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No. \_\_\_\_\_

S.C. SUPREME COURT

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**In the Supreme Court of the United States**

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STATE OF SOUTH CAROLINA,

*Petitioner,*

vs.

JULIO ANGELO HUNSBERGER,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF SOUTH CAROLINA

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PETITION FOR WRIT OF CERTIORARI

---

ALAN WILSON

*South Carolina Attorney General*

J. ROBERT BOLCHOZ

*Chief Deputy Attorney General*

DONALD J. ZELENKA

*Deputy Attorney General*

*dzelenka@scag.gov*

\*MELODY J. BROWN

*Sr. Asst. Attorney General*

*mbrown@scag.gov*

*Post Office Box 11549*

*Columbia, South Carolina 29211*

*(803) 734-6305*

*\*Counsel of Record*

## QUESTION PRESENTED

Whether relief may be granted for violation of the Sixth Amendment right to a speedy trial without individual assessment of the case as required by *Barker v. Wingo*?

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## PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of South Carolina respectfully petitions this Court for a Writ of Certiorari to review fundamental error in the state court's resolution of Respondent's claim his Sixth Amendment right to a speedy trial was violated. This Court has plainly and clearly set out that consideration of such a claim must be on an *ad hoc* basis. The Supreme Court of South Carolina failed to apply this basic mandate.

Moreover, the nature of the remedy – immunity from trial – raises the need for error correction in this case. The State has no method or vehicle for seeking justice absent intervention from this Court. Murder is a particularly heinous crime. The Supreme Court of South Carolina has summarily granted immunity to Respondent for his part in the murder of the victim in this case. Unexplained immunity granted for such a crime particularly offends the sense of public justice. The decision of the state supreme court should be reversed to preserve the supremacy of this Court's interpretation of the Federal Constitution:

The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court's decisions. But what a state court cannot do is experiment with our

Federal Constitution and expect to elude this Court's review so long as victory goes to the criminal defendant.

*Kansas v. Carr*, 577 U.S. \_\_\_, \_\_\_, 136 S. Ct. 633, 641 (2016) (citation omitted).

#### CITATION TO OPINIONS BELOW

The decision of the South Carolina Court of Appeals is not officially reported but may be found at 2014 WL 5772757, and has been reproduced in the Petition Appendix at App. 34-45. The decision of the Supreme Court of South Carolina is not officially reported, but may be found at 2016 WL 5930130, and is also reproduced in the Petition Appendix at App. 2-11. Lastly, the order denying the timely petition for rehearing is not reported, but has been reproduced in the Appendix at App. 32-33.

#### JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), as the opinion from the Supreme Court of South Carolina decides an issue regarding the Sixth Amendment right to a speedy trial. The petition is timely as the Supreme Court of South Carolina denied the petition for rehearing on December 16, 2016. (App. p. 32).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to a speedy trial secured by the Sixth Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment.

### STATEMENT OF THE CASE

#### A. Facts of the Crime.

The Supreme Court of South Carolina did not include any reference to the facts of the crime in the opinion. However, the facts were summarized in co-defendant Alexander L. Hunsberger's appeal as follows:

The acts that led to Alex's prosecution for murder are heinous. Sturup allegedly stole money from Steven Barnes, the purported head of a robbery and prostitution ring in Georgia. In an effort to force Sturup to divulge where the stolen money was located, Barnes allegedly beat, and caused others to beat, Sturup at a location in Augusta, Georgia. Sturup was then placed in the trunk of a vehicle

and brought from Georgia to South Carolina by Alex and his brother Julio Hunsberger. Sturup was taken into a field and shot by several individuals including the Hunsberger brothers. Barnes is alleged to have fired the fatal shot.

*State v. Hunsberger*, 794 S.E.2d 368, 370–71 (S.C. 2016).

#### B. State Appellate Decisions.

The sole issue on appeal was whether the trial court properly denied the motion to dismiss based upon a violation of the right to a speedy trial. The dates of the murder, arrest, indictment, and scheduling of trial are relevant.

The murder was committed in September 2001. The murder, involving six individuals and two crime scenes, was unsolved for several months. Respondent was arrested in South Carolina in January 2002 and indicted in March 2002 for murder. South Carolina prosecutors assessed the facts and found the facts may warrant capital proceedings. South Carolina pursued capital proceedings for Barnes before prosecution Respondent. (See App. p. 37). In February, 2005, South Carolina released Respondent to Georgia where he stood trial for kidnapping of the murder

victim. Respondent was convicted and began service of a life sentence in September 2006. Respondent never asserted a demand for trial.

South Carolina prosecutors pursued capital proceedings for co-defendant Barnes and obtained a death sentence in November 2010. After those proceeding, prosecutors opted not to pursue capital proceedings for Respondent and sought and obtained his return in September 2011. Respondent moved for a continuance. (App. pp. 47-49). He was eventually tried in January 2012, at which time he moved to dismiss the murder charge for violation of his right to a speedy trial. (See App. pp. 35-36).

The South Carolina Court of Appeals made a detailed review of the trial court's ruling weighing various facts of record and determined, without dissent, no violation had occurred under the circumstances. (App. pp. 34-45).

The Supreme Court of South Carolina granted certiorari review and summarily reversed citing only Respondent's co-defendant/brother's case (State v. Alexander Hunsberger) where relief was granted on a speedy trial violation. (See App. p. 3). It did not make an individualized assessment of Respondent's situation at all. The dissent criticized the failure and noted significant differences:

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. 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.

(App. p. 7).

At the conclusion of the individual assessment of this case, the dissenting justices reasoned certiorari should have been deemed improvidently granted. (App. p. 10).

