ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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MAY 1 4 2012

S.C. Supreme Court

Certiorari to Lexington County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GENE TONY COOPER, JR.,

APPELLANT

BRIEF OF PETITIONER

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ISSUE PRESENTED

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?

STATEMENT

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.

On January 12, 2012, this Court granted a petition for writ of certiorari on petitioner's Question I and denied the petition as to the remaining questions. This brief of petitioner follows.

ARGUMENT

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

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 claimed 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). Despite prior contentions concerning pending capital matters 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 was unaware 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 contrary to Solicitor Myers' testimony discussed above: "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 in the year elapsed between August 2002 and the speedy trial motion in August 2003. 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. (emphasis added). The judge reasoned that petitioner had benefited to some extent because the "state has 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 submits 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 for years 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, in contrast to

Myers' testimony 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 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 apparent contempt. 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, and later in Maximum Security, 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. Defense counsel implored the judge that Farmer's demeanor would speak volumes to the jury about his mendacity, and that reading from a cold transcript of the prior trial was no substitute for the jury viewing and listening to this fraud. The state gained quite an advantage from its own delay.

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 which had 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 arbitrary and 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 and even used it in a Court Motion to Strike Southerland's guilt phase appellate issues. 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.

CONCLUSION

By reason of the foregoing argument this Court should order the indictments against petitioner dismissed based on the flagrant failure to provide him as speedy trial as repeatedly demanded.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 14th th day of May, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GENE TONY COOPER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on William Edgar Salter, III, Esquire, this 14th day of May, 2012.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of May, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021