STATE OF SOUTH CAROLINA
In the Supreme Court

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

Opinion No. 27671

The State, Respondent,

v.

Alexander L. Hunsberger, Petitioner.

Appellate Case No. 2015-000083

PETITION FOR REHEARING

In its October 12, 2016 opinion, a three member majority of this Court reversed the South Carolina Court of Appeals which had affirmed the trial judge's decision to deny the defense motion to dismiss for violation of the right to a speedy trial. Absent revision or a remand, the Court's opinion has the effect of granting dismissal and also bars retrial in two murder cases.[1] However, the majority's opinion misconstrues or misapprehends important facts of record and erroneously construes and improperly applies well-established Supreme Court precedent. Therefore, pursuant to Rule 221(a), SCACR, Respondent, State of South Carolina, seeks rehearing and revision of the erroneous opinion.

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[1] The majority also summarily reversed Julio Angelo Hunsberger's appeal citing the opinion here. *State v. Hunsberger*, Memorandum Opinion No. 2016-MO-029 (S.C.Sup.Ct.filed Oct.12, 2016).

Summary of Argument

As asserted above, the majority made multiple factual errors and also incorrectly applied Supreme Court precedent. The following particular errors are set out as a summary here and will also be discussed in detail in the following section of this petition.

First, the majority failed to acknowledge and give appropriate deference to the factual findings of record. In particular, the majority criticized the trial judge for lack of factual findings in ruling on the defense motion when, in actuality, the findings are included in the record. Further, the majority either mischaracterized or misunderstood Judge Keesley's factual findings in his December 2004 Order which have led to erroneous conclusions in the instant opinion.

Second, the majority failed to properly calculate and consider the delay caused by Petitioner's actions and/or inaction.[2]

Third, the majority finds "no evidence" that any delay between December 2004 and January 2012 was connected to South Carolina's consideration of whether to seek death against Petitioner. (Opinion, p. 10). Yet, there is clear reference to same in the record both in court order and the prosecutor's statements to the trial court.

Fourth, while considering prejudice, the majority incorrectly considered competing witness testimony and statements as a basis for finding actual prejudice to the defense. Prejudice under a Sixth Amendment claim is correctly analyzed in context of what the Sixth Amendment protects by the right to speedy trial, not the persuasiveness of the evidence which was undeniably available and presented. Further, the majority apparently overlooked that the cited differences in testimony were memorialized in different proceedings and utilized at trial. Nothing was lost to

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[2] Respondent continues to reference Alexander L. Hunsberger by Petitioner as he is designated in the caption, and as the dissent makes reference to him, rather than the less formal diminutive "Alex" as adopted by the majority.

Petitioner's detriment. To the contrary, this creation of evidence decided worked to his benefit – allowing him to use discrepancies to attack credibility.

Fifth, the majority erroneously concluded Supreme Court precedent essentially mandates the fact of incarceration in another jurisdiction could not make minimal the anxiety concerns in this case. (Opinion, p. 6 at n. 4). However, the precedent relied upon, *Smith v. Hooey*, 393 U.S. 374 (1969), shows distinguishable factual background (which, in a case specific, fact specific analysis such as the instant one, is unquestionably critical). First, the *Hooey* case reflects the defendant made repeated attempts to force a return to the state court. That is not so here. Further, the *Hooey* matter was considered in terms of a pending separate state charge unrelated to the conviction under federal law. In this case, Petitioner was convicted in Georgia for kidnapping the murder victim— the same series of criminal acts, with the same actors, at the same time. The majority misconstrued Supreme Court precedent and misapplied that precedent in the instant case under these discrete facts.

Sixth, the majority erred as a matter of law in finding "presumptive prejudice" from the mere passage of time could support relief over proven lack of actual prejudice; and/or that the trial judge misconstrued the availability of presuming prejudice in consideration of all available facts and factors. (Opinion, p. 12). The majority blended concepts that have been consistently separate in United States Supreme Court precedent. As the dissent correctly noted, presumptive prejudice refers to whether a court needs to consider the *Barker* v. *Wingo*[3] factors. Elevating presumptive prejudice effectively overrules *Barker* which mandates a balancing that includes presumptive versus actual prejudice on the facts of the case. However, this Court may not overrule or modify Supreme Court precedent. Alternatively, the majority faults the trial judge for

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[3] 407 U.S. 514 (1972).

an error of law he did not commit as the records shows he entertained the possibility of presumption of prejudice but rejected it under the facts of this case. That was a correct balancing procedure under *Barker* in light of the available facts of the case and its particular circumstances.

