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May 22, 2017

RECEIVED

MAY 22 2017

S.C. SUPREME COURT

Honorable Scott S. Harris
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: The State of South Carolina v. Alexander L. Hunsberger

Dear Mr. Harris:

Enclosed is the Respondent's Certificate of Filing by Mail in the above-referenced case.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosure

cc: Melody J. Brown, Esquire
Honorable Daniel E. Shearouse, Clerk

IN THE

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA, Petitioner,

v.

ALEXANDER L. HUNSBERGER, Respondent.

RECEIVED

MAY 22 2017

S.C. SUPREME COURT


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

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on May 22, 2017, I filed the brief in opposition to the petition for writ of certiorari in the above-referenced case, together with a motion for leave to proceed in forma pauperis with accompanying order of appointment, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.


Susan B. Hackett
Counsel of Record

SUBSCRIBED AND SWORN TO before me
This 22nd day of May, 2017.


(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.



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May 22, 2017

Honorable Scott S. Harris
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: The State of South Carolina v. Alexander L. Hunsberger

Dear Mr. Harris:

Enclosed are the original and ten copies of the brief in opposition to the petition for writ of certiorari, and the motion for leave to proceed *in forma pauperis*, and an order of appointment of legal counsel for Alexander L. Hunsberger. The certificate of service is attached to the original petition. Representing the State of South Carolina is Melody J. Brown, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. I represent Respondent Alexander L. Hunsberger. If additional information is desired, please contact me.

Sincerely,

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosure

cc: Honorable Daniel E. Shearouse
Melody J. Brown, Esquire
Alexander L. Hunsberger

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Petitioner,

v.

ALEXANDER L. HUNSBERGER,

Respondent.

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Alexander L. Hunsberger, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

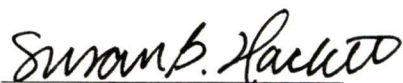
[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

South Carolina Supreme Court; South Carolina Court of Appeals; South Carolina Court of General Sessions for the Eleventh Circuit .

[] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Pursuant to Rule 39(1) a copy of the order appointing counsel in the original circuit court action is attached. Michael W. Chesser was appointed to represent Respondent on March 19, 2002. Appellate counsel was appointed to represent Respondent through the South Carolina Commission on Indigent Defense.

Respectfully submitted,



Susan B. Hackett

Attorney at Law

South Carolina Commission on Indigent Defense

Division of Appellate Defense

1330 Lady Street, Fourth Floor

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May 22, 2017

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Petitioner,

v.

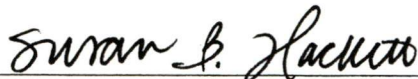
ALEXANDER L. HUNSBERGER,

Respondent.

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

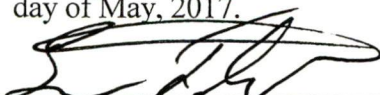
CERTIFICATE OF SERVICE

I certify that copies of the motion for leave to proceed in forma pauperis have been served upon opposing counsel, Melody J. Brown, at the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 22nd day of May, 2017.



Susan B. Hackett
Counsel of Record

SWORN TO BEFORE me this 22nd
day of May, 2017.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.



IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Petitioner,

v.

ALEXANDER L. HUNSBERGER,

Respondent.

*On Petition for Writ of Certiorari
to the Supreme Court of South Carolina*

BRIEF IN OPPOSITION

Susan Barber Hackett
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ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

- I. Whether the South Carolina Supreme Court correctly evaluated and weighed the facts in accordance with this Court's jurisprudence in this inherently fact-intensive matter concerning the right to a speedy trial.
 - A. Whether the South Carolina Supreme Court, in its evaluation of the first *Barker* factor, the reasons for the delay, properly weighed the prosecutor's explanation that one reason for the ten-year delay was the state's desire to try a co-defendant first.
 - B. Whether the South Carolina Supreme Court, in its evaluation of the third *Barker* factor, the accused's assertion of his right, properly weighed the specific fact presented of an individual not making continuous requests for a speedy trial after initial requests were ignored.
 - C. Whether the South Carolina Supreme Court, in its evaluation of the fourth *Barker* factor, prejudice, properly weighed the evidence and found presumptive and actual trial prejudice due to the state's ten-year delay in calling the case to trial.

- II. Whether this Court should deny certiorari because the South Carolina Supreme Court's opinion is supported by an adequate and independent state ground – the state constitution. In the alternative, whether this Court should deny certiorari because the issue presented included a claim that the state's conduct in delaying Respondent's trial for ten years violated the state constitution, which would require resolution on remand if this Court were to reverse under the federal constitution.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	
I. Factual Background	3
II. Procedural History	5
REASONS FOR DENYING CERTIORARI	
I. This Court should deny certiorari in this inherently fact-intensive matter because the South Carolina Supreme Court correctly evaluated and weighed the facts in accordance with this Court’s jurisprudence.....	11
A. In its evaluation of the first <i>Barker</i> factor, the reasons for the delay, the South Carolina Supreme Court properly weighed the prosecutor’s explanation that one reason for the ten-year delay was the state’s desire to try a co-defendant first.	13
B. In its evaluation of the third <i>Barker</i> factor, the accused’s assertion of his right, the South Carolina Supreme Court properly weighed an individual not making continuous request for a speedy trial after initial requests were ignored.	17
C. In its evaluation of the fourth <i>Barker</i> factor, prejudice, the South Carolina Supreme Court properly weighed the evidence and found presumptive and actual trial prejudice due to the state’s ten-year delay in calling the case to trial.	20
II. This Court should deny certiorari because the South Carolina Supreme Court’s opinion is supported by an adequate and independent state ground – the state constitution. In the alternative, the issue presented included a claim that the state’s conduct in delaying Respondent’s trial for ten years violated the state constitution, which would require resolution on remand if this Court were to reverse under the federal constitution.....	28
CONCLUSION.....	31

TABLE OF AUTHORITIES

Cases

<i>Abie State Bank v. Bryan</i> , 282 U.S. 765 (1931).....	30
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	passim
<i>Beavers v. Haubert</i> , 198 U.S. 77 (1905).....	11
<i>Bennett v. Stirling</i> , 842 F.3d 319 (4th Cir. 2016)	21
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991).....	29
<i>Dickey v. Florida</i> , 398 U.S. 30 (1970).....	26, 27
<i>Doggett v. United States</i> , 505 U.S. 647 (1992).....	passim
<i>Georgiadis v. Superintendent, Eastern Correctional Facility</i> , 450 F.Supp. 975 (S.D.N.Y.).....	12
<i>Jackson v. Ray</i> , 390 F.3d 1254 (10th Cir. 2004).....	12
<i>Jones v. Morris</i> , 590 F.2d 684 (7th Cir. 1979)	12
<i>Klopfer v. North Carolina</i> , 386 U.S. 213 (1967).....	11, 26
<i>Magnum Import Co. v. Coty</i> , 262 U.S. 159 (1923).....	17
<i>McNeely v. Blanas</i> , 336 F.3d 822 (9th Cir. 2003)	12
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	29, 30
<i>Minnesota v. National Tea Co.</i> , 309 U.S. 551 (1940)	30
<i>Moore v. Arizona</i> , 414 U.S. 25 (1973).....	22
<i>Morris v. Wyrick</i> , 516 F.2d 1387 (8th Cir. 1975)	12
<i>N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.</i> , 454 U.S. 170 (1981).....	27
<i>Rice v. Sioux City Memorial Park Cemetary</i> , 349 U.S. 70 (1955)	1, 17
<i>Ross v. Moffitt</i> , 417 U.S. 600 (1974).....	2
<i>Ruldolph v. United States</i> , 370 U.S. 269 (1962).....	27
<i>Smith v. Hooey</i> , 393 U.S. 374 (1969)	26
<i>Southern Power Co. v. North Carolina Public Service Co.</i> , 263 U.S. 508 (1924).....	27

