

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

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S.C. Supreme Court

GENE TONY COOPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA COURT OF APPEALS

Counsel for Gene Tony Cooper petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his convictions for murder, and his death sentence.

CITATION TO OPINION BELOW

The opinion of the South Carolina Court of Appeals opinion is reported as State v. Gene Tony Cooper, 386 S.C. 210, 687 S.E.2d 62 (2009). The opinion is reproduced in the appendix at pages A1-8. The South Carolina Supreme Court granted certiorari on January 12, 2012. A copy of that order is reproduced in the Appendix at page A10. The South Carolina Supreme Court

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QUESTION PRESENTED

Whether a forty-five month delay in retrying Petitioner, where he repeatedly demanded his right to a speedy trial and where the delay was caused by the prosecutor's admission he "did nothing" to prepare for Petitioner's retrial from 2002 forward, then failed to keep his promise to try the case in the Spring of 2004, and then failed to comply with the court's order to try the case by the end of 2005 violated Petitioner's Sixth and Fourteenth Amendment right to a speedy trial?

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
APPENDIX INDEX.....	iii
TABLE OF AUTHORITIES.....	iv
CITATION TO OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
Procedural History.....	2
WHY THE WRIT SHOULD BE GRANTED	
A forty-five month delay in retrying Petitioner, where he repeatedly demanded his right to a speedy trial and where the delay was caused by the prosecutor’s admission he “did nothing” to prepare for Petitioner’s retrial from 2002 forward, then failed to keep his promise to try the case in the Spring of 2004, and then failed to comply with the court’s order to try the case by the end of 2005 violated Petitioner’s Sixth and Fourteenth Amendment right to a speedy trial.....	4
Relevant Facts.....	4
Speedy Trial Motion After Grant of a New Trial.....	5
South Carolina Court of Appeals Opinion.....	13
Discussion.....	13
CONCLUSION.....	20

APPENDIX

1. OPINION OF SOUTH CAROLINA COURT OF APPEALSA1

2. ORDER DENYING REHEARING A9

3. ORDER GRANTING PETITION FOR WRIT OF CERTIORARI.....A10

4. ORDER DISMISSING PETITION FOR WRIT OF CERTIORARI AS IMPROVIDENTLY
GRANTED:..... A11

TABLE OF AUTHORITIES

CASES

<u>Barker v. Wingo</u> , 407 U.S. 514 (1972)	11, 14, 16, 17
<u>Cooper v. Moore</u> , 351 S.C. 207, 569 S.E.2d 330 (2002)	3
<u>Doggett v. United States</u> , 505 U.S. 647, 642 n. 1 (1992).....	10, 15, 19
<u>Lahur v. State</u> , 615 N.E.2d 150 (Ind. App. 1993).....	10
<u>State v. Allen</u> , 269 S.C. 233 S.E.2d 64 (1977).....	16
<u>State v. Brazzell</u> , 325 S.C. 65, 480 S.E.2d 64 (1997)	15
<u>State v. Chapman</u> , 289 S.C. 42, 344 S.E.2d 611 (1986).....	16
<u>State v. Cooper</u> , 312 S.C. 90, 439 S.E.2d 276 (1994).....	3
<u>State v. Cooper</u> , 386 S.C. 210, 687 S.E.2d 62 (Ct.App. 2009)	4
<u>State v. Cooper</u> , 400 S.C. 256, 734 S.E.2d 166 (2012).....	5
<u>State v. Ferguson</u> , 476 So.2d 1252 (Miss. 1991)	10
<u>State v. Foster</u> , 260 S.C. 511, 197 S.E.2d 280 (1973).....	16
<u>State v. Gene Tony Cooper</u> , 386 S.C. 210, 687 S.E.2d 62 (2009)	1
<u>State v. Robinson</u> , 335 S.C. 620, 518 S.E.2d 269 (Ct.App. 1999)	16
<u>State v. Tyson</u> , 283 S.C. 375, 323 S.E.2d 375 (1984) (2001).....	16
<u>United State v. McDonald</u> , 456 U.S. 1 (1982).....	14, 19

CONSTITUTIONAL PROVISIONS

United States Constitution 28 §1257(a)	3
United States Constitutional Amendment VI	passim
United States Constitutional Amendment XIV	3, 7

dismissed the writ as improvidently granted on November 17, 2012. A copy of that order is reproduced in the Appendix at pages A11-12.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Petitioner Cooper is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments which provide, in pertinent part:

Amendment VI: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...”

Amendment XIV: No State “shall ... deprive any person of life, liberty, or property, without due process of law . . .”

STATEMENT OF THE CASE

Procedural history

Petitioner was indicted by the Lexington County grand jury for the offenses of murder, armed robbery, conspiracy, and conspiracy to commit armed robbery. R. 1561 - 1565. The State sought the death penalty. After Petitioner’s first trial he was convicted of murder and sentenced to death. The South Carolina Supreme Court in State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994) reversed Petitioner’s conviction for murder and his death sentence and remanded for a new trial on the murder charge since there was not an on-the-record waiver of Petitioner’s right to personally address the jury during the guilt phase of the trial. Petitioner’s remaining convictions were affirmed.

Subsequently, on August 12, 2002, the South Carolina Supreme Court in Cooper v. Moore,

351 S.C. 207, 569 S.E.2d 330 (2002), reversed Petitioner's non-capital convictions finding trial counsel's failure to inform Petitioner of his statutory right to make a closing statement to the jury constituted ineffective assistance of counsel. As will be seen infra, Petitioner subsequently moved, and kept renewing motions for a speedy trial. Petitioner had maintained his innocence since his arrest in October, 1989.

The first speedy trial motion hearing was held on August 18, 2003 before the Honorable Marc H. Westbrook. David Bruck and Robert Lominack represented Petitioner. Donald V. Myers and C. Dayton Riddle were the solicitors. R. 4. A second speedy trial hearing was held on February 15, 2005 before the Honorable William P. Keesley. David Bruck represented Petitioner. Dayton Riddle was the Deputy Solicitor. R. 22.

A third speedy trial hearing and motion to dismiss was held before Judge Keesley on July 12, 2005. David Bruck, Jack Duncan, and Stuart Andrews, Jr. represented Petitioner. Donald V. Myers was the solicitor. R. 37. A motion to dismiss hearing was then held on February 8, 2006 before the Honorable Daniel F. Pieper. David Bruck and Jack Duncan represented Petitioner. B. Harrison Bell, Jr. represented the State because the Lexington solicitor's office had moved to be recused, and that motion was granted. The State no longer sought the death penalty. R. 101.

On May 22, 2006 Petitioner's case was called to trial before the Honorable Daniel F. Pieper, and a jury. David Bruck, Jack Duncan and Stuart M. Andrews, Jr., represented Petitioner. B. Harrison Bell, Jr. and Theodore N. Lupton were the solicitors. R. 345. At the conclusion of the trial the jury found Petitioner guilty on all four counts. R. 1521, l. 15 – 1522, l. 2. Judge Pieper sentenced Petitioner to life imprisonment for murder, twenty-five years for armed robbery, and five years imprisonment for criminal conspiracy. R. 1535, ll. 13 – 19. The Court of Appeals affirmed

Petitioner's convictions in State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct.App. 2009) App. 1-12. Petitioner sought rehearing which was denied. App. 13-43.

On January 12, 2012, the Supreme Court of South Carolina granted a petition for writ of certiorari on Petitioner's Question I and denied the petition as to the remaining questions. On November 7, 2012, the South Carolina Supreme Court dismissed certiorari is improvidently granted in State v. Cooper, 400 S.C. 256, 734 S.E.2d 166 (2012).

