

The Supreme Court of South Carolina

The State,

Respondent,

v.

Gene Tony Cooper,

Petitioner.

The Honorable Daniel F. Pieper
Lexington County
Trial Court Case No. 1990-GS-32-00083
1990-GS-32-00084

ORDER

For good cause shown, the request for an extension to serve and file the Brief of Petitioner is granted and extended until May 14, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Grenda I. Sheehy*
Chief Deputy Clerk

Columbia, South Carolina

April 16, 2012.

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General William Edgar Salter, III
Donald V. Myers, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Daniel F. Pieper, Circuit Court Judge

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APR 13 2012

S.C. Supreme Court

(3)

THE STATE,

RESPONDENT,

V.

GENE TONY COOPER, JR.,

APPELLANT

PETITION FOR EXTENSION TO FILE
BRIEF OF PETITIONER

The undersigned counsel respectfully requests a **final thirty day extension, until May 14, 2012**, in which to file the brief of petitioner in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The brief of petitioner in this case is due to be served and filed today.
2. Counsel is filing the initial brief of appellant and designation of matter in State v. David Lewis with this Court today, April 13, 2012. Counsel filed the initial brief of respondent in State v. Robert Jolly #2 with the Court of Appeals on April 6, 2012. Counsel filed the brief of petition in State v. David M. Rocquemore with this Court on April 4, 2012. Counsel had an oral argument on March 29, 2012, in State v. Randy Vickery before the Court of Appeals. Counsel filed the initial reply brief in the death penalty case of State v. Stephen Christopher Stanko with

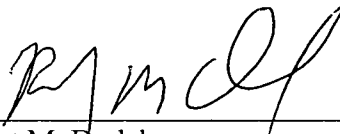
this Court on March 26, 2012. Counsel filed the initial brief of respondent and designation of matter in State v. Robert Jolly #2 with the Court of Appeals on Friday, March 23, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Matthew Taylor Hinton with the Court of Appeals on Thursday, March 22, 2012. Counsel filed the petition for writ of certiorari to the Court of Appeals and accompanying appendix in State v. Terrell McCoy with this Court on March 16, 2012. Counsel had an oral argument in State v. Christopher Heller before the Court of Appeals on March 13, 2012. Counsel filed the petition for rehearing in State v. Garvin Duvall with the Court of Appeals on March 15, 2012. Counsel also filed the initial brief of appellant and designation of matter in State v. Donald Petty with the Court of Appeals on March 15, 2012. Counsel and co-counsel also had a further meeting on State v. Richard Gagnon on March 15, 2012. Counsel is currently working on the death penalty case of Richard Bernard Moore v. State with co-counsel Susan B. Hackett. Counsel also is working on the brief of petitioner with co-counsel in the death penalty case of State v. Brad Sigmon. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

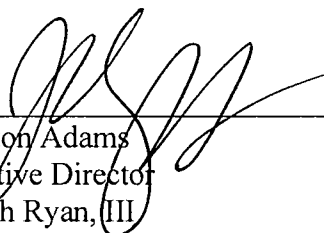
4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a **final thirty day extension, until May 14, 2012**. Counsel respectfully requests that the time limits for filing the brief of petitioner be held in abeyance pending a ruling on this motion.

Respectfully submitted,



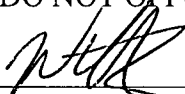
Robert M. Dudek
Chief Appellate Defender



T. Patton Adams
Executive Director
J. Hugh Ryan, III
General Counsel

April 13, 2012

I DO NOT OPPOSE:



William Edgar Salter, III

The Supreme Court of South Carolina

The State,

Respondent,

v.

Gene Tony Cooper,

Petitioner.

The Honorable Daniel F. Pieper
Lexington County
Trial Court Case No. 1990-GS-32-00083
1990-GS-32-00084

ORDER

For good cause shown, the request for an extension to the Brief of Petitioner and additional copies of the Appendix is granted and extended until April 13, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Brenda L. Healy*
Chief Deputy Clerk

Columbia, South Carolina

March 16, 2012

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General William Edgar Salter, III
Donald V. Myers, Esquire

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Daniel F. Pieper, Circuit Court Judge

RECEIVED
MAR 14 2012
S.C. Supreme Court
(2)

THE STATE,

RESPONDENT,

V.

GENE TONY COOPER, JR.,

APPELLANT

PETITION FOR EXTENSION TO FILE
BRIEF OF PETITIONER

The undersigned counsel respectfully requests a thirty day extension in which to file the brief of petitioner in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

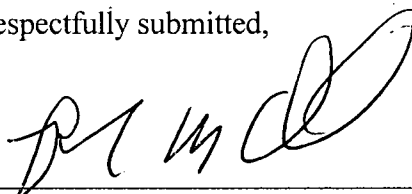
1. The brief of petitioner in this case is due to be served and filed today.
2. Counsel had an oral argument in State v. Christopher Heller before the Court of Appeals on March 13, 2012. Counsel will file the petition for rehearing in State v. Garvin Duvall with the Court of Appeals on March 15, 2012. Counsel also plans to file the initial brief of appellant and designation of matter in State v. Donald Petty with the Court of Appeals on March 15, 2012. Counsel and co-counsel are also having a further meeting on State v. Richard Gagnon on March 15, 2012. Counsel filed the return to the petition for writ of certiorari in Michael A.

Hough v. State with this Court on March 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Charles Berlin Pennell with the Court of Appeals on March 5, 2012. Counsel also filed the brief of petitioner in State v. Miama Kromah with this Court on March 5, 2012. Counsel is currently working on the death penalty case of Richard Bernard Moore v. State with co-counsel Susan B. Hackett. Counsel filed the five issue death penalty brief in the case of State v. Steven Barnes on February 22, 2012, with this Court. Counsel argued part of the case of State v. Kathy Salley along with Matt Bogan of the Nelson-Mullins firm before this Court on February 22, 2012 after the Court of Appeals sought certification. On February 23, 2012, counsel argued part of the case of State v. Chris Anthony Liverman before this Court, also along with Matt Bogan. Counsel filed a petition of for writ of certiorari with the United States Supreme Court in the death penalty case State v. William O. Dickerson on February 15, 2012. Counsel argued State v. Gavin Duvell before the Court of Appeals on February 16, 2012. Counsel argued part of, along with Reid Sherard of the Nelson-Mullins firm, the murder case of State v. Richard Bill Niles, Jr. with the Court of Appeals on Tuesday, February 14, 2012. Counsel is reading the state's brief in the death penalty case of State v. Steven Stanko where he anticipates filing a reply brief. Counsel also is working on the brief of petitioner with co-counsel in the death penalty case of State v. Brad Sigmon. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension. Counsel respectfully requests that the time limits for filing the brief of petitioner be held in abeyance pending a ruling on this motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

March 14, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Daniel F. Pieper, Circuit Court Judge

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MAR 14 2012
S.C. Supreme Court

THE STATE,

RESPONDENT,

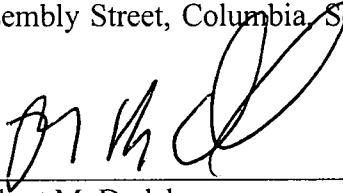
V.

GENE TONY COOPER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

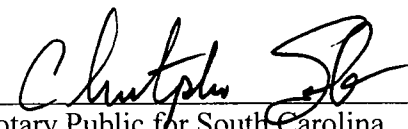
The undersigned attorney hereby certifies that a true copy of the petition for extension to file brief of petitioner in the above referenced case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 14th day of March, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 14th day of March, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: May 16, 2021.

The Supreme Court of South Carolina

The State,

Respondent,

v.

Gene Tony Cooper,

Petitioner.

The Honorable Daniel F. Pieper
Lexington County
Trial Court Case No. 1990-GS-32-00083
1990-GS-32-00084

ORDER

The request for an extension to serve and filed the Brief of Petitioner and additional copies of the Appendix is granted and extended until March 14, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Dorenda I. Skealy*
Chief Deputy Clerk

Columbia, South Carolina

February 14, 2012

cc: Chief Appellate Defender Robert M. Dudek
Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Senior Assistant Attorney General William Edgar Salter, III
Donald V. Myers, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

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

February 13, 2012

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

RECEIVED

FEB 13 2012

S.C. Supreme Court

Re: State v. Gene Tony Cooper, Jr.

Dear Mr. Shearouse:

The brief of petitioner and 13 additional copies of the appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition and the 13 additional copies of the appendix.

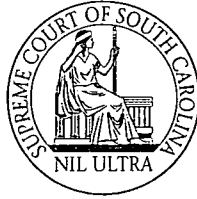
By copy of this letter, I am informing William Edgar Salter, III, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/cms

cc: William Edgar Salter, III, 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

January 12, 2012

Chief Appellate Defender Robert M. Dudek
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Cooper, Gene Tony

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before February 13, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

Daniel E. Shearouse
25

CLERK

DES/lda

Enclosure

cc: Senior Assistant Attorney General William Edgar Salter, III
Donald V. Myers, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

The State,

Respondent,

v.

Gene Tony Cooper,

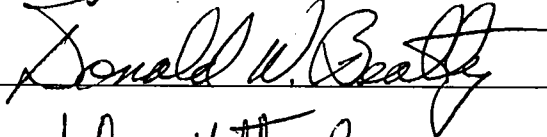
Petitioner.

ORDER

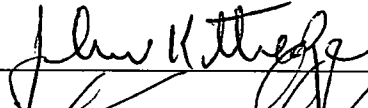
Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009). We grant the petition on petitioner's Question I and deny the petition as to the remaining questions. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.



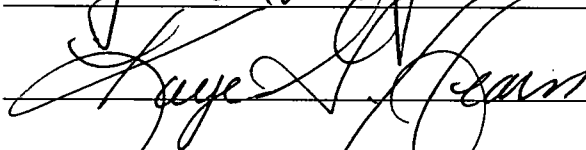
J.



J.



J.



J.

Chief Justice Jean H. Toal, not participating.

Columbia, South Carolina

January 12, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Daniel F. Pieper, Circuit Court Judge

Opinion No. 4633 (S.C. Ct. App. filed 11/19/2009)

90-GS-32-83-84.

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

GENE TONY COOPER, JR.,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 21, 2010.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by ruling petitioner was not denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where the forty-four month delay was caused by the Eleventh Circuit Solicitor's admission he "did nothing" to prepare for petitioner's retrial from August, 2002 forward, the state then failed to keep its promise to try the case in the Spring of 2004, and later also failed to comply with the court's order to try the case by the end of 2005, since the state's lackadaisical approach was prejudicial to the incarcerated petitioner who had always maintained his innocence?

2.

Whether the Court of Appeals erred by ruling petitioner was not denied his Sixth Amendment right to confront witness Red Farmer where the state did not make reasonable efforts to secure his presence from the Texas correctional system for petitioner's trial, since Farmer should

not have been considered “unavailable” under these circumstances, and the jury was denied the opportunity to observe Farmer’s demeanor, particularly where Farmer was a key witness?

3.

Whether the Court of Appeals erred by ruling it was not reversible error for petitioner to be impeached with his 1977 convictions for house breaking and grand larceny since these convictions were too remote under Rule 609, SCRE, and the trial court did not conduct a State v. Colf analysis for admitting these highly prejudicial crimes of dishonesty?

STATEMENT OF THE CASE

Procedural history

Petitioner was indicted by the Lexington County grand jury for the offenses of murder, armed robbery, conspiracy, and conspiracy to commit armed robbery. R. 1561 - 1565. The state sought the death penalty. After petitioner's first trial he was convicted of murder and sentenced to death. This Court in State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994) reversed petitioner's conviction for murder and his death sentence and remanded for a new trial on the murder charge since there was not an on-the-record waiver of petitioner's right to personally address the jury during the guilt phase of the trial. Petitioner's remaining convictions were affirmed.

Subsequently, on August 12, 2002, this Court in Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002), reversed petitioner's non-capital convictions finding trial counsel's failure to inform petitioner of his statutory right to make a closing statement to the jury constituted ineffective assistance of counsel. As will be seen infra, petitioner subsequently moved, and kept renewing motions for a speedy trial. Petitioner had maintained his innocence since his arrest in October, 1989.

The first speedy trial motion hearing was held on August 18, 2003 before the Honorable Marc H. Westbrook. David Bruck and Robert Lominack represented petitioner. Donald V. Myers and C. Dayton Riddle were the solicitors. R. 4. A second speedy trial hearing was held on February 15, 2005 before the Honorable William P. Keesley. David Bruck represented petitioner. Dayton Riddle was the Deputy Solicitor. R. 22.

A third speedy trial hearing and motion to dismiss was held before Judge Keesley on July 12, 2005. David Bruck, Jack Duncan, and Stuart Andrews, Jr. represented petitioner. Donald V. Myers was the solicitor. R. 37. A motion to dismiss hearing was then held on February 8, 2006 before the Honorable Daniel F. Pieper. David Bruck and Jack Duncan represented petitioner. B.

Harrison Bell, Jr. represented the state because the Lexington solicitor's office had moved to be recused, and that motion was granted. The state no longer sought the death penalty. R. 101.

On May 22, 2006 petitioner's case was called to trial before the Honorable Daniel F. Pieper, and a jury. David Bruck, Jack Duncan and Stuart M. Andrews, Jr., represented petitioner. B. Harrison Bell, Jr. and Theodore N. Lupton were the solicitors. R. 345. At the conclusion of the trial the jury found petitioner guilty on all four counts. R. 1521, l. 15 – 1522, l. 2. Judge Pieper sentenced petitioner to life imprisonment for murder, twenty-five years for armed robbery, and five years imprisonment for criminal conspiracy. R. 1535, ll. 13 – 19. The Court of Appeals affirmed petitioner's convictions in State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct.App. 2009) App. 1-12. Petitioner sought rehearing which was denied. App. 13-43.

I. The Court of Appeals erred by holding petitioner was not denied his Sixth Amendment right to a speedy trial.

Trial facts

Robert "Bo" Southerland told anyone who would listen following his own 1992 conviction for the murder of the victim, and his death sentence that he, Southerland, - - killed the decedent - - and that petitioner, Tony Cooper was not present. Death row inmate Norman Starnes testified Bo Southerland admitted to him, and Southerland later confessed in court, that "[T]ony didn't have anything to do with it and Tony was not present when it happened." R. 1044, l. 19 – 1045, l. 15.

Bessie Davis started a prison ministry after she retired as a school teacher. She and fellow ministry worker Niada Knotts often met with Bo Southerland and other death row inmates. R. 1051, l. 11 – 1052, l. 17. Davis recalled: "I never asked [Bo Southerland], but he shared with me that he did the crime alone, that Tony did not have anything to do with it." R. 1056, l. 22 – 1057, l. 3; R. 1062, ll. 1 – 5. Knotts similarly recalled that she asked Southerland about petitioner: "I said, well

what about Tony? What did he do? And he [Southerland] said, well, Tony wasn't even there. He didn't have anything to do with it." R. 1066, ll. 9 – 25; R. 1068, ll. 1 – 4. It was not until April 21, 2006, "sixteen-and-a-half years after Kimberly Quinn's death," and after Southerland received a new sentencing hearing, and after the state no longer sought the death penalty against him in exchange for his testimony that Southerland claimed petitioner was the killer and he essentially was just along for the ride. R. 799, l. 6 – 807, l. 22; R. 940, ll. 5-20.

This Court can take judicial notice of the fact that when Southerland's case was on direct appeal the Attorney General moved to strike "all guilt phase issues from the initial brief of petitioner, or, in the alternative to supplement record on appeal." R. 1549. The June 25, 1993 motion had attached to it a notarized statement from Southerland dated April 11, 1992 admitting his guilt, and exculpating petitioner. R. 1557.

Speedy trial motion after grant of a new trial

On July 15, 2003 defense counsel filed an "amended demand for speedy trial," following his first speedy trial motion. R. 1. This motion noted "since August 29, 2002, the state has, to the defendant's knowledge, taken no action to bring him to trial." Motion at 2. R. 2. At an August 18, 2003, speedy trial motion hearing before the Honorable Marc H. Westbrook defense counsel Bruck told the judge that petitioner had maintained his innocence since the day of his arrest, and he wanted a trial date set. R. 6, ll. 3 – 16. On June 20, 2003 counsel left a phone message for Solicitor Myers. However, Deputy Solicitor Riddle returned counsel's call, and told him Myers was unavailable. Riddle asked counsel to give him "ten days to get back to me about a trial date." R. 6, ll. 15-25. After counsel left several more messages with the solicitor's office: "Finally on July 11, 2003, Mr. Riddle called me back to say I probably needed to go ahead and file this [speedy trial]

motion, that the State was not in a position to propose a trial date as yet. Since then we have been going through the mechanics to bring the matter before the Court.” R. 7, ll. 1-6.