Seventh, the majority's reasoning again conflicts with Supreme Court precedent in that the majority opinion is skewed to weighing what the State could have done differently, rather than evaluation of actual Speedy Trial considerations. The Supreme Court has cautioned "that overzealous application of this remedy would infringe 'the social interest in trying people accused of a crime,'" granting immunity from justice – a much more serious infliction of damage for victims, the community, and "the rights of public justice," than a standard exclusionary rule for evidence. *Id.* at 522. The majority here has reversed the last standing conviction for the murder of sixteen-year-old Samuel J. Sturrup and effectively barred the State from seeking justice for the victim in the Hunsberger cases, not for lack of evidence, not for lack of witnesses, not upon a finding of intentional delay to hurt the defense, but in disagreement with the State's decisions to honor the detainer lodge by Georgia, and not to call the case until after the primary actor's capital trial was completed.[4] This is in direct conflict with the *Barker* and the dictates of fairness and justice.

In support these positions, Respondent would respectfully submit the following:

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[4] There is no disagreement that Barnes was the most culpable actor. It was Barnes that the State initially sought capital proceedings against. Had the State not obtained a death sentence for Barnes, it would be less likely to seek death for the Hunsbergers. The reason, though clearly the majority disagrees with the decision, was not malicious nor evidenced any intent to harm the Petitioner's defense in any sense. Further, the record does not even show intentional prosecution delay in the capital proceedings in Barnes. (See R. p. 30). In fact, this Court ultimately assigned another circuit judge to that case before the case could be brought to trial. Id. Ultimately, though, the prosecution's decision worked to Petitioner's benefit. There was, however, never an intent not to try these individuals for their participation in the murder. (See R. pp. 38-39).

(1) The Majority Relies Upon Multiple Erroneous or Incomplete Facts in Opinion.

Multiple errors in the opinion have skewed the majority's view. First, the majority starts a listing of their "important dates" at arrest. (See Opinion, p. 4). The most important date is the date of the murder. This matter remained unsolved for several months and at the outset shows the complication of multiple witnesses, the development of information and separate jurisdiction charges. (See Opinion, pp. 5-6). Further, the majority simply finds the murder charge was not complicated,[5] (See Opinion, p. 8), even though proof of the charge would entail multiple witnesses, two crime sites, multiple statements of co-conspirators, and circumstances of aggravation warranting capital proceedings, (See Opinion, p. 2). Further still, the majority appears to reason review is difficult due to the trial judge's "failure to make specific findings, relying instead on general statements about the complexity of the case, problems involving

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[5] This is also contrary to settled opinion across multiple jurisdictions. It cannot be avoided that the facts support capital proceedings – these facts resulted in a death sentence for co-defendant Barnes. Such cases, though based on the charge of murder, are hardly considered "simple." In fact, reams of paper have produced scores of recommended fail safes and funding demands premised upon the complex capital case. *See, e.g.*, Ira P. Robbins, *Toward A More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990) ("Many have complained about delay in the review of capital cases. Delay is a pejorative term, however, frequently connoting procrastination or abuse. This is not necessarily the case in capital litigation, for some fair time period is both necessary and desirable to ensure adequate and deliberate review of complex cases."); *White v. Bd. of Cty. Comm'rs of Pinellas Cty.*, 537 So. 2d 1376, 1378 (Fla. 1989) ("We find that all capital cases by their very nature can be considered extraordinary and unusual and arguably justify an award of attorney's fees in excess of the current statutory maximum fee cap."). *Cf. State-Record Co. v. State*, 332 S.C. 346, 362, 504 S.E.2d 592, 600 (1998) (Toal, J., concurring) ("A standard must be formulated that adequately addresses the pressures and complex constitutional concerns that accompany a high-profile murder case."). Complexity is not limited to financial matters or conspiracies or any certain type of case. The majority's interpretation would essentially read-out this consideration of complexity for any crime of murder – regardless of crime sites or multiple involvement or circumstances of aggravation to consider. This simply cannot be.

multiple jurisdictions, and Alex's failure to show actual prejudice." (Opinion, pp. 5-6).[6] The record solidly refutes this conclusion.

In denying the motion to dismiss, Judge Newman noted that since Petitioner's release back to Georgia, there were a number of cases resolved in Georgia for the co-defendants, a trial was held for Petitioner and his brother, and co-defendant Barnes was tried in a capital case in this State. (R. p. 40, line 1 – p. 41, line 20). He found this particular case was "unique in the sense that you have cross-border issues, you have Georgia wanting to pursue Georgia's case, but South Carolina wanting to pursue South Carolina's cases, each defendant asserting their individual constitutional rights and the State having a capital case that they're wanting to pursue and have successfully pursued." (R. p. 41, line 25 – p. 42, line 6). Judge Newman concluded:

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

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

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

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

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[6] The majority appears to qualify its criticism by noting the "judge never explicitly stated the delay here was sufficient to trigger the speedy trial analysis...." (Opinion, p. 6). If that is actually the only criticism, it is a criticism of a point not contested by the parties and is of no moment.

might affect his right to a fair trial or his due process rights. I therefore, deny the motion.

