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No. _____

S. C. SUPREME COURT

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Petitioner,

vs.

ALEXANDER L. HUNSBERGER,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this criminal case, six individuals were arrested, charged and convicted at various times for multiple crimes against one sixteen-year-old victim. The crimes began in September 2001 with assault and kidnapping in August, Georgia, and culminated with the victim's murder in a remote field in Edgefield, South Carolina. Respondent was indicted in South Carolina in March 2002 for murder. South Carolina prosecutors assessed the facts and found the facts may warrant capital proceedings. While his case was still under consideration, Respondent moved pursuant to a state statute for trial or bail. As the State was not yet ready for trial, Respondent – who could not be simply released due the pending charges in Georgia – was released to Georgia in 2005 where he stood trial for kidnapping of the murder victim. Respondent was convicted and began service of a life sentence. Respondent never asserted a demand for trial on the pending South Carolina murder charge while in Georgia.

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 his return for trial on the now non-capital murder in early 2011. Respondent resisted. Several months later, his presence was secured, and a trial commenced in January 2012. The trial court's denial of Respondent's motion to dismiss the charge for

failure to provide a speedy trial was upheld by unanimous panel decision of the state court of appeals. A divided state supreme court reversed finding the delay weighed heavily against the State, Respondent's failure to demand trial while in Georgia was a "neutral" event, and prejudice could be presumed from the delay. The questions presented are:

I.

Does *Barker v. Wingo* allow a court conducting a speedy trial analysis to assess no weight to the fact a defendant – while knowing of his pending charge – chose not to demand a trial for nearly seven years?

II.

Does *Barker v. Wingo* allow a court conducting a speedy trial analysis to presume prejudice where evidence of record rebuts the existence of actual prejudice?

III.

Does *Barker v. Wingo* allow a court conducting a speedy trial analysis to conclude a prosecution plan that subordinates trial of one murder charge to the trial of a co-defendant's capital proceedings weighs equally as heavy as a deliberate intent to harm the defense?

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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 application of *Barker v. Wingo*, 407 U.S. 514 (1972). Petitioner submits the state court erred in its legal analysis, especially in fully excusing Respondent's failure to demand trial for nearly seven years. This matter not only presents a plain flouting of the legal precedent this Court has established for speedy trial claims, the resulting grant of immunity blocks the state from seeking justice for a murder victim – all without any real prejudice to Respondent's constitutional right.

The nature of the remedy – immunity from trial – raises a pressing need for 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. Immunity granted for such a crime based upon stark disagreement with the order of prosecution decision where the decision shows *no* deliberate attempt to hamper a defense, resulted in *no* actual prejudice to the defendant, and continued with *no* demand for trial from the defendant for nearly seven years, particularly offends the sense of public justice.

CITATION TO OPINIONS BELOW

The decision of the South Carolina Court of Appeals is not reported but may be found at 2014 WL 5772563, and is reproduced in the Petition

Appendix at App. pp. 76-88. The decision of the Supreme Court of South Carolina is reported as *State v. Hunsberger*, 418 S.C. 335, 794 S.E.2d 368 (2016), and is also reproduced in the Petition Appendix at App. 2-36. Lastly, the order denying the timely petition for rehearing is unpublished and reproduced in the Petition Appendix at App. pp. 74-75.

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. 73).

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 summarized the facts of the crime 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).¹ (See also App. p. 3).

¹ Julio Hunsberger's conviction was summarily reversed without an individualized speedy trial analysis. The State filed a petition for writ of certiorari in this Court on March 14, 2017, addressing that separate error .

B. State Appellate Court Decisions.

Both the Court of Appeals and Supreme Court of South Carolina opinions are reproduced in full in the appendix. (App. pp. 76-88 and 2-36). As the dissent correctly found, it was not the facts that were at issue, but the legal inferences that could be properly drawn from those facts. (App. p. 25). The Court of Appeals and the dissenters from the Supreme Court of South Carolina disagreed with the legal of implications drawn from these particular facts:

- Respondent never requested return from Georgia or demanded a trial at any time after his South Carolina released him to Georgia in 2005 up until his January 2012 trial;
- The multiple transcripts from multiple proceedings from Georgia and South Carolina preserved prior testimony from the witnesses who were all available for trial;
- The State delayed calling the case until after capital proceedings for co-defendant Barnes had concluded.

The legal conclusions stemming from these facts are the subject of this petition.

REASONS CERTIORARI SHOULD BE GRANTED

Like the Vermont Supreme Court in *Brillon*, the Supreme Court of South Carolina made such “fundamental error in its application of *Barker* that [it] calls for this Court’s correction.” *Vermont v. Brillon*, 556 U.S. 81, 91–92 (2009). The state court’s legal conclusions drawn from facts of record inexplicably depart from fair consideration under the *Barker* factors. Its published case stands in direct conflict with this Court’s precedent, and in doing so, grants a windfall to a defendant who was convicted of murder. This Court’s precedent, when fair and truly applied, does not support a grant of immunity.

- I. The majority opinion reflects a fundamental error in application of *Barker v. Wingo* by failing to weigh Respondent’s own inaction against him.

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 shall be made in context of the specific case, within the general framework of factors announced in that case. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). An established part of the *Barker* framework is consideration of whether a defendant has asserted his right to a speedy trial. *Id.*, at 531. The Supreme Court of South Carolina acknowledged that *Barker* teaches “[f]ailure by the

accused to assert the right will make it more difficult for the accused to carry his burden of proving that he was denied a speedy trial.” (App. p. 15). The state court then failed to follow this Court’s instruction.

The state court found Respondent had asserted his right to a speedy trial (albeit by state statute, App. p. 4) in November 2004 before release to Georgia in early 2005, (See App. p. 16). It also credited Respondent’s two motions to dismiss his murder charge during the January 2012 trial proceedings as demands for trial.² (See App. pp. 16 and 17). It then excused the admitted failure to seek any relief for approximately seven (7) years:

While the State argues that it is significant that Alex did not move for a speedy trial between January 2005 and January 2012, we hold that under the circumstances of this case, including the fact

² *But see United States v. Frye*, 489 F.3d 201, 212 (5th Cir. 2007) (“Frye’s repeated motions for dismissal of the capital charge are not an assertion of the right, but are an assertion of the remedy. A motion for dismissal is not evidence that the defendant wants to be tried promptly.”) (citing *Barker*, 407 U.S. at 534-35 (“More important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial Instead 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.”)).

that Alex's appeal from his 2006 Georgia conviction was still unresolved when the State sought extradition in 2011, *his failure to press his right during this period is understandable*. While Alex's assertion of his right to a speedy trial three times was sufficient to demonstrate Alex's desire for a speedy resolution of his charges, *we find his seven-year silence renders this factor largely neutral in our overall evaluation*.

(App. p. 16) (emphasis added).

This Court has never relieved a criminal defendant of the responsibility to assert 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 heavy 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. 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”). The Supreme Court of South Carolina turns this precedent in a new direction to consider whether a defendant had an “understandable” reason not to seek a trial. That is not the inquiry.

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.”).

The Supreme Court of South Carolina erred in failing to consider Respondent’s inaction as heavily weighted against him. Further, the state court failed to give any consideration at all to the fact that Respondent not only could have demanded trial (he certainly knew of the pending charge) but he could have demanded return under the Interstate Agreement on Detainers. 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 gives prisoners in the applicable jurisdictions the right to force trial or secure dismissal.³ Even an unsuccessful attempt would show Respondent was not simply sitting on his right.

³ South Carolina adopted the Act in 1962. S.C. Code § 17-11-10. Georgia adopted the Act in 1972. Ga. Code Ann., § 42-6-20.

Thus, in assessing the delay, the fact that Respondent failed to assert his right to a speedy trial in any way is significant, and further, is the fact that he actually resisted return, (App. p. 10). 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 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").⁴

Again, the Supreme Court of South Carolina erred as a matter of law in concluding Respondent's failure to demand a speedy trial from January 2005 through January 2012 was a "neutral" factor.

⁴ 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. Hooy*, 393 U.S. 374, 375 (1969).

- II. The majority opinion reflects a fundamental error in application of *Barker v. Wingo* when it allowed for a presumption of prejudice in a case where a lack of actual prejudice was shown and supported by evidence of record.

Building on the error in excusing Respondent's inaction in full, the state supreme court found further error in the court of appeals' lack of prejudice ruling:

As the United States Supreme Court held, "When the Government's negligence . . . causes delay six times as long as that generally sufficient to trigger judicial review . . . and when the presumption of prejudice, albeit unspecified, *is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted*, the defendant is entitled to relief." *Doggett*, 505 U.S. at 658 (holding an accused's right to a speedy trial was violated when his trial was

delayed eight years with no showing of actual prejudice); . . . on this record it appears the State's delay was not merely negligent but intentional. Further, there was some evidence of actual prejudice in the discrepancies in the eyewitnesses' testimony. We hold that Alex met his burden of demonstrating prejudice.

(App. pp. 18-19) (emphasis added).

However, the cited precedent – by the very quote relied upon by the state court majority – dictates the consideration of the other *Barker* factors that the state court incorrectly discounted. Further, and again shown in this very quote, this Court specifically provided that presumption could be rebutted. *Doggett*, 505 U.S. at 658.

The dissent properly applied this Court's precedent, noting the record supported two distinct *benefits* to the delay and *no prejudice*:

I see two benefits accruing to Petitioner's defense as a result of the passage of time in this case. First, as the trial judge pointed out,

Petitioner was able to cross-examine and impeach the witnesses using their prior testimony. Second, as the court of appeals pointed out, Petitioner "may have received a benefit as a result of the delay because the State ultimately decided not to pursue the death penalty against him." . . . Because I cannot identify any prejudice befalling Petitioner as a result of the delay, I would find the trial court did not abuse its discretion when assessing this factor.

(App. p. 32).

The majority erred in determining this Court's precedent supports an unrebuttable presumption of prejudice.

The majority further erred in failing to consider the large record of testimony amassed from the differing trials in this matter, and Respondent's access to those transcripts as established at trial.