The solicitor contended that he had other death penalty reversals to try in addition to petitioner’s case, and he wanted counsel Bruck disqualified for his earlier contact with Bo Southerland. R. 8, l. 2 – 9, l. 21. Defense counsel responded, “I am Mr. Cooper’s lawyer now. He has made a motion. I think we should set the case for trial. “ Counsel also informed the court that the other cases Myers alluded to only involved re-sentencing, and that this was a retrial. R. 10, ll. 8-25. Counsel said the fact “there are a lot of other cases piled up” was not an excuse to keep people in jail “year after year without a trial,” and he asked the judge to set a trial date. R. 10, l. 8. The judge took the matter under advisement, adding there would probably be another hearing in “just a couple weeks or so.” R. 14, ll. 1-10.

Petitioner again filed a “renewed demand for a speedy trial” on February 10, 2005 citing his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Motion at page 1. R. 18. This motion noted after the August 18, 2003 hearing that “Deputy Solicitor Riddle advised Judge Westbrook and the undersigned counsel for the defendant *that the state would call Mr. Cooper’s case for trial during the spring of 2004* - - that is, between April and the end of June 2004. Based on this representation, no on-the-record hearing was held at that time.” Motion at page 2. R.19. (emphasis added). The motion stated that despite undertaking to call petitioner’s case for trial during the spring of 2004, “the state has not done so.” The motion stated petitioner had remained in prison where he had been awaiting his retrial since August 29, 2002. Motion at pages 2 – 3. R. 19 - 20.

A hearing was held before Judge William P. Keesley on February 15, 2005. Defense counsel reiterated that petitioner “at all times has desired a speedy trial, and for this reason we are

now renewing our demand for a speedy trial.” R. 23, ll. 10 – 19. Counsel added: “Now Mr. Riddle just a moment ago advised me that Mr. Myers is not present today and the state is not prepared to go forward with the date setting in Mr. Myers’ absence.” R. 23, l. 24 – 24, l. 5. Counsel further stated that the state had already promised to try this case in the spring of 2004. Since that time counsel had taken a law professor’s position at the Washington and Lee University of Law School in Lexington, Virginia. “In effect, I feel like I’ve been waited out. I know that the state didn’t know that was going to happen, but that’s what happens when a case is not tried. Change and difficulties increase,” and he asked the judge as Administrative Judge to set a trial date. R. 24, ll. 6 – 13. The judge ruled the bottom line was that this was “a 1990 case and it needs to move.” R. 26, l. 18 – 27, l. 10.

Another hearing was held on July 12, 2005 before Judge Keesley. Defense counsel noted that after the prior hearing the judge had issued an order on April 25, 2005 “which directed the commencement of this trial *in the year 2005 and directed that defense counsel be notified of a date within thirty days.*” The order noted that each side had moved to disqualify the other. R. 39, ll. 5 – 25. (emphasis added). See Order of Judge Keesley. R. 76 - 79. Defense counsel told the judge “I’m not going to go through the entire history of Mr. Cooper’s fruitless efforts to bring this case to trial because the record already abundantly reflects them.” Counsel noted Judge Keelsey’s order of April 25, 2005 which directed the state to get “a trial date set and advise Mr. Cooper and counsel of that date in thirty days.” R. 42, ll. 11 – 21. Regarding that order counsel “contacted Court Administration and determined that the state never contacted Court Administration to ask for the assignment of a trial judge.” Counsel argued “close to three years have now elapsed since this case was ready for retrial, and close to two years have elapsed since first Mr. Cooper’s motions for a speedy trial.” R. 43, l. 8 – 44, l. 6. “We really think they’ve had their chance and they missed it and

it's time to dismiss the charges. The length of the delay is completely unreasonable. The reasons for the delay are entirely invalid." R. 45, ll. 11 – 21. Counsel requested that the judge dismiss the case "for lack of prosecution, lack of a speedy trial, and let that be the end of it." In the alternative, counsel asked to be heard on having petitioner released on bond with conditions. R. 46, ll. 3- 19. Counsel argued the time had passed in giving the state more chances and that "just keeping a man in prison forever" could not be tolerated. R. 46, ll. 3 – 8.

The solicitor then requested that his office be disqualified from this case. The solicitor told the judge that "Rick Hubbard, who is my deputy solicitor . . . assisted Judge Long during the first trial." The solicitor now argued this raised an issue of a conflict of interest. R. 53, l. 18 – 55, l. 21. Defense counsel responded: "We're at a loss to understand why its being raised at such a late date, long after the time Your Honor had ordered a trial date be set had elapsed." R. 60, l. 22 – 61, l. 9. Defense counsel argued:

This is the pattern that we've been encountering, Judge, for almost two years. It's always mañana, it's always "we're not ready," it's always "We didn't give notice, and plus we've got something else," which would keep you, the Court, from doing anything to vindicate this man's rights.

R. 63, ll. 4 – 18.

Judge Keesley said "you'll have an order within forty-eight hours." R. 66, ll. 3 – 4. The judge issued an order dated July 12, 2005 denying the speedy trial motion "on the grounds it was already covered by the order in April directing the case be tried in 2005." See Order at page 3. R. 70. This July 12, 2005 order also denied the state's motion to remove defense counsel, and it granted the state's motion to have the Eleventh Circuit Solicitor's Office disqualified due to a conflict of interest. The order also denied the defendant's motion for bail. Order at page 3. R. 70.

The First Circuit Solicitor's Office was then appointed to the case in September of 2005, and the Chief Justice designated the Honorable Daniel Pieper to hear and dispose of the case in an order signed December 2, 2005. Petitioner filed a "notice of motion and renewed motion to dismiss all charges for lack of a speedy trial, or the alternative to release pending trial" on December 29, 2005. See Motion. R. 81 - 84. The defense again asked for an order dismissing all charges against petitioner for the denial of his right to a speedy trial. R. 84. The state filed a response conceding petitioner had asserted his right to a speedy trial "several times and before the proper courts" but it claimed petitioner was not prejudiced by the delay, and it also opposed granting petitioner bond. State's Response at page 4 - 5. R. 86 - 90

On January 18, 2006, petitioner filed a reply noting the delay of "approximately three years and four months" between the reversal of the last of petitioner's convictions and his unscheduled retrial was sufficient to trigger judicial scrutiny under the speedy trial clause of the Sixth Amendment. Motion at page 2. R. 92. The reply further stated that the United States Supreme Court had recognized as a general manner, that delays approaching one year are regarded as presumptively prejudicial, *citing*, Doggett v. United States, 505 U.S. 647, 642 n. 1 (1992). R. 92. Counsel also argued that the state had not cited any authority for the proposition that the Sixth Amendment's speedy trial guaranteed "was diluted or rendered ineffective by an intervening conviction and appellate reversal." R. 92 - 93. Counsel wrote: "[C]ommon sense suggests that, ordinarily on retrial, less time would be necessary to bring a case to trial than before." State v. Ferguson, 476 So.2d 1252, 1254 (Miss. 1991). Counsel also *cited* Lahur v. State, 615 N.E.2d 150, 152 (Ind. App. 1993), for the proposition that "the delay that can tolerated for retrial is considerably less than for the initial trial because the issues and evidence have been fully explored." R. 93. "The state also fails to explain why, in the face of at least three speedy

trial demands and two orders mandating a 2005 trial, the First Circuit Solicitor's Office took no discernable action to bring this case to trial after receiving the file from the Attorney General in September, 2004 . . . Now, nearly three and a half years after the Supreme Court ordered that the last of his charges be retried, the state's time is up." Reply at page 7. R. 97

A hearing on the motion was held on February 8, 2006 before Judge Pieper in Charleston, South Carolina. David Bruck and Jack Duncan represented petitioner and B. Harrison Bell, Jr., was the solicitor. Defense counsel argued the state had not shown any reason in their return "why in 2002, 2003 and 2004, even when there was a court order in 2005, this case was not called for trial and there is simply no other way to develop the record other than to ask the person whose job it was to call it why it wasn't called." R. 107, ll. 1 – 9. Solicitor Myers then testified and he agreed petitioner's case could "very well could be" "the oldest murder case in Lexington County." R. 111, l. 19 – 113, l. 1. The solicitor said that Dayton Riddle was responsible for "all the pre-trial workup . . ." R. 113, ll. 3- 9. The solicitor admitted he really could not tell the court whether Riddle had ever given him "a progress report" about preparing this case for trial. R. 114, l. 23 – 115, l. 6. Myers also acknowledged that between August 29, 2002 and July of 2003 he made no request for Court Administration to schedule the case. R. 117, l. 17 – 119, l. 21. While the solicitor said he had other cases which had priority "over this one" he could not recall such a case or why it had priority. R. 126, l. 25 – 127, l. 2. The solicitor said he did *not know* that in Barker v. Wingo, 407 U.S. 514 (1972) the Supreme Court said that a delay of more than a year is "presumptively prejudicial." R. 128, ll. 17 – 20.

As to what his office did to prepare for that spring 2004 trial, the solicitor said defense counsel would have to ask Riddle that question -- "I don't know. You will have to ask him. *I didn't do anything.*" R. 130, ll. 19 – 22. (emphasis added). The solicitor also said he would not

be surprised to know that he had not tried any capital cases between the “date of final reversal” and the time of the speedy trial motion. R. 131, l. 16 – 135, l. 7. The solicitor stated he was not aware of any problem the state had with evidence or otherwise that prevented him from calling this case, and he acknowledged petitioner’s was the second oldest case in his circuit. R. 137, ll. 7-15; r.154, ll. 2 – 12; R. 296 - 327.

On cross-examination, the solicitor maintained he had lost seven or eight months court time “because of the mold in the new courthouse.” R. 160, ll. 2 – 4. However, on redirect examination the solicitor acknowledged the move into the new courthouse took place in 2004. R. 161, l. 15 – 162, l. 18. Deputy Solicitor Riddle then admitted that some murder cases had been assigned to him. However, he added: “I don’t think Mr. Cooper or Mr. Southerland ever appeared on my roster, my personal roster.” R. 166, ll. 1 – 3. Riddle acknowledged he was not getting petitioner’s case ready for trial between August 2002 and the speedy trial motion in August 2003, and he also did not know of anyone else in his office that was working on this case. R. 168, ll. 12 – 20. Riddle also said he received no direction from Solicitor Myers. R. 169, l. 14 – 176, l. 5. Defense counsel then moved to dismiss the charges against petitioner for the denial of his Sixth Amendment right to a speedy trial, and he noted that while this motion was difficult to grant it was the judge’s duty to do so. R. 177, l. 7 – 178, l. 18.

Defense counsel explained that without a trial date “we cannot subpoena our witnesses,” and he reminded the judge that the solicitor’s office had not “done a lick in preparing the case.” R. 185, ll. 10 – 24. There was also the prejudice from petitioner’s pretrial confinement “day after day and week after week and month after month and now its being year after year.” R. 186, ll. 4 – 15. Counsel also argued that the anxiety and stress of the pending charges against petitioner where he was presumed innocent, and where for three and a half years “the sword hangs over

him.” Counsel added, “[y]ou will not find another speedy trial case where a man has been dangled over the abyss for three and a half years pending trial for his life. There ain’t one. This case stands alone.” R. 188, ll. 8 – 18. The solicitor *acknowledged to the judge that the defense was not responsible for any delay in this case* cause by a motion for a continuance or otherwise. R. 218, l. 9 – 221, l. 1. Defense counsel added that the defense had made four “and perhaps five” demands for a speedy trial. R. 229, l. 3 – 232, l. 6.

Judge Pieper issued a written order dated April 21, 2006. In this order the judge noted the delay of forty-four months was sufficient to “trigger review of the other [speedy trial] factors.” Order at page 5. R. 332. Judge Pieper questioned the solicitor’s assertion that the procedures of Court Administration were an obstacle. R. 335. The order also recognized that South Carolina case law had held that the delay must be due to the “neglect and willfulness of the state’s prosecution.” R.335 (Court’s emphasis). However, the judge strongly questioned this precedent: “It is not clear to this court whether such precedence requiring neglect and willfulness is in line with the jurisprudence of the United States Supreme Court. Nonetheless, the court finds that the state’s conduct in this instance was not apparently willful and was largely justifiable.” R. 336 - 337. The judge reasoned that petitioner had benefited to some extent because the “state have now withdrawn its notice to seek the death penalty,” and he denied the motion. 15. R. 342.

The Court of Appeals affirmed the judge’s ruling, holding petitioner’s Sixth Amendment right to a speedy trial was not violated in this case, and it stated petitioner received some benefit from the delay because the state dropped its request to seek the death penalty. App. 5-8.

Discussion: Petitioner continues to submit the Court of Appeals impermissibly cited that fact the state no longer sought the death penalty as a factor in its analysis because the state conceded

petitioner was not responsible for the delay and petitioner repeatedly, more than any case present counsel has ever seen, renewed his demands for a speedy trial, and he suffered prejudice from the state's inexcusable delay. A criminal defendant is guaranteed the right to a speedy trial by the Sixth Amendment to the United States Constitution. This right "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, nevertheless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." United State v. McDonald, 456 U.S. 1, 8 (1982); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 155 (2007). Here, of course, petitioner had been incarcerated the entire time. In determining whether a defendant has been deprived of the right to a speedy trial, the court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary and unreasonable. State v. Waites, 270 S.C 104, 108, 240 S.E.2d 651, 653 (1978).

Here, the delay was both arbitrary and unreasonable. Solicitor Myers openly admitted he did *nothing* to bring petitioner to trial or to prepare for trial after his convictions were vacated in August 2002. Defense counsel correctly argued the solicitor's office was willing to let petitioner "rot" in jail without any intention of retrying him. That constituted bad faith. The solicitor's intention to leave petitioner in jail without a trial was true even though petitioner was not facing re-sentencing, he was facing a new trial where his guilt or innocence were at issue. As seen, Solicitor Myers said it was Deputy Solicitor Riddle's responsibility to prepare the case. Riddle testified that he did not understand the case was even assigned to him as Myers testified under

oath. The solicitor's office bungled this case out of arrogance. It promised to try petitioner in the Spring of 2004, and it did not. It was ordered to try petitioner by the end of 2005, and it did not. It made a belated motion to withdraw based upon an assistant solicitor having worked for Judge Hubert Long many years ago. The solicitor's office was well aware of that fact, and it took no action until after the last minute. Surely, a solicitor hiring an assistant solicitor took into account the applicant's clerkship with a circuit court judge.

The delay in this case was forty-four months between the reversal of the last of petitioner's convictions and the final hearing. As seen, the United States Supreme Court has recognized that, as a general matter, delays approaching one year are regarded as presumptively prejudicial. Doggett v. United States, 505 U.S. 647, 652 n.1 (1992). A delay of forty-four months, (three years and eight months) already exceeded that found in almost any reported South Carolina case. See State v. Brazzell, 325 S.C. 65, 480 S.E.2d 64, 70 (1997) (two years, four months); State v. Chapman, 289 S.C. 42, 344 S.E.2d 611, 612 (1986) (one year); State v. Tyson, 283 S.C. 375, 323 S.E.2d 375 (1984) (2001) (thirteen months); State v. Waites, 270 S.C. 104, 240 S.E.2d 651, 652 (1978) (two years, four months); State v. Allen, 269 S.C. 233, 237 S.E.2d 64 (1977) (two years, four months); Cf. State v. Robinson, 335 S.C. 620, 518 S.E.2d 269, 271 (Ct.App. 1999) (delay of nearly four years triggered Barker scrutiny, but trial occurred ten months after defendant's first request for speedy trial, and no prejudice resulted from delay); State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973) (seven and a half year delay in trying defendants who jumped bond before trial and were imprisoned in another state for unrelated crimes; trial occurred within fifteen months of their belated demand to be returned to South Carolina for trial).

Here, the state had already tried petitioner one time, and where it had already marshaled its proof once, as argued above, common sense dictated that less time was needed to prepare to retry petitioner. Yet it treated petitioner's demands, its own promises of a trial date, and a judge's order for a trial by the end of 2005 with equal arrogance. Second, as argued above, the government's reason for the delay was both arbitrary *and* unreasonable. Any delay caused by the "mold" in the Lexington County Courthouse was minimal. The attempt to blame the delay on Court Administration was equally unavailing since the solicitor had the responsibility to call his case, and be sure the system was prepared. A phone call is not a difficult task. Petitioner would respectfully point to the extraordinary authority the solicitor had to control the criminal court docket, and such excuses offered against petitioner's Sixth Amendment right to a speedy trial under the highly unusual facts of this case should be quickly dispatched.