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

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

The record fully and fairly supports Judge Newman's specific findings. Conversely, if the majority correctly determined that there is a failure of the trial judge to make "specific findings" which does not allow for fair appellate review, (see Opinion, pp. 5-6), then this matter should be remanded rather than converted to *de novo* review on an incomplete record. *See Leopold v. State*, 777 S.E.2d 254, 257 (Ga.App. 2015), *cert. denied* (Jan. 11, 2016), *cert. denied,* 136 S. Ct. 2468 (2016) (noting history of remand for trial judge directing entry of specific findings of facts and conclusions of law). This is especially so where the Supreme Court has expressly noted the gravity of the relief associated with such claims and the heightened danger to community and public justice. *Barker v. Wingo*, 407 U.S. at 522.

(2) The Majority Erred in Assessing Fault and Heavily Weighing Against the State Its Allowing Georgia to Try Defendant Rather Than to Try Defendant Before the Capital Proceedings in Co-Defendant Barnes' Case were Completed; and, Failed to Fully Consider Petitioner's Actions and/or Inactions in the Delay.

The majority correctly found reasons for the delay should be considered in the analysis. (Opinion, p. 8). The majority rejected the trial judge's factual findings on same – "the complexity of the cases and the problems involved in cross border prosecutions" – finding "reliance on complexity and cross border issues patently insufficient in this case in light of the findings of Judge Keesley in his December 2004 order." (Opinion, p. 8). In other words, the majority faulted the State for releasing the defendant to Georgia which was waiting to try the Defendant for kidnapping of the murder victim.[7] This finding is internally inconsistent and

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[7] This reflects again the cross border issues clear to Judge Keesley, Judge Newman, and three judges in the Court of Appeals, but summarily rejected by the majority here. Both jurisdictions would be waiting in the prosecutorial turnstile. The State notes that these cases involved separate litigation, with each individual tried on varying counts or pleading to varying counts connected not only with Samuel's beating, kidnapping and murder, but also the criminal enterprise run by primary actor, Steven Barnes. The procedural history differs for each.

Barnes was tried in South Carolina November 2010, convicted, and sentenced to death. (R. p. 23, lines 3-16; p. 41, lines 15-17). As the majority notes, his conviction and death sentence were reversed on direct appeal after a majority of this Court rejected the self-representation limitation authorized by the Supreme Court in *Indiana v. Edwards*, 554 U.S. 164 (2008). (Opinion, p. 2 n. 1). This Court accepted the State's subsequent petition to reinstate the conviction after Barnes requested new counsel for new proceedings instead of vindicating his right to self-representation, but a majority of the Court declined to reinstate. Barnes' retrial is pending. One of his appointed counsel is under protection for the Dylann Roof state capital trial and the retrial is likely to be delayed until at least mid to late 2017.

As referenced in the Opinion, the Hunsbergers and Barnes were released to Georgia to stand trial prior to their trials in South Carolina. (R. p. 23, line 17 – p. 24, line 11). Georgia convicted Barnes of matters relating to his criminal enterprise separate from the murder and sentenced him to life imprisonment. (R. p. 24, lines 3-8; p. 28, lines 16-22). As noted, the Hunsbergers were convicted and received a life sentence for the kidnapping of the murder victim in the instant case. (R. p. 24, lines 9-13). Additionally, Richard Cave pled guilty in Georgia to aggravated assault and received an eighteen year sentence. (R. p. 28, lines 5-6; p. 95, lines 16-25). Antonio Griffin also pled guilty to assault in Georgia and received an eighteen year sentence. (R. p. 28, lines 5-6; p. 143, lines 1-5). Charlene Thatcher pled guilty to aggravated

unfair. It is inconsistent because release to the waiting state demonstrates a portion of the cross border issues connected to the matter which the majority marginalized. It is unfair, as the State complied with the offered option of bond which resulted in release to Georgia. The majority faults the State for complying with the appropriate relief under the statute, and the relief sought by Petitioner.

