), dismissed the indictment for a defendant who the state waited 35 months to try. In ruling, the court stated:

> *Dixon*[4]'s holding that a three-and-a-half year delay necessitates a finding of presumptive prejudice is in keeping with decisions from two of our sister circuits. In *United States v. Erenas-Luna*, the Eighth Circuit applied Doggett and concluded that a three-year delay between indictment and arraignment caused by "the serious negligence of the government" was excessive enough to trigger a presumption of prejudice. 560 F.3d 772, 780 (8th Cir. 2009). Likewise, in *United States v. Ingram*, the Eleventh Circuit held that a two-year, post-indictment delay caused by egregious government negligence allowed the court to presume prejudice in the fourth *Barker* prong. 446 F.3d 1332, 1339 (11th Cir. 2006).

The length of time between petitioner's arrest to trial in this case was egregious by any measure, and it warrants the dismissal of petitioner's indictments.

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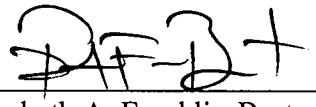
[4] Dixon v. White, 210 F. App'x 498, 499 (6th Cir. 2007)(unpublished opinion).

Trial counsel was ineffective for failing to argue that petitioner's charges be dismissed for failing to grant him a speedy trial. Had counsel raised the correct arguments, he would have been granted relief because there is compelling legal authority to support dismissal of the charges. Counsel, instead, was completely unaware that his client was entitled to federal speedy trial protections. His performance was woefully inadequate and his performance prejudiced petitioner. Strickland v. Washington, 466 U.S. 668 (1984). For this reason, petitioner is entitled to relief, and he respectfully asks this Court to grant his petition for writ of certiorari.

CONCLUSION

For the preceding reason, petitioner respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of January, 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 a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Brian Petrano, Esquire this 17th day of January, 2012.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of January, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021.

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAR 16 2012
S.C. Supreme Court

CERTIORARI TO THE COURT OF APPEALS

The Honorable Alison Renee Lee, Circuit Court Judge
Case No. 2001-CP-40-03299

ROBERT ANTHONY JAMES, ... PETITIONER,

v.

STATE OF SOUTH CAROLINA, ...RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

1. Probative evidence supports the PCR court's findings that Petitioner failed to carry his burden in proving that counsel's arguments in support of the motion constitute deficient performance and in proving such alleged deficient performance resulted in prejudice.

2. The argument raised through *Amicus Curiae* in this matter improperly diverts the actual issue before this Court as argued on appeal and therefore does not meet the requirements under Rule 213, SCACR, as it is not "limited to ... the issues...as presented by the parties"; further, the issue is not preserved for appellate review as the PCR court did not rule on whether counsel was ineffective in failing to challenge the constitutionality of S.C. Code § 1-7-330 (1976), nor was the issue raised to the PCR court.

STATEMENT OF THE CASE

Petitioner is currently incarcerated in the South Carolina Department of Corrections pursuant to orders of the Richland County Clerk of Court. Petitioner was true bill indicted at the August 1999 term of the Richland County Grand Jury for two (2) counts of Armed Robbery, two (2) counts of Possession of a Firearm or Knife During the Commission of or Attempt to Commit a Violent Crime, Assault with Intent to Kill, two (2) counts of Kidnapping, and Criminal Sexual Conduct in the First Degree. He was represented by John Shupper, Esquire, on the charges. On September 20, 1999, Applicant proceeded to jury trial before the Honorable Costa M. Pleicones and on September 24, 1999, the jury found Petitioner guilty of all charges as indicted. Applicant was sentenced to thirty (30) years imprisonment for Criminal Sexual Conduc and concurrent terms as follows: thirty (30) years for count two of Armed Robbery, thirty (30) years on each count of Kidnapping, ten (10) years for Assault with Intent to Kill and five (5) years on each count of Possession of a Weapon, all to be followed consecutively by ten (10) years imprisonment for count one of Armed Robbery, for a forty (40) year aggregate sentence.

A Notice of Appeal was filed and an appeal was perfected. By order dated March 21, 2001, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Petitioner subsequently filed an application for post-conviction relief on August 8, 2001 The State made its Return on March 26, 2002. An evidentiary hearing was convened on January 14, 2005, at the Richland County Courthouse. Applicant was present and represented by counsel, Tara Shurling, Esquire. The State was represented by Arie D. Bax, Esquire, of the South Carolina Attorney General's Office. At the hearing, Petitioner testified on his own behalf. Also testifying was John B. Shupper, Esquire, Petitioner's former trial counsel. By order dated August

19, 2005, and filed August 22, 2005, The Honorable Alison Renee Lee denied and dismissed Petitioner's PCR application with prejudice.

Thereafter, Petitioner filed a Petition for Writ of Certiorari on February 27, 2008. On January 6, 2009, the South Carolina Supreme Court transferred the matter, per Rule 227(l), SCACR, to the Court of Appeals.[1] The Court of Appeals granted certiorari on December 14, 2009, and the matter proceeded to briefing. On October 19, 2011, the Court heard oral arguments and subsequently issued an unpublished opinion on October 27, 2011, affirming the convictions and sentences. James v. State, 2011-UP-480 (S.C. Ct. App. filed October 27, 2011). The petition for rehearing was denied on December 20, 2011.

This Return to Petition for Writ of Certiorari follows.

1 Now cited as Rule 243(l), SCACR.

STATEMENT OF FACTS

On the evening of May 28, 1996, Victim and Winfred Bull (hereafter "Bull") met at Bull's house at roughly nine o'clock in the evening. (App. pp. 566, ln 25 – p. 567, ln 6). The two left Bull's house shortly after and drove to T.S. Martin Park where they watched an on-going softball game. (App. pp. 569, ln 13 – 570, ln 25). At the end of the game, they left to get food at a fast food restaurant, then returned to the park to a nearby picnic bench to talk. (App. pp. 571, ln 1 – p. 573, ln 24).

After several minutes, they were approached by two men walking through the park, one of whom stopped and asked to borrow a lighter. (App. pp. 574, ln 18 – p. 575, ln 4). As Bull reached into his pocket to pull out his lighter, the man requesting the lighter pulled out a gun and grabbed Bull, placing the gun against Bull's head. (App. p. 575, lns 8 – 13; p. 577, lns 9 – 20). Victim would later identify this first perpetrator as Petitioner. (App. p.p 576, ln 23 – p. 577, ln 6). At that instant, three additional men ran out of the bushes to the picnic table where one of the men grabbed Victim and began to demand money from the two. (App. p. 577, lns 11 – 12; p 578, 1 – 5). Victim would later identify this suspect as Petitioner's co-defendant brother, Kenneth James (hereafter "James"). (App. p. 580, lns 2 – 7). After being told by the victims they did not have any money, the perpetrators stripped Victim and Bull of their clothes and began to demand car keys. While stripping Victim of her clothes, James found Victim's car keys hidden in Victim's dress. (App. p. 578, lns 1 – 5; p. 580, lns 19 – 22). James passed the keys to two of the perpetrators who then began to search victim's car, eventually taking several purses from her trunk. (App. p. 581, lns 15 – 16). During that time, James threw Victim against the back of a chair and began to rape her. (App. pp. 582, ln 2 – p. 583, ln 23). When he was finished, the perpetrators dragged Victim and Bull to a nearby wooded area, where four of the five

perpetrators "took turns" sexually assaulting Victim, raping her and forcing her to perform fellatio. (App. pp. 584, ln 4 – p. 585, ln 24). Victim testified Petitioner was the second of the group to assault her with all of the remaining men either raping or attempting to rape her thereafter, but was adamant that James never left her side during the entirety of the attack. (App. p. 586, lns 11 – 24; p. 623, lns 4 - 20). Several of the men were wearing condoms during the assault, and ultimately two used condoms and four condom wrappers were found at the scene by police. (App. p. 590, lns 15 – 19; App. p. 539, lns 11 – 13).

During the attack on Victim, a struggle ensued between Bull and the perpetrators restraining him, during which Bull was able to get free and flee the scene. The perpetrators fired several shots at Bull as he ran away but all shots missed. At the end of the assault, three of the men then ran from the scene, leaving only Petitioner and James with the victim. (App. p. 592, lns 5 – 7). The two men dragged Victim to a mausoleum in the nearby cemetery where James again raped Victim before leaving her alone inside the structure. (App. p. 593, ln 3 – 21).

After several minutes, Victim came out of the mausoleum almost entirely nude and made her way to her car. (App. pp. 594, ln 17 – p. 595, ln 9). Once there, she was met by a police cruiser carrying Bull. (App. p. 595, lns 18 – 24). Victim was taken to Richland Memorial Hospital where she was fully examined and tested by doctors. (App. p. 596, ln 7 – p. 598, ln 16). A Sexual Assault Kit was performed on Victim at that time as well. (App. pp. 890 – 903). Later that morning, Victim was also shown a photo-lineup from which she picked Kenneth James, Petitioner's brother, as one of the perpetrators. (App. pp. 599, ln 23 – p. 603, ln 6; p. 826, lns 10 - 21). A search warrant was executed on James' house on May 30, 1999. (App. pp. 831, ln 17 – p. 835, ln 5). On June 18, 1996, Victim was again presented with a photo-lineup, at which time she

identified Petitioner as a second participant in the brutal attack. (App. pp. 603, ln 7 – p. 605, ln 14; p. 841, lns 3 - 18).