#### REASONS CERTIORARI SHOULD BE GRANTED

Since 1972, when this Court fully endorsed and adopted the balancing approach set out in *Barker v. Wingo*, it has been, and remains, the law of the land that individual consideration of speedy trial claims are mandated:

A balancing test necessarily compels courts to approach speedy trial cases on *an ad hoc basis*. We can do little

more than identify some of the factors which courts should assess in determining whether *a particular defendant* has been deprived of his right.

*Barker v. Wingo*, 407 U.S. 514, 530 (1972). In fact, the Court recognized the individualized balancing test approach as the only sufficient test, confirming the longstanding preference for a “functional analysis.” *Id.*, at 522 (citing *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

Like the Vermont Supreme Court in *Brillon*, the state supreme court in this case made such a “fundamental error in its application of *Barker* that [it] calls for this Court’s correction.” *Vermont v. Brillon*, 556 U.S. 81, 91 (2009). The state court’s resolution by sparse legal conclusion plainly ignores this Court’s longstanding requirement that fair review must be effected by individualized consideration. Further, it inflicts by this infirmity what is already deemed an “unsatisfactorily severe remedy of dismissal” even when a proper finding of deprivation of the right is warranted. *Barker*, 407 U.S. at 522.

“The sole remedy for a violation of the speedy trial right” is the “dismissal of the charges....” *Betterman v. Montana*, 578 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1609, 1615 (2016). It is a remedy not lightly made

as it undermines the right of the public to justice. *Barker*, 407 U.S. at 522.

A grant of immunity wounds the victims, the community, and the justice system – much more than suppression of evidence or error correction by granting a new trial. *Id.* As such, a grant of immunity upon finding a violation of the right to a speedy trial must be carefully, and transparently, considered in a specific weighing of evidence of intent, demand for the constitutional right, and measurable harm in the specific case at issue. *Id.* The Supreme Court of South Carolina failed to follow this Court's rule.

- I. The majority opinion reflects fundamental error in application of *Barker v. Wingo* by failing to afford individual consideration to the allegation of violation of the right to a speedy trial.

In this case, the whole of the Supreme Court of South Carolina's opinion is that they reverse, citing a separately presented, separately tried, case. (App. p. 3). This is clear legal error.

Moreover, the sharply divided court summarily reversed a unified decision of the intermediate appellate court that had made the required detailed, individual, consideration. In summarily reversing, the state supreme court granted immunity though Respondent made no demand for a speedy trial (in fact, stated he did not want one). The specific facts considered by the trial

and intermediate appellate courts fully supported denial of the motion to dismiss.

- a. The majority erred in failing to weigh Respondent's own inaction against him. Respondent, while specifically aware of the charge and represented by counsel, made no demand for trial – ever.

“A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice.” *State v. Johnson*, 167 S.E.2d 274, 278 (N.C. 1969). Thus, review of the defendant's actions must be considered to prevent mechanically imposed windfalls due to delay alone.

This Court has never relieved a criminal defendant of all responsibility in asserting his right. To the contrary, this Court firmly *rejected* the concept “the defendant has no responsibility to assert his right,” stating further, and strongly, “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.” *Barker*, 407 U.S. at 528 and 536. *See also Doggett v. United States*, 505 U.S. 647, 653 (1992) (had Government shown defendant knew of a charge and sat on his right it “would be weighed heavily against him.”).

The fact that this Court's precedent instructs heavily weight must be given this factor is routinely recognized. *See, e.g., Rashad v. Walsh*, 300 F.3d 27, 40 (1st Cir. 2002) ("...the record is clear that the petitioner failed to seek a speedy trial with anything remotely approaching diligence. This counts significantly in the speedy trial calculus."); *United States v. Gibson*, 513 F.2d 978, 981-82 (6th Cir. 1975) ("The only reason suggested by appellant for his failure to demand a speedy trial is the assertion by his counsel that he had understood from conversations with the United States Attorney that the government might drop charges against Gibson and proceed only against his co-defendant, Kenneth Smith. Like the defendant Barker in *Barker v. Wingo, supra*, Gibson gambled and failed."); *United States v. Tranakos*, 911 F.2d 1422, 1429 (10th Cir. 1990) ("We are unimpressed by a defendant who moves for dismissal on speedy trial grounds when his other conduct indicates a contrary desire"); *United States v. Bagga*, 782 F.2d 1541, 1545 (11th Cir. 1986) ("Bagga was a reluctant defendant who was not concerned with a speedy trial"); *United States v. Tchibassa*, 452 F.3d 918, 926 (D.C. Cir. 2006) ("failure to make any effort to secure a timely trial on them (and his apparent desire to avoid one) manifests a total disregard for his speedy trial right"). The inexplicable failure of the Supreme Court of South Carolina to consider same cannot be considered anything but clear legal error.

The Supreme Court of South Carolina erred in failing to consider this weighty circumstance.

- b. The majority erred in failing to consider Respondent failed to force trial by demanding trial under the Interstate Agreement on Detainers. The Agreement empowers a prisoner to effectively demand and vindicate his right to a speedy trial or be released.

The State brought Respondent back to the jurisdiction to stand trial by the Interstate Agreement on Detainers. Respondent moved for a continuance to exceed the limited time placed upon trial by the Agreement. (App. p. 46). But, critically, Respondent failed to utilize his own right under the Act to demand a timely trial. The Agreement is a great equalizer in an arena historically saved to the State.