On November 16, 2004, defense counsel moved for an order setting the "case [to] be tried during the November 8th, 2004 term of Court, or at the next succeeding term of Court, ***or, in the event the Defendant is not so tried, that the Defendant be released from confinement on his own recognizance."*** (R. p. 222) (emphasis added). On December 2, 2004, the Honorable William P. Keesley issued an Order denying the requested relief. However, Judge Keesley found the length of time troubling, and offered to attempt to "establish a special term of court to handle this case during February" 2005. (R. p. 224). Judge Keesley also recognized that ***"[p]art of the problem in disposing of these cases is the fact that multiple defendants and different jurisdictions are involved, and there is the possibility that the State of South Carolina could seek the death penalty."*** (R. p. 224) (emphasis added). Judge Keesley also further recognized that "Georgia has placed a hold on the defendant, so if he were granted bail in South Carolina, he would still be incarcerated in Georgia." (R. p. 224). Judge Keesley's order supports in specificity some of the cross border issues that the majority summarily casts aside. His subsequent Order

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assault, as well. She also received an eighteen year sentence. Further, she pled guilty to an unrelated armed robbery in Georgia (as a result of her participation in Barnes' criminal enterprise), received another eighteen year sentence, and was also convicted in 2002 of prostitution. (R. p. 28, lines 7-10; p. 168, lines 1 – 24; p. 170, lines 6-21).

Under the majority's logic, release on detainer should forever bar the sending's state's ability to prosecute for crimes committed in their community no matter what the facts demonstrate as to complexity, or alternatively, force speedy trial arguments to shift from one jurisdiction to another – the same "shifting-of-point-of-argument" conundrum noted by Judge Newman. (See R. p. 17).

dated January 28, 2005 underscored these issues when Judge Keesley noted with emphasis: "DEFENDANT IS NOT TO BE RELEASED FROM CUSTODY UNLESS THE HOLDS PLACED BY THE STATE OF GEORGIA ARE LIFTED." (R. p. 226 (emphasis in original)).

Contrary to the majority's finding, Judge Keesley's findings in the 2004 order ***support*** both the complexity of the case and the cross border issues. Further, the State complied with release to Georgia for defendant to stand trial for the kidnapping of the murder victim. At no time did Petitioner seek to return. In fact, Petitioner actively blocked the State's attempt to obtain his return which resulted in nearly a one year delay.

Petitioner was released to Georgia in 2005, for trial on a charge of kidnapping of the same victim. On September 12, 2006, upon conviction of the kidnapping charge, a Georgia court sentenced Petitioner to life imprisonment (which, apparently, carries parole eligibility within a few years). Petitioner thereafter began service of that sentence in Georgia. (R. p. 3, line 16- p. 4, line 4; p. 8, line 22 – p. 9, line 22; p. 16, lines 3-8; p. 18, lines 16-18; p. 23, line 17 – p. 24, line 13). The State attempted to try Petitioner ***in early 2011***, after conclusion of the capital trial for Barnes in November 2010. However, Petitioner did not consent to the State's request for his return to South Carolina which resulted in a continuance. (R. p. 25, line 21 – p. 26, line 9). (See also R. p. 36, lines 13-23). The prosecuting attorney noted that the Solicitor had not determined whether to seek death on Petitioner's murder charge until after Barnes' conviction. (R. p. 23, lines 3-16). The State also acknowledged that it extended the offer to have Petitioner testify against Barnes in the capital case, but Petitioner declined. The State further acknowledged that was his absolute right, but again asserted that he had the same opportunity to cooperate as other co-defendants. (R. 4, lines 14-25; p. 6, lines 12-17; p. 26, line 10- p. 27, line 3; p. 29, lines 12-15). This is not evidence of an intentional act to delay in Petitioner's case to create disadvantage

to the defense, but compliance with a neutral prosecution plan, evidencing even handed treatment extended to witnesses.

The State was eventually able to secure Petitioner's presence and a jury trial was held in ***January 2012***. (R. p. 25, line 21 – p. 26, line 9). The majority misconstrued the record to limit the time to four months.[8] The fact that the prosecution requested to obtain custody in early 2011 after the Barnes trial had been completed should be considered. Further, the time it took the State to seek extradition over the defendant's lack of consent should not be weighed against the State. Extradition proceedings could not be completed for a trial date in 2011. (R. p. 25, line 21 – p. 26, line 9). Thus, rather than a meager four months as quoted in the opinion, (Opinion, p. 7), this was a nearly a year-long delay which was directly attributed to Petitioner and should be weighed against him. *Vermont v. Brillon,* 556 U.S. 81 (2009) ("Delays occasioned by the defendant ... weigh against him.").