At trial, Charles Murray ("Murray") testified he was preparing to ride his bike home from his mother's house on Germany Street on the night in question when he was approached by a scared, bloody, and paranoid Bull on the house's front porch. (App. p. 667, lns 2 – 14). Murray stated Bull ran up to him asking him to call the police because his girlfriend was being raped in a nearby park. (App. p. 667, lns 9 – 20). Murray's mother allowed Bull to use the phone to call police, after which Murray, his stepfather and Bull waited outside. While outside waiting for police to arrive, the group saw five black men walk by Murray's mother's house in two groups from the direction of the park, at which time Bull identified them as the perpetrators of the assault. (App. p. 672, lns 6 – 25; p.711, ln 18 – p. 712, ln 14). Murray, as a long-time resident of the neighborhood, recognized three of the men in the group, two of whom were Petitioner and James. (App. p. 673, ln 11 – p. 674, ln 24).

Additionally, Ira Jeffcoat ("Jeffcoat"), the DNA Lab Supervisor for South Carolina Law Enforcement testified he oversaw the DNA testing performed as a result of Victim's Rape Kit in this case. Jeffcoat received the initial Rape Kit on May 31, 1996 at which time it was logged and stored for later testing (App. pp. 937, ln 16 – p. 941, ln 3). Due to SLED policy, the samples were sent back to the submitting agency six months later on March 1997 as no suspect DNA was available at that time. (App. p. 942, lns 8 – 25). The materials in Victim's Rape Kit were returned back to SLED for DNA analysis on May 15, 1997, at which time Jeffcoat was made aware that the State would be moving to have the suspects' DNA samples drawn to be used in testing. (App. p. 943, lns 7 – 25; p. 948, lns 18 - 25). The Schmerber hearing to have such blood drawn was eventually convened in April of 1998. (App. p. 38, lns 9 – 11). Jeffcoat received

Petitioner and James' blood samples for testing shortly thereafter on May 14, 1998. (App. p. 951, lns 3 – 12). Ultimately, James was a DNA match for the semen found as a result of the Rape Kit, while Petitioner was excluded as a potential donor. (App. pp. 956, ln 1 – 957, ln 20).[2]

2 While the record does not establish an actual DNA Analysis Report date issued by SLED, Jeffcoat testified to performing DNA analysis testing at least through August 12, 1998. (App. p. 997, ln 6).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'any evidence' of probative value" exists to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

1. **Probative evidence supports the PCR court's findings that Petitioner failed to carry his burden in proving that counsel's arguments in support of the motion constitute deficient performance and that such alleged deficient performance resulted in prejudice.**

   A. Probative evidence supports the PCR court's finding that Petitioner failed to carry his burden in proving counsel's arguments in support of the speedy trial motion constitute deficient performance.[1]

Petitioner alleges counsel was ineffective in raising the speedy trial motion and not achieving dismissal of the indictments. However, the motion was raised only five days before trial, so no speedy trial violation occurred. Further, any delay incurred was beneficial to Petitioner. Additionally, counsel articulated the motion reasonably, and his performance was not deficient.

Under the deficiency prong of an ineffectiveness claim, attorney performance is measured by reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Evidence of probative value supports the PCR court's finding that counsel's articulation of Petitioner's speedy trial motion was reasonable under professional norms.

Petitioner appeared for the start of trial before The Honorable Costa Pleicones on September 25, 1999, represented by counsel. During pre-trial motions, counsel presented Petitioner's motion for dismissal of the indictments due to an alleged speedy trial violation under S.C. Code § 17-23-90 (1976), requesting "the Court...take the matter under consideration and...in a light

[1] Petitioner did not set forth any allegation that counsel was deficient in his performance for failing to raise the speedy trial issue at some earlier point in his representation; therefore, this issue has been abandoned for appellate review. See State v. Tyndall, 336 S.C. 8, 17, 518 S.E.2d 278, 282 (Ct. App. 1999); See also Rule 208(b)(1)(B), SCACR (Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal).

most favorable to [Petitioner] take [Chief Justice Finney's] order literally and dismiss the charge[s]." (App. p. 35, lns 14 – 17). In support of the motion, counsel advised the Court Petitioner was arrested on December 30, 1996, and appointed an attorney from the Public Defender's Office roughly two months later. (App. p. 28, lns 13 – 17). Counsel said that due to the Office's on-going representation of Petitioner's co-defendant brother, Petitioner's appointed attorney was relieved and Nathaniel Roberson, Esquire, was appointed as new counsel. (App. p. 28, lns 17 – 20; p. 38, lns 1 – 4). Counsel went on to say in September of 1997, a personal conflict arose between Roberson and Petitioner, at which time Roberson was relieved and counsel took over representation of Petitioner. (App. p. 28, lns 18 – 21; p. 38, lns 2 – 5; p. 43, lns 20 – 24). Counsel stated Petitioner filed a *pro se* motion for speedy trial on April 26, 1999, which he was not aware of until just prior to the start of the September 25th trial. (App. p. 33, lns 18 – 20; lns 1 - 2).

Counsel presented the motion to the Court, articulating Petitioner's grounds for dismissal of the indictment premised on the fact that "[Petitioner] clearly [had] been incarcerated since December of 1996," and, because there were no orders continuing the case beyond the statutory time period of one-hundred and eighty days, "the State should have proceeded to trial and disposed of [the] charges" long before the September 1999 trial date. (App. p. 35, lns 3 – 8). After allowing Petitioner the opportunity to add any information and/or argument in support of the motion, the Court denied Petitioner's request finding that although Petitioner suffered a "horrendous delay" caused by factors "not terribly well explained" by either side, there had been insufficient evidence "relating to prejudice to the defense" presented to prove a speedy trial violation had occurred. (App. p. 44, lns 17 – 18, 22 – 24).

Counsel was reasonable in his presentation of the speedy trial motion despite little reference to resulting prejudice as there was no prejudice to Petitioner's defense which counsel could have presented. In fact, the alleged "undue delay" between Petitioner's arrest and eventual trial was advantageous to Petitioner's defense. Counsel's testimony at the PCR hearing supports this theory and, therefore, counsel's failure to point to specific instances of prejudice as part of his argument during the motion hearing was reasonable.

First, the delay allowed Petitioner the opportunity to vie for an independent trial where he could present his case without the burden of a highly incriminating sibling co-defendant to whom Petitioner could be linked through circumstantial evidence. According to counsel's PCR testimony, he and Petitioner were operating under a specific defense strategy to allow Petitioner's co-defendant, Kenneth James (hereafter "James"), the opportunity to accept an outstanding plea offer from the State prior to Petitioner's case being called for trial in an effort to guarantee Petitioner avoided a joint-trial. While the State had initially represented its intention to try the co-defendants separately, counsel used the delay as an opportunity to ensure the State could not try Petitioner with James as it would be devastating to Petitioner's chances at trial. As stated by counsel, he and Petitioner "were proceeding under a theory that...the State had announced intentions from the time of [his] involvement that they were going to plead [James]...and [he] felt [that] was to [Petitioner]'s advantage." (App. p. 1411, lns 11 – 17). Further, counsel "felt the weight of the evidence, the greater weight, the quality and quantity of the evidence, was directed to [James] and there was circumstantial evidence linking [Petitioner] to [James]." (App. pp. 1412, ln 22 – p. 1413, ln 20). The evidence against James included a positive DNA match, the victim's unwavering identification of James, and eyewitness

identifications from a nearby gas station shortly after the attack where James allegedly requested change for a one-hundred dollar bill (the same denomination of money stolen from victim's boyfriend during the attack).

In counsel's view, the disparity in incriminating evidence between the co-defendants, having Petitioner's case tried separately was the most critical concern for counsel in the months leading to trial. Waiting for James to enter a plea prior to Petitioner proceeding to trial was the only way counsel could be absolutely certain Petitioner would not be subjected to a joint-trial. Counsel made a reasonable strategic decision to allow the matter to be delayed from trial in an effort to guarantee Petitioner proceeded to an independent trial. See Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992)(Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective), *citing* Stokes v. State,308 S.C. 546, 419 S.E.2d 778 (S.C. 1992); see also Whitehead v. State,308 S.C. 119, 417 S.E.2d 529 (1992)(Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective). Although James ultimately chose not to accept the State's plea offer in August of 1999, counsel's sound strategy was valid and reasonable, and other benefits were gained by the trial being delayed.

Once James rejected the plea offer and the State gave notice that the co-defendants would in fact be tried jointly, counsel began to prepare a motion for severance, further stressing the importance of separate trials to Petitioner's defense. A motion for severance was filed by counsel and presented to the court through a pre-trial motion hearing, but was denied by the trial court. Counsel testified he became "very, very concerned" once his "efforts to get the trial severed had failed", and opined he "still believe[d] the outcome might have been different had there been

separate trials" for James and Petitioner. (App. p. 1412, lns 14 – 16; p. 1432, lns 11 – 12). In light of the magnitude of incriminating evidence against James, counsel undertook reasonable strategic steps to avoid Petitioner being subjected to a joint-trial including allowing Petitioner's trial date to be severely delayed. This strategy limited counsel's ability to later present a prejudice argument to the trial court as Petitioner fully intended to take advantage of the delay to strengthen his chances of acquittal at trial.