Further, after at least three speedy trial demands and two orders mandating a 2005 trial the First Circuit Solicitor's Office took no discernable action to bring petitioner's case to trial after receiving the file from the Attorney General in September 2005. Again, the state had already broken its promise to try petitioner in the spring of 2004. The state's delay was willful, arbitrary, and unreasonable. Petitioner respectfully submits the Court of Appeals erred by affirming the trial judge's refusal to grant relief. The trial judge did not given due consideration to what occurred *before the case arrived on his doorstep*: No preparation for trial or intention to prepare by the solicitor, the deputy solicitor denying he was aware it was his responsibility to prepare the case, the broken promise to try the case in 2004, and not trying the case in 2005 as ordered. Barker v. Wingo, 407 U.S. at 531. It should also be clear that petitioner was far more than diligent in continuously demanding a speedy trial ever since July of 2003. Petitioner's persistent attempts seeking to vindicate his constitutional right to a speedy trial differentiate this

case from the great majority of reported cases dealing with claims of pretrial delay, and it should have weighed heavily in favor of granting his motion to dismiss. Finally, as to the prejudice prong, as seen above, the trial judge noted his apparent discomfort in his order with South Carolina precedent he thought overemphasized this prong of the analysis. The Court in Barker v. Wingo emphasized that no one factor was determinative in the balancing test noting, “[W]e regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors . . . courts must still engage in a difficult and sensitive balancing process.” Barker v. Wingo, 407 U.S. 514, 533 (1972).

It must further be remembered that Barker v. Wingo listed “oppressive pretrial incarceration” and anxiety and concern of the accused as two of the three forms of possible prejudice that may arise from the denial of a speedy trial. Barker v. Wingo, 407 U.S. at 532. Petitioner’s rigid incarceration on death row in Lieber Correctional Institution amounted to no small prejudice, particularly given the state’s arrogance in failing to call his case to trial.

Moreover, the First Circuit Solicitor’s Office then displayed its unreasonable ineptitude, as will be seen infra, in failing to secure the presence of Red Farmer as a state’s witness through its unnecessary delay to petitioner’s obvious prejudice. Further, memories were clearly affected by the delay at trial. Edward Hite was called as a reply witness, and he admitted that the solicitor’s office (neither the Eleventh Circuit or the First Circuit) provided him with his original trial notes, and he was not sure they even existed any more. Hite’s assertion that petitioner told him “He was out driving around in his pick-up truck drinking beer, said he got home at, approximately, 2300 hours, or 11:00 p.m.” on the night of the incident was based on his review of only the earlier transcript. His further testimony that petitioner’s mother told him “she did not

see Tony Cooper at all [on the day of the murder]" were based on a "follow-up" sheet from the notes he did not know still existed, or were not provided for him. R. 1307, l. 14 – 1315, l. 4. Hite's reply testimony was used to impeach petitioner's testimony that he did not drive around drinking beer, and his late mother's earlier testimony that provided petitioner part of a corroborated alibi. R. 1143, l. 14 – 1147, l. 15; R. 1260, l. 23 – 1262, l. 17. While all of this was not known at the time the judge issued his order denying the motion, it was perfectly predictable. As counsel earlier argued, when unreasonable delay occurs there are foreseeable consequences.

In the final analysis, the trial judge observed that "[S]outh Carolina jurisprudence is somewhat undeveloped on the topic, including the different forms of prejudice, and there has not been any state guidance on the issue since the United States Supreme Court issued its opinion in Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686 (1992)." R. 338 – 339.

The Court of Appeals erred by affirming the trial judge's denial of his motion to dismiss and by holding petitioner's Sixth Amendment right to a speedy trial was not violated in this case, and by considering petitioner received some benefit from the delay because the state dropped its request to seek the death penalty. As petitioner also argued on rehearing the state would have been estopped from seeking the death penalty against petitioner where it had accepted Bo Southerland's confession exonerating petitioner as true, tried to derail his direct appeal because of his confession, and petitioner therefore did not gain any benefit from the state's unreasonable, arbitrary, and arrogant delay in retrying him. App. 17. Petitioner suffered prejudice from the state's inexcusable delay. See United States v. MacDonald, 456 U.S. 1, 8 (1982); R. 339.

II. Petitioner's Sixth Amendment right to confront Red Farmer was violated where the state did not make reasonable efforts to secure his presence from the Texas Correctional institution since allowing Farmer to be treated as "unavailable" under these circumstances, and having his prior stale testimony being read into the record was prejudicial to petitioner's defense.

The state brought the problem with Farmer to the court's attention on May 22, 2006, when petitioner's case was called to trial. Red Farmer was incarcerated at CCI in Columbia, South Carolina in October, 1989. Farmer later pled guilty to criminal conspiracy for his part in the decedent's death and he faced a sentence of five years imprisonment at the time of petitioner's prior trial. R. 943, ll. 12 – 23. Farmer's story was that he conspired with petitioner to rob the decedent. Farmer claimed he told petitioner on Wednesday, October 5, 1989 that Eugene Carter, who was the decedent's boyfriend, and who was in prison with Farmer, had told him that the decedent would be receiving an insurance check for twenty eight hundred dollars. Farmer claimed he told petitioner "that it would be good opportunity to rob her." R. 957, ll. 9 – 23. Farmer said he was to get five hundred dollars of the insurance money for his part in the robbery. R. 958, ll. 4 – 10.

Farmer testified during the first trial that petitioner called him at CCI on a state phone he had access to because of his work in the library as part of a literacy program. Farmer said that call came at 10:00 on Friday on October 6, 1999. R. 960, ll. 2 – 15. Farmer stated that because the phones were monitored "we talk in riddles." Farmer maintained that petitioner told him "that my intelligence was wrong that she did not have the twenty-eight hundred [dollars], that he completed the construction job that he was working on and that he had burned excess material and was pleased with the job and didn't see any complications." Farmer said he took this to mean that the decedent did not have the money, that petitioner killed her, and burned her body. R. 960, l. 8 – 961, l. 5. Farmer would later to admit to a clinical psychology student, Kimberly Turner, who interviewed him in a Texas jail the month of petitioner's re-trial, *that he did not tell the truth at petitioner's first trial and that he wanted to tell the truth "this time."* R. 1136, ll. 2 – 6. Farmer also told Turner he had put *the state's "spin" on the facts* at petitioner's first trial to make petitioner look bad. R. 1134, l. 13 – 1135, l. 14. (emphasis added).

The defense strongly urged that Farmer was a pathological liar, and it was imperative for the trial jury to observe his demeanor in person. Prior to trial, Assistant Solicitor Lupton told the judge the state had not been able to secure Farmer's presence from the state of Texas through a "normal out-of-state subpoena." Lupton said the state's attempt to have Farmer transported for the trial was rejected by the state of Texas. The solicitor attempted to blame this on the fact "[W]e're [South Carolina] not a signatory state in the uniform rendition of prisoners as witnesses in criminal proceedings act." Texas was a signatory state. Therefore Lupton maintained it was more difficult to obtain Farmer's presence for petitioner's trial. R. 349, l. 16 – 351, l. 4. Lupton also said "the paperwork was drawn up in April, submitted, you signed it" and that the "paperwork" went to the Texas Governor's Office, the Texas Secretary of State's office and then to their Criminal Justice Department. R. 350, l. 22 – 351, l. 4. Lupton opined that the state acted reasonably to obtain Farmer as a witness since it would normally took one to two weeks, "often times less time than that" to secure an out-of-state witness. R. 351, ll. 5 – 17. Therefore, the state claimed that Farmer was an unavailable witness within the meaning of Rule 804(a)(5), SCRE. R. 351, ll. 13 – 20. Lupton added that the state therefore should be allowed to merely read Farmer's prior testimony from fifteen or sixteen years ago into the record. R. 351, l. 13 – 354, l. 14.

The trial judge was skeptical of the state's representations. He asked: "Why did it take ten days to get SLED arranged . . . why didn't ya'll just use two local Lexington Deputies." Lupton claimed SLED was the lead law enforcement agency, and that was the proper agency to use. The judge still questioned why it took "ten days to get two agents assigned to the case." R. 354, ll. 15 – 25. Lupton claimed that SLED did not have sufficient manpower with Myrtle Beach bike week and black bike week going on in Myrtle Beach. R. 355, ll. 1–7. The judge responded: "I certainly don't think bike week takes precedence over this sort of proceeding." R. 355, ll. 8 –

11. Lupton then said he agreed with the judge but that he also did not think a week would have made any difference “because the judges were unavailable [in Texas], for the month of May” – the month of the trial. R. 355, ll. 8 – 22. Lupton told the judge he began talking with SLED on April 10, 2006, and provided “them names” between April 17 “through the 20th, somewhere in that time frame. And, at that time, the paperwork was prepared.” R. 356, ll. 11 – 24.

Defense counsel told the judge “the showing is inadequate on its face . . .” Counsel argued “Mr. Farmer is a classic unreliable witness,” and that petitioner would be denied his Sixth Amendment right to confrontation if his presence was not secured for trial. R. 357, l. 6 – 360, l. 22. Counsel informed the court that Farmer was a person who would “tell anybody who was talking to him anything. The man has absolutely no conception of what telling the truth might involve.” R. 360, ll. 7 – 24. Counsel noted that the defense had interviewed Farmer in Texas a few weeks ago, and that his presence at trial was critical. R. 360, l. 7 – 363, l. 14. Defense counsel *cited* Barber v. Page, 390 U.S. 719 (1968) and Crawford v. Washington, 541 U.S. 36 (2004), in support of his arguments that the state’s efforts to obtain Farmer for confrontation purposes were unreasonable, and that petitioner would be denied his right to Constitutional right to confrontation if Farmer did not testify at trial. R. 362, l. 18 – 366, l. 21. Counsel reminded the court: “[T]his case has been waiting around for a long, long time” and that the state’s efforts to procure Farmer’s presence from Texas were not reasonable. R. 364, l. 1 – 365, l. 20. The state found out “eleven days ago . . . that it “couldn’t have Mr. Farmer . . . it was casually mentioned during a meeting for another purpose. . .” During a discussion of discovery the state informed petitioner’s attorneys that “we’ve run into a problem with Mr. Farmer. He heard about this on a Friday a week, ten days ago.” Counsel told the judge that the “court has not heard one

word about this until this morning and most tellingly there was no motion for a continuance.” R. 365, l. 17 – 366, l. 21.

The judge then questioned the solicitor about why the state had not brought the problem with Farmer to the court’s attention. The solicitor claimed he thought the judge “at one point, [said] come hell or high water [the case would be tried] this week.” R. 366, l. 24 – 367, l. 24. An extremely testy response from the trial judge followed that suggestion. The judge told the solicitor “at no point did the court say it would not entertain your motions. If that’s your belief, you’re wrong.” R. 368, l. 14 – 370, l. 22. The judge told the solicitor “let’s just be honest, there was never any desire in your mind to convey to me that you wanted a continuance.” The judge added that the solicitor came in “just assuming you’re going to either not have that testimony or go forward with the transcript from the prior trial . . . you better think carefully about what you’re telling this court because I know the people I’ve been dealing with in this case and I never got a clue that there would be any desire to continue this case from anyone here today.” R. 370, l. 11 – 373, l. 18.

Defense counsel argued the state had had time to prepare its case, and he told the court: “I just could not, for this man *who’s been waiting for his trial for so long*, agree to any further accommodations for the state to make up for the fact *they don’t have their witnesses lined-up*. If the defense don’t have their witnesses, that’s the end of it. You do without. You argue and charge. And I think that’s where we are in this case.” R. 379, ll. 8 – 21. As the judge continued to inquire about the state’s actions the solicitor said “the paperwork was received in Texas at the beginning of May, processed in Texas. And, ultimately, we were informed on May 11 that he would not be available to South Carolina during the month of May.” R. 384, ll. 11-22. Defense counsel responded that May 10, 2006 was twelve days before a trial that had “been pending for

four years and months,” and he questioned how the state of South Carolina allowed it go unnoticed that it was not a signatory member of the Uniform Act R. 385, l. 20 – 386, l. 22. The solicitor repeated that the state had tried to obtain Farmer’s presence, and he opined that Farmer should be considered an unavailable witness. R. 389, ll. 4 – 12. The trial judge questioned that assertion. R. 393, l. 17 – 394, l. 6. Defense counsel argued reading the testimony back into the record, particularly here where the jury needed to observe Farmer’s demeanor because he was a pathological liar, and other options were unsatisfactory alternatives to his constitutional right to confrontation. R. 394, l. 12 – 395, l. 20. Counsel said the state should have started its efforts to obtain Farmer earlier and “it certainly is lackadaisical and it’s not fair.” R. 396, ll. 2 – 22. Counsel argued it was the state’s mistake and that the state and not petitioner should bear the burden of its unreasonable action. R. 396, l. 22 – 398, l. 3.

Farmer’s testimony was later read into the record. R. 940, l. 4 - 978, l. 25. In that testimony Farmer said he conspired with petitioner to rob the decedent. R. 944, l. 22 – 967, l. 19. While defense counsel was reading Farmer’s cross-examination from the prior trial where Farmer testified he excelled as a heavy lift crane operator, and talked about being “real good at what I do,” and getting requests from “one coast [of the country] to the other,” the solicitor objected. The objection was sarcasm in defense counsel’s voice as he read Farmer’s testimony. The judge instructed counsel: “Just read it straight from the record.” R. 1002, l. 15 – 1005, l. 7. Kimberly Turner, a doctoral candidate in psychology, was sent by the defense to interview Red Parker in the Texas Prison and she testified at trial. Turner interviewed Red Farmer in the Texas prison for two to three hours on May 5, 2006. R. 1130, ll. 6 – 17. Farmer said the first time he heard about the murder was the morning after it happened when he claimed he got a telephone call from petitioner. R. 1130, l. 14 – 1132, l. 12. Turner remembered Farmer telling her that he

did “spin” his testimony in favor of the state at trial to make “Mr. Cooper look worse than he was.” Turner thought Farmer was conveying to her that his testimony represented the state’s “version of the truth.” R. 1134, l. 13 – 1135, l. 14. However, on cross-examination the solicitor was able to get Turner *to go along with his characterization of the Cooper to Farmer phone call as a “confession” by petitioner to Farmer.* R. 1136, l. 19 – 1140, l. 25. The Court of Appeals held that petitioner was not denied his right to confrontation, and that the state’s efforts were not so unreasonable that Farmer’s prior testimony should have been excluded. App. *.

Discussion

The right to confrontation is a “trial right” and a defendant is entitled to the opportunity for effective cross-examination at trial. Barber v. Page, 390 U.S. 719 (1968); Kentucky v. Stincer, 482 U.S. 730 (1987); Starnes v. State, 307 S.C. 247, 414 S.E.2d 582 (1992); Pointer v. Texas, 380 U.S. 400, 405 (1965); Barber v. Page, 390 U.S. 719, 721 (1968). In Barber v. Page, the Court noted it was no longer reasonable to simply state that a witness was unavailable because he was in prison in another state. The Supreme Court stated there was now cooperation between the states and the federal government to procure the attendance of witnesses in prison and out of prison. Barber v. Page, 380 U.S. at 723 – 724. The Court in Barber v. Page explained that “for witnesses in prison, quite probably many state courts would utilize the common-law writ of habeas corpus ad testificandum at the request of prosecutorial authority of a sister state upon a showing that adequate safeguards to keep the prisoner in custody would be maintained.” Barber v. Page, 390 U.S. at 724, n. 4.

The Court in Barber v. Page held: “A witness is not ‘unavailable’ for purpose of the forgoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” Barber v. Page, 390 U.S. 724-725. “The

length to which the prosecution must go to procure a witness's presence is a question of reasonableness." State v. Hacheney, 160 Wash.2d 503, 158 P.3d. 1152, 1162 (2007). *citing* Ohio v. Roberts, 448 U.S. 56, 74 (1980), *overruled on other grounds*, Crawford v. Washington, 541 U.S. 36 (2004). Hacheney recognized that the United States Supreme Court has drawn a distinction between unavailability for Constitutional confrontation purposes, and unavailability for purposes of the rules of evidence. Here, as in Hacheney, the issue was solely confrontation.

In Hacheney, the state successfully moved to videotape their testimony at the deposition for later use. The defendant was present, and his attorneys were fully able to confront these witnesses and "*the jury was able to observe each witnesses' demeanor.*" State v. Hacheney, 160 Wash.2d 503, 158 P.3d. 1152, 1162 (2007). (emphasis added). Unavailability under Barber v. Page can only be found where the state has made reasonable efforts to secure the presence of the witness. It is the government's duty to establish the unavailability of the witness. Crawford v. Washington, 541 U.S. at 59–60.

The failure of the state to have Farmer available denied petitioner the opportunity to have the jury observe his demeanor. The jury needed to observe him because he was a pathological liar. The Court of Appeals erred by holding otherwise. App. 26.

III. The Court of Appeals erred by holding it was not error for the court to admit remote convictions for crimes of dishonesty where the court did not conduct a *State v. Colf* analysis.

