

# The Supreme Court of South Carolina

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January 3, 2017

The Honorable Charles L. Reel  
P.O Box 34  
Edgefield, SC 29824

## REMITTITUR

Re: The State v. Julio A. Hunsberger  
Lower Court Case No. 2002-GS-19-00110  
Appellate Case No. 2015-000085

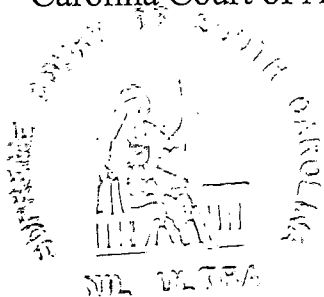
Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

*Daniel E. Shearouse*  
DS

CLERK



cc: Kathrine Haggard Hudgins, Esquire  
Alan McCrory Wilson, Esquire  
Melody Jane Brown, Esquire  
John W. McIntosh, Esquire

Donald J. Zelenka, Esquire  
Donald V. Myers, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

The State, Respondent,

v.

Julio Angelo Hunsberger, Petitioner.

Appellate Case No. 2015-000085

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Edgefield County  
R. Knox McMahon, Circuit Court Judge

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Memorandum Opinion No. 2016-MO-029  
Heard December 2, 2015 – Filed October 12, 2016

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**REVERSED**

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Appellate Defender Kathrine Haggard Hudgins, of  
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General John W. McIntosh, Senior Assistant  
Deputy Attorney General Donald J. Zelenka, Senior  
Assistant Attorney General Melody Jane Brown, all of

Columbia, and Solicitor Donald V. Myers, of Lexington,  
all for Respondent.

**CHIEF JUSTICE PLEICONES:** We granted certiorari to review the decision of the Court of Appeals, which upheld the denial of Petitioner Julio Hunsberger's speedy trial motion. *State v. Hunsberger*, Op. No. 2014-UP-382 (S.C. Ct. App. filed Nov. 5, 2014). We now reverse. See *State v. Alexander Hunsberger*, Op. No. 27671 (S.C.Sup.Ct. filed October 12, 2016).

**REVERSED.**

**BEATTY and HEARN, JJ., concur. Acting Justice Jean H. Toal, dissenting in a separate opinion in which KITTREDGE, J., concurs.**

**ACTING JUSTICE TOAL:** I respectfully dissent. Because Julio Hunsberger (Petitioner) never made a demand for trial and the record indicates that Petitioner did not actually desire a speedy trial prior to the call of his case, it is my opinion that the majority erred in summarily reversing Petitioner's direct appeal pursuant to the Court's stated reasons for granting co-defendant Alexander Hunsberger's speedy trial motion in *State v. Alexander L. Hunsberger*.<sup>1</sup> Because I would affirm the trial court for the reasons stated in the court of appeals' opinion, *see State v. Julio Angelo Hunsberger*, Op. No. 2014-UP-382 (S.C. Ct. App. filed Nov. 5, 2014), I would dismiss the writ of certiorari as improvidently granted.

On September 3, 2001, Samuel Sturup (the victim) was murdered. The State alleged Steven Barnes, Richard Cave, Antonio Griffin, and Charlene Thatcher began an assault on the victim in Georgia because Barnes believed the victim had stolen money from him. Barnes called Petitioner and his brother, Alexander Hunsberger, who drove from South Carolina to Augusta, where the group placed the victim in the trunk of Petitioner's car. Barnes, Cave, Griffin, and Thatcher followed Petitioner and Alexander in another vehicle to a remote area of Edgefield County. When they arrived, Barnes ordered everyone in the group to shoot the victim, and Barnes fired the fatal shot into the back of the victim's head.

Petitioner was arrested for murder on January 25, 2002.<sup>2</sup> On February 16, 2005, Petitioner was transferred to Georgia to face additional charges there. On September 12, 2006, he was convicted in Georgia for the crime of kidnapping with bodily injury and sentenced to life imprisonment. On September 30, 2011, Petitioner was transferred back to South Carolina.<sup>3</sup> The State first sought to call

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<sup>1</sup> Op. No. 2014-UP-381 (S.C. Sup. Ct. filed Nov. 5, 2014) (finding Petitioner Alexander Hunsberger was deprived of his constitutional right to a speedy trial and dismissing his murder charge).