Notably absent from the discussion is the fact Petitioner failed to assert his right after his return to Georgia. Without question, Petitioner asserted his right in late 2004 and again January 2005 albeit via statute not clearly Sixth Amendment redress. This resulted in a bond that allowed Georgia to obtain custody and subsequently try Petitioner on the kidnapping charge. (R. p. 226). Essentially, Petitioner moved for relief under Section 17-23-90 and appropriate relief was granted at that time. (R. p. 222). *See generally State v. Campbell*, 277 S.C. 408, 288 S.E.2d 395 (1982) (denying speedy trial claim pursuant to statute where S.C. Code § 17-23-90 provides for release if not indicted and tried within certain time frame, not dismissal of the charge). After

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[8] The majority apparently embraces only Petitioner's testimony that he received a form from his counsel on September 11, 2011. (See R. p. 35). The State advised Judge Newman on the record that the State "attempted to get him back here in the first part of 2011." (R. p. 25).

this grant of relief, however, Petitioner failed to reassert or pursue his constitutional right to a speedy trial at any point until immediately before his January 2012 trial.

"[T]he defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." *Barker v. Wingo*, 407 U.S. at 528. As noted, Petitioner failed to do anything to assert a speedy trial issue after he was released to Georgia in early 2005 until the time of his trial in January 2012. (See R. p. 17, lines 21-25, ***acknowledging no request during six to seven years of the delay***). To the contrary, he actually declined to allow extradition in 2011. (R. p. 36, lines 13-23). Unlike his co-defendant Steven Barnes, he did not seek return and prosecution under the Interstate Detainer Act. *See Hopper v. State*, 495 S.W.3d 468, 478 (Tex. App. 2016), *petition for discretionary review granted* (Oct. 19, 2016) ("Appellant knew that a charge was pending against him and, despite having the opportunity to demand a resolution of that charge through the IAD, he sat on his rights for more than eighteen and a half years. We, therefore, conclude that even if we applied a presumption of prejudice in this case, the presumption is rebutted because of the trial court's implied finding that appellant acquiesced in the delay."); *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003) ("'[t]he longer delay becomes, the more likely a defendant who wished a speedy trial would be to take some action to obtain it. Thus inaction weighs more heavily against a violation the longer the delay becomes.'") (quoting G. Dix & R. Dawson, *Texas Criminal Practice and Procedure* § 23.40 (2d ed.2001)). *See also Barker v. Wingo*, 407 U.S. at 521 ("Delay is not an uncommon defense tactic."). Thus, in assessing the delay, the fact that Petitioner failed to assert his right to a speedy trial after his release to Georgia is significant. *State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) (finding no violation where during five of the seven year delay at issue, neither the State nor defendants "pursued the matter" and a "failure

to assert the right will make it difficult for the defendants to prove that they were denied a speedy trial"). *See also United States v. Wanigasinghe*, 545 F.3d 595, 599 (7th Cir. 2008) (in review of eleven year delay after indictment but before arrest: "Wanigasinghe did not request a speedy trial during the time he was out of the country. We agree with the district court's finding that he likely knew he had been charged with a crime but nevertheless did nothing to take care of the charges; quite the opposite. His failure to request a speedy trial is also a factor which weighs against him.").

Simply, during the time that Petitioner argued the "cross-border" jurisdiction issues were "resolved," (see FBOA, p. 18; BOP, p. 19), which the majority apparently agreed with, (Opinion, p. 9), Petitioner did not request return or trial. This must weigh heavily against him. *Barker v. Wingo*, 407 U.S. at 536 ("barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial."). The majority erred in its factual consideration and assessment of same.

(3) The Majority Erroneous Finds a Lack of Evidence the State was Considering Whether to Pursue Capital Proceedings after the December 2004 Order.

The majority erroneously finds "no evidence" in the record that any delay between December 2004 and January 2012 was connected to South Carolina's consideration of whether to seek death against Petitioner. (Opinion, p. 10). Yet, there is clear reference to same in the record both in court order and the prosecutor's statements to the trial court.

Judge Keesley found the "there is a possibility that the State of South Carolina could seek the death penalty" and noted a decision had not yet been made, though had instructed the office a decision must be made. (See R. p. 225). Further still, the prosecutor clearly stated to Judge Newman that consideration was ongoing and was not completed until the capital proceedings in

the Barnes trial. (R. pp. 23 and 25). The majority is plainly incorrect in finding an absence of any evidence in the record.

Further, the State ultimately decided against seeking the death penalty in the case against Petitioner. As such, the length of the delay in this aspect certainly holds no prejudice to Petitioner. *See State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62, 67 (Ct.App. 2009) ("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."). The delay in this respect was decidedly in Petitioner's favor. The majority's reasoning to the contrary lacks support.

(4) The Majority Erroneous Considers the Persuasiveness of the Evidence, Not its Availability.

Prejudice under a Sixth Amendment claim is correctly analyzed in context of what the Sixth Amendment protects by the right to speedy trial, not the persuasiveness of the evidence which was undeniably available and presented. *Barker v. Wingo*, 407 U.S. at 532 ("Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.").