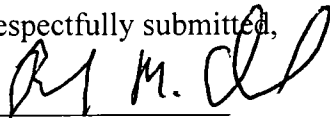
The solicitor moved to impeach petitioner with housebreaking, grand larceny and armed robbery convictions from 1977. R. 1027, l. 6 – 1029, l. 14. Defense argued these convictions were too remote, and outside the ten year time period allowed by Rule 609, SCRE. R. 1029, l. 15 – 1030, l. 11. The solicitor agreed more than ten years had elapsed "from this date." R. 1030, ll. 12 – 14. The convictions were twenty-nine years old at the time of trial. The solicitor argued

the crime occurred in 1989, that the 1977 crimes were ones of dishonesty. R. 1030, l. 22 – 1032, l. 10. The judge disallowed the armed robbery conviction. However he allowed the housebreaking and larceny conviction for impeachment. R. 1032, l. 8 – 1034, l. 5. Petitioner acknowledged that on September 16, 1977 he pled guilty to housebreaking and grand larceny in Lexington County. R. 1187, ll. 13 – 23. The court told the jury they could consider these as to petitioner's credibility.

This case is controlled by this Court's decision in State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005). Evidence of a prior conviction was admissible to impeach a witness unless a period of more than ten years had elapsed since the date (1) of the conviction or (2) the release of the witness from confinement of that conviction, whichever is later. Petitioner's convictions for grand larceny and house breaking occurred in 1977. Petitioner was released under the parole laws as they existed at that time. Trial was in May 2006. Thus petitioner's convictions and the release were well over ten years before trial, seventeen years after his arrest, and twenty-nine years after the convictions. The error was not harmless. Further, the trial judge did not perform the balancing test required by Rule 609 (b) SCRE State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). R. 1028, l. 22-1033, l. 25; App. 13-15.

Conclusion

A writ of certiorari should issue to allow full briefing on these issues.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender
Attorney for Petitioner

April 23, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Daniel F. Pieper, Circuit Court Judge

Opinion No. 4633 (S.C. Ct. App. filed 11/19/2009)
90-GS-32-83-84.

THE STATE,

RESPONDENT,

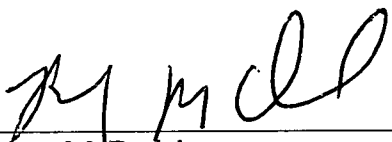
V.

GENE TONY COOPER, JR.,

PETITIONER

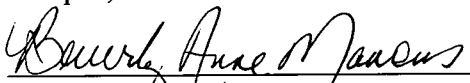
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, and the S.C. Court of Appeals this 23rd day of April, 2010.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of April, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: November 9, 2019

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Lexington County
The Honorable Daniel F. Pieper, Circuit Court Judge**

RECEIVED

JUL 26 2010

S.C. SUPREME COURT

THE STATE,

Respondent,

-vs-

GENE TONY COOPER, JR.,

Appellant.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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PETITION'S QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by ruling petitioner was not denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where the forty-four month delay was caused by the Eleventh Circuit Solicitor's admission he "did nothing" to prepare for petitioner's retrial from August, 2002 forward, the state then failed to keep its promise to try the case in the Spring of 2004, and later also failed to comply with the court's order to try the case by the end of 2005, since the state's lackadaisical approach was prejudicial to the incarcerated petitioner who had always maintained his innocence?
2. Whether the Court of Appeals erred by ruling petitioner was not denied his Sixth Amendment right to confront witness Red Farmer where the state did not make reasonable efforts to secure his presence from the Texas correctional system for petitioner's trial, since Farmer should not have been considered "unavailable" under these circumstances, and the jury was denied the opportunity to observe Farmer's demeanor, particularly where Farmer was a key witness?
3. Whether the Court of Appeals erred by ruling it was not reversible error for petitioner to be impeached with his 1977 convictions for house breaking and grand larceny since these convictions were too remote under Rule 609, SCRE, and the trial court did not conduct a State vs. Colf analysis for admitting these highly prejudicial crimes of dishonesty?

COUNTERSTATEMENT OF QUESTIONS PRESENTED

- I. Whether the Court of Appeals properly held that the trial judge did not abuse his discretion by denying Cooper's motion to dismiss the charges against him based upon an alleged

violation of his Sixth Amendment right to a speedy trial, where Cooper did not meet his burden of showing that he was entitled to relief under *Barker v. Wingo* and its progeny?

- II. Assuming that the trial judge's *in limine* ruling is preserved for appellate review, whether the trial judge abused his discretion by finding that Phillip Farmer was an "unavailable" witness within the meaning of Rule 804(a)(5), SCRE, such that his prior, sworn testimony could be presented to the jury, where the State made reasonable, good-faith efforts to secure his presence, but were unable to do so as the result of the Texas Department of Corrections' failure to act upon its request?
- III. Whether, assuming that the issue is preserved for appellate review, the Court of Appeals properly found that the trial judge did not abuse his discretion by ruling that Cooper could be impeached with his 1977 housebreaking and grand larceny convictions, under Rule 609(b), SCRE, where the State rebutted the presumption against admissibility of remote convictions and established that the probative value of the evidence substantially outweighed its prejudicial effect. Also, whether any error was harmless?

STATEMENT OF THE CASE

The State accept's Petitioner Cooper's Statement of the case for purposes of this Return.

ARGUMENTS

I. The Court of Appeals correctly held that the trial judge did not abuse his discretion by denying Cooper's motion to dismiss the charges against him based upon an alleged violation of his Sixth Amendment right to a speedy trial because Cooper did not meet his burden of showing that he was entitled to relief under *Barker v. Wingo* and its progeny.

Cooper's first argument is that the trial judge erroneously denied his motion to dismiss the charges against him based upon an alleged violation of his Sixth Amendment right to a speedy trial. However, the State submits that the Court of Appeals correctly held that the trial judge did not abuse his discretion by denying the motion because Cooper did not meet his burden of showing that he was entitled to relief under *Barker v. Wingo* and its progeny.

The Court of Appeals' "Statement of Facts" found that the relevant facts pertaining to this issue were as follows:

Cooper was indicted in January 1990 for murder, kidnapping, armed robbery, forgery, and conspiracy. On February 22, 1991, he was convicted on all charges and sentenced to death. However, almost three years later, the South Carolina Supreme Court reversed Cooper's conviction for murder and remanded the case for a new trial.FN1 The Supreme Court affirmed Cooper's convictions for kidnapping, armed robbery, forgery, and conspiracy.FN2 The following year, Cooper filed an application for Post Conviction Relief (PCR) pertaining to his four non-capital convictions. Counsel for both parties agreed that Cooper's retrial for murder should await the disposition of his PCR challenge. Following an evidentiary hearing, the PCR court granted Cooper relief for all of his non-capital convictions. The State appealed, and the South Carolina Supreme Court affirmed the granting of PCR.FN3 The State did not petition for rehearing, and the Supreme Court sent the remittitur to the Lexington County Circuit Court on August 29, 2002.

FN1. See *State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994).

FN2. Cooper remained incarcerated from his arrest in 1989 until his retrial in 2006.

FN3. See *Cooper v. Moore*, 351 S.C. 207, 569 S.E.2d 330 (2002).

Almost a year later, however, Cooper's retrial had still not been scheduled. On July 15, 2003, Cooper filed an amended demand for speedy trial, and a month later, a hearing was held in the circuit court before Judge Westbrook. FN4 During the hearing, the State made a motion to disqualify Cooper's attorney, David Bruck, from the case for having contact with Cooper's co-defendant, Bo Southerland. Bruck asserted he had no prior knowledge of the State's motion to disqualify him from the case. Judge Westbrook took the matter under advisement, and set another hearing to discuss the speedy trial and disqualification issues. On August 25, 2003, the parties held an in-chambers conference to discuss the issues, and at that time, the deputy solicitor stated the solicitor's office would call Cooper's case for trial during spring 2004, between April and June.

FN4. Cooper's motion was titled "Defendant's Amended Demand for Speedy Trial," but the record does not contain a copy of an un-amended motion.

The case was not called in spring 2004, and on February 10, 2005, Cooper filed a renewed demand for a speedy trial. Five days later, a hearing on the motion was held before Judge Keesley. Cooper moved to have the trial set for June or July 2005. The assistant solicitor said he could not set a date without Solicitor Donnie Myers being present, and the court should wait to set a date until a judge was selected for the case. On April 25, 2005, Judge Keesley ordered the case be heard before the end of 2005, or Cooper could move for bail or for dismissal of the charges. The order also provided notice was to be given to defense counsel of the trial date within thirty days of the order.

The following month, Solicitor Myers filed a motion to disqualify and recuse Cooper's attorneys. Myers stated that during Bruck's PCR representation of Cooper, Bruck contacted and communicated with Southerland, and obtained statements from him exculpating Cooper without approval from Southerland's attorneys. Myers asserted Bruck stipulated to the unauthorized communications; thus, Bruck and the other attorneys should be removed from the case and prohibited from talking with Cooper's newly-appointed attorneys.

Cooper filed a motion to dismiss all charges for lack of a speedy trial on June 1st. In the motion, Bruck stated that in response to Judge Keesley's April 25, 2005 Order, he sent an e-mail to the judge opposing counsel's request that the trial be set for the first of August because of a conflict with his schedule as a law professor at an out-of-state school.FN5 On July 12, 2005, a hearing was held before Judge Keesley concerning Cooper's motion for speedy trial; the State's motion to excuse Cooper's counsel; and the Eleventh Circuit Solicitor's motion to withdraw from the case due to a conflict of interest. The solicitor's office moved to be excused because the deputy solicitor was a law clerk to the judge who presided over Cooper's first trial and was present for attorney-client issues.FN6 The State also argued Bruck should be

removed from the case because of his improper contact with Southerland. On July 13, 2005, Judge Keesley filed his order, (1) denying the State's motion to remove Cooper's counsel; (2) granting the State's motion to disqualify the Eleventh Circuit Solicitor's Office; (3) denying Cooper's motion to dismiss; and (4) denying Cooper's motion for bail.

FN5. Bruck also sent copies of the e-mail to opposing counsel.

FN6. The motion to have the solicitor's office removed was not made known to Cooper until a June 29, 2005 letter.

In September 2005, the First Circuit Solicitor's Office was appointed to the case, and in December, Chief Justice Toal appointed Judge Pieper to hear the case. Shortly thereafter, on December 29, Cooper filed a renewed motion to dismiss all charges for lack of a speedy trial, or in the alternative for release on bail. Cooper re-asserted everything from his prior motions. Cooper also asserted that despite Judge Keesley's second order, the State appeared to have taken no action other than deliver the file to the Attorney General's Office and request assignment of a new solicitor. The State filed a response to Cooper's Motion, arguing this case was different from most speedy trial cases involving pre-indictment or pre-trial delay because the case had already been tried once. The State conceded the length of delay in this case triggered further analysis of the reasons the trial was delayed and whether Cooper was prejudiced; however, the State claimed the case was delayed for three years and four months, beginning from August 29, 2002, the date the Supreme Court sent down the remittitur. The State contended Cooper was not prejudiced by the delay because he had already been tried and convicted for the crimes. Cooper filed a reply to the State's response, asserting the State cited no authority for its position that Cooper's rights were diminished by his intervening conviction and appellate reversal, and Cooper argued it should have required less time for the State to retry the case. Cooper also claimed his many motions for speedy trial differentiated this case from other speedy trial cases and weighed heavily in granting his motion to dismiss.

On February 8, 2005, a hearing was held before Judge Pieper concerning the speedy trial issue. Judge Pieper issued his order on April 21, 2006, denying Cooper's motion. Cooper's second trial was held before Judge Pieper from May 22 to June 1, 2006. At the conclusion of the State's case and the conclusion of the presentation of evidence, Cooper made motions for directed verdict, which were denied. Cooper also renewed his motion to dismiss the indictments due to a speedy trial violation at the conclusion of all the evidence; however, Judge Pieper denied the motion. The jury convicted Cooper of each of the charged offenses. Judge Pieper sentenced *216 Cooper to life imprisonment for murder, twenty-five years for armed robbery, and five years for conspiracy to commit armed robbery. He did not impose a sentence for the kidnapping conviction. This appeal followed.

State v. Cooper, 386 S.C. 210, 212-16, 687 S.E.2d 62, 64-66 (Ct.App. 2009).¹ The Court thereafter denied relief on this allegation, reasoning as follows:

Cooper argues the trial court erred in denying his motion to dismiss the charges against him because his constitutional right to a speedy trial was violated. We disagree.

A criminal defendant is guaranteed the right to a speedy trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14; *State v. Pittman*, 373 S.C. 527, 548, 647 S.E.2d 144, 155 (2007). "This right 'is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life

¹ The State generally does not dispute the findings. However, it does take issue with and would correct several of the Court of Appeals' findings, such as the finding that Cooper filed his first request for a speedy trial on July 11, 2003 because this is the date of the document and not the date on which it was filed. South Carolina does not follow the "mailbox rule." Therefore, the demand for a speedy trial was not made until filed by the Lexington County Clerk of Court. *Fox v. Union-Buffalo Mills*, 226 S.C. 561, 86 S.E.2d 253 (1955) (when a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer). Judge Westbrook's hearing on the motion was on August 18, 2003; and that the date relied upon by the Court of Appeals was a date Cooper alleged an unrecorded proceeding was held. **R. pp. 5-15; see also April 25, 2005 Order, R. p. 29.** (Counsel waived Cooper's presence at this hearing and at the February 2005 hearing. **R. p. 5**). Also, counsel stated that the prosecution and defense had agreed that the retrial of the murder indictment should not proceed "until the status of his noncapital cases was finally resolved" in PCR. **R. pp. 5-7.** The State would further note that Judge Westbrook took the matter under advisement and he did not thereafter act on Cooper's motion. **R. pp. 10-14.**

The State would further note that at the first hearing held by Judge Keesley. Counsel explained that, after Spring of 2004, counsel accepted a job as a law school professor in Virginia, but that Cooper was anxious for him to remain on the case and he suggested a June or July 2005 trial date to accommodate counsel's school schedule. **R. pp. 5-6.** Further, counsel Bruck noted Cooper's willingness to have Judge Keesley serve as trial judge. **R. pp. 7-8.** *Contra Floyd v. State*, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991) ("in all post-conviction relief hearings held after the date of this opinion, a judge shall, upon motion, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought"). The State would also explain that the Solicitor's Office motion to be recused because of a conflict of interest arising from the Office's employment of the original trial judge's law clerk was based on the concern that, as a law clerk, Deputy Assistant Hubbard had been privy to privileged communications between the judge and defense counsel. **R. pp. 68-71.** Furthermore, the State would point out that at the July 12, 2005 hearing into the renewed motion held by Judge Keesley, counsel Bruck conceded that the Solicitor had written Judge Westbrook within thirty days of the April 25th Order "concerning the scheduling of a trial date" but he claimed that the State had not contacted Court Administration to ask that a judge be assigned. He also conceded that "at least the last four months of the year ... posed serious logistical problems for me" because of counsel's unrelated obligations as a law school professor. **R. pp. 8-10.** Judge Keesley's July 12, 2005 Order (**R. pp. 76-79**) concluded by noting that the court would "probably not be able to accommodate [trial counsel's] request that the case only be tried when he is not involved in his professional duties, while still trying to schedule the case at the earliest possible time." (Emphasis added).

Finally, for the Court's convenience, the State would note that Cooper's December 29, 2005 Notice of Motion and Renewed Motion to Dismiss All Charges for Lack of a Speedy Trial, Or in the Alternative for Release on Bail is at **R. pp. 81-85**; the "State's Response to Defendant's Motion for Speedy Trial and/or Granting Bail" is on **R. pp. 86-90**; Cooper's reply to that pleading is on **R. pp. 91-100**; Judge Pieper's February 8, 2006 *de novo* hearing on Cooper's motions is on **R. pp. 106-239**; the Solicitor's file, which Cooper introduced as **Defendant's Exhibit 1** at this hearing, is on **R. pp. 267-95**; a computer generated printout of Eleventh Circuit cases, **Defendant's Exhibit 2**, is on **R. pp. 296-327**; and Judge Pieper's Order denying Cooper's motion, which is dated April 21, 2006, is on **R. pp. 328-43.**

caused by arrest and the presence of unresolved criminal charges.’ ” *Id.* (quoting *U.S. v. MacDonald*, 456 U.S. 1, 8, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982)). There is no universal test to determine whether a defendant's right to a speedy trial has been violated. *State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

A reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *see also State v. Brazell*, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). These four factors are related and must be considered together with any other relevant circumstances. *Barker*, 407 U.S. at 533, 92 S.Ct. 2182. “Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.” *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155. However, in *Doggett v. U.S.*, 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), the United States Supreme Court suggested in *dicta* that a delay of more than a year is “presumptively prejudicial.” Also, in *State v. Waites*, our supreme court found a two-year and four month delay was sufficient to trigger further review. *Waites*, 270 S.C. at 108, 240 S.E.2d at 653. Therefore, “a delay may be so lengthy as to require a finding of presumptive prejudice, and thus trigger the analysis of the other factors.” *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155.

Cooper argues the delay of forty-four months in bringing his case to trial the second time exceeded any delay in almost any reported South Carolina case, and the State's reason for the delay was both arbitrary and unreasonable. Cooper argues his many motions for speedy trial should be weighted heavily in favor of granting his motion to dismiss. He also asserts his incarceration on death row “amounted to no small prejudice” and his “anxiety and concern as he waited for the state to call his case also cannot be diminished.” He further asserts that witnesses' memories were clearly affected by the delay at trial.

In his April 21, 2006 order denying Cooper's motions, Judge Pieper addressed each of the four Barker factors. As to the length of delay in bringing the case to trial, Judge Pieper noted that “a total delay of at least forty-four months [was] sufficient to trigger review of the other factors.” FN7 However, he found “the delay was to some degree the result of prosecutorial and governmental negligence, and partly justifiable.” He also stated that while none of the excuses alone were sufficient to justify the delay, when considered together, they sufficiently justified a majority of the delay. *See Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (holding that the “ constitutional guarantee of a speedy trial is protection only against delay which is arbitrary or unreasonable”). Specifically, Judge Pieper determined the main excuses for the delay were: (1) the complexity of the case and the amount of time required to prepare for trial; (2) the Eleventh Circuit Solicitor's Office's relocation due to mold

contamination and an overcrowded docket; (3) confusion over which judge, if any, had been assigned to the case; and (4) the recusal of the Eleventh Circuit Solicitor's Office from the case in July 2005, preventing the First Circuit Solicitor's Office from being appointed until September 2005. Therefore, Judge Pieper concluded "the state's conduct in this instance was not apparently willful and was largely justifiable."

FN7. We note the forty-four month delay in re-trying Cooper's case is troubling; however, in this case, we find it was justifiable.

In considering Cooper's assertion of his right to a speedy trial, Judge Pieper noted that "[i]t cannot be argued that since 2003 the defendant ever failed to assert his right to a speedy trial" and "nothing in the procedural history of the case could support a finding that the defendant failed to properly assert his right to a speedy trial." In consideration of the fourth and most important factor, prejudice, Judge Pieper found the main prejudice Cooper suffered was pretrial incarceration.

After weighing the four *Barker* factors and "the lack of demonstrable evidence of trial prejudice," Judge Pieper determined the "presumption of prejudice has been persuasively rebutted"; therefore, he denied Cooper's motion. Further, Judge Pieper noted the State withdrew its notice to seek the death penalty; thus, the withdrawal could be construed as a benefit to Cooper resulting from the delay. *See Brazell*, 325 S.C. at 76, 480 S.E.2d at 70-71 (noting the three-year and five-month delay was negated by the lack of prejudice to the defense). Therefore, we find Judge Pieper's decision was supported by the evidence.

Cooper, 386 S.C. at 216-18, 687 S.E.2d at 66-67. There was no error because Cooper has clearly failed to show a prejudicial abuse of discretion resulting from denial of his motion because the trial judge correctly applied the *Barker* factors. *See Brazell*, 325 S.C. at 75, 480 S.E.2d at 70 (1997).

The first factor, length of delay, acts as a threshold requirement. *Barker*, 407 U.S. at 530. *Barker* does not set forth a specific time which constitutes a "length of delay" that requires a complete inquiry into the other three factors, but states that it should be determined by the peculiar circumstances of the case. *Id.*² Here, the trial judge found that there was a forty-four month delay

² In *Doggett*, 505 U.S. at 651-52, the Court explained that this first prong is, itself a two-part inquiry. It is first necessary to determine if the delay breaks the threshold point of presumptive prejudice. If it does not, the inquiry is over and it is unnecessary to consider the other *Barker* factors. *Id.* Conversely, the Court must consider the remaining factors if the delay is presumptively prejudicial, and *Doggett* indicates that delay has been found "presumptively prejudicial" as it "approaches one year." 505 U.S. at 652.

and Respondent does not dispute that finding because approximately forty-four months passed between the Court's decision in *Cooper v. Moore*, and the trial judge's Order.³ As for the second factor of the *Barker* test, Cooper's suggestion that the reason for delay was the result of "bad faith," or as he claimed at oral argument "arrogance" on the part of the Eleventh Circuit Solicitor, simply is unsupported by the record. Rather than a "sit-in" or a willful refusal to act by the prosecution, the trial judge correctly found that "the delay was to some degree the result of result of prosecutorial and governmental negligence, and partly justifiable." **R. pp. 91-100.**⁴ The State agrees with most of the remaining findings by the trial judge on this prong of the *Barker* analysis.⁵ Some of the delay was the result of the mold problems in the Lexington County Courthouse, the repeated physical relocation

³ Contrary to Cooper's representation to this Court, the delay here did not "already exceed[] that found in almost any reported South Carolina case," **Final Brief of Appellant, p. 25**, as his citation to *Foster* and *State v. Robinson*, 335 S.C. 620, 634, 518 S.E.2d 269 (Ct. App. 1999) (delay of over four years and four months between indictment and trial triggered analysis of other *Barker* factors, but concluding that there was no prejudice) proves. Indeed, the delay in *Barker* was more than five years. *See also Brazell, supra* (delay three years and five months). However, the Court must consider the other three factors under *Barker* because this delay was "presumptively prejudicial" under *Doggett*. Cooper conceded below that the delay caused by the lengthy appeals process is not attributable to the prosecution, and that the murder case should not have been tried until the validity of his other convictions had been finally resolved. *See State v. Foster*, 260 S.C. 511, 197 S.E.2d 280, 281 (1973) (finding a delay of more than five years was sufficient to require analysis of the other factors without finding presumptive prejudice); *cf. Brazell*, 480 S.E.2d at 76 (a delay of three years and five months was sufficient to trigger review of the other *Barker* factors).

⁴ Further, to the extent there was any arrogance involved, it was that of defense counsel. Although he did repeatedly assert Cooper's right to a speedy trial, he likewise repeatedly asked that the trial date not interfere with his voluntarily assumed responsibilities as a law school professor in a state several hundred miles from South Carolina. *See R. pp. 23-24* (February 15, 2005 hearing before the Honorable William P. Keesley); **R. pp. 41-43** (counsel conceded at July 12, 2005 hearing before Judge Keesley that "at least the last four months of the year ... posed serious logistical problems for me" because of counsel's unrelated obligations as a law school professor); **65-66** (Judge Keesley addresses Cooper about desire to have Bruck represent him after Bruck took teaching job); **251-53** (scheduling hearing before trial judge). The trial judge found that Cooper had consistently asserted his right to a speedy trial since 2003; that Cooper timely asserted his right; and that Judge Keesley had not considered defense counsel's Bruck's requests to accommodate his schedule. **R. pp. 328-343**. However, the trial judge found that *some delay after his assignment to the case was because of his efforts to accommodate Bruck's schedule. R. pp. 250-53; 328-43.*

⁵ However, the State disagrees with the finding that the Solicitor had the responsibility of contacting Court Administration and obtaining assignment of a judge to Cooper's then-capital trial after repeatedly discussing the case with the chief administrative judge.

of the Eleventh Circuit Solicitor's Office and the construction of a new courthouse.⁶ Likewise, the delay caused by recusal of the Eleventh Circuit Solicitor's Office was reasonable, as were the steps taken by the First Circuit Solicitor's Office to comply with Judge Keesley's July 12, 2005 Order directing trial by the end of 2005.⁷ Similarly, the trial judge acted promptly and reasonably once the case was assigned to him.⁸ As a result, the trial judge properly concluded that all of the delay between July 12, 2005 and the subsequent trial was reasonable.⁹ Therefore, the delay was caused by a combination of reasonable, justifiable matters and simple neglect or inadvertence, rather than any willful act or bad faith by the State. It does not reflect intentional or malicious delay in an effort to gain any advantage over Cooper or to impede his defense; and he failed to meet his burden. *See Robinson*, 335 S.C. at 626, 518 S.E.2d at 272; *see also Barker*, 407 U.S. at 531 (finding deliberate attempt to delay a trial in order to hamper the defense should be weighed heavily against the

⁶ The trial judge's Order found that court records reflected that "the last general sessions term in the old courthouse was November 13, 2003 The first general sessions jury trial in the new courthouse was on April 4, 2004." This accounts for four months and twenty-one days of delay. The trial judge correctly found that, although general sessions pleas and civil court began on January 8, 2004, it was reasonable for the Solicitor's Office "to get settled into the new facility," as Solicitor Myers testified. *R. p. 334*. Also, the delay occasioned by consideration of the prosecution's motions for recusal, including the motion to recuse the Eleventh Circuit Solicitor's Office because of a conflict of interest, was reasonable and not part of a "pattern of delay," as Cooper argues. The spuriousness of Cooper's attack on the motion to recuse the Eleventh Circuit Solicitor's Office is demonstrated by Judge's Keesley's decision to grant the motion and the trial judge's finding that it was an appropriate motion. If the motion had not been granted, then Cooper most assuredly would have raised the issue, either at trial or, more likely, in PCR.

⁷ The case was not assigned to the First Circuit Solicitor until September 2005, and Senior Assistant Solicitor Bell took it upon himself to inquire about the assignment of a judge when he realized that Court Administration still had not assigned one despite Judge Keesley's July 12, 2005 Order.

⁸ Also, the trial judge clearly accommodated the schedule of Cooper's trial counsel when scheduling the case. *R. p. 336-38 & n. 3*. *See Gattis v. Snyder*, 278 F.3d 222, 231 (3rd Cir. 2002) (no speedy trial denial for delays sought by petitioner's attorney); *United States v. Tanh Huu Lam*, 251 F.3d 852, 856-7 (9th Cir. 2001), amended, 262 F.3d 1033 (9th Cir. 2001) (litigants are bound by the conduct of their attorneys and delays caused by continuances granted to the defense precludes a claimed speedy trial violation). Mr. Bruck's unwillingness or inability to try cases throughout the calendar year further delayed the case and his conduct is not the fault of the State. *Id.*

⁹ The delay between July 12, 2005, and the trial judge's April 21, 2006 Order was nine months and nine days. Thus, almost fourteen months of the forty-four month delay was reasonable, notwithstanding Cooper's contrary argument.

government while a more neutral reason such as negligence or overcrowded docket should be weighted less heavily); *Kennedy*, 339 S.C. at 250, 528 S.E.2d at 704 (absence of evidence of purposeful delay by State in considering reason for delay is a factor in speedy trial analysis); *State v. Owens*, 260 S.C. 79, 194 S.E.2d 246 (1973).

The third *Barker* factor, the accused's assertion of his constitutional right to a speedy trial, supports the ruling below. Cooper first asserted his right demand for a speedy trial on July 11, 2003, or almost eleven months after this Court had ruled on the validity of the kidnapping, armed robbery and conspiracy convictions in *Cooper v. Moore*, *supra*. He thereafter asserted his right, as repeatedly qualified by trial counsel's efforts to have the trial accommodate his schedule, as discussed. Finally, this Court must examine whether Cooper was prejudiced as a result of the delay.¹⁰

While the *Doggett* Court indicated that "affirmative proof of particularized prejudice is not essential to every speedy trial claim," *Doggett*, 505 U.S. at 654, the delay in the present case was caused, in part, by negligence. "[T]o warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice." *Id* at 657; *see also Pittman*, 373 S.C. at ___, 647 S.E.2d at 156 (citing *Doggett*). In support of his claim of prejudice, Cooper points to his "rigid incarceration on death row;" the absence of Phillip "Red" Farmer's physical presence, so that the jury could assess his testimonial demeanor; and the fact some memories had faded by the time of the retrial, including that of the prosecution's reply witness, Edward Hite. None of these factors shows prejudice by the delay. His

¹⁰ *Barker* emphasizes that prejudice should be assessed in light of the interests of defendants that the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility the defense will be impaired. *Barker*, 407 U.S. at 532. Of these, the most serious is the impairment of the defense because the inability of a defendant to adequately prepare his case skews the fairness of the entire system. *Id*; *see Kennedy*, 528 S.E.2d at 704 (quoting *Barker*). *See also Smith v. Hooey*, 393 U.S. 374, 377-78 (1969); *United States v. Ewell*, 383 U.S. 116, 120 (1966).

reliance upon the first two, subjective components of the *Barker* prejudice analysis is disingenuous, at best.¹¹ As the record makes abundantly clear, Cooper had previously been under a death sentence for this murder; and he had been housed on death row at least since February 22, 1991, when the original jury sentenced him to death. Thus, his pretrial incarceration cannot seriously be viewed as oppressive.¹²

More importantly, the trial judge correctly determined that Cooper had not shown possible trial prejudice. **R. pp. 328-43.** This case had been tried in 1991. Most, if not all, of the evidentiary issues had been “fleshed out” and Cooper had a transcript of the testimony of the witnesses who testified at that time. There was also a transcript available of Southerland’s trial. Thus, he had a roadmap for the retrial. The prior sworn testimony of unavailable witnesses from both sides was preserved; and any witness who testified at the 2006 trial could have his or her memory refreshed by the earlier, sworn testimony. Also, testifying witnesses could be impeached with inconsistencies between their 2006 testimony and the earlier testimony.

¹¹ His argument is predicated upon *dicta* from *United States v. McDonald*, 456 U.S. 1, 8 (1982), that “the Sixth Amendment is not primarily intended to prevent prejudice to the defense caused by the passage of time; that interest is protected primarily by the due process clause and by statutes of limitations.” However, he is wrong. The majority in *Doggett* clearly indicated that the lack of prejudice to the defense caused by the passage of time is the primary manner for the prosecution to rebut presumptively prejudicial delay, in most speedy trial cases. Even the dissent in *Doggett* recognizes that *Barker* and other cases emphasize that prejudice to the defense is a chief component in assessing prejudice. The dissent simply faults the majority for not recognizing that there are, in the dissent’s estimation, apparently “two conflicting lines of authority.” *Doggett*, 505 U.S. at 61-62 (Thomas, J., dissenting).

¹² This is particularly true when one considers the other evidence of his criminal history which was more fully developed at the subsequent trial. For instance, the State’s showing at sentencing was that Cooper has three prior convictions for armed robbery, and convictions for housebreaking and grand larceny from 1977. Once incarcerated, he was caught plotting an escape from Manning Correctional Institution and was then transferred to Central Correctional Institution. He also had three escape attempts from C.C.I. On one occasion, guards shot at him and bloodhounds had to be called out to track him on another. “While he was in the maximum security unit at C.C.I., he ... managed to escape [and] shanked a fellow inmate,” stabbing the other inmate three times. **R. pp. 1527-28.** Admittedly, his record was not presented in connection with the State’s response to the motion to dismiss because of denial of Cooper’s right to a speedy trial, but this Court must understand how misleading Cooper’s argument is as to this aspect of prejudice under *Barker*. Also, any anxiety that he may have felt while awaiting a retrial must surely have been *de minimus*.

That Farmer was not physically present was not prejudicial to Cooper.¹³ For the reasons set forth in **Argument II**, Cooper cannot show any prejudice from the trial judge's ruling with respect to Farmer.¹⁴ Therefore, the trial judge properly concluded that the State "ha[d] proved that the delay has not impaired [Cooper's] ability to defend himself, contrary to the circumstances in *Doggett*." **R. pp. 323-43 n. 3.** Cooper's argument lacks merit. Further, Cooper's heavy reliance upon Southerland's admission to Bruck or at PCR is not properly before this Court because not argued in the Initial Brief of Appellant. See **IBOA, pp. 8-29.** See Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). This argument was therefore abandoned and may not be raised in the rehearing petition. *Id.* See also *State v. Primus* 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002) ("The State did not raise this issue in its brief to the Court of Appeals. The State offered its present argument for the first time in its petition for rehearing. Because the State failed to raise its current argument in its brief to the Court of Appeals, the issue is not properly preserved for this Court's consideration on writ of certiorari").¹⁵ Cooper's argument lacks merit.

II. Assuming that the trial judge's *in limine* ruling is preserved for appellate review, the trial judge did not abuse his discretion by finding that Phillip Farmer was an "unavailable" witness within the meaning of Rule 804(a)(5), SCRE, such that his prior, sworn testimony could be

¹³ In this regard, he was no different from any other unavailable witness.

¹⁴ He was also not prejudiced, in any fashion, by supposed deficits in Mr. Hite's memory or that of any other prosecution witness. *Prantil v. California*, 843 F.2d 314, 318-19 (9th Cir. 1988 (dimmed memory by a prosecution witness is insufficient because it helps the defendant)).

Nor has Cooper pointed to any witness who died between August 2003 and the date of his trial whose sworn testimony was not preserved, either through his 1991 trial or the trial of his co-defendant, Southerland.