“[T]he agreement prescribes procedures by which a prisoner may demand the speedy disposition of charges pending against him in another jurisdiction, as well as procedures by which a state may obtain custody, for purposes of trial, of a prisoner who is incarcerated in another state.” 98 A.L.R.3d 160 (Originally published in 1980). *See also Fex v. Michigan*, 507 U.S. 43, 52 (1993) (IAD provides a trial must be held within 180-days of actual delivery of a “prisoner’s request for final disposition of the charges against him”). Far from the era of a powerless defendant, the Act now gives

prisoners the right to force trial or secure dismissal.<sup>1</sup>

Here, Respondent actually waived his right to be tried within 180 days when the State used the Act to bring him into the jurisdiction. (App. p. 49). Though Respondent cited, in the state appellate litigation, the Order Upon Motion for Continuance as supporting his motion for continuance should not apply to the matter of a speedy trial, the Order nonetheless reflects the IAD compact terms were tolled *due directly to Respondent's request for continuance*. (App. p. 49). Thus, in assessing the reasons for the delay, the fact that Respondent failed to assert his right to a speedy trial is significant, especially where he never attempted to force a trial by any means, and actually waived his right to force trial within 180 days under the interstate compact. See *Weems v. State*, 714 S.E.2d 119, 124 (Ga.App. 2011) (considering defendant's failure to file "a statutory demand for speedy trial" and that he only asserted "his constitutional right to a speedy trial until 38 months after his arrest, waiting to do so on the day of his trial's calendar call," weighed against him); *Hopper v. State*, 495 S.W.3d 468, 477-78 (Tex. App. 2016), *petition for discretionary review granted* (Oct. 19, 2016) (inaction where defendant could have demanded trial under IAD weighed heavily against him in

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<sup>1</sup> South Carolina adopted the Act in 1962. S.C. Code Ann., § 17-11-10. Georgia adopted the Act in 1972. Ga. Code Ann., § 42-6-20.

speedy trial analysis); *Crocket v. State*, 206 So.3d 742, 746 (Fla. Dist.Ct.App. 2016) (if knowledge of the detainer for IAD purposes would have been shown, it “would have then shifted the burden to appellant pursuant to the Act to request a speedy trial”).<sup>2</sup>

It is certainly understandable with the possibility of capital proceedings looming that Respondent would not wish to insist on trial, but it is inconsistent with demanding his right to a speedy trial. It is likewise relevant to assessment of personal prejudice. *Barker*, 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 Supreme Court of South Carolina erred as a matter of law in failing to consider this fact in an individualized speedy trial analysis.

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<sup>2</sup> It does not appear this Court has specifically ruled upon the effect of this empowerment on the speedy trial analysis. However, the Court has ruled the absence of the power is supportive of dismissal in light of repeated requests to be tried. See *Smith v. Hooey*, 393 U.S. 374, 375 (1969).

c. The majority erred in failing to consider counsel's statement expressing a strategy not to seek trial.

As noted above, hoping to avoid trial all together is understandable but it is not a basis to excuse the failure to seek a timely trial. Here, though, there is direct evidence of avoidance.

Defense counsel in Respondent's case moved for a continuance in October 2011. Though not a bar to making his claim, the fact of this delay is directly attributable to Respondent and should be weighed against him in a speedy trial analysis. *Brillon*, 556 U.S. at 81. As the Court of Appeals found, the trial judge properly treated this fact as such within the balancing of competing interests and weight. (App. pp. 36-37; pp. 42-44; see also App. p. 7, dissenting opinion). However, there is further a significant matter of a specific strategy reflected in the instant record.

Essentially, Respondent's counsel expressed that he specifically did not request a trial because he did not want a trial. He hoped that the State may not prosecute Respondent at all depending on how the prosecution of co-defendant Barnes would resolve. (App. p. 9, dissenting opinion). The facts here closely track the facts of the *Barker* case where this Court found the defendant "was not deprived of his due process right to a speedy trial." 407 U.S. at 536.

In *Barker*, the defendant failed to object to a

series of continuances in a probable “gamble” that a co-defendant would be acquitted in a separate trial that was likewise delayed. 407 U.S. at 516. Appointed counsel made no request for years during the relevant period, and “the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried.” 407 U.S. at 534-535. “The probable reason for Barker’s attitude was that he was gambling on Manning’s acquittal,” and hoped “he would never be tried.” *Id.*, at 535. This Court reasoned: “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.” *Id.*, at 536. The situation is much the same here.

The State indicated a desire to try Barnes first, and Barnes’ capital prosecution was delayed for various reasons. During that time, Respondent apparently considered whether he, like other co-defendants, would testify against Barnes. Counsel, admittedly, did not move for a trial as he might have “gotten what he asked for,” and he did not want to secure a trial. (App. p. 9). Like *Barker*, the record supports Respondent did not want a trial. And, also like *Barker*, a reviewing court should be “reluctant indeed to rule” there is a violation of his constitutional right. *Id.* See also *Doggett*, 505 U.S. at 653 (if facts show a defendant had knowledge of his indictment and failed to make a demand for trial, “*Barker’s* third factor, concerning invocation of

the right to a speedy trial, would be weighed heavily against him”).

The Supreme Court of South Carolina failed to follow the reasoning and dictates of *Barker* and consider the claim in light of the facts of record.

- II. The majority’s inexplicable failure to consider any fact of record (other than Respondent’s brother received relief in his case) renders the majority opinion a pale suggestion of a Sixth Amendment analysis. In essence, the opinion conveys a sanction rather than vindication of a right. This is not contemplated in Sixth Amendment speedy trial jurisprudence.

The Sixth Amendment right to a speedy trial is a right granted every criminal defendant to have his case heard in a timely fashion. It is to minimize undue incarceration and its attendant ills:

The Sixth Amendment right to a speedy trial is ... not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial

guarantee 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.