<sup>2</sup> Petitioner's first attorney was appointed in 2002. Because Petitioner complained throughout 2004 and 2005 that he had not seen his attorney, another public defender was appointed. This attorney was relieved in June 2010. Petitioner's final counsel was appointed in June 2010 and represented him at his trial.

<sup>3</sup> During this time, the State sought the death penalty against Petitioner's co-defendant, Steven Barnes. The State contends it chose to try Steven Barnes first of

Petitioner's case for trial in October 2011, but Petitioner moved for a continuance. Petitioner's South Carolina trial began on January 9, 2012, and for the first time during pre-trial motions, Petitioner invoked his right to a speedy trial and moved to dismiss his case.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI; *see also* S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right to a speedy . . . trial."). The right has been described as "necessarily relative," in that "[i]t is consistent with delays and depends upon circumstances." *State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 481 (2012) (quoting *Beavers v. Haubert*, 198 U.S. 77 (1905)). In other words, "[a] speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay." *Id.* at 441, 735 S.E.2d at 481–82 (quoting *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)).

Even though the United States Supreme Court has provided that speedy trial issues should be resolved on an ad hoc basis, the Court has identified several factors to be considered when deciding speedy trial issues, including: (1) the length of the delay; (2) the reason(s) the government provides to justify the delay; (3) the timing of the defendant's assertion of his right to speedy trial; and (4) the prejudice resulting to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *see also State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) (recognizing *Barker* factors as applicable under South Carolina law). The Supreme Court has explained that not one of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U.S. at 533. Rather, the factors are interrelated and "must be considered along 'with such other circumstances as may be relevant.'" *Langford*, 400 S.C. at 441, 735 S.E.2d at 482 (quoting *Barker*, 407 U.S. at 533). Thus, courts should weigh "'the conduct of both the prosecution and the defense.'" *Id.* at 441–42, 735 S.E.2d at 482 (quoting *Barker*, 407 U.S. at 529–30).

The "triggering mechanism" of the *Barker* analysis is the length of the delay. *Id.* at 442, 735 S.E.2d at 482 (citing *Barker*, 407 U.S. at 530). When a defendant asserts his speedy trial right, the court "should not even examine the remaining factors '[u]ntil there is some delay which is presumptively prejudicial.'" *Id.*

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the co-defendants. Barnes was arrested in January 2002, convicted in Georgia for kidnapping in 2003, and sentenced to death in South Carolina in September 2010.

(quoting *Barker*, 407 U.S. at 530). "The clock starts running on a defendant's speedy trial right when he is 'indicted, arrested, or otherwise officially accused,' and therefore we are to include the time between arrest and indictment." *Id.* (quoting *United States v. MacDonald*, 456 U.S. 1, 6 (1982)). Notably, however, "even the length of time necessary to trigger the full inquiry 'is necessarily dependent upon the peculiar circumstances of the case.'" *Id.* (quoting *Barker*, 407 U.S. at 530–31). Further, the Supreme Court has explained that "as the term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Doggett v. United States*, 505 U.S. 647, 652, n.1 (1992).

Let us assume that the time period in question triggers further inquiry into the delay.<sup>4</sup> This case yields two additional, but notable, distinctions from *State v. Alexander Hunsberger* which in my opinion weigh very heavily against reversal in this case.<sup>5</sup> First, Petitioner never made a demand for a speedy trial until after his trial began. Further, during the hearing on the motion, Petitioner's counsel admitted he chose not to invoke the speedy trial right as a matter of strategy.

As noted by the trial court, the fact that Petitioner did not make a demand for trial does not operate as an automatic procedural bar to hearing the motion to dismiss based on the invocation of the speedy trial right. Instead, the failure to make a demand for trial is merely another factor in the *Barker* analysis. *See State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (recognizing *Barker's* explicit rejection of the notion that the failure to demand a trial constituted the waiver of the speedy trial right).