The majority conceded that the witness statements and testimonies were available, but apparently reasoned the evidence presented was not persuasive. The majority specifically noted: "Most importantly, whether one or both of the Hunsberger brothers exited the car with a gun, and who was outside the car when Sturrup was forced in the Hunsbergers' car's trunk." (Opinion, p. 11).[9] Again, the charge was murder, not kidnapping, and the State ultimately decided not to seek

[9] Of not little note, Petitioner admitted he was present, and that he fired a gun toward the victim. (See R. pp. 187-193; p. 216).

death. The offered distinction has no meaning. *See generally State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 100–01 (1999) ("A jury could have found appellant guilty of victim's murder under several theories presented by the State. First, appellant would be guilty of murder if he actually shot victim. Second, under the "hand of one, the hand of all theory," appellant would be guilty of murder if he aided [... another...]. Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.... Third, appellant would be guilty of murder if the jury found he was an accomplice...."). But the concession here is key. The majority conceded: "... Alex pointed out specific discrepancies in the testimony of two of the three eyewitnesses between their earlier statements or testimony at earlier proceedings." (Opinion, p. 11). The information showing discrepancies or conflicts in the testimony was available and used at trial. That was not a failure in the availability of evidence but a fact to offer in challenge to credibility. There could be no actual prejudice to the defense.

In short, even though Petitioner was tried for the 2002 charge in January of 2012, he had ample opportunity to thoroughly cross-examine the witnesses against him, including making use of prior sworn testimony – testimony that was available as a result of multiple actions both in South Carolina and Georgia. (See R. p. 19, line 24 – p. 21, line 9; p. 22, lines 18-25). Further, he does not contend any exculpatory witness or testimony is not unavailable. *Compare State v. Buckner*, 738 S.E.2d 65 (Ga. 2013) (affirming finding of prejudice and dismissal where defendant "'was in the unique position of not just speculating, but knowing there was tampering with the evidence at the ... crime scene, but being prevented from identifying and showing what aspects of the scene and what specific pieces of evidence, have been altered or manipulated'" due to dimming memories and lack of recorded statements). Petitioner has twice been convicted

(once in Georgia, once here) on evidence of participation in the events that led to Samuel's murder, and readily admits his presence during the crime. (See R. p. 187, line 8 – p. 193, line 5; p. 216, lines 8-13). Petitioner argued in the Court of Appeals, though, that the passage of time affected extent of memory and credibility of the witnesses against him. (See FBOA, p. 19; R. p. 194, line 22 – p. 195, line 13). In effective rebuttal, though, the trial transcript demonstrates credibility was challenged by use of prior transcripts which preserved sworn testimony, (See R. p. 97, line 14 – p. 100, line 19; p. 144, line 25 – p. 145, line 5), and that contemporaneous notes were used to refresh memories, (See R. p. 144, lines 2-24; p. 172, line 7 – p. 173, line 13). The multiple trials and statements, in essence, preserved and/or created records of testimony for this Petitioner's use to his benefit. *See United States v. Kashamu*, 15 F. Supp. 3d 854, 864 (N.D. Ill. 2014) ("the testimony and accounts of the various witnesses and participants of the conspiracy have been preserved through grand jury testimony, numerous plea agreements, and testimony given at the trial of co-defendant Peter Stebbins. Thus, the danger of faded memories as to the details of the conspiracy is largely removed."). At any rate, as Judge Newman found, there was no evidence of prejudice to Petitioner based on the passage of time:

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

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

His ruling is well-supported factually and his reasoning sound.

(5) The Majority Incorrectly Interprets and Misapplies Smith v. Hooey.

The majority misconstrues this Supreme Court precedent to opine that the fact of incarceration in another jurisdiction did not make minimal the anxiety concerns in this case. (Opinion, p. 6 at n. 4). However, the precedent relied upon, *Smith v. Hooey*, 393 U.S. 374 (1969), is factually distinguishable in two ways. First, the defendant there made repeated attempts in order to force a return to the state. *See Smith v. Hooey*, 393 U.S. 374, 375 (1969) (cataloguing multiple demands and attempts to resolve the pending charge over six years). That is not the case here. Further, the charge was unrelated. *Betterman v. Montana*, 136 S. Ct. 1609, 1615 n. 5 (2016) (describing the ruling in Hooey: "There we concluded that a defendant, though already convicted and imprisoned on one charge, nevertheless has a right to be speedily brought to trial on an unrelated charge."). In this case, Petitioner was convicted in Georgia for kidnapping the murder victim— the same series of criminal acts, with the same actors, at the same time – with separate sovereigns allowed to seek separate convictions for those same acts. Whether Petitioner would be convicted of at least some of the crimes against Samuel Sturrup was already settled – he was there, he participated. That was settled. The majority misconstrued the impact of Supreme Court precedent in these particular circumstances.