*United States v. MacDonald*, 456 U.S. 1, 8 (1982).

Dismissal of the criminal charge is contrary to the ends of justice in seeking redress for the crime discharged. *Barker, supra*. Consequently, a detailed balancing must ensue before dismissal will be warranted. *Id.* Further, without such review, the State's ability to seek redress is immeasurably harmed.

The Supreme Court of South Carolina's refusal to apply *Barker* to the facts of this case leaves only the unpalatable conclusion the Court intended to rebuke the prosecution for its prosecution plan. That is not contemplated in the Sixth Amendment, or, for that matter, any limitation on length of pre-trial detention such as the IAD, or the Speedy Trial Act. See *Barker*, 407 U.S. at 531 (even "deliberate attempt to delay the

trial in order to hamper the defense” is simply “weighted heavily against the government” in the required analysis); S.C. Code Ann. § 17-11-10 (Agreement on Detainers: prisoner “shall be brought to trial within one hundred eighty days” unless a continuance is granted upon “good cause shown”); *United States v. Taylor*, 487 U.S. 326, 343 (1988) (“...the District Court appears to have decided to dismiss with prejudice in this case in order to send a strong message to the Government that unexcused delays will not be tolerated. That factor alone, by definition implicated in almost every Speedy Trial Act case, does not suffice to justify barring reprosecution in light of all the other circumstances present”). Nothing in this precedent indicates a court may dismiss a serious criminal charge as an expression of disapproval for the State’s decision in order of prosecution.<sup>3</sup>

In light of this Court’s precedent, and the absence of any precedent allowing the avoidance of individualized review, this case resoundingly merits review.

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<sup>3</sup> It is particularly curious to use this case as an expression of displeasure directed at the prosecution to deter future decisions in like circumstances. The state court *after the trial scheduling in this case* struck down the state statute that allowed the solicitor discretion in calling cases. *State v. Langford*, 735 S.E.2d 471 (S.C. 2012). In short, due to *Langford*, this particular situation could not occur again, but, at the time, the responsibility for calling the case – here, in deciding the order of prosecution in a case with multiple defendants, the most culpable tried first, receiving a death sentence – rested in the discretion of the solicitor.

## CONCLUSION

For all these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ALAN WILSON  
South Carolina Attorney General

J. ROBERT BOLCHOZ  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Deputy Attorney General  
dzelenka@scag.gov

\*MELODY J. BROWN  
Sr. Asst. Attorney General  
mbrown@scag.gov  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

\*Counsel of Record  
March 14, 2017.

APPENDIX

- A. Opinion, Supreme Court of South Carolina Granting Relief, with dissenting opinion.....App. pp. 1-11
- B. Petition for Rehearing.....App. pp. 12-31
- C. Order, Denying Petition for Rehearing..... App. pp. 32-33
- D. Opinion, South Carolina Court of Appeals Denying Relief.....App. pp. 34-45
- E. Order Granting Continuance...App. pp. 46-49

**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

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

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Appeal from Edgefield County  
R. Knox McMahan, 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*. [FN 1] 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 Sturrup (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. [FN 2] 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. [FN 3] The State first sought to call 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.* (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. [FN 4] 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. [FN 5] 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 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 speedy trial motion should be granted, and *Barker*

"emphasize[d] that failure to assert the right will make it 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**

[FN 1] 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).

[FN 2] 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.

[FN 3] During this time, the State sought the death penalty against Petitioner's codefendant, Steven Barnes. The State contends it chose to try Steven Barnes first of 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.

[FN 4] The timeline in Alexander Hunsberger's case and Petitioner's case is very similar.

[FN 5] 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).

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM EDGEFIELD COUNTY  
Court of General Sessions  
R. Knox McMahon, Circuit Court Judge

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Memorandum Opinion No. 2016-MO-029

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The State, Respondent,  
v.  
Julio Angelo Hunsberger, Petitioner.

Appellate Case No. 2015-000085

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PETITION FOR REHEARING

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In its October 12, 2016 opinion, a three member majority of this Court summarily reversed the South Carolina Court of Appeals which had affirmed the trial judge's decision to deny the 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 the defense motion to dismiss and bars retrial in two murder cases. [FN 1] However, the majority's opinion fails to consider the individual facts of this case pursuant to mandate in *Barker v. Wingo*, 407

U.S. 514 (1972), thus is legally insufficient as a matter of law to support relief under the Sixth Amendment. Therefore, pursuant to Rule 221(a), SCACR, Respondent, State of South Carolina, seeks rehearing and revision of the erroneous opinion.

*Summary of Argument*

The majority committed legal error in summarily reversing the instant case based on factual findings and conclusions made in a separate case, *State v. Alexander L. Hunsberger*. [FN 2] Supreme Court precedent is clear that courts reviewing speedy trial claims must engage in fact specific, case specific analysis. *Barker v. Wingo*, 407 U.S. at 522 (“any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case”). The majority opinion fails to abide by this directive. Thus, the opinion is insufficient as a matter of law to support reversal. Further, the discrete factual findings made in connection with Petitioner Alexander L. Hunsberger’s case are not applicable here as each case is separate and presents differing procedure history and factual basis for the claim. In particular, the summary opinion wholly fails to analyze Petitioner’s actions and/or inaction. This is especially critical as Petitioner never made a demand prior to requesting dismissal at the beginning of his trial in January of 2012. Moreover, the evidence in Petitioner’s case indicates that the lack of demand was strategic. Respondent requests the Court reconsider the facts of this case and issue a ruling on those facts consistent with the mandated

*Barker* “case-by-case” review.

