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RECEIVED
MAR 14 2013
S.C. Supreme Court

March 14, 2013

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

Re: Bryan Phillips 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,

LaNelle Cantey DuRant
Appellate Defender

LCD/mch

Enclosure

cc: William M. Blitch, Jr., Esquire

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

BRYAN PHILLIPS

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

LaNelle Cantey DuRant
Attorney at Law

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QUESTION PRESENTED

Whether the South Carolina Supreme Court erred in finding Petitioner was not denied his constitutional due process right to a speedy trial pursuant to the Sixth Amendment, although the Supreme Court found that S.C. Code Section 1-7-330, which vests control of the criminal docket in the circuit solicitor, was unconstitutional?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the South Carolina Supreme Court were Petitioner Bryan Phillips and the Respondent State of South Carolina.

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APPENDIX

[1] Langford and Petitioner were co-defendants whose oral arguments were heard the same day in the South Carolina Supreme Court. The Supreme Court incorporated by reference the published opinion of Langford into Petitioner's unpublished opinion.

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CONSTITUTIONAL PROVISIONS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

BRYAN PHILLIPS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Bryan Phillips asks this Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court in this case.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as The State v. Bryan Phillips, Opinion No. 2012-MO-049 (Filed November 21, 2012), The opinion is reproduced in the Appendix to this petition at pages App. 1-4. The opinion below decided Petitioner's speedy trial issue solely by reference to the co-defendant's opinion. Therefore, a copy of State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) which contains the speedy trial analysis applied to Petitioner's case, is also included in the Appendix at pages App. 5-28. Rehearing denied December 20, 2012.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on November 21, 2012. The Respondent's petition for rehearing was denied on December 20, 2012. A41. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

> Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial for obtaining witnesses in his favor.

STATEMENT OF THE CASE

On May 5, 2010, the Edgefield County Grand Jury indicted Bryan Jordan Phillips on the charges of burglary first degree; armed robbery; kidnapping; and criminal conspiracy. On September 6-9, 2010,[2] Petitioner and one of his co-defendants, K.C. Langford, proceeded to trial before the Honorable William P. Keesley and a jury. Petitioner was represented by Randall D. Williams, and his co-defendant Langford was represented by Mark R. Calhoun; and the state was represented by Assistant Solicitor Ervin J. Maye. The jury returned verdicts of guilty on all charges as indicted. R. 452 – 454. Judge Keesley sentenced Petitioner to twenty years on each of the kidnapping, burglary first degree, and armed robbery charges. The sentence on criminal conspiracy was five years; all sentences were to run concurrently. R. 477. Petitioner's attorney filed a notice of appeal. The case was certified to the South Carolina Supreme Court which consolidated the cases of Phillips and his co-defendant, K.C. Langford. Oral arguments in both cases were heard April 18, 2012. The South Carolina Supreme Court affirmed the convictions and sentences on November 21,

[2] The first trial transcript mistakenly had the trial date as January 23, 2011. The court reporter corrected this, and the record reflects the correction. The period of incarceration for Petitioner was changed to twenty-four months to reflect this correction.

2012. State v. Phillips, Op. No. 2012-MO-049 (Filed November 21, 2012). App. 1-4. The state filed a petition for rehearing on December 6, 2012 which the Supreme Court denied on December 20, 2012. App. 29-41.

RELEVANT FACTS

Ji Quing Chen and his wife and son were working in their Chinese restaurant, Hong Kong Restaurant, in Johnston, South Carolina on August 14, 2008. R. 86; R. 117; R. 115. They left the restaurant around ten o'clock and went to their home nearby. R. 115. Chen's wife and son went into the house but he went to the side of the house to water plants. R. 115; R. 117.

Three black men, who were hiding in the bushes, pointed a gun at Chen's head, forced him down, and took his wallet. One hit him in the head. R. 117. His son came out, and saw his father in danger. His son told the men to go in the house and get the bag if they needed money. One man did go inside and took the money. Then the three men ran away. R. 118 – 119.