¹⁵ Additionally, his point is simply a red herring. His contention that the State "would have been estopped from seeking the death penalty against him because it relied upon Southerland's statement in PCR and later allowed Southerland to plead guilty is simply wrong. He misses the point of the State's reliance upon that statement in PCR. The statement was an admission, regardless of his truthfulness; and the State unsuccessfully argued that it procedurally barred his guilt phase ineffectiveness claims under *Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981).

presented to the jury because the State made reasonable, good-faith efforts to secure his presence, but was unable to do so as the result of the Texas Department of Corrections' failure to act upon its request.

Cooper next argues that the trial judge erred by finding that Phillip Farmer was an "unavailable" witness within the meaning of Rule 804(a)(5), SCRE, such that his prior, sworn testimony could be presented to the jury. Assuming that the trial judge's *in limine* ruling is preserved for appellate review, despite Cooper's failure to renew his objection when the State published Farmer's testimony, the trial judge did not abuse his discretion by finding¹⁶ that Phillip Farmer was an "unavailable" witness within the meaning of Rule 804(a)(5), SCRE, because the State made reasonable, good faith efforts to secure his presence, but was unable to do so as the result of the Texas Department of Corrections' failure to act upon its request. Further, any error in the trial judge's ruling was harmless beyond a reasonable doubt.

Initially, the State submits that the issue is not preserved for appellate review. The direct examination from Farmer's prior testimony was presented to the jury, without Cooper renewing his

¹⁶ The question of Phillip "Red" Farmer's availability as a witness was initially addressed at a pretrial hearing during which the State submitted two affidavits in support of its motion to have Farmer declared an "unavailable" witness under Rule 804(a)(5): one from Senior Assistant Solicitor Bell (**Court's Ex. 4, R. p. 1541**) and one from James M. Frazier, III, Esq., who is an Assistant General Counsel for the Office of General Counsel for the Texas Department of Criminal Justice. (**Court's Ex. 3, R. p. 1539**). That hearing is set forth on **R. pp. 349-401**. The trial judge later revisited the issue during the State's case. **R. p. 836-63**. A copy of the State's paperwork was introduced as **Court's Ex. 9**.

In ruling, the trial judge stated that he had reviewed the record, including Farmer's prior testimony. He found that there had originally been some uncertainty as to the trial date, but that this was clarified by March. The rendition request (**Court's Ex. 9**) was initiated in April, but it was delayed because a duplicate had not been submitted to the Secretary of State. However, the trial judge had reviewed the "pertinent procedures and statutory requirements" and did not see any requirement that a duplicate had to be submitted. Thus, he did not attribute that delay to the prosecution. **R. pp. 863-64**. He further found that both governors had signed the paperwork in early May. However, no judge was available to hold a hearing, which is mandatory under Texas law. He also found that "it's difficult for me to say that the State acted unreasonably" when Texas did not make any judges available to hear the rendition request. He therefore found that Farmer was an unavailable witness. Moreover, he found that "[t]he second aspect of the rule has been met by Agreement," since Farmer was under oath in the original trial and Cooper had engaged in "the full right of confrontation" at that time. Cooper's only argument was denial of "face-to-face confrontation." After he observed that there was apparent argument as to the record for impeachment purposes, the trial judge noted that he had never prevented either party from requesting a continuance and he observed that neither party had requested a continuance. **R. pp. 865-66**. Cooper was then given until the following morning to determine whether he wanted a continuance (**R. p. 866**), but he ultimately decided not to request one. **R. pp. 871-72; 875-76**.

objection. **R. pp. 941-63.** Cooper then published segments of the 1991 cross-examination. **R. pp. 963-69; 975-78.** It is well settled that a ruling on an *in limine* motion is usually not final and the losing party must renew his or her objection when the evidence is presented. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Gagum*, 328 S.C. 560, 492 S.E.2d 822 (Ct.App. 1997).¹⁷ Here, the *in camera* ruling was not immediately before the State published Farmer's testimony, and the issue is not preserved for appellate review. *See Schumpert*. Apart from this point, the State submits that the Court of Appeals' decision and the trial judge's ruling correctly applied the appropriate state and federal law, and that Cooper has not advanced any reason warranting reversal. The Court of Appeals denied relief as follows:

Cooper argues the trial court erred in finding Phillip Farmer was an unavailable witness and allowing Farmer's prior testimony to be read into the record because it denied Cooper his constitutional right to confrontation. We disagree.

The confrontation clause of the Sixth Amendment of the Constitution of the United States is applicable to the States, and the primary interest secured by the confrontation clause is the right of cross-examination. *State v. Mizzell*, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); *Starnes v. State*, 307 S.C. 247, 249, 414 S.E.2d 582, 583 (1991). "The right to confrontation has been referred to as a 'trial right.' " *Starnes*, 307 S.C. at 249, 414 S.E.2d at 583 (quoting *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)). This trial right includes the opportunity to cross-examine and have a jury weigh the demeanor of the witness. *Barber*, 390 U.S. at 725, 88 S.Ct. 1318 (1968). Thus, "the appropriate question under the confrontation clause is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." *Starnes*, 307 S.C. at 250, 414 S.E.2d at 584.

"[T]here has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." *Barber*, 390 U.S. at 722, 88 S.Ct. 1318. "[A] witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the

¹⁷ An exception is recognized only where the motion is ruled on immediately prior to the introduction of the evidence in question. Under those circumstances, no further objection is necessary. *State v. Tufts*, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (S.C. App. 2003); *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1998); *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995).

prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” FN8 *Id.* at 724-25, 88 S.Ct. 1318. Rule 804(a)(5), SCRE, provides that a witness may be declared “unavailable” if the declarant “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance ... by process or other reasonable means.”

FN8. In *Barber v. Page*, the United States Supreme Court found Barber’s right to confrontation had been violated when “the State made absolutely no effort to obtain the presence of [the witness] at trial other than to ascertain that he was in a federal prison outside of Oklahoma.” 390 U.S. at 723, 88 S.Ct. 1318. Further, the Court found the “sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek his presence.” *Id.* at 725. In contrast, here, the State attempted to have Farmer brought to South Carolina to testify, but was unable to do so due to circumstances beyond the State’s control.

Cooper argues the State’s efforts to procure Farmer’s presence from Texas were unreasonable. Cooper also asserts the State knew it would be unable to obtain Farmer’s presence at trial eleven days prior to the trial; however, the State did not make a motion for continuance, or even bring the problem to the court’s attention. He argues the State’s failure to have Farmer available to testify in person denied him his constitutional right to confrontation because Farmer is a pathological liar and it was imperative for the trial jury to observe his demeanor in person.FN9

FN9. At trial, the State introduced Farmer’s previous testimony that he called Cooper to initiate a conspiracy between himself and Cooper to rob the decedent. To impeach Farmer’s previous testimony, Cooper introduced the testimony of Kimberly Turner, a Ph.D. student in clinical psychology who had interviewed Farmer in jail. In Farmer’s new statement to Turner, he stated he had only heard from Cooper after the murder, and he was “completely surprised” by the phone call. Farmer told her that he had put a “spin” on his testimony in favor of the State at the first trial to make “Cooper look worse than he was.” He said he wanted to “tell the truth this time.”

The State asserted the Solicitor was unable to secure Farmer’s presence from a Texas penitentiary through a normal out-of-state subpoena because South Carolina is not a signatory state to the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (the Act). At trial, the State submitted two affidavits in support of its motion to have Farmer declared an “unavailable” witness under Rule 804(a)(5): one from Senior Assistant Solicitor B. Harrison Bell, and one from James M. Frazier, III, an Assistant General Counsel for the Office of General Counsel for the Texas Department of Criminal Justice.

In his affidavit, Frazier testified that because South Carolina is not a signatory to the Act, the Texas Department of Criminal Justice would not honor a mere subpoena for Farmer to appear as a witness in South Carolina. Instead, Texas required an executive agreement between the governor of South Carolina and the governor of Texas. The prisoner witness must then have a hearing before a district judge who will decide whether the prisoner witness will be transported to the requesting state. Frazier also testified that Texas will not release a prisoner without a hearing and an order of transport from a district judge. He further testified there are only two judges in Texas who hold hearings for prisoner witness renditions to other states. He confirmed Bell made a request to have Farmer transported, and he submitted the appropriate paperwork to Texas, which was received on May 10, 2006. Frazier testified he contacted the court to set up a hearing; however, neither judge was available for the remainder of the month of May. He notified Bell of this on May 11, 2006. He said he had “no reason to believe the South Carolina authorities were aware of that unavailability before this week when I first informed them of such.”

Judge Pieper reviewed the rendition request and noted it was initiated in April, but was delayed because a duplicate had not been submitted to the South Carolina Secretary of State. However, he reviewed the “pertinent procedures and statutory requirements” and did not see any requirement to submit a duplicate; thus, he did not attribute the delay to the prosecution. He found that both the South Carolina and Texas governors had signed the paperwork in early May; however, no Texas judge was available to hold the hearing as required by Texas law. Thus, Judge Pieper stated “it’s difficult for me to say that the State acted unreasonably” when Texas did not have any judges available to hear the rendition request. Additionally, Judge Pieper noted that Farmer was under oath at the first trial and Cooper had engaged in “the full right of confrontation.” Judge Pieper further noted that neither party had requested a continuance. Therefore, we find Judge Pieper’s decision was supported by the evidence.

Cooper, 386 S.C. at 218-21, 687 S.E.2d at 67- 69.¹⁸

Cooper conceded below that the second prong for admission of Farmer’s testimony was satisfied because Cooper had the prior opportunity to cross-examine him in 1991. Thus, the only

¹⁸ As interpreted by the Court in *Crawford v. Washington*, 541 U.S. 36 (2004), the primary object of the right of confrontation lies in securing for the criminal defendant a basic procedural guarantee: that he is entitled to confront and cross-examine “witnesses” who bear “testimony” against him. *Id* at 51. The Court ruled that the trial court erred by admitting an unavailable witness’s tape recorded statement, taken during police investigation and describing defendant’s commission of the crime, because the defendant had no opportunity to cross-examine during the witness’s prior statement to the police. However, “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior statements.... The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Id* at 38 n. 9 (citations and punctuation omitted).

question for the Court to resolve on appeal is whether the trial judge abused his discretion by finding that Farmer was “unavailable.” There was no error. The “unavailability as a witness” requirement of Rule 804, SCRE, is satisfied where the “declarant ... is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ... by process or other reasonable means.” Rule 804 804(a)(5), SCRE (emphasis added).¹⁹

Here, the State acted in good faith and utilized “other reasonable means” but was ultimately unsuccessful.²⁰ The present case is clearly distinguishable from *Barber*, since the prosecution immediately “began attempting to subpoena ... Farmer, an inmate in the Texas Department of Corrections” upon hearing “in the beginning to middle of March 2006” that the trial of this case would begin on May 22, 2006. Farmer was contacted and it was determined that he was willing to testify, and that his testimony would be consistent with his original trial testimony. However, the Texas Department of Criminal Justice would not honor the subpoena because South Carolina is not a signatory state for the Uniform Act to secure rendition of prisoners in criminal proceedings.²¹

¹⁹ Under Rule 804(b)(1), SCRE, “[t]estimony given as a witness at another hearing of the same or a different proceeding” is not hearsay if the declarant is unavailable. *See also State v. Sanders*, 356 S.C. 214, 217, 588 S.E.2d 142, 144 (Ct. App. 2003) (“Here, it is uncontested that the State made numerous unsuccessful attempts to procure Vigier's appearance at the re-trial by subpoena and that Vigier was, therefore, unavailable within the meaning of Rule 804(a) and (b)”).

²⁰ The Supreme Court's prior decisions have recognized the necessity for a limited exception to the confrontation requirement, for the prior testimony of a witness who is unavailable at the defendant's trial. “In keeping with the importance of this provision in our constitutional scheme, however, we have imposed a heavy burden on the prosecution either to secure the presence of the witness or to demonstrate the impossibility of that endeavor.” *Ohio v. Roberts*, 448 U.S. 56, 78 (1980), *overruled on other grounds*, *Crawford*, *supra*. In *Barber v. Page*, 390 U.S. 719, 724-25 (1968), the Court held that “a witness is not ‘unavailable’ for purposes of the ... exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” *Accord Mancusi v. Stubbs*, 408 U.S. 204 (1972); *California v. Green*, 399 U.S. 149, 161-62, 165, 167 n. 16 (1968); *Berger v. California*, 393 U.S. 314 (1969). “The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness.” *Green*, 399 U.S. at 189 n. 22 (Harlan, J., concurring) (citing *Barber*, *supra*). “The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.” *Roberts*, 448 U.S. at 74.

²¹ *See* Vernon's Ann. Texas C.C.P. Art. 24.29. *Contra Brumley v. Wingard*, 269 F.3d 629, 641 (6th Cir. 2001).

Instead, Texas required the executive agreement between the governors of both states as described above. Mr. Bell, the prosecutor, consulted with both with the Governor's Office and the State of Texas about the process. He then began preparing the necessary paperwork and making other necessary arrangements related to transporting and housing Farmer.²² By April 20th, the State had obtained the necessary signatures of the trial judge and the Clerk of Court; and it had submitted the rendition request to the Governor of South Carolina.

When Mr. Bell learned of a scrivener's error on April 26th, he promptly submitted corrected paperwork. However, his reasonable efforts to obtain Farmer were further hampered when the South Carolina Secretary of State added an additional requirement, of which Mr. Bell was not aware; a signed duplicate of the original.²³ However, Mr. Bell expeditiously complied with this requirement, and the rendition request was received by the Governor of Texas on May 5th. Even with the additional delay unnecessarily caused by the Secretary of State's request for a signed duplicate, the request was in Texas and was ready to be acted upon over two weeks before Farmer's testimony would have been needed. Only after the Texas Department of Criminal Justice received the request on May 10th was it ascertained that neither of the two Texas judges with authority to hear the request would be able to hear the request until June 2006. Notwithstanding Cooper's argument to the contrary, these steps constituted a good-faith and objectively reasonable effort to secure Farmer's presence. It was neither bad faith nor unreasonable to assume that a Texas judge would be able to

²²Also, a member of the General Counsel's Office for the Texas Department of Criminal Justice had told Mr. Bell, in their late March or early April conversation, that "the judges were available every week or every other week."

²³Neither Vernon's Ann. Texas C.C.P. Art. 24.29, nor the "Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings," of which South Carolina is a signatory state, have such a requirement. *See* S.C. Code Ann. § 19-9-70 (Supp. 2010).

hear the request. See *United States v. Casamento*, 887 F.2d 1141, 1169 -1170 (2^d Cir. 1989).²⁴ A number of cases from other jurisdictions support the conclusion that the State acted reasonably and in good faith.²⁵

Nor did the State act in an objectively unreasonable fashion by not requesting a continuance. The State did not make a continuance request because it thought that the trial judge's ruling on the speedy trial motion precluded it from requesting a continuance.²⁶ Additionally, Cooper conceded in the lower court that he was permitted full confrontation in the 1991 trial, and his argument ignores the extraordinary latitude that the trial judge gave Cooper to impeach Farmer's 1991 testimony with matters occurring after the 1991 trial. Counsel's cross-examination fully set forth enough information so that the jury could properly assess the witness' credibility and counsel could demonstrate the supposed lack of it. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (the

²⁴ In *Casamento*, the Court concluded that the extent of the government's effort to obtain the witness "was both reasonable and undertaken in good faith-as is implied by the district court's ruling-and therefore satisfied both Rule 804 and the confrontation clause. Having been told by the Italian authority responsible for extraditions that Italy would not extradite [the witness], the government had no obligation to take any further action. [Defendant] implies that the government should have made a formal written request for [the witness'] extradition. While utilizing this formal approach perhaps would have been preferable, such a request would most likely have been futile and '[t]he law does not require the doing of a futile act.' *Roberts*, 448 U.S. at 74, 100 S.Ct. at 2543." *Casamento*, 887 F.2d at 1169. The Court further concluded that "[t]he government's statement in its affidavit that it believed Italy's position was sound was not unreasonable and the statement sufficed to establish that the government made a 'good-faith effort[],' *id*, despite the fact that it limited itself to a single conversation with the responsible Italian official in its effort to procure [the witness] for trial. *Id*.

²⁵ E.g., *United States v. Acevedo-Ramos*, 842 F.2d 5 (1st Cir. 1988); *United States v. Sindona*, 636 F.2d 792 (2^d Cir. 1980); *Bailey v. Southern Pac. Transp. Co.*, 613 F.2d 1385 (5th Cir. 1980), *reh'g denied*, 618 F.2d 781 (5th Cir. 1980); *Odato v. Vargo*, 677 F. Supp. 384, 24 Fed. R. Evid. Serv. 753 (W.D. Pa. 1988).