*(1) The Majority Failed to Acknowledge the Factual Differences Between the Two Cases Which Affect Speedy Trial Analysis.*

Like Alexander L. Hunsberger, Petitioner was arrested on January 25, 2002, for his part in the murder of Samuel Sturup. (R. p. 34, line 23– p. 35, line 6). The procedural history differs from this point forward in critical ways. Petitioner complained about appointed counsel but did not seek bond or a speedy trial. (See R. pp. 38; pp. 564-567; p. 572). On February 16, 2005, apparently in connection with the relief granted on his brother’s demand, Petitioner was released to Georgia to stand trial for the kidnapping. (R. p. 37, lines 2-3). On September 12, 2006, Petitioner was convicted after a jury trial in Georgia and sentenced to life imprisonment. He thereafter began service of that sentence in Georgia. (R. p. 38, line 12 – p. 39, line 1).

Co-defendant Steven Barnes was tried and convicted in capital proceedings in November 2010. Judge McMahon presided. (R. p. 27, lines 2-13). The solicitor determined that the capital proceedings should proceed first; however, there were marked delays in capital proceedings which were eventually resolved when Judge McMahon was assigned. (R. p. 28, lines 5-11). The prosecution noted they were “waiting certainly to prosecute that case prior to dealing with any of the co-defendants’ case[s].” (R. p. 28, lines 11-13). The State offered Petitioner the opportunity to be a witness against Mr. Barnes. (R.

p. 25, lines 6-16). (See also R. p. 558). [FN 3]

On or about August 12, 2011, the State requested custody under the Interstate Agreement on Detainers (“IAD”). (R. p. 40, line 11 – p. 41, line 3). Pursuant to the State’s request, Petitioner was returned to the State on September 30, 2011. (R. p. 41, lines 17-19). The State stood ready to call the case for the week of October 3, 2011 and/or the week of October 10, 2011. Defense counsel moved for a continuance for each date. The continuances were granted over the State’s objection. (R. p. 28, line 25 – p. 29, line 13; p. 41, line 13 – p. 42, line 20). In granting the continuance, Judge Keesley noted that counsel had little time to consult with Petitioner due to Petitioner’s incarceration in Georgia. He also noted that there was no motion for a speedy trial, though the Order for continuance was “not intended to prejudice any future right the defendant may have to make such a motion.” (R. pp. 560 - 561). The judge found, though, that the request tolled the 180 day time period in which the State was required to try Petitioner pursuant to the terms of the IAD. (R. p. 561).

On January 9, 2012, the State called the case to trial. In pre-trial motions, Petitioner moved to dismiss the murder charge for failure to bring the charge to trial in a timely fashion. Defense counsel for Petitioner admitted there was a “hurdle” to his motion to dismiss based on a violation of the right to a speedy trial in that Petitioner never demanded a trial. (R. p. 22, line 8 – p. 23, line 4). Defense counsel argued, though, that the passage of time should

prompt review. (R. p. 23, lines 5-8). Defense counsel also suggested that, due to the length of time at issue, “the Court could, on its own motion, find that that is a violation of his right to a speedy trial.” (R. p. 23, lines 5-8). Counsel further argued that the failure to request a trial should not be weighed heavily against Petitioner when there was fluctuation in representation, and where there was a question of whether Petitioner may decide to be a witness against co-defendant Steven Barnes in the capital case. (R. p. 25, lines 6 – p. 26, line 1). Defense counsel also asserted that prejudice would be shown “by the conflicting evidence that will come from the varying witnesses based on prior testimonies they’ve given over the last six, seven years and last week.” (R. p. 26, lines 6-9). Counsel asserted “that the State’s own role in failing to bring him to trial is solely on the State and its not on him” and “the fact that he failed to assert it, I don’t think should necessarily defeat our claim” regarding delay. (R. p. 26, lines 12-18). The solicitor asserted in response:

There’s just a lot of circumstances that went into this. There certainly was no intentional delay of this case on the part of the State. ... they were given over to Georgia, a separate sovereign, who initiated a prosecution. They have been serving time over there.

(R. p. 30, line 20 – p. 31, line 1).

The solicitor argued it was the consistent

intent of the State to try the capital case against Barnes before turning to the other defendants. (R. p. 27, line 21-p. 28, line 1). The solicitor asserted that the State moved to prosecute the Hunsbergers after the Barnes conviction. However, the matter was then delayed when Alexander Hunsberger contested extradition and Petitioner moved for a continuance. (R. p. 28, line 17- p. 30, line 10).

The trial judge, considering the facts presented and the argument of counsel, found that neither the failure to assert the right previously nor defense counsel's motion for continuance would be a bar to asserting the motion to dismiss; however, the fact that Petitioner did not request a trial may be a factor to consider. Further, he reasoned the entire period of approximately ten (10) years should not be assessed against the State, as Petitioner was held in Georgia, tried, convicted and sentenced in Georgia, then began service of his sentence in Georgia. This distinguished the matter from one of pre-trial detainment alone. Lastly, the judge found that "the fact that years have passed may be to [Petitioner's] advantage, or at least not to his disadvantage." He noted the witnesses may be impeached with any inconsistent statements, and there was no allegation of a missing or unavailable witness. (R. p. 44, line 11- p. 48, line 13).

In regard to the State's determination to try Barnes first, the trial judge noted that Petitioner's "due process rights are separate and distinct from the State's prosecutorial plan," but "given the fact that he was a sentenced prisoner in Georgia and

that he was, for that length of time, that he would not have been released, that it was not unreasonable for the State to take the position that they wanted to try the one defendant that they sought the death penalty on in the case first and disposed of that case first.” (R. p. 48, line 24 – p. 49, line 12).