Petitioner contends counsel should have pointed to an alibi witness' fading memory as a specific instance of prejudice to support the pre-trial motion. Specifically, Petitioner alleges his defense was prejudiced by the delay as his former girlfriend, Henretta Jordan (hereafter "Jordan"), was not able to testify on his behalf as an alibi witness because she could no longer be certain whether she had been with Petitioner on the night of the incident due to her fading memory. However, when asked about witnesses' fading memories at the PCR hearing, counsel testified that although there were "certainly lapses in [witnesses'] recollections when [he] got involved in the case" in September of 1997, Jordan's "memory" of the night in question seemed influenced by the victim's positive identification of Petitioner as one of the assailants and not by the passage of time or fading of memory. (App. pp. 1436, ln 19 – p. 1437, ln 2). Based on counsel's testimony regarding this alleged alibi witness, it would have been unreasonable, and perhaps unethical, for counsel to argue that Petitioner's defense was prejudiced as a result of Jordan's fading memory, when in fact counsel perceived Jordan's changed in story as a result of learning her boyfriend was positively identified as a rapist.

Petitioner also contends counsel could have pointed to potential changes in witness and victim testimony as a ground for prejudice in presenting the motion. Again, counsel was not

unreasonable in not presenting this argument as any inconsistencies between witnesses' testimonies and their prior statements would prejudice the State's ability to prosecute the charges, not Petitioner's ability to defend against them.

There is evidence of probative value to support the PCR court's finding that counsel acted reasonably and within the range of competence required by attorneys in articulating Petitioner's speedy trial motion. Therefore, his performance was not deficient. Counsel was unable to present specific instances of prejudice to Petitioner's defense because the delay between Petitioner's arrest and trial was not prejudicial, but beneficial, to Petitioner.

B. Probative evidence exists to support the PCR court's finding that Petitioner failed to prove, had counsel argued the speedy trial motion as Petitioner alleges he should, the trial court would have granted the speedy trial motion and dismissed the indictments.

The PCR court properly found counsel was not ineffective in his articulation of Petitioner's speedy trial motion because Petitioner could not establish sufficient resulting prejudice to make a finding of ineffectiveness pursuant to Strickland v. Washington, *supra*. Specifically, even if counsel had set forth the arguments Petitioner alleges he should have, Petitioner's motion still would have been denied as he failed to meet the requirements for a speedy trial violation. Further, because Petitioner's right to speedy trial was asserted for the first time only five days before trial, dismissal of the indictments would have been an inappropriate remedy. State v. Robinson, 335 S.C. 620, 626, 518 S.C. 269, 272 (Ct. App. 1999)(finding a one year delay between filing of formal motion and trial date is insufficient to warrant dismissal of indictments).

As a preliminary matter, it is important to note the four relevant factors to be considered by a court when assessing an alleged violation of right to speedy trial are as follows: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of the right and (4) resulting

prejudice to the defendant. Barker v. Wingo, 407 U.S. 514 at 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Because Petitioner cannot satisfy the four prongs of Barker, he is unable to prove resulting prejudice based on counsel's alleged deficiency in arguing the motion.

Length of Delay

The record indicates Petitioner was arrested for the charges on December 30, 1996, and held in custody until his case was called for trial roughly two years and nine months later on September 20, 1999.[2] The South Carolina Supreme Court has held, while not dispositive standing alone, a three year and five month delay between arrest and trial is sufficient to trigger a full speedy trial violation review as set forth under the four-part balancing test in Barker. *See* State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997). The Court in Brazell went on to note that although a delay in calling the matter to trial may be lengthy, the Court must balance the remaining Barker factors in making its determination, specifically with regard to when the defendant asserted the right and any alleged resulting prejudice. Brazell 325 S.C. at 75, 480 S.E.2d at 70.

Assertion of Right to Speedy Trial

The delay incurred after counsel asserted Petitioner's right to speedy trial was minimal. Petitioner drafted a *pro se* motion for speedy trial on April 26, 1999, which trial counsel was not aware of until September 15, 1999, less than one week before the start of Petitioner's trial. (App. pp. 32, ln 24 – p. 33, ln 2). [3] The PCR court found counsel's PCR testimony to be credible

[2] A portion of the six month delay between the actual incident (May 29, 1996) and Petitioner's arrest (December 30, 1996) may be attributable to Petitioner's on-going incarceration for Receiving Stolen Goods, according to counsel's PCR testimony. (App. p. 1423, lns 15 – 20).

[3] State law does not permit or recognize "hybrid representation," that is, representation that is partially by counsel and partially *pro se*. *See*, e.g., Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). The transcript shows counsel

regarding his knowledge of Petitioner's *pro se* motion, saying "counsel was not aware of the motion until after [Petitioner] filed it" and "there is no evidence that Applicant discussed any concerns about the timeliness of the trial with his attorney". (App. p. 1498, lns 4 – 5; lns 8 - 9).[4] On September 20, 1999, Petitioner appeared before Judge Costa Pleicones, at which time his case was called for jury trial. During the pre-trial motion hearing, counsel was able to articulate a violation of Petitioner's right to speedy trial for the first time. Trial counsel informed the Court that, although Petitioner alleged he also filed a *pro se* speedy trial motion sometime in 1998, he was unable to obtain a copy of the motion to present to the court, nor was there any other evidence presented to indicate such a motion was in fact filed. (App. p. 35, lns 9 – 13).

Petitioner explained to the trial court he waited "seven to eight months" after trial counsel took over his representation to file the *pro se* speedy trial motion.[5] (App. p. 42, lns 21 – 23).[6] The Court in Barker stressed the importance of a defendant's assertion of the right to a speedy trial saying, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Id. at 532, 92 S.Ct. 2182. In State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), the Court noted it was "significant that [defendant], represented by counsel, waited approximately twenty-eight months" before asserting his right to speedy trial and/or claiming such a right had been violated. Waites 270 S.C. at 109, 240 S.E.2d at 653. In this instance,

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was appointed roughly in September 1997, and this motion was submitted *pro se* well after counsel took over representation ; therefore, the motion was clearly impermissible hybrid representation.

[4] Petitioner's contention that counsel "knew from speaking with...prior counsel" that Petitioner wanted a speedy trial is a mischaracterization of the testimony presented at the PCR. In fact, counsel testified that based on his discussions with prior counsel, he knew "there may have been a motion and [he] didn't recall whether it was on a speedy trial or a bond reduction". (App. p. 1416, ln 24 – p. 1417, ln 2). Further, there is no mention of when this conversation took place to impute such knowledge to counsel.

[5] Solicitor Gasser specifically noted the State's problem with Petitioner's *pro se* speedy trial motion: "When a defendant has counsel, we are not allowed to – under the Rules, we are not allowed to communicate with the defendant. So these defendants have consistently had counsel since December of 1996." (App. p. 40, lns 6 – 9).

[6] Judge Pleicones commented on Petitioner's statements regarding the *pro se* motion for speedy trial, saying "You should have let [counsel] know about [your *pro se* motion]... That would be helpful." (App. p. 42, lns 24 – 25).

Petitioner also waited approximately twenty-eight months to assert his right to speedy trial through an improper *pro se* motion (i.e. December 30, 1996 until April 26, 1999). In fact, it wasn't until a full thirty-two months after Petitioner's arrest that counsel became aware of Petitioner's *pro se* motion requesting a speedy trial and was thereafter able to properly bring the matter before the Court. (App. p. 32, ln 24 – 25).

Based on the above, Petitioner did not validly "assert his right" to speedy trial until September 15, 1999, when counsel learned of Petitioner's desire for a speedy trial and was able to present the formal motion to the Court. Petitioner's case was called for trial within five days and, therefore, the delay between Petitioner's assertion of the right and the time at which the matter was called for trial was minimal. State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999)(finding speedy trial rights were not violated where the case was tried within ten months after the first formal motion was filed, even though it took five years to go to trial.) Even scrutinizing the delay incurred between Petitioner's *pro se* filing of the improper *pro se* motion on April 26, 1999, and the start of trial, Petitioner suffered only a five month delay between assertion of the right and the case being called for trial. Therefore, the delay incurred between Petitioner's assertion of the right and the matter being called for trial was minimal.

Reason for the Delay

Even assuming Petitioner's right to speedy trial was asserted sometime prior to September, 1999, Petitioner has failed to prove the delay in calling the matter to trial was attributable to the State in any way. Petitioner's assertion that the "entire delay...is attributable to the State" is an unfounded and unsupported conclusion, inconsistent with the facts contained in the record before this Court.