However, this Court has acknowledged that "the manner in which the defendant asserts his right [to a speedy trial] is an important factor to be considered" when analyzing whether a defendant's speedy trial motion should be granted, and *Barker* "emphasize[d] that failure to assert the right will make it

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<sup>4</sup> The timeline in *Alexander Hunsberger's* case and Petitioner's case is very similar.

<sup>5</sup> In *State v. Alexander Hunsberger*, the Court found that of the delay chargeable to the State, the State's reasons for the delay in Alexander's prosecution were insufficient to overcome the prejudice befalling him in light of the presumptively prejudicial length of the delay and the fact that Alexander asserted his right to a speedy trial three times. *See Op. No. 27671* (S.C. Sup. Ct. filed October 12, 2016). I disagree that that case should be reversed. *See id.* (Toal, J., dissenting).

difficult for a defendant to prove that he was denied a speedy trial." *Id.* (quoting *Barker*, 407 U.S. at 532). In *State v. Waites*, the defendant was arrested on August 26, 1974, and on that date, his attorney requested a preliminary hearing which was then scheduled for September 25, 1974. *Id.* at 106, 240 S.E.2d at 652. Due to scheduling changes and the magistrate's recusal and subsequent transfer of the case to another magistrate, the preliminary hearing was not held until December 29, 1976—two years and four months after the service of the defendant's arrest warrants. *Id.* at 106–07, 240 S.E.2d at 652. There, the Court found "significant" the fact that Waites "waited approximately twenty-eight months before claiming he had been denied his constitutional right to a speedy trial" even though he had been represented by counsel. *Id.* at 109, 240 S.E.2d at 653 (citation omitted). In my opinion, Petitioner's failure to assert his speedy trial right until after trial is likewise significant in balancing the *Barker* factors. As noted by the court of appeals,

Although almost ten years passed between [Petitioner's] arrest and his trial, the trial court noted that [Petitioner] was only detained in South Carolina from January 25, 2002, to February 16, 2005, before he was released to Georgia. This three-year period would have been sufficient to trigger further review of his speedy trial rights; *however, he never asserted them.*

Op. No. 2014-UP-382 (S.C. Ct. App. filed Nov. 5, 2014) (emphasis added).

Unlike cases in which a defendant merely sleeps on his right to a speedy trial, Petitioner's failure to raise his right is made more significant because it was intentional. Here, the delay in resolution—apart from the State's given reasons of the Georgia prosecution and Steven Barnes capital murder case delay—was occasioned partly as a matter of trial strategy. In fact, counsel for Petitioner stated he was hoping that the prosecution of Steven Barnes would lead to the State choosing not to prosecute Petitioner due to his life sentence in Georgia. At the hearing, Petitioner's counsel explained, "Sometimes that [asserting the right] can be a dangerous proposition. You may get just what you ask for." Thus, the record clearly evinces a desire on Petitioner's part not to go to trial.

In *Barker*, the defendant did not object to the Commonwealth of Kentucky seeking sixteen separate continuances in his trial date. In assessing the speedy trial motion, the Supreme Court stated, "[B]arring extraordinary circumstances, we [should] 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.*" 407 U.S. at 536 (emphasis added). This record makes clear

that Petitioner sought to delay trial to reap the potential benefits from the delay. Therefore, it is my opinion that this case certainly does not present the extraordinary circumstances envisioned by *Barker* in which a court could find Petitioner's right to a speedy trial was violated in the face of his stated intent to avoid trial pending the outcome of the Barnes murder trial.

As the United States Supreme Court has made clear again and again, the assessment of the assertion of a speedy trial right is extremely fact-specific. In my opinion, the majority erred in relying on *State v. Alexander Hunsberger* to summarily reverse this case. Because I agree with the court of appeals that the trial judge should be affirmed, I would dismiss the writ of certiorari as improvidently granted.

**KITTREDGE, J., concurs.**

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Julio Angelo Hunsberger, Appellant.