Considering all the facts and upon finding a lack of prejudice, the judge denied the motion. (R. p. 49, lines 13-18).

Counsel renewed his motion to dismiss at the close of the State’s case, adding that cross-examination demonstrated the “inconsistencies of the memories of the witnesses” and the prejudice to Petitioner. (R. p. 455, lines 12-24). The judge again denied the motion referencing his prior ruling. (R. p. 455, line 25 – p. 456, line 1).

On appeal in the South Carolina Court of Appeals, Petitioner complained that the trial judge erred in that the State was at fault in failing to bring the case to trial for nearly ten (10) years. (FBOA, p. 9). The Court of Appeals rejected his argument, concluding:

... 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.

(App. p. 8).

Multiple errors in the opinion in Alexander L. Hunsberger's case skewed the majority's view. Some may relate here (though it is far from certain what the majority meant by the summary reversal), and Respondent attempts to address at least some of those errors. For instance, as a first point of error, the majority starts a listing of their "important dates" at arrest. (See Opinion, p. 4). [FN 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, [FN 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). This is far too narrow a view of the case driven by singular review of the charge without consideration of the multiple co-defendants, development of the case and charges, and potential for capital proceedings. Additional factual findings and conclusions based on those facts mentioned in the Opinion relate to the ruling by Judge Newman in that separate case, not Judge McMahon in this case, and are not applicable.

(2) *The Record Supports the Trial Judge Did Not Abuse His Discretion in Denying the*

*Motion to Dismiss.*

“A court’s decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion.” *State v. Langford*, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012). In essence, “the court is bound by the findings of the trial court unless they are unsupported by the evidence, clearly wrong, or controlled by an error of law.” *State v. Cooper*, 386 S.C. 210, 216, 687 S.E.2d 62, 66 (Ct. App. 2009). The record here fully and fairly supports Judge McMahan’s finding that, in these discrete circumstances, the delay did not offend the right to a speedy trial nor prejudice Petitioner to the extent dismissal was warranted. There was no demand for a speedy trial, and there was no allegation of lost witnesses or other prejudice to Petitioner. The trial judge carefully balanced the competing factors under the appropriate legal framework and denied the defense motion. Thus, the Court of Appeals properly affirmed.

“The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused’s defense.” *Langford*, 400 S.C. at 440, 735 S.E.2d at 481. As the trial judge found, pre-trial detention in South Carolina was limited to the period of January 25, 2002 to February 16, 2005. Petitioner was then released to Georgia and subsequently stood trial, was convicted and sentenced *for the kidnapping of the murder victim*. In light of that incarceration, and the beginning of

service of the life sentence in Georgia, it was not unreasonable for the State to pursue a capital case against co-defendant Steven Barnes first before trying Petitioner. [FN 6] The “main goals” of preventing “undue pretrial incarceration,” concerning over accusation of crime, and unduly limited the ability to gather evidence by incarceration are not offended in these circumstances. *See United States v. Grimmond*, 137 F.3d 823, 830 (4<sup>th</sup> Cir. 1998) (when “incarcerated for reasons not related to the pending charges and [defendant] makes no credible showing that either his present or potential sentence will be substantially affected by the delay... there is simply no way the pretrial incarceration can be deemed oppressive.”) (internal citation omitted).

The majority in the Alexander L. Hunsberger opinion misconstrues 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 both in this case and in the Alexander L. Hunsberger case. First, the defendant in *Hooey* 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 Sturup was already settled – he was there, he participated. That was settled. The majority misconstrued the impact of Supreme Court precedent in the Alexander L. Hunsberger case. To the extent it wishes to impose such logic here, it is similarly wrong in these particular circumstances.

Further, 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 still, *Hooey* did not concern a possible capital case. Additionally, 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, to the extent the logic in the Opinion is meant to be applied here, the majority erred in relying on *Hooley* to conclude the contrary.

Even so, the right to allege a speedy trial is still preserved, and any alleged violation is resolved by balancing a number of factors. The trial judge properly considered various factors as announced in the *Barker* case. However, different from the factual scenario in the Alexander L. Hunsberger case, defense counsel in Petitioner’s case moved for a continuance in October 2011. Though not a bar to making his claim, the fact of this delay is directly attributable to Petitioner and should be weighed against Petitioner in a speedy trial analysis. *Vermont v. Brillon*, 556 U.S. 81 (2009) (“Delays occasioned by the defendant ... weigh against him.”). The trial judge properly treated this fact as such within the balancing of competing interests and weight. (See R. p. 47, lines 1-13). Further, there is a significant matter of the strategy apparent on the instant record, which counsel admitted, and that is not shared with the facts in the Alexander L. Hunsberger case.

Essentially, counsel for Petitioner expressed that he specifically did not request a trial because he did not want a trial. He hoped that the State may not prosecute Petitioner at all depending on how the

prosecution of co-defendant Barnes would resolve. (R. p. 25, line 12 – p. 26, line 1). In fact, Petitioner failed to ever demand a speedy trial. Further, and unlike his co-defendant Steven Barnes, he did not seek return and prosecution under the IAD. Though Petitioner cites the Order Upon Motion for Continuance as noting the motion for continuance should not apply to the matter of a speedy trial, (see FBOA, p. 12; BOP, p. 13), the Order also specifically includes a finding that the IAD compact terms were tolled *due directly to Petitioner's request for continuance*. (R. p. 561). Thus, in assessing the delay, the fact that Petitioner failed to assert his right to a speedy trial is significant, especially where he never attempted to force a trial by any means, and actually waived his right to force trial within 180 days under the interstate compact. See *Weems v. State*, 714 S.E.2d 119, 124 (Ga.App. 2011) (considering defendant's failure to file "a statutory demand for speedy trial" and that he only asserted "his constitutional right to a speedy trial until 38 months after his arrest, waiting to do so on the day of his trial's calendar call" weighed against him). Moreover, the facts here closely track the facts of the *Barker* case where the United States Supreme Court found the defendant "was not deprived of his due process right to a speedy trial." *Barker v. Wingo*, 407 U.S. at 536.