First, nothing in the record suggests the State played any role in Petitioner having two previously appointed attorneys relieved from their representation during the first year of Petitioner's incarceration.[7] Petitioner's assertion that "any time that may have been involved with the [Schmerber] hearing's scheduling is attributable to the State" fails to take into account the repeated changes in counsel during the first nine months of Petitioner's incarceration. The record reveals the Public Defender's office was relieved from its representation of Petitioner after alleging a conflict of interest arising from its simultaneous representation of Petitioner's co-defendant brother.[8] Identifying and remedying such conflict situations is the responsibility of solely the Public Defender's office. Additionally, subsequently appointed counsel, Nathaniel Roberson, had a personal conflict with Petitioner for which he was relieved sometime around September of 1997. (App. p. 28, lns 13 – 21; p. 1428, lns 13 – 18). Because of this continuous turnover in representation, the State incurred much difficulty scheduling the Schmerber v. California hearing.[9] Ultimately, the Schmerber hearing was convened in April of 1998, at which time the State was finally able to obtain court permission to draw a sample of Petitioner's DNA for analysis. (App. p. 38, lns 1 – 11). "A valid reason [for the delay] presented by the State may

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[7] Of particular interest to this point is the Public Defender Association's contention that the initial nine month delay incurred during the appointment process is attributable to the State as it has an "obligation to appoint" "conflict-free counsel" as soon as practicable for a defendant. (Brief of *Amicus Curiae* of the Public Defender Association, p. 21, fns 17 & 18). This implication of the States' "duties" appears to be both ironic and paradoxical in light of the Association's ultimate conclusion that the State should not, and cannot, be charged with the duty of manging the General Sessions Court docket and/or case load. Further, the PDA's footnote goes on to assert the nine-month delay was caused by a "breakdown of the Public Defender system" (i.e. the very entity they represent), but then attempts to link such a breakdown to state action/inaction. Respondent submits it is in fact the duty of the Public Defender, not the State, to determine if a conflict exists within the office due to dual representation. Any delay incurred as a result of failing to identify or otherwise manage that conflict is attributable to the Public Defender's Office.

[8] The fact that the same county Public Defender's Office was appointed to represent co-defendants does not, in and of itself, support Petitioner's contention that a conflict of interest existed sufficient to be relieved from Petitioner's representation. See for example Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998)(No actual conflict of interest resulted from Public Defender's representation of defendant while others in county Public Defender's office represented defendant's co-defendants.)

[9] Schmerber v. California, 384 U.S. 757 (1966).

justify an appropriate delay." State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007); *citing* Barker, *supra*. The State articulated an entirely valid and logical reason why there was extreme difficulty in moving the case to trial during the first year of Petitioner's incarceration. Further, once the blood standards were taken from Petitioner and James for DNA analysis, the case was at a standstill for several months in anticipation of the results. The record reflects that, following the Schmerber hearing, Petitioner's blood standards were transported to SLED for DNA analysis on June 24, 1998. (App. p. 951, lns 3 – 7). While the record fails to set forth a date on which SLED issued its finalized report and findings from the testing, it is clear it was sometime after August 12, 1998, as the testing was still on-going at that time. (App. p. 997, lns 5 – 6; p. 999, lns 18 – 19).[10]

Petitioner's assertion that any delay due to the on-going DNA testing is attributable exclusively to the State as it "was necessary for [its] prosecution" manifestly ignores key facts set forth in the record. While the State may have been relying on the pending DNA results as a seemingly crucial part of its prosecution, counsel was also relying on the results to be used as the very foundation of Petitioner's defense to show he was **not** one of the assailants in the attack. At the PCR, counsel testified it was his recollection, based on his discussions with Petitioner, that "Petitioner never indicated he was around, that he was involved, that he was a part of [the crimes]...[Petitioner] maintained his innocence". (App. p. 1425, ln 24 – p. 1426, ln 1). Counsel went on to say he "was operating under the theory that [Petitioner] wasn't there" during the commission of the crimes. (App. p. 1426, lns 3 – 4). Counsel also noted he and the State "had

[10] With this date in mind, it is clear that Petitioner's case was not tried during the July 13, 1998, term as scheduled because the results of the DNA analysis had not yet been returned at that time. (App. p. 33, lns 10 – 13). Petitioner's claim that the case was "obviously not called for trial" in July, 1998, because the charges had not been indicted is erroneous in light of counsel's desire to receive the results of the DNA test prior to proceeding to trial.

frequent discussions" and attempted to try the case for "close to ten months", but that because of the on-going DNA testing, the bond reduction hearing, and other "various and sundry reasons", the case was delayed until the September, 1999, term. (App. p. 1425, ln 4; p. 37, lns 8 – 17). Clearly, where counsel was preparing a defense under the theory that Petitioner was not present and played no part in the crimes, DNA results conclusively excluding Petitioner would be critical to support that theory at trial. Counsel was relying on the Petitioner's assertions that he was not present at the incident in the hopes that the DNA results would be beneficial to the defense. Therefore, it is reasonable to believe Petitioner's own counsel played a role in delaying the trial pending the final SLED DNA report.

Further, it appears some delay in the trial(s) going forward is attributable to co-defendant counsel's inability to appear at the earlier scheduled August 1999 trial date due to a scheduling conflict. In the pre-trial motion hearing, counsel stated, "Mr. Strickler had a [conflicting] trial at the time when these trials were originally scheduled", necessitating the matter be continued and rescheduled. (App. p. 12, lns 6 – 10). This delay is not attributable to either the State or Petitioner.

Nothing in the record establishes this alleged "unreasonable" delay was in any way caused by the state stalling or otherwise manipulating the trial docket. As in Pittman, the record before this Court "does not reflect any intentional or malicious delays by the prosecution, nor does the record reflect any negligent prosecutorial behavior in connection with this case" Pittman at 552, 647 S.E.2d 144, 157. Further, the record does not support Petitioner's assertion that the State is "more to blame" than Petitioner for the delay incurred between arrest and trial.

Resulting Prejudice to Defendant

Finally, Petitioner's allegations do not meet the fourth prong of the Barker test for a speedy trial violation. "The United States Supreme Court has said the most serious interest to be protected by the guarantee to a speedy trial is the possibility of impairment to the defense." State v. Pittman, *supra* at 550, 155 – 156. It is important to note this Court has held that even a delay of five years was sufficient to trigger a speedy trial analysis **without** finding a presumption of prejudice; therefore, the trial and PCR courts did not err in finding the same. Pittman at 551, 156 (2007); *citing* State v. Foster, 260 S.C. 511, 515, 197 S.E.2d 280, 281 (1973). The trial court relied heavily on this prong in denying the pre-trial motion, saying Petitioner failed entirely to demonstrate any resulting prejudice to his defense based on the delay and, therefore, was not entitled the relief requested. (App. p. 44, lns 23 – 25). Further, the time spent incarcerated pre-trial on very serious charges should not alone constitute sufficient prejudice to justify dismissal of the case. See State v. Kennedy, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) (We are unwilling, however, to hold that the prejudice he suffered by his pretrial incarceration is sufficient to warrant dismissal of his charges for a speedy trial violation.). As explained below, any arguments Petitioner alleges counsel should have made at the motion hearing would not have made any difference on the outcome of the motion. Therefore, Petitioner cannot prove resulting prejudice.

Petitioner's allegation that he "did not receive any benefit from the delay", but rather had his defense prejudiced, is a mischaracterization of the evidence and facts before this Court. Considering the results of the DNA test cleared Petitioner of any connection to the DNA specimen(s) recovered from Victim via the Rape Kit, the Petitioner benefited significantly from

any delay caused by awaiting the DNA test results. The DNA test results explicitly excluding Petitioner as a donor of the semen found was a key point stressed by counsel at trial to bolster Petitioner's defense and place reasonable doubt in the jurors' minds. (App. p. 1262, lns 3 – 10; p. 1263, lns 10 – 12; p. 1264, lns 10 – 16).

Petitioner also sets forth the supposed testimony of the alleged "alibi" witness, Henretta Jordan. Petitioner states Jordan was no longer able to testify on his behalf at trial as she could not be certain of whether she was with Petitioner on the night of the incident due to the passage of time. Jordan ultimately did not testify at trial, nor did she testify at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998)(This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.) Without her testimony at the PCR, there is no way to substantiate that she was willing to provide testimony at trial, that she would have ever been able to establish an alibi, or that she was ever even involved in this case. Therefore, Respondent submits Petitioner cannot prove prejudice based on this supposed alibi witness' fading memory.[11]

Further, Petitioner claims he was specifically prejudiced by the delay as victim's story changed "significantly from the time of the events until the time of trial". Any inconsistencies in the victim's testimony prejudiced the State's ability to prosecute, not Petitioner's ability to defend. Counsel testified the fading memories of the parties created inconsistencies in state

[11] As mentioned previously, counsel testified Jordan's alleged "fading memory" was due to the victim's positive identification of Petitioner and not necessarily the passage of time. (App. p. 1436 – 1437). Petitioner has failed to submit any evidence/testimony to prove this alibi witness' testimony would have established an alibi or otherwise made any difference at trial.

witnesses' testimony which allowed him to effectively challenge "the validity of the [state's] eyewitness identification" through cross-examination. (App. p. 1437, lns 3 – 9). The victim and eyewitness identifications were key pieces of evidence for the defense to overcome during the trial; the inconsistencies that arose in their testimony allowed counsel to call into question the accuracy and reliability of their identifications of Petitioner. In fact, during closing arguments counsel used these inconsistencies to stress the defense theory that this was a case of mistaken identification, using the fading memories of the states' witnesses to Petitioner's advantage. (App. pp. 1252, ln 7 – p. 1261, ln 3).

Based on this analysis, Petitioner did not, and cannot, satisfy his burden in proving that had counsel articulated the speedy trial motion in a different way, the trial court would have granted it and dismissed the indictments against Petitioner.

2. The argument raised through *Amicus Curiae* in this matter improperly diverts the actual issue before this Court as argued on appeal and therefore does not meet the requirements under Rule 213, SCACR, as it is not "limited to ... the issues...as presented by the parties". Further, the issue is not preserved for appellate review as the PCR court did not rule on whether counsel was ineffective in failing to challenge the constitutionality of S.C. Code § 1-7-330 (1976).