Appellate Case No. 2012-207290

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Appeal From Edgefield County  
R. Knox McMahon, Circuit Court Judge

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Unpublished Opinion No. 2014-UP-382  
Heard September 9, 2014 – Filed November 5, 2014

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**AFFIRMED**

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Appellate Defender Kathrine Haggard Hudgins, of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General John W. McIntosh, Senior Assistant  
Deputy Attorney General Donald J. Zelenka, and Senior  
Assistant Attorney General Melody Jane Brown, all of  
Columbia; and Solicitor Donald V. Myers, of Lexington,  
for Respondent.

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**PER CURIAM:** Julio Angelo Hunsberger appeals his conviction for murder, arguing the trial court erred in denying his motion to dismiss the charge against him because his constitutional right to a speedy trial was violated as a result of the almost ten-year delay in bringing his case to trial. We affirm.

## **FACTS**

On September 3, 2001, Samuel J. Sturup was shot and killed in South Carolina. Hunsberger was arrested for his murder on January 25, 2002. Hunsberger's brother, Alexander, and Steven Louis Barnes were also charged with Sturup's murder.<sup>1</sup>

On February 16, 2005, Hunsberger was transferred to Georgia to face charges in connection to the South Carolina murder charge. Hunsberger was tried and convicted in Georgia for kidnapping with bodily injury on September 12, 2006. He was sentenced to life in prison in Georgia. Hunsberger was returned to South Carolina on September 30, 2011, pursuant to the Interstate Agreement on Detainers (IAD). Hunsberger never moved for a speedy trial. The State wanted to try Barnes' capital case before it tried any of the co-defendants' cases. After Barnes was convicted, the State sought to bring Hunsberger's case to trial in October 2011; however, he moved for a continuance. The court granted his motion for a continuance in an order dated October 18, 2011. The order stated there was "no such motion for speedy trial now before the [c]ourt. Therefore, no part of this Order is intended to apply or address any matter of speedy trial. Likewise, this order is not intended to prejudice any future right the defendant may have to make such a motion."

Hunsberger's South Carolina trial began on January 9, 2012. At the beginning of trial, Hunsberger moved to dismiss his case, asserting his right to a speedy trial was violated. Hunsberger initially admitted he had a "hurdle" in making his argument because he had not previously asserted his right to speedy trial, which is a factor in determining whether his rights have been violated. He argued the State failed to bring his case within a reasonable time and was dilatory in its duty. Hunsberger stated the ten-year delay was a significant passage of time for the court to find his right to a speedy trial was violated. Furthermore, Hunsberger asserted

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<sup>1</sup> Three additional defendants were convicted in Georgia of charges involving the kidnapping and assault of Sturup.

he was effectively without counsel for a time.<sup>2</sup> Hunsberger's current attorney stated he did not file a motion for speedy trial when he was first appointed in June 2010, eight and a half years after Hunsberger's arrest, because he was not certain Hunsberger would be tried in the case based on his life sentence in Georgia and some assertions made to him by the solicitor. Hunsberger argued he was prejudiced by the witnesses' varied stories over the years. He also argued the prosecution was vindictive or selective because other individuals were similarly situated to him. He further argued he was being punished for exercising his right to remain silent and not assist the State in the prosecution of Barnes. Finally, he asserted there was an identification issue related to three of the State's witnesses.

The State responded it always intended to dispose of Barnes' case prior to bringing any of the co-defendants to trial. The State called Hunsberger's case in October 2011, as soon as it completed Barnes' trial; however, Hunsberger moved for a continuance, which the court granted. The State asserted Hunsberger did not file a motion for speedy trial at that time. Hunsberger's counsel responded he requested the continuance because he had only met with Hunsberger one time before he was moved to Georgia and he "thought it was fundamentally unfair for me to proceed to trial having only met with him on that one occasion and that one occasion was actually regarding his consideration to testify for the State in the Barnes case."

The court denied Hunsberger's motion to dismiss, explaining that based on the totality of the circumstances in this case, Hunsberger would not be prejudiced. The court continued, "I think given the fact that [Hunsberger] was a sentenced prisoner in Georgia and . . . , for that length of time, . . . he would not have been released, . . . it was not unreasonable for the State to take the position that [it] wanted to try the one defendant that [it] sought the death penalty on in the case first and dispose of that case first."