<i>State v. Barnes</i> , 753 S.E.2d 545 (S.C. 2014)	4
<i>State v. Barnes</i> , 774 S.E.2d 454 (S.C. 2015)	4
<i>State v. Cooper</i> , 687 S.E.2d 62 (S.C. Ct. App. 2009).....	28
<i>State v. Hunsberger</i> , 2014 WL 5772757 (S.C. Ct. App. filed Nov. 5, 2014).....	5
<i>State v. Hunsberger</i> , 2016 WL 5930130 (S.C. Sup. Ct. filed Oct. 12, 2016).....	5
<i>State v. Hunsberger</i> , 794 S.E.2d 368 (S.C. 2016)	passim
<i>State v. Langford</i> , 735 S.E.2d 471 (S.C. 2012).....	1, 15, 16
<i>State v. Northcutt</i> , 641 S.E.2d 873 (S.C. 2007)	21
<i>State v. Pittman</i> , 647 S.E.2d 144 (S.C. 2008).....	28
<i>State v. Reaves</i> , 777 S.E.2d 213 (2015)	28
<i>State v. Waites</i> , 240 S.E.2d 651 (S.C. 1978).....	28
<i>United States v. Brown</i> , 169 F.3d 344 (6th Cir. 1999).....	12
<i>United States v. Ingram</i> , 446 F.3d 1332 (11th Cir. 2006)	12
<i>United States v. MacDonald</i> , 456 U.S. 1 (1982)	22
<i>United States v. Molina-Solorio</i> , 577 F.3d 300, 305 (5th Cir. 2009).....	23, 24
<i>United States v. Velazquez</i> , 749 F.3d 161 (3rd Cir. 2014).....	26
<i>Vermont v. Brillon</i> , 556 U.S. 81 (2009).....	1, 12
<i>Wheeler v. State</i> , 147 S.E.2d 627 (S.C. 1966)	28
Statutes	
28 U.S.C. § 1257.....	29
28 U.S.C. § 1257(a)	2, 28
S.C. Code Ann. § 1-7-330.....	1, 6, 15, 19
Constitutional Provisions	
S.C. Const. art. I, §14.....	2, 28
U.S. Const. amend. VI	11

Other Authorities

Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy From a Land Time Forgot*, 32 Am. J. Crim. L. 325 (Summer 2005)..... 17

Ed Pilkington, *The Business of Securing Death Sentences: 40 Years and 28 Men*, The Guardian, May 5, 201721

Kaye G. Hearn, *What Has the Docket Management Task Force Done for You Lately?*, SC Lawyer, January 2016.....15, 16

Phillip Bantz, *Better Late Than Never: Court Docket Panel Formed, South Carolina Lawyers Weekly*, Jan. 13, 2014.....16

Phillip Bantz, *Sound of Silence: Docket Control Committee Seeks Direction from Quiet Supreme Court*, South Carolina Lawyers Weekly, Sept. 28, 2015.....16

INTRODUCTION

This Court requires “compelling reasons” in order to grant a writ of certiorari. Sup. Ct. R. 10. In its petition, the state failed to establish any compelling reason to invoke this Court’s discretionary review. Respondent Alexander “Alex” Hunsberger respectfully requests this Court deny the petition for writ of certiorari.

The state, which maintains absolute control over the criminal dockets in South Carolina, refused to call this case to trial for *ten years* following arrest.¹ On appeal, the South Carolina Supreme Court held the state, using its state statutory authority to exercise unfettered discretion in the call of cases on the criminal docket, violated Alex’s right to a speedy trial by delaying his trial for a decade. *State v. Hunsberger*, 794 S.E.2d 368 (S.C. 2016); App. 2-36. This matter concerns the right to a speedy trial under the Sixth Amendment; therefore, *Barker v. Wingo*, 407 U.S. 514 (1972) controls the analysis. “*Barker*’s formulation ‘necessarily compels courts to approach speedy trial cases on an ad hoc basis,’ and the balance arrived at in close cases ordinarily [will] not prompt this Court’s review.” *Vermont v. Brillon*, 556 U.S. 81, 91 (2009)(internal citation omitted).

¹ The criminal dockets in South Carolina are the arena of prosecutorial dominion, as a state statute places complete authority over the call of criminal cases in the hands of prosecutors. S.C. Code Ann. § 1-7-330. After Alex’s trial, the South Carolina Supreme Court struck down the state statute as violative of the separation of powers doctrine. *State v. Langford*, 735 S.E.2d 471 (S.C. 2012). Despite the ruling, the prosecutors in South Carolina continue to determine which cases are called and when while the stakeholders work on how to implement the *Langford* decision. However, in light of *Langford*, Respondent agrees with a point made by Petitioner that a ten-year delay in calling a case to trial, like what happened in Alex’s case, is unlikely to occur again as soon as judges administer the criminal dockets. See Pet. at 18, n. 7. Therefore, the *Langford* decision serves as yet another reason this Court should deny review. See *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73 (1955)(dismissing a writ as improvidently granted where a statute enacted after the commencement of the litigation “bar[red] the ultimate question presented in this case from again arising in that state” rendering the case of “isolated significance”).

Although the state couched its argument for review in language suggesting the state supreme court decided an important federal question in a way that conflicts with a relevant decision of this Court, the thrust of the state's complaint was that the state supreme court's decision required "correction" due to purportedly erroneous "legal analysis." Pet. at 1. Therefore, the matter is not worthy of review by this Court. See Sup. Ct. R. 10 (stating "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); see also *Ross v. Moffitt*, 417 U.S. 600, 617 (1974) ("This Court's review is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). At any rate, no error, and certainly no "fundamental error" as claimed by the state, exists for this Court to review. The state supreme court properly identified the controlling case law and balanced the *Barker* factors in order to reach its conclusion that the state violated Alex's right to a speedy trial.

Additionally, an adequate and independent state ground exists to support the state supreme court's decision. In its opinion, the state court recognized the issue before it implicated not only the federal constitution's speedy trial provision, but it also concerned the state constitution's right to a speedy trial. See S.C. Const. art. I, §14 ("Any person charged with an offense shall enjoy the right to a speedy and public trial"). In light of this Court's jurisdictional limitation to federal issues, this Court should not review the decision of the South Carolina Supreme Court in this case when state constitutional grounds support the decision. See 28 U.S.C. § 1257(a).

The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On Labor Day weekend of 2001, Richard Cave, Antonio Griffin, Charlene Thatcher, Samuel Sturup, and Steven Barnes were at a house in Augusta, Georgia. R. 73, line 5 – R. 74, line 2; R. 75, lines 7-10; R. 125, lines 8-24; R. 126, lines 6-19; R. 128, lines 1-25; R. 160, lines 3-10; R. 160, lines 19-25. Barnes argued and fought with Sturup and Thatcher. R. 74, line 18 – R. 75, line 6; R. 76 line 16 – R. 77, line 9; R. 161, lines 1-24. Cave, Griffin, and Thatcher claimed that Alex and his brother, Julio Hunsberger, arrived later at the house in Augusta. R. 79, lines 12-14; R. 132, lines 8-12; R. 162, lines 14-16.² According to Thatcher, Barnes instructed Sturup to get into the trunk of the Hunsbergers' car. R. 163, lines 7-22; *see also* R. 86, lines 9-13; R. 135, lines 11-24; R. 164, line 7 – R. 165, line 9. Cave, Griffin, Barnes, Julio, Alex, and Thatcher got into cars and drove to a field just over the state line in South Carolina. R. 82, lines 1-8; R. 82, line 24 – R. 83, line 1; R. 85, lines 15-18; R. 133, lines 2-6. All seven walked to a wooded area.³ There, Barnes instructed each person to shoot Sturup. R. 86, lines 17-25; R. 88, line 18 – R. 89, line 1.⁴ Here, the stories diverged.

Cave claimed that Thatcher shot Sturup first, and then he, Cave, shot Sturup. R. 89, lines 3-12. He and Thatcher then walked away. Cave heard four more shots, but did not see the shooter. R. 89, lines 15-20. According to Griffin, Thatcher resisted shooting Sturup causing Barnes to

² Antonio Griffin could not remember everything he said to police ten years earlier on January 23, 2002, and his testimony at Alex's trial differed from his statement to police regarding which of the Hunsbergers he observed do what. R. 143, line 19 – R. 144, line 24.