WHY CERTIORARI SHOULD BE GRANTED

A forty-five month delay in retrying Petitioner, where he repeatedly demanded his right to a speedy trial and where the delay was caused by the prosecutor's admission he "did nothing" to prepare for Petitioner's retrial from 2002 forward, then failed to keep his promise to try the case in the Spring of 2004, and then failed to comply with the court's order to try the case by the end of 2005 violated Petitioner's Sixth and Fourteenth Amendment right to a speedy trial.

Relevant facts

Robert "Bo" Southerland told anyone who would listen following his own 1992 conviction for the murder of the victim, and his death sentence that he, Southerland, - - killed the decedent - - and that Petitioner, Tony Cooper was not present. Death row inmate Norman Starnes testified Bo Southerland admitted to him, and Southerland later confessed in court, that "[T]ony didn't have anything to do with it and Tony was not present when it happened." R. 1044, l. 19 – 1045, l. 15.

Bessie Davis started a prison ministry after she retired as a school teacher. She and fellow ministry worker Niada Knotts often met with Bo Southerland and other death row inmates. R. 1051, l. 11 – 1052, l. 17. Davis recalled: "I never asked [Bo Southerland], but he shared with me

that he did the crime alone, that Tony did not have anything to do with it.” R. 1056, l. 22 – 1057, l. 3; R. 1062, ll. 1 – 5. Knotts similarly recalled that she asked Southerland about Petitioner: “I said, well what about Tony? What did he do? And he [Southerland] said, well, Tony wasn’t even there. He didn’t have anything to do with it.” R. 1066, ll. 9 – 25; R. 1068, ll. 1 – 4.

It was not until April 21, 2006, “sixteen-and-a-half years after Kimberly Quinn’s death,” and after Southerland received a new sentencing hearing, and after the State no longer sought the death penalty against him, in exchange for his testimony, that Southerland claimed Petitioner was the killer and he essentially was just “along for the ride.” R. 799, l. 6 – 807, l. 22; R. 940, ll. 5-20.

While Southerland’s case was on direct appeal in the South Carolina Supreme Court the Attorney General of South Carolina moved to strike “all guilt phase issues from the initial brief of Petitioner, or, in the alternative to supplement record on appeal.” R. 1549. The June 25, 1993 motion had attached to it a notarized statement from Southerland dated April 11, 1992 admitting his guilt, and exculpating Petitioner. R. 1557.

Speedy trial motion after grant of a new trial

On July 15, 2003 defense counsel filed an “amended demand for speedy trial,” following his first speedy trial motion. R. 1. This motion noted “since August 29, 2002, the State has, to the defendant’s knowledge, taken no action to bring him to trial.” Motion at 2. R. 2. At an August 18, 2003, speedy trial motion hearing before the Honorable Marc H. Westbrook defense counsel Bruck told the judge that Petitioner had maintained his innocence since the day of his arrest, and he wanted a trial date set. R. 6, ll. 3 – 16. On June 20, 2003 counsel left a phone message for Solicitor Myers. However, Deputy Solicitor Riddle returned counsel’s call, and told him that Solicitor Myers was unavailable. Riddle asked counsel to give him “ten days to get back to me about a trial

date.” R. 6, ll. 15-25. After counsel left several more messages with the solicitor’s office: “Finally on July 11, 2003, Mr. Riddle called me back to say I probably needed to go ahead and file this [speedy trial] motion, that the State was not in a position to propose a trial date as yet. Since then we have been going through the mechanics to bring the matter before the Court.” R. 7, ll. 1-6.

The solicitor contended that he had other death penalty reversals to try in addition to Petitioner’s case, and he wanted counsel Bruck disqualified for his earlier contact with Bo Southerland. R. 8, l. 2 – 9, l. 21. Defense counsel responded, “I am Mr. Cooper’s lawyer now. He has made a motion. I think we should set the case for trial. “Counsel also informed the court that the other cases Myers alluded to only involved re-sentencing, and that this was a retrial. R. 10, ll. 8-25. Counsel said the fact “there are a lot of other cases piled up” was not an excuse to keep people in jail “year after year without a trial,” and he asked the judge to set a trial date. R. 10, l. 8. The judge took the matter under advisement, adding there would probably be another hearing in “just a couple weeks or so.” R. 14, ll. 1-10.

Petitioner again filed a “renewed demand for a speedy trial” on February 10, 2005 citing his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Motion at page 1. R. 18. This motion noted after the August 18, 2003 hearing that “Deputy Solicitor Riddle advised Judge Westbrook and the undersigned counsel for the defendant that the State would call Mr. Cooper’s case for trial during the spring of 2004 - - that is, between April and the end of June 2004. Based on this representation, no on-the-record hearing was held at that time.” Motion at page 2. R.19. The motion stated that despite undertaking to call Petitioner’s case for trial during the spring of 2004, “the State has not done so.” The motion stated Petitioner had remained in prison where he had been awaiting his retrial since August 29, 2002. Motion at pages 2 – 3. R. 19

A hearing was held before Judge William P. Keesley on February 15, 2005. Defense counsel reiterated that Petitioner “at all times has desired a speedy trial, and for this reason we are now renewing our demand for a speedy trial.” R. 23, ll. 10 – 19. Counsel added: “Now Mr. Riddle just a moment ago advised me that Mr. Myers is not present today and the State is not prepared to go forward with the date setting in Mr. Myers’ absence.” R. 23, l. 24 – 24, l. 5. Counsel further stated that the State had already promised to try this case in the spring of 2004. Since that time counsel had taken a law professor’s position at the Washington and Lee University of Law School in Lexington, Virginia. “In effect, I feel like I’ve been waited out. I know that the State didn’t know that was going to happen, but that’s what happens when a case is not tried. Change and difficulties increase,” and he asked the judge as Administrative Judge to set a trial date. R. 24, ll. 6 – 13. The judge ruled the bottom line was that this was “a 1990 case and it needs to move.” R. 26, l. 18 – 27, l. 10.

Another hearing was held on July 12, 2005 before Judge Keesley. Defense counsel noted that after the prior hearing the judge had issued an order on April 25, 2005 “which directed the commencement of this trial *in the year 2005 and directed that defense counsel be notified of a date within thirty days.*” The order noted that each side had moved to disqualify the other. R. 39, ll. 5 – 25. (emphasis added). See Order of Judge Keesley. R. 76 - 79. Defense counsel told the judge “I’m not going to go through the entire history of Mr. Cooper’s fruitless efforts to bring this case to trial because the record already abundantly reflects them.” Counsel noted Judge Keelsey’s order of April 25, 2005 which directed the State to get “a trial date set and advise Mr. Cooper and counsel of that date in thirty days.” R. 42, ll. 11 – 21. Regarding that order counsel “contacted Court

Administration and determined that the State never contacted Court Administration to ask for the assignment of a trial judge.” Counsel argued “close to three years have now elapsed since this case was ready for retrial, and close to two years have elapsed since first Mr. Cooper’s motions for a speedy trial.” R. 43, l. 8 – 44, l. 6. “We really think they’ve had their chance and they missed it and it’s time to dismiss the charges. The length of the delay is completely unreasonable. The reasons for the delay are entirely invalid.” R. 45, ll. 11 – 21. Counsel requested that the judge dismiss the case “for lack of prosecution, lack of a speedy trial, and let that be the end of it.” In the alternative, counsel asked to be heard on having Petitioner released on bond with conditions. R. 46, ll. 3- 19. Counsel argued the time had passed in giving the State more chances and that “just keeping a man in prison forever” could not be tolerated. R. 46, ll. 3 – 8.

The solicitor then requested that his office be disqualified from this case. The solicitor told the judge that “Rick Hubbard, who is my deputy solicitor . . . assisted Judge Long during the first trial.” The solicitor now argued this raised an issue of a conflict of interest. R. 53, l. 18 – 55, l. 21. Defense counsel responded: “We’re at a loss to understand why its being raised at such a late date, long after the time Your Honor had ordered a trial date be set had elapsed.” R. 60, l. 22 – 61, l. 9. Defense counsel argued:

This is the pattern that we’ve been encountering, Judge, for almost two years. It’s always mañana, it’s always “we’re not ready,” it’s always “We didn’t give notice, and plus we’ve got something else,” which would keep you, the Court, from doing anything to vindicate this man’s rights.

R. 63, ll. 4 – 18.

Judge Keesley said: “You’ll have an order within forty-eight hours.” R. 66, ll. 3 – 4. The judge issued an order dated July 12, 2005 denying the speedy trial motion “on the grounds it was

already covered by the order in April directing the case be tried in 2005.” See Order at page 3. R. 70. This July 12, 2005 order also denied the State’s motion to remove defense counsel, and it granted the State’s motion to have the Eleventh Circuit Solicitor’s Office disqualified due to a conflict of interest. The order also denied the defendant’s motion for bail. Order at page 3. R. 70.

The First Circuit Solicitor’s Office was then appointed to the case in September of 2005, and the Chief Justice designated Judge Daniel Pieper to hear and dispose of the case in an order signed December 2, 2005. Petitioner filed a “notice of motion and renewed motion to dismiss all charges for lack of a speedy trial, or the alternative to release pending trial” on December 29, 2005. See Motion. R. 81 - 84. The defense again asked for an order dismissing all charges against Petitioner for the denial of his right to a speedy trial. R. 84. The State filed a response conceding Petitioner had asserted his right to a speedy trial “several times and before the proper courts” but it claimed Petitioner was not prejudiced by the delay, and it also opposed granting Petitioner bond. State’s Response at page 4 – 5. R. 86 - 90

On January 18, 2006, Petitioner filed a reply noting the delay of “approximately three years and four months” between the reversal of the last of Petitioner’s convictions and his unscheduled retrial was sufficient to trigger judicial scrutiny under the speedy trial clause of the Sixth Amendment. Motion at page 2. R. 92. The reply further stated that this Court had recognized as a general manner, that delays approaching one year are regarded as presumptively prejudicial, *citing*, Doggett v. United States, 505 U.S. 647, 642 n. 1 (1992). R. 92. Counsel also argued that the State had not cited any authority for the proposition that the Sixth Amendment’s speedy trial guaranteed “was diluted or rendered ineffective by an intervening conviction and appellate reversal.” R. 92 - 93. Counsel wrote: “[C]ommon sense suggests that, ordinarily on

retrial, less time would be necessary to bring a case to trial than before.” State v. Ferguson, 476 So.2d 1252, 1254 (Miss. 1991). Counsel also *cited* Lahur v. State, 615 N.E.2d 150, 152 (Ind. App. 1993), for the proposition that “the delay that can tolerated for retrial is considerably less than for the initial trial because the issues and evidence have been fully explored.” R. 93. “The State also fails to explain why, in the face of at least three speedy trial demands and two orders mandating a 2005 trial, the First Circuit Solicitor’s Office took no discernable action to bring this case to trial after receiving the file from the Attorney General in September, 2004 . . . Now, nearly three and a half years after the Supreme Court ordered that the last of his charges be retried, the State’s time is up.” Reply at page 7. R. 97

A hearing on the motion was held on February 8, 2006 before Judge Pieper in Charleston, South Carolina. David Bruck and Jack Duncan represented Petitioner and B. Harrison Bell, Jr., was the solicitor. Defense counsel argued the State had not shown any reason in their return “why in 2002, 2003 and 2004, even when there was a court order in 2005, this case was not called for trial and there is simply no other way to develop the record other than to ask the person whose job it was to call it why it wasn’t called.” R. 107, ll. 1 – 9.

Solicitor Myers then testified and he agreed Petitioner’s case could “very well could be” “the oldest murder case in Lexington County.” R. 111, l. 19 – 113, l. 1. The solicitor claimed that Dayton Riddle was responsible for “all the pre-trial workup . . .” R. 113, ll. 3- 9. The solicitor admitted he really could not tell the court whether Riddle had ever given him “a progress report” about preparing this case for trial. R. 114, l. 23 – 115, l. 6. Myers also acknowledged that between August 29, 2002 and July of 2003 he made no request for Court Administration to schedule the case. R. 117, l. 17 – 119, l. 21. While the solicitor said he had

other cases which had priority “over this one” he could not recall such a case or why it had priority. R. 126, l. 25 – 127, l. 2. The solicitor said he did *not know* that in Barker v. Wingo, 407 U.S. 514 (1972) that this Court held that a delay of more than a year is “presumptively prejudicial.” R. 128, ll. 17 – 20.

As to what his office did to prepare for that spring 2004 trial, the solicitor said defense counsel would have to ask Riddle that question -- “I don’t know. You will have to ask him. *I didn’t do anything.*” R. 130, ll. 19 – 22. (emphasis added). Despite prior contentions concerning pending capital matters the solicitor also said he would not be surprised to know that he had not tried any capital cases between the “date of final reversal” and the time of the speedy trial motion. R. 131, l. 16 – 135, l. 7. The solicitor was unaware of any problem the State had with evidence or otherwise that prevented him from calling this case, and he acknowledged Petitioner’s was the second oldest case in his circuit. R. 137, ll. 7-15; r.154, ll. 2 – 12; R. 296 - 327.

On cross-examination, the solicitor maintained he had lost seven or eight months court time “because of the mold in the new courthouse.” R. 160, ll. 2 – 4. However, on redirect examination the solicitor acknowledged the move into the new courthouse took place in 2004. R. 161, l. 15 – 162, l. 18. Deputy Solicitor Riddle then admitted that some murder cases had been assigned to him. However, he added contrary to Solicitor Myers’ testimony discussed above: “I don’t think Mr. Cooper or Mr. Southerland ever appeared on my roster, my personal roster.” R. 166, ll. 1 – 3. Riddle acknowledged he was not getting Petitioner’s case ready for trial in the year elapsed between August 2002 and the speedy trial motion in August 2003. He also did not know of anyone else in his office that was working on this case. R. 168, ll. 12 – 20. Riddle also said he

received no direction from Solicitor Myers. R. 169, l. 14 – 176, l. 5. Defense counsel then moved to dismiss the charges against Petitioner for the denial of his Sixth Amendment right to a speedy trial, and he noted that while this motion was difficult to grant it was the judge’s duty to do so. R. 177, l. 7 – 178, l. 18.

Defense counsel explained that without a trial date “we cannot subpoena our witnesses,” and he reminded the judge that the solicitor’s office had not “done a lick in preparing the case.” R. 185, ll. 10 – 24. There was also the prejudice from Petitioner’s pretrial confinement “day after day and week after week and month after month and now its being year after year.” R. 186, ll. 4 – 15. Counsel also argued that the anxiety and stress of the pending charges against Petitioner where he was presumed innocent, and where for three and a half years “the sword hangs over him.” Counsel added, “[y]ou will not find another speedy trial case where a man has been dangled over the abyss for three and a half years pending trial for his life. There ain’t one. This case stands alone.” R. 188, ll. 8 – 18. The solicitor *acknowledged to the judge that the defense was not responsible for any delay in this case* cause by a motion for a continuance or otherwise. R. 218, l. 9 – 221, l. 1. Defense counsel added that the defense had made four “and perhaps five” demands for a speedy trial. R. 229, l. 3 – 232, l. 6.

Judge Pieper issued a written order dated April 21, 2006. In this order the judge noted the delay of forty-four months was sufficient to “trigger review of the other [speedy trial] factors.” Order at page 5. R. 332. Judge Pieper questioned the solicitor’s assertion that the procedures of Court Administration were an obstacle. R. 335. The order also recognized that South Carolina case law had held that the delay must be due to the “neglect and willfulness of the State’s prosecution.” R.335 (Court’s emphasis). However, the judge strongly questioned this precedent:

“It is not clear to this court whether such precedence requiring neglect and willfulness is in line with the jurisprudence of the United States Supreme Court. Nonetheless, the court finds that the State’s conduct in this instance was not apparently willful *and was largely justifiable*.” R. 336 - 337. (emphasis added). The judge reasoned that Petitioner had benefited to some extent because the “State has now withdrawn its notice to seek the death penalty,” and he denied the motion. 15. R. 342.

South Carolina Court of Appeals Opinion

The Court of Appeals affirmed the judge’s ruling, holding Petitioner’s Sixth Amendment right to a speedy trial was not violated in this case, and it also Petitioner received some benefit from the delay because the State dropped its request to seek the death penalty. App. A1. “Judge Pieper noted the State withdrew its notice to seek the death penalty; thus, the withdrawal be construed as a benefit to Cooper resulting from the delay.” App. A5.

Discussion

It was improper for the South Carolina Court of Appeals to reason that since the State no longer sought the death penalty the unreasonable delay in retrying Petitioner became reasonable. A criminal defendant is guaranteed the right to a speedy trial by Sixth Amendment to the United States Constitution. This right “is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, nevertheless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.” United State v. McDonald, 456 U.S. 1, 8 (1982). Here, Petitioner had been incarcerated the entire time.

In determining whether a defendant has been deprived of the right to a speedy trial, the

court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary and unreasonable.

Here, the delay was both arbitrary and unreasonable. Solicitor Myers openly admitted he did *nothing* to bring Petitioner to trial or to prepare for trial for years after his convictions were vacated in August 2002. Defense counsel correctly argued the solicitor's office was willing to let Petitioner "rot" in jail without any intention of retrying him. That constituted bad faith. The solicitor's intention to leave Petitioner in jail without a trial was true even though Petitioner was not facing re-sentencing, he was facing a new trial where his guilt or innocence was at issue. As seen, Solicitor Myers said it was Deputy Solicitor Riddle's responsibility to prepare the case. Riddle testified that he did not understand the case was even assigned to him, in contrast to Myers' testimony under oath.

The prosecution bungled this case out of arrogance. It promised to try Petitioner in the Spring of 2004, and it did not. It was ordered to try Petitioner by the end of 2005, and it did not. It made a belated motion to withdraw based upon an assistant solicitor having worked for former Circuit Court Judge Hubert Long many years ago. The solicitor's office was well aware of that fact, and it took no action until after the last minute. Surely, a solicitor hiring an assistant solicitor took into account the applicant's clerkship with a circuit court judge.

The delay in this case was forty-four months between the reversal of the last of Petitioner's convictions and the final hearing. As seen, this Court has recognized that, as a general matter, delays approaching one year are presumptively prejudicial. Doggett v. United

States, 505 U.S. 647, 652 n.1 (1992). A delay of forty-four months, (three years and eight months) exceeded that found in almost any reported South Carolina case. See State v. Brazzell, 325 S.C. 65, 480 S.E.2d 64, 70 (1997) (two years, four months); State v. Chapman, 289 S.C. 42, 344 S.E.2d 611, 612 (1986) (one year); State v. Tyson, 283 S.C. 375, 323 S.E.2d 375 (1984) (2001) (thirteen months); State v. Waites, 270 S.C. 104, 240 S.E.2d 651, 652 (1978) (two years, four months); State v. Allen, 269 S.C. 233, 237 S.E.2d 64 (1977) (two years, four months); Cf. State v. Robinson, 335 S.C. 620, 518 S.E.2d 269, 271 (Ct.App. 1999) (delay of nearly four years triggered Barker scrutiny, but trial occurred ten months after defendant's first request for speedy trial, and no prejudice resulted from delay); State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973) (seven and a half year delay in trying defendants who jumped bond before trial and were imprisoned in another state for unrelated crimes; trial occurred within fifteen months of their belated demand to be returned to South Carolina for trial).

Here, the State had already tried Petitioner one time, and where it had already marshaled its proof once, as argued above, common sense dictated that less time was needed to prepare to retry Petitioner. Yet it treated Petitioner's demands, its own promises of a trial date, and a judge's order for a trial by the end of 2005 with apparent contempt. Second, as argued above, the government's reason for the delay was both arbitrary *and* unreasonable. Any delay caused by the "mold" in the Lexington County Courthouse was minimal. The attempt to blame the delay on the South Carolina Office of Court Administration was equally unavailing since the solicitor had the responsibility to call his case, and be sure the system was prepared. A phone call is not a difficult task. Petitioner would respectfully point to the extraordinary authority the solicitor had to control the criminal court docket, and such excuses offered against Petitioner's Sixth

Amendment right to a speedy trial under the highly unusual facts of this case should be quickly dispatched.

Further, after at least three speedy trial demands and two orders mandating a 2005 trial the First Circuit Solicitor's Office took no discernable action to bring Petitioner's case to trial after receiving the file from the Attorney General in September 2005. Again, the State had already broken its promise to try Petitioner in the spring of 2004. The State's delay was willful, arbitrary, and unreasonable. Petitioner submits the South Carolina Court of Appeals erred by affirming the trial judge's refusal to grant relief. The trial judge did not given due consideration to what occurred *before the case arrived on his doorstep*: No preparation for trial or intention to prepare by the solicitor, the deputy solicitor denying he was aware it was his responsibility to prepare the case, the broken promise to try the case in 2004, and not trying the case in 2005 as ordered. Barker v. Wingo, 407 U.S. at 531.

It should also be clear that Petitioner was far more than diligent in continuously demanding a speedy trial ever since July of 2003. Petitioner's persistent attempts seeking to vindicate his constitutional right to a speedy trial differentiate this case from the great majority of reported cases dealing with claims of pretrial delay, and it should have weighed heavily in favor of granting his motion to dismiss. Finally, as to the prejudice prong, as seen above, the trial judge noted his apparent discomfort in his order with South Carolina precedent he thought overemphasized this prong of the analysis. Further, this Court in Barker v. Wingo emphasized that no one factor was determinative in the balancing test noting, "[W]e regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors . . . courts must still engage in a difficult and

sensitive balancing process.” Barker v. Wingo, 407 U.S. 514, 533 (1972).

This Court in Barker v. Wingo listed “oppressive pretrial incarceration” and anxiety and concern of the accused as two of the three forms of possible prejudice that may arise from the denial of a speedy trial. Barker v. Wingo, 407 U.S. at 532. Petitioner’s rigid incarceration on death row in Lieber Correctional Institution, and later in Maximum Security, amounted to no small prejudice, particularly given the prosecutions arrogance in failing to call his case to trial.

Moreover, the First Circuit Solicitor’s Office then displayed its unreasonable ineptitude, in failing to secure the presence of Red Farmer as a State’s witness through its unnecessary delay to Petitioner’s obvious prejudice. Farmer was in prison out-of-state, and even with the enormous delay in this case the prosecution failed to secure his presence as a witness at this second trial. Defense counsel implored the judge that Farmer’s demeanor would speak volumes to the jury about his mendacity when he claimed Petitioner was involved in the murder. Counsel strenuously argued that merely reading Farmer’s testimony during the first trial from a cold transcript of the prior trial was no substitute for the jury viewing and listening to this fraud. The prosecution gained quite an advantage from its own delay.

Further, memories were clearly affected by the delay at trial. Edward Hite was called as a reply witness, and he admitted that the solicitor’s office (neither the Eleventh Circuit or the First Circuit) provided him with his original trial notes, and he was not sure they even existed any more. Hite’s assertion that Petitioner told him “He was out driving around in his pick-up truck drinking beer, said he got home at, approximately, 2300 hours, or 11:00 p.m.” on the night of the incident which was based on his review of only the earlier transcript. His further testimony that Petitioner’s mother told him “she did not see Tony Cooper at all [on the day of the murder]” was based on a “follow-up” sheet from the notes he did not know still existed, or were not provided for

him. R. 1307, l. 14 – 1315, l. 4. Hite’s reply testimony was used to impeach Petitioner’s testimony that he did not drive around drinking beer, and his late mother’s earlier testimony which had provided Petitioner part of a corroborated alibi. R. 1143, l. 14 – 1147, l. 15; R. 1260, l. 23 – 1262, l. 17. While all of this was not known at the time the judge issued his order denying the motion, it was perfectly predictable. As counsel earlier argued, when arbitrary and unreasonable delay occurs there are foreseeable consequences.

In the final analysis, the trial judge observed that “[S]outh Carolina jurisprudence is somewhat undeveloped on the topic, including the different forms of prejudice, and there has not been any State guidance on the issue since the United States Supreme Court issued its opinion in Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686 (1992).” R. 338 – 339.

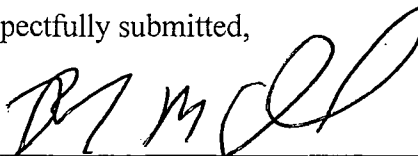
The South Carolina Court of Appeals erred by affirming the trial judge’s denial of his motion to dismiss and by holding Petitioner’s Sixth Amendment right to a speedy trial was not violated in this case, and by considering Petitioner received some benefit from the delay because the State dropped its request to seek the death penalty. As Petitioner also argued on rehearing the State would have been estopped from seeking the death penalty against Petitioner where it had accepted Bo Southerland’s confession exonerating Petitioner as true and even used it in a Court Motion to Strike Southerland’s guilt phase appellate issues before the South Carolina Supreme Court. Petitioner therefore did not gain any benefit from the State’s unreasonable, arbitrary, and arrogant delay in retrying him even if that were a valid consideration when deciding whether Petitioner had been denied his constitutional right to a speedy trial. App. 17. Petitioner suffered prejudice from the State’s inexcusable arrogant delay, and this Court is the Court of last resort to speak on the limit to which prosecutors can simply allow a prisoner to languish in jail for many years without any

intention of retrying him after an appellate reversal out of sheer arrogance. See United States v. MacDonald, 456 U.S. 1, 8 (1982); R. 339.

CONCLUSION

By reason of the foregoing argument this Court should grant the writ of certiorari.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

February 5, 2013

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

GENE TONY COOPER,

Petitioner,

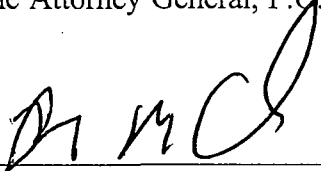
v.

STATE OF SOUTH CAROLINA,

Respondent

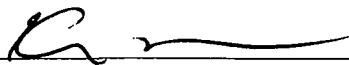
CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel, William Edgar Salter, III, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 5th day of February, 2013.



ROBERT M. DUDEK
Counsel of Record

SWORN TO BEFORE me this 5th
day of February, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

GENE TONY COOPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

A P P E N D I X

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ATTORNEY FOR PETITIONER

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Gene Tony Cooper, Jr., Appellant.

Appeal From Lexington County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 4633

Heard September 15, 2009 – Filed November 19, 2009

AFFIRMED

Deputy Chief Appellate Defender for
Capital Appeals Robert M. Dudek, of
Columbia, for Appellant.

Attorney General Henry Dargan
McMaster, Chief Deputy Attorney
General John W. McIntosh, Assistant
Deputy Attorney General Donald J.
Zelenka and Senior Assistant
Attorney General William Edgar
Salter, III, of Columbia; and Solicitor
Donald V. Myers, of Lexington, for
Respondent.

SHORT, J.: Gene Cooper appeals his convictions for murder, armed robbery, conspiracy to commit armed robbery, and kidnapping, arguing the trial court erred in: (1) denying Cooper's motion to dismiss the charges against him because his constitutional right to a speedy trial was violated; (2) finding Phillip Farmer was an unavailable witness and allowing Farmer's prior testimony to be read into the record because it denied Cooper his constitutional right to confrontation; and (3) ruling Cooper could be impeached with his 1977 convictions for housebreaking and grand larceny because the convictions were too remote and were highly prejudicial. We affirm.

FACTS

Cooper was indicted in January 1990 for murder, kidnapping, armed robbery, forgery, and conspiracy. On February 22, 1991, he was convicted on all charges and sentenced to death. However, almost three years later, the South Carolina Supreme Court reversed Cooper's conviction for murder and remanded the case for a new trial.[1] The Supreme Court affirmed Cooper's convictions for kidnapping, armed robbery, forgery, and conspiracy.[2] The following year, Cooper filed an application for Post Conviction Relief (PCR) pertaining to his four non-capital convictions. Counsel for both parties agreed that Cooper's retrial for murder should await the disposition of his PCR challenge. Following an evidentiary hearing, the PCR court granted Cooper relief for all of his non-capital convictions. The State appealed, and the South Carolina Supreme Court affirmed the granting of PCR.[3] The State did not petition for rehearing, and the Supreme Court sent the remittitur to the Lexington County Circuit Court on August 29, 2002.

Almost a year later, however, Cooper's retrial had still not been scheduled. On July 15, 2003, Cooper filed an amended demand for speedy trial, and a month later, a hearing was held in the circuit court before Judge Westbrook.[4] During the hearing, the State made a motion to disqualify Cooper's attorney, David Bruck, from the case for having contact with Cooper's co-defendant, Bo Southerland. Bruck asserted he had no prior knowledge of the State's motion to disqualify him from the case. Judge Westbrook took the matter under advisement, and set another hearing to discuss the speedy trial and disqualification issues. On August 25, 2003, the parties held an in-chambers conference to discuss the issues, and at that time, the deputy solicitor stated the solicitor's office would call Cooper's case for trial during spring 2004, between April and June.

The case was not called in spring 2004, and on February 10, 2005, Cooper filed a renewed demand for a speedy trial. Five days later, a hearing on the motion was held before Judge Keesley. Cooper moved to have the trial set for June or July 2005. The assistant solicitor said he could not set a date without Solicitor Donnie Myers being present, and the court should wait to set a date until a judge was selected for the case. On April 25, 2005, Judge Keesley ordered the case be heard before the end of 2005, or Cooper could move for bail or for dismissal of the charges. The order also provided notice was to be given to defense counsel of the trial date within thirty days of the order.

The following month, Solicitor Myers filed a motion to disqualify and recuse Cooper's attorneys. Myers stated that during Bruck's PCR representation of Cooper, Bruck contacted and communicated with Southerland, and obtained statements from him exculpating Cooper without approval from Southerland's attorneys. Myers asserted Bruck stipulated to the unauthorized communications; thus, Bruck and the other attorneys should be removed from the case and prohibited from talking with Cooper's newly-appointed attorneys.

Cooper filed a motion to dismiss all charges for lack of a speedy trial on June 1st. In the motion, Bruck stated that in response to Judge Keesley's April 25, 2005 Order, he sent an e-mail to the judge opposing counsel's request that the trial be set for the first of August because of a conflict with his schedule as a law professor at an out-of-state school.[5] On July 12, 2005, a hearing was held before Judge Keesley concerning Cooper's motion for speedy trial; the State's motion to excuse Cooper's counsel; and the Eleventh Circuit Solicitor's motion to withdraw from the case due to a conflict of interest. The solicitor's office moved to be excused because the deputy solicitor was a law clerk to the judge who presided over Cooper's first trial and was present for attorney-client issues.[6] The State also argued Bruck should be removed from the case because of his improper contact with Southerland. On July 13, 2005, Judge

Keesley filed his order, (1) denying the State's motion to remove Cooper's counsel; (2) granting the State's motion to disqualify the Eleventh Circuit Solicitor's Office; (3) denying Cooper's motion to dismiss; and (4) denying Cooper's motion for bail.

In September 2005, the First Circuit Solicitor's Office was appointed to the case, and in December, Chief Justice Toal appointed Judge Pieper to hear the case. Shortly thereafter, on December 29, Cooper filed a renewed motion to dismiss all charges for lack of a speedy trial, or in the alternative for release on bail. Cooper re-asserted everything from his prior motions. Cooper also asserted that despite Judge Keesley's second order, the State appeared to have taken no action other than deliver the file to the Attorney General's Office and request assignment of a new solicitor. The State filed a response to Cooper's Motion, arguing this case was different from most speedy trial cases involving pre-indictment or pre-trial delay because the case had already been tried once. The State conceded the length of delay in this case triggered further analysis of the reasons the trial was delayed and whether Cooper was prejudiced; however, the State claimed the case was delayed for three years and four months, beginning from August 29, 2002, the date the Supreme Court sent down the remittitur. The State contended Cooper was not prejudiced by the delay because he had already been tried and convicted for the crimes. Cooper filed a reply to the State's response, asserting the State cited no authority for its position that Cooper's rights were diminished by his intervening conviction and appellate reversal, and Cooper argued it should have required less time for the State to retry the case. Cooper also claimed his many motions for speedy trial differentiated this case from other speedy trial cases and weighed heavily in granting his motion to dismiss.

On February 8, 2005, a hearing was held before Judge Pieper concerning the speedy trial issue. Judge Pieper issued his order on April 21, 2006, denying Cooper's motion. Cooper's second trial was held before Judge Pieper from May 22 to June 1, 2006. At the conclusion of the State's case and the conclusion of the presentation of evidence, Cooper made motions for directed verdict, which were denied. Cooper also renewed his motion to dismiss the indictments due to a speedy trial violation at the conclusion of all the evidence; however, Judge Pieper denied the motion. The jury convicted Cooper of each of the charged offenses. Judge Pieper sentenced Cooper to life imprisonment for murder, twenty-five years for armed robbery, and five years for conspiracy to commit armed robbery. He did not impose a sentence for the kidnapping conviction. This appeal followed.

STANDARD OF REVIEW

In a criminal case, the appellate court reviews errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). 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. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997). The reviewing "[c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

LAW/ANALYSIS

I. Speedy Trial

Cooper argues the trial court erred in denying his motion to dismiss the charges against him

because his constitutional right to a speedy trial was violated. We disagree.

A criminal defendant is guaranteed the right to a speedy trial. 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). "This right 'is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.'" Id. (quoting U.S. v. MacDonald, 456 U.S. 1, 8 (1982)). There is no universal test to determine whether a defendant's right to a speedy trial has been violated. State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

A reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972); see also State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). These four factors are related and must be considered together with any other relevant circumstances. Barker, 407 U.S. at 533. "Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." Pittman, 373 S.C. at 549, 647 S.E.2d at 155. However, in Doggett v. U.S., 505 U.S. 647, 652 n.1 (1992), the United States Supreme Court suggested in dicta that a delay of more than a year is "presumptively prejudicial." Also, in State v. Waites, our supreme court found a two-year and four month delay was sufficient to trigger further review. Waites, 270 S.C. at 108, 240 S.E.2d at 653. Therefore, "a delay may be so lengthy as to require a finding of presumptive prejudice, and thus trigger the analysis of the other factors." Pittman, 373 S.C. at 549, 647 S.E.2d at 155.

Cooper argues the delay of forty-four months in bringing his case to trial the second time exceeded any delay in almost any reported South Carolina case, and the State's reason for the delay was both arbitrary and unreasonable. Cooper argues his many motions for speedy trial should be weighted heavily in favor of granting his motion to dismiss. He also asserts his incarceration on death row "amounted to no small prejudice" and his "anxiety and concern as he waited for the state to call his case also cannot be diminished." He further asserts that witnesses' memories were clearly affected by the delay at trial.

In his April 21, 2006 order denying Cooper's motions, Judge Pieper addressed each of the four Barker factors. As to the length of delay in bringing the case to trial, Judge Pieper noted that "a total delay of at least forty-four months [was] sufficient to trigger review of the other factors."^[7] However, he found "the delay was to some degree the result of prosecutorial and governmental negligence, and partly justifiable." He also stated that while none of the excuses alone were sufficient to justify the delay, when considered together, they sufficiently justified a majority of the delay. See Waites, 270 S.C. at 108, 240 S.E.2d at 653 (holding that the "constitutional guarantee of a speedy trial is protection only against delay which is arbitrary or unreasonable"). Specifically, Judge Pieper determined the main excuses for the delay were: (1) the complexity of the case and the amount of time required to prepare for trial; (2) the Eleventh Circuit Solicitor's Office's relocation due to mold contamination and an overcrowded docket; (3) confusion over which judge, if any, had been assigned to the case; and (4) the recusal of the Eleventh Circuit Solicitor's Office from the case in July 2005, preventing the First Circuit Solicitor's Office from being appointed until September 2005. Therefore, Judge Pieper concluded "the state's conduct in this instance was not apparently willful and was largely

justifiable."

In considering Cooper's assertion of his right to a speedy trial, Judge Pieper noted that "[i]t cannot be argued that since 2003 the defendant ever failed to assert his right to a speedy trial" and "nothing in the procedural history of the case could support a finding that the defendant failed to properly assert his right to a speedy trial." In consideration of the fourth and most important factor, prejudice, Judge Pieper found the main prejudice Cooper suffered was pretrial incarceration.

After weighing the four Barker factors and "the lack of demonstrable evidence of trial prejudice," Judge Pieper determined the "presumption of prejudice has been persuasively rebutted"; therefore, he denied Cooper's motion. Further, 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. See Brazell, 325 S.C. at 76, 480 S.E.2d at 70-71 (noting the three-year and five-month delay was negated by the lack of prejudice to the defense). Therefore, we find Judge Pieper's decision was supported by the evidence.

II. Unavailable Witness

Cooper argues the trial court erred in finding Phillip Farmer was an unavailable witness and allowing Farmer's prior testimony to be read into the record because it denied Cooper his constitutional right to confrontation. We disagree.

The confrontation clause of the Sixth Amendment of the Constitution of the United States is applicable to the States, and the primary interest secured by the confrontation clause is the right of cross-examination. State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); Starnes v. State, 307 S.C. 247, 249, 414 S.E.2d 582, 583 (1991). "The right to confrontation has been referred to as a 'trial right.'" Starnes, 307 S.C. at 249, 414 S.E.2d at 583 (quoting Barber v. Page, 390 U.S. 719, 725 (1968)). This trial right includes the opportunity to cross-examine and have a jury weigh the demeanor of the witness. Barber, 390 U.S. at 725 (1968). Thus, "the appropriate question under the confrontation clause is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." Starnes, 307 S.C. at 250, 414 S.E.2d at 584.

"[T]here has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." Barber, 390 U.S. at 722. "[A] witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."^[8] Id. at 724-25. Rule 804(a)(5), SCRE, provides that a witness may be declared "unavailable" if the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."

Cooper argues the State's efforts to procure Farmer's presence from Texas were unreasonable. Cooper also asserts the State knew it would be unable to obtain Farmer's presence at trial eleven days prior to the trial; however, the State did not make a motion for continuance, or even bring the problem to the court's attention. He argues the State's failure to have Farmer available to testify in person denied him his constitutional right to confrontation because Farmer is a pathological liar and it was imperative for the trial jury to observe his

demeanor in person.[9]

The State asserted the Solicitor was unable to secure Farmer's presence from a Texas penitentiary through a normal out-of-state subpoena because South Carolina is not a signatory state to the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (the Act). At trial, the State submitted two affidavits in support of its motion to have Farmer declared an "unavailable" witness under Rule 804(a)(5): one from Senior Assistant Solicitor B. Harrison Bell, and one from James M. Frazier, III, an Assistant General Counsel for the Office of General Counsel for the Texas Department of Criminal Justice.

In his affidavit, Frazier testified that because South Carolina is not a signatory to the Act, the Texas Department of Criminal Justice would not honor a mere subpoena for Farmer to appear as a witness in South Carolina. Instead, Texas required an executive agreement between the governor of South Carolina and the governor of Texas. The prisoner witness must then have a hearing before a district judge who will decide whether the prisoner witness will be transported to the requesting state. Frazier also testified that Texas will not release a prisoner without a hearing and an order of transport from a district judge. He further testified there are only two judges in Texas who hold hearings for prisoner witness renditions to other states. He confirmed Bell made a request to have Farmer transported, and he submitted the appropriate paperwork to Texas, which was received on May 10, 2006. Frazier testified he contacted the court to set up a hearing; however, neither judge was available for the remainder of the month of May. He notified Bell of this on May 11, 2006. He said he had "no reason to believe the South Carolina authorities were aware of that unavailability before this week when I first informed them of such."

Judge Pieper reviewed the rendition request and noted it was initiated in April, but was delayed because a duplicate had not been submitted to the South Carolina Secretary of State.

However, he reviewed the "pertinent procedures and statutory requirements" and did not see any requirement to submit a duplicate; thus, he did not attribute the delay to the prosecution. He found that both the South Carolina and Texas governors had signed the paperwork in early May; however, no Texas judge was available to hold the hearing as required by Texas law. Thus, Judge Pieper stated "it's difficult for me to say that the State acted unreasonably" when Texas did not have any judges available to hear the rendition request. Additionally, Judge Pieper noted that Farmer was under oath at the first trial and Cooper had engaged in "the full right of confrontation." Judge Pieper further noted that neither party had requested a continuance. Therefore, we find Judge Pieper's decision was supported by the evidence.

III. Prior Crimes

Cooper argues the trial court erred in ruling Cooper could be impeached with his 1977 convictions for housebreaking and grand larceny because the convictions were too remote and were highly prejudicial. We disagree.

Rule 609(b) of the South Carolina Rules of Evidence provides:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially

outweighs its prejudicial effect.

Rule 609(b), SCRE. "Rule 609(b) establishes a presumption against admissibility of remote convictions . . . and the State bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption." State v. Colf, 337 S.C. 622, 626-27, 525 S.E.2d 246, 248 (2000). In determining whether the probative value of a prior conviction outweighs its prejudicial effect, the court should apply five factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Id. at 627, 525 S.E.2d at 248.

Cooper was released from prison in 1988 for his 1977 convictions for armed robbery, housebreaking, and grand larceny.[10] Cooper was being re-tried for a murder that occurred in 1989. Cooper objected to the introduction of his prior crimes under Rule 609 because they were more than ten years old.

After considering the balancing test required by Rule 609(b), Judge Pieper did not allow Cooper's conviction for armed robbery to be used for impeachment because of its similarity to the armed robbery in this case. However, Judge Pieper did allow Cooper's convictions for housebreaking and larceny to be admitted for impeachment purposes because they are crimes of dishonesty that weigh on Cooper's credibility, and the probative value of the convictions outweighed their prejudicial effect. See Colf, 337 S.C. at 628, 525 S.E.2d at 249 ("The fact that larceny reflects on credibility and the importance of credibility to the jury's decision are both factors the trial court should have weighed in making the admissibility determination."). Additionally, Cooper's attorney conceded the crimes of housebreaking and larceny were not so similar to the charge in this case to be prejudicial to Cooper. Furthermore, Judge Pieper gave a limiting charge to the jury explaining Cooper's convictions could only be considered for impeachment purposes. Therefore, we find Judge Pieper's decision was supported by the evidence.

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

[1] See State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994).

[2] Cooper remained incarcerated from his arrest in 1989 until his retrial in 2006.

[3] See State v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002).

[4] Cooper's motion was titled "Defendant's Amended Demand for Speedy Trial," but the record does not contain a copy of an un-amended motion.

[5] Bruck also sent copies of the e-mail to opposing counsel.

[6] The motion to have the solicitor's office removed was not made known to Cooper until a June 29, 2005 letter.

[7] We note the forty-four month delay in re-trying Cooper's case is troubling; however, in this case, we find it was justifiable.

[8] In Barber v. Page, the United States Supreme Court found Barber's right to confrontation had been violated when "the State made absolutely no effort to obtain the presence of [the witness] at trial other than to ascertain that he was in a federal prison outside of Oklahoma." 390 U.S. at 723. Further, the Court found the "sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek his presence." Id. at 725. In contrast, here, the State attempted to have Farmer brought to South Carolina to testify, but was unable to do so due to circumstances beyond the State's control.

[9] At trial, the State introduced Farmer's previous testimony that he called Cooper to initiate a conspiracy between himself and Cooper to rob the decedent. To impeach Farmer's previous testimony, Cooper introduced the testimony of Kimberly Turner, a Ph.D. student in clinical psychology who had interviewed Farmer in jail. In Farmer's new statement to Turner, he stated he had only heard from Cooper after the murder, and he was "completely surprised" by the phone call. Farmer told her that he had put a "spin" on his testimony in favor of the State at the first trial to make "Cooper look worse than he was." He said he wanted to "tell the truth this time."

[10] Cooper pleaded guilty to armed robbery, housebreaking, and grand larceny, and received a sentence of fifteen years. He was released from prison in 1988 for his 1977 convictions. Cooper was arrested for murder that occurred in 1989 and his retrial was in May 2006. Thus, although eighteen years had passed between his release for his prior convictions and his retrial for murder, Cooper's 1988 release for the prior crimes was very close in time to the October 1989 offenses for which he was being retried.

The South Carolina Court of Appeals

The State, Respondent,

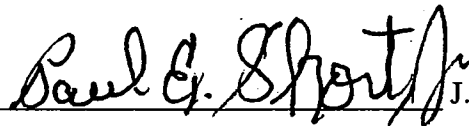
v.

Gene Tony Cooper, Jr., Appellant.

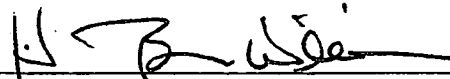
The Honorable Daniel F. Pieper
The Honorable Daniel F. Pieper
Lexington County
Trial Court Case No. 1990-GS-32-00083
1990-GS-32-00084

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.



J. Short



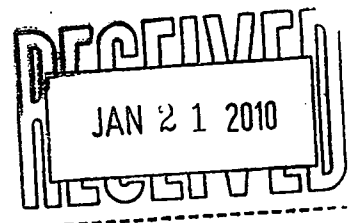
J. Williams



J. Geathers

Columbia, South Carolina

January 21, 2010



The Supreme Court of South Carolina

The State,

Respondent,


v.

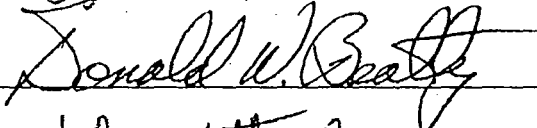
Gene Tony Cooper,

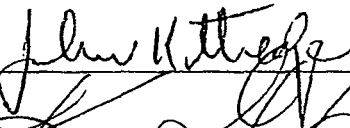
Petitioner.

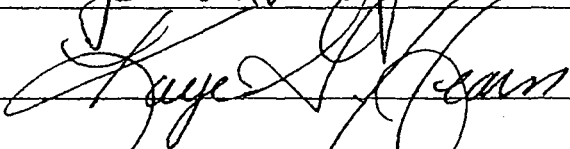
ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009). We grant the petition on petitioner's Question I and deny the petition as to the remaining questions. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.



J.


J.


J.


J.
Chief Justice Jean H. Toal, not participating.

Columbia, South Carolina

January 12, 2012

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

The State, Respondent,

v.

Gene Tony Cooper, Petitioner.

Appellate Case No. 2010-152786

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 27184
Heard October 17, 2012 – Filed November 7, 2012

DISMISSED AS IMPROVIDENTLY GRANTED

Chief Appellate Defender Robert Michael Dudek, of
South Carolina Commission on Indigent Defense,
Division of Appellate Defense, of Columbia, for
Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Attorney General W. Edgar Salter, III, all of Columbia;
and Solicitor Donald V. Meyers, of Lexington, for
Respondent.

PER CURIAM: We granted a writ of certiorari to review the decision of the Court of Appeals in *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice E. C. Burnett, III, concur.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

GENE TONY COOPER,

Petitioner,

v.

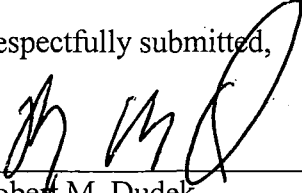
STATE OF SOUTH CAROLINA,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Gene Tony Cooper requests leave to proceed in forma pauperis, in accordance with the provisions of Title 28 U.S.C. §1915. The affidavit of Petitioner in support of this motion is attached, along with the petition for writ of certiorari.

Respectfully submitted,



Robert M. Dudek
Attorney at Law
South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

February 5, 2013

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12 - _____

GENE TONY COOPER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

AFFIDAVIT OF GENE TONY COOPER
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Gene Tony Cooper, being duly sworn, state that I am the petitioner in this case; that because of my poverty I am unable to pay the costs of or give security for this proceeding; that I believe I am entitled to redress.

The responses to the questions and instructions below relating to my ability to pay costs or give security are true.

1. Are you presently employed? NO _____

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

- b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

20 yrs ago

2. Have you received within the past twelve months any income from a business, progression or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? NO

- a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

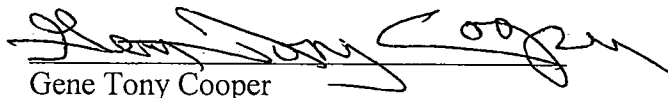
- a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

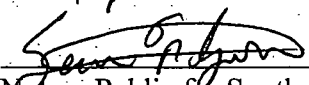
- a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

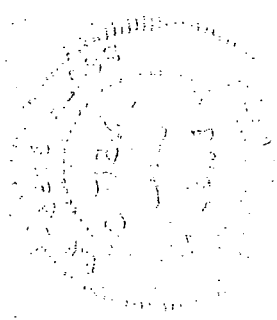
I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.


Gene Tony Cooper

SWORN to and subscribed before me
this 19 day of December, 2012.


____ (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

GENE TONY COOPER,

Petitioner,


v.

STATE OF SOUTH CAROLINA,

Respondent

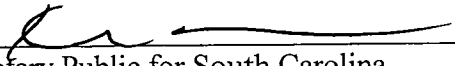
CERTIFICATE OF SERVICE

I certify that copies of the motion for leave to proceed in forma pauperis have been served upon opposing counsel, William Edgar Salter, III, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 5th day of February, 2013.



ROBERT M. DUDEK
Counsel of Record

SWORN TO BEFORE me this 5th
day of February, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.





SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 5, 2013

RECEIVED

FEB 5 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

Re: Gene Tony Cooper v. State of South Carolina

Dear Mr. Shearouse:

Enclosed is a copy of the petition for writ of certiorari and IFP motion and affidavit which I have filed today in the United States Supreme Court. Please contact me if you have any questions.

Sincerely,

Robert M. Dudek
Chief Attorney

RMD/kam
Enclosure

cc: William Edgar Salter, III, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Columbia, South Carolina 29201-3332
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Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 5, 2013

RECEIVED

FEB 5 2013

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543

S.C. Supreme Court

Re: Gene Tony Cooper v. South Carolina

Dear Mr. Suter:

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

Sincerely,

Robert M. Dudek
Attorney at Law

RMD:kam

Enclosure

cc: William Edgar Salter, III, Esquire
Honorable Daniel E. Shearouse, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

GENE TONY COOPER,

Petitioner,

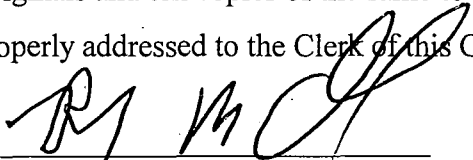
v.

STATE OF SOUTH CAROLINA,

Respondent

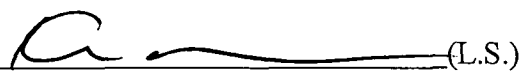
CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on February 5, 2013, I filed the petition for writ of certiorari in the above-referenced case, together with a motion for leave to proceed in forma pauperis, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.



Robert M. Dudek
Counsel of Record

SUBSCRIBED AND SWORN TO before me
this 5th day of February, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.





SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 5, 2013

RECEIVED

FEB 5 2013

S.C. Supreme Court

Honorable William K. Suter
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Gene Tony Cooper v. State of South Carolina

Dear Mr. Suter:

Enclosed are the petition for writ of certiorari, a motion for leave to proceed *in forma pauperis*, and an affidavit of Gene Tony Cooper in support of motion to proceed *in forma pauperis*. The certificate of service is attached to the original petition. Representing the State of South Carolina is William Edgar Salter, III, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. His phone number is (803) 734-3970. I represent Petitioner Gene Tony Cooper. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

Sincerely,

Robert M. Dudek
Attorney at Law

RMD\kam

Enclosure

cc: Honorable Daniel E. Shearouse
William Edgar Salter, III, Esquire