Hunsberger renewed his motion to dismiss again at the close of the State's case, arguing the inconsistencies in witnesses' testimony provided an example of the prejudice he suffered from the delay in bringing his case to trial. The court again

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<sup>2</sup> Hunsberger's first attorney was appointed in 2002. After several complaints from Hunsberger in 2004 and 2005 that he had not seen his attorney, another public defender was appointed, but he was then relieved on June 14, 2010. Hunsberger's current attorney was appointed in June 2010 and represented Hunsberger during his 2012 trial in South Carolina.

denied the motion. The jury convicted Hunsberger of murder, and the court sentenced him to life in prison without parole. This appeal followed.

## STANDARD OF REVIEW

In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009); *see State v. Evans*, 386 S.C. 418, 422, 688 S.E.2d 583, 585 (Ct. App. 2009) (applying the standard of review to speedy trial cases). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

## LAW/ANALYSIS

Hunsberger argues the trial court erred in denying his motion to dismiss the charge against him because the almost ten-year delay in bringing his case to trial violated his constitutional right to a speedy trial. We disagree.

A criminal defendant is guaranteed the right to a speedy trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14. "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 caused by arrest and the presence of unresolved criminal charges.'" *State v. Pittman*, 373 S.C. 527, 548-49, 647 S.E.2d 144, 155 (2007) (quoting *United States v. MacDonald*, 456 U.S. 1, 8 (1982)). A "speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay." *State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012) (quoting *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)). "There is no universal test to determine whether a defendant's right to a speedy trial has been violated." *Evans*, 386 S.C. at 423, 688 S.E.2d at 586.

When determining whether a defendant has been deprived of his or her right to a speedy trial, this court should consider four factors: (1) length of the delay; (2)

reason for the delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant. *State v. Brazell*, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). These four factors are related and must be considered together with any other relevant circumstances. *Barker*, 407 U.S. at 533. "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. United States*, 505 U.S. 647, 652 n.1 (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*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978), our supreme court found a two-year-and-four-month delay was sufficient to trigger further review. "[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.

In *State v. Evans*, 386 S.C. at 424-26, 688 S.E.2d at 586-87, this court found a twelve-year delay in bringing a case to trial did not violate the defendant's speedy trial right when the defendant's statement to police was suppressed; the appeals of the suppression order lasted five years; after the appeals, the case was transferred to an assistant solicitor and the solicitor was later elected solicitor of another circuit; and the defendant failed to establish she was prejudiced by the delay. In *State v. Cooper*, 386 S.C. 210, 217-18, 687 S.E.2d 62, 67 (Ct. App. 2009), this court held a delay of forty-four months did not violate the defendant's constitutional right to speedy trial even though the delay was to some degree the result of prosecutorial and governmental negligence because any presumption of prejudice was persuasively rebutted when the State withdrew its notice to seek the death penalty. Thus, the court found the withdrawal could be construed as a benefit to the defendant resulting from the delay. *Id.*

On appeal, Hunsberger argues the ten-year delay was presumptively prejudicial, unreasonable, and without a valid reason by the State. Hunsberger also asserts the State's purported reason for the delay, that it wanted to try Barnes' case first, does not justify the almost ten-year delay. He asserts the "State's refusal to call the case for trial for almost ten years, without sufficient cause, gives the appearance that the State was using the delay as a tactical advantage to coerce cooperation from [him] in the trial of the co-defendant, Barnes." Hunsberger admitted he had not previously asserted his speedy trial right but argued it should not weigh against him because he was effectively without counsel from 2002 until at least 2005. Finally, he asserts prejudice should be presumed from the almost ten-year delay.

He argues the trial court attached undue significance to his incarceration in Georgia and the State's assertion it wanted to try Barnes first.