A. The argument raised by the Public Defender's Association through *Amicus Curiae* improperly diverts the actual issue before this Court as it attempts to raise an issue not properly preserved for appellate review.[12]

The *Amicus Curie* brief filed by the South Carolina Public Defender's Association is of little consequence to the matter presented before this Court as it attempts to divert the issue currently raised on appeal to one of counsel's deficiency in failing to present a criticism of existing S.C. Code § 1-7-330 at the pre-trial motion hearing. Further, the issue was not raised or ruled upon at

[12] Also worth noting, direct appeal issues are inappropriate for post-conviction relief actions. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); see also Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); S.C. Code § 17-27-20(b) (1976).

the PCR hearing, and there was no Rule 59(e), SCRCP, motion filed suggesting the PCR judge failed to rule on the issue of the constitutionality of S.C. Code § 1-7-330. Accordingly, the *amicus curiae* brief goes beyond the issue raised on appeal herein and is therefore improper under Rule 213, SCACR.

B. Counsel was not deficient in failing to challenge the constitutionality of S.C. Code § 1-7-330 as counsel is not required to be clairvoyant or anticipate future changes in the law.

Should this court deem it proper to turn to the merits of the *Amicus Curiae*, counsel was not deficient in his performance for failing to challenge the constitutionality of S.C. Code § 1-7-330 (1976). The South Carolina Supreme Court has repeatedly held "[w]e never require an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); See also Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993); see also Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992); Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1992); Kirkpatrick v. State, 306 S.C. 359, 412 S.E.2d 389 (1991). At this juncture, S.C. Code § 1-7-330 is valid, controlling state law under which preparation of the dockets for general sessions courts is vested in the circuit solicitor. As set forth in Gilmore, counsel was not required to be clairvoyant or anticipate such a law would be changed at some future point in time, especially in light of the fact that such a change in law has not occurred regarding S.C. Code § 1-7-330 to date. Therefore, even if this Court turns to the merits of the *Amicus Curiae,* there can be no finding that counsel was not deficient in this regard.

C. Petitioner has failed to prove that, had counsel challenged the constitutionality of S.C. Code 1-7-330 during Petitioner's speedy trial motion hearing, the Court would have agreed that the statute is unconstitutional and dismissed Petitioner's indictments.

Counsel was not ineffective in failing to present an argument on the constitutionality of S.C. Code § 1-7-330 during Petitioner's speedy trial motion hearing as the statute is constitutional and, therefore, Petitioner cannot prove the necessary prejudice to validate such a finding. The statute is constitutional as it is necessary to carry out the principles set forth in the Article I, Section 8, separation of powers clause of the South Carolina Constitution.

Section 1-7-330 of the South Carolina Code provides as follows:

> 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. Provided, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term.

S.C. Const. Art. I, § 8, provides as follows:

> 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 of any other.

As stated by the Court in State ex rel. McLeod v. McInnis:

> One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.

278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982). The purpose of the separation of powers is carried out through the system established by section 1-7-330. The Solicitors function in their role in the executive branch to carry the laws into effect by deciding the cases to be brought to trial and when. Further, the courts of the state maintain their right to oversee and provide the necessary check of the executive power through judicial remedies such as continuances, sanctions, and dismissal of cases.

As this Court pronounced:

> We hold that the solicitor has authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, 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 beyond the term or for postponement to a date later within the term. In the calling of cases for trial the solicitor has a broad discretion in the first instance, and the trial judge has a broad discretion in the final analysis.

State v. Mikell, 257 S.C. 315, 322, 185 S.E.2d 814, 817 (1971); see also, State v. Ridge, 269 S.C. 61, 64, 236 S.E.2d 401, 402 (1977) ("In this State, the entering of a nolle prosequi at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a nol pros at that time."). This Court has recognized the separation of powers, with the executive branch charging decisions including calling the case, and the judicial branch providing the oversight through remedies such as continuances, dismissal for violation of a right to a speedy trial, and sanctions or dismissal for other abuses by the Solicitors. This Court has acknowledged these fact appropriate checks and balances are in place with regard to administration of the docket.

Additionally, Article V, Section 4 of the South Carolina Constitution provides as follows:

> The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. . . . The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. . . . The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

This provision related to the administrative functions of the Supreme Court and the Chief Justice clearly presupposes the "rules governing the practice and procedure in all such courts" to be subject to statutory law, which would include the statutory rule under section 1-7-330 granting the power to Solicitors to decide which cases should be called for trial. See e.g., State v. Flood, 257 S.C. 141, 146, 184 S.E.2d 549, 552 (1971) ("The solicitor has a broad discretion deciding the order in which cases are called").

Further, S.C. Const. Art. V, Section 4 empowers the Chief Justice to set the terms of court that are available within a particular county and the judges to sit in any court. The *amicus* claims there is a potential for judge shopping by the solicitor under the current system where solicitors can "learn which judges will be likely to rule favorably" for the State and ensure certain cases are presented before those judges. The brief goes on to note that, in this particular case, even the trial judge "acknowledged being confused about the [speedy trial] issue", perhaps attempting to point to such an improper motive by the solicitors in this case. It is important to note Petitioner's trial was convened before the Honorable Costa Pleicones during his time on the circuit court bench. As noted in the *amicus* brief, Justice Pleicones now serves as the Committee Chair for the General Sessions Court Committee section of the Docket Management Task Force, the entity currently dissecting the solicitor managed docket issue. Surely the solicitor did not

"judge shop" Petitioner's case, nor gain any tactical advantage, in having Petitioner's speedy trial motion heard before a judge who may have demonstrated manifest concerns with the solicitor's statutorily imposed duty to manage the docket.[13]

In Williams v. Bordon's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980), this Court determined the trial court has the inherent power to grant continuances so as to safeguard the rights of litigants. As a result, the Court found a statute purporting to limit or require when a court can exercise its inherent authority within the judiciary to grant or deny a continuance was unconstitutional. Nothing in S.C. Code § 1-7-330 prohibits, requires, or in any way affects the trial court's control and final say on whether a case goes forward through the grant or denial of a continuance. This check inherent to the judiciary remains intact and remains a strong device for curbing any possible abuse by the solicitor in calling a case to trial before the defendant has had a reasonable opportunity to prepare.

Further, another inherent judicial function can serve to prevent abuse by the Solicitor at the other end of the spectrum when he delays calling a case – a motion for speedy trial and ultimately a motion for dismissal based on a violation of the defendant's right to a speedy trial. While the facts of this case clearly do not support a grant of the motion, the judicial discretion to grant the motion can serve as deterrence to the prosecutor who clearly delays a trial for vindictive or other improper purposes.

Robinson suggests another remedy employed in that case.[14] Robinson notes that the Administrative Judge ordered the case set for trial after "the last of several status conferences."

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[13] Further, neither the Petition for Writ of Certiorari nor the *Amicus Curiae* set forth any instance where the any of the five alleged "potentials for abuse" occurred in Petitioner's case. In fact, an overview of the record conclusively refutes that any one of the five alleged improper motives was carried out in Petitioner's case.

[14] State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999), cited previously.

An administrative judge could require a scheduling order or status conferences where delays become troubling, either *sua sponte,* or on motion made by defense counsel, that properly demonstrates the need for such judicial monitoring in a specific instance. This certainly seems a less drastic drain on limited judicial resources than complete administration of the docket by the judiciary, presumably the remedy put forward by counsel for the Public Defender's Association.

The *amicus* brief raises the purely speculative specter of numerous abuses perpetrated by Solicitors in control of the docket, frequently using the term "potential for abuse". The vast majority are clearly remediable by the checks inherent in the judiciary such as the ability to grant a continuance and the ability to dismiss a case. Other potential abuses may only occur when one presumes bias on the part of the judiciary or assumes judges will take into consideration the factor that a Solicitor chose to bring a case before that judge.

When one branch of government has a check which limits the other branch's ability to abuse its power, the separation of powers established in Article I, section 8 of the South Carolina Constitution is effectuated. As a result, there is no separation of powers violation by having the executive branch responsible for charging decisions including what case to call and the judicial branch having the final say on which cases move forward and whether any remedies are necessary to curtail abuse by Solicitors.

Additionally, the terms of court and assignment of judges to preside over terms of court are determined by the judicial branch. See S.C. Const. Art. V, Section 4. The terms of court and rotating or random assignment of judges to the terms of court are subject to change by the judicial department at any time upon order of the Court. The solicitor's control over administering the criminal docket is limited by the assignment of terms and judges and because

case scheduling is subject to motions for continuance and other matters that are not subject to the solicitor's docketing discretion but are matters solely with the control of the courts.

Further, there is no valid due process violation argument to be made against the current system of administering the docket. Due process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property. State v. Brown, 182 S.E. 838, 841 (S.C. 1935). The United States Supreme Court has stated:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (internal citation omitted). The procedure of administration of the dockets by the Solicitors subject to the judicial "final analysis" protects the due process rights of the defendant and ensures the right to a fair and impartial trial.