The majority also erred in failing to consider Respondent's inability on appeal to show that an earlier trial would have somehow ensure his

co-defendant's would have testified in more detail, much less that such detail would have helped the defense.⁵ Again, the witnesses were not unavailable and the record shows the availability and use of transcripts. To summarize the dissenters, not only did Respondent fail to show prejudice on appeal contrary to the trial court ruling, the record reflected, to his benefit, the full opportunity to effectively cross-examine and impeach the various

⁵ In detriment to the majority's conclusion on prejudice, the court noted the "most important[]" point of the faded memory contention was trial testimony on "whether one or both of the Hunsberger brothers exited their car with a gun, and who was outside the car when Sturrup was forced in the Hunsbergers' car's trunk." (App. p. 17 and 34 n. 8). This minor point of the Georgia events pales against the majority's concession that the evidence showed both brothers shot the victim in South Carolina. (See App. 3). Moreover, this may very well be another benefit for Respondent's inaction. See *Barker*, 407 U.S. at 521 ("Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade."); *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) (noting "delay is a two-edged sword... The passage of time may make it difficult or impossible for the Government to carry this burden."); *United States v. Richardson*, 780 F.3d 812, 817 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 654 (2017) ("if the defendant is guilty there are likely to be more witnesses helpful to the government's case than to the defendant's. And the government will usually need more witnesses than the defendant because the government must prove guilt beyond a reasonable doubt, and the defendant has no burden of proof whatsoever. And so on average the death, disappearance, forgetfulness, or recantation of a witness will favor the defendant"). At bottom, the record shows nothing of substantive value has been alleged to have been lost. The record still shows no actual prejudice. *Butler v. Mitchell*, 104 F. Supp. 3d 166, 184 (D. Mass. 2015), *aff'd*, 815 F.3d 87 (1st Cir. 2016), *cert. denied sub nom. Butler v. Murphy*, No. 16-5927, 2017 WL 670332 (U.S. Feb. 21, 2017) (where petitioner fails to "posit what the potential impact of such failures would be... [f]aded memories are ... not enough to justify a finding of prejudice").

co-defendants with state made records across several court proceedings. See *United States v. Kashamu*, 15 F. Supp. 3d 854, 864 (N.D. Ill. 2014) ("the testimony and accounts of the various witnesses and participants of the conspiracy have been preserved through grand jury testimony, numerous plea agreements, and testimony given at the trial of co-defendant Peter Stebbins. Thus, the danger of faded memories as to the details of the conspiracy is largely removed.")

Finally, the majority erred in not considering the benefit of having capital proceedings not pursued after the conviction and death sentence of the co-defendant.⁶

In short, the "possibility of prejudice is not sufficient to support [Respondent's] position that

⁶ The majority also "notes" its "concern" that the trial court and the Court of Appeals did not consider the pretrial anxiety one may have though incarcerated in another jurisdiction. (App. p. 34 n. 4). In his appeal, Respondent asserted he suffered while waiting for the State's decision on whether to pursue capital proceedings against him. (App. p. 83). Rather than supporting the majority's reasoning, this points to yet another reason Respondent's inaction should weigh heavily against him: "If an incarcerated defendant will suffer because of a delay in the trial of his case he knows it. He should make his need for a speedy trial known to the authority with power to fix the trial date." *United States v. Penland*, 300 F. Supp. 354, 355 (D. Mont. 1969), *aff'd*, 429 F.2d 9 (9th Cir. 1970) (distinguishing Penland's one letter and one formal motion from facts in *Smith v. Hooey*, 393 U.S. 374 (1969) where defendant made repeated requests for trial). See also *Rashad v. Walsh*, 300 F.3d 27, 37 (1st Cir. 2002) (interpreting the holding in *Smith v. Hooey* as direction that "when a defendant demands a speedy trial, the state is obliged to make a diligent effort to obtain custody over his person even if another sovereign ultimately might decline to grant such custody.").

[his] speedy trial right[] w[as] violated.” *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986).

III. The majority opinion reflects a fundamental error in application of *Barker v. Wingo* in assessing heavy weight to a prosecutorial plan that delayed a co-defendant’s trial in favor of pursuing capital proceedings for the more culpable co-defendant first.

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 not a right to dismissal to be held and used at an opportune time. 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*. This Court has said:

The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.

Beavers v. Haubert, 198 U.S. 77, 87 (1905).

The Supreme Court of South Carolina's refusal to correctly apply *Barker* to the facts of this case offends "the rights of public justice," favoring only the defendant and the mere passage of time and granting a windfall of immunity. In failing to assess the facts in the correct legal framework, the opinion leaves only the unpalatable conclusion the state 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.⁷

⁷ 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 non-capital cases. *State v. Langford*, 735 S.E.2d 471 (S.C. 2012). In short, due to *Langford*, this particular situation could not occur again in a non-capital case, but, at the time, the responsibility for calling the case – in deciding the order of prosecution here – rested in the discretion of the solicitor. In capital cases, one

Further, the record reflects several reasons showing there was no intentional infliction of harm on the defense by way of delay:

In my opinion, the trial court did not abuse its discretion in finding the State presented legitimate reason for the delay. . . . Here, the State was dealing with the potential for six separate prosecutions (one of which involved the State seeking the death penalty and two that involved the possibility of the death penalty); the various defendants were asked to be witnesses in the other cases; and the crime occurred in two states, both of which were seeking to prosecute the defendants. In light of these unique facts, it is

specific circuit court judge is assigned authority over the case and secures adherence to the additional requirements unique to capital litigation. See, for example, S.C. Code Ann., § 16-3-26. Thus, the prosecution does not have the control to simply place a capital case on a general roster. That is another complication in holding the significant delay in the capital proceedings for co-defendant Barnes prior to the trial in this case against the prosecution.

my opinion that the court of appeals did not err in upholding the trial court's finding that the reasons given for the delay were reasonable.

(App. p. 27).

The majority opinion assigned ill-intent – not just responsibility for the delay – when it heavily weighted the length of delay against the State. While true the prosecution plan did delay the State's decision to call the case, it did so without a demand from Respondent for nearly seven years, and with no intent to harm the defense. *See Barker*, 407 U.S. at 531 (“A *deliberate* attempt to delay the trial *in order to hamper the defense* should be weighted heavily against the government”) (emphasis added). To the contrary, the multiple transcripts used at trial for impeachment show that testimony was well-preserved, and there was no evidence of any intent or attempt to prevent the use of these transcripts. Additionally, Respondent's acquiescence in this prosecution plan should not be marginalized to the point of non-existence as the majority did in the opinion granting immunity.

In light of the irreconcilable conflict between the majority opinion and this Court's precedent, and the severe remedy of immunity that follows the error of law, this case resoundingly merits review.

CONCLUSION

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

Respectfully submitted,

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March 16, 2017.

APPENDIX

- A. Opinion, Supreme Court of South Carolina Granting Relief, with dissenting opinion.....App. pp. 2-36
- B. Petition for Rehearing. App. pp. 37-72
- C. Order Denying Rehearing..... App. pp. 73-74
- D. Opinion, South Carolina Court of Appeals Denying Relief..... App. pp. 75-87

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

The State, Respondent,

v.

Alexander L. Hunsberger, Petitioner.

Appellate Case No. 2015-000083

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

Appeal from Edgefield County
Clifton Newman, Circuit Court Judge

Opinion No. 27671
Heard December 2, 2015 – Filed October 12, 2016

REVERSED

Appellate Defender Susan Barber Hackett, of
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief
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CHIEF JUSTICE PLEICONES: Petitioner Alexander L. Hunsberger (Alex) was sentenced to thirty-three years' incarceration for his part in the murder of Samuel Sturup. Alex argued on appeal that the trial judge erred in denying his speedy trial motion. The Court of Appeals affirmed. *State v. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). We granted Alex's petition for a writ of certiorari to review the Court of Appeals' decision, and now reverse.

The acts that led to Alex's prosecution for murder are heinous. Sturup allegedly stole money from Steven Barnes,[FN 1] 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.[FN 2] Sturup was taken into a field and shot by several individuals including the Hunsberger brothers. Barnes is alleged to have fired the fatal shot.

In January 2002, Alex was arrested in South Carolina and in March 2002, he was indicted for the murder of Sturup. In June 2002, Alex's request for bail was denied and his renewed request was denied

in April 2004. In November 2004, Alex moved for an order requiring the State to try him during the next two terms of court, or if no trial were held, that he be released on bail, citing S.C. Code Ann. §17-23-90 (2014) [FN 3] and the state and federal constitutional guarantees of due process and speedy trial. While this motion was denied in December 2004, the circuit court judge found the delay "clearly bordering on the excessive" and admonished the State to either try Alex or release him to Georgia which had placed a hold on him.

In an effort to resolve the case, Judge Keesley offered to seek a special February 2005 term of court to allow the State to try Alex then, but the solicitor declined. Following notification that the State would not go forward with Alex's trial, in January 2005 Judge Keesley granted Alex bail but ordered him held unless Georgia released its hold. Alex was subsequently extradited to Georgia, and in September 2006, he was convicted there of kidnapping with bodily injury of Sturup, and sentenced to life imprisonment. While imprisoned in Georgia, Alex repeatedly declined to be a witness against Steven Barnes in Barnes' South Carolina death penalty case. Barnes was tried and convicted in November 2010. In early 2011, Alex was extradited to South Carolina. In January 2012, the State called Alex's case for trial and Alex moved for dismissal of his charges, claiming his state and federal rights to a speedy trial had been violated. The motion was denied, as was his renewed request made at mid-trial.

ISSUE

Did the Court of Appeals err in affirming the trial court's denial of Alex's motion to dismiss his charges under both the United States and South Carolina Constitutions due to a violation of his right to a speedy trial?

ANALYSIS

Alex argues that his right to a speedy trial under both the United States and South Carolina Constitutions was violated, and therefore, his murder charge should be dismissed. We analyze the issue under the Sixth Amendment, and agree.

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution provides that "Any person charged with an offense shall enjoy the right to a speedy and public trial." S.C. Const. art. I, § 14. A speedy trial means a trial without unreasonable and unnecessary delay. *State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012) (quoting *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)). The remedy for a speedy trial violation is dismissal of the charges. *Langford*, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted). The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard. *Id.* at 442, 735 S.E.2d at 482 (internal citation omitted). An abuse of discretion occurs when the court's decision is based on an error of law or upon

factual findings that are without evidentiary support. *Id.* at 442, 735 S.E.2d at 482 (internal citation omitted).

An accused's speedy trial right begins when he is "indicted, arrested, or otherwise officially accused." *Langford*, 400 S.C. at 442, 735 S.E.2d at 482 (citing *United States v. MacDonald*, 456 U.S. 1, 6 (1982)). To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. *Doggett v. U.S.*, 505 U.S. 647, 652 (1992). Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness. *See Doggett*, 505 U.S. at 651- 52 (1992). Once the accused has met this initial burden, a court must look to four factors, among the totality of the circumstances, to decide whether the defendant's right to a speedy trial has been denied. *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972); *see also Langford*, 400 S.C. at 441, 735 S.E.2d at 482. These factors are: (1) length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused. *Barker* at 531-32. A speedy trial claim must be "analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." *State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008) (citing *Barker*, 407 U.S. at 530).

