No. 16-1126

In The

Supreme Court of the United States

THE STATE OF SOUTH CAROLINA,
Petitioner,

V.

JULIO ANGELO HUNSBERGER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent Julio Angelo Hunsberger respectfully requests that this Court deny the petition for writ of certiorari because the South Carolina Supreme Court decision in this case is not in conflict with any decision of this Court and the state court opinion rests upon adequate and independent state constitutional grounds. The State refused to call this case to trial for ten years following arrest and indictment. The South Carolina Supreme Court's decision finding a speedy trial violation follows this Court's instructions in *Barker v. Wingo*, 407 U.S. 514 (1972). The State's emphasis on the fact that Respondent did not formally assert the speedy trial right overlooks the fact that in the first three years following arrest Respondent never met his appointed counsel. The *Barker* factors balance reached by the South Carolina Supreme Court does not warrant review by this Court.

In an unpublished opinion the South Carolina Supreme Court reversed Respondent's conviction, citing the published opinion in his brother and co-defendant's case, without additional analysis. App. 3. *State v. Hunsberger*, 418 S.C. 335, 794 S.E.2d 368 (2016). Both cases involve the same set of facts, the same ten year delay between arrest and trial, the same reasons for the delay asserted by the State and the same prejudice analysis. The only difference between the two cases involves the assertion of the right to a speedy trial. Respondent, who was effectively without counsel during the first three years after his arrest in January of 2002, did not formerly assert his right to a speedy trial until trial in January of 2012. The South Carolina Supreme Court considered Respondent's failure to assert the speedy trial right, balanced that factor against the other *Barker* factors and properly found a speedy trial violation.

The South Carolina Supreme Court chose to issue one published opinion in the Alexander L. Hunsberger case and cite to the published opinion rather than write a second opinion in Respondent's case. Petitioner challenges the manner in which the South Carolina Supreme Court decided Respondent's case by reference to the published opinion in the co-defendant brother's case. There is no fundamental error in the manner in which the South Carolina Supreme Court decided the cases. The manner in which the South Carolina Supreme Court decided the cases does not warrant review by this Court. This Court does not grant certiorari to advise state courts on how they should issue and write their opinions.

This Court should additionally deny the petition for writ of certiorari because the South Carolina Supreme Court decided the case on an adequate and independent state constitutional ground. In addition to the speedy trial right found in the Sixth Amendment to the United States Constitution, the South Carolina Supreme Court also relied on the South Carolina Constitution which provides, "Any person charged with an offense shall enjoy the right to a speedy and public

trial." S.C. Const. art. I, §14. This Court should not review the decision of the South Carolina Supreme Court in this case when state constitutional grounds support the decision.

No error exists for this Court to review. The court properly balanced the *Barker* factors in finding a speedy trial violation. The manner in which the cases were decided does not warrant review by this Court. Additionally, there is an adequate and independent state constitutional ground to support the decision by the South Carolina Supreme Court. The petition for writ of certiorari should be denied.

JURISDICTION

The State asserts that this Court has jurisdiction pursuant to 28 U.S.C. §1257(a). The South Carolina Supreme Court, however, in addition to the speedy trial right found in the Sixth Amendment to the United States Constitution, also relied on the South Carolina Constitution which provides, "Any person charged with an offense shall enjoy the right to a speedy and public trial." S.C. Const. art. I, §14. The State Constitution provides an adequate and independent basis to support the decision of the South Carolina Supreme Court. *See Coleman v. Thompson*, 501 U.S. 722 (1991) *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012); *Republican National Committee v. Burton*, 455 U.S. 1301 (1982).

STATEMENT OF THE CASE

A. Facts of the Case

On January 25, 2002, Respondent was served with arrest warrant #G-679758 for the murder of Samuel J. Sturrup on September 3, 2001. (R. p. 555.) Respondent's brother, Alexander Hunsberger, and Steven Louise Barnes were also charged with the murder of Sturrup and each was tried separately. In either March or May of 2002, the Edgefield County Grand Jury indicted Respondent for the murder of Sturrup, indictment #2002-GS-19-110. Records from the Edgefield Clerk of Court's Office reflect that attorney O. Lee Sturkey was appointed to represent Respondent on January 29, 2002. (R. p. 562). On February 16, 2005, over three years after his arrest in South Carolina, Respondent was transferred to Georgia to face charges connected to the South Carolina murder charge. (R. p. 37, lines 14-25). The trial judge noted that during that three year period former tri-county public defender Lee Sturkey represented Respondent. (R. p. 38, lines 1-11).

On September 12, 2006, Respondent and his co-defendant brother, Alex Hunsberger, were convicted in Georgia for kidnapping with bodily injury. (R. p. 27, lines 5-9). Respondent received a sentence of life in prison with the possibility of parole. (R. p. 27, lines 9-13). At some point in time, another public defender, Mr. Siegler, was appointed to represent Respondent for the South Carolina charge. (R. p. 39, lines 2-6). On May 18, 2010, Mr. Siegler moved to be relieved as counsel based on the fact that a conflict of interest existed as Mr. Seigler represented co-defendant Steven Louise Barnes on another criminal matter unrelated to the murder of Sturrup. (R. p. 39, lines 6-9). Mr. Siegler's motion to be relieved was granted and on June 14, 2010, trial counsel, Randall D. Williams, was appointed to represent Respondent. (R. p. 39, lines 10-18; R. p. 559). Respondent remained incarcerated in Georgia.

On September 30, 2011, Respondent was returned to South Carolina pursuant to the Interstate Agreement on Detainers [IAD]. On October 3, 2011, the State called Respondent's case for trial. Respondent moved for a continuance which was granted by the Honorable William P. Keesley in a written order signed October 18, 2011. (R. p. 559). In the order granting the continuance, Judge Keesley wrote, "There is no such motion for speedy trial now before the Court. Therefore, no part of this Order is intended to apply or address any matter of speedy trial. Likewise, this order is not intended to prejudice any future right the defendant may have to make such a motion." (R. p. 563). On January 9, 2012, the State again called the case for trial, this time before the Honorable R. Knox McMahon.

Prior to trial, Respondent moved to dismiss the charges based on the State's failure to bring the case to trial in a timely manner. (R. p. 10, lines 11 – p. 11, lines 1-13). Respondent specifically argued a violation of the right to a speedy trial pursuant to both the United States and South Carolina Constitutions. (R. pp. 21 – 26). Respondent acknowledged that the right to a speedy trial had not previously been formally asserted but correctly argued that this was merely a factor for the judge to consider under *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed2d 101 (1972). (R. p. 22, lines 8 – pp. 23 – 26, lines 1-18). Counsel for Respondent attributed the failure to assert the right to a speedy trial, in some degree, to the fact that Respondent's initial attorney, Lee Sturkey, was suspended from the practice of law prior to his death. Counsel stated, "Now, the position I simply take is his failure to assert his right, I think, is coupled with the fact that he was basically in a flux, did not have an attorney. I was not representing him until leading into the Barnes trial. I was - - didn't even know what his circumstances were until I was appointed some, I guess, eight years after his arrest, eight and a half years to him after his arrest." (R. p. 25, lines 3-11).

Counsel further argued that his motion for a continuance should not preclude assertion of Appellant's right to a speedy trial. Counsel stated:

> . . . as it relates to the issue of us requesting the continuance, my client got to South Carolina on September 30th of 2011. I had not had an opportunity to meet with him but on one prior occasion before he was moved back away from Augusta, back to some part of lower Georgia on the other side – well on the other side of Savannah and Dublin and had only met with him on one occasion. And I did request a continuance because I thought it was fundamentally unfair for me to proceed to trial having only met with him on that one occasion and that one occasion was actually regarding his consideration to testify for the State in the Barnes case.

(R. p. 32, lines 22 - p. 33, lines 1-10; p. 42, lines 13-20).

The trial judge denied the motion to dismiss. (R. pp. 44 – 49). The judge stated, "I think once you get past the – you look at the right to a speedy trial and you look at those factors under Barker versus Wingo, and there is some indication that there is somewhat of a presumed prejudice because of the length of delay, I find based on the totality of the circumstances here of what's been presented, that the defendant would not be prejudiced." (R. p. 48, lines 14-21). The judge went on to state, "I think given the fact that he was a sentenced prisoner in Georgia and that he was, for that length of time, that he would not have been released, that it was not unreasonable for the State to take the position that they wanted to try the one defendant that they sought the death penalty on in the case first and disposed of that case first." (R. p. 49, lines 6-12). At the close of the State's case, Respondent again moved for dismissal based on violation of the speedy trial right. (R. p. 455, lines 12-24). The judge again denied the motion. (R. p. 455, lines 25 – p. 456, line 1).

B. State Appellate Decisions

In the briefs filed in both the South Carolina Court of Appeals and the South Carolina Supreme Court Respondent specifically argued that the trial judge erred in refusing to dismiss the

indictment because Respondent's state and federal constitutional right to a speedy trial was denied when the State failed to call the case for trial until January 9, 2012, almost ten years after arrest and indictment. Prior to the South Carolina Supreme Court decision in *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012), S.C. Code §1-7-330 vested control of the criminal docket with the circuit solicitor. In *Langford* the South Carolina Supreme Court held that S.C. Code §1-7-330 violates the separation of powers principle embodied in Article 1, Section 8 of the South Carolina Constitution. During the ten year time frame between Respondent's arrest and trial, control of the criminal docket rested exclusively with the circuit solicitor. In reversing the conviction in *State v. Hunsberger*, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016) the South Carolina Supreme Court cited *Langford* extensively. In an unpublished opinion the South Carolina Supreme Court reversed Respondent's conviction, citing to the published opinion in his brother and co-defendant's case. App. 3. *State v. Hunsberger*, 418 S.C. 335, 794 S.E.2d 368 (2016).

REASONS FOR DENYING THE WRIT

The South Carolina Supreme Court, in finding a speedy trial violation, properly considered and balanced the *Barker* factors, including the fact that Respondent did not formerly assert the right to a speedy trial prior to trial in 2012. The *Barker* factors balance reached by the South Carolina Supreme Court does not warrant review by this Court. Respondent remained in pre-trial detention in South Carolina from the time of his arrest on January 25, 2002, until the time he was transferred for trial in Georgia on February 16, 2005, a period of over three years. Respondent remained incarcerated in Georgia after his conviction on September 12, 2006, until September 30, 2011, when he was finally returned to South Carolina for trial. The State of South Carolina did not seek extradition until August of 2011, five years after the Georgia conviction. Respondent's federal and state constitutional speedy trial rights were violated requiring dismissal of the indictment.

The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy ... trial." S.C. Const. art. I, § 14. In determining whether a defendant has been deprived of the right to a speedy trial, the Court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed2d 101 (1972). In *State v. Langford*, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012) the South Carolina Supreme Court wrote:

> The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy ... trial."

> S.C. Const. art. I, § 14. The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense. *State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

The speedy trial right "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, nevertheless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." United States v. MacDonald, 456 U.S. 1 (1982); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 155 (2007).

This Court should deny the petition for writ of certiorari because the South Carolina Supreme Court properly balanced the *Barker* factors in finding a speedy trial violation. Additionally, this Court should deny the petition for writ of certiorari because the South Carolina Supreme Court also relied on adequate and independent state constitutional grounds.

1. The South Carolina Supreme Court decision in this case is not in conflict with a decision of this Court. The court considered all of the facts presented, properly balanced the factors from *Barker v. Wingo* and found a speedy trial violation

Petitioner challenges the manner in which the South Carolina Supreme Court decided Respondent's case. The South Carolina Supreme Court, in an unpublished opinion, reversed Respondent's conviction citing to the published opinion in his brother and co-defendant's case without additional analysis. App. 3. *State v. Hunsberger*, 418 S.C. 335, 794 S.E.2d 368 (2016). Petitioner asserts that this is error because the court failed to afford individual consideration in Respondent's case. The facts of each case were presented to the state court, the *Barker* factors in each case considered and the South Carolina Supreme Court chose to issue one published opinion in the Alexander L. Hunsberger case and reference the published opinion rather than

write a second opinion in Respondent's case. Both cases involve the same set of facts, the same ten year delay between arrest and trial, the same reasons for the delay asserted by the State and the same prejudice analysis. The only difference between the two cases involves the assertion of the right to a speedy trial. In *Johnson v. Williams*, 133 S. Ct. 1088, 1095, 185 L. Ed. 2d 105 (2013) this Court wrote:

> While it is preferable for an appellate court in a criminal case to list all of the arguments that the court recognizes as having been properly presented, see R. Aldisert, Opinion Writing 95–96 (3d ed. 2012), federal courts have no authority to impose mandatory opinion-writing standards on state courts, see *Coleman v. Thompson,* 501 U.S. 722, 739, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) ("[W]e have no power to tell state courts how they must write their opinions").

There was no error in the manner in which the South Carolina Supreme Court decided the cases.

In the Alexander L. Hunsberger case the South Carolina Supreme Court found that, "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 analysis." *State v. Hunsberger*, 418 S.C. 335, 350, 794 S.E.2d 368, 375 (2016). Respondent did not assert his right to a speedy trial. Respondent, however, was effectively without counsel during the first three years after his arrest in January of 2002. There is nothing in the record to suggest that the court failed to consider Respondent's failure to assert in its *Barker* balance analysis. The fact that the court did not specifically address Respondent's failure to assert is not an indication that the court failed to consider that factor.

The South Carolina Supreme Court properly balanced the *Barker* factors in both cases and found speedy trial violations in both cases. In the published opinion the court wrote, "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**." State v. Hunsberger, 418 S.C. 335, 352, 794

S.E.2d 368, 377 (2016). Just as in the Alexander Hunsberger case, the court in Respondent's case considered the totality of the circumstance and found that Respondent's right to a speedy trial was violated, despite the fact that Respondent's failed to assert. The *Barker* factors balance reached by the South Carolina Supreme Court does not warrant review by this Court.

Petitioner is asking this Court to ignore the balancing analysis by the South Carolina Supreme Court and assign such weight to Respondent's failure to assert the speedy trial right so as to overcome the other *Barker* factors discussed in detail in the published opinion. In *Vermont v. Brillon*, 556 U.S. 81(2009), this Court wrote:

> *Barker* 's formulation "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," 407 U.S., at 530, 92 S.Ct. 2182, and the balance arrived at in close cases ordinarily would not prompt this Court's review. But the Vermont Supreme Court made a fundamental error in its application of *Barker* that calls for this Court's correction. The Vermont Supreme Court erred in attributing to the State delays caused by "the failure of several assigned counsel ... to move his case forward," 183 Vt., at 494, 955 A.2d, at 1122, and in failing adequately to take into account the role of Brillon's disruptive behavior in the overall balance.

In contrast, there is no fundamental error in this case. The balance arrived at by the South Carolina Supreme Court does not warrant review by this Court. Petitioner does not allege that the court improperly attributed delay to the State as found as fundamental error in *Vermont v. Brillon*. Instead, Petitioner argues that the South Carolina Supreme Court failed "to afford individual consideration to the allegation of violation of the right to a speedy trial" by issuing a published opinion in the Alexander Hunsberger case and an unpublished opinion in Respondent's case, citing the published opinion without additional analysis. Additional analysis was not needed. The court properly analyzed the *Barker* factors and addressed each in the published Alexander Hunsberger case. The court did not commit fundamental error in Respondent's case by referencing the analysis from the published opinion when three of the four

Barker factors: (1) length of delay; (2) the reason for the delay; and (3) prejudice to the defendant, were the same in both cases.

A. Respondent's failure to formally assert the speedy trial right should not weigh against him when he was effectively without counsel in South Carolina for at least three years.

The status of Respondent's appointed counsel during the first three years after his arrest and while he remained in pre-trial detention in South Carolina is in question. Documents from the Edgefield Clerk of Court's Office reflect that attorney O. Lee Sturkey was appointed to represent Respondent on January 29, 2002. (R. p.35, lines 7-9; R. p. 562). Attorney Sturkey was suspended from the practice of law in an opinion issued by the South Carolina Supreme Court on January 28, 2008. In re Sturkey, 657 S.E.2d 465 (2008). The In re Sturkey opinion from 2008 references a prior disciplinary sanction from 2000. The court wrote, "The sub-panel gave some consideration to respondent's heavy caseload and the systematic problems with the public defender system, but it found respondent still had the obligation to only accept as many cases as he could ethically handle. The sub-panel noted that, at a minimum, respondent should have adopted the case and office management systems introduced to him during his participation in LOMAP pursuant to his 2000 disciplinary sanction." In re Sturkey, 376 S.C. 286, 291, 657 S.E.2d 465, 467 (2008). The South Carolina Supreme Court noted that a sub-panel considered Attorney Sturkey's prior disciplinary history and failure to comply with the requirement that he change the way he ran his office an aggravating circumstance in the disciplinary proceeding. Attorney Sturkey was appointed to represent Respondent on January 29, 2002, after the 2000 disciplinary sanction but before the 2008 suspension noting his failure to correct problems with office management dating back to 2000. Attorney Sturkey died on December 24, 2010.

On May 3, 2004, Respondent wrote to Judge Keesley with concerns that he was unable to obtain access to his counselor and specifically referred to his co-defendant/brother's motion for a speedy trial. (R. p. 565). In the letter Respondent wrote, "To my understanding your Honor, in a Court Written order you informed my Brother Alexander Hunsberger that if this case is not prosecuted in the next court term, that my brother may move again for Bond. I am under the impression that this applies to myself as well, due to the fact that my brother and I are going to have a joint trial." Respondent and his brother were ultimately tried separately. Respondent's brother, Alexander Hunberger's case was called to trial on January 3, 2012. Respondent's case was called for trial on January 9, 2012.

In the May 3, 2004, letter to Judge Keesley, Respondent stated that he had not seen his lawyer and had been unable to make appropriate pre-trial motions. (R. p. 566). As a result of not having contact with his appointed counsel, Respondent asked the judge to appoint a second attorney.[1] (R .p. 566). On May 4, 2004, Respondent wrote a letter to the Edgefield County Clerk of Court advising that he has not seen his appointed counsel, Mr. Sturkey. (R. pp. 567-569). Respondent wrote, "Through my incarceration, I have been unable to discuss with any attorney to obtain material about my case. Which prevents me from being able to take the appropriate measures in my case." (R. p. 568). Respondent advised that Mr. Sturkey has failed to communicate with him and asks that Mr. Sturkey be relieved as counsel. (R. pp. 568-569). Respondent then wrote, "Mr. Dunn, I hereby put notice that the solicitors are suppose to take us to trial next court term. I need the Clerk of Court to take affirmative action as soon as possible." (R. p. 569).

[1] Respondent, acting *pro se*, incorrectly cited S.C.Code §16-3-26(B)(1) for the proposition that he was entitled to two appointed attorneys.

Judge Keesley responded to Respondent's letters to the judge and to the Clerk of Court in a document filed May 11, 2004. (R. pp. 570-571). Judge Keesley wrote, "You indicate in your letter to me that you want certain motions filed, but are unable to file them because your attorney has not communicated with you. It is true that we do not have hybrid representation in South Carolina, so almost every motion would have to be filed by your lawyer. However, there is an exception for requests to relieve counsel. If you want Mr. Sturkey relieved as your attorney, you may file a motion and request that a hearing be scheduled. By copy of this letter, I am instructing the Solicitor to get with Mr. Sturkey to allow you to appear before the first available judge in the circuit." (R. p. 571). It does not appear that Respondent was allowed to appear in front of a judge, as instructed by Judge Keesley.

On January 4, 2005, Respondent wrote another letter to the Edgefield County Clerk of Court again asking to relieve Mr. Sturkey as counsel because Respondent had never met his court appointed attorney in the three years since the time of his arrest on January 22, 2002. (R. pp. 572-573). It appears that this second motion to relieve Attorney Sturkey was not ruled on by the Court. In February of 2005, Respondent was transferred to Georgia to stand trial. The status of Respondent's representation in South Carolina remained in question. At some point in time, another public defender, Mr. Siegler, was appointed to represent Respondent for the South Carolina charge. (R. p. 39, lines 2-6). On May 18, 2010, Mr. Siegler moved to be relieved as counsel based on the fact that a conflict of interest existed as Mr. Seigler represented co-defendant Steven Barnes on another criminal matter unrelated to the murder of Sturrup. (R. p. 39, lines 6-9). Mr. Siegler's motion to be relieved was granted and on June 14, 2010, trial counsel, Randall D. Williams, was appointed to represent Respondent. (R. p. 39, lines 10-18; R. p. 559). Respondent remained incarcerated in Georgia.

Respondent was unable to assert his speedy trial rights because he was represented for three years by court appointed counsel who he never met. As noted by Judge Keesley in his response to Respondent's letter, as a represented party Respondent was precluded from filing a speedy trial motion on his own behalf. *See State v.* Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998). The fact that Respondent did not previously assert his right to a speedy trial, when Respondent was effectively without counsel from 2002 until at least 2005, should not weigh against Respondent. Critically, it was during this time frame when Respondent's brother and co-defendant asserted his right to a speedy trial.

In focusing on Respondent's failure to assert the right to a speedy trial, the South Carolina Court of Appeals overlooked the fact that Respondent Julio Hunsberger was effectively without counsel for the South Carolina charges from the time of his arrest in South Carolina on January 25, 2002, until June 14, 2010, when trial counsel, Randall D. Williams, was appointed to represent Respondent. (R. p. 39, lines 10-18). The South Carolina Court of Appeals wrote:

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

State v. Hunsberger, No. 2012-207290, 2014 WL 5772757, at *4 (S.C. Ct. App. Nov. 5, 2014). App. 43-44. Trial counsel quoted in the South Carolina Court of Appeals opinion was Randall D. Williams who was not appointed until June 14, 2010, more than eight years after Respondent's arrest and four years after the Georgia conviction. (See R. p. 25).

Respondent's failure to assert his right to a speedy trial prior to the 2012 trial should not weigh against Respondent when the State failed to provide Respondent, an indigent defendant charged with murder, with competent, conflict free legal counsel until June of 2010, eight years after his arrest. Respondent's failure to assert his right to a speedy trial prior to his January 2012 trial date should not weigh against him when he was effectively without legal representation for eight years after his arrest. It is reasonable to assume that if Respondent had been represented by competent counsel, he would have asserted his right to a speedy trial, as his brother and co-defendant, Alexander Hunsberger asserted his right to a speedy trial on November 17, 2004. *See State v. Hunsberger*, 418 S.C. 335, 352, 794 S.E.2d 368, 377 (2016). As noted by the South Carolina Court of Appeals in the unpublished opinion of State v. Alexander Hunsberger:

> 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 acknowleged 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.

State v. Hunsberger, No. 2012-206608, 2014 WL 5772563, at *1 (S.C. Ct. App. Nov. 5, 2014).

Respondent attempted to obtain competent, conflict free appointed counsel. It is reasonable to believe that if Respondent had been represented by competent counsel, a speedy trial motion would have been made. The lack of appointment of competent counsel for three years reflects a systemic break down in the public defender system. As noted by this Court, "The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic 'breakdown in the public defender system,' 955 A.2d, at 1111, could be charged to the State. Cf. *Polk County,* 454 U.S., at 324–325, 102 S.Ct. 445. But the Vermont Supreme Court made no determination, and nothing in the record suggests, that institutional problems caused any part of the delay in Brillon's case." *Vermont v. Brillon*, 556 U.S. 81(2009). The cause of the delay in the present case was the result of the State's refusal to call the case for trial and was properly weighed heavily against the State. The failure to assert the right to a speedy trial in the present case, when Respondent was represented for three years by an attorney he never met, was the result of a systemic break down in the public defender system. This factor should not weigh against Respondent. While the assertion of the right factor was considered neutral in the Alexander Hunsberger case, the factor could have been weighed against the State in Respondent's case.

B. Respondent's waiver of his right to be tried within 180 days pursuant to the Interstate Agreement on Detainers in October of 2011, nine years after arrest and indictment, should not weigh against Respondent.

Petitioner asserts that the South Carolina Supreme Court failed to consider the fact that Respondent "failed to force trial by demanding trial under the Interstate Agreement on Detainers." The South Carolina Supreme Court addressed extradition pursuant to the Interstate Agreement on Detainers [IAD] in calculating the length of the delay. In *Hunsberger* the court wrote:

> 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.

State v. Hunsberger, 418 S.C. 335, 346, 794 S.E.2d 368, 373 (2016). The fact that the court did not weigh the IAD factor against either Respondent or his co-defendant is not a fundamental error warranting review by this Court. Again, Petitioner is asking this Court to ignore the proper *Barker* balancing done by the South Carolina Supreme Court and conduct its own balancing test, weighing the IAD factor against Respondent. This Court should deny the petition for writ of certiorari.

C. Counsel's failure to move for a speedy trial in October of 2011, nine years after arrest and indictment should not weigh against Respondent.

When the State finally called the case for trial in October of 2011, Respondent did not move for a speedy trial and instead moved for a continuance. Petitioner alleges that the South Carolina Supreme Court erred in failing to consider counsel's statement expressing a strategy not to seek trial. The fact that the court did not specifically address counsel's purported strategy in not seeking a speedy trial, nine years after arrest and indictment, is not an indication that the court failed to consider the factor. As noted by the South Carolina Court of Appeals, "His counsel testified he did not think it was appropriate to file a speedy trial motion prior to that time because he did not know the State was going to try Hunsberger due to his life sentence in Georgia. Counsel testified, 'Sometimes that can be a dangerous proposition. You may get just what you ask for.'" State v. Hunsberger, No. 2012-207290, 2014 WL 5772757, at *4 (S.C. Ct. App. Nov.

5, 2014). App. 43-44. Trial counsel quoted in the South Carolina Court of Appeals opinion was Randall D. Williams who was not appointed until June 14, 2010, more than eight years after Respondent's arrest and four years after the Georgia conviction. (See R. p. 25).

Counsel Williams also argued that his motion for a continuance should not preclude assertion of Petitioner's right to a speedy trial. Trial counsel stated:

> . . . as it relates to the issue of us requesting the continuance, my client got to South Carolina on September 30th of 2011. I had not had an opportunity to meet with him but on one prior occasion before he was moved back away from Augusta, back to some part of lower Georgia on the other side – well on the other side of Savannah and Dublin and had only met with him on one occasion. And I did request a continuance because I thought it was fundamentally unfair for me to proceed to trial having only met with him on that one occasion and that one occasion was actually regarding his consideration to testify for the State in the Barnes case.

(R. p. 32, lines 22 - p. 33, lines 1-10; p. 42, lines 13-20).

The fact that the South Carolina Supreme Court did not weigh counsel's statement and motion for a continuance, both made in 2011, nine years after arrest and indictment, against him in its balancing test is not a fundamental error warranting review by this Court. Once again, Petitioner is asking this Court to weigh factors differently than the way in which the South Carolina Supreme Court weighed factors. The petition for writ of certiorari should be denied.

D. The South Carolina Supreme Court's decision is not a sanction.

As discussed above, the South Carolina Supreme Court properly considered all of the *Barker* factors and found a speedy trial violation. The only possible remedy for a speedy trial violation is dismissal. *Barker v. Wingo, Langford.* The state court's decision to issue a summary unpublished opinion in Respondent's case, citing the published opinion in the Alexander Hunsberger, is not a sanction or a rebuke. Instead, after properly finding speedy trial violations in both Hunsberger cases, the state court decided the manner in which to issue the opinions. Again,

this Court does not grant certiorari to advise state courts on how they should issue and write their opinions.

2. The South Carolina Supreme Court decided this case based on an adequate and independent state constitutional ground.

In addition to the speedy trial right found in the Sixth Amendment to the United States Constitution, the South Carolina Supreme Court also relied on the South Carolina Constitution. In State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016), the South Carolina Supreme Court wrote:

> 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)).

In *Coleman v. Thompson*, 501 U.S. 722 (1991) *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012), this Court wrote:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. See, *e.g., Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935); *Klinger v. Missouri,* 13 Wall. 257, 263, 20 L.Ed. 635 (1872). This rule applies whether the state law ground is substantive or procedural. See, *e.g., Fox Film, supra; Herndon v. Georgia,* 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. See *Herb v. Pitcairn,* 324 U.S. 117, 125–126, 65 S.Ct. 459, 462–464, 89 L.Ed. 789 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

This Court should not review the decision of the South Carolina Supreme Court in this case when a state constitutional ground supports the decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT

This 17th day of April, 2017.

No. 16-1126

In the Supreme Court of the United States

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

JULIO ANGELO HUNSBERGER,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief in Opposition to the Petition for Writ of Certiorari in the above referenced case has been served upon Melody J Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Mr. Julio Angelo Hunsberger, # 959417 at Baldwin State Prison, Post Office Box 218, Hardwick, GA 31034this 17th day of April, 2017.

Kathrine H. Hudgins,
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 17th day of April, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.