The federal courts examining whether a defendant's due process rights have been violated by a particular method of assigning a case to a judge generally agree there is no due process violation without proof of prejudice suffered. See generally, United States v. Gallo, 763 F.2d

1504, 1532 (6th Cir.1985) ("'a defendant does not have the right to have his case heard by a particular judge,' does not 'have a right to have his case selected by a random draw,' and 'is not denied due process as a result of the error unless he can point to some resulting prejudice.'") (quoting Sinito v. United States, 750 F.2d 512 (6th Cir.1984)); Sinito, 750 F.2d at 515 (same); United States v. Erwin, 155 F.3d 818, 825 (6th Cir.1998) ("Even when there is an error in the process by which the trial judge is selected, or when the selection process is not operated in compliance with local rules, the defendant is not denied due process as a result of the error unless he can point to some resulting prejudice."); United States v. Forbes, 150 F.Supp.2d 672, 681-682 (D.N.J. 2001); Board of School Directors of City of Milwaukee v. Wisconsin, 102 F.R.D. 596, 598 (E.D.Wis.1984) ("Even a criminal defendant has no due process rights in the assignment of his case."); United States v. Keane, 375 F.Supp. 1201, 1204 (N.D.Ill.1974) (concluding that "a defendant has no vested right to have his case tried before any particular judge, nor does he have the right to determine the manner in which his case is assigned to a judge").

Finally, public policy supports the current system of administration of the docket, especially in light of the lack of a violation of due process or the separation of powers.

> The principal reasons prosecutors have been called upon to administer the dockets are fourfold: (1) neither circuit court judges nor clerks of court have the personnel, time or infrastructure to organize, publish and administer a criminal docket; (2) solicitors are elected to represent a hybrid of public safety and justice balanced with efficiency within their circuits; (3) prosecutors are uniquely well suited to know the nuances of individual cases and the availability of lay witnesses, law enforcement witnesses, as well as expert witnesses they routinely share with other circuits; and (4) since prosecutors are the ones called upon to provide an explanation for the current state of the criminal justice system, the muses thought it only fair to provide them with a few tools to actually impact the administration of the justice.

Gowdy, Trey, Criminal Dockets Administered by Prosecutors: Past Present and Future, The South Carolina Lawyer, (January 2010) at 24. Solicitors are responsive and held accountable by two groups – the public who elects them and the judges before whom they practice. The Solicitor faces reelection and as such, his record in moving cases efficiently and without abuses is an issue for the public's consideration. Further, as discussed above, the Solicitor must operate without abusing the system or the judge before whom he brings the case has numerous remedies at his disposal to provide a check on the Solicitor's actions. No other entity has such checks and balances in place to provide for the administration of the docket.

Accordingly, Petitioner has failed to demonstrate he was entitled to dismissal of the charges against him based on a violation of speedy trial even if counsel had set forth a constitutional argument against S.C. Code § 1-7-330. The delay in this case was reasonable in light of Petitioner's turnover in appointed counsel, counsel's defense strategies and theories, and Petitioner's failure to properly assert his right to speedy trial **through counsel** at an earlier juncture. Further, Petitioner cannot establish any resulting prejudice to his defense based on the delay. Finally, although the unrelated issue set forth in the *Amicus Curiae* Brief is not preserved for appellate review in this instance, the solicitor's duties in setting the docket did not result in the denial of a fair trial for Petitioner. Therefore, this Court should deny the Petition for Writ of Certiorari and affirm the findings set forth in the PCR court's Order of Dismissal.

CONCLUSION

For all of the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

ROBERT D. CORNEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

March 16, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
Honorable Alison R. Lee, Circuit Court Judge

Robert A. James, 261393,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and Motion to Relax Rule 242(f), SCACR and Exceed Page Limits has been served upon opposing counsel, Elizabeth Franklin-Best by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 16th day of March, 2012.

ROBERT D. CORNEY
ATTORNEY FOR RESPONDENT

SWORN to before me this 16th
day of March, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: My Commission Expires
January 30, 2013

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 21, 2012

Assistant Attorney General Robert D. Corney
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: James, Robert A. v. State of SC

Dear Counsel:

The following Order has been endorsed on your Motion to Relax Rule 242(f), SCACR and Exceed Page Limits in the above entitled case on appeal.

"Granted.

s/ Jean H. Toal C.J.
For the Court

March 21, 2012."

Please be advised that by copy of this letter we are advising all interested parties of the action by the Court.

Very truly yours,

Daniel E. Shearouse

CLERK

DES/lda

cc: Appellate Defender Elizabeth A. Franklin-Best
Ernest Charles Grose, Jr, Esquire
Tara Marie Schultz, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge
Case No. 2001-CP-40-3299

ROBERT ANTHONY JAMES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

MOTION TO RELAX RULE 242(f), SCACR AND EXCEED PAGE LIMITS

---

(1) This concerns the State's return to Petitioner's petition for writ of certiorari to the Court of Appeals challenging the Court of Appeals' determination that probative evidence supported affirming the PRC court's findings that counsel was not ineffective relating to a motion for speedy trial. Additionally, the Public Defender's Association was allowed to submit an *amicus curie* brief to this Court concerning the constitutionality of S.C. Code Ann. § 1-7-330. The petition for writ of certiorari is twenty pages. The amicus brief is twenty-five pages.

(2) The State's return to petition for writ of certiorari is in excess of twenty-five pages. Specifically, it is thirty-four pages in length. The State would move to relax Rule 242(f), SCACR, on the grounds that the additional length of the return is due to the necessity

of not only responding to the arguments in the petition for writ of certiorari, but also the amicus brief's arguments concerning the topic of the solicitor's "control" of the docket as well as its own discussion of the speedy trial issue. Further, the petition for writ of certiorari concerns the collateral attack of a conviction obtained after lengthy trial and the record on appeal is in excess of 1,500 pages, and the nature of the topic necessarily concerns discussion of the extensive procedural history of this case. Finally, it appears that this Court may be seeking to expedite this matter in light of the fact that Respondent was limited to only one extension and so Respondent wants to ensure that its full argument will be presented to this Court.

Respectfully Submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

ROBERT D. CORNEY
Assistant Attorney General

March 21, 2012

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 16, 2012

ALAN WILSON
ATTORNEY GENERAL

March 16, 2012

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

Re: **Robert A. James, 261393 v. State of South Carolina**
2001-CP-40-3299

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari and six (6) copies of the Motion to Relax Rule 242(f), SCACR and Exceed Page Limits in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return and Motion today.

Sincerely,

Robert D. Corney
Assistant Attorney General

Enclosures

cc: Elizabeth A. Franklin-Best, Esquire

The Supreme Court of South Carolina

Robert Anthony James, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

Respondent seeks a thirty day extension to serve and file the return in this matter. The motion is granted in part and respondent shall serve and file its return to the petition by March 16, 2012. Further, any reply to the return must be served and filed by March 26, 2012.

Further, any response to the brief filed by the amicus curiae must be served and filed by March 16, 2012. Thereafter, any reply by the amicus curiae must be served and filed by March 26, 2012.

The parties and amicus curiae are warned that no extensions of these time periods will be granted except for the most exceptional of circumstances.

C. J.
FOR THE COURT

Columbia, South Carolina

February 28, 2012

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Robert D. Corney
Ernest Charles Grose, Jr, Esquire
Tara Marie Schultz, Esquire

ALAN WILSON
ATTORNEY GENERAL

February 24, 2012

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

RE: **Robert Anthony James v. State of South Carolina**
Return to Petition for Writ of Certiorari

Dear Mr. Shearouse:

Attached, please find a copy of my Motion to File Respondent's Return to Petition for Writ of Certiorari Out of Time and Request for an Extension to File in reference to the Petition for Writ of Certiorari in the PCR matter of Robert Anthony James (Case No. 2001-CP-40-03299). I have been in touch with Linda Allen from the Court throughout the day regarding this matter and am filing this motion in accordance with our discussions. I apologize for any inconvenience I may have caused in inadvertently missing the filing deadline.

I appreciate your consideration into this matter.

Respectfully,

Robert D. Corney
Assistant Attorney General

cc: Betsy Franklin-Best, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
FEB 24 2012
S.C. Supreme Court

ON PETITION FOR WRIT OF CERTIORARI
From the South Carolina Court of Appeals

Case No. 2001-CP-40-03299
Richland County Court of Common Pleas
Honorable Alison Renee Lee, Circuit Court Judge

Robert Anthony James ..... Petitioner,

v.

State of South Carolina, ... Respondent.

Motion to File Respondent's Return to Petition for Writ of Certiorari Out of Time and Request for Extension of Time to File

The Respondent would respectfully show this Court:

The Respondent's Return to Petition for Writ of Certiorari was due on February 16, 2012. Respondent received service of the Petitioner's Petition for Writ of Certiorari on January 17, 2012, at which time Respondent calendared its due date for the Return to Petition on March 2, 2012, forty-five (45) days out. It appears the timeline for filing a Return to Petition for Certiorari from the Court of Appeals is thirty (30) days and not forty-five (45) days as in Certiorari from the court of common pleas. Therefore, Respondent inadvertently missed the filing deadline for its Return to Petition for Writ of Certiorari and now files this motion out of time.

The Respondent requests that this Court also grant an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari should this Court grant the Respondent's Motion to File Out of Time. No extensions have been requested yet by Respondent in this action.

WHEREFORE, for these reasons, the Respondent respectfully requests that this Court grant an extension of thirty (30) days in which to file the Respondent's Return to Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ROBERT D. CORNEY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
Attorneys for the Respondent

Columbia, South Carolina

February 24, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
FEB 24 2012
S.C. Supreme Court

Appeal From Richland County
Honorable Alison R. Lee, Circuit Court Judge

Robert A. James, 261393,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Motion to File Respondent's Return to Petition for Writ of Certiorari Out of Time and Request for an Extension has been served upon opposing counsel, Elizabeth Franklin-Best by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 24th day of February, 2012.