Because the timeline is essential to determining whether Alex was denied a speedy trial, the important dates are outlined below:

- January 25, 2002: Arrest.
- March 2002: Indictment
- November 17, 2004: Alex makes first Speedy Trial motion.
- December 2, 2004: Judge Keesley declines to release Alex on bail but admonishes the State to be prepared to try Alex in February 2005 unless the solicitor notifies the court he will allow Georgia to take custody. Court order acknowledges problems arising from multiple defendants and different jurisdictions in addition to the possibility that South Carolina will seek the death penalty against Alex. Judge Keesley then writes: "However, Georgia has disposed of the cases involving the co-defendants over a year ago, and the court has instructed the Solicitor's office on at least two prior occasions that it must make a decision about whether to serve the death penalty notice."
- January 28, 2005: The State declines Judge Keesley's offer to try Alex during a special February 2005 term of Court; Judge Keesley grants Alex bail, subject to hold placed on him by Georgia.
- Early 2005: Alex is extradited to Georgia.

- September 12, 2006: Alex is convicted in Georgia of kidnapping Sturup with bodily injury and sentenced to life imprisonment. Alex appeals.
- November 2010: Barnes is convicted and sentenced to death in South Carolina
- September 2011: Alex is made aware South Carolina is seeking his extradition.
- October 2011: Alex is extradited to South Carolina.
- January 3, 2012: Alex's murder case is called in South Carolina, and he makes a motion for dismissal based on the denial of his right to a speedy trial. He renews this motion after the State rests.

In this case appellate review of the trial court's ruling is complicated by the court's failure to make specific findings, relying instead on general statements about the complexity of the cases, problems involving multiple jurisdictions, and Alex's failure to show actual prejudice. [FN 4]

A. Triggering Factor and Length of Delay

The Court of Appeals held that the three-year period between Alex's arrest in 2002, and his release to Georgia in 2005, was sufficient to trigger the speedy trial analysis. *State v. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). We agree.

The Court of Appeals held that the three-year period between Alex's arrest [FN 5] and extradition to Georgia from South Carolina was sufficient to trigger further review. [FN 6] Alex argues that using three years instead of ten years is an error of law that affects the entire Court of Appeals' analysis. We hold, whether three years or ten years, the delay between Alex's arrest and trial meets the threshold requirement for a speedy trial claim, and requires an analysis of the four *Barker* factors. See *Langford*, 400 S.C. at 442-443, 735 S.E.2d at 482 (holding a twenty-three month delay was presumptively prejudicial) (internal citation omitted); *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009) (reaching the *Barker* factors when there was a forty-four month delay); *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978) (holding a twenty-eight month delay triggered speedy trial analysis). Having found that Alex satisfied the threshold standard, we turn now to a review of the four *Barker* factors we consider when analyzing a speedy trial claim: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his speedy trial right; and (4) prejudice to the defendant from the delay. See *State v. Reaves*, 414 S.C. 118, 777 S.E.2d 213 (2015).

We agree with the trial judge and with the Court of Appeals that the full ten-year delay between Alex's South Carolina arrest in 2002, and his South Carolina trial in 2012, is not entirely attributable to the State. See *Langford*, 400 S.C. at 443, 735 S.E.2d at 483 (holding that delays occasioned by the defendant weigh against him). The State should not

bear responsibility for the time that Alex was awaiting trial in Georgia, for when a defendant violates the laws of multiple sovereigns, one jurisdiction must necessarily wait at the "prosecutorial turnstile." See *U.S. v. Grimmond*, 137 F.3d 823, 828 (4th Cir. 1998). Therefore, we hold the time from the January 28, 2005 order requiring Alex's extradition to Georgia or his release on bail, until his Georgia conviction on September 12, 2006, should not be counted against the State. This reduces the ten-year period by approximately one year and seven months.

It appears from the record that Alex did not affirmatively consent to extradition to South Carolina in 2011, and therefore delayed his trial by four months. The State argues Alex contested extradition by refusing to consent, although Alex testified that after being presented with the extradition form in September 2011 he sought advice from an attorney on the effect his consent would have on his pending Georgia appeal. For purposes of our analysis, we weigh the four-month delay in the extradition proceedings slightly against Alex. Therefore, with the delay from Alex's Georgia proceedings and the extradition deducted from the total, the State is responsible for an eight-year delay between arrest and trial. This extraordinary delay, during which time Alex was continuously in custody and for the most part available for trial in South Carolina, weighs heavily against the State.

We turn next to the reasons given by the State for the delay.

B. Reasons for Delay

The State's justifications for delay in trying a defendant are weighted differently: (1) a deliberate attempt to delay trial as a means to hamper the defense weighs heavily against the State; (2) negligence or overcrowded dockets weigh less heavily against the State, but are ultimately its responsibility; (3) a valid reason, such as a missing witness, justifies an appropriate delay; and (4) delays occasioned by the accused weigh against him. *Langford*, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted). Ultimately, justifying the delay between charge and trial is the responsibility of the State. *Langford*, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted).

The trial court held the State gave legitimate reasons for the delay, pointing to the complexity of the cases and the problems involved in cross border prosecutions. The Court of Appeals did not specifically address the reasons for the State's delay, but held that under the totality of the circumstances, the trial court did not abuse its discretion. *State v. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). We find the reliance on complexity and cross border issues patently insufficient in this case in light of the findings of Judge Keesley in his December 2004 order.

To the extent the Court of Appeals upheld the trial court's ruling on the basis of "complexity," it erred.

There is no evidence that Alex's case, while serious, was complex. See *Langford*, 400 S.C. at 442, 735 S.E.2d at 482 (making the distinction between complex and serious crimes). Three individuals (other than Barnes and the Hunsberger brothers) were codefendants in the Georgia and South Carolina cases involving the beating of Sturup in Georgia and his murder in South Carolina. These three eyewitnesses, who all testified against Alex in this January 2012 trial, had pleaded guilty in Georgia by December 2003. From at least that time forward, all three were available to law enforcement in South Carolina, and available to testify against Alex in South Carolina. No new evidence was sought or discovered during the almost nine-year delay between their Georgia pleas and Alex's South Carolina trial. This was not a complicated conspiracy that required years to unravel, instead, all of the evidence used to prosecute Alex for Sturup's murder was known at the time of or shortly after Alex's arrest. The lower courts erred in agreeing with the State that the "complexity" of Alex's case justified the delay.

The second reason the trial court found justified the delay in Alex's South Carolina trial was "the problems involved in cross-border prosecutions." Again, we find no evidence in the record to support this finding. The State had the opportunity to bring Alex to trial for three years before he was extradited to Georgia. Moreover, the State waited another five years after Alex was convicted in Georgia to begin extradition proceedings. Excepting the year and eight months that Georgia took to try Alex's case,

and the four months delay caused by Alex (allegedly) contesting extradition, the record does not demonstrate that "cross-border" issues had any bearing on the State's delay. We find no evidence that the issues resulting from Alex's prosecution in Georgia justified the lengthy delay of his South Carolina trial.

The State now argues, and we agree, that "collecting" witnesses can be a legitimate reason for delay. The State, however, neither presented evidence that it was looking for additional witnesses in Alex's case nor did the trial judge make such a finding. The State seeks to distort this otherwise legitimate reason by applying it not to a witness, but instead to the defendant. Alex was neither a missing witness" nor a witness that needed "collecting." Instead, he was at all times a prisoner in either South Carolina or Georgia. The State admitted it delayed trying Alex in hopes he would agree to be a witness against Barnes in Barnes' South Carolina's capital trial, which itself did not take place until approximately nine years after Sturrup's skeletal remains were found in a South Carolina field. The State's characterization of Alex as a witness needing to be "collected," or "missing" suggests its true reason for delay was its hope that Alex would be coerced by the delay in his trial into testifying against Barnes. *See Barker*, 407 U.S. at 531 n.32 (indicating it is improper for the prosecution to intentionally delay to gain a tactical advantage over a defendant (internal citation omitted)). The State's desire to have Alex testify against Barnes in South Carolina did not, under the circumstances present

here, justify the delay in Alex's trial. Further, that the State placed a higher priority on strengthening its case against Barnes than on bringing Alex's case to trial cannot, alone, justify the delay of Alex's trial. The purpose of the right to a speedy trial is to vindicate a defendant's and society's interest in a speedy resolution of cases. *Barker* at 519. This purpose is not served when the constitutional right of a low priority defendant is sacrificed in hopes that defendant will help the State in a higher priority trial. *Cf.*, *Doggett*, 505 U.S. at 657 (holding that condoning unjustifiable delays would encourage the government to gamble with the interests of those assigned a low prosecutorial priority). The State's desire to present the strongest case against Barnes, especially when the three other eyewitnesses who had pled guilty to the Georgia charges in 2003 were available and willing to testify against him, does not justify the delay in prosecuting Alex's case.

Finally, there is simply no evidence that the delay was the result of the State's decision-making process whether to seek the death penalty against Alex. The State does not assign a specific amount of delay to this decision, nor does it explain why this capital decision took such an especially long time. Further, this purported reason is undermined by Judge Keesley's order issued in early December 2004, in which he wrote he had already "instructed the Solicitor's Office on at least two prior occasions that it must make a decision about whether to serve the death penalty notice [on Alex]." While the decision to seek the death penalty must be

weighed carefully by the State, here all facts necessary to such a decision were known to it well before December 2004. There is simply no evidence that the State was actually debating the capital decision during the period between December 2004 and Alex's trial in January 2012.

The justifications advanced by the State for its delay are unsupported by the evidence, which in turn suggests that the State was using this murder charge as leverage to coerce Alex's testimony in Barnes' capital trial. The reasons for the delay is a factor that weighs heavily against the State.

C. Accused's Assertion of the Right to a Speedy Trial

Whether a defendant previously asserted the right to a speedy trial is not alone dispositive of whether he is entitled to relief. *See Barker*, 407 U.S. at 533 (holding none of the four factors are either necessary or sufficient to find a denial of the right to a speedy trial). The accused's assertion of the right, however, is entitled strong evidentiary weight in determining whether the accused is being deprived of the right. *Barker*, 407 U.S. at 531-32. Failure by the accused to assert the right will make it more difficult for the accused to carry his burden of proving that he was denied a speedy trial. *Id.* at 532.

The trial court did not specifically address Alex's assertions of his right to speedy trial, other than to note it had been almost five years since Alex was

tried in Georgia. The Court of Appeals noted that Alex asserted his right three times.

It is undisputed that Alex moved for a speedy trial in November 2004 and twice during January 2012. While the State argues that it is significant that Alex did not move for a speedy trial between January 2005 and January 2012, we hold that under the circumstances of this case, including the fact that Alex's appeal from his 2006 Georgia conviction was still unresolved when the State sought extradition in 2011, his failure to press his right during this period is understandable. While Alex's assertion of his right to a speedy trial three times was sufficient to demonstrate Alex's desire for a speedy resolution of his charges, we find his seven-year silence renders this factor largely neutral in our overall evaluation.

D. Prejudice to the Accused

The trial court held:

the only way that prejudice can be determined in an instance like this is based on something you demonstrated if there's a trial. . . . prejudice [cannot] be assumed given the facts I have heard. . . . Who knows what may develop during the course of the trial. We may get some indication that the defendant's due process rights have been violated or right to a fair trial has been violated. Due to the length of time involved, but I believe that the—

based on what I've heard the State has shown that it has acted properly under the circumstances and that the defendant has not shown any prejudice that might affect his right to a fair trial or his due process rights.

After the State presented its case, Alex renewed his motion for dismissal. In making this midtrial motion, Alex pointed out specific discrepancies in the testimony of two of the three eyewitnesses between their earlier statements or testimony at earlier proceedings. [FN 7] The trial court again denied the motion, stating Alex had not been prejudiced because the memories of the witnesses were "pretty vivid." The Court of Appeals held the trial court did not abuse its discretion in finding Alex did not demonstrate prejudice from the trial delay, speculating that Alex may have received a benefit from the delay because the State no longer sought the death penalty. *State v. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). We agree with Alex that these prejudice rulings are erroneous.

First, we note that the trial court's ruling was influenced by an error of law in so much as it rested on a belief that actual prejudice—to the exclusion of presumptive prejudice—was the only type of prejudice that would support a speedy trial claim. In fact, an accused can assert actual prejudice or presumptive prejudice as the result of the State's violation of his right to a speedy trial. Actual prejudice occurs when the trial delay has weakened the accused's ability to raise specific defenses, elicit

specific testimony, or produce specific items of evidence. *See Doggett*, 505 U.S. at 655 (accepting the State's definition of actual prejudice). The United States Supreme Court also recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify. *Id.* (internal citation omitted). This is so because "time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett*, 505 U.S. at 655 (citing *Barker*, 407 U.S. at 532). When the government persistently fails to try an accused and the delay is excessive, the accused need not show actual prejudice in order to prevail in his speedy trial claim. *Doggett*, 505 U.S. at 657-58. While presumptive prejudice cannot alone support a speedy trial claim, it is part of the mix of relevant facts, and its importance increases with the length of time. *Doggett*, 505 U.S. at 656 (internal citation omitted).

We hold the Court of Appeals erred in affirming the trial court's failure to consider presumptive prejudice. As the United States Supreme Court held, "When the Government's negligence . . . causes delay six times as long as that generally sufficient to trigger judicial review . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief." *Doggett*, 505 U.S. at 658 (holding an accused's right to a speedy trial was violated when his trial was delayed eight years with no showing of actual prejudice); *see also U.S. v. Ingram*, 446 F.3d 1332, 1340 (11th Cir. 2006)

(holding that a two-year delay from indictment to trial resulted in a speedy trial violation when the first three factors weighed against the State and there was no actual prejudice). While not every lengthy delay results in presumptive prejudice, see *State v. Evans*, 386 S.C. 418, 688 S.E.2d 583 (2009) (holding a twelve year delay did not violate the right to speedy trial), on this record it appears the State's delay was not merely negligent but intentional. Further, there was some evidence of actual prejudice in the discrepancies in the eyewitnesses' testimony. We hold that Alex met his burden of demonstrating prejudice.

CONCLUSION

After considering the totality of the circumstances, we hold that the Court of Appeals erred in affirming the trial court's ruling that Alex's right to a speedy trial was not violated and therefore the Court of Appeals' decision is

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 I would affirm the court of appeals' decision finding that the trial court did not abuse its discretion in refusing to dismiss the murder charge against Alexander Hunsberger (Petitioner)

on the basis of the State's failure to provide a speedy trial, I would dismiss the writ of certiorari as improvidently granted.

I. Facts and Procedural Background

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 Julio, who drove from South Carolina to Augusta, where the group placed the victim in the trunk of Julio's car. Barnes, Cave, Griffin, and Thatcher followed Petitioner and Julio in another car to a remote area of Edgefield County, South Carolina. 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.

On January 25, 2002, Petitioner was arrested in South Carolina for the murder of the victim and was held without bond. On March 25, 2002, a grand jury indicted Petitioner for murder. On June 14, 2002, Petitioner was denied bail. Another bond hearing was held on April 29, 2004, before the Honorable William P. Keesley. While Judge Keesley denied bail, he provided that Petitioner could renew his motion if the State failed to try Petitioner during the next term of court. On November 17, 2004, Petitioner filed a motion to dismiss the charges

against him or release him on a personal recognizance bond based upon the State's failure to give him a speedy trial, denial of due process, unreasonable confinement without bail, and violation of S.C. Code Ann. § 17-23-90. [FN 8] Judge Keesley heard arguments on the motion in December 2004, and by order filed December 3, 2004, Judge Keesley denied the motions. However, Judge Keesley expressed "deep[] concern[] about the length of time that ha[d] transpired without bringing [Petitioner] to trial" and noted that "[t]hree years in jail awaiting trial on this charge [was] clearly bordering on excessive." Judge Keesley further offered to create a special term of court for the purpose of proceeding with Petitioner's trial in February 2005, and in his order, permitted Petitioner to renew his motion if he had not been tried by February 2005. The Court "again admonished [the State] that unless immediate steps [were] taken to bring this case to trial promptly, the court [would] have no option under the constitutions of the United States and South Carolina except to release the defendant from jail in South Carolina." The State subsequently notified Judge Keesley that it did not intend to try the case in February, and Petitioner filed a second speedy trial motion. On January 28, 2005, Judge Keesley issued an order denying Petitioner's motion to dismiss the charges, but granted Petitioner a \$50,000 personal recognizance bond. However, Judge Keesley placed a condition on the bond that Petitioner was not to be released from custody until Georgia released its hold on Petitioner. Judge Keesley also invited Georgia officials to begin extradition proceedings.

Thereafter, the State relinquished custody of Petitioner to Georgia. Petitioner and Julio were jointly tried in Georgia and were convicted of kidnapping in September 2006. They were sentenced to life imprisonment.

After the State obtained a death penalty conviction in Barnes's case in November 2010, the State sought to extradite Petitioner to South Carolina in early 2011. It is unclear when exactly Petitioner was extradited to South Carolina; however, Petitioner proceeded to trial on January 3, 2012. During pre-trial motions, Petitioner sought to have his South Carolina charges dismissed because the State had violated his constitutional right to a speedy trial. The trial court denied the motion, and Petitioner appealed. The court of appeals affirmed. *See State v. Alexander L. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). We granted certiorari to consider Petitioner's claim that he was denied his constitutional right to a speedy trial.

II. Analysis

"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).

A. Triggering Factor and Length of Delay

I agree with the majority and the court of appeals that Petitioner's incarceration South Carolina from January 2002 until January 2005 is presumptively prejudicial and therefore triggers further analysis into the causes of the delay using the *Barker* factors. *See id.*; *State v. Waites*, 270 S.C.

104, 108, 240 S.E.2d 651, 653 (1978) (finding a two year, four month delay was sufficient to trigger further review of the *Barker* factors). I also agree with the majority's analysis of the length of time factor within the context of the *Barker* inquiry. Under the majority's formulation, the State is responsible for an eight-year delay in prosecuting Petitioner. I disagree, however, with how the majority analyzed the delay within the context of the remaining *Barker* factors.

B. Reason for Delay

In assessing this element, this Court has interpreted *Barker* as follows:

The ultimate responsibility for the trial of a criminal defendant rests with the State. *Barker*, 407 U.S. at 531. Therefore, the court should weigh heavily against the State any intentional delays to impede the defense. *Id.* Where the reason for the delay is more neutral, the court should weigh it less heavily against the State. *Id.* A valid reason presented by the State may justify an appropriate delay. *Id.* However, the Court must also consider and weigh the defendant's contribution to the delay in determining whether the defendant's Sixth Amendment rights have been violated. *Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (holding defendant's contribution to the delay of the trial militated against a finding of a violation of the right to a speedy trial).

State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007).

As noted by the majority, the State has provided the following reasons for the delay: (1) the complexity of the case; (2) the fact that there were two separate jurisdictions endeavoring to prosecute Petitioner; (3) the need to collect witnesses; and (4) the decision to seek the death penalty in Petitioner's case. The majority finds that this was a simple crime, and therefore, to the extent the court of appeals found it to be complex, the court of appeals erred. In my opinion, this case was unique in that it required a great deal of coordination within the Solicitor's office and amongst the jurisdictions to pursue these prosecutions. As astutely explained by the trial judge:

It's a rather unique case for a lot of reasons. It's unique in the sense that you have cross-border issues, you have Georgia wanting to pursue Georgia's case, but South Carolina wanting to pursue South Carolina's cases, each defendant asserting their individual constitutional rights and the State having a capital case that [it is] wanting to pursue and [has] successfully pursued. So this case doesn't follow the normal framework of cases where a person is—has a charge outstanding and simply wants to get it tried, wants to get it over with. This is a case that has a number of complicated factors that bring us to this moment in time.

The trial judge found that the State had "demonstrated legitimate reasons for the delay given the complex nature of the cases, [and] the problems involving prosecutions in multiple jurisdictions in this state as well as the State of Georgia."

In my opinion, the trial court did not abuse its discretion in finding the State presented legitimate reason for the delay. *See, e.g., State v. Kennedy*, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) ("While Kennedy asserted his right to a speedy trial fourteen months prior to the commencement of his trial, the case was clearly complicated and required substantial time to investigate and prepare. Further, there is an absence of evidence in this case that the State purposefully delayed Kennedy's trial. Finally, we conclude the prejudice to Kennedy, if any, is minimal."). Here, the State was dealing with the potential for six separate prosecutions (one of which involved the State seeking the death penalty and two that involved the possibility of the death penalty); the various defendants were asked to be witnesses in the other cases; and the crime occurred in two states, both of which were seeking to prosecute the defendants. [FN 9] In light of these unique facts, it is my opinion that the court of appeals did not err in upholding the trial court's finding that the reasons given for the delay were reasonable. *See Pittman*, 373 S.C. at 552, 647 S.E.2d at 156-57 ("The record does not reflect any intentional or malicious delays by the prosecution, nor does the record reflect any negligent prosecutorial behavior in connection with this case.

Additionally, the delays attributable to the defense were also reasonable in light of the circumstances of this case. Although it took a long time for the case to come to trial, any delay was the result of the complexities of this case. The justifications for the delay offered by both parties in this case weigh in favor of a finding that Appellant was not deprived of his right to a speedy trial.").

C. Accused's Assertion of the Right to a Speedy Trial

Unlike the majority, I would find that Petitioner's assertion of his speedy trial right in November 2004 and January 2005 is not dispositive under the facts of this case. In response to Petitioner's assertion of the speedy trial right in conjunction with his motions for bail, Petitioner was granted relief under section 17-23-90 in the form of a personal recognizance bond. *See State v. Campbell*, 277 S.C. 408, 288 S.E.2d 395 (1982) (denying speedy trial claim where section 17-23-90 provides for release if not indicted and tried within a certain time frame, not dismissal of the charge). Petitioner did not again assert his speedy trial right until his trial in January 2012. At this point Petitioner had been prosecuted in Georgia and incarcerated there for seven years (from January 2005 until January 2012). In my opinion, Petitioner's failure to assert his right during this time period weighs against him. *See Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (noting "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." (quoting *Barker*, 407 U.S. at 532)); *State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) ("The record offers no reason for the failure of the defendants to assert their right sooner, and under [*Barker*], a failure to assert the right will make it difficult for the defendants to prove that they were denied a speedy trial"). [FN 10]

Therefore, in my opinion the majority erroneously weighs this factor against the State.

D. Prejudice

Petitioner argues that he was prejudiced by the passage of time because the witnesses' memories were impaired. The trial court found Petitioner's right to a fair trial was not impacted by the delay and therefore no prejudice resulted, in that every witness was still available to testify, the prior transcripts were available to Petitioner for impeachment purposes and to refresh the witnesses' recollections, and in fact Petitioner did "an effective job at pointing out to the witnesses in crossexamining them and impeaching them on prior inconsistent statements." Significantly, as noted by the court of appeals, Petitioner "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 *Hunsberger*, Op. No. 2014-UP-381. However, the majority asserts

that the mere passage of time is enough to find prejudice in this case. I disagree. See *Pittman*, 373 S.C. at 551, 647 S.E.2d at 156 (rejecting Pittman's argument that a delay of three years, two months between arrest and trial was so lengthy that it was presumptively prejudicial); *Foster*, 260 S.C. at 515, 197 S.E.2d at 281 (finding a delay of more than five years was sufficient to require analysis of the other factors without finding presumptive prejudice).

This Court has noted that "the most serious interest to be protected by the guarantee to a speedy trial is the possibility of impairment of the defense." *Pittman*, 373 S.C. at 550, 647 S.E.2d at 155-56. In *Doggett*, the United States Supreme Court has also observed that:

Unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including 'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence.

505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532). Under the circumstances of this case, where Petitioner was serving a life sentence in Georgia, it is my opinion that the pretrial incarceration and anxiety concerns were minimal. [FN 11] Most, importantly, the delay did not in any way impair his defense. In fact, the delay may have worked to

Petitioner's advantage. The Supreme Court has explained this paradox as follows:

The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused

. . . .
A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

Barker, 407 U.S. at 521.

I see two benefits accruing to Petitioner's defense as a result of the passage of time in this case. First, as the trial judge pointed out, Petitioner was able to cross-examine and impeach the witnesses using their prior testimony. Second, as the court of appeals pointed out, Petitioner "may have received a benefit as a result of the delay because the State ultimately decided not to pursue the death penalty against him." *State v. Hunsberger*, Op. No. 2014-UP-381; see *State v. Cooper*, 386 S.C. 210, 218, 687 S.E.2d 62, 67 (Ct. App. 2009) (noting because the State withdrew its notice to seek the death penalty, "the withdrawal could be construed as a benefit to Cooper resulting from the delay."). Because I cannot identify any prejudice befalling Petitioner as a result of the delay, I would find the trial court did not abuse its discretion when assessing this factor. See *Langford*, 400 S.C. at 445, 735 S.E.2d at 484 (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); *State v. Brazell*, 325 S.C. 65, 76, 480 S.E.2d 64, 70–71 (1997) (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.").

Conclusion

No single *Barker* factor is "either a necessary 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). Under this particular constellation of facts, I would hold that the trial court did not abuse its discretion in refusing to dismiss the charges against the petitioner, and consequently, the court of appeals did not err in upholding the trial court's finding that the petitioner's speedy trial right was not violated. Accordingly, I would dismiss the writ of certiorari as improvidently granted.

KITTREDGE, J., concurs.

[FN 1] Steven Barnes' capital conviction was reversed on direct appeal. *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014).

[FN 2] Julio's conviction is also being set aside on speedy trial grounds in an opinion filed today. *State v. Hunsberger*, Op No. 2016-MO-029(S.C. Sup. Ct. filed October 12, 2016).

[FN 3] This statute is derived from Section 7 of the Habeas Corpus Act of 1679. See 1 Statutes at Large 117, 119-120. Section 17-23-90 provides that, upon demand, a prisoner who is not indicted or tried by the second term following the demand be released without bail. *E.g.*, *State v. Campbell*, 277 S.C. 408, 288 S.E.2d 395 (1982).

[FN 4] We note our concern that both the trial court and the Court of Appeals seem to find an absence of prejudice since Alex "was not deprived of his liberty because he was incarcerated in Georgia under another sentence." The dissent echoes this sentiment when it makes a factual finding that Alex's "pretrial incarceration and anxiety concerns were minimal." We have searched the record for any evidence to support this statement, and have found none. Both of the lower tribunals ignored the Supreme Court's decision in *Smith v. Hooy*, 393 U.S. 374 (1969), and the dissent purportedly distinguishes it by citing to an unpublished federal district court opinion, which held that incarceration in one jurisdiction does not lessen the accused's constitutional right to a speedy trial on charges pending in another jurisdiction, noting "an outstanding untried charge . . . can have fully as depressive effect upon a prisoner as upon a person who is at large." *Id.* 378. See also *Betterman v. Montana*, 578 U.S. ____ (2016) fn (confirming *Smith's* holding).

[FN 5] The time period for speedy trial analysis begins with "formal accusation," which can be earlier than an accused's arrest. *Langford*, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted). Alex uses his arrest as the date his speedy trial right attached, and we do so as well.

[FN 6] The trial judge never explicitly stated that the delay here was sufficient to trigger the speedy trial analysis but instead proceeded to immediately analyze the question of prejudice.

[FN 7] Most importantly, whether one or both of the Hunsberger brothers exited their car with a gun, and who was outside the car when Sturup was forced in the Hunsbergers' car's trunk.

[8] See S.C. Code Ann. § 17-23-90 (2014) providing for bail and release from imprisonment should the State fail to prosecute a defendant within a certain time period (see also *State v. Barnes*, 2014 WL 1234567 (S.C. 2014)).

[9] Ultimately, the Hunsbergers and Barnes were transported to Georgia to stand trial prior to their trials in South Carolina. Barnes received a life sentence in Georgia for crimes related to running a prostitution ring separate from this matter. The Hunsbergers were both convicted of kidnapping in Georgia and received life sentences. Cave, Griffon, and Hatcher all pleaded guilty to aggravated assault in Georgia and received eighteen-year sentences. Barnes and the Hunsbergers were then prosecuted in South Carolina.

[N 10] In my opinion, it can be inferred from the record that Petitioner did not, in fact, want a speedy trial. See *Walker*, 407 U.S. at 536 (stating, where the defendant did not object to the Commonwealth of Kentucky seeking sixteen separate continuances in his trial date, "barring 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.*" (emphasis added)). Petitioner testified that one of the reasons he did not want to be extradited to South Carolina was that he "needed to find out" how extradition would affect his Georgia appeal. In addition, the record indicates that the State was considering seeking the death penalty against Petitioner, which might explain Petitioner's failure to assert his speedy trial right during his Georgia incarceration.

[FN 11] In making this finding, the majority claims I ignore the Supreme Court's holding in *Smith v. Hooy*, 393 U.S. 374 (1969). There, the Supreme Court noted that incarceration in another jurisdiction "can have fully as depressive an effect upon a prisoner as upon a person who is at large." *Id.* at 378. In my opinion, this case is distinguishable. As one federal court has explained:

Smith involved a prisoner who remained in federal custody for six years during which the State of Texas ignored his repeated requests to be brought to trial on an outstanding state charge. The Supreme Court rejected the argument propounded by Texas that federalism concerns and respect for equal sovereigns barred it from seeking to try a defendant in federal custody even when that defendant vociferously and repeatedly requested to be tried as quickly as possible. Thus, the Supreme Court, as it made clear in *Barker*, attaches significant weight in the balance of interests that is dispositive of speedy trial claims to a defendant's assertion or failure to assert his speedy trial right with respect to an outstanding charge.

United States v. Wade, No. 08-CR-0120 LAK, 2015 WL 4475178, at *3 (S.D.N.Y. July 22, 2015) (footnotes omitted). Here, unlike in *Smith*, Petitioner never once asserted his speedy trial right while incarcerated in Georgia.

STATE OF SOUTH CAROLINA
In the Supreme Court

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

Opinion No. 27671

The State, Respondent,
v.

Alexander L. Hunsberger, Petitioner.

Appellate Case No. 2015-000083

PETITION FOR REHEARING

In its October 12, 2016 opinion, a three member majority of this Court reversed the South Carolina Court of Appeals which had affirmed the trial judge's decision to deny the defense motion to dismiss for violation of the right to a speedy trial. Absent revision or a remand, the Court's opinion has the effect of granting dismissal and also bars retrial in two murder cases. [FN 1] However, the majority's opinion misconstrues or misapprehends important facts of record and erroneously construes

and improperly applies well-established Supreme Court precedent. Therefore, pursuant to Rule 221(a), SCACR, Respondent, State of South Carolina, seeks rehearing and revision of the erroneous opinion.

Summary of Argument

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

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

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

Third, the majority finds "no evidence" that any delay between December 2004 and January 2012 was connected to South Carolina's consideration of whether to seek death against

itioner. (Opinion, p. 10). Yet, there is clear
ference to same in the record both in court
r and the prosecutor's statements to the trial
t.

Fourth, while considering prejudice, the
majority incorrectly considered competing witness
testimony and statements as a basis for finding
actual prejudice to the defense. Prejudice under a
Sixth Amendment claim is correctly analyzed in
context of what the Sixth Amendment protects by
the right to speedy trial, not the persuasiveness of
the evidence which was undeniably available and
presented. Further, the majority apparently
overlooked that the cited differences in testimony
were memorialized in different proceedings and
utilized at trial. Nothing was lost to Petitioner's
prejudice. To the contrary, this creation of evidence
decided worked to his benefit allowing him to use
discrepancies to attack credibility.

Fifth, the majority erroneously concluded
Supreme Court precedent essentially mandates
the fact of incarceration in another jurisdiction
could not make minimal the anxiety concerns in
this case. (Opinion, p. 6 at n. 4). However, the
precedent relied upon, *Smith v. Hoey*, 393 U.S.
374 (1969), shows distinguishable factual
background (which, in a case specific, fact specific
analysis such as the instant one, is unquestionably
critical). First, the *Hoey* case reflects the defendant
made repeated attempts to force a return to the
state court. That is not so here. Further, the *Hoey*
matter was considered in terms of a pending

separate state charge unrelated to the conviction under federal law. In this case, Petitioner was convicted in Georgia for kidnapping the murder victim- the same series of criminal acts, with the same actors, at the same time. The majority misconstrued Supreme Court precedent and misapplied that precedent in the instant case under these discrete facts.

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

Seventh, the majority's reasoning again conflicts with Supreme Court precedent in that the majority opinion is skewed to weighing what the majority could have done differently, rather than the consideration of actual Speedy Trial considerations.

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

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

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

Multiple errors in the opinion have skewed the majority's view. First, the majority starts a listing of their "important dates" at arrest. (See

Opinion, p. 4). The most important date is the date of the murder. This matter remained unsolved 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, [Footnote] (See Opinion, p. 8), even though proof of the charge would entail multiple witnesses, two crime sites, multiple statements of co-conspirators, and circumstances of aggravation warranting capital proceedings, (See Opinion, p. 2). Further still, the majority appears to reason review is difficult due to the trial judge's "failure to make specific findings, relying instead on general statements about the complexity of the case, problems involving multiple jurisdictions, and Alex's failure to show actual prejudice." (Opinion, pp. 5-6). [FN 6] The record solidly refutes this conclusion.

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

to pursue and have successfully pursued." (R. p. 41, line 25 - p. 42, line 6). Judge Newman concluded:

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

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

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

... I don't think that prejudice can be assumed given the facts that I've heard. I think the State has demonstrated legitimate reasons for the delay given the complex nature of the cases, the problems involving prosecutions in multiple jurisdictions in this state as well as the State of Georgia.

Who knows what may develop during the course of the trial. We may get some indication that the defendant's due process rights have been violated or right to a fair trial has been violated. Due to the length of time involved, but I believe that the - - based on what I've heard *the State has shown that it has acted properly under the circumstances and the defendant has not shown any prejudice* that might affect his right to a fair trial or his due process rights. I therefore, deny the motion.

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

Defense counsel renewed his motion at the close of the State's case. Defense counsel complained that the trial testimony well-supported his earlier assertion that the passage of time dimmed memories and created prejudice, though, he argued, he need not show prejudice where the State was at fault in delaying the trial. (R. p. 194, line 22 - p. 195, line 21). Judge Newman again denied relief, noting the number of trials for all the co-defendants, the

time for "sorting out that process," and the fact that Petitioner was incarcerated in Georgia pursuant to the Georgia conviction since 2006, as factors that did not support the State was at fault such that relief was warranted. Further, he found no prejudice otherwise, noting that there were transcripts available for impeachment that were used at trial, and that "everyone seems to have a pretty vivid memory" of this most serious matter. (R. p. 196, line 9 - p. 197, line 12).

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

(2) The Majority Erred in Assessing Fault and Heavily Weighing Against the State Its Allowing Georgia to Try Defendant Rather Than to Try Defendant Before the Capital Proceedings in Co-Defendant Barnes' Case

were Completed; and, Failed to Fully Consider Petitioner's Actions and/or Inactions in the Delay.

The majority correctly found reasons for the delay should be considered in the analysis. (Opinion, p. 8). The majority rejected the trial judge's factual findings on same - "the complexity of the cases and the problems involved in cross border prosecutions" – finding "reliance on complexity and cross border issues patently insufficient in this case in light of the findings of Judge Keesley in his December 2004 order." (Opinion, p. 8). In other words, the majority faulted the State for releasing the defendant to Georgia which was waiting to try the Defendant for kidnapping of the murder victim. [FN 7] This finding is internally inconsistent and unfair. It is inconsistent because release to the waiting state demonstrates a portion of the cross border issues connected to the matter which the majority marginalized. It is unfair, as the State complied with the offered option of bond which resulted in release to Georgia. The majority faults the State for complying with the appropriate relief under the statute, and the relief sought by Petitioner.

On November 16, 2004, defense counsel moved for an order setting the "case [to] be tried during the November 8th, 2004 term of Court, or at the next succeeding term of Court, *or, in the event the Defendant is not so tried, that the Defendant be released from confinement on his own recognizance.*" (R. p. 222) (emphasis added). On December 2, 2004, the Honorable William P.

Keesley issued an Order denying the requested relief. However, Judge Keesley found the length of time troubling, and offered to attempt to "establish a special term of court to handle this case during February" 2005. (R. p. 224). Judge Keesley also recognized that "*[p]art of the problem in disposing of these cases is the fact that multiple defendants and different jurisdictions are involved, and there is the possibility that the State of South Carolina could seek the death penalty.*" (R. p. 224) (emphasis added). Judge Keesley also further recognized that "Georgia has placed a hold on the defendant, so if he were granted bail in South Carolina, he would still be incarcerated in Georgia." (R. p. 224). Judge Keesley's order supports in specificity some of the cross border issues that the majority summarily casts aside. His subsequent Order dated January 28, 2005 underscored these issues when Judge Keesley noted with emphasis: "DEFENDANT IS NOT TO BE RELEASED FROM CUSTODY UNLESS THE HOLDS PLACED BY THE STATE OF GEORGIA ARE LIFTED." (R. p. 226 (emphasis in original)).

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

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

The State was eventually able to secure Petitioner's presence and a jury trial was held in

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

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

constitutional right to a speedy trial at any point until immediately before his January 2012 trial.

"(T]he defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." *Barker v. Wingo*, 407 U.S. at 528. As noted, Petitioner failed to do anything to assert a speedy trial issue after he was released to Georgia in early 2005 until the time of his trial in January 2012. (See R. p. 17, lines 21-25, ***acknowledging no request during six to seven years of the delay***). To the contrary, he actually declined to allow extradition in 2011. (R. p. 36, lines 13-23). Unlike his co-defendant Steven Barnes, he did not seek return and prosecution under the Interstate Detainer Act. See *Hopper v. State*, 495 S.W.3d 468, 478 (Tex. App. 2016), *petition for discretionary review granted* (Oct. 19, 2016) ("Appellant knew that a charge was pending against him and, despite having the opportunity to demand a resolution of that charge through the IAD, he sat on his rights for more than eighteen and a half years. We, therefore, conclude that even if we applied a presumption of prejudice in this case, the presumption is rebutted because of the trial court's implied finding that appellant acquiesced in the delay."); *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003) ("[t]he longer delay becomes, the more likely a defendant who wished a speedy trial would be to take some action to obtain it. Thus inaction weighs more heavily against a violation the longer the delay becomes.") (quoting G. Dix & R. Dawson, *Texas Criminal Practice and Procedure* § 23.40 (2d

ed.2001)). See also *Barker v. Wingo*, 407 U.S. at 521 ("Delay is not an uncommon defense tactic."). Thus, in assessing the delay, the fact that Petitioner failed to assert his right to a speedy trial after his release to Georgia is significant. *State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) (finding no violation where during five of the seven year delay at issue, neither the State nor defendants "pursued the matter" and a "failure to assert the right will make it difficult for the defendants to prove that they were denied a speedy trial"). See also *United States v. Wanigasinghe*, 545 F.3d 595, 599 (7th Cir. 2008) (in review of eleven year delay after indictment but before arrest: "Wanigasinghe did not request a speedy trial during the time he was out of the country. We agree with the district court's finding that he likely knew he had been charged with a crime but nevertheless did nothing to take care of the charges; quite the opposite. His failure to request a speedy trial is also a factor which weighs against him.").

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

majority erred in its factual consideration and assessment of same.

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

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

Judge Keesley found the "there is a possibility that the State of South Carolina could seek the death penalty" and noted a decision had not yet been made, though had instructed the office a decision must be made. (See R. p. 225). Further still, the prosecutor clearly stated to Judge Newman that consideration was ongoing and was not completed until the capital proceedings in the Barnes trial. (R. pp. 23 and 25). The majority is plainly incorrect in finding an absence of any evidence in the record.

Further, the State ultimately decided against seeking the death penalty in the case against Petitioner. As such, the length of the delay in this aspect certainly holds no prejudice to Petitioner. See *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62, 67 (Ct.App. 2009) ("Judge Pieper noted the State

withdrew its notice to seek the death penalty; thus, the withdrawal could be construed as a benefit to Cooper resulting from the delay."). The delay in this respect was decidedly in Petitioner's favor. The majority's reasoning to the contrary lacks support.

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

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

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

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

In short, even though Petitioner was tried for the 2002 charge in January of 2012, he had ample opportunity to thoroughly cross-examine the witnesses against him, including making use of prior sworn testimony - testimony that was available as a result of multiple actions both in South Carolina and Georgia. (See R. p. 19, line 24 - p. 21, line 9; p. 22, lines 18-25). Further, he does not contend any exculpatory witness or testimony is not

unavailable. *Compare State v. Buckner*, 738 S.E.2d 65 (Ga. 2013) (affirming finding of prejudice and dismissal where defendant "was in the unique position of not just speculating, but knowing there was tampering with the evidence at the ... crime scene, but being prevented from identifying and showing what aspects of the scene and what specific pieces of evidence, have been altered or manipulated" due to dimming memories and lack of recorded statements). Petitioner has twice been convicted (once in Georgia, once here) on evidence of participation in the events that led to Samuel's murder, and readily admits his presence during the crime. (See R. p. 187, line 8 - p. 193, line 5; p. 216, lines 8-13). Petitioner argued in the Court of Appeals, though, that the passage of time affected extent of memory and credibility of the witnesses against him. (See FBOA, p. 19; R. p. 194, line 22 - p. 195, line 13). In effective rebuttal, though, the trial transcript demonstrates credibility was challenged by use of prior transcripts which preserved sworn testimony, (See R. p. 97, line 14 - p. 100, line 19; p. 144, line 25 - p. 145, line 5), and that contemporaneous notes were used to refresh memories, (See R. p. 144, lines 2-24; p. 172, line 7 - p. 173, line 13). The multiple trials and statements, in essence, preserved and/or created records of testimony for this Petitioner's use to his benefit. See *United States v. Kashamu*, 15 F. Supp. 3d 854, 864 (N.D. Ill.2014) ("the testimony and accounts of the various witnesses and participants of the conspiracy have been preserved through grand jury testimony, numerous plea agreements, and testimony given at the trial of co-defendant Peter Stebbins. Thus, the

danger of faded memories as to the details of the conspiracy is largely removed."). At any rate, as Judge Newman found, there was no evidence of prejudice to Petitioner based on the passage of time:

Regarding ... problems the witnesses had remembering, Counsel did an effective job at pointing out to the witnesses in cross-examining them and impeaching them on prior inconsistent statements. The fact that there is a transcript to go over your testimony available, it accounts the opportunity to refresh the witness' recollection and to impeach where needed[.]

In looking at it, the trial to this point - - looking back I indicated in retrospectively on a position of prejudice, I don't see where the defendant has been prejudiced in any way. Based on the lapse of time, for the most part, everyone seems to have a

pretty vivid memory. Of course, these matters will probably - - probably be forever etched in the memories and minds of people who were there involved, eye witnesses.

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

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

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

The majority misconstrues this Supreme Court precedent to opine that the fact of incarceration in another jurisdiction did not make minimal the anxiety concerns in this case. (Opinion, p. 6 at n. 4). However, the precedent relied upon, *Smith v. Hooey*, 393 U.S. 374 (1969), is factually distinguishable in two ways. First, the defendant there made repeated attempts in order to force a return to the state. *See Smith v. Hooey*, 393 U.S. 374, 375 (1969) (cataloguing multiple demands and attempts to resolve the pending charge over six years). That is not the case here. Further, the charge was unrelated. *Betterman v. Montana*, 136 S. Ct. 1609, 1615 n. 5 (2016) (describing the ruling in *Hooey*: "There we concluded that a defendant, though already convicted and imprisoned on one charge, nevertheless has a right to be speedily brought to trial on an unrelated charge."). In this

case, Petitioner was convicted in Georgia for kidnapping the murder victim- the same series of criminal acts, with the same actors, at the same time – with separate sovereigns allowed to seek separate convictions for those same acts. Whether Petitioner would be convicted of at least some of the crimes against Samuel Sturup was already settled - he was there, he participated. That was settled. The majority misconstrued the impact of Supreme Court precedent in these particular circumstances.

Lastly, the prominence of the repeated attempts in the *Hooley* 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, *Hooley* did not concern a possible capital case. Further still, the defendant in *Hooley* did not have the Interstate Detainer Act which could force return to the jurisdiction. Petitioner's decision not to ask for a speedy trial or demand return is understandable where the State was still considering the possibility of capital proceedings. It is, however, inconsistent with pursuing his right to a speedy trial. It is likewise relevant to assessment of personal prejudice. *Barker v. Wingo*, 407 U.S. at 531 ("Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a

defendant is to complain."). Again, the majority erred in relying on *Hooey* to conclude the contrary.

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

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

majority opinion would subjugate or eradicate the weight of the individual factors in *Barker* -particularly in considering length of delay where there is evidence of no actual prejudice. [FN 10] The Supreme Court has rejected the interpretation forwarded by the majority:

We regard none of the four factors identified [... in *Barker* ...] as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors ***and must be considered together with such other circumstances as may be relevant.*** In sum, ***these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.***

Barker v. Wingo, 407 U.S. at 533.

Only the Supreme Court can overrule its Sixth Amendment precedent. *E.g. Bosse v. Oklahoma*, No. 15-9173, 2016 WL 5888333, at *1 (U.S. Oct. 11, 2016). Thus, this Court is bound to apply the Supreme Court's precedent in regard to interpretation of federal law. Consequently, the

opinion contains a clear error of law in melding the concepts of presumptive prejudice for review and weight of the length of delay as assigned by various other factors. Further, the majority's conclusion that the trial court and the Court of Appeals committed an error of law in failing to recognize both the length of time as a prompt to analysis and also as to assessment of prejudice to the defense only intensifies the apparent error in the opinion. This is so because, contrary to the majority's decision, both courts did consider the passage of time along with the "weaken[ing of] the accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." (See Opinion, p. 12). In particular, Judge Newman considered the length of time and proceedings in the interim in terms of the defense argument for presumption of prejudice:

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

unique case for a lot of
reasons ...

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

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

Now, in evaluating this issue of prejudice, *I certainly understand defense counsel's argument that the testimony of witnesses might be suspect due to them attempting to recall something that happened almost a decade ago*. Of course, that can cut both ways with a jury. I think that the issue of prejudice probably has to be looked at prospectively; is that correct? Not prospectively, retrospectively.

I think the only way that prejudice can be determined in an instance

like this is based on something you demonstrated if there's a trial. *I don't think that prejudice can be assumed given the facts that I've heard.* I think the State has demonstrated legitimate reasons for the delay given the complex nature of the cases, the problems involving the prosecutions in multiple jurisdictions in this state as well as the State of Georgia.

(R. p. 42, line 13 - p. 43, line 2).

Judge Newman specifically referenced the defense argument and his consideration that prejudice could be presumed given the length of time - he just (quite logically and reasonably) rejected that in this case. (See also R.pp. 19-22, defense counsel acknowledging receipt of transcripts from other proceedings prior to Petitioner's trial; pp. 196-197, judge considering transcripts from other proceedings and "vivid" recall by witnesses). The trial judge's ruling was factually supported and legally sound. Consequently, if the majority opinion is construed as consistent with *Barker*, it is incorrect that the trial judge did not believe he could consider the length of time in

regard to prejudice where the transcript indicated otherwise. If the majority opinion is construed as inconsistent with *Barker* in finding prejudice may be presumed regardless of real and submitted evidence demonstrating the lack of actual prejudice, it rests on an erroneous understanding of the law. Either way, the majority opinion is not correct in its discussion of "presumptive prejudice."

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

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

Certainly, complexity in the case is a valid reason for delay in the proceedings. *Pittman*, 373 S.C. at 552, 647 S.E.2d at 157 ("Although it took a long time for the case to come to trial, any delay was the result of the complexities of this case."); *Cooper*,

386 S.C. at 218, 687 S.E.2d at 67 (noting "complexity of the case and the amount of time required to prepare for trial" in assessing justification for the delay). As discussed previously, sometimes the complexity is not the charge itself but the number of defendants and individual moving parts of trial preparation. *See, for example, United States v. Brown*, 498 F.3d 523, 531 (6th Cir. 2007) ("the reasons for the delay weigh against finding a Sixth Amendment violation. First, the charges were complex, involving multiple defendants and" multiple charges); *United States v. King*, 483 F.3d 969, 976 (9th Cir. 2007) (noting complex cases with "numerous defendants and alleged co-conspirators"). Judge Newman correctly identified the complexity of the case in the number of defendants, the number of trials, the prosecutions in two States, and the capital proceedings for co-defendant Barnes.

Further, attempting to "collect witnesses" is a valid cause for delay. *See Doggett v. United States*, 505 U.S. at 656 ("Our speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable. The government may need time to collect witnesses against the accused, oppose his pretrial motions ... "). Contrary to majority's conclusion that no witnesses needed "collection," (Opinion, p. 9), the record shows the State actively sought to reach out to all witnesses to testify. Its offer to Petitioner actually shows the State did not place isolated or undue pressure on Petitioner. The majority consistently errs in failing to consider that

the criminal actions here involved more than Petitioner and his brother. The State had success in securing many of the co-defendants to testify against Barnes, and, the offer to allow the Hunsbergers to testify "might [have] go[ne] toward their benefit." (See R. p. 4, lines 14- 25; p. 26, lines 10-16). As the State acknowledged, it was their right to decide not to testify against Barnes. (R. p. 26, line 17 - p. 27, line 6). Even so, they had the same opportunities as the other co-defendants. This even treatment does not lend itself to attack here as evidence of an attempt to harm the defense. It is, however, a facet of the complexity.

Further still, it is clear from the record that the State immediately set out to bring the Hunsbergers back to this jurisdiction for trial upon completion of the capital proceedings against Barnes. (R. p. 25, line 21 - p. 26, line 6). There was no delay of any consequence in seeking Petitioner's return after the capital proceedings concluded. The inference that the State acted to gain improper advantage is without support and without merit.

Lastly, Respondent notes with this Court's reversal of Barnes' conviction, and now the reversal for the Hunsbergers, no one has received punishment for Samuel Sturup's murder at all - no one. Murder is a particularly heinous crime and immunity granted based upon a disagreement with the State's prosecution method where such method reflects *no* deliberate attempt to hamper a defense, *no* malice toward the defense, and *no* actual, identifiable prejudice to the defendant, particularly

offends the victim, community and the sense of public justice. The immunity granted here is far too high a price to pay for disagreement with the individual prosecution method reflected in the record.

CONCLUSION

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

Respectfully submitted,

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Columbia, South Carolina.

ATTORNEYS FOR
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[FN 1] The majority also summarily reversed Julio Angelo Hunsberger's appeal citing the opinion here. State v. Hunsberger, Memorandum Opinion No. 2016-M0-029 (S.C.Sup.Ct. filed Oct. 12, 2016).

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

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

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

[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 funding demands premised upon the complex capital case. *See, e.g.,* Ira P. Robbins, *Toward A More Just and Effective System of Review in State Death Penalty Cases*, 40 *Am. U. L. Rev.* 1 (1990) ("Many have complained about delay in the review of capital cases. Delay is a pejorative term, however, frequently connoting procrastination or abuse. This is not necessarily the case in capital litigation, for some fair time period is both necessary and desirable to ensure adequate and deliberate review of complex cases."); *White v. Bd. Of Cty. Comm'rs of Pinellas Cty.*, 537 So. 2d 1376, 1378 (Fla. 1989) ("We find that all capital cases by their very nature can be considered extraordinary and unusual and arguably justify an award of attorney's fees in excess of the current statutory maximum fee cap."). *Cf State-Record Co. v. State*, 332 S.C. 346, 362, 504 S.E.2d 592, 600 (1998) (Toal, J., concurring) ("A standard must be formulated that adequately addresses the pressures and complex constitutional concerns that accompany a high-profile murder case."). Complexity is not

limited to financial matters or conspiracies or any certain type of case. The majority's interpretation would essentially read-out this consideration of complexity for any crime of murder - regardless of crime sites or multiple involvement or circumstances of aggravation to consider. This simply cannot be.

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

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

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

As referenced in the Opinion, the Hunsbergers and Barnes were released to Georgia to stand trial prior to their trials in South Carolina. (R. p. 23, line 17 - p. 24, line 11). Georgia convicted Barnes of matters relating to his criminal enterprise separate from the murder and sentenced him to life imprisonment. (R. p. 24, lines 3-8; p. 28, lines 16-22). As noted, the Hunsbergers were convicted and received a life sentence for the kidnapping of the murder victim in the instant case. (R. p. 24, lines 9-13). Additionally, Richard Cave pled guilty in Georgia to aggravated assault and received an eighteen year sentence. (R. p. 28, lines 5-6; p. 95, lines 16- 25). Antonio Griffin also pled guilty to assault in Georgia and received an eighteen year sentence. (R. p. 28, lines 5-6; p. 143, lines 1-5). Charlene Thatcher pled guilty to aggravated assault, as well. She also received an eighteen year sentence. Further, she pled guilty to an unrelated armed robbery in Georgia (as a result of her participation in Barnes' criminal enterprise), received another eighteen year sentence, and was also convicted in 2002 of prostitution. (R. p. 28, lines 7-10; p. 168, lines 1 - 24; p. 170, lines 6-21).

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

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

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

[FN 10] As established in the oral argument, the presumption of prejudice was essentially the only argument here, and the basis for the presumption argument forwarded by Petitioner was essentially premised on his anxiety over possible capital proceedings. Petitioner also offered that he was innocent to proven guilty. See Oral Argument Video, at 7:26 (<http://www.judicial.state.sc.us/SCvideo>). These positions flow back to the errors previously noted in application of *Hoey* since the conviction in Georgia was for the kidnapping of the murder victim, and Petitioner could have demanded return under the IAD. That prior discussion is incorporated as if repeated verbatim here.

THE SUPREME COURT OF SOUTH
CAROLINA

The State, Respondent,

v.

Alexander L. Hunsberger, Petitioner.

Appellate Case No. 2015-000083

ORDER

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: Susan Barber Hackett, Esquire
Donald J. Zelenka, Esquire
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
John W. McIntosh, 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.

Alexander L. Hunsberger, Appellant.

Appellate Case No. 2012-206608

Appeal From Edgefield County
Clifton Newman, Circuit Court Judge

Unpublished Opinion No. 2014-UP-381
Heard September 9, 2014 - Filed November 5, 2014

AFFIRMED

Appellate Defender Susan Barber Hackett, 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: Alexander L. 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, Julio, and Steven Louis Barnes were also charged with Sturup's murder. [FN 1]Hunsberger was denied bail by order dated June 14, 2002. On November 17, 2004, he filed a motion for speedy trial. Judge William Keesley filed an order addressing Hunsberger's speedy trial motion on December 2, 2004. Judge Keesley noted he was "deeply concerned about the length of time that has transpired without bringing [Hunsberger] to trial." Judge Keesley acknowledged that part of the delay was because multiple defendants and different jurisdictions were involved and there was the possibility the State could seek the death

penalty. However, Judge Keesley stated Georgia had disposed of the co-defendants' cases more than a year before and the court had instructed the Solicitor's office to make a decision about whether to serve the death penalty notice. Judge Keesley determined no circumstances warranted modification of his previous order, admonished the State to bring the case to trial in February 2005, and provided Hunsberger could reassert his motions if the case was not brought to trial in February 2005.

The State subsequently informed the court that it did not intend to try the case in February. As a result, Hunsberger renewed his motion. Judge Keesley filed a second order on January 28, 2005, denying Hunsberger's motion to dismiss, but granting him a \$50,000 personal recognizance bond. Judge Keesley stated Hunsberger "is not to be released from custody unless the holds placed by the State of Georgia are lifted. The State of Georgia may attempt extradition proceedings to secure possession of [Hunsberger]." Thereafter, the State released custody of Hunsberger to the State of Georgia. On September 12, 2006, Hunsberger was tried and convicted in Georgia for kidnapping Sturup. Some time later, the State learned that although Hunsberger was given a life sentence in Georgia, he was eligible for parole after serving a term of imprisonment. Hunsberger was eventually returned to South Carolina to be tried for murder.

Hunsberger's South Carolina trial began on January 3, 2012. At the beginning of trial,

Hunsberger renewed his motion to dismiss his case, asserting his right to a speedy trial was violated. Hunsberger asserted he would be prejudiced by the delay because the State's theory rested on the theory of "the hand of one is the hand of all" and the witnesses' memories would be faded or nonexistent. He also argued the State created the almost ten-year delay by waiting until he was eligible for parole in Georgia to bring the case to trial.

The State asserted the solicitor had wanted to proceed with Barnes' trial first to give Hunsberger the opportunity to testify against Barnes if he wanted to and the solicitor was not sure whether he intended to seek the death penalty against Hunsberger until after Barnes' trial was completed. Meanwhile, Georgia had wanted to try Hunsberger and sought his extradition back to Georgia. The solicitor relented and allowed Georgia to try him first. The State asserted it attempted to proceed with Hunsberger's trial in October 2011 upon completing Barnes' trial; however, Hunsberger refused to sign the extradition papers, which delayed transporting him back to South Carolina. Additionally, the State argued Hunsberger never asserted his right to a speedy trial during the seven years he was serving his life sentence in Georgia. Finally, the State contended Hunsberger was not prejudiced by the delay because all the witnesses testified in the Georgia case and he had the benefit of their sworn testimony to impeach them. All the codefendants were also extradited to South Carolina and were prepared to testify against Hunsberger. After considering arguments from both sides, Judge

Clifton Newman denied Hunsberger's motion to dismiss. Judge Newman asserted the State had "demonstrated legitimate reasons for the delay given the complex nature of the cases, [and] the problems involving prosecutions in multiple jurisdictions in this state as well as the State of Georgia."

Hunsberger renewed his motion to dismiss his case at the close of the State's case, arguing the changes in witnesses' testimony provided an example of the prejudice he suffered from the delay in bringing his case to trial. Judge Newman denied the motion, stating Hunsberger's counsel did "an effective job at pointing out to the witnesses in cross-examining them and impeaching them on prior inconsistent statements." He added the transcript was available to refresh witnesses' recollection and impeach them when needed. He further stated Hunsberger had not "been deprived of his liberty because he's been incarcerated under another sentence." The jury convicted Hunsberger of murder, and the court sentenced him to thirty-three years' imprisonment. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court sits to review 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 rights when the defendant's statement to police was suppressed; the appeals of the suppression order lasted for five years; after the appeals the case was transferred to an assistant solicitor, 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 when the delay was to some degree the result of prosecutorial and governmental negligence, but any presumption of prejudice was persuasively rebutted because the State withdrew its notice to seek death penalty; thus, the withdrawal could be construed as benefit the defendant resulting from delay.

On appeal, Hunsberger asserts the ten-year delay triggers the speedy trial analysis because the delay was presumptively prejudicial and weighed heavily against the State. He argues the reason for the delay was a deliberate attempt by the State to force him to testify against Barnes. Hunsberger claims he asserted his right to a speedy trial in 2004 and 2005. Additionally, he argues he had "no burden of pointing to specific prejudice"; however, he

provided the testimony of Richard Cave, who stated "his testimony was the result of what he actually remembered and what he read in transcripts and statements, not the basis of his own memory." Moreover, he argues he demonstrated through cross-examination that the memories of the witnesses were impaired by the passage of time. Lastly, he asserts he lived in a state of mental and emotional turmoil for almost a decade, waiting for the State to make a life-or-death decision.

Although almost ten years passed between Hunsberger's arrest and his trial, Hunsberger was only detained in South Carolina from January 25, 2002, to 2005, when he was released to Georgia. This three-year period was sufficient to trigger further review of his right to speedy trial, and he asserted his right two times before being transported to Georgia. *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). Both of his motions were denied. Hunsberger was then tried, convicted, and sentenced in Georgia on September 12, 2006, to life imprisonment for the crime of kidnapping with bodily injury. He was incarcerated in Georgia and returned to South Carolina in October 2011. The State asserted it attempted to proceed with the trial in October 2011, but Hunsberger refused to sign the extradition papers, which delayed transporting him back to South Carolina. Hunsberger did not assert his right to a speedy trial during the time he was serving his life sentence in Georgia.

Hunsberger again asserted his right to a speedy trial at the beginning of his South Carolina trial in January 2012. Before denying the motion, Judge Newman addressed the length of the delay:

It's a rather unique case for a lot of reasons. It's unique in the sense that you have cross-border issues, you have Georgia wanting to pursue Georgia's case, but South Carolina wanting to pursue South Carolina's cases, each defendant asserting their individual constitutional rights and the State having a capital case that [it is] wanting to pursue and [has] successfully pursued. So this case doesn't follow the normal framework of cases where a person is - has a charge outstanding and simply wants to get it tried, wants to get it over with. This is a case that has a number of complicated factors that bring us to this moment in time.

As for the reason for the delay, Judge Newman maintained the State had "demonstrated legitimate reasons for the delay given the complex nature of the cases, [and] the problems involving prosecutions in multiple jurisdictions in this state as well as the State of Georgia." 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).

Further, Hunsberger argues he was prejudiced because the witnesses' memories were impaired by the passage of time. The trial court found Hunsberger "has not shown any prejudice that might affect his right to a fair trial or his due process rights." All the witnesses were still available

to testify, and the transcripts from the previous actions were available to Hunsberger to use to refresh witnesses' recollection and impeach the witnesses. Judge Newman stated Hunsberger did "an effective job at pointing out to the witnesses in cross-examining them and impeaching them on prior inconsistent statements." 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. Longford*, 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). Judge Newman found Hunsberger was not deprived of his liberty because he had been incarcerated in Georgia under another sentence. In fact, Hunsberger may have received a benefit as a result of the delay because the State ultimately decided not to pursue the death penalty against him. See *Pittman*, 373 S.C. at 553, 647 S.E.2d at 157 (noting Pittman received some benefits as a result of the delay); *Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (stating the State withdrew its notice to seek the death penalty; thus, the withdrawal could be

construed as a benefit to Cooper resulting from the delay).

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.