STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The State, Respondent,

v.

Alexander L. Hunsberger, Appellant.

Appellate Case No. 2012-206608

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General
S.C. Bar No. 14244

Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit
205 E. Main Street
Lexington, SC 29072
(803) 785-8285

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The State, Respondent,

v.

Alexander L. Hunsberger, Appellant.

Appellate Case No. 2012-206608

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General
S.C. Bar No. 14244

Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit
205 E. Main Street
Lexington, SC 29072
(803) 785-8285

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

State Cases:

Federal Constitutional Provisions:

State Constitutional Provisions:

State Statutes:

State Court Rules:

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial court's failure to dismiss the pending criminal charge against Appellant violate his state and federal constitutional rights to a speedy trial where the crime allegedly took place on September 3, 2001, Appellant was arrested on January 25, 2002, but the case was not called for trial until January 3, 2012, almost a decade after Appellant's arrest?

(FBOA, p. 1).

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

Did the trial court fairly deny Appellant's motion to dismiss the 2002 charge of murder pending in South Carolina based on the complexity of the case involving multiple co-defendants and pending charges in separate jurisdictions, and where there was no prejudice to Appellant.

STATEMENT OF THE CASE

Sixteen-year-old Samuel J. Sturrup was murdered in Edgefield County in September 2001. Appellant, Alexander L. Hunsberger, was arrested on January 25, 2002. (R. p. 8, line 3). In March 2002, an Edgefield County Grand Jury indicted Appellant for murder. (R. pp. 232). Appellant remained in custody in South Carolina until released to Georgia in or around January 2005 to stand trial for the kidnapping of the murder victim. (R. p. 226 [January 28, 2005 Order]). On September 12, 2006, after a Georgia jury convicted appellant and brother Julio Hunsberger,[1] of kidnapping with bodily injury, Appellant was sentenced to life imprisonment. (R. p. 3, line 16- p. 4, line 13).[2]

In early 2011, the State attempted to obtain custody for trial in this jurisdiction. Appellant did not consent which resulted in continuance of any 2011 hearing dates. (R. p. 25, line 21 – p. 26, line 9). Appellant eventually stood trial January 4-6, 2012, before the Honorable Clifton Newman and a jury. Michael Chesser, Esq., represented Appellant. In a pre-trial motion hearing held January 3, 2012, defense counsel moved to dismiss the pending murder charge in South Carolina for violation of the right to a speedy trial, which the trial judge denied. (R. p. 41, line 7–p. 43, line 11). The jury convicted as charged. (R. p. 198, lines 9-15). Judge Newman sentenced Appellant to thirty-three (33) years imprisonment. (R. p. 219, line 25 – p. 220, line 2). This appeal follows.

---

[1] The brothers were tried separately in this State. Appellant's brother's direct appeal is also before this Court. He also raises a speedy trial issue. *See State v. Julio Angelo Hunsberger*, Appellate Case No.: 2012-207-290.

[2] Julio Hunsberger's conviction was affirmed by the Georgia Court of Appeals on August 6, 2009. *Hunsberger v. State*, 683 S.E.2d 150 (Ga.App. 2009). Neither WestLaw nor the Docket/Case Inquiry System of the Georgia Court of Appeals (http://www.gaappeals.us) shows an opinion for Appellant (Appellant stated at sentencing that his appeal was pending, (see R. p. 202, lines 15-25)).

RESPONDENT'S STATEMENT OF FACTS

The victim in this case was sixteen-year-old Samuel J. Sturrup. The evidence presented at trial demonstrated that Steven Barnes, as head of a criminal enterprise involving robbery and prostitution in Georgia, repeatedly beat and caused others to beat, Samuel over the suggestion of missing money. Barnes, with the help of Appellant, Appellant's brother, Julio Hunsberger, Charlene Thatcher, Richard Cave, and Antonio Griffin, took Samuel across the state line from Georgia into Edgefield, South Carolina. Barnes marched Samuel to an open field to be shot by the others, before Barnes personally fired a bullet into the back of Samuel's head inflicting the fatal wound.

Discovery of the Remains and Evidence at the Scene

On November 19, 2001, investigators from the Edgefield County Sheriff's Department were called to a remote field upon report of the discovery of a human skull. (R. p. 50, line 2 – p. 51, line 3). A search of the surrounding areas resulted in finding other bones and a pair of jeans with a belt displaying the name "Samuel." One of his leg bones was still in the pants leg. The pockets yielded two grocery store savings cards, a keychain with two keys, and a dollar bill. In the same area, investigators found a cigarette lighter, a .40 caliber shell casing, and extracted two bullets from the ground. (R. p. 52, line 4 – p. 55, line 24; p. 61, lines 4-7; p. 62, lines 2-8; p. 63, lines 7-16; p. 66, line 1 – p. 67, line 9).

Identification and Cause of Death

Information from the grocery cards discovered with the jeans gave investigators the name "Sturrup." Searching records in neighboring jurisdictions, officers found a missing person report for Samuel Sturrup. (R. p. 64, line 8 – p. 65, line 8). The autopsy

and review of dental records resulted in a positive identification of the remains as the remains of Samuel Sturrup. (R. p. 118, lines 11-24). An examination of the skull indicated a gunshot wound to the head. Entry was "high on the back of the head" with a downward path. The bullet was recovered still lodged at the base of the skull along with some of the brain tissue. The brain tissue showed a contusion which indicated Samuel was alive at the time the wound was inflicted. (R. p. 119, lines 2-17). The cause of death was the gunshot wound to the head. (R. p. 120, lines 6-8). Other injury was impossible to determine due to the condition of the remains. (R. p. 121, lines 6-14).

Co-Defendant Testimony

Richard Cave testified that he, along with his friend, Antonio Griffin, went to Barnes' home in Georgia after a call from Barnes. It was Labor Day weekend 2001. Barnes was arguing with Samuel about missing money. (R. p. 73, line 8 – p. 75, line 6). Charlene Thatcher, who worked with Barnes and was also his girlfriend, was present, as well. (R. p. 75, lines 9-18). When Samuel denied having the money, Barnes grabbed a shock absorber and hit Samuel, and also beat him with his fist. (R. p. 76, line 9 – p. 77, line 9). Barnes threatened to kill Samuel. (R. p. 78, lines 22-23). Barnes made a telephone call. After the call, Alexander and Julio Hunsberger arrived. (R. p. 79, lines 7-14). Barnes and the Hunsbergers spoke to each other. The group then left in two cars. Cave testified they followed the Hunsbergers. After stopping, the Hunsbergers stood with Barnes and they got Samuel out of the trunk of the Hunsbergers' car. (R. p. 81, line 20 – p. 83, line 10; p. 110, lines 18-25). After directing everyone into a remote field, Barnes announced everyone would have to shoot Samuel or he would shoot them. (R. p. 88, line 19 – p. 89, line 1). Cave testified that he and Thatcher both shot Samuel and left the field. Cave

heard four more shots and noted Barnes was the last one to leave the field. (R. p. 89, line 3 – p. 90, line 4). The Hunsbergers led the group to a nearby trailer before the group scattered. (R. p. 90, line 5 – p. 91, line 17; p. 111, lines 1-21).

Antonio Griffin testified similarly. Griffin testified that after the Hunsbergers arrived at the Georgia House, the Hunsbergers and Barnes spoke apart from the group. (R. p. 132, lines 6 –18). Shortly thereafter, the group left in two cars, with the Hunsbergers in the lead. (R. p. 132, line 18 – p. 133, line 8). Griffin testified that after arriving in the field, Barnes instructed everyone to shoot Samuel or Barnes would kill them. (R. p. 137, lines 1-11). Thatcher shot Samuel. (R. p. 137, lines 14-19). One of the Hunsbergers (Griffin did not recall which one) grabbed the gun from Thatcher and fired. (R. p. 137, line 22 – p. 138, line 4). As they all gathered to leave, Barnes told Griffin that Barnes had shot Samuel in the head. (R. p. 138, lines 15-21).

Charlene Thatcher also testified at Appellant's trial. She testified that the Hunsbergers led the way to the remote field, and the Hunsbergers were with Barnes when taking Samuel out of the trunk of the Hunsbergers' car. (R. p. 163, line 7- p. 164, line 15). Thatcher admitted to shooting Samuel first in the stomach. She testified Barnes shot Samuel in the head. (R. p. 165, line 15 – p. 166, line 6). After returning to the cars, the Hunsbergers lead the way to a nearby trailer. (R. p. 166, line 25 – p. 167, line 1). In the trailer, the Hunsbergers looked for materials to clean the guns, and wiped the guns down. (R. p. 167, lines 9-19).

Other Evidence At Trial

Gerald Richardson testified that he was formerly married to Appellant's mother. Richardson owns property in Edgefield County and maintains mobile homes on the

property. Appellant lived at one of those homes from 1999 to 2001. (R. p. 114, line 21 – p. 117, line 24). That home was near the gated field where Samuel's jeans and bones were found. (See R. p. 56, line 8 – p. 60, line 4).

In a statement to investigating officers, Appellant admitted to being present when Samuel was taken from Georgia into South Carolina, and admitted shooting at Samuel but stated he "shot off to the side." (R. p. 187, line 8 – p. 193, line 5).

ARGUMENT

The trial judge fairly denied Appellant's motion to dismiss the 2002 charge of murder pending in South Carolina based on the complexity of the case involving multiple co-defendants and pending charges in separate jurisdictions, and where there was no prejudice to Appellant.

Relevant Facts:

On November 16, 2004, defense counsel moved for an order setting the "case [to] be tried during the November 8th, 2004 term of Court, or at the next succeeding term of Court, or, in the event the Defendant is not so tried, that the Defendant be released from confinement on his own recognizance." (R. p. 222 [Notice of Motion and Motion for Speedy Trial]). Within the motion, defense counsel advised:

> The Defendant has been incarcerated since January 25th, 2002 without bail. Bail was denied by written order of the Court dated June 14th, 2002. On April 29th, 2004, a bond hearing was held before the Honorable William P. Keesley, at which time bond was again denied by oral order, but with the provision that the issue of bond could be brought before the Court again if the State failed to try the Defendant at the next term of Court in Edgefield. The State has failed to so try the Defendant, and upon information and belief the State has no plans to try the Defendant in the foreseeable future.

(R. p. 222 [Notice of Motion and Motion for Speedy Trial]).

Appellant also asked, in the alternative, "for a bond for the release of the Defendant pending the trial of this matter, on such terms and conditions as the Court shall deem appropriate." (R. p. 222 [Notice of Motion and Motion for Speedy Trial]).

On December 2, 2004, the Honorable William P. Keesley issued an Order denying the requested relief. However, Judge Keesley found the length of time troubling, and offered to attempt to "establish a special term of court to handle this case during February" 2005. (R. p. 224 [December 2, 2004 Order]). Judge Keesley also recognized that "[p]art of the problem in disposing of these cases is the fact that multiple defendants

and different jurisdictions are involved, and there is the possibility that the State of South Carolina could seek the death penalty." (R. p. 224 [December 2, 2004 Order, pp. 1-2]). Judge Keesley also further recognized that "Georgia has placed a hold on the defendant, so if he were granted bail in South Carolina, he would still be incarcerated in Georgia." (R. p. 224 [December 2, 2004 Order, p. 1]).

Defense counsel renewed the motions in January 2005. By Order dated January 28, 2005, Judge Keesley noted that the State declined the Court's offer for a special term. (R. p. 226 [January 28, 2005 Order, pp. 1-2]). Judge Keesley again denied the motion to dismiss, but granted bond with the caveat "DEFENDANT IS NOT TO BE RELEASED FROM CUSTODY UNLESS THE HOLDS PLACED BY THE STATE OF GEORGIA ARE LIFTED." (R. p. 226 [January 28, 2005 Order, p. 2 (emphasis in original)].

Appellant was released to Georgia in 2005, for trial on a charge of kidnapping of the same victim. On September 12, 2006, upon conviction of the kidnapping charge, a Georgia court sentenced Appellant to life imprisonment (which, apparently, carries parole eligibility within a few years). Appellant thereafter began service of that sentence in Georgia. (R. p. 3, line 16- p. 4, line 4; p. 8, line 22 – p. 9, line 22; p. 16, lines 3-8; p. 18, lines 16-18; p. 23, line 17 – p. 24, line 13).

Steven Barnes was also indicted for the murder of Samuel J. Sturrup. Barnes was tried in November 2010, convicted, and sentenced to death. (R. p. 23, lines 3-16; p. 41, lines 15-17). His case is, as of this writing, still pending on direct appeal in the Supreme Court of South Carolina.[3] (Appellate Case No. 2010-178247, argued February 5, 2013).

---

[3] Barnes does not raise a speedy trial issue in his direct appeal, but has argued that the Interstate Agreement on Detainers Act provided for dismissal of the murder charge where he was not tried within the statutorily set one hundred and eighty (180) days.

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

The State attempted to try Appellant in early 2011, after conclusion of the capital trial for Barnes in November 2010. However, Appellant did not consent to the State's request for his return to South Carolina which resulted in a continuance. (R. p. 25, line 21 – p. 26, line 9). (See also R. p. 36, lines 13-23). The prosecuting attorney noted that the Solicitor had not determined whether to seek death on Appellant's murder charge until after Barnes' conviction. (R. p. 23, lines 3-16). The State also acknowledged that it extended the offer to have Appellant testify against Barnes in the capital case, but Appellant declined. The State further acknowledged that was his absolute right, but

again asserted that he had the same opportunity to cooperate as other co-defendants. (R. 4, lines 14-25; p. 6, lines 12-17; p. 26, line 10- p. 27, line 3; p. 29, lines 12-15).

The State was able to secure Appellant's presence and a jury trial was held in January 2012. (R. p. 25, line 21 – p. 26, line 9). Appellant argued that the charges should be dismissed for failure to provide a speedy trial. (See R. p. 41, line 7–p. 43, line 11). The trial judge, after hearing lengthy argument, and having received testimony on same from Appellant, denied the motion. In denying the motion, Judge Newman noted that since Appellant's release back to Georgia, there were a number of cases resolved in Georgia for the co-defendants, a trial was held for Appellant and his brother, and co-defendant Barnes was tried in a capital case in this State. (R. p. 40, line 1 – p. 41, line 20). He found this particular case was "unique in the sense that you have cross-border issues, you have Georgia wanting to pursue Georgia's case, but South Carolina wanting to pursue South Carolina's cases, each defendant asserting their individual constitutional rights and the State having a capital case that they're wanting to pursue and have successfully pursued." (R. p. 41, line 25 – p. 42, line 6). Judge Newman concluded:

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

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

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

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

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

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

Defense counsel renewed his motion at the close of the State's case. Defense counsel complained that the trial testimony well supported his earlier assertion that the passage of time dimmed memories and created prejudice, though, he argued, he need not show prejudice where the State was at fault in delaying the trial. (R. p. 194, line 22 – p. 195, line 21). Judge Newman again denied relief, noting the number of trials for all the co-defendants, the time for "sorting out that process," and the fact that Appellant was incarcerated in Georgia pursuant to the Georgia conviction since 2006, as factors that did not support the State was at fault such that relief was warranted. Further, he found no prejudice otherwise, noting that there were transcripts available for impeachment that were used at trial, and that "everyone seems to have a pretty vivid memory" of this most serious matter. (R. p. 196, line 9 – p. 197, line 12).

Appellant argues on appeal that Judge Newman erred in denying the motion where the facts supported that the prosecution deliberately delayed for advantage in attempt to "force Appellant to testify against Barnes." (FBOA, p. 18). He argues there was no other reason to delay prosecution. (FBOA, p. 18). Further, he argues that his trial in Georgia was completed in 2006. "Therefore, any cross-border issues were resolved by the end of 2006." (FBOA, p. 18). Appellant also argues "[t]here is no argument that the state can present except that Appellant's trial was delayed deliberately by the state in

order for the state to gain an advantage in the trial of Steven Barnes." (FBOA, p. 18). As to prejudice, he asserts "the outrageous length of the delay and the admitted reason for the delay" renders "the presumption of prejudice to Appellant is great." (FBOA, p. 19). Appellant also asserts that "memories of the witnesses were impaired by the passage of time," and he suffered "mental and emotional anguish" having to wait for the State to determine whether to seek the death penalty against him. (FBOA, p. 19). Lastly, as a basis for finding prejudice, Appellant asserts that he may not receive credit for all the time served. (FBOA, p. 19).

Discussion:

The record fully and fairly supports Judge Newman's finding that, in these discrete circumstances, delay was justifiable based on the complexity of the case and the multiple prosecutions in separate jurisdictions, and showed no prejudice to Appellant. This Court should affirm the denial of the motion to dismiss.

"A criminal defendant is guaranteed the right to a speedy trial." *State v. Cooper*, 386 S.C. 210, 216, 687 S.E.2d 62, 66 (Ct. App. 2009), *citing* U.S. Const. amend. VI; S.C. Const. art. I, § 14; *State v. Pittman,* 373 S.C. 527, 548, 647 S.E.2d 144, 155 (2007). Yet, "[t]here is no universal test to determine whether a defendant's right to a speedy trial has been violated." *Id, citing State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)). Rather, a two-step inquiry has emerged. The first step is to determine whether the delay is of such length to require analysis. *See Doggett v. United States*, 505 U.S. 647, 652 (1992) ("Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay, … , since, by definition, he cannot complain that the

government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness.") (internal citation omitted). Once that triggering presumption is shown, a court may then consider any number of facts to understand the cause of the delay. *State v. Waites*, 270 S.C. at 108, 240 S.E.2d at 653 ("The two year four month delay between arrest and preliminary hearing is disturbing" and "[w]hile length of delay alone is not dispositive" the "two year four month delay between arrest and preliminary hearing" in that case was "sufficient to trigger ... review of the other three factors enumerated in Barker v. Wingo, and our consideration of 'such other circumstances as may be relevant'"). *See also State v. Cooper*, 386 S.C. 210, 216, 687 S.E.2d 62, 66 (Ct.App. 2009), *citing State v. Waites*, 270 S.C. at 107, 240 S.E.2d at 653 ("There is no universal test to determine whether a defendant's right to a speedy trial has been violated.").

The leading case setting out various factors to consider is *Barker v. Wingo*, 407 U.S. 514 (1972). The Supreme Court, acknowledging that each case turns on its own facts, provided the following guidance:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Barker v. Wingo, 407 U.S. 514, 530 (1972).

South Carolina courts generally follow these factors in assessing whether a violation has occurred. *See, e.g., State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012); *State v. Evans*, 386 S.C. 418, 688 S.E.2d 583, 586 (Ct.App. 2009). Considering the facts

of this case within that framework, the record well supports the denial of relief. Respondent will address each of the *Barker* factors separately as they apply here.

The Length of Delay

The time of ten years from arrest and indictment[4] to trial is unusual when compared to delays referenced in a survey of published cases on speedy trial issues in this jurisdiction. *See, for example, State v. Langford, supra* (twenty-three month delay reviewed in armed robbery, first degree burglary and kidnapping case); *State v. Pittman, supra* (reviewing three year delay between arrest and trial in murder case); *State v. Waites*, supra (reviewing two year four month delay in assault and battery of a high and aggravated nature and pointing and presenting a firearm); *State v. Cooper, supra* (reviewing forty-four month delay on murder re-trial). *See also State v. Brazell*, 325 S.C. 65, 480 S.E.2d 64 (1997) (reviewing three years and five months delay in armed robbery and murder case); *State v. Kennedy*, 339 S.C. 243, 528 S.E.2d 700 (Ct.App. 2000), *affirmed by State v. Kennedy*, 348 S.C. 32, 558 S.E.2d 527 (2002) (reviewing two year and two month delay in grand larceny, first degree burglary and financial transaction card fraud case); *State v. Smith*, 307 S.C. 376, 415 S.E.2d 409 (Ct.App. 1992) (reviewing three year delay in murder case). But it is not the outer limit. *See State v. Evans*, 386 S.C. 418, 688 S.E.2d 583 (Ct.App. 2009) (reviewing twelve year delay in manslaughter case). *Cf. State v. Lee*, 360 S.C. 530, 602 S.E.2d 113 (Ct.App. 2004) (reviewing twelve-year pre-indictment delay in CSC first degree and lewd act case). Even so, there is little question

---

[4] "The clock starts running on a defendant's speedy trial right when he is 'indicted, arrested, or otherwise officially accused,' and therefore we are to include the time between arrest and indictment." *State v. Langford*, 400 S.C. at 442, 735 S.E.2d at 482.

such time could trigger the further evaluation of whether a violation has occurred. *See Doggett v. United States*, 505 U.S. 647, 652 n. 1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial'"). Yet, the factual background shows certain breaks in the time period. Such breaks undermine a blanket assertion that the whole of the delay falls at the feet of the prosecution.

For instance, the prosecution requested to obtain custody in early 2011 after the Barnes trial had been completed. Appellant did not consent to extradition. Therefore, extradition proceedings could not be completed for a trial date in 2011. (R. p. 25, line 21 – p. 26, line 9). This nearly year-long delay may be directly attributed to Appellant and should not be assessed to the State. *State v. Langford*, 400 S.C. at 443, 735 S.E.2d at 483, *citing Vermont v. Brillon,* 556 U.S. 81 (2009) ("Delays occasioned by the defendant ... weigh against him."). *See also State v. Pittman*, 373 S.C. at 549, 647 S.E.2d at 155 ("the Court must also consider and weigh the defendant's contribution to the delay in determining whether the defendant's Sixth Amendment rights have been violated.").

At any rate, the reasons for the delay are more dispositive of the lack of a violation than the block of time Appellant relies upon. *See Doggett*, 505 U.S. at 652 n. 1 ("We note that, as the term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry."); *State v. Cooper*, 386 S.C. at 217, 687 S.E.2d at 66, *quoting State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) ("'...the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead

is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense."').

The Reason for the Delay

Barker provides not only should the reason for the delay be considered, but also that those reasons should be examined as to relative justification:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker v. Wingo, 407 U.S. at 531.

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

Certainly, complexity in the case is a valid reason for delay in the proceedings. *Pittman*, 373 S.C. at 552, 647 S.E.2d at 157 ("Although it took a long time for the case to come to trial, any delay was the result of the complexities of this case."); *Cooper*, 386

S.C. at 218, 687 S.E.2d at 67 (noting "complexity of the case and the amount of time required to prepare for trial" in assessing justification for the delay). *See also United States v. Brown*, 498 F.3d 523, 531 (6th Cir. 2007) ("the reasons for the delay weigh against finding a Sixth Amendment violation. First, the charges were complex, involving multiple defendants and" multiple charges); *United States v. Bass*, 460 F.3d 830, 837 (6th Cir. 2006) ("With regard to the five-year period between Bass's arraignment and trial, it is apparent that the government was not any more to blame than Bass for this delay either. Bass's case was complex, involving a large-scale drug and murder conspiracy that, at one point, encompassed seventeen defendants. That the delay was caused by the case's complexity favors a finding of no constitutional violation."); *United States v. King*, 483 F.3d 969, 976 (9th Cir. 2007) (noting complex cases with "numerous defendants and alleged co-conspirators"); *United States v. Register*, 182 F.3d 820, 827 (11th Cir. 1999) (noting "the complex nature of the charges and sheer number of defendants and issues involved also account for some of the delay"). Judge Newman correctly identified the complexity of the case in the number of defendants, the number of trials, the prosecutions in two States, and the capital proceedings for co-defendant Barnes.

Further, attempting to "collect witnesses" is a valid cause for delay. *See Doggett v. United States*, 505 U.S. at 656 ("Our speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable. The government may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down. We attach great weight to such considerations when balancing them against the costs of going forward with a trial whose probative accuracy the passage of time has begun by degrees to throw into question."). *See also Barker v. Wingo*, 407 U.S. at 531 ("a

valid reason, such as a missing witness, should serve to justify appropriate delay."). Contrary to Appellant's assertion that the State acted improperly in offering Appellant the opportunity to testify against Barnes, (FBOA, p. 18), this offer actually shows the State did not place isolated or undue pressure on Appellant. The State had success in securing many of the co-defendants to testify against Barnes, and, the offer to allow the Hunsbergers to testify "might [have] go[ne] toward their benefit." (See R. p. 4, lines 14-25; p. 26, lines 10-16). As the State acknowledged, it was their right to decide not to testify against Barnes. (R. p. 26, line 17 – p. 27, line 6). Even so, they had the same opportunities as the other co-defendants. This even treatment does not lend itself to attack here as evidence of an attempt to harm the defense. It is, however, a facet of the complexity.

Further still, it is clear from the record that the State immediately set out to bring the Hunsbergers back to this jurisdiction for trial upon completion of the capital proceedings against Barnes. (R. p. 25, line 21 – p. 26, line 6). There was no delay of any consequence in seeking Appellant's return after the capital proceedings concluded.

It should be noted, as well, that the State had relinquished custody in early 2005. Georgia did not try the case until September 2006. The State could not seek simultaneous trials as these are separate sovereigns. This nearly two-year period may not be attributed directly to the State. *See United States v. Battis*, 589 F.3d 673, 679-680 (3rd Cir. 2009) (separating federal and state charges for purposes of speedy trial analysis, but finding decision to wait on state prosecution weighed against federal government, though not heavily as the federal government was not "intentionally undermining the defense"); *United States v. Seltzer*, 595 F.3d 1170, 1178 (10th Cir. 2010) ("We agree with our sister

circuits that awaiting the completion of another sovereign's prosecution may be a plausible reason for delay in some circumstances..."). *Cf. State v. Robbins*, 590 A.2d 1133, 1136-1137 (N.J. 1991), *quoting State v. Williams*, 224 A.2d 331 (N.J. 1966) ("Inasmuch as it is impossible for a person to be in two places at the same time, where one owes penalties to two separate sovereigns, one sovereign must relinquish its claim and allow the other to exact its penalty first."). After conviction, Appellant began service of his Georgia sentence in Georgia. (See R. p. 24, line 12-25). In fact, Appellant testified at the pre-trial hearing on the motion to dismiss that one of his reasons for not agreeing to extradition was he "needed to find out" how leaving Georgia would affect his Georgia appeal. (R. p. 36, lines 16-23). This marked hesitancy in returning to the State fails to show a desire for a speedy trial here. Again, this time should not count against the State. This is most assuredly so where Appellant simply did nothing to force prosecution in South Carolina, though he had the ability to do so.

The Defendant's Assertion of the Right

Without question, Appellant asserted his right in late 2004 and again January 2005. This resulted in a bond that allowed Georgia to obtain custody and subsequently try Appellant on the kidnapping charge. (R. p.226 [January 28, 2005 Order]). Essentially, Appellant moved for relief under Section 17-23-90 and appropriate relief was granted at that time. (R. p. 222 [Notice of Motion and Motion for Speedy Trial]). *See generally State v. Campbell*, 277 S.C. 408, 288 S.E.2d 395 (1982) (denying speedy trial claim pursuant to statute where S.C. Code § 17-23-90 provides for release if not indicted and tried within certain time frame, not dismissal of the charge). After this grant of relief,

however, Appellant failed to reassert or pursue his constitutional right to a speedy trial at any point until immediately before his January 2012 trial.

"[T]he defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." *Barker v. Wingo*, 407 U.S. at 528. Multiple assertions of the right will weigh heavily in a defendant's favor. *See, for example, United States v. Bass*, 460 F.3d at 837 ("Between his arraignment and trial, Bass filed three motions to dismiss based upon speedy trial grounds: (1) in January 1999, two months after the arraignment; (2) in March 2000; and (3) in March 2002. Accordingly, Bass asserted his right to a speedy trial, and this factor weighs in his favor.").

As noted, Appellant failed to do anything to assert a speedy trial issue after he was released to Georgia in early 2005 until the time of his trial in January 2012. (See R. p. 17, lines 21-25, acknowledging no request during six to seven years of the delay). In fact, he declined to allow extradition in 2011. (R. p. 36, lines 13-23). Unlike his co-defendant Steven Barnes, he did not seek return and prosecution under the Interstate Detainer Act. Thus, in assessing the delay, the fact that Appellant failed to assert his right to a speedy trial after his release to Georgia is significant. *State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) (finding no violation where during five of the seven year delay at issue, neither the State nor defendants "pursued the matter" and a "failure to assert the right will make it difficult for the defendants to prove that they were denied a speedy trial"). *See also United States v. Wanigasinghe*, 545 F.3d 595, 599 (7th Cir. 2008) (in review of eleven year delay after indictment but before arrest: "Wanigasinghe did not request a speedy trial during the time he was out of the country. We agree with the

district court's finding that he likely knew he had been charged with a crime but nevertheless did nothing to take care of the charges; quite the opposite. His failure to request a speedy trial is also a factor which weighs against him.").

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

Whether There Is Prejudice to the Defendant

As noted above, the delay itself is not dispositive of whether a violation has occurred. Neither is the time at issue dispositive of prejudice. *Pittman*, 373 S.C. at 551, 647 S.E.2d at 156) (rejecting Pittman's argument "that the delay of his trial was so lengthy that it not only meets the requisite finding of delay, but also that the delay is presumptively prejudicial"). Other courts have examined similar delays and declined to find presumptive prejudice. *See United States v. Blanco*, 861 F.2d 773, 778 (2nd Cir. 1988) (rejecting general assertion of prejudice in ten year delay between indictment and trial where defendant at fault in delay and where "delay can just as easily hurt the government's case"); *United States v. Tchibassa,* 452 F.3d 918, 925-927 (D.C.Cir. 2006) (finding no presumptive prejudice where defendant more at fault than government in eleven year delay). *Accord United States v. Mendoza*, 530 F.3d 758, 764-765 (9th Cir. 2008) (noting that if government had "exercised due diligence," for speedy trial claim on delay of eight years, defendant would have had to have shown "specific prejudice to his

defense" rather than assessing presumptive prejudice). The Supreme Court in *Barker* specifically noted the damage that may very well be done to the prosecution's case:

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

Barker v. Wingo, 407 U.S. at 521.

Even though Appellant was tried for the 2002 charge in January of 2012, he had ample opportunity to thoroughly cross-examine the witnesses against him, including making use of prior sworn testimony – testimony that was available as a result of multiple actions both in South Carolina and Georgia. (See R. p. 19, line 24 – p. 21, line 9; p. 22, lines 18-25). Further, he does not contend any exculpatory witness or testimony is not unavailable. Appellant has twice been convicted (once in Georgia, once here) on evidence of participation in the events that led to Samuel's murder, and readily admits his presence during the crime. (See R. p. 187, line 8 – p. 193, line 5; p. 216, lines 8-13). Appellant argues, though, that the passage of time affected extent of memory and credibility of the witnesses against him. (See FBOA, p. 19; R. p. 194, line 22 – p. 195, line 13). In effective rebuttal, the trial transcript demonstrates credibility was challenged by use of prior transcripts which preserved sworn testimony, (See R. p. 97, line 14 – p. 100, line 19; p. 144, line 25 – p. 145, line 5), and that contemporaneous notes were used to refresh memories, (See R. p. 144, lines 2-24; p. 172, line 7 – p. 173, line 13). The multiple trials and statements in essence preserved and/or created testimony for this

Appellant's use to his benefit. At any rate, as Judge Newman found, there was no evidence of prejudice to Appellant based on the passage of time:

> Regarding ... problems the witnesses had remembering, Counsel did an effective job at pointing out to the witnesses in cross-examining them and impeaching them on prior inconsistent statements. The fact that there is a transcript to go over your testimony available, it accounts the opportunity to refresh the witness' recollection and to impeach where needed[.]
>
> In looking at it, the trial to this point - - looking back I indicated in retrospectively on a position of prejudice, I don't see where the defendant has been prejudiced in any way. Based on the lapse of time, for the most part, everyone seems to have a pretty vivid memory. Of course, these matters will probably - - probably be forever etched in the memories and minds of people who were there involved, eye witnesses.

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

His ruling is well supported and his reasoning sound.

Further, though Appellant's case was considered for capital proceedings, the State ultimately decided against seeking the death penalty for Appellant. (R. p. 23, lines 3-16). As such, the length of the delay in this aspect certainly holds no prejudice to Appellant. *See Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 ("Judge Pieper noted the State withdrew its notice to seek the death penalty; thus, the withdrawal could be construed as a benefit to Cooper resulting from the delay.").

As far as Appellant's argument referencing credit for time served, (see FBOA, p. 19), this was not raised as a ground for the speedy trial motion. This argument is procedurally barred. *See, e.g. State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (appellant's failure to raise constitutional issue to the trial court barred review on appeal); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may

not argue one ground at trial and an alternate ground on appeal."). Further, this issue was not developed below and should not be heard at this time. Defense counsel requested at sentencing credit for time served and a sentence that would run concurrent with the Georgia sentence. (See R. p. 204, lines 11-18). The transcript closes with the State attempting to confirm the steps for a concurrent sentence and defense counsel providing information for the case number and date of sentencing. (R. p. 218, line 6 – p. 221 line 2). Appellant concedes "the record is unclear at this time...." (FBOA, p. 19). Indeed, this record is not fully developed on this point which is another reason the argument should not be reached. *See State v. Tyndall*, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999) ("An appellant has a duty to provide this Court with a record sufficient for review of the issues on appeal."); Rule 210, SCACR (in general, "the appellate court will not consider any fact which does not appear in the Record on Appeal.").

At any rate, as more fully set out above, the record well supports Judge Newman's factual findings which he correctly analyzed in the appropriate legal framework. Therefore, this ruling should be upheld on appeal. *Cooper*, 386 S.C. at 218, 687 S.E.2d at 67 (affirming denial of motion to dismiss where appellate court found trial judge's "decision was supported by the evidence").

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

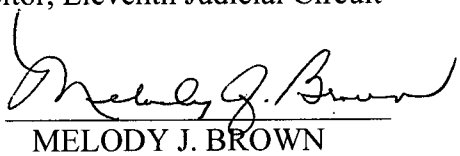
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY: 
MELODY J. BROWN
S.C. Bar No. 14244

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

ATTORNEYS FOR RESPONDENT

September 9, 2013.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The State, Respondent,

v.

Alexander L. Hunsberger, Appellant.

Appellate Case No. 2012-206608

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

MELODY J. BROWN
Senior Assistant Attorney General
S.C. Bar No. 14244

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

ATTORNEYS FOR RESPONDENT

September 9, 2013.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The State, Respondent,

v.

Alexander L. Hunsberger, Appellant.

Appellate Case No. 2012-206608

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Final Brief of Respondent* and *Certificate of Compliance* on Appellant by depositing two copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

This 9th day of September, 2013.

MELODY J. BROWN
Senior Assistant Attorney General
S.C. Bar No. 14244

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

ATTORNEYS FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

September 9, 2013

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Alexander L. Hunsberger
Appeal from Edgefield County
Appellate Case No. 2012-206608

Dear Ms. Kitchings:

Enclosed please find the original plus nine (9) copies of the ***Final Brief of Respondent*** and ***Certificate of Compliance***, along with proof of service, in the above-referenced case.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

Enclosures

cc: Susan B. Hackett, Appellate Defender
The Honorable Donald V. Myers, Eleventh Circuit Solicitor
Sandi Wofford, Victim Services