²⁶ Although the Order does not expressly state a continuance would not be entertained, the last page of that Order contains strong language about the responsibility for an expeditious trial, and the Order shows the reasonableness of the prosecution's failure to seek a continuance. Moreover, there is no guarantee that Texas would have acted during "a temporary delay" of the trial, which the trial judge was willing to grant. R. p. 397. Cooper's arguments to the contrary are purely speculative. Further, Cooper's claim that he was deprived of the opportunity to have the jury assess Farmer's testimonial demeanor is specious. This position would negate the reason for Rule 804(a) and it is contrary to the United States Supreme Court's authority recognizing a limited exception to the confrontation requirement for the prior testimony of a witness who is unavailable at the defendant's trial. See *Roberts*, and *Mancusi*, *supra*. See also *Barber*, 390 U.S. at 724-25; *Green*, 399 U.S. at 161-62.

Confrontation Clause is generally satisfied where the defense had a full and fair opportunity to expose a witness' "forgetfulness, confusion or evasion," thereby calling to the attention of the fact-finder reasons to discredit the witness's testimony); *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998).

Finally, any error resulting from the trial judge's ruling must be viewed as harmless. A violation of a defendant's Sixth Amendment right to confront a witness is not *per se* reversible error if the error is harmless beyond a reasonable doubt. *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Whether an error is harmless depends on the particular facts of each case and upon a host of factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case." *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." *Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted). Here, the ruling was harmless for several reasons:

- While Farmer was an important witness for the reasons argued in the lower court, he was not the State's main witness. Rather, Southerland was the primary witness because he gave graphic, detailed eyewitness testimony as to all of the offenses, including the conspiracy, kidnapping, armed robbery and, of greatest importance, the murder of Kim Quinn.
- Much of Farmer's testimony was cumulative to Southerland's, although he provided more details concerning the conspiracy to rob her.
- Many of the material points in Farmer's testimony were corroborated, either by Southerland's testimony or by the circumstantial evidence presented at trial, facts with which this Court is obviously familiar in light of hearing the

prior appeals in this case and which are recited in the Statement of Facts of the Final Brief of Respondent.

- It is virtually impossible to imagine how the trial judge could have been any more lenient in his rulings on what Cooper could use to impeach Farmer's 1991 testimony. Indeed, much of what the trial judge permitted Cooper to use to impeach Farmer would not have been admissible if Farmer had testified and the State had raised an objection.²⁷
- Of greatest importance, there was overwhelming evidence of Cooper's guilt, separate and apart from Farmer's testimony.²⁸

The bottom line is that, in order to have found Cooper not guilty, the jury would have had to accept that virtually every single fact witness either lied or was mistaken. Thus, any error was harmless.

III. Assuming that the issue is preserved for appellate review, the Court of Appeals properly found that he trial judge did not abuse his discretion by ruling that Cooper could be impeached with his 1977 housebreaking and grand larceny convictions, under Rule 609(b), SCRE, where the State rebutted the presumption against admissibility of remote convictions and established that the probative value of the evidence substantially outweighed its prejudicial effect. Further, any error was harmless.

Assuming that the issue is preserved for appellate review, Cooper's remaining argument is that the trial judge erroneously ruled that the State could impeach him with his 1977 housebreaking and grand larceny convictions. There was no abuse of discretion because the prosecution rebutted

²⁷ Cooper was allowed to publish a summary of drug related charges against Farmer in Aiken County, all of which apparently occurred in 1995. Farmer, however, was not arrested until sometime thereafter on each charge and arrest warrants were not served until 1998. A bench warrant was issued on at least two charges after he fled the jurisdiction. Cooper also published Farmer's 2001 Texas convictions and sentences for manufacturing methamphetamine and possession of methamphetamine. On the manufacturing charge he received a life sentence and a \$144,000.00 fine. On the possession charge, he was sentenced to life and a \$100,000.00 fine. **R. pp. 992-93.** Additionally, Cooper published significant portions of Farmer's testimony from his August 17, 2001 Texas sentencing hearing. **R. pp. 993-1013.** Later, Kimberly Turner testified to statements Farmer had made to her and a Texas attorney when they interviewed him on May 5, 2006, in a Texas prison. Much of what he said at that time impeached his 1991 testimony. **R. pp. 1127-1141.**

²⁸ On appeal, Cooper repeatedly attempts to denigrate how overwhelming the State's case was against him. However, this was not merely the evidence presented in his 1991 trial. Rather, Southerland puts the murder weapon in Cooper's hands. He also established Cooper's intent to commit the murder even after Cooper knew that he would get less than two hundred dollars for the crime. The macabre and gruesome facts to which Southerland testified demonstrate as much malice as one could possibly imagine; and Cooper's attacks on Southerland's credibility ignore that many of the details to which he testified were corroborated by other witnesses.

the presumption against admissibility of remote convictions under Rule 609(b), SCRE, and it established that the probative value of the evidence substantially outweighed its prejudicial effect. Also, any error was harmless.

Before addressing the merits of Cooper's claim, the State submits that his argument is barred on appeal because any error was invited by him. A party "cannot complain of an error which his own conduct has induced." *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (citation omitted).²⁹ Alternatively, the issue lacks merit for the reasons found by the Court of Appeals:

[Cooper argues the trial court erred in ruling Cooper could be impeached with his 1977 convictions for housebreaking and grand larceny because the convictions were too remote and were highly prejudicial. We disagree.

Rule 609(b) of the South Carolina Rules of Evidence provides:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative

²⁹ The trial judge addressed this issue at **R. pp. 948-49; 1030-33**. Although not addressed by the Court of Appeals, defense counsel told jurors in his opening statement that: "[o]ne of the things lawyers often object to is anything that shows about the prior record of their client, they don't want the jury to know about that. Well, y'all need to know everything and we are not going to object to the warrants and the things in ... Cooper's background that are relevant to your job. So, we're not going to object. And we want you to know and we'll tell you right now that when Bo Southerland was a career criminal in his early 30's, he committed a long series of crimes and he had along with him a 17-year-old kid named Tony Cooper. And they both went to prison together. And they both got out in 1988." **R. p. 415, l. 20-p. 416, l. 8**. While counsel quite reasonably made this statement, *see R. p. 1032*, the State submits that any error was made by counsel and therefore not properly before this Court. *Stroman*; *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991). Before finishing his opening statement, counsel reminded jurors of Cooper's previous incarceration. **R. p. 688**. The jury thereafter heard a great deal of evidence of Cooper's prior convictions and other bad acts, both before and after the murder. Much of this evidence, including evidence of his prior death sentence in this case, was elicited by defense counsel. *See R. pp. 712; 721-24; 756-57; 761-64; 1001-02; 1131*. Cooper's trial counsel elicited evidence of the 1977 convictions at issue on direct examination. **R. p. 1186, ll. 13-20**. Also, the State did not mention the convictions on its relatively brief cross-examination of Cooper (**R. pp. 1252-63**), and neither prosecutor referenced them in closing argument. **R. pp. 1347-54 (Mr. Lupton's opening on the law); 1446-1486 (Mr. Bell's closing argument)**. This, again, supports the conclusion that any error was invited by Petitioner's own conduct.

value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b), SCRE. "Rule 609(b) establishes a presumption against admissibility of remote convictions ... and the State bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption." *State v. Colf*, 337 S.C. 622, 626-27, 525 S.E.2d 246, 248 (2000). In determining whether the probative value of a prior conviction outweighs its prejudicial effect, the court should apply five factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Id.* at 627, 525 S.E.2d at 248.

Cooper was released from prison in 1988 for his 1977 convictions for armed robbery, housebreaking, and grand larceny.FN10 Cooper was being retried for a murder that occurred in 1989. Cooper objected to the introduction of his prior crimes under Rule 609 because they were more than ten years old.

FN10. Cooper pleaded guilty to armed robbery, housebreaking, and grand larceny, and received a sentence of fifteen years. He was released from prison in 1988 for his 1977 convictions. Cooper was arrested for murder that occurred in 1989 and his retrial was in May 2006. Thus, although eighteen years had passed between his release for his prior convictions and his retrial for murder, Cooper's 1988 release for the prior crimes was very close in time to the October 1989 offenses for which he was being retried.

After considering the balancing test required by Rule 609(b), Judge Pieper did not allow Cooper's conviction for armed robbery to be used for impeachment because of its similarity to the armed robbery in this case. However, Judge Pieper did allow Cooper's convictions for housebreaking and larceny to be admitted for impeachment purposes because they are crimes of dishonesty that weigh on Cooper's credibility, and the probative value of the convictions outweighed their prejudicial effect. *See Colf*, 337 S.C. at 628, 525 S.E.2d at 249 ("The fact that larceny reflects on credibility and the importance of credibility to the jury's decision are both factors the trial court should have weighed in making the admissibility determination."). Additionally, Cooper's attorney conceded the crimes of housebreaking and larceny were not so similar to the charge in this case to be prejudicial to Cooper. Furthermore, Judge Pieper gave a limiting charge to the jury explaining Cooper's convictions could only be considered for impeachment purposes. Therefore, we find Judge Pieper's decision was supported by the evidence.

Cooper, 386 S.C. at 221-23, 687 S.E.2d at 69. Additionally, Cooper's convictions were almost eighteen years old only because he was released in 1988 and testified in May 2006. *See State v.*

Johnson, 363 S.C. 53, 57, 609 S.E.2d 520, 522 (2005). The State rebutted the presumptive inadmissibility of these convictions, *see Colf*, 337 S.C. at 626, 525 S.E.2d at 248, because the impeachment value of these convictions was great and credibility was a key issue. *See Colf, supra*.³⁰ Both of the challenged convictions bore on Cooper's credibility, particularly his larceny conviction. Evidence of guilt of larceny unquestionably goes to the credibility of a witness. *State v. Vaughn*, 268 S.C. 119, 232 S.E.2d 328 (1977); *State v. Shaw*, 328 S.C. 454, 492 S.E.2d 402 (Ct. App. 1997). The State submits that the same is true of housebreaking. *See United States v. DiLorenzo*, 429 F.2d 216 at 220 (2^d Cir. 1970); *United States v. Spero*, 625 F.2d 779, 780-81 (8th Cir. 1980).³¹ Therefore, Cooper's prior convictions were not such as would have only minimal bearing on the issue of his credibility. *Id.* Second, because Cooper committed the murder and other crimes roughly within a year of his release in 1988 and has been incarcerated since his October 1989 arrest, there was no subsequent history with which his testimony could be impeached. This is the second factor in a Rule 609(b) analysis. *See Colf*, 337 S.C. at 627, 525 S.E.2d at 248.³²

³⁰ Southerland gave vivid eyewitness testimony that was corroborated, in many respects, by other circumstantial evidence, and Farmer's published testimony implicated Cooper in the conspiracy as well as the robbery and murder. However, Cooper denied any involvement in the crimes. He claimed alibi and suggested that Southerland was the guilty party.

³¹ *See also United States v. Gilbert*, 668 F.2d 94 (2d Cir. 1981); *United States v. Cathey*, 591 F.2d 268, 276 (5th Cir. 1979); *United States v. Redditt*, 381 F.3d 597, 601 (7th Cir. 2004); *United States v. Brown*, 956 F.2d 782 at 787 (8th Cir. 1992); *United States v. Jefferson*, 925 F.2d 1242 at 1256 (10th Cir. 1991).

³² Further, and as the Fifth Circuit Court of Appeals has explained that:

[t]he implicit judgment of the Federal Rules is that evidence of convictions over a decade old is generally more prejudicial to the side which calls the witness than it is helpful to the jury in evaluating the witness' credibility. Alternatively, the ten-year time limit could be conceptualized as a policy statement that if an offender keeps his record unblemished for ten years, he will be presumed to be as truthful as a normal citizen, *i. e.*, that the ten-year period is evidence that the inference supporting use of prior crime impeachment evidence (a lawbreaker is likely to lie) can no longer be drawn about a certain person. It should be understood, however, that this judgment is normative rather than empirical: that is, Rule 609(b) stands for the proposition that a jury should not be influenced by prior crime impeachment evidence over ten years old, not that they would not be influenced by such evidence.

The third factor under *Colf* - “[t]he similarity between the past crime and the charged crime,” see 337 S.C. at 627, 525 S.E.2d at 248 - also supports the trial judge’s ruling because the two crimes, while very probative on the question of whether Cooper is truthful, are not similar to the offenses of murder, armed robbery, kidnapping and conspiracy. To the contrary, the trial judge excluded the two similar armed robbery convictions because of the prejudicial effect of those crimes.³³ Cooper argues that *Johnson* requires reversal because of the significance of his credibility. However, he did not present these arguments to the trial judge and they are not properly before this Court on appeal. See *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one theory at trial and a different theory on appeal).³⁴ Finally, any error resulting from the trial judge’s ruling is harmless because the error could not have reasonably affected the outcome of the trial. See *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). There was overwhelming evidence of Cooper’s guilt, which was established by Farmer’s testimony, Southerland’s testimony and circumstantial evidence. See **Argument II**. Also, defense counsel strategically introduced Cooper's

Mills v. Estelle, 552 F.2d 119, 120 (5th Cir. 1977). See also Wright and Gold, 28 *Federal Practice & Procedure, Evidence*, § 6136(b). Here, Cooper was arrested and charged with the present offenses in the year following his release from prison on the impeaching convictions. Therefore, the rehabilitative presumption underlying Rule 609(b) does not apply, and the convictions were properly admitted. See, e.g., *United States v. Jefferson*, 925 F.2d 1242, 1256 (10th Cir. 1991); *United States v. Holmes*, 822 F.2d 802, 804–805 (8th Cir. 1987); *Gilbert*, 668 F.2d at 97.

³³ Further, the jury was already aware that Cooper had served time for crimes that he committed with Southerland from the opening statement of trial counsel. **R. p. 415, l. 20-p. 416, l. 8**. Before Cooper’s testimony, the jury also had already heard evidence that: Cooper had threatened to have Southerland killed, if Southerland did not confess to the murder in a manner which exculpated Cooper (**R. pp. 712; 721-24**); Cooper’s wife left him at some point and went to Sister Care (**R. pp. 756-57**); Cooper was Southerland’s co-defendant in a series of armed robberies (**R. pp. 761-64**); Cooper had received a death sentence in this case (**R. pp. 1001-02**) and Farmer knew Cooper through prison. **R. p. 1131**. Given this evidence, the jury was quite aware of a great deal of his past criminal activity. This evidence thereby lessened whatever prejudicial effect the prior convictions would carry; and the probative value substantially outweighed their prejudicial effect under Rule 609(b). Cf. *Holmes*, 822 F.2d at 804.

³⁴ Again, his only argument in the trial court was that the convictions were too old. See **R. pp. 1032-33**. Further, *Johnson* is clearly distinguishable from this case. In addition to the reasons set forth, the trial judge in *Johnson* did not apply a balancing test required by *Colf*; and his ruling on the admissibility of the remote conviction was guided by legal error: i.e., that the offense was one involving moral turpitude.

prior convictions on direct examination, in an obvious effort to lessen the impact they might have on his credibility. **R. p. 1186, ll. 13-20.** Further, the trial judge gave a lengthy limiting charge, both with respect to evidence of earlier proceedings in this case; and evidence of prior crimes or bad acts by a witness. **R. pp. 1489, ll. 2-13; 1490, ll. 13-15.**³⁵ Therefore, the impact of this evidence “was minimal because other evidence introduced by the prosecution [and trial counsel] likely damaged [Cooper's] credibility” and any error was harmless. *Johnson*, 363 S.C. at 60, 609 S.E.2d at 524. *See also Mitchell.*

CONCLUSION

For the foregoing reasons Respondent respectfully submits this Court should deny certiorari.

Respectfully submitted,

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By: 

ATTORNEYS FOR RESPONDENT

July 26, 2010.

³⁵ Thus, he properly focused the jury's attention on the fact that the convictions and the other bad acts could only be considered for impeachment purposes. Also, the State did not emphasize his prior convictions, by cross-examination or closing argument. **R. pp. 1252-63; 1347-54; 1446-86.**

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
The Honorable Daniel F. Pieper, Circuit Court Judge

THE STATE,

Respondent,

-VS-

GENE TONY COOPER, JR.,

Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to the attorney of record, Robert M. Dudek, Esquire, South Carolina Comm. on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 26th day of July, 2010.



WILLIAM EDGAR SALTER, III

Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

JUL 26 2010

July 26, 2010

S.C. SUPREME COURT

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

Re: The State v. Gene Tony Cooper
Appeal from Lexington County

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari in the above-referenced matter.

Thank you for your assistance in this matter.