³ Per Griffin, Steven Barnes instructed everyone to exit the cars at gunpoint. R. 135, lines 9-11.

⁴ Initially, Charlene Thatcher denied that Barnes threatened everyone present that if they did not shoot Sturup, then he would shoot the resisters. R. 181, lines 4-7; R. 181, lines 21-23; R. 184, lines 10-24. However, when she was confronted with her contradictory statements, she agreed Barnes threatened everyone. R. 185, line 8 –R. 186, line 17.

threaten to shoot her if she continued to disobey him. After Thatcher shot Sturrup, one of the Hunsbergers grabbed the gun from her and shot Sturrup. Someone then thrust the gun at Griffin, who “shot at the ground.” Cave got the gun next, but Barnes instructed them to go to the car. While walking across the field, Griffin heard another shot. R. 138, line 25 –R. 138, line 13. Thatcher testified that she shot Sturrup first in the stomach, and then Barnes shot Sturrup in the head. She “freaked out and got crazy” and did not remember anything else. R. 165, lines 11-19.

Not only did Cave, Griffin, and Thatcher testify against Alex in the 2012 murder trial in South Carolina, but they also testified against Alex in 2006 when Alex was tried in Georgia for the kidnapping of Sturrup that occurred there. R. 97, lines 14-16; R. 143, line 25 – R. 146, line 11.⁵ Additionally, all three testified against Barnes during his capital murder trial in South Carolina in 2010. R. 97, lines 14-16; R. 183, lines 16-18; R. 185, lines 8-10; *State v. Barnes*, 753 S.E.2d 545, 547 (S.C. 2014).⁶

⁵ Richard Cave admitted that his testimony during the 2006 and 2010 trials was different from his testimony in 2012 in at least one respect – whether any one conversed after the shooting. R. 98, line 11 – R. 100, line 19; R. 112, lines 12-23.

⁶ The state charged Barnes with capital murder for his role in Sturrup’s death. *State v. Barnes*, 753 S.E.2d 545, 546 (S.C. 2014). In 2010, he was found guilty and sentenced to death. *Id.* On appeal, the South Carolina Supreme Court determined the trial judge applied the incorrect competency standard in denying his request for self-representation. *Id.* at 547. When the state indicated its plan to retry Barnes and seek the death penalty again, Barnes sought the appointment of counsel. *State v. Barnes*, 774 S.E.2d 454, 455 (S.C. 2015). At the hearing for the appointment of counsel, the state argued that by seeking counsel at his second trial, Barnes conceded that his prior conviction was constitutionally obtained. *Id.* The state sought reinstatement of the original conviction and death sentence. *Id.* The South Carolina Supreme Court rejected the state’s position “that the erroneous denial of a defendant’s Sixth Amendment right to self-representation at the first proceeding results in that defendant having a diminished Sixth Amendment right in a second trial.” *Id.* at 457. The court refused the state’s invitation “to punish the defendant whose constitutional rights have been violated,” finding such to be “a concept that is contrary to both justice and common sense.” *Id.* at 457-458. According to the Edgefield County Clerk of Court records, counsel has been appointed to represent Barnes and he is waiting for his case to be called to trial.

Cave pled guilty to aggravated assault in Georgia for his part in the crimes committed against Sturup. R. 95, lines 16-20. He received a sentence of eighteen years' imprisonment. R. 95, lines 24-25. At the time of Alex's trial, which was ten years after Sturup's death, Cave claimed he faced "potential charges" in South Carolina. R. 2, lines 19-23; R. 96, lines 1-5. The Edgefield County Clerk of Court records revealed Cave was never charged or prosecuted in South Carolina for his involvement in Sturup's death.

Years before Alex's trial in South Carolina, Griffin pled guilty to assault in Georgia and received an eighteen year sentence for his involvement in the beating of Sturup. Griffin claimed, at the state's prompting, there were "potential charges for the events that occurred related to the murder." R. 143, lines 1-11. A review of the Edgefield County Clerk of Court records revealed Griffin was not charged or prosecuted in South Carolina for any crimes related to Sturup's death.

Thatcher also pled guilty to aggravated assault in relation to beating Sturup in Georgia. She claimed she faced "potential charges" for her conduct in South Carolina. R. 168, lines 1-6; R. 179, lines 2-6. Again, the Edgefield County Clerk of Court records revealed that Thatcher was never charged or prosecuted in South Carolina for her crimes in connection with Sturup's death.⁷

II. PROCEDURAL HISTORY

On January 25, 2002, the police arrested Alex, charging him with the September 3, 2001, murder of Sturup. R. 2, lines 10-15; R. 7, lines 14-15; R. 8, line 3; R. 29, lines 22-23; R. 232; App. 7. Thereafter, the Edgefield County grand jury indicted him for murder on March 25, 2002. R. 7, lines 9-14; R. 232; App. 7.

⁷ The state called Alex's brother, Julio, to trial separately on January 9, 2012. *State v. Hunsberger*, 2016 WL 5930130 (S.C. Sup. Ct. filed Oct. 12, 2016). After the jury found Julio guilty, the judge sentenced him to life imprisonment without the possibility for parole. *State v. Hunsberger*, 2014 WL 5772757 (S.C. Ct. App. filed Nov. 5, 2014). On appeal, the South Carolina Supreme Court held the state violated Julio's right to a speedy trial as well. *State v. Hunsberger*, 2016 WL 5930130 (S.C. Sup. Ct. filed Oct. 12, 2016).

On June 14, 2002, Alex was denied bail. Subsequently, a bond hearing was held on April 29, 2004. The judge denied bail again; however, he provided that if the state failed to try Alex during the next term of court, then Alex could renew his motion. On November 17, 2004, Alex filed a motion to dismiss the charges against him based upon the state's failure to give him a speedy trial under the state and federal constitutions. R. 8, lines 4-16; R. 222; App. 7. Alternatively, Alex requested a bond. R. 8, lines 4-16; R. 222. The judge heard arguments on the motion in December 2004. R. 8, lines 4-16; R. 222.

By order filed December 3, 2004, the judge denied the motions. Nevertheless, he remarked: "[T]he court is deeply concerned about the length of time that has transpired without bringing [Alex] to trial." The judge found "[t]hree years in jail awaiting trial on this charge is clearly bordering on excessive." As a result, the judge offered to establish a special term of court to resolve the case "during February." The judge provided that Alex could renew his motions if the case were not tried in February 2005. R. 8, lines 4-16; R. 224; App. 7. Importantly, the judge could not order the case to be tried in light of the state statute placing the "[p]reparation of the dockets" for criminal courts "exclusively" in the hands of the prosecution. S.C. Code Ann. § 1-7-330.

The order recognized that Alex's criminal charge involved multiple co-defendants and jurisdictions and the possibility that South Carolina could seek the death penalty. Despite these same challenges, Georgia "ha[d] disposed of the cases involving the co-defendants over a year ago." Additionally, the "court ha[d] 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." 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." R. 224; App. 7.

Thereafter, Alex renewed his motion for dismissal of the charge based upon the state's failure to give him a speedy trial under the state and federal constitutions. By order filed January 28, 2005, the judge denied the motion to dismiss, but granted Alex a personal recognizance bond in the amount of \$50,000. His order noted that Alex would be released to Georgia due to the hold placed on him. According to the order, the prosecution informed the court that it would not "take advantage of the offer to create a special term" of court and had no intention of trying the case in February 2005. R. 8, lines 16-21; R. 226; App. 7.

The state agreed to release custody of Alex to the State of Georgia. R. 8, line 22 – R. 9, line 20; R. 23, line 25 – R. 24, line 2; R. 30, lines 13-16. On September 12, 2006, Alex was convicted in Georgia for kidnapping Sturup, and sentenced to life imprisonment. R. 9, lines 21-22; R. 23, lines 17-24; App. 8.

At some point, the South Carolina prosecutor learned that although Alex received a life sentence in Georgia, he was eligible for parole after service of a term of years. R. 3, line 24 – R. 4, line 4 (Prosecutor informed the judge that he received conflicting information from the Georgia authorities, but believed Alex would be eligible for parole); R. 15, line 16 – R. 18, line 15. After Alex was tried and convicted in Georgia in 2006, the first attempt by the prosecutor to extradite him to South Carolina was "in the first part of 2011" following Barnes' conviction in November of 2010. R. 25, lines 21-23. In January 2012, the prosecutor claimed that South Carolina was unable to pick up Alex from Georgia in order to try him during the previous term of court, October of 2011. R. 25, line 25 – R. 26, line 9.

When the prosecutor was preparing the case against Barnes for trial, he sought Alex's cooperation, asking Alex to testify against Barnes. Alex declined. According to the prosecutor, the elected Solicitor, Donald Myers, "did not know whether or not he would notice" Alex for death.

Ultimately, Myers elected not to seek Alex's death, and instructed the prosecutor to proceed against Alex on the outstanding murder charge. R. 4, lines 14-25; R. 25, lines 3-17; R. 29, lines 15-19.

The state called the case for trial on January 3, 2012. R. 1; App. 8. Immediately prior to the start of Alex's trial, Alex filed a written motion to dismiss the charge against him based upon the state's violation of his right to a speedy trial under the state and federal constitutions. Alex explained that the state set his trial a decade after his arrest. Alex argued the state's significant delay in calling his case for trial resulted in presumptive prejudice. R. 11, line 17 – R. 15, line 15; R. 19, lines 12-24; R. 228-231; App. 8. Nevertheless, Alex provided at least one example of prejudice - during the capital trial of Barnes, Cave testified that his testimony was partly the result of what he actually remembered and partly what he read in transcripts and statements. R. 19, line 24 – R. 20, line 18; R. 228-231.

The prosecutor countered that “[a]t the outset of this case, Solicitor Myers did determine that he intended to seek the death penalty against Mr. Barnes. Up until the time that Mr. Barnes was convicted in November of 2010, Solicitor Myers was not sure whether or not he intended to seek the death penalty against [Alex] or not. He delayed that decision until after Steven Louis Barnes' trial was finished and he was sentenced to death as to whether or not he was going to notice [Alex].” R. 23, lines 3-16. When the judge asked the prosecutor to explain why the case was not called for ten years, the prosecutor explained the prosecution “intended to proceed against Steven Louis Barnes first.” R. 30, lines 6-12.

The prosecutor also argued that Alex “knew this charge was outstanding against him in South Carolina” and that he could not “assert his right once or twice and then rest on his laurels and do nothing.” R. 24, lines 12-20. According to the prosecutor, Alex did nothing in seven years, since 2005, “other than attempt to delay coming back here and being tried through his contesting

extradition and not wanting us to proceed at the last term of court.” R. 24, lines 21-25; R. 27, lines 6-11. The prosecutor opined Alex was required to make “some continual effort” to assert his constitutional rights. R. 31, lines 2-10.

The prosecutor further argued that the delay was to Alex’s benefit. He “felt like [Alex] should ... have the same opportunity to cooperate that the other codefendants in this case received.” R. 26, lines 10-16; R. 26, line 24 – R. 28, line 10. The prosecutor claimed “it was the intent of the State at all times to proceed against [Alex], but [he] was over in Georgia serving a life sentence.” R. 27, lines 3-6; R. 38, lines 18-23. He claimed “there was certainly no malice in any decision on the State to delay the prosecution.... It was my hope that they would testify against Mr. Barnes. I felt like they should receive the same opportunity as the other codefendants.” R. 29, lines 10-15; R. 31, lines 10-12.

The prosecutor claimed Alex contested extradition, but he provided no evidence to support this assertion. R. 25, lines 23-24. On this issue, the only evidence presented from either side was the testimony of Alex. In September 2011, Alex’s prison counselor in Georgia presented him with a form explaining that if he signed the form, he would be consenting to extradition to South Carolina. If he chose not to sign the form, then he would have twenty days to file a writ of habeas corpus to contest extradition. Alex did not sign the form, explaining he wanted to speak with his attorney to determine any impact upon his appeal from his conviction for kidnapping, which was pending in Georgia. Alex did not file any paperwork or make any motions to contest extradition. Alex testified unequivocally that he was willing to go to South Carolina. R. 35, line 6 – R. 38, line 9.

According to the trial judge, this was the first case he had where ten years had passed between the arrest and trial. R. 39, lines 6-9. The judge characterized the case as follows: “what I heard from the solicitor is that they wanted to first do the capital trial and that they delayed this case

to do the capital trial and it was their hope and desire that [Alex] would testify in that case.” R. 48, lines 15-19. Nevertheless, the trial judge denied Alex’s motion.

Alex renewed his motion to dismiss at the close of the state’s case. Alex argued that the changes in the testimony of the witnesses, which had been demonstrated through cross-examination, provided an example of the prejudice Alex suffered. Alex pointed to the poor memories of Griffin and Thatcher due to the passage of time. Concerning the prejudice factor, Alex indicated the delay was “so substantial and was due entirely to prosecutorial discretion” and therefore, Alex had no burden to show specific prejudice. Alex also reminded the court that prejudice was only one factor for consideration. R. 194, line 22 – R. 195, line 25.

The judge again denied the motion. He was persuaded that “given the number of trials and different proceedings that were taking place both here and in the state of Georgia involving these defendants and others ... it’s something that is inherent after sorting out that process.” The judge remarked that Alex had not “been deprived his liberty because he’s incarcerated under another sentence.” He found no prejudice to Alex. R. 196, line 9 – R. 197, line 13.

The jury found Alex guilty of murder, and the judge sentenced him to thirty-three years’ imprisonment. R. 198, lines 9-12; R. 220, line 25 – R. 220, line 2; R. 234. The South Carolina Court of Appeals affirmed in an unpublished opinion on November 5, 2014. *State v. Hunsberger*, 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014); App. 75-87. On May 20, 2015, the state supreme court granted review. Following oral arguments on December 2, 2015, the South Carolina Supreme Court issued its opinion on October 12, 2016, finding the state violated Alex’s right to a speedy trial. *State v. Hunsberger*, 794 S.E.2d 368 (S.C. 2016); App. 2-36. On November 10, 2016, the state filed a petition for rehearing. App. 37-72. The court denied the petition. App. 73-74. On March 16, 2017, the state filed its petition for writ of certiorari in this Court.

REASONS FOR DENYING CERTIORARI

In finding a speedy trial violation, the South Carolina Supreme Court properly identified the controlling law from this Court, made the relevant factual findings for this inherently fact-bound issue, and correctly balanced the *Barker* factors. Additionally, the South Carolina Supreme Court considered the relevant state constitutional provision guaranteeing the right to a speedy trial. Review by this Court is unnecessary and unwarranted.

I. **This Court should deny certiorari in this inherently fact-intensive matter involving a violation of the right to a speedy trial because the South Carolina Supreme Court correctly evaluated and weighed the facts in accordance with this Court's jurisprudence.**

The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy trial.” U.S. Const. amend. VI; *see also Klopfer v. North Carolina*, 386 U.S. 213 (1967). “[U]nreasonable 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.” *Doggett v. United States*, 505 U.S. 647, 654 (1992). If a court concludes a defendant’s right to a speedy trial has been violated, dismissal of the charges “is the only possible remedy.” *Barker v. Wingo*, 407 U.S. 514, 522 (1972).⁸

“The right to a speedy trial is necessarily relative. It is consistent with delays and depends upon the circumstances.” *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). Therefore, this Court explained, the appropriate analysis for a speedy trial claim is “a balancing test, in which the conduct

⁸ Throughout its petition, the state mischaracterized the relief afforded Alex by stating he was granted immunity by the state supreme court. *See e.g.*, Pet. at 1, 5. Rather, the South Carolina Supreme Court dismissed the charge because the state violated Alex’s constitutional right to a speedy trial, which is the remedy fashioned by this Court for such a violation.

of both the prosecution and defendant are weighed.” *Barker*, 407 U.S. at 529. The *Barker* Court “identif[ied] *some* of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.” *Id.* at 530 (emphasis added). Those four factors are (1) the length of the delay, (2) the reason for the delay, (3) the defendant’s assertion of his right, and (4) the prejudice to the defendant. *Id.*; *see also Doggett*, 505 U.S. at 651-652; *Vermont v. Brillon*, 556 U.S. 81 (2009). However, “*none* of the four factors identified [are] a *necessary* or sufficient condition to the finding of a deprivation of the right to a speedy trial.” *Barker*, 407 U.S. at 533 (emphasis added).⁹

Different reasons for the presumptively prejudicial delay are afforded different weights.¹⁰ On the far end of the spectrum is a deliberate delay by the prosecution to impede the defendant’s ability to defend himself. A prosecutor acts improperly if he intentionally delays a trial to gain some tactical advantage over a defendant or to harass a defendant. *Barker*, 407 U.S. at 531, n.32. Such a reason must be weighted heavily against the prosecution. Even neutral reasons weigh against the state because “the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Barker*, 407 U.S. at 531. As this Court wrote in *Doggett*:

⁹ In its petition for writ of certiorari, the state failed to challenge whether the length of the delay triggered a speedy trial analysis. In the state supreme court, the state conceded the length of the delay in this case was “unusual” and presumptively prejudicial. BOR at 14-15.

¹⁰ The burden is on the government to provide an acceptable rationale for the delay. *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004)(explaining that the “Supreme Court places the burden on the state to provide an inculpable explanation for delays in speedy trial claims”); *see also United States v. Ingram*, 446 F.3d 1332, 1337 (11th Cir. 2006); *McNeely v. Blanas*, 336 F.3d 822, 827 (9th Cir. 2003); *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999); *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999); *Jones v. Morris*, 590 F.2d 684, 686 (7th Cir. 1979); *Morris v. Wyrick*, 516 F.2d 1387, 1390 (8th Cir. 1975); *Georgiadis v. Superintendent, Eastern Correctional Facility*, 450 F.Supp. 975, 980 (S.D.N.Y.), *aff’d*, 591 F.2d 1330 (2nd Cir. 1978).

Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned to a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

505 U.S. at 657.

In the instant case, the South Carolina Supreme Court identified the applicable law and properly applied the law to the facts presented. *Hunsberger*, 794 S.E.2d at 343 (quoting the *Barker* factors). In its petition, the state admitted the court identified the correct law, but complained that the court misapplied the law. According to the state, “[t]he state court’s legal conclusions drawn from facts of record inexplicably depart from *fair* consideration under the *Barker* factors.” Pet. at 5 (emphasis added). More specifically, the state complained of *how* the state supreme court weighed two facts: (1) the prosecution’s attempt to secure Alex’s testimony against Barnes, and (2) Alex not requesting a speedy trial *after* he was released upon the state’s consent to Georgia and imprisoned there. Contrary to the state’s assertions, the state supreme court properly weighed these two facts in this necessarily fact-intensive inquiry.

A. In its evaluation of the first *Barker* factor, the reasons for the delay, the South Carolina Supreme Court properly weighed the prosecutor’s explanation that one reason for the ten-year delay was the state’s desire to try a co-defendant first.

In the state court, the prosecution argued the delay in Alex’s trial was because the prosecution was “collecting witnesses.” *Hunsberger*, 794 S.E.2d at 374; App. 13. The South Carolina Supreme Court agreed that collecting witnesses “can be a legitimate reason for delay.” *Id.*

However, the court explained the prosecution presented no evidence that it was looking for additional witnesses in Alex's case and the trial judge did not make such a finding. *Id.* According to the state court, "the state [sought] to distort this otherwise legitimate reason by applying it not to a witness, but instead to the defendant." *Id.* "The state admitted it delayed trying Alex in hopes he would agree to be a witness against Barnes in Barnes' South Carolina capital trial." *Id.* The court went on to explain that the state's "characterization of Alex as a witness needing to be 'collected,' or 'missing' suggest[ed] its true reason for delay was its hope that Alex would be coerced by the delay in his trial into testifying against Barnes." *Id.* at 374-375.

After making these factual observations, the court held that "under the circumstances present here," the state's "desire to have Alex testify against Barnes in South Carolina did not" "justify the delay in Alex's trial." *Id.* at 375; App. 14. Relying upon *Doggett*, 505 U.S. at 657, the court held the state's placement of "a higher priority on strengthening its case against Barnes than on bringing Alex's case to trial" could not "alone, justify the delay of Alex's trial." *Hunsberger*, 794 S.E.2d at 375; App. 14. As explained by the court, any desire to present the strongest case against Barnes failed to justify the delay in prosecuting Alex "when the three other eyewitnesses who had pled guilty to the Georgia charges in 2003 were available and willing to testify against him." *Id.*

After examining each of the reasons offered by the state for the delay – complexity of the case, problems involved in cross border prosecutions, collecting witnesses, and deciding whether to seek the death penalty against Alex – the court determined "the justifications advanced by the state for its delay [were] unsupported by the evidence," suggesting that the state "was using this murder charge as leverage to coerce Alex's testimony Barnes' capital trial." *Id.*; App. 15. After making

this determination, the court determined the “reasons for the delay” factor weighed “heavily against the state.” *Id.*

Despite the court considering every reason offered by the state to justify the lengthy delay and offering ample reasoning to justify its conclusions, the state mischaracterized the court’s decision to weigh this factor heavily against the state as “intended to rebuke the prosecution for its prosecution plan.” Pet. at 17-18. The state even suggested that the state court’s weighing of this factor heavily against the state was the equivalent of dismissing “a serious criminal charge as an expression of disapproval for the state’s decision in order of prosecution.” Pet. at 18. The well-reasoned and exhaustive opinion of the South Carolina Supreme Court refutes the state’s characterization. The state’s real grievance appears to be that the remedy for a violation of a speedy trial violation is dismissal of the charges. Pet. at 16 (The Sixth Amendment “is not a right to dismissal to be held and used at an opportune time”); Pet. at 17 (“Dismissal of the criminal charge is contrary to the ends of justice in seeking redress for the crime discharged”). It has long been the rule that “the *only possible* remedy” for violation of a defendant’s right to a speedy trial was dismissal of the charges. *Barker*, 407 U.S. at 522 (emphasis added). The state was well aware of the remedy when it refused to call Alex’s case to trial for a decade. Essentially, the state assumed the risk that the murder charge would be dismissed by its negligent and ill-intentioned behavior.

Any discussion of the right to a speedy trial in South Carolina, particularly a discussion of the reasons for the delay in calling a case to trial, necessitates consideration of how the criminal justice system works in South Carolina. The Circuit Solicitor (the prosecutor) exercises absolute and unfettered control over the criminal docket pursuant to state statute in the state. S.C. Code Ann. § 1-7-330. In *State v. Langford*, 735 S.E.2d 471, 475 (S.C. 2012), the South Carolina Supreme Court held the statute violated the state constitution’s separation of powers principle.

In conjunction with the opinion, the court issued two administrative orders entitled “Disposition of Cases in General Sessions” and “Uniform Differentiated Case Management.” However, the court subsequently held the orders in abeyance and established a committee to develop a plan to implement the changes necessary in light of its decision in *Langford*. Kaye G. Hearn, *What Has the Docket Management Task Force Done for You Lately?*, SC Lawyer, January 2016, at 21, 25. Despite diligent effort by the committee members, South Carolina has not implemented a statewide system of judicial control. *Id.*

The committee officially¹¹ formed in January 2014. Phillip Bantz, *Better Late Than Never: Court Docket Panel Formed*, *South Carolina Lawyers Weekly*, Jan. 13, 2014, at 7. In 2015, committee members drafted various proposals to comply with Langford’s directive of judge-control of the docket. Phillip Bantz, *Sound of Silence: Docket Control Committee Seeks Direction from Quiet Supreme Court*, *South Carolina Lawyers Weekly*, Sept. 28, 2015, at 1. Those proposals remain under review. *Id.* at 1, 7. Therefore, solicitors remain in control of the criminal docket in South Carolina.

According to the state, “this particular situation,” whereby a prosecutor fails to call a case to trial for ten years could not occur again because the state supreme court “struck down the state statute that allowed the solicitor discretion in calling non-capital cases.” Pet. 18, n.7 (citing *Langford, supra*). Respondent agrees with Petitioner that when the solicitors are no longer in control of the criminal docket in South Carolina, a ten-year delay in calling a case to trial is unlikely to happen again. However, that day has not arrived. Nevertheless, in light of the ruling

¹¹ The committee created in 2014 consisted of public defenders and criminal defense attorneys from the private bar, in addition to judges, prosecutor, clerks of court, and administrative staffers. Phillip Bantz, *Better Late Than Never: Court Docket Panel Formed*, *South Carolina Lawyers Weekly*, Jan. 13, 2014, at 7. This composition was in response to revelations that the Chief Justice “had been quietly meeting with solicitors to talk about docket control.” *Id.*

in *Langford* and the shared optimism of the prosecution, state courts, and the defense bar, the state's point regarding the *unlikelihood* of "this particular situation" occurring again provides additional support for denying certiorari review in this case. *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 73 (1955)(dismissing a writ as improvidently granted where a statute enacted after the commencement of the litigation "bar[red] the ultimate question presented in this case from again arising in that state" rendering the case of "isolated significance"). This Court's review is limited to cases that "reach a problem beyond the academic or the episodic." *Id.* at 74. The purpose of review in this Court is not "merely to give the defeated party ... another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

Review is unwarranted in this case because in finding a speedy trial violation, the South Carolina Supreme Court properly identified the controlling law, made the necessary factual findings, and arrived at the correct balance of the *Barker* factors. The matters about which Petitioner complains are alleged errors in the factual findings or the misapplication of a properly stated rule or law, which this Court rarely considers. *See* Sup. Ct. R. 10; *Brillon, supra*; *Ross, supra*. Further, review by this Court would necessarily involve wadding into the quagmire of state law involving prosecutorial control of the criminal docket, a system unique to South Carolina. *See* Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy From a Land Time Forgot*, 32 Am. J. Crim. L. 325, 327 (Summer 2005).

B. In its evaluation of the third *Barker* factor, the accused's assertion of his right, the South Carolina Supreme Court properly weighed the specific fact presented of an individual not making continuous requests for a speedy trial after initial requests were ignored.

In determining the proper weight to be assessed when examining an accused's assertion of the right to a speedy trial, the state supreme court relied heavily upon the guidance provided by this Court. *Hunsberger*, 794 S.E.2d at 375. The state court noted that whether a defendant previously

asserted his right to a speedy trial “is not alone dispositive of whether he is entitled to relief.” *Id.* (citing *Barker*, 407 U.S. at 533). Further, the court explained that the “accused’s assertion of the right, however, is entitled to strong evidentiary weight in determining whether the accused is being deprived of the right.” *Id.* (citing *Barker*, 407 U.S. at 531-532). Additionally, the court acknowledged that “[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.” *Id.* (citing *Barker*, 407 U.S. at 532).

Thereafter, the state court found that “[i]t was undisputed that Alex moved for a speedy trial in November 2004¹² and twice during January 2012.”¹³ *Id.* The state court also considered the argument advanced by the state that it was “significant that Alex did not move for a speedy trial between January 2005 and January 2012.” *Id.* Ultimately, the court held “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 [was] understandable.” *Id.* (emphasis added). The court then determined that although “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,” “his seven-year silence render[ed] this factor largely neutral in [the] overall evaluation.” *Id.*

¹² In its petition, the state claimed Alex asserted his right to a speedy trial under a state statute. Pet. at 6. The record belies this claim. In the written motion for a speedy trial, trial counsel specifically noted the grounds for the motion included not only a state statutory provision, but also the “right to speedy trial under the state and federal constitutions.” R. 222.

¹³ Based on the record evidence, Alex asserted his right to a speedy trial *at least* three times. In addition to the assertions in November 2004 and January 2012, the order signed by the trial judge granting Alex a bond on the condition that he be released only to the authorities in Georgia indicated Alex’s initial motion for a speedy trial was *renewed*. R. 226-227 (order signed on January 28, 2005).

Regarding this analysis, the state complained the court “erred in failing to consider [Alex]’s inaction as heavily weighted against him.” Pet. at 9. In an effort to support its contention that the state court was *required* to weigh this fact heavily against Alex, the state distorted the law of this Court. According to the state, “[t]his 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.’” Pet. at 7 (quoting *Barker*, 407 U.S. at 528)(emphasis in original). What this Court *rejected* was “the rule that a defendant who fails to demand a speedy trial forever waives his right.” *Barker*, 407 U.S. at 528. This Court was referring to the “demand-waiver” doctrine, which provided that a defendant waived any consideration of his right to speedy trial for any period prior to which he did not demand a trial. *Id.* at 525. This Court *refused* to presume waiver of a fundamental right – the right to speedy trial – based on *inaction*. *Id.* at 525-528. Instead, this Court held “the defendant’s assertion of or failure to assert his right to a speedy trial [was] one of the factors to be considered in an inquiry into the deprivation of the right.” *Id.* at 528.¹⁴

According to the state, the South Carolina Supreme Court’s finding that Alex’s failure to continuously and repeatedly renew his request for a speedy trial was “understandable” was not a

¹⁴ The state also referred to this Court’s statements that unless there were extraordinary circumstances, this Court would be reluctant to find a speedy trial violation where the record indicated the defendant did not want a speedy trial. Pet. at 7 (citing *Barker*, 407 U.S. at 536). Missing from the state’s reference was that this Court was remarking on Barker’s failure to object to the prosecution’s request for continuances. *Barker*, 407 U.S. at 536. Although Barker filed a motion to dismiss in 1962, he did not object to the prosecution’s “next two motions for continuances.” *Id.* It was not until March 1963 that he objected to further delay. *Id.* Thus, the record in *Barker* affirmatively showed he was not interested in a speedy trial. The state’s attempt to characterize Alex not filing for a speedy trial – *after* he did so at least twice – as an affirmative showing of a desire not to have a speedy trial akin to that in *Barker* lacks evidentiary and legal support. Alex never failed to object to continuance requests by the state because the state made no such requests. Continuances were unnecessary because the state alone determined when to call the case to trial. S.C. Code Ann. § 1-7-330.

proper inquiry. Pet. at 8. In fact, examining a defendant's assertion of his right to a speedy trial is exactly what this Court charged lower courts with doing. In adopting the "assertion of the right" as a factor for consideration in the speedy trial analysis, this Court explained this "formulation" required courts to exercise judicial discretion "based on the circumstances" surrounding the assertion of or failure to assert the right to a speedy trial. *Barker*, 407 U.S. at 528. "The strength of [the accused's] 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." *Barker*, 407 U.S. at 531. Such an evaluation is necessarily a fact-intensive inquiry. Here the state court did exactly what it was required to do.

C. In its evaluation of the fourth *Barker* factor, prejudice, this South Carolina Supreme Court properly weighed the evidence and found presumptive and actual trial prejudice due to the state's ten-year delay in calling the case to trial.

The South Carolina Supreme Court held Alex met his burden of demonstrating prejudice where presumptive prejudice applied and actual prejudice was proven. *Hunsberger*, 794 S.E.2d at 376-377; App. 19. The court examined the length of the delay here – ten years – in light of the reasons for the delay – "not merely negligent but intentional" – to determine presumptive prejudice applied. *Id.* Relying upon this Court's opinion in *Doggett*, the state court recognized that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." *Id.* at 376; App. 18. The court explained it was examining presumptive prejudice as "part of the mix of relevant facts." *Id.* Further, the court explained the importance of presumptive prejudice increased with the length of time, as this Court dictated. *Id.*; App. 19. Finally, the state court found evidence of actual prejudice in the discrepancies in the eyewitnesses' testimony. *Id.* The state court noted one of the most important of these discrepancies, certainly not the only one, concerning "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 Hunsberger's car's trunk." *Id.* at 376 n.7; App. 34.

Seeking review in this Court, the state claimed the South Carolina Supreme Court "allowed for a presumption of prejudice in a case where a lack of actual prejudice was shown and supported by evidence of record." Pet. at 11. In support of this argument, the state quibbled with the South Carolina Supreme Court's consideration of the discrepancies in witnesses' testimony in determining Alex demonstrated actual trial prejudice calling the testimony specifically described a "minor point." Pet. at 14, n.5. Under this heading, the state made several unsupported and seemingly incongruous statements. According to the state, (1) the state supreme court quoted this Court's precedent regarding persuasive rebuttals of prejudice, but failed to follow the directive because it "erred in determining this Court's precedent supports an un rebuttable presumption of prejudice," Pet. at 11-13, (2) "erred in failing to consider the large record of testimony amassed from the differing trials ... and [Alex]'s access to those transcripts," Pet. at 13, (3) "erred in failing to consider [Alex]'s inability on appeal to show that an earlier trial would have somehow ensure [*sic*] his co-defendant's [*sic*] would have testified in more detail," Pet. at 13-14, and (4) "erred in not considering the benefit of having capital proceedings not pursued after the conviction and death sentence of the co-defendant,"¹⁵ Pet. at 15. Quite obviously, the state's contentions remain fact-bound and unworthy of review by this Court.

¹⁵ The state's suggestion that had Barnes' trial *not* resulted in a guilty verdict and death sentence, then the state *would* have sought to kill Alex is repugnant and exemplary of the arbitrariness and capriciousness with which the death penalty is sought, especially in South Carolina. *See Bennett v. Stirling*, 842 F.3d 319, 325 (4th Cir. 2016)(granting sentencing relief where Solicitor Donnie Myers appealed to the racial prejudice of the all-white jury by referring to Bennett as "King Kong," among other names); *State v. Northcutt*, 641 S.E.2d 873, 881-882 (S.C. 2007)(vacating conviction and death sentence where Solicitor Myers informed the jury that a life sentence would be the equivalent of declaring "open season" on babies and that he expected a death sentence, and by producing a large black shroud and draping it over the baby's crib, which he wheeled

A defendant is not required to show prejudice affirmatively to win a speedy trial claim. *Moore v. Arizona*, 414 U.S. 25, 26 (1973). This Court explained “we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify.” *Doggett*, 505 U.S. at 655. 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). In light of the difficult nature of proving prejudice, this Court held that the importance of presumptive prejudice increases with the length of delay. *Doggett*, 505 U.S. at 655-656. In the absence of proof of particularized prejudice, the state’s negligence and a substantial delay will compel relief unless the presumption of prejudice is either “extenuated, as by the defendant’s acquiescence, or persuasively rebutted” by the prosecution. *Id.* at 658.

Clearly, the reason for the delay plays a large role in the analysis, for it determines whether a presumption of prejudice applies; therefore, the reasoning used overlaps to some degree with the reasoning discussed earlier. In *Doggett*, this Court provided three hypotheticals to demonstrate the role of presumptive prejudice in the speedy trial analysis. As one would imagine, the defendant’s degree of proof in each of the hypothetical situations varies inversely with the prosecuting body’s degree of culpability for the delay. *Id.* at 657. If the government put forward reasonably diligent efforts to try the defendant, then the defendant must show “specific prejudice to his defense.” *Id.*

from the courtroom in a staged funeral procession); *see also* Ed Pilkington, *The Business of Securing Death Sentences: 40 Years and 28 Men*, *The Guardian*, May 5, 2017, available at <https://www.theguardian.com/world/2017/may/05/donnie-myers-interview-death-penalty-prosecutor-south-carolina> (last modified May 8, 2017).

On the other end of the spectrum, if the government intentionally held back its prosecution to gain an impermissible tactical advantage, then the case for dismissal is “overwhelming.” *Id.*

Occupying the “middle ground” is “official negligence.” *Id.* The Constitution’s “toleration of ... negligence varies inversely with its protractedness ... and its consequent threat to the fairness of the accused’s trial.” *Id.* Thus, if the prosecuting body’s conduct is neither diligent nor malicious – simply negligent – the court must perform another balancing to determine the weight to be accorded such negligence. In conducting this balancing, the court must determine what portion of the delay is attributable to the state’s negligence and whether the negligent delay is of such a duration that prejudice to the defendant should be presumed. *Id.*

Looking at the hypotheticals offered in *Doggett, supra*, it is clear that in at least two circumstances prejudice is presumed: (1) when the government intentionally delayed its prosecution to gain a tactical advantage, or (2) when the government negligently delayed the prosecution for an inordinate amount of time.

The Fifth Circuit found the presumption of prejudice applicable where the Government had not engaged in bad faith, but merely failed to show diligent pursuit of the charges against the defendant. *United States v. Molina-Solorio*, 577 F.3d 300, 305 (5th Cir. 2009). Molina-Solorio escaped from federal custody on September 28, 1997. *Id.* at 302. The following month, he was indicted for escape. *Id.* In 1999, the state of Texas apprehended Molina-Solorio on drug charges. After he served his sentence, he was deported to Mexico on February 24, 2001. *Id.* At the time of his deportation, the federal authorities were aware of the federal warrant against him for escape. *Id.* at 302-303. In December 2006, federal authorities arrested Molina-Solorio in Texas for illegal re-entry. *Id.* at 303. In July 2007, he was sentenced on that charge. Shortly thereafter, he was arrested

on the escape charge. *Id.* Molina-Solorio moved to dismiss the escape indictment based on a violation of his speedy trial right. *Id.*

The Fifth Circuit found the length of the delay “to weigh heavily in Molina-Solorio’s favor because the delay was nearly ten years, the last eight of which occurred after Molina-Solorio had been back in state and federal custody.” *Id.* at 305. Additionally, the Fifth Circuit found the authorities’ negligence in pursuing Molina-Solorio weighed heavily in his favor where the Government did not pursue him diligently for over eight years. *Id.* Finally, the Fifth Circuit concluded that because the first three factors weighed heavily in Molina-Solorio’s favor, he was relieved of demonstrating actual prejudice. *Id.* at 307. Thus, the court held the delay violated his right to a speedy trial and dismissed the indictment. *Id.* at 308.

As the South Carolina Supreme Court held, Alex had “no burden of pointing to specific prejudice” in light of the outrageous length of the delay and the state’s intentional conduct of delaying the case in order to gain Alex’s cooperation against Barnes. *Hunsberger*, 794 S.E.2d at 376; App. 19. The prosecution’s intentional delay to gain an advantage warranted application of automatic and presumptive delay. *Id.* However, even construing the delay as negligence, rather than bad faith, the protractedness of the delay combined with the negligence relieved Alex from showing specific prejudice. Just as Doggett relied upon the presumption of prejudice created by the extreme delay, Alex was entitled to rely upon the presumption of prejudice, as determined by the state court. Doggett was unable to “make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence.” *Doggett*, 505 U.S. at 655. Nevertheless, this Court held Doggett’s speedy trial rights were violated due to the inordinate delay, reasoning that “affirmative proof of particularized prejudice is not essential to every speedy trial claim” because “excessive delay presumptively compromises the

reliability of a trial in ways that neither party can prove or, for that matter identify.” *Id.* As observed by this Court, the longer the delay between indictment and trial extends beyond the bare minimum, the heavier this factor weighs in a defendant’s favor because “the presumption that pretrial delay has prejudiced the accused intensifies over time.” *Id.* at 652.

Alex never extenuated the delay through acquiescence, as demonstrated through his assertions of his right to a speedy trial. Further, the state failed to “persuasively rebut” the presumption here, which the state supreme court considered, as evident through its quotation of *Doggett* that the presumption of prejudice may be rebutted. *Hunsberger*, 794 S.E.2d at 376, App. 18. As this Court expressed in *Doggett*, although the Government “ably counter[ed] *Doggett*’s efforts to demonstrate particularized trial prejudice, it has not, and probably could not have, affirmatively proved that the delay left his ability to defend himself unimpaired.” 505 U.S. at 654 n.4.

Further, the South Carolina Supreme Court found that Alex demonstrated particularized prejudice. *Hunsberger*, 794 S.E.2d at 376-377; App. 19. As this Court observed, unreasonable delay 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 the loss of memories and exculpatory evidence. *Barker*, 507 U.S. at 532. Loss of memory “is not always reflected in the record because what has been forgotten can rarely be shown.” *Id.* According to this Court, “[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness.” *Id.* It further hinders a defendant’s ability to gather evidence, contact witnesses, and prepare his defense. *Id.* at 533. Even a defendant who is not in jail prior to trial is disadvantaged “by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.” *Id.*

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from “undue and oppressive incarceration prior to trial.” But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.

Smith v. Hooey, 393 U.S. 374, 378 (1969). While “it might be argued that a person already in prison would be less likely than others to be affected by ‘anxiety and concern accompanying public accusation,’ there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large.” *Id.* at 379 (citing *Klopfer*, 386 U.S. at 221-222). In addition to the psychological toll inflicted by the unreasonable delay, even to an individual incarcerated in another jurisdiction, “it is self-evident that ‘the possibilities that long delay will impair the ability of an accused to defend himself’ are markedly increased when the accused is incarcerated in another jurisdiction.” *Id.* Such confinement, especially if far from the place where the offense allegedly took place, obviously impairs an individual’s “ability to confer with potential defense witnesses, or even to keep track of their whereabouts.” *Id.* at 379-380. “[A] man isolated in prison is powerless to exert his own investigative efforts to mitigate [the] erosive effects of the passage of time.” *Id.* at 380.

Additionally, the South Carolina Supreme Court found evidence of “actual prejudice” in the discrepancies in the eyewitnesses’ testimony. *Hunsberger*, 794 S.E.2d at 376; App. 19; *see also United States v. Velazquez*, 749 F.3d 161, 185 (3rd Cir. 2014)(explaining that “[f]orecasting how faded memories could harm him is precisely the sort of difficult-to-obtain proof that supports the finding of general prejudice in a case of extraordinary delay”).

“The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed.” *Dickey v. Florida*, 398 U.S. 30, 37 (1970). “[T]he time to meet [the charges] is when the case is fresh.” *Id.* “Stale claims have never been favored by the law, and far less so in criminal cases.” *Id.* “[T]he right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial.” *Id.* at 38. The state delayed trying Alex for ten years. The stated reasons for the delay show negligence at best, and malice at worst, as determined by the South Carolina Supreme Court. Alex asserted his right to a speedy trial and he was relieved of showing prejudice due to the protractedness of the delay and the nature of the reasons offered by the state to justify the delay. Moreover, even if presumptive prejudice were not applicable, the state court also found “actual prejudice” from the delay.

Petitioner requests this Court review the detailed, factual findings of the state court. Review of the facts “would be of no importance save to the litigants themselves” and therefore, review is unwarranted. *See Rudolph v. United States*, 370 U.S. 269, 270 (1962)(dismissing a writ of certiorari when the briefing revealed no important questions were presented and any review would impact the parties before this Court only); *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981)(dismissing as improvidently granted where the case presented primarily a question of fact, which did not merit this Court’s review); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924)(dismissing as improvidently granted when the argument showed the question was “primarily a question of fact”).

II. This Court should deny certiorari because the South Carolina Supreme Court’s opinion is supported by an adequate and independent state ground – the state constitution. In the alternative, the issue presented included a claim that the state’s conduct in delaying Respondent’s trial for ten years violated the state constitution, which would require resolution on remand if this Court were to reverse under the federal constitution.

The state asserts that this Court has jurisdiction pursuant to 28 U.S.C. §1257(a), which provides that “[f]inal judgements ... rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution” of the United States. Pet. at 2. In other words, this Court’s jurisdiction is limited to questions of interpretation of federal law. Although the South Carolina Supreme Court decided his case under the right to a speedy trial contained in the Sixth Amendment to the United States Constitution, the state supreme court also cited 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; *Hunsberger*, 794 S.E.2d at 371; App. 5.

As explained by the court, Respondent raised his claim that the state violated his right to a speedy trial under the federal *and* state constitutions. *Hunsberger*, 794 S.E.2d at 371; App. 5. In conducting its analysis, the court explained it was analyzing “the issue under the Sixth Amendment.” *Id.* Importantly, however, the court then quoted the federal constitution’s speedy trial provision *and* the state constitution’s corresponding speedy trial command. *Id.* Thereafter, the court cited to speedy trial cases from this Court as well as its own jurisprudence. *See id.* at 371-377 (citing *Langford, supra*; *Wheeler v. State*, 147 S.E.2d 627 (S.C. 1966); *State v. Pittman*, 647 S.E.2d 144 (S.C. 2008); *State v. Cooper*, 687 S.E.2d 62 (S.C. Ct. App. 2009); *State v. Waites*, 240 S.E.2d 651 (S.C. 1978); *State v. Reaves*, 777 S.E.2d 213 (2015)).

“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 Coleman v. Thompson*, 501 U.S. 722, 729 (1991). In fact, “[i]n the context of direct review of a state court judgment,” such as the instant case, “the independent and adequate state ground doctrine is jurisdictional.” *Id.* “[T]his Court has no power to review a state law determination that is sufficient to support the judgment.” *Id.* Therefore, “resolution of any independent federal ground for the decision could not affect the judgment and would be ... advisory.” *Id.* Put more plainly, “[w]hen this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the judgment; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do.” *Id.* at 730.

This Court created a conclusive presumption of jurisdiction in *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). When “a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion,” this Court “will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.” *Id.* Additionally, this Court provided that a state court wishing “to look to federal law for guidance or as an alternative holding while still relying on an independent and adequate state ground” could “avoid the presumption by stating ‘clearly and expressly that [its decision] is ... based on bona fide separate, adequate, and independent grounds.’” *Coleman*, 501 U.S. at 733 (quoting *Long*, 463 U.S. at 1041).

This Court should maintain its long tradition of “[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions,” which “have been the cornerstones

of this Court's refusal to decide cases where there is an adequate and independent state ground." *Long*, 463 U.S. at 1040. "It is fundamental that state courts be left free and unfettered by" this Court "in interpreting their state constitutions." *Id.* at 1041 (citing *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). This Court should not review the decision of the South Carolina Supreme Court in this case when a state constitutional ground supports the decision. Although the state court indicated it was analyzing the issue under the Sixth Amendment, the court cited and quoted the state constitution in its analysis. *Hunsberger*, 794 S.E.2d at 371; App. 5. Further, the opinion is replete with citations to South Carolina cases resolving speedy trial claims. *Id.* at 371-377; App. 5-19. While Respondent concedes the opinion does not contain the language necessary to avoid the presumption, Respondent must inform this Court of the South Carolina Supreme Court's reliance on its own constitution and case law in resolving Alex's speedy trial claim. "It is, of course, 'incumbent upon this Court ... to ascertain for itself ... whether the asserted non-federal ground independently and adequately supports the judgment.'" *Long*, 463 U.S. at 1038 (quoting *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931)). The South Carolina Constitution's speedy trial guarantee provides an adequate and independent basis to support the decision of the South Carolina Supreme Court.

Additionally, even if this Court were to determine the state court's opinion rested solely upon federal law and found an error with the opinion, review of this matter based on the federal issue presented would not finally resolve the case as the state constitutional question would require adjudication.

CONCLUSION

The petition for writ of certiorari should be denied.

Susan B. Hackett

Susan Barber Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 22nd day of May, 2017.

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Petitioner,

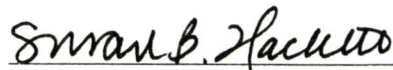
v.

ALEXANDER L. HUNSBERGER,

Respondent.

CERTIFICATE OF SERVICE

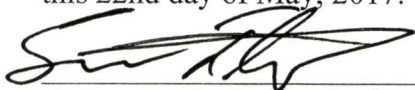
The undersigned hereby certifies that a true copy of the Brief in Opposition to the Petition for Writ of Certiorari in the above referenced case has been served upon Honorable Scott S. Harris, Esquire, at the Supreme Court of the United States, 1 First Street, N.E., Washington, DC 20543; Melody J Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Mr. Alexander L. Hunsberger, # 986761 at Coffee Correctional Facility, 1153 North Liberty Street, Nicholls, GA 31554, this 22nd day of May, 2017.



Susan Barber Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 22nd day of May, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.