Lastly, the prominence of the repeated attempts in the *Hooey* opinion necessarily limits applicability to this case as it cannot be said that case and the instant case are on the same procedural footing. Further, *Hooey* did not concern a possible capital case. Further still, the defendant in *Hooey* did not have the Interstate Detainer Act which could force return to the jurisdiction. Petitioner's decision not to ask for a speedy trial or demand return is understandable where the State was still considering the possibility of capital proceedings. It is, however,

inconsistent with pursuing his right to a speedy trial. It is likewise relevant to assessment of personal prejudice. *Barker v. Wingo*, 407 U.S. at 531 ("Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain."). Again, the majority erred in relying on *Hooey* to conclude the contrary.

(6) *The Majority Erred as a Matter of Law in Recognizing Presumptive Prejudice as Supporting Reversal.*

The majority erred as a matter of law in finding "presumptive prejudice" from the mere passage of time could support relief under the *Barker* test in the proven absence of actual trial prejudice. (Opinion, p. 12). The passage shows a mixing of concepts that does not faithfully reflect Supreme Court precedent. Presumptive prejudice goes to consideration of the claim under the totality of the *Barker* factors, not disposition of the claim in light of evidence demonstrating the absence of actual trial prejudice. *See, e.g., Barker v. Wingo*, 407 U.S. at 530 ("The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."); *United States v. Loud Hawk*, 474 U.S. 302, 314 (1986) ("The first factor, the length of delay, defines a threshold in the inquiry: there must be a delay long enough to be 'presumptively prejudicial'" which "serves to trigger application of *Barker*'s other factors"). In fact, the Supreme Court in *Barker* specifically rejected a set time to presume prejudice: "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." 407 U.S. at 523. Presumptive prejudice as referenced in the majority opinion would subjugate or eradicate the weight of the individual factors in *Barker* –

Newman considered the length of time and proceedings in the interim in terms of the defense argument for presumption of prejudice:

> Another codefendant, in addition to the activity in Georgia, the capital case in South Carolina against the codefendant Mr. Barnes, which now brings us to Mr. Hunsberger, who's saying that after all this time, I've been denied my right to a speedy trial, I've been prejudiced and so the prejudice should be presumed based on the length of time involved in the delay. It's a rather unique case for a lot of reasons...

(R. p. 41, lines 18-24).

Further, the trial judge did not state he could not consider a presumption, rather, as *Barker* mandates, he considered and found that the length of time did not carry the day in light of other facts of record:

> Now, in evaluating this issue of prejudice, ***I certainly understand defense counsel's argument that the testimony of witnesses might be suspect due to them attempting to recall something that happened almost a decade ago.*** Of course, that can cut both ways with a jury. I think that the issue of prejudice probably has to be looked at prospectively; is that correct? Not prospectively, retrospectively.
>
> I think the only way that prejudice can be determined in an instance like this is based on something you demonstrated if there's a trial. ***I don't think that prejudice can be assumed given the facts that I've heard.*** I think the State has demonstrated legitimate reasons for the delay given the complex nature of the cases, the problems involving the prosecutions in multiple jurisdictions in this state as well as the State of Georgia.

(R. p. 42, line 13 – p. 43, line 2).

Judge Newman specifically referenced the defense argument and his consideration that prejudice could be presumed given the length of time – he just (quite logically and reasonably) rejected that in this case. (See also R.pp. 19-22, defense counsel acknowledging receipt of transcripts from other proceedings prior to Petitioner's trial; pp. 196-197, judge considering

transcripts from other proceedings and "vivid" recall by witnesses). The trial judge's ruling was factually supported and legally sound. Consequently, if the majority opinion is construed as consistent with *Barker*, it is incorrect that the trial judge did not believe he could consider the length of time in regard to prejudice where the transcript indicated otherwise. If the majority opinion is construed as inconsistent with *Barker* in finding prejudice may be presumed regardless of real and submitted evidence demonstrating the lack of actual prejudice, it rests on an erroneous understanding of the law. Either way, the majority opinion is not correct in its discussion of "presumptive prejudice."

(7) The Majority Failed to Consider the Complexity of the Facts Separate from the Charge and Incorrectly Inferred Bad Faith from Offers to Testify.

The reason for the delay here is multifaceted. There were at the outset of the prosecution two jurisdictions vying for the opportunity to pursue charges against a minimum of six individuals who participated in varying respects with the assault, kidnapping and murder. Further, the murder with aggravating circumstance(s) allowed for consideration of capital proceedings. In fact, capital proceedings were sought against Steven Barnes. The State expressed its intent to try Barnes first, and the delay in Barnes' capital case caused additional delays in the subsequent trials. (R. p. 30, lines 17-24). The record well supports Judge Newman's findings on the complexity of the case.

Certainly, complexity in the case is a valid reason for delay in the proceedings. *Pittman*, 373 S.C. at 552, 647 S.E.2d at 157 ("Although it took a long time for the case to come to trial, any delay was the result of the complexities of this case."); *Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (noting "complexity of the case and the amount of time required to prepare for trial" in assessing justification for the delay). As discussed previously, sometimes the complexity is not the charge itself but the number of defendants and individual moving parts of trial preparation.

See, for example, United States v. Brown, 498 F.3d 523, 531 (6th Cir. 2007) ("the reasons for the delay weigh against finding a Sixth Amendment violation. First, the charges were complex, involving multiple defendants and" multiple charges); *United States v. King*, 483 F.3d 969, 976 (9th Cir. 2007) (noting complex cases with "numerous defendants and alleged co-conspirators"). Judge Newman correctly identified the complexity of the case in the number of defendants, the number of trials, the prosecutions in two States, and the capital proceedings for co-defendant Barnes.

Further, attempting to "collect witnesses" is a valid cause for delay. *See Doggett v. United States*, 505 U.S. at 656 ("Our speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable. The government may need time to collect witnesses against the accused, oppose his pretrial motions..."). Contrary to majority's conclusion that no witnesses needed "collection," (Opinion, p. 9), the record shows the State actively sought to reach out to all witnesses to testify. Its offer to Petitioner actually shows the State did not place isolated or undue pressure on Petitioner. The majority consistently errs in failing to consider that the criminal actions here involved more than Petitioner and his brother. The State had success in securing many of the co-defendants to testify against Barnes, and, the offer to allow the Hunsbergers to testify "might [have] go[ne] toward their benefit." (See R. p. 4, lines 14- 25; p. 26, lines 10-16). As the State acknowledged, it was their right to decide not to testify against Barnes. (R. p. 26, line 17 – p. 27, line 6). Even so, they had the same opportunities as the other co-defendants. This even treatment does not lend itself to attack here as evidence of an attempt to harm the defense. It is, however, a facet of the complexity.

Further still, it is clear from the record that the State immediately set out to bring the Hunsbergers back to this jurisdiction for trial upon completion of the capital proceedings against

Barnes. (R. p. 25, line 21 – p. 26, line 6). There was no delay of any consequence in seeking Petitioner's return after the capital proceedings concluded. The inference that the State acted to gain improper advantage is without support and without merit.

Lastly, Respondent notes with this Court's reversal of Barnes' conviction, and now the reversal for the Hunsbergers, no one has received punishment for Samuel Sturrup's murder at all – no one. Murder is a particularly heinous crime and immunity granted based upon a disagreement with the State's prosecution method where such method reflects *no* deliberate attempt to hamper a defense, *no* malice toward the defense, and *no* actual, identifiable prejudice to the defendant, particularly offends the victim, community and the sense of public justice. The immunity granted here is far too high a price to pay for disagreement with the individual prosecution method reflected in the record.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the Court of Appeals properly affirmed on the facts of this record. The record well supports Judge Newman's factual findings which he correctly analyzed in the appropriate legal framework. Therefore, his ruling was properly upheld on appeal. *Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (affirming denial of motion to dismiss where appellate court found trial judge's "decision was supported by the evidence"). This Court should grant rehearing, and modify to affirm the Court of Appeals' well-reasoned decision or dismiss as improvidently granted.

Respectfully submitted,

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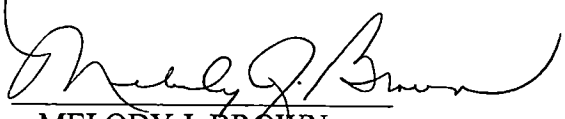
BY: 

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November 10, 2016.
Columbia, South Carolina.

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STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
NOV 10 2016
SC Court of Appeals

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

Opinion No. 27671

The State, Respondent,

v.

Alexander L. Hunsberger, Petitioner.

Appellate Case No. 2015-000083

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the Petition for Rehearing on Petitioner by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
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This 10th day of November, 2016.

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RECEIVED
NOV 10 2016
SC Court of Appeals

November 10, 2016

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

Re: The State v. Alexander L. Hunsberger
Appellate Case No. 2015-000083

Dear Mr. Shearouse:

Enclosed for filing with the Court is the original and six (6) copies of the Petition for Rehearing, dated November 10, 2016, together with a Proof of Service, in the above-referenced matter. Thank you for your assistance in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/pjc

Enclosures

cc: Susan B. Hackett, Appellate Defender
Donald V. Myers, Eleventh Circuit Solicitor
Trisha Allen, Victim Services
The Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals