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STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
OCT 08 2013
SC Court of Appeals

The State, Respondent,

v.

Julio Angelo Hunsberger, Appellant.

Appellate Case No. 2012-207290

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, SC 29211-1549
(803) 734-6305

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit
205 E. Main Street
Lexington, SC 29072
(803) 785-8352

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial when the State failed to call the case for trial until January 9, 2012, almost ten years after the arrest and indictment of appellant for murder?

(FBOA, p. 3).

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

Did the trial court fairly deny Appellant's motion to dismiss the 2002 charge of murder where Appellant never made a demand for a speedy trial; he was tried and convicted of the kidnapping of the murder victim by a separate sovereign and was serving a life sentence in that jurisdiction while the murder charge was pending in this jurisdiction; and, where there was no allegation of lost witnesses or other prejudice to Appellant?

STATEMENT OF THE CASE

Sixteen-year-old Samuel J. Sturrup was murdered in Edgefield County in September 2001. (R. p. 27, lines 21-22). Appellant, Julio Angelo Hunsberger, was arrested on January 25, 2002. (R. p. 34, lines 23- p. 35, line 6; p. 37, lines 14-20). An Edgefield County Grand Jury indicted Appellant in March 2002 for Samuel's murder. (R. p. 7, lines 5-9; R. p. 555). Appellant remained in custody in South Carolina until released to Georgia on February 16, 2005 to stand trial for Samuel's kidnapping. (R. p. 36, line 5 – p. 37, line 25).

On September 12, 2006, after a Georgia jury convicted Appellant and his brother Alexander Hunsburger[1] of kidnapping with bodily injury, Appellant was sentenced to life imprisonment.[2] Appellant remained in custody in Georgia on the life sentence until South Carolina requested custody under the Interstate Agreement on Detainers. Appellant was returned to South Carolina on September 30, 2011. Upon Appellant's return, defense counsel requested a continuance both for the week of October 3 and the week of October 10, 2011, which was granted over the State's objection. (R. p. 27, lines 1-13; p. 40, lines 11-16; p. 40, line 20-p. 42, line 20; R. p. 559 [Order Upon Motion for Continuance]).

Appellant eventually stood trial on the murder charge January 9-11, 2012, before the Honorable R. Knox McMahon and a jury. The jury convicted as charged. (R. p. 538, line 25 – p. 539, line 4). Judge McMahon sentenced Appellant to life imprisonment. (R. p. 552, line 21 – p. 553, line 1). This appeal follows.

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[1] The brothers were tried separately in this State. Alexander Hunsberger stood trial January 4-6, 2012, the week prior to Appellant's trial. His direct appeal is also before this Court, and he also raises a speedy trial issue. *See State v. Alexander L. Hunsberger*, Appellate Case No.: 2012-206608.

[2] Appellant'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).

RESPONDENT'S STATEMENT OF FACTS

The victim in this case was sixteen-year-old Samuel J. Sturrup. The evidence 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 missing money. Barnes, with the help of Appellant and Appellant's brother, Alexander Hunsberger, and with co-defendants 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 rural area upon report of local residence Grover Dais Jr., finding a human skull on his property. (R. p. 146, lines 14-24; p. 161, line 22–p. 162, line 17). A search of the surrounding areas resulting in finding other bones and a pair of jeans with a belt displaying the name "Samuel." The pockets yielded two grocery store savings cards, a keychain with two keys, and a dollar bill. In the same area, investigators found a .40 caliber Smith & Wesson shell casing. (R.p. 169, lines 2-7; p. 173, line 21 – p. 175, line 20; p. 181, line 1–p. 183, line 20; p. 187, lines 2-3; p. 189, line 15–p. 190, line 13; p. 204, line 2– p. 205, line 7). During a later search in January 2002, investigators also recovered two bullets from the ground. (R. p. 208, line 5 – p. 210, line 16).

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. 205, line 13 – p. 206, line 10). The autopsy and review of dental records resulted in a positive identification of the remains as the remains of Samuel Sturrup. Examination of the skull indicated a gunshot wound to the head. (R. p. 283, line 10 – p. 284, line 20; p. 296, lines 4-14). Entry was "high on the back of the head" with a downward path. (R. p. 285, lines 14-17; p. 290, lines 8-16). The bullet was recovered still lodged at the base of the skull along with some of the brain tissue. (R. p. 284, line 21 – p. 285, line 10). The brain tissue showed a contusion which indicated Samuel was alive at the time the wound was inflicted. (R. p. 285, lines 5-10). The cause of death "was the destruction of brain tissue and fracture of the bone due to the gunshot wound to the back of his head." (R. p. 296, lines 15-22). The gunshot wound "would have immediately caused unconsciousness and probably would have caused death in a very short period of time." Other injury was impossible to determine due to the condition of the remains. (R. p. 294, line 14 – p. 296, line 3; p. 296, line 23 - p. 297, line 25).

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. 234, line 14 – p. 236, line 25). When Samuel denied having the money, Barnes grabbed a shock absorber and hit Samuel, and also beat him with his fist. (R. p. 237, line 21 – p. 240, line 12). Cave recalled that Charlene Thatcher, who worked with Barnes and was also his girlfriend, was present as well, and was also, at one point, blamed for the missing money. (R. p. 239, lines 15-22; p. 242, lines 18 -23). Cave testified that Barnes eventually made a telephone

call. After the call, Alexander and Julio Hunsberger arrived. (R. p. 239, line 21 – p. 240, line 12). Barnes and the Hunsbergers spoke to each other. (R. p. 240, lines 13-19). After they spoke, Barnes ordered the group to leave. They split up and left in two cars. Barnes drove one car. Cave, Griffin and Thatcher were in the car with Barnes. The Hunsbergers' left in their own car. (R. p. 241, lines 9-10; p. 243, lines 2-18). Cave testified they followed the Hunsbergers. (R. p. 244, line 9 – p. 245, line 1). The Hunsbergers led them to a remote field. Barnes directed the people in his car to get out, then went to the Hunsberger's car and opened the trunk. Samuel got out of the trunk. (R p. 245, line 9 – p. 246, line 14). Cave testified that Samuel had a "busted up arm" and a bruised face as a result of the prior beating. (R. p. 246, lines 21-24). According to Cave, Barnes marched the group further into the remote area, again demanded the return of money from Samuel, and, again, Samuel denied having the money. (R. p. 247, line 11 – p. 248, line 18). Cave testified that Barnes then pulled a gun and announced they would all shoot Samuel. (R. p. 248, lines 20 – 23). Cave testified that Thatcher shot Samuel at Barnes' direction, then gave the gun to him. He shot and gave the gun to Griffin. Cave testified he returned to the car with Thatcher, but heard four more shots. (R. p. 249, line 20 – p. 250, line 6). Cave testified that Barnes and the Hunsbergers returned, and the Hunsbergers led the group to a nearby trailer. They spoke separately with Barnes, before Barnes returned and instructed the group – except for the Hunsbergers' – to leave. Cave testified that he did not see either Julio or Alexander Hunsberger leave the trailer. (R. p. 250, line 7 – p. 252, line 6; p. 252, line 19 – p. 253, line 2). Cave also testified that at one point prior to leaving the trailer, Griffin asked Barnes "how did he know that Sam wasn't going to get

up and go to the neighbors," and Cave heard Barnes reply, because "he shot him in the head." (R. p. 252, lines 12-15).

Antonio Griffin testified similarly. Griffin added that he actually fought with Samuel at the Georgia house, and that Barnes threatened, at one point, to have both Thatcher and Samuel shot. (R. p. 330, line 17 – p. 332, line 10; p. 335, line 12 – p. 336, line 9). Like Cave, Griffin testified that the two Hunsberger brothers came to the Georgia house after a phone call by Barnes. (R. p. 336, lines 15-25). The Hunsbergers and Barnes spoke to each other, then the group left in two cars with the Hunsbergers' car leading. (R. p. 337, lines 14-19; p. 338, lines 20-22; p. 339, lines 1-10). Griffin testified the Hunsbergers led the group to a remote field. (R. p. 339, lines 11-24). Samuel was in the Hunsbergers' trunk. Griffin testified that Barnes had a gun, and one of the Hunsbergers had another gun. (R. p. 340, line 20 – p. 341, line 12). He recalled that after getting Samuel out of the trunk, Barnes marched Samuel farther into the remote area, going through woods to another open area away from the cars. (R. p. 341, lines 13-19). Griffin testified Barnes stopped the group and instructed that "everybody fixing to shoot" beginning with Thatcher. (R. p. 342, lines 6-12). Barnes forced Thatcher to shoot Samuel, then "one of the brothers" took the gun from Thatcher and gave it Griffin. Griffin testified that he "shot at the ground," then Cave "got the gun." (R. p. 342, line 18 –p. 343, line 3). Griffin testified that "the last one who shot had his own gun." (R. p. 343, lines 3-4). Griffin testified he returned to the car. When Barnes came back to the car, Griffin testified he asked, "how you know this man ain't fixing to get up and go get some help," to which Barnes replied, "He ain't going to get up … I shot him in the head, he ain't going to get back up. (R. p. 343, line 22 – p. 344, line 5). Griffin also testified that

it was the Hunsbergers who led the group out of the area to a nearby trailer and opened the door to the trailer. Griffin testified that inside the trailer, Barnes and the Hunsbergers had another conversation, again, away from the group, (R. p. 344, line 7 – p. 345, line 8), and the group eventually dispersed with the Hunsbergers staying at the trailer, (R. 345, line 22 – p. 346, line 4). In related testimony, Griffin also testified Barnes would later call, after discovery of the remains, and instruct Griffin not to say anything. Griffin further testified that Barnes also told him that Samuel really didn't steal the money (apparently Barnes' dogs dug up money he buried in the yard at the Georgia house and shredded it), but stated "what's done is done...." (R. p. 349, line 19- p. 351, line 4).

Charlene Thatcher also testified at Appellant's trial. She similarly testified that the Hunsbergers arrived at the Georgia House after Barnes' call. (R. p. 403, lines 3-7). She testified that Barnes ordered Samuel to get inside the Hunsbergers' car in the trunk, (R. p. 403, lines 20-25), and the Hunsbergers led the way to the remote field area. (R. p. 404, lines 10-25). Thatcher testified that Samuel got out of the trunk and Barnes ordered him to march further into the remote area. Thatcher testified "Barnes told Sam to stop and pick a place to die." (R. p. 405, line 12 – p. 406, line 3). When Samuel stopped, "everybody surrounded him." (R. p. 406, lines 3-4). Thatcher admitted that at Barnes' direction she shot Samuel first. She shot him the stomach. (R. p. 406, lines 7-17). Thatcher also testified Barnes thereafter shot Samuel in the head. (R. p. 406, lines 19-20). She also testified that other people fired at Samuel. (R. p. 406, lines 21-23). Her testimony reflected that everyone shot Samuel including Thatcher, Barnes, Griffin, Cave, Alexander Hunsberger, and Appellant. (R. p. 407, lines 4-11). Thatcher testified the group then followed the Hunsbergers to a trailer. According to Thatcher, "[t]he

Hunsbergers went in the back of the trailer to find something to clean the guns with to take the fingerprints off." (R. p. 407, lines 20-25). She could positively identify Appellant as she not only knew him from the crime but also from "sexual dealings" with him. She testified that she had seen him "numerous times" after the murder. (R. p. 409, line 9 – p. 410, line 10).

Other Evidence At Trial

Gerald Richardson testified that he was formerly married to Appellant's mother. Richardson owned property in Edgefield County and maintained mobile homes on the property. Appellant had access of one of those mobile homes. (R. p. 309, line 10 – p. 312, line 18). Appellant was arrested at that mobile home in January 2002. The home was a "couple of hundred yards" from the crime scene. (R. p. 172, lines 3-22; p. 215, line 17 – p. 216, line 1; p. 219, lines 11-14; p. 226, line 14 – p. 227, line 13).

Mr. Dias, who initially discovered the skull and called officers, was subsequently charged with unrelated offenses and shared a cell with Appellant in the Edgefield County Detention Center. Mr. Dias testified Appellant spoke about the murder and the crime scene. Appellant admitted living near the crime scene. He further indicated knowledge of the crime scene and the possible available evidence. (R. p. 151, line 4 – p. 154, line 9).

As noted above, the jury convicted after hearing the evidence.

ARGUMENT

The trial judge fairly denied Appellant's motion to dismiss the 2002 charge of murder where Appellant never made a demand for a speedy trial; he was tried and convicted of the kidnapping of the murder victim by a separate sovereign and was serving a life sentence in that jurisdiction while the murder charge was pending in this jurisdiction; and, where there was no allegation of lost witnesses or other prejudice to Appellant.

Relevant Facts:

On January 25, 2002, Appellant was arrested in Edgefield, South Carolina, for Samuel's murder. (R. p. 34, line 23 – p. 35, line 6). On January 29, 2002, Public Defender O. Lee Sturkey was appointed to represent Appellant. (R. p. 38, lines 1-11; p. 564, [Order of Appointment of Legal Counsel for Indigent Defendant]).

By letter dated May 3, 2004, Appellant wrote to Judge Keesley and complained that he had not seen his attorney. He also requested the appointment of two attorneys for his case. (R. 565, [May 3, 2004 Letter]). By letter dated May 4, 2004, Appellant wrote to the Clerk of Court and again reported Mr. Sturkey had not communicated with him, and similarly requested the appointment of two attorneys. (R. p. 567, [May 4, 2004 Letter]). By letter dated May 10, 2004, Judge Keesley acknowledged the correspondence and advised that Appellant or Mr. Sturkey would need to file appropriate motions to gain relief. (R. p. 570, [May 10, 2004 Letter]). Judge Keesley advised Appellant that he could file a motion to relieve counsel, though hybrid representation on other matters was not allowed. (R. p. 570, [May 10, 2004 Letter).

By letter dated May 11, 2004, private counsel, John Delgado, wrote the Court to request a bond hearing. Mr. Delgado wrote in a February letter that he would not be representing Appellant. (R. p. 35, lines 10-25).

By letter dated January 4, 2005, Appellant wrote the Clerk of Court and again complained he had not seen Mr. Sturkey, and complained that Mr. Sturkey had been reassigned to him in June 2004. Appellant asked for Mr. Sturkey to be relieved of appointment. (R. p. 572, [January 4, 2005 Letter]).

On February 16, 2005, Appellant was released to Georgia to stand trial for the kidnapping. (R. p. 37, lines 2-3).

On September 12, 2006, Appellant was convicted after a jury trial in Georgia and sentenced to life imprisonment. He thereafter began service of that sentence in Georgia. (R. p. 38, line 12 – p. 39, line 1).

Public Defender Seigler assumed representation from Mr. Sturkey. On or about May 18, 2010, Mr. Seigler moved to be relieved of appointment as Mr. Seigler represented co-defendant Barnes on a separate, throwing bodily fluids matter. Judge McMahon signed an order on June 14, 2010 relieving Mr. Seigler from appointment. Judge McMahon appointed Mr. Williams, defense counsel at trial, in June of 2010 after Mr. Seigler was relieved. (R. p. 39, line 2 – p. 40, line 6).

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

Appellant was considering same during this time. (R. p. 25, lines 6-16). (See also R. p. 558, [Court Exhibit 1]).

On or about August 12, 2011, the State requested custody under the Interstate Agreement on Detainers ("IAD"). (R. p. 40, line 11 – p. 41, line 3). Pursuant to the State's request, Appellant was returned to the State on September 30, 2011. (R. p. 41, lines 17-19).

The State stood ready to call the case both for the week of October 3, 2011 and/or the week of October 10, 2011. Defense counsel moved for a continuance for each date. The continuances were granted over the State's objection. (R. p. 28, line 25 – p. 29, line 13; p. 41, line 13 – p. 42, line 20). In granting the continuance, Judge Keesley noted that counsel had little time to consult with Appellant due to Appellant's incarceration in Georgia. Judge Keesley also noted that there was no motion for a speedy trial, though the Order for continuance was "not intended to prejudice any future right the defendant may have to make such a motion." (R. pp. 560 - 561, [Order Upon Motion for Continuance, pp. 2-3]). However, Judge Keesley found that the defendant's request for continuance tolled the 180 day time period in which the State was required to try Appellant pursuant to the terms of the IAD. (R. p. 561, [Order Upon Motion for Continuance, p. 3).

On January 9, 2012, the State called the case to trial. In pre-trial motions, Appellant moved to dismiss the murder charge for failure to bring the charge to trial in a timely fashion. Defense counsel for Appellant admitted there was a "hurdle" to his motion to dismiss based on a violation of right to a speedy trial in that Appellant never demanded a trial. (R. p. 22, line 8 – p. 23, line 4). Defense counsel argued, though, that the passage of time should prompt review. (R. p. 23, lines 5-8). Defense counsel also

suggested that, due to the length of time at issue, "the Court could, on its own motion, find that that is a violation of his right to a speedy trial." (R. p. 23, lines 5-8). Counsel further argued that the failure to request a trial should not be weighed heavily against Appellant when there was fluctuation in representation, and where there was a question of whether Appellant may decide to be a witness against co-defendant Steven Barnes in the capital case:

> … I was not representing him until leading into the Barnes trial. I was - - didn't even know what his circumstances were until I was appointed some, I guess, eight years after his arrest, eight and a half years to him after his arrest.
>
> And quite honestly, Judge, as I indicated to you, when I was appointed to him, it was under the guise of, well, what's going to happen with him? Is he going to cooperate in the prosecution of Steven Barnes? How do we address that issue?
>
> And, essentially, I did not consider the filing of a speedy trial motion immediately because, again, with him doing a life sentence and based on some assertions made to me by the Solicitor, I wasn't certain that he would be tried in this case, did not believe he would be, did not believe it was appropriate to file a speedy trial motion. Sometimes that can be a dangerous proposition. You may get just what you ask for. And, essentially, we didn't file it.

(R. p. 25, lines 6 – p. 26, line 1).

Defense counsel also asserted that prejudice would be shown "by the conflicting evidence that will come from the varying witnesses based on prior testimonies they've given over the last six, seven years and last week." (R. p. 26, lines 6-9). Counsel argued "[t]heir stores have varied over time and we believe that that's an obvious demonstration of prejudice." (R. p. 26, lines 10-11). Counsel asserted "that the State's own role in failing to bring him to trial is solely on the State and its not on him" and "the fact that he

failed to assert it, I don't think should necessarily defeat our claim that his rights have been violated … on the basis of this substantial delay." (R. p. 26, lines 12-18).

The solicitor asserted in response:

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

(R. p. 30, line 20 – p. 31, line 1).

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

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

or unavailable witness. (R. p. 44, line 11 – p. 48, line 13). In regard to the State's determination to try Barnes first, the trial judge noted that Appellant's "due process rights are separate and distinct from the State's prosecutorial plan," but "given the fact that he was a sentenced prisoner in Georgia and that he was, for that length of time, that he would not have been released, that it was not unreasonable for the State to take the position that they wanted to try the one defendant that they sought the death penalty on in the case first and disposed of that case first." (R. p. 48, line 24 – p. 49, line 12). Considering all the facts and upon finding a lack of prejudice, the judge denied the motion. (R. p. 49, lines 13-18). Counsel renewed his motion to dismiss at the close of the State's case, adding that cross-examination demonstrated the "inconsistencies of the memories of the witnesses" and the prejudice to Appellant. (R. p. 455, lines 12-24). The judge again denied the motion referencing his prior ruling. (R. p. 455, line 25 – p. 456, line 1).

On appeal, Appellant complains that the trial judge erred in that the State was at fault in failing to bring the case to trial for nearly ten (10) years. (FBOA, p. 9).

Discussion:

"A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion." *State v. Langford*, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012). It is well established that an abuse of discretion occurs either of two ways, "when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Id (quoting Fields v. J. Haynes Waters Builders, Inc.,* 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008)). In essence, "the court is bound by the findings of the trial court unless they are unsupported by the evidence, clearly wrong, or

controlled by an error of law." *State v. Cooper*, 386 S.C. 210, 216, 687 S.E.2d 62, 66 (Ct. App. 2009). The record here fully and fairly supports Judge McMahon's finding that, in these discrete circumstances, the delay did not offend the right to a speedy trial nor prejudice Appellant to the extent dismissal was warranted. There was no demand for a speedy trial, and there was no allegation of lost witnesses or other prejudice to Appellant. The trial judge carefully balanced the competing factors under the appropriate legal framework. The record does not support an abuse of discretion. Thus, this Court should affirm the denial of the motion to dismiss.

The right to a speedy trial is guaranteed by the United States Constitution and the State Constitution. *State v. Langford*, 400 S.C. at 440, 735 S.E.2d at 481. *See also State v. Cooper*, 386 S.C. at 216, 687 S.E.2d at 66, *citing* U.S. Const. amend. VI; S.C. Const. art. I, § 14. "The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense." *Langford,* 400 S.C. at 440, 735 S.E.2d at 481, *citing State v. Waites,* 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978). As the trial judge found, pre-trial detention in South Carolina was limited to the period of January 25, 2002 to February 16, 2005. Appellant was then released to Georgia and subsequently stood trial, was convicted and sentenced *for the kidnapping of the murder victim*. In light of that incarceration, and the beginning of service of the life sentence in Georgia, it was not unreasonable for the State to pursue a capital case against co-defendant Steven Barnes first before trying Appellant. The "main goals" of preventing "undue pretrial incarceration," concerning over accusation of crime, and unduly limited the ability to gather evidence by incarceration are not offended in these circumstances.

See United States v. Grimmond, 137 F.3d 823, 830 (4th Cir. 1998) ("When, as here, a defendant is lawfully incarcerated for reasons not related to the pending charges and makes no credible showing that either his present or potential sentence will be substantially affected by the delay... we hold that there is simply no way the pretrial incarceration can be deemed oppressive.") (internal citation omitted). Even so, the right to a speedy trial is still preserved, and any alleged violation is resolved by balancing a number of factors.

"There is no universal test to determine whether a defendant's right to a speedy trial has been violated." *State v. Cooper*, 386 S.C. at 216, 687 S.E.2d at 66 (*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 was 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'").

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, supra*; *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, as the trial judge did, (see R. p. 48, line 14 – p. 49, line 18), the record well supports the denial of relief. Respondent will address each of the *Barker* factor separately as they apply here.

The Length of Delay

The time of ten years from arrest[3] 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,* 373 S.C. 527, 647 S.E.2d 144 (2007) (reviewing three year delay between arrest and trial in murder case);

[3] "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.

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 such time as reflected here – a period just shy of ten years – 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'"). The State did not argue otherwise before the trial judge and the trial judge apparently found the time sufficient to trigger the presumption as he continued his analysis of additional factors.

However, the trial judge properly found that not all the time that passed may be counted against the State. (See R. p. 46, line 8- p. 47, line 13). For instance, defense counsel moved for a continuance in October 2011. Though not a bar to making his claim, the fact of this delay is directly attributable to Appellant and should be weighed against Appellant in a speedy trial analysis. *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."). The trial judge properly treated this fact as such within the balancing of competing interests. (See R. p. 47, lines 1-13). Further, there is a significant matter of the strategy which counsel admitted. Essentially, counsel expressed that he specifically did not request a trial because he did not want a trial. He hoped that the State may not prosecute Appellant at all depending on how the prosecution of co-defendant Barnes would resolve:

> And quite honestly, Judge, as I indicated to you, when I was appointed to him, it was under the guise of, well, what's going to happen with him? Is he going to cooperate in the prosecution of Steven Barnes? How do we address that issue?
>
> And, essentially, I did not consider the filing of a speedy trial motion immediately because, again, with him doing a life sentence and based on some assertions made to me by the Solicitor, I wasn't certain that he would be tried in this case, did not believe he would be, did not believe it was appropriate to file a speedy trial motion. Sometimes that can be a dangerous proposition. You may get just what you ask for. And, essentially, we didn't file it.

(R. p. 25, line 12 – p. 26, line 1).

At bottom, there is no indication on this record that Appellant ever wanted a trial. At any rate, as in the case of any delay, the reasons for the delay are more dispositive 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 (Barnes, Cave, Griffin, Thatcher, Appellant and Alexander Hunsburger) who participated in varying respect 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 delay in Barnes' capital case caused additional delays in the subsequent trials. (R. p. 28, lines 2-13). 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").

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, pp. 10-11), 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 may have been a benefit to either or both. It was, undoubtedly, Appellant's right to decline that offer. Even so, he 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 both Hunsbergers back to this jurisdiction for trial upon completion of the capital proceedings against Barnes. There was no delay of any consequence in seeking Appellant's return after the capital proceedings concluded. Judge McMahon correctly noted that this alone would not necessarily be reasonable in light of the protection of each individual's rights; however, in these particular circumstances, Appellant was already serving a life sentence in another jurisdiction for the kidnapping of the murder victim. His hope was not to be prosecuted here. There was no pressing need for a trial date from Appellant's perspective and he didn't ask for one.

It should be noted the State 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 simply 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. Grimmond,* 137 F.3d at 828 ("When a defendant violates the laws of several different sovereigns, as was the case here, at least one sovereign, and perhaps more, will have to wait its turn at the prosecutorial turnstile. Simply waiting for another sovereign to finish prosecuting a defendant is without question a valid reason for the delay."); *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.").

Further, after conviction, Appellant began service of his Georgia sentence in Georgia. Again, as asserted previously, this time should not count against the State, or, at the least, not be counted heavily 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

"[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.").

Appellant failed to ever demand a trial. Further, and unlike his co-defendant Steven Barnes, he did not seek return and prosecution under the IAD.[4] The State clearly informed the trial judge that it was the State that had to institute proceedings to gain custody. (See R. p. 40, lines 17-19). Further, though Appellant cites the Order Upon Motion for Continuance as noting the motion for continuance should not apply to the matter of a speedy trial, (see FBOA, p. 12), the Order also specifically includes a finding that the IAD compact terms were tolled *due directly to Appellant's request for continuance.* (R. p. 561, [Order Upon Motion for Continuance, p. 3]). Thus, in assessing the delay, the fact that Appellant failed to assert his right to a speedy trial is significant, especially in light of the fact that he never attempted to force a trial by any means, and actually waived his right to force trial within 180 days under the interstate compact. *See Weems v. State*, 714 S.E.2d 119, 124 (Ga.App. 2011) ("while a defendant can assert his or her right to a speedy trial at any time before trial, this does not mean the trial court cannot and should not consider the timing of the defendant's assertion of that right ... Here, Weems—who has had the benefit of counsel since shortly after his arrest—did not file a statutory demand for speedy trial pursuant to OCGA § 17–7–170 and did not assert his constitutional right to a speedy trial until 38 months after his arrest, waiting to do so

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[4] Barnes' case, as of this writing, is pending on direct appeal in the Supreme Court of South Carolina. (Appellate Case No. 2010-178247, argued February 5, 2013). Barnes does not raise a speedy trial issue in his direct appeal, but has argued that the IAD provided for dismissal of the murder charge where he was not tried within the statutorily set one hundred and eighty (180) days.

on the day of his trial's calendar call. Weems's failure to assert this right in a timely manner can certainly be weighed heavily against him"). Moreover, these facts regarding the failure to request a trial closely track the facts of the *Barker* case where the United States Supreme Court found the defendant "was not deprived of his due process right to a speedy trial." *Barker v. Wingo*, 407 U.S. at 536.

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

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

Id, 407 U.S. at 516.

The Supreme Court found that "barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial." *Id* at 536. The situation is much the same here. The State indicated a desire to try Barnes first, and that capital prosecution was delayed for various reasons. During that time, Appellant apparently considered whether he, like other co-defendants, would testify against Barnes. (See R. p. 25, lines 12-16; R. p. 558 [Court Exhibit 1]). Counsel,

admittedly, did not move for a trial as he might have "gotten what he asked for," and he did not want to secure a trial. (R. p. 25, lines 17-25). Respondent notes that this was fourth counsel, and Appellant was well aware of how to file a motion to relieve counsel and that he could receive another attorney who would press for his rights if he was not in agreement with counsel. (See R. p. 570 , [May 10, 2004 Letter]). Like *Barker*, the record supports Appellant did not want a trial. And, also like *Barker*, a reviewing court should be "reluctant indeed to rule" there is a violation of his constitutional right. *Id. See also State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) (finding no violation where during five of the seven year delay at issue, neither the State nor defendants "pursued the matter" and a "failure to assert the right will make it difficult for the defendants to prove that they were denied a speedy trial"). *See also United States v. Wanigasinghe*, 545 F.3d 595, 599 (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."). Further, the suggestion that counsel "status" was "in question," during part of the time, (see FBOA, p. 12), seems to be of little bearing. As the trial judge found, Appellant was represented. (See R. p. 40, lines 8-10). In fact, counsel at trial was appointed in June 2010, well before the January 2012 trial. (R. p. 40, lines 5-7). He stated that he did not at that time wish to secure a trial. (See R. p. 25, line 12 – p. 26, line 1). Further still, the trial judge logically found that the request for continuance in October 2011 was reasonable as Appellant had been incarcerated in Georgia until September 30, 2011. (See R. p. 47, lines

1-13). Nothing shows a lack of counsel at a crucial time. Interestingly, though, trial counsel's request for continuance due to Appellant's absence from the State strengthens the finding that the custody in another jurisdiction added additional delays. Again, this should not count against the State. Even so, it remains that Appellant never requested a trial, nor did he want one. 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," 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). Further, 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.

The trial judge appeared to have considered this very passage in weighing the factors in this case. (See R. p. 44, line 11 – p. 46, line 7). Moreover, the trial judge correctly noted that Appellant would have the opportunity to test and challenge memories in his cross-examination. (R. p. 47, lines 14-19). The record well demonstrates that, in fact, Appellant did have ample opportunity for full and effective cross-examination, including making use of prior sworn testimony – testimony that was available as a result of multiple actions both in South Carolina and Georgia. (See, for example, R. p. 260, line 8 – p. 264, line 15; p. 276, lines 2-25; p. 327, lines 20-25; p. 356, line 22 – p. 358, line 17; p. 362, line 10; p. 442, line 14 – p. 445, line 1). The multiple trials in essence preserved testimony for this Appellant's use to his benefit.[5]

Further, the trial judge correctly found that Appellant does not contend any exculpatory witness or testimony is not unavailable. "Prejudice, of course, should be

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

assessed in the light of the interests of defendants which the speedy trial right was designed to protect ... (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker v. Wingo*, 407 U.S. at 532. "[T]he most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* The complete failure here to show any impairment in the defense could not support a finding of prejudice.[6] *Id. Compare State v. Buckner*, 738 S.E.2d 65 (Ga. 2013) (affirming finding of prejudice and dismissal where defendant "'was in the unique position of not just speculating, but knowing there was tampering with the evidence at the ... crime scene, but being prevented from identifying and showing what aspects of the scene and what specific pieces of evidence, have been altered or manipulated'" due to dimming memories and lack of recorded statements). Respondent notes that, contrary to showing any exculpatory evidence was previously available, the record supports that Appellant has twice been convicted (once in Georgia in 2006, and once here in 2012) on evidence of participation in the events that led to Samuel's murder. At any rate, Appellant did not allege there was any lost evidence or testimony.

Lastly, the passage of time alone evidences one further benefit to Appellant. Though there were circumstances of aggravation connected to the murder, the State ultimately decided only to seek the death penalty for Barnes. As such, the length of the

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[6] Further, as noted previously, the pre-trial "societal disadvantages" were effectively ended with the Georgia conviction for kidnapping, as loss of employment or other life disruptions are attributed to that conviction – not waiting for another conviction in another jurisdiction. *Barker v. Wingo,* 407 U.S. at 533 (noting the various "societal disadvantages and reasoning: "Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.").

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.").

In sum, the record well supports Judge McMahon'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,

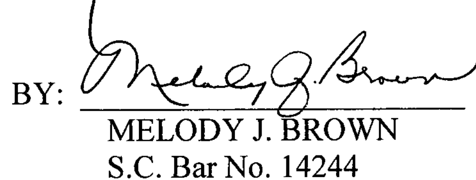
ALAN WILSON
Attorney General

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

October 8, 2013.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

The State, Respondent,

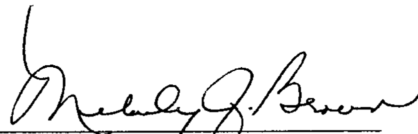
v.

Julio Angelo Hunsberger, Appellant.

Appellate Case No. 2012-207290

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
S.C. Bar No. 14244

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

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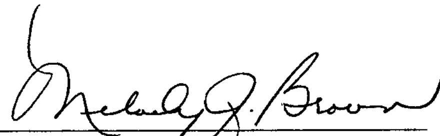
Appellate Case No. 2012-207290

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:

Kathrine H. Hudgins, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

This 8th day of October, 2013.



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

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

ALAN WILSON
ATTORNEY GENERAL

October 8, 2013

RECEIVED
OCT 08 2013
SC Court of Appeals

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

Re: The State v. Julio Angelo Hunsberger
Appeal from Edgefield County
Appellate Case No. 2012-207290

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.

Thank you for your cooperation in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv
Enclosures

cc: Kathrine H. Hudgins, Appellate Defender
The Honorable Donald V. Myers, Eleventh Circuit Solicitor
Sandi Wofford, Victim Services

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