The son, Li Guan Xin, testified that he brought home from the restaurant a bag with $3000 in it. R. 128 – 129. He gave the bag of money to the man that went into the house. He then called the police when the men ran away. R. 131. Neither he nor his father could give a description of the men to the police. R. 133; R. 134; R. 120; R. 121. Police Investigator Lamaz Robinson testified that there was no forensic evidence to connect Petitioner to the crime. R. 249; R. 247; R. 248.

Alvin Phillips was a senior at Strom Thurmond High School in Johnston at the time of this incident. He testified that he and Petitioner Phillips, his first cousin, watched this Chinese family come and go between their home and work at the restaurant. They allegedly thought the family might be taking their money from the restaurant home with them because they did not see the family take the money to the bank after work, R. 151; R. 153; R. 156; R. 157. Alvin Phillips stayed with his sister much of the time who lived within walking distance of the restaurant. Bryan lived

with his mother in the same apartment complex. R. 152; R. 153.

On August 14, 2008, Alvin Phillips, and as he claimed, Petitioner, decided to rob the family. Alvin got his gun from inside the house and met Bryan. R. 158; R. 159. K.C. Langford, co-defendant, who lived with Alvin's sister, decided to go with them. R. 159; R. 160; R. 161. Alvin said they waited outside in the bushes. When Chen came out, Alvin jumped on him and pointed the gun at him. The robbers could not understand what the man said. R. 162; R. 163. Then the son came out. Langford went in the house, and then came out running down the street. Alvin and Petitioner then ran away also. R. 164.

Investigator Roosevelt Young with the Edgefield Sheriff's Office, testified that an acquaintance of his, Pat Stevens , gave him information about this incident. R. 297; R. 299; R. 301; R. 302. Stevens gave him the names of the three co-defendants. R. 303.

Investigator Lamaz Robinson was working with the Johnston Police Department in August 2008. R. 231. Robinson testified that investigator Roosevelt Young told him of the information they received from Stevens. Investigator Young talked with Alvin Phillips who confessed to the incident. Alvin implicated Petitioner Bryan Phillips and K.C. Langford. R. 236.

Alvin testified that he gave a statement to the police confessing to the incident and implicating Petitioner and Langford. R. 170. However, he gave a second statement stating that he was not in his right state of mind when he gave the first false statement implicating Petitioner and Langford, and asked that all charges against the two men be dismissed because his first statement was not true. R. 192; R. 193; R. 194; R. 195; R. 196. Alvin pled guilty to the armed robbery a few weeks before this trial, but the other charges of burglary first degree, conspiracy, kidnapping and assault and battery with intent to kill were still pending. R. 172; R. 173.

Petitioner Phillips and K.C. Langford did not testify. R. 27 – 28; R. 292; R. 293.

After the verdict, Petitioner's co-defendant, Langford, told the court that he had been ready to go forward when the case was first called to trial in May 2010. He told the court that he felt prejudiced by the trial court's granting the State's continuance, and that he felt his right to a speedy trial had been violated. R. 461- 468. The trial court judge reiterated that his reasons for granting the continuance related to "the Bruton analysis." R. 475, ll. 3-7.

Petitioner Phillips said to the judge that "he wanted to follow what Mr. Langford said about the charges not being dismissed when they came to court last term." R. 469, ll. 5 – 14. Petitioner said that Alvin Phillips who testified against him, had wavered and recanted his statement several times. R. 470.

Petitioner's attorney had filed a Motion for A Speedy Trial on January 14, 2010. R. 4. At a hearing on May 17, 2011, the attorney argued for his motion that Petitioner was arrested September 28, 2008 and had been denied bond three times, and been incarcerated sixteen months. He argued that the only witness, the co-defendant Alvin Phillips, had recanted his statement.

Alvin Phillips admitted at trial that he changed his mind and decided not to testify when the case was called for trial in May 2010. R. 188 – 191.

Judge William Keesley issued an order on May 19, 2010 denying Petitioner's motion and granting the state a continuance. R. 14 The judge wrote that the co-defendant had changed his mind and asserted his Fifth Amendment right to remain silent. The judge wrote that the state had gone to great effort to obtain an interpreter and needed time to determine whether to try Alvin Phillips. The judge stated that the state would have to try the defendant who gave the statement in order to avoid a Bruton[3] problem.

Petitioner Phillips was denied his right to a speedy trial. The trial occurred September 6-9,

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[3] Bruton v. United States, 391 U.S. 123 (1968).

2010. After the verdict, Petitioner Phillips and his co-defendant Langford raised the speedy trial violation again. Langford argued, with which Petitioner Phillips concurred, that they were ready to go forward when the case was first called to trial in May 2010. They felt they were prejudiced by the trial court granting the state's continuance, and their right to a speedy trial was violated. R. 461-468.

REASON FOR GRANTING THE WRIT: SPEEDY TRIAL VIOLATION

In Doggett v. United States, 505 U.S. 647 (1992), this Court listed the factors required in order to assess speedy trial claims. There are four relevant inquiries: (1) whether delay before trial was uncommonly long, (2) whether the government or defendant is more to blame for the delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether the defendant suffered any prejudice from the delay. Id. at 651. See Barker v. Wingo, 407 U.S. 514 (1972).

In order 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." Id. at 652 (*quoting* Barker at 530-531). Doggett notes in footnote 1 that, depending on the nature of the charges, lower courts have generally found post-accusation delay "presumptively prejudicial" as it approaches one year. Id.

> *Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned to a low

> prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

Doggett 505 U.S. at 657.

Petitioner filed a motion for a speedy trial a year before the trial was held. Petitioner was prejudiced because he stayed in jail for twenty-four months without a bond waiting to go to trial. He was denied his right to a speedy trial. R. 58.

The government did bear the blame for the delay as Petitioner had no control over when the case was called. The state did not assure that its star witness was prepared to testify. It is also relevant, in considering Petitioner's claim, that, although the charges are serious, the prosecution of this case was not complex. Indeed, the state only called percipient witnesses and law enforcement.

Additionally, the defense did not call any expert witnesses, did not request any competency evaluations, nor make any continuance motions. Also, Petitioner did not receive any benefit from the delay. This too militates in favor of granting him relief.

It is also relevant to the Court's analysis that the state was not prepared to try the case until May 5, 2010, when it finally had the case indicted. The state simply allowed Petitioner to sit in the county jail for nearly 2 years before it even indicted his case.

This fact is especially egregious in light of the fact that, in South Carolina, the prosecutors (solicitors)controlled the docket system. The South Carolina Supreme Court held in the co-defendant's appeal, State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), that S.C. Code Section 1-7-330 vesting control of the criminal docket in the circuit solicitor, a member of the executive branch, was unconstitutional. The statute violated the separation of powers. It weighed heavily against the state that they attached no priority at all to Petitioner's case until nearly two years after the first warrant was served, even though the solicitor had total control of the docket with no judicial

oversight.

Additionally, the solicitor's control of the docket system allowed Petitioner to sit in the county detention center for nearly 2 years before his case went to the grand jury.[4] And then, once the state obtained its continuance because its case fell apart, it waited an additional 112 days to call his case to trial.

The state abused its authority over the docket by "gaming" the system to increase its chances of securing a conviction against Petitioner even while he was asserting his right to a speedy trial. The state's actions in this case subverted Petitioner's constitutional right to a speedy trial by its abusive exercise of the solicitor controlled docket system. The delay in Petitioner's trial was based on an unconstitutional statute.

The "Bruton" problem cited by the trial judge as the reason for the delay was not a valid excuse. There simply was no issue here with a non-testifying co-defendant.