Sincerely,


William Edgar Salter, III
Senior Assistant Attorney General

WES/dmd

Enclosures

cc: Robert M. Dudek, Esq. (w/ two (2) copies of encls.)
Honorable Donald V. Myers, Solicitor, 11th Judicial Circuit (w/copy of encls.)
Ms. Sandi Wofford, Victim Services (w/copy of encls.)

The Supreme Court of South Carolina

The State,

Respondent,

v.

Gene Tony Cooper,

Petitioner.

The Honorable Daniel F. Pieper
The Honorable Daniel F. Pieper
Lexington County
Trial Court Case No. 1990-GS-32-00083
1990-GS-32-00084

ORDER

For good cause shown, the request for an extension to file Return to Petition for Writ of Certiorari is granted and extended until August 23, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

COSTA M. PLEICONES,
ACTING CHIEF JUSTICE

BY Dwenda J. Shealy
Chief Deputy Clerk

Columbia, South Carolina

July 27, 2010

cc: Chief Appellate Defender Robert M. Dudek
Donald V. Myers, Esquire
Senior Assistant Attorney General William Edgar Salter, III

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUL 26 2010

S.C. SUPREME COURT

Appeal From Lexington County
The Honorable Daniel F. Pieper, Circuit Court Judge

THE STATE,

Respondent,

vs.

GENE TONY COOPER, JR.,

Petitioner.

MOTION FOR THIRD EXTENSION OF TIME TO FILE
RETURN TO PETITION FOR WRIT OF CERTIORARI

The undersigned counsel for the State of South Carolina requests a third extension of thirty (30) days within which to complete, serve and file the Return to Petition for Writ of Certiorari in the above-referenced appeal. The Return is currently due to be served and filed today, July 23, 2010. This request is made in good faith and not for the purpose of delay.

The Court's March 18, 2009 Order *re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that:

"(3) "A third extension may be granted upon a showing of good cause. The facts supporting the good cause shall be set forth in the motion. If filed by the Division of Appellate Defense or the Office of the Attorney General, the motion shall be signed by the attorney involved and his or her immediate supervisor."

In compliance with that Order and in support of this motion, counsel would respectfully

show the Court the following:

1. Counsel prepared a Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *David Ceasar*, #217220 vs. *A. Padula*, Warden, C/A No.: 0:10-486-MBS-PJG on June 21, 2010;
2. Counsel appeared for oral argument on June 24, 2010 before the South Carolina Supreme Court in the matter of *The State vs. Damon Jacquise Jones*, a Spartanburg County murder case;
3. Counsel prepared a Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Robert Campbell*, #131941 vs. *Warden, Lieber Correctional Institution*, C/A No.: 0:10-671-JFA-PJG. Said Return was originally due on May 28, 2010 and was on its 1st extension. The Return was filed on Monday, June 28, 2010;
4. Counsel participated in a telephone status conference with the Honorable Diane Goodstein on June 30, 2010 in the matter of *Timothy Dion Rogers #4883 v. Jon E. Ozmint, Direction, South Carolina Department of Corrections*, C.A. No.: 00-CP-18-575, a Dorchester County Death Penalty PCR case;
5. On July 12, 2010 counsel also participated in a telephonic deposition of Dr. Richard Leo in the matter of *Kenneth Simmons vs. State of South Carolina*, 2005-CP-18-1368, a Dorchester County Death Penalty, Post Conviction Relief matter;
6. Counsel prepared a Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Jamin Mazyck*, #238056 vs. *Warden, Broad River Correctional Institution*, C/A No.: 3:10-389-HFF-JRM. Said Return was originally due on May 3, 2010 and was on its 3rd extension. Counsel had to reconstruct the 2007 PCR appeal

file in this matter, as same could not be located. The Return was filed on July 13, 2010 and was sixty-two (62) pages in length;

7. Counsel prepared an Initial Brief of Appellant and Designation of Matter in the matter of *The State vs. Robert Lee Nance*, a Florence County murder case which was on its second extension and was filed on Friday, July 16, 2010;

8. Counsel prepared a Return to Petition for Writ of Certiorari in the South Carolina Supreme Court in the matter of *The State vs. Tremayne Washington*, a Charleston County murder case on July 21, 2010;

9. Counsel prepared a Response in Opposition to a Motion to Amend/Correct Petition for Writ of Habeas Corpus and a Response in Opposition to Motion for Discovery in the matter of *Aubin Liberte, #239470 vs. Warden, Lieber Corr. Institution*, C/A. No.: 0:09-1343-JFA-PJG today, July 23, 2010; and

10. Counsel is also preparing a proposed Order as per the instructions of the Honorable J. Michael Baxley in the Capital PCR matter of *Jonathan K. Binney vs. State of South Carolina* C/A No.: 2006-CP-11-223 which is currently due on Thursday, August 5, 2010.

As a result of my involvement in these cases, I have not been able to prepare the Return to Petition for Writ of Certiorari in this case.

I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The thirty (30) day extension requested will make the Return to Petition for Writ of Certiorari due on August 23, 2010. I understand the desire of the Court and petitioner's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me

to complete the Return to Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

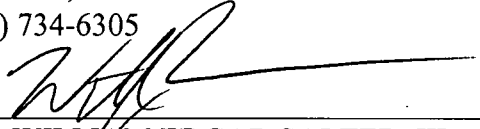
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: 

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

BY: 

DONALD J. ZELENKA
Assistant Deputy Attorney General

July 23, 2010.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUL 26 2010

Appeal From Lexington County
The Honorable Daniel F. Pieper, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

Respondent,

vs.

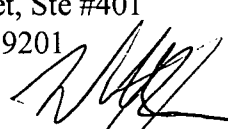
GENE TONY COOPER, JR.,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of July, 2010, a copy of the Respondent's Motion for Third Extension of Time to File Return to Petition for Writ of Certiorari was served on counsel for the Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, and addressed as follows:

Robert M. Dudek, Esq.
SCCID- Division of Appellate Defense
1330 Lady Street, Ste #401
Columbia, SC 29201


WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General



HENRY McMASTER
ATTORNEY GENERAL

July 23, 2009

RECEIVED

JUL 23 2010

S.C. SUPREME COURT

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

Re: *The State vs. Gene Tony Cooper, Jr.*

Dear Mr. Shearouse:

Enclosed for filing in your office is the original and six (6) copies of a Third Motion for Extension of Time to File Return to Petition for Writ of Certiorari in the above-referenced case, together with a Proof of Service.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/dmd

Enclosures

cc: Robert M. Dudek, Esq. (w/two (2) copies of encls.)

The Supreme Court of South Carolina

The State,

Respondent,

v.

Gene Tony Cooper,

Petitioner.

The Honorable Daniel F. Pieper
The Honorable Daniel F. Pieper
Lexington County
Trial Court Case No. 1990-GS-32-00083
1990-GS-32-00084

ORDER

Respondent seeks a second extension of time to serve and filed the Return to the Petition for Writ of Certiorari in the above matter. The request for an extension is granted until July 23, 2010. No further extensions of time will be granted absent the showing of extraordinary circumstances.

IT IS SO ORDERED.

COSTA M. PLEICONES,
ACTING CHIEF JUSTICE

BY *Dunda J. Shealy*
Chief Deputy Clerk

Columbia, South Carolina

June 24, 2010

cc: Chief Appellate Defender Robert M. Dudek

Mr. Donald V. Myers, Esquire

Senior Assistant Attorney General William Edgar Salter, III



HENRY McMASTER
ATTORNEY GENERAL

June 23, 2009

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

RECEIVED

JUN 23 2010

S.C. SUPREME COURT

Re: *The State vs. Gene Tony Cooper, Jr.*

Dear Mr. Shearouse:

Enclosed for filing in your office is the original and six (6) copies of a Second Motion for Extension of Time to File Return to Petition for Writ of Certiorari in the above-referenced case, together with a Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/dmd

Enclosures

cc: Robert M. Dudek, Esq. (w/two (2) copies of encls.)

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Lexington County
The Honorable Daniel F. Pieper, Circuit Court Judge**

THE STATE,

Respondent,

vs.

GENE TONY COOPER, JR.,

Petitioner.

**MOTION FOR SECOND EXTENSION OF TIME TO FILE
RETURN TO PETITION FOR WRIT OF CERTIORARI**

The undersigned counsel for the State of South Carolina requests a second extension of thirty (30) days within which to complete, serve and file the Return to Petition for Writ of Certiorari in the above-referenced appeal. The Return is currently due to be served and filed today, June 23, 2010. This request is made in good faith and not for the purpose of delay.

The Court's March 18, 2009 Order *re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that:

(2) A second extension request may be granted upon a showing of good cause. The facts supporting good cause shall be set forth in the motion. The signature of the attorney on the motion shall be a certification that the attorney believes that the extension is warranted and that there is good cause to seek the extension.

In compliance with that Order and in support of this motion, counsel would respectfully

show the Court the following:

1. Counsel prepared a Petition for Writ of Certiorari and Appendix in the South Carolina Supreme Court in the matter of *The State vs. Jarod Wayne Tapp* on May 24, 2010;
2. Counsel lectured at a Capital Litigation CLE in Myrtle Beach, South Carolina on June 1st, 2nd and 3rd, 2010;
3. Counsel attended a three hour telephonic deposition of Applicant's expert in the matter of *Jonathan Kyle Binney vs. State of South Carolina*, a Cherokee County Death Penalty matter on June 7, 2010;
4. Counsel prepared a Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Jeffrey Weston, #293594 vs. Warden, Perry Correctional Institution*, C/A No.: 4:10-107-MBS-TER. Said Return was originally due on May 5, 2010 and was over one hundred (100) pages in length. The Return was on its 2nd extension and was filed on June 11, 2010;
5. Counsel prepared an Initial Brief of Respondent and Designation of Matter in the matter of *The State vs. Robert J. Phipps*, a Spartanburg County murder case which was on its third extension and was filed on June 14, 2010;
6. Counsel prepared a Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *David Ceasar, #217220 vs. A. Padula, Warden*, C/A No.: 0:10-486-MBS-PJG which was filed on June 21, 2010;
7. Counsel is preparing an Initial Brief of Appellant and Designation of Matter in the matter of *The State vs. Robert Lee Nance*, a Florence County murder case which is on its second extension and is now currently due on July 16, 2010; and

8. Counsel is preparing for a hearing scheduled for tomorrow, Thursday, June 24, 2010 before the South Carolina Supreme Court in the matter of *The State vs. Damon Jacquise Jones*, a Spartanburg County murder case.

As a result of my involvement in these cases, I have not been able to prepare the Return to Petition for Writ of Certiorari in this case.

I am serving petitioner's counsel two (2) copies of this Motion via regular mail today. The thirty (30) day extension requested will make the Return to Petition for Writ of Certiorari due on July 23, 2010. I understand the desire of the Court and petitioner's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Return to Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

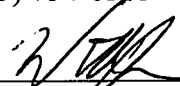
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: 

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

June 23, 2010.

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Lexington County
The Honorable Daniel F. Pieper, Circuit Court Judge**

THE STATE,

Respondent,

vs.

GENE TONY COOPER, JR.,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of June, 2010, a copy of the Respondent's Motion for Extension of Time to File Return to Petition for Writ of Certiorari was served on counsel for the Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, and addressed as follows:

Robert M. Dudek, Esq.
SCCID- Division of Appellate Defense
1330 Lady Street, Ste #401
Columbia, SC 29201



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

MAY 24 2010

May 24, 2009

S.C. SUPREME COURT

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

Re: *The State vs. Gene Tony Cooper, Jr.*

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari is due today, May 24, 2010 in the above matter. Respondent respectfully requests an extension of thirty (30) days to submit same. This request is being made for the following reasons:

1. Counsel prepared a sixty-six (66) page Supplemental Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Jerome Myers, #258396 vs. Gregory Knowlin, Warden of Turbeville Correctional Institution*, C/A No.: 6:09-1076-CMC-WMC on April 29, 2010. The Honorable William M. Catoe entered an Order on March 17, 2010 directing Respondent to file same in response to the additional grounds raised by Petitioner;
2. Counsel prepared a Response in Opposition to Petitioner's Motion for Appointment of Counsel and (Motion) Demand and Review of All Documents that was Attached with the Habeas Corpus in the matter of *Robert Campbell, #131941, a/k/a Robert Bernard Campbell, vs. Warden of Lieber Correctional Institution*, C/A No. 0:10-671-JFA-PJG on April 29, 2010; a Response in Opposition to Petitioner's Motions for Consideration of Law, for Case to be Heard, and to Compel on April 30, 2010; and counsel prepared an Amended Response in Opposition to Petitioner's Motion for Appointment of Counsel and (Motion) Demand and Review of All Documents that was Attached with the Habeas Corpus on April 30, 2010;
3. Counsel is also preparing an Initial Brief of Appellant and Designation of Matter in the matter of *The State vs. Robert Lee Nance*, a Florence County murder case which is now due on June 16, 2010 and on its first extension;

May 24, 2010
Page 2

4. Counsel appeared for oral argument in the South Carolina Court of Appeals on May 19, 2010 in the matter of *The State vs. Darrell Burgess*, a Lexington County murder case;

5. Counsel will be lecturing at a Capital Litigation CLE in Myrtle Beach, South Carolina on June 1st, 2nd and 3rd, 2010;

6. Counsel is preparing a Return and Memorandum of Law in Support of Motion for Summary Judgment in the matter of *Jeffrey Weston, #293594 vs. Warden, Perry Correctional Institution*, C/A No.: 4:10-107-MBS-TER. Said Return was originally due on May 5, 2010 and is now currently eighty-eight (88) pages in length. The Return is now on its 2nd extension and is due on June 11, 2010;

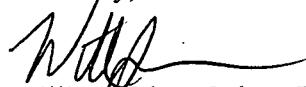
7. Counsel prepared a response dated May 18, 2010 to the Order of the Honorable Joseph F. Anderson dated May 14, 2010 directing counsel for the State to file a response to the petitioner's letter in the matter of *Roger O'Neill Bostick vs. Warden of Broad River Correctional Institution*, C/A No.: 8:07-727-JFA-BHH;

8. Counsel is also preparing for a hearing scheduled for the June 2010 term before the South Carolina Supreme Court in the matter of *The State vs. Damon Jacquise Jones*, a Spartanburg County murder case; and

9. Counsel prepared a Petition for Writ of Certiorari and Appendix in the South Carolina Supreme Court in the matter of *The State vs. Jarod Wayne Tapp* today, May 24, 2010.

I am informing opposing counsel of my request by copy of this letter. Thank you for your consideration.

Sincerely,



William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

cc: Robert M. Dudek, Esq.

The Supreme Court of South Carolina

The State,

Respondent,

v.

Gene Tony Cooper,

Petitioner.

The Honorable Daniel F. Pieper
Lexington County
Trial Court Case No. 1990-GS-32-00083
1990-GS-32-00084

ORDER

Petitioner seeks a second extension of time to serve and file the Petition for a Writ of Certiorari and Appendix in the above entitled matter. The request for an extension is granted and extended until April 23, 2010. No further extensions will be granted absent the showing of extraordinary circumstances.

IT IS SO ORDERED.

COSTA M. PLEICONES,
ACTING CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 25, 2010

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General William Edgar Salter, III
The Honorable Tanya Gee



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

March 24, 2010

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

RECEIVED

MAR 24 2010

S.C. SUPREME COURT

Re: State v. Gene Tony Cooper
Lexington County
Daniel E. Pieper, Circuit Court Judge
Trial Date: June 1, 2006
90-GS-32-83-84

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix are due to be served and filed today. However, due to my workload, I am requesting a thirty day extension in which to serve and file these materials.

By copy of this letter, I am informing William Edgar Salter, III, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/kms

cc: The Honorable Tanya Gee
William Edgar Salter, III, Esquire

The Supreme Court of South Carolina

The State,

Respondent,

v.

Gene Tony Cooper,

Petitioner.

The Honorable Daniel F. Pieper
Lexington County
Trial Court Case No. 1990-GS-32-00083
1990-GS-32-00084

ORDER

For good cause having been shown, the time for serving and filing the Petition for Writ of Certiorari and Appendix in the above entitled matter is hereby extended until March 24, 2010.

IT IS SO ORDERED.

COSTA M. PLEICONES, ACTING CHIEF JUSTICE

BY *Lrenda J. Shealy*
Chief Deputy CLERK

Columbia, South Carolina

February 23, 2010

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General William Edgar Salter, III
The Honorable Tanya Gee



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

February 22, 2010

RECEIVED

FEB 22 2010

S.C. SUPREME COURT

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

Re: State v. Gene Tony Cooper
Lexington County
Daniel E. Pieper, Circuit Court Judge
Trial Date: June 1, 2006
90-GS-32-83-84

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix are due to be served and filed today, February 22, 2010. However, due to my workload, I am requesting a thirty day extension in which to serve and file these materials.

By copy of this letter, I am informing William Edgar Salter, III, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/kms

cc: The Honorable Tanya Gee
William Edgar Salter, III, Esquire