In *Barker*, the defendant failed to object to a series of continuances in a probable gamble that a co-defendant would be acquitted in a separate trial that was likewise delayed. The Supreme Court explained the basis for this thought:

... an elderly couple was beaten to death by intruders wielding an iron tire tool. Two suspects, Silas Manning and Willie Barker, the petitioner, were arrested shortly thereafter. The grand jury indicted them on September 15. Counsel was appointed on September 17, and Barker's trial was set for October 21. The Commonwealth had a stronger case against Manning, and it believed that Barker could not be convicted unless Manning testified against him. Manning was naturally unwilling to incriminate himself. Accordingly, on October 23, the day Silas Manning was brought to trial, the Commonwealth sought and obtained the first of what was to be a series of 16 continuances of Barker's trial. Barker made no objection. By first convicting Manning, the Commonwealth would remove possible problems of self-incrimination and would be able to assure his testimony against Barker.

*Id.*, 407 U.S. at 516. The Supreme Court found that "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." *Id.* at 536. The situation is much the same here.

The State indicated a desire to try Barnes

first, and that capital prosecution was delayed for various reasons. During that time, Petitioner apparently considered whether he, like other co-defendants, would testify against Barnes. (See R. p. 25, lines 12-16; R. p. 558). Counsel, admittedly, did not move for a trial as he might have “gotten what he asked for,” and he did not want to secure a trial. (R. p. 25, lines 17-25). Like *Barker*, the record supports Petitioner did not want a trial. And, also like *Barker*, a reviewing court should be “reluctant indeed to rule” there is a violation of his constitutional right. *Id.* See also *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 (7<sup>th</sup> 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 ... His failure to request a speedy trial is also a factor which weighs against him.”). At bottom, this must weigh heavily against Petitioner. *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.”).

As to possible prejudice, the trial judge correctly noted that Petitioner would have the

opportunity to test and challenge memories in his cross-examination. (R. p. 47, lines 14-19). The record well demonstrates that, in fact, Petitioner did have ample opportunity for full and effective cross-examination, including making use of prior sworn testimony – testimony that was available as a result of multiple actions both in South Carolina and Georgia. (See, for example, R. p. 260, line 8 – p. 264, line 15; p. 276, lines 2-25; p. 327, lines 20-25; p. 356, line 22 – p. 358, line 17; p. 362, line 10; p. 442, line 14 – p. 445, line 1). The multiple trials in essence preserved testimony for this Petitioner’s use to his benefit. [FN 7]

Further, the trial judge correctly found that Petitioner does not contend any exculpatory witness or testimony is not unavailable. “Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect ... (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.” *Barker v. Wingo*, 407 U.S. at 532. “[T]he most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.* The complete failure here to show any impairment in the defense could not support a finding of actual trial or defense prejudice. *Id. 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). Respondent notes that, quite contrary to showing any exculpatory evidence was previously available, the record supports that Petitioner has twice been convicted (once in Georgia in 2006, and once here in 2012) on evidence of participation in the events that led to Samuel Sturup’s murder. At any rate, Petitioner did not allege there was any lost evidence or testimony.

Lastly, the passage of time alone evidences one further benefit to Petitioner. The State ultimately decided only to seek the death penalty for Barnes. As such, the length of the delay in this aspect certainly holds no prejudice to Petitioner. See *Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (“Judge Pieper noted the State withdrew its notice to seek the death penalty; thus, the withdrawal could be construed as a benefit to Cooper”). Again, Petitioner is not entitled to any relief.

### CONCLUSION

For all the foregoing reasons, Respondent, the State, submits the majority opinion’s is insufficient as a matter of law as the opinion does not account for the specific facts of this case as required in a proper review under *Barker v. Wingo*. Moreover, Respondent maintains that the Court of Appeals properly affirmed on the facts of this record. The record well supports Judge McMahon’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 the decision to affirm the Court of Appeals' well-reasoned decision or dismiss as improvidently granted.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney  
General

DONALD J. ZELENKA  
Senior Assistant Deputy  
Attorney General

MELODY J. BROWN  
Senior Assistant Attorney  
General

DONALD V. MYERS  
Solicitor, Eleventh  
Judicial Circuit

BY: s/Melody J. Brown .  
MELODY J. BROWN  
S.C. Bar No. 14244

Office of the Attorney General  
Post office Box 11549  
Columbia, SC 29211-1549  
(803) 734-6305

November 10, 2016.  
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT  
OF SOUTH CAROLINA

[FN 1] The majority also granted relief to Alexander L. Hunsberger. *State v. Hunsberger*, Opinion No. 27671 (S.C.Sup.Ct. filed Oct. 12, 2016).

[FN 2] Petitioner is a brother and co-defendant to Alexander L. Hunsberger.

[FN 3] Contrary to the inference in the Alexander L. Hunsberger opinion, 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.

[FN 4] Reference to "Opinion" designate the Opinion in the Alexander L. Hunsberger case.

[FN 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 codefendant 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 finding 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.