Petitioner's attorney filed a Motion for A Speedy Trial January 14, 2010. R. 4. The attorney argued in his motion that Petitioner was arrested September 28, 2008 and had been denied bond three times. He argued that the witness, the co-defendant Alvin Phillips, had recanted his statement. Judge William Keesley issued an order on May 19, 2010 denying Petitioner's motion and granting the state a continuance. R. 14

Petitioner was prejudiced by the delay because what the judge characterized as a "Bruton problem" was really only the state's difficulty in securing a conviction against the co-defendants

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[4] See S.C. Code Ann. §1-7-330 (1976): **Attendance at circuit courts; preparation and publication of docket**. The solicitors shall attend the courts of general sessions for their respective circuits. Preparations of the docket for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. *Provided*, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term. (emphasis in original).

without Alvin Phillips' testimony. Granting a continuance based on their inability to prove Petitioner's guilt at the time the state called the case to trial was a violation of Petitioner's right to a speedy trial, and gave the state the additional time to get Alvin Phillips to comply.

"Speedy trial" is part of due process of law to which every person accused of a crime is entitled under State and Federal Constitutions. Barker v. Wingo, 407 U.S. 514 (1972); U.S.C.A. Const. Amends. 6, 14. and S.C. Const. art. 1, Section 5.

The South Carolina Supreme Court held that Petitioner suffered no prejudice because of the delay of his trial. State v. Phillips,*supra;* State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). The Court misapprehended the prejudice suffered by Petitioner. It was not just the length of the delay, but that the delay harmed Petitioner's defense because it provided the state time to persuade the testifying co-defendant Alvin Phillips to testify. When Alvin changed his mind just before the trial set in May, and would not testify, the state was given a continuance which allowed them time to persuade Alvin once again to testify.

The South Carolina Supreme Court cited the case of State v. Kennedy, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) where the Court of Appeals held that Kennedy may have been "slightly" prejudiced by the twenty-six month pretrial incarceration, the more important question is whether he was prejudiced because the delay impaired his defense.

The Court wrote that the record here indicated that Phillips and Langford had persuaded Alvin to remain silent. However, the Court did not state what that evidence was. The Record indicates that the only reference to delay tactics by Petitioner and Langford was in the May 17, 2010 hearing when the state asked for a continuance. The state told the court that "law enforcement provided information that Petitioner and Langford were pressuring the witness not to testify and telling him if he keeps his mouth shut, none of them are going to be in trouble." R. 12, ll. 12 – 23.

No specifics were provided.

Petitioner was also prejudiced because he was denied bond three times when this was not a murder case, and he had to sit in the local detention center. Petitioner filed his speedy trial motion timely.

In Vermont v. Brillon, 129 S.Ct. 1283 (2009),this Court held that deliberate delay to hamper the defense weighs heavily against the prosecution, in determining whether the right to a speedy trial has been violated; more neutral reasons such as negligence or overcrowded courts weigh less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

The South Carolina Supreme Court placed more weight on the neutral factors rather than considering the extreme prejudice suffered by Petitioner when the state was given additional time to persuade their critical witness to testify in the state's favor. Petitioner Phillips was incarcerated two years before his case went to trial.

CONCLUSION

Based on the foregoing, a writ of certiorari should be granted to allow full briefing on this issue.

Respectfully submitted,

LANELLE CANTEY DURANT
Counsel of Record
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

March 14, 2013

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

BRYAN PHILLIPS,

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 M. Blitch, Jr., 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 14th day of March, 2013.

LaNelle Cantey DuRant
Counsel of Record

SUBRSCRIBED AND SWORN TO before me
This 14th day of March, 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-

BRYAN PHILLIPS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

A P P E N D I X

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ATTORNEY FOR PETITIONER

APPENDIX

[1] Langford and Petitioner were co-defendants whose oral arguments were heard the same day in the South Carolina Supreme Court. The Supreme Court incorporated by reference the published opinion of Langford into Petitioner's unpublished opinion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,
v.
Bryan Phillips, Appellant.