ROBERT D. CORNEY
ATTORNEY FOR RESPONDENT

SWORN to before me this 24th
day of February, 2012.

(L.S.)
Notary Public for South Carolina.
My Commission Expires: My Commission Expires
January 30, 2013

ALAN WILSON
ATTORNEY GENERAL

February 24, 2012

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

Re: **Robert A. James, 261393 v. State of South Carolina**
2001-CP-40-03299

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Motion to File Respondent's Return to Petition for Writ of Certiorari Out of Time and Request for an Extension in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Motion today.

Sincerely,

Robert D. Corney
Assistant Attorney General

Enclosures

cc: Elizabeth A. Franklin-Best, Esquire

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 24, 2012

Ernest Charles Grose, Jr, Esquire
600 Monument St.
Box P-133
Greenwood, SC 29646

Re: James, Robert A. v. State of SC

Dear Mr. Grose:

The following Order has been endorsed on your Petition of the South Carolina Public Defender Association for Leave to File and Amicus Curiae Brief in the above entitled case on appeal.

"Motion granted.

s/ Jean H. Toal C.J.
For the Court

February 24, 2012."

Please be advised that by copy of this letter we are advising all interested parties of the action by the Court.

Very truly yours,

CLERK

DES/lda

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Brian Petrano
Tara Marie Schultz, Esquire

Original

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

Petition of the South Carolina Public Defender Association for Leave to File and *Amicus Curiae* Brief

---

The South Carolina Public Defender Association petitions this Court for leave to file an *amicus curiae* brief in support of the petitioner, Robert James.

Statement of Interest of *Amicus Curiae*

The South Carolina Public Defender Association is a non-profit corporation created to promote and support advancement of indigent defense in the State of South Carolina. Membership in the Association is open to all attorneys whose statutory job responsibility is providing defense to indigents accused of criminal offenses in Federal, State, County, and Municipal Courts in South Carolina and to all attorneys in the Appellate Defender's Office. Public Defenders represent the majority of the people accused of crimes in General Sessions Court. A report from the Budget and Control

Board estimated that Public Defenders handled eighty-five percent (85%) of the cases disposed of in General Session Court in 2006.

In addition to providing direct representation, the PDA sponsors continuing legal education for its members and members of the private criminal defense bar who accept court appointments to represent indigent defendants. This training focuses on substantive criminal law, constitutional safeguards, procedural rules, and lawyers' ethical responsibilities.

To promote the advancement of indigent defense, the PDA offers its knowledge and experience to the courts and the General Assembly. For over two decades, courts have accepted *amicus curie* briefs from the PDA. *E.g. State v. Langford* and *Phillips*, currently pending before this Court; *Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009); *Johnson v. Catoe*, 336 S.C. 354, 520 S.E.2d 617 (1999); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); and *South Carolina v. Gathers*, 490 U.S. 805 (1989) *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991). The PDA regularly appears before the General Assembly[1] and has provided public comments regarding proposed changes to the South Carolina Rules of Evidence[2] and the proposed South Carolina Criminal Rules.[3]

---

[1] *E.g.* Scalzo, *et. al.*, *Strategies for Successful Sentencing Reform: A Report by the S.C. Public Defenders to the S.C. Commission on Sentencing Reform*, March 5, 2009, http://www.scstatehouse.gov/citizensinterestpage/SentencingReformCommission/SentencingReform.html (last viewed Jan. 30, 2012).

[2] http://www.judicial.state.sc.us/whatsnew/ruleChanges/ruleChangeSSpeakersList.htm (list of presenters for public hearing on July 9, 2009) (last viewed Jan. 30, 2011).

[3] http://www.judicial.state.sc.us/whatsnew/criminalRuleComments/charlesGrose.pdf (written comments received by the Supreme Court on Proposed South Carolina Criminal Rules) (last viewed Jan. 30, 2011).

Reasons Why an *Amicus Curiae* Brief from the PDA is Desirable

In this case, Petitioner asks this Court to dismiss the charges against him for a violation of his right to a speedy trial.

The state arrested James on December 30, 1996 but did not seek an indictment until 1999. Despite James filing speedy trial motions in 1998 and 1999, the state delayed 993 days before calling his case to trial. When his case was finally called to trial, James 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, the trial judge made three significant factual findings. First, petitioner wanted a speedy trial. Second, the delay was "horrendous." Third, the prosecution's justification for the delay was "not terribly well explained." App. 31, 32, 34, 35, 39, 41, and 44.

Trial counsel, however, 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.

James' request on appeal for this Crout to dismiss the charges against him is significant for two reasons. First, the South Carolina appellate courts have ***never*** enforced the right to a speedy trial by dismissing criminal charges. Second, this state's unique practice of allowing the Solicitor to control the criminal docket is intertwined with the State denying James a speedy trial. The bench and bar, accordingly, will monitor this appeal with great interest.

An *amicus curiae* brief from the Public Defender Association is desirable for three reasons. First, Public Defenders represent the majority of the defendants who will be impacted by this Court's ruling on the right to a speedy trial. Second, this issue inherently involves South Carolina's unique procedure where the Solicitor's control the criminal court docket. By representing the majority of criminal defendants, Public Defenders are in a unique position to review the practical considerations of Solicitor control of the docket on the disposition of criminal cases. Third, Public Defenders can assist this Court in understanding the evolution of continually increasing judicial supervision of General Sessions Court dockets.

In addition, the PDA has a keen interest in the issue presented in this appeal. In 2011, PDA has filed an *amicus curiae* brief in support of K.C. Langford and Bryan Phillips, asking that their charges be dismissed because of a denial of their rights to a speedy trial. This Court certified these appeals pursuant to Rule 204(b), SCACR and consolidated them for review. A copy of this Court's order in *Langford* and *Phillips* dated November 3, 2011 is attached.

Conclusion

This Court, therefore, should grant leave for the South Carolina Public Defender Association to file an *amicus curiae* brief.

(Signature on Next Page)

IT IS SO MOVED.

Respectfully submitted,

By 

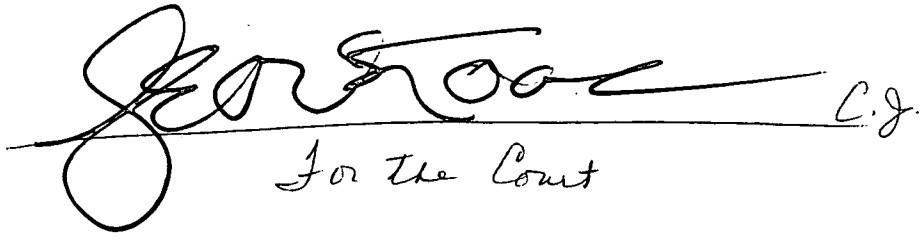
E. Charles Grose, Jr.
600 Monument St., Box P-133
Greenwood, SC 29646
(864) 229-9505

Tara S. Waters
P.O Box 174
Laurens, South Carolina 29360
(864) 984-8807

Attorneys for *Amicus Curiae*
South Carolina Public Defender Association

January 31, 2012

Motion granted.



February 24, 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 petition to file the *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:

Elizabeth A. Franklin-Best, Esquire
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589

ATTORNEY FOR PETITIONER

Brian T. Petrano, Esquire
Assistant Attorney General
SC Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT

Respectfully submitted,

By 

E. Charles Grose, Jr.
600 Monument St., Box P-133
Greenwood, SC 29646
(864) 229-9505

Tara S. Waters
P.O Box 174
Laurens, South Carolina 29360
(864) 984-8807

Attorneys for *Amicus Curiae*
South Carolina Public Defender Association

January 31, 2012

The Supreme Court of South Carolina

The State, Respondent,

v.

K. C. Langford, Appellant.

and

The State, Respondent,

v.

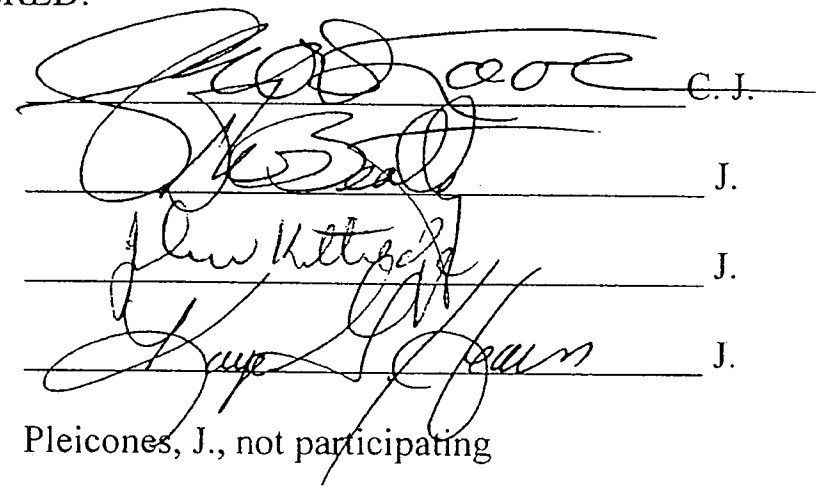
Bryan Phillips, Appellant.