[FN 6]            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. Ultimately, though, the prosecution’s decision worked to Petitioner’s benefit as the State decided not to seek the death penalty against Petitioner.

[FN 7]            In fact, defense counsel noted not only having the transcripts, but also that he had observed some of the prior proceeding (it would appear he was referencing the trial against Alexander L. Hunsberger, but the record is not clear). (See R. p. 536, lines 8-17). At any rate counsel was familiar with the development of the case against Petitioner and the multiple codefendants. (Id. See also R. p. 25, lines 12-16).

THE SUPREME COURT OF SOUTH  
CAROLINA

The State, Respondent,

v.

Julio Angelo Hunsberger, Petitioner.

Appellate Case No. 2015-000085

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ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

/s/ Costa Pleicones J.

/s/ Donald W. Beatty J.

/s/ Kaye G. Hearn J.

We would grant the petition for rehearing.

/s/ John Kittredge J.

/s/ Jean H. Toal A.J.

Columbia, South Carolina

December 16, 2016

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  
The Honorable Charles L. Reel

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.

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. Sturrup 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 Sturrup's murder. [FN 1]

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 he was effectively without counsel for a time. [FN 2] 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 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 SJE.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. [FN 3] Hunsberger did not move for a speedy trial. The trial was then delayed until January 2012 because Hunsberger moved for and was 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

[FN 1] Three additional defendants were convicted in Georgia of charges involving the kidnapping and assault of Sturup.

[FN 2] 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.

[FN 3] The State sought Capital proceedings against Barnes, who was sentenced to death for Sturup's murder.

Edgefield County  
Clerk of Court  
Shirley F. Newby  
2011 Oct 19 AM 11:28

~~ORDER~~WPC

STATE OF SOUTH CAROLINA  
IN THE COURT OF GENERAL SESSIONS  
ELEVENTH JUDICIAL CIRCUIT  
COUNTY OF EDGEFIELD

THE STATE OF SOUTH CAROLINA

VS.

JULIO HUNSBERGER  
Defendant

ORDER UPON MOTION  
FOR CONTINUANCE

INDICTMENT NOS. 2005-GS-19-471  
2002-GS-19-1110

PRESIDING JUDGE: William P. Keesley  
ATTORNEY FOR DEFENDANT:

Randall Dewitt Williams

ATTORNEYS FOR THE STATE: Ervin J. Maye and  
H. Franklin Young

COURT REPORTER: Stacy L. Sheppard  
WPK

#1

At a hearing held before the undersigned on October 3, 2011, the Attorney for the Defendant moved for a continuance through the end of the current term of

court. The State indicated that it was prepared to call this case for trial when the Petit Jury was to appear on October 4, 2011. The request for continuance is granted for the reasons stated below.

## FACTUAL BACKGROUND AND CONSIDERATIONS

This case involves the murder of one Samuel Stirrup, a teenager whose remains were discovered in Edgefield County in November of 2001. According to the allegations, Mr. Stirrup had been reported missing sometime after Labor Day weekend 2001; subsequent investigation by Edgefield and Richmond County GA authorities led to kidnapping charges in Georgia and murder charges in South Carolina against this Defendant and a number of others, all stemming from the discovery of Mr. Stirrup's remains. One of these defendants, Steven Louis Barnes, was convicted of the Georgia kidnapping of Samuel Stirrup in 2003. The Solicitor pursued the detainer placed on Mr. Barnes for the capital murder of Samuel Stirrup of which he was convicted and sentenced to death in 2010. This defendant was also convicted for the kidnapping of Mr. Stirrup and was serving the sentence on that charge when the Solicitor sought his return to South Carolina under the Interstate Act on Detainers. Pursuant to the IAD, the defendant was returned to South Carolina on September 30, 2011 for disposition of the pending indictment for the murder of Samuel Stirrup. The State has not noticed this defendant of its intent to seek the death penalty.

The Attorney for the Defendant has indicated to the Court that he has had very little opportunity to consult with his client given the circumstance of the defendant's incarceration in Georgia prison(s). The pending murder charge is among the most serious offenses and subjects the defendant to the potential for life imprisonment without the possibility of parole. The Court is informed that an extensive record of trial is available and has been created in the prior capital murder case of State v. Steven Louis Barnes. Many of the exhibits and witnesses are expected to be similar and/or the same in the trial of this defendant. Notwithstanding this potential similarity as an aid to preparation, the Court accepts as persuasive that the Attorney for the Defendant should and must have additional opportunity to consult with his client in order to give adequate meaning to the client's right to consult with and receive the advice of counsel.

WPK

#2

Accordingly, and as part of this order granting a continuance::

1. The Attorneys shall schedule and meet in status conference with the Chief Administrative Judge for General Sessions (Honorable R. Knox McMahan) as soon as possible following the conclusion of the current term of court in order to schedule the trial and/or resolve by hearing or otherwise any necessary matters which will lead to the earliest possible trial of the current indictment(s).

2. There is no such motion for speedy trial now before the Court, ~~nor has any such motion been previously filed in this case.~~ (WPK). Therefore, no part of this Order is intended to apply to 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.

3. Pursuant to the IAD, the State is under an obligation to bring the defendant to trial within 180 days. For those purposes, the 180 day time period is tolled by virtue of my granting the defendant's request for continuance.

AND IT IS SO ORDERED:

/s/ William P. Keesley  
WILLIAM P. KEELSEY  
Presiding Judge  
Eleventh Judicial Circuit

October 18, 2011  
Edgefield, SC

#3

Respectfully submitted:

H. FRANKLIN YOUNG  
Assistant Solicitor  
Eleventh Judicial Circuit