Appellate Case No. 2010-173307

Appeal From Edgefield County
William P. Keesley, Circuit Court Judge

Memorandum Opinion No. 2012-MO-049
Heard April 18, 2012 – Filed November 21, 2012

AFFIRMED

LaNelle Cantey DuRant, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all of Columbia, SC, and Solicitor Donald V. Myers, of Lexington, for Respondent.

E. Charles Grose, Jr., of Greenwood, and Tara S. Waters, of Laurens, for Amicus Curiae South Carolina Public Defender Association.

Solicitor David M. Pascoe, Jr., of Columbia, for Amicus Curiae Solicitors' Association of South Carolina.

PER CURIAM: Bryan Phillips was tried and convicted, along with his co-defendant K.C. Langford, III, for armed robbery, kidnapping, first degree burglary, and criminal conspiracy. Langford's convictions are affirmed in a published opinion issued today. *State v. Langford*, Op. No. 27195 (S.C. Sup. Ct. filed November 21, 2012). This case presents the same facts and raises the same questions as *Langford*, *viz.*, whether Section 1-7-330 of the South Carolina Code (2005), which grants solicitors control of the General Sessions docket, violates the separation of powers doctrine, whether Phillips was denied due process because section 1-7-330 permits judge shopping, and whether he was denied his right to a speedy trial. In addition to the issues addressed in *Langford*, Phillips also argues the circuit court erred in qualifying the Chinese interpreter used during his trial and in not granting a mistrial due to comments made by the solicitor in closing arguments. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. Separation of Powers: *Langford, supra.*

2. Due Process: *Id.*

3. Speedy Trial: *Id.*

4. Interpreter Qualification: S.C. Code Ann. § 15-27-155(B) (2005) (setting forth qualifications for a foreign language interpreter)[1]; *Melton v. Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008) (applying abuse of discretion standard to qualification of interpreter).

5. Mistrial: *State v. Graddick*, 345 S.C. 383, 387, 548 S.E.2d 210, 211-12 (2001) ("As a corollary of the right to remain silent, a prosecutorial comment upon a defendant's failure to testify at trial is constitutionally impermissible."); *State v. Prince*, 316 S.C. 57, 67, 447 S.E.2d 177, 183

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[1] We note this is the statute for interpreters in a civil case, not a criminal one. However, because it was the one applied by the circuit court and argued by the parties at trial and on appeal, we use it here.

(1993) (stating the decision to grant a mistrial is left to the discretion of the circuit judge); *State v. Rouse*, 262 S.C. 581, 585, 206 S.E.2d 873, 874 (1974) (determining that comment complained of was not actually a comment on the defendant's failure to testify).

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the result only for the reasons stated in my concurring opinion in *State v. Langford*, Op. No. 27195 (S.C. Sup. Ct. filed November 21, 2012).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

K.C. Langford, III, Appellant.

Appellate Case No. 2010-173128

Appeal From Edgefield County
William P. Keesley, Circuit Court Judge

Opinion No. 27195
Heard April 18, 2012 – Filed November 21, 2012

AFFIRMED

Elizabeth Anne Franklin-Best, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Deputy Attorney General David A. Spencer, all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

E. Charles Grose, Jr., of Greenwood, and Tara S. Waters, of Laurens, for Amicus Curiae South Carolina Public Defender Association.

Solicitor David M. Pascoe, Jr., of Columbia, for Amicus Curiae Solicitors' Association of South Carolina.

JUSTICE HEARN: We must determine whether Section 1-7-330 of the South Carolina Code (2005), which vests control of the criminal docket in the circuit solicitor, violates the separation of powers principle embodied in Article 1, Section 8 of the South Carolina Constitution. In 1980, we recognized that "[t]he authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases." *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). "This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." *Id.* The time has now come for us to acknowledge that section 1-7-330 is at odds with this intrinsically judicial power. We therefore hold that section 1-7-330 violates the separation of powers and therefore is unconstitutional. However, because K.C. Langford, III, the Appellant herein, suffered no prejudice as a result of section 1-7-330, we affirm his convictions.

FACTUAL/PROCEDURAL BACKGROUND

On August 14, 2008, Ji Quing Chen, along with his son, Li Guan Xin, and wife, Li Ai Ming, left the Chinese restaurant they own in Johnston, South Carolina, shortly after 10:00 p.m. and headed home. With them was a black bag containing the day's earnings. When they arrived home, Ji Quing stayed outside to water some plants while his wife and son entered the house. As he was tending to his garden, three men wearing masks came out from the bushes, forced him to the ground, hit him, and took his wallet. Concerned that his father had not yet come inside, Li Guan stepped out onto the porch to check on him. Once he was outside, the men forced Li Guan to the ground and asked where the restaurant's money was. He told them it was in the house, and one of the men went inside to find it. That man returned shortly with the black bag, and all three of them ran off. Because the men wore masks, the victims were unable to provide a useful description to law enforcement. Moreover, it does not appear the men left any forensic evidence during the commission of these crimes.

Investigators eventually met with Alvin Phillips, who in a statement dated September 28, 2008, confessed that he was one of the men who robbed the family. He further identified his cousin and Langford as the two remaining suspects. In the absence of an eye-witness identification and forensic evidence, Phillips' statement

was the only evidence implicating the other men. Langford was arrested shortly thereafter on October 3, and he was indicted for criminal conspiracy a few months later in December 2008. However, he was not indicted for armed robbery, first degree burglary, and kidnapping until May 5, 2010, nineteen months following his arrest. He would remain incarcerated until his trial.

The State attributed the delay in procuring these indictments to difficulties in finding Chinese interpreters to translate what Ji Quing and his family, none of whom spoke English well, were relaying to investigators. Furthermore, Phillips retracted his statement implicating Langford while the two of them were housed in the same detention facility. He did so first in a signed statement dated January 29, 2009. On March 31, 2009, he signed another statement wherein he attested that the original statement he made to police in September 2008 was not true and he was not in the "right state of mind" when he made it. According to the State, Langford and his co-defendant pressured Phillips into recanting. In fact, Phillips testified Langford even brought him these later statements to sign. To avoid further intimidation, Phillips was moved to another facility. At some point thereafter, although it is not clear when, Phillips again agreed to testify against Langford.

On June 29, 2009, nearly nine months after he was taken into custody, Langford made what appears to be a *pro se* motion for a speedy trial. A hearing was held on May 17, 2010, and Langford renewed his motion at that time and joined it with a motion to dismiss.[1] This was the date on which the State originally planned to try Langford and his co-defendant, with Phillips serving as a cooperating witness who would testify against them. But the State received word that morning that Phillips decided to invoke his privilege against self-incrimination and would not testify at the trial. Allegedly, this was due to pressure Langford and Phillips' cousin continued to exert on him even after his transfer. Phillips now would not be available for cross-examination at trial, and the State therefore could not use his prior statement implicating Langford.[2] Because the State's case against

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[1] It does not appear the court ever ruled on Langford's ostensibly *pro se* motion prior to this hearing. Moreover, the record suggests that the hearing was held upon the motion of Langford's co-defendant, Phillips' cousin. This motion was styled as a motion to dismiss or, in the alternative, a motion for a speedy trial.

[2] *See Bruton v. United States*, 391 U.S. 123, 126 (1968) (holding the Confrontation Clause bars the admission of a statement of a co-defendant who remains silent which is to be used against the other defendant at trial).

Langford rested almost exclusively on Phillips' statement, without it the State effectively was prevented from going forward.

To remedy the situation, the State needed to try Phillips first or, presumably, obtain a guilty plea with the attendant waiver of his right to remain silent. However, Phillips had retained new counsel just eight days prior to the hearing who understandably was not ready to move forward during that term of court. The State therefore requested a continuance so it could proceed against Phillips at the next available opportunity, at which point it would then be able to try Langford. Although the court was "deeply concerned" by the twenty-month delay in the case, it found that "[n]one of this delay was occasioned by any impropriety on the part of the State." It also recognized that, for all intents and purposes, the State could not proceed in the absence of Phillips' testimony. The court accordingly denied Langford's motion to dismiss and granted the State a continuance. However, cognizant of the delays which had already accrued, the court ordered the State to try Langford within nine months, and it further directed that Langford could renew his motion at that time if the State failed to do so.[3]

Phillips pled guilty in August 2010 and once again agreed to testify for the State. Langford's case was then called for trial on September 7, 2010, nearly two years after his arrest.[4] The jury convicted Langford on all four charges, and the court sentenced him to twenty years' imprisonment on the armed robbery, kidnapping, and first degree burglary charges, and five years' imprisonment on the civil conspiracy charges, all to run concurrently. This appeal followed. After the appeal was perfected, the court of appeals granted permission for the South Carolina Public Defender Association to file an amicus curiae brief challenging the constitutionality of section 1-7-330. This case subsequently was certified to us pursuant to Rule 204(b), SCACR.

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[3] The court would have set an earlier deadline, but there were scheduling conflicts with a pending death penalty trial and a visiting judge. Additionally, while Langford did file what seems to be another *pro se* motion to dismiss on May 25, 2010, it does not appear the court ruled on it.

[4] This was only the second General Sessions term of court for Edgefield County after May 17, 2010, the term in which the State received the continuance.

ISSUES PRESENTED

I. Is section 1-7-330 constitutional?

II. Did Langford suffer any prejudice as a result of the solicitor controlling when his case would be called for trial?

LAW/ANALYSIS

I. SECTION 1-7-330

We agree with the Public Defender Association that section 1-7-330 is unconstitutional. Before we reach the merits of this question, however, we must first address the State's position that it is not preserved for our review.

Constitutional questions must be preserved like any other issue on appeal. *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001). As the State correctly notes, this issue was not raised to or ruled upon by the circuit court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue must have been raised to and ruled upon to be preserved for review). Moreover, Langford's statements of the issue on appeal do not raise this question. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Indeed, this issue is only before us by way of the amicus brief filed by the Public Defender Association, and our rules provide that an amicus brief "shall be limited to argument of the issues on appeal *as presented by the parties.*" Rule 213, SCACR (emphasis added).

Nevertheless, we previously have considered arguments raised only by an amicus when they concern a "matter of significant public interest." *Ex parte Brown*, 393 S.C. 214, 216, 711 S.E.2d 899, 900 (2011). We stress that this exception to Rule 213 must be applied narrowly and only under the appropriate circumstances so as not to eviscerate the long-standing preservation requirements in our jurisprudence. However, we have little trouble concluding that who decides when criminal defendants in this State should be tried is a matter of significant

public interest as envisioned by *Brown*.[5] We therefore proceed to analyze the constitutionality of section 1-7-330.

Section 1-7-330 states in full:

> The solicitors shall attend the courts of general sessions for their respective circuits. Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. *Provided,* however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term.

In reviewing the validity of this statute, we are reluctant to find it unconstitutional. *See In re Treatment and Care of Luckbaugh*, 351 S.C. 122, 134, 568 S.E.2d 338, 344 (2002). We will therefore make every presumption in favor of its validity. *Id.* The party challenging the statute bears the heavy burden of proving that "its repugnance to the constitution is clear and beyond a reasonable doubt." *Id.* at 134-35, 568 S.E.2d at 344.

The Public Defender Association contends section 1-7-330 violates the separation of powers by impermissibly conferring judicial responsibilities upon