ORDER

Appellant K.C. Langford petitions this Court to certify his appeal from the Court of Appeals pursuant to Rule 204(b), SCACR. Appellant Bryan Phillips, a co-defendant of Mr. Langford, also moves to have his appeal certified to this Court and for the appeal to be consolidated with Mr. Langford's appeal. Mr. Phillips further requests that the amicus curiae brief filed in the Court of Appeals by the South Carolina Public Defender Association in support of Mr. Langford's appeal be incorporated into Mr. Phillips' appeal. All of the requests are granted. The two appeals are hereby certified to this Court from the Court of Appeals and shall be consolidated,

including the amicus curiae brief.

IT IS SO ORDERED.



C. J.

J.

J.

J.

Pleicones, J., not participating

Columbia, South Carolina

November 3, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No. 2001-CP-40-03299

Robert Anthony James, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION OF THE SOUTH CAROLINA PUBLIC DEFENDER ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIE* BRIEF

Elizabeth A. Franklin-Best
Appellate Defender

South Carolina
Commission on Indigent
Defense
PO BOX 11589
Columbia, SC 29211
803-734-1343

ATTORNEYS FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

ROBERT D. CORNEY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

This Court should deny the petition for leave to file *amicus curie* because it fails to satisfy all of the requirements of Rule 213, SCACR. "The [*amicus curie*] brief shall be limited to argument of the issues on appeal as presented by the parties...." Rule 213, SCACR. The argument raised in the amicus brief is not limited to any of the issues on appeal. The South Carolina Public Defender Association previously filed a Motion for "Leave to File *Amicus Curiae*" in this matter on August 5, 2010, setting forth the identical grounds found in this petition. This Court denied the motion by order dated September 17, 2010. In the current petition, the Public Defender Association is essentially re-filing a brief which sets forth the same grounds which attempt to divert the existing prejudice issue and instead claim that trial counsel was deficient for not arguing that S.C. Code § 1-7-330 is unconstitutional. Deficient performance of trial counsel is not at issue in this case. Essentially, the *speedy trial* issue raised on appeal is whether the PCR court erred in finding Petitioner failed to establish he was prejudiced by counsel's handling of the speedy trial issue.

Amicus curiae argues that the Petitioner's conviction (and charges) should be "dismissed" because trial counsel was deficient for failing to present a criticism of existing S.C. Code § 1-7-330. The PCR court's Order of Dismissal dedicated only a short paragraph concerning the *speedy trial* issue. The PCR court denied relief solely on its prejudice analysis. (App. p. 1498). As required, PCR courts routinely dispose of PCR claims simply because of a lack of prejudice.[1] There was no Rule 59(e), SCRCP motion

[1] In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, *that course should be followed.* Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069 (U.S.1984) (emphasis added).

suggesting that Judge Lee failed to rule on an issue of deficient performance apart from a lack of evidence/prejudice concerning the supposed *speedy trial* issue. Accordingly, *amicus curiae* goes beyond the issue(s) addressed by Judge Lee in the PCR Order and beyond the prejudice issue that has been briefed by the parties. Therefore *amicus curiae's* petition for leave to file *amicus curie* fails to satisfy Rule 213, SCACR.

CONCLUSION

For the reasons stated above, this Court should not accept the *amicus curie* brief in this case because "Solicitor Control of the Docket" is not the issue on appeal – the issue on appeal in this case is a lack of prejudice. However, if this Court grants the amicus curiae's petition, the Respondent requests permission under the rules to brief the issues discussed fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

ROBERT D. CORNEY
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

By: _____
ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
February 14, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
Honorable Alison R. Lee, Circuit Court Judge

Robert A. James, 261393,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition of the South Carolina Public Defender Association for Leave to File *Amicus Curie* Brief has been served upon opposing counsel, Elizabeth A. Franklin-Best by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 14th day of February, 2012.

ROBERT D. CORNEY
ATTORNEY FOR RESPONDENT

SWORN to before me this 14th
day of February, 2012.

(L.S.)
Notary Public for South Carolina.
My Commission Expires: My Commission Expires
January 30, 2013

ALAN WILSON
ATTORNEY GENERAL

February 14, 2012

The Honorable Tanya Gee
Clerk of Court, SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Robert Anthony James v. State (PCR appeal)
Return to Petition for Leave to File Amicus Curie Brief

Ms. Gee:

Enclosed for filing, please accept an original and six (6) copies of the Respondent's RETURN TO PETITION OF THE SOUTH CAROLINA PUBLIC DEFENDER ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIE* BRIEF.

Thank you for your attention in this matter.

With kindest regards, I am

Yours very truly,

Robert D. Cornev
Assistant Attorney General

cc. Appellate Defender
Elizabeth A. Franklin-Best
Attorney for Petitioner

E. Charles Grose, Jr.
Amicus Curiae

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

Reply to State's Return to the
Petition of the South Carolina Public Defender Association
for Leave to File and *Amicus Curiae* Brief

The State asks this Court to disallow the Public Defender Association's (herein after "PDA") petition to file an *amicus curiae* brief, arguing the *amicus* brief does not comply with Rule 213, SCACR because the *amicus* brief "attempt[s] to divert the existing prejudice issue and instead claim that trial counsel was deficient for not arguing that S.C. Code §1-7-330 is unconstitutional." State's Return p. 2.

The PDA, in fact, argued the same issue as petitioner Robert James. Trial counsel's deficiency was failing to cite then-existing United States Supreme Court precedent requiring the trial judge to dismiss the charges against petitioner. *See amicus* brief, Section IV, p. 19-24. Because the State concedes "[d]eficient performance of trial counsel is not an issue in

this case," Sate's Return p. 2, the only remaining issue is whether petitioner was prejudiced by the State holding him in jail for 993 days without offering him a jury trial.

It is not necessary for this Court to hold §1-7-330 unconstitutional in order to grant petitioner relief. Rather, the PDA offers this *amicus* brief to provide historical context of solicitor control of the docket and to point out how this control can be abused to the detriment of someone like petitioner.[1] The judiciary's management of the right to a speedy trial is a matter of great public interest. An *amicus* brief is the appropriate mechanism for a professional organization to call this Court's attention to a matter of public interest concerning the administration of the judicial system. *E.g. Ex Parte Brown*, 393 S.C. 214, 220, 711 S.E.2d 899, 902 (2011) ("The South Carolina Bar appears *Amicus Curiae*. The Bar contends that the appointment of attorneys to represent indigent litigants implicates the Takings Clause of the Fifth Amendment to the United States Constitution.").

Conclusion

Because petitioner's case raises matters of great public interest, this Court should grant the PDA leave to file an *amicus curie* brief.

IT IS SO MOVED.

(Signature on Next Page)

[1] As pointed out in its petition for leave to file an *amicus* brief, the PDA has filed a similar brief in the cases of *State v. K.C. Langford* and *State v. Bryan Phillips*, which this Court has consolidated and scheduled for oral arguments on April 18, 2012.

Respectfully submitted,

By 

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Attorneys for *Amicus Curiae*
South Carolina Public Defender Association

February 21, 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 petition to file the *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:

Elizabeth A. Franklin-Best, Esquire
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589

ATTORNEY FOR PETITIONER

Robert D. Corney, Esquire
Assistant Attorney General
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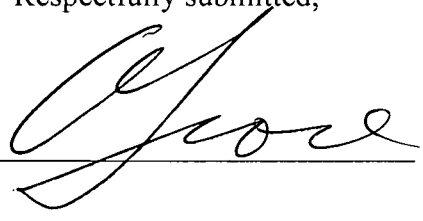
ATTORNEY FOR RESPONDENT

Respectfully submitted,

By 

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February 21, 2012

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February 21, 2012

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Robert Anthony James v. State
Petition for Leave to File *Amicus Curiae* Brief

Dear Mr. Shearouse:

Enclosed for filing, please find the original and six (6) copies of the reply to the State's return to the petition of the South Carolina Public Defender Association for leave to file an *amicus curiae* brief. Two copies of this document are being served on the parties. The certificate of service is attached to the reply.

Thank you for your attention to this matter.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Christopher Scalzo, Esquire
President, South Carolina Public Defender Association

Elizabeth A. Franklin-Best, Esquire
Attorney for Petitioner

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January 31, 2012

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Robert Anthony James v. State
Petition for Leave to File *Amicus Curiae* Brief

Dear Mr. Shearouse:

Tara Waters and I represent the South Carolina Public Defender Association.

Enclosed for filing, please find the original and six (6) copies of the petition of the South Carolina Public Defender Association for leave to file an *amicus curiae* brief.

Pursuant to Rule 213, SCACR, also enclosed for provisional filing please find the original and fifteen (15) copies of the Public Defender Associations *amicus curie* brief.

Two copies of each document are being served on the parties. Certificates of service are attached to each document.

Thank you for your attention to this matter.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Christopher Scalzo, Esquire
President, South Carolina Public Defender Association

Elizabeth A. Franklin-Best, Esquire
Attorney for Petitioner

Brian T. Petrano, Esquire
Attorney for Respondent

The Supreme Court of South Carolina

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January 19, 2012

Appellate Defender Elizabeth A. Franklin-Best
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: James, Robert A. v. State of SC
Case Tracking No. 2012-206346

Dear Counsel:

This office has received your Petitioner for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

DES/lda

Enclosure

cc: Assistant Attorney General Brian Petrano
The Honorable Tanya Gee