Although almost ten years passed between Hunsberger's arrest and his trial, the trial court noted that Hunsberger was only detained in South Carolina from January 25, 2002, to February 16, 2005, before he was released to Georgia. This three-year period would have been sufficient to trigger further review of his speedy trial rights; however, he never asserted them. *See Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (determining a two-year-and-four-month delay was sufficient to trigger further review). Hunsberger was then tried, convicted, and sentenced in Georgia on September 12, 2006, to life for the crime of kidnapping with bodily injury. He was incarcerated in Georgia and returned to South Carolina on September 30, 2011.

As for the reason for the delay, the trial court found that "given the fact that [Hunsberger] was a sentenced prisoner in Georgia and . . . , for that length of time, . . . he would not have been released, . . . it was not unreasonable for the State to take the position that [it] wanted to try the one defendant that [it] sought the death penalty on in the case first and dispose of that case first." *See United States v. Grimmond*, 137 F.3d 823, 828 (4th Cir. 1998) ("When a defendant violates the laws of several different sovereigns, . . . at least one sovereign, and perhaps more, will have to wait its turn at the prosecutorial turnstile. Simply waiting for another sovereign to finish prosecuting a defendant is without question a valid reason for delay."); *Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (holding the "constitutional guarantee of a speedy trial is protection only against delay which is arbitrary or unreasonable"); *State v. Kennedy*, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) (finding no violation of the defendant's right to a speedy trial, even though the delay was two years and two months, when the case was clearly complicated and required substantial time to investigate and prepare and there was no evidence the State purposefully delayed the trial); *State v. Smith*, 307 S.C. 376, 380, 415 S.E.2d 409, 411 (Ct. App. 1992) (holding the burden was on the defendant to show the delay was due to the neglect and willfulness of the State's prosecution). The State called Hunsberger's case in October 2011, as soon as it completed Barnes' trial.<sup>3</sup> Hunsberger did not move for a speedy trial. The trial was then delayed until January 2012 because Hunsberger moved for and was

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<sup>3</sup> The State sought Capital proceedings against Barnes, who was sentenced to death for Sturup's murder.

granted a continuance. Thus, Hunsberger's case was called to trial very shortly after being returned to South Carolina and was only delayed at his request.

Hunsberger first asserted his right to speedy trial at the beginning of his South Carolina trial on January 9, 2012. *See Waites*, 270 S.C. at 109, 240 S.E.2d at 653 (citing to *Commonwealth v. Watson*, 360 A.2d 710 (Pa. Super. 1976), in which the court concluded a delay of more than three years between the defendant's arrest and the trial did not deny the defendant his constitutional right to a speedy trial when he did not assert the right until three days prior to trial). His counsel testified he did not think it was appropriate to file a speedy trial motion prior to that time because he did not know the State was going to try Hunsberger due to his life sentence in Georgia. Counsel testified, "Sometimes that can be a dangerous proposition. You may get just what you ask for."

Further, at trial, Hunsberger argued he was prejudiced by the witnesses' varied stories over the years. On appeal, he only argues prejudice should be presumed from the excessive almost ten-year delay. The trial court noted Hunsberger did not allege any witnesses were unavailable. All the witnesses were available to testify, and the transcripts from the previous trials were available to Hunsberger to use to impeach the witnesses. Hunsberger did not allege any witnesses or evidence were lost, the delay impacted his case, or an earlier trial would have resulted in a different verdict and sentence. *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); *Kennedy*, 339 S.C. at 251, 528 S.E.2d at 704 ("While Kennedy may have been slightly prejudiced by the twenty-six month pretrial incarceration, the more important question is whether he was prejudiced because the delay impaired his defense."); *State v. Langford*, 400 S.C. 421, 445, 735 S.E.2d 471, 484 (2012) (finding a two-year delay in bringing the case to trial did not amount to a constitutional violation in the absence of any actual prejudice to the defendant's case).

Therefore, looking at the *Barker* factors and the case as a whole, we find the trial court did not abuse its discretion in finding Hunsberger's constitutional right to a speedy trial was not violated and denying his motion to dismiss.

## **CONCLUSION**

Accordingly, the decision of the trial court is

**AFFIRMED.**

**HUFF, SHORT, and KONDUROS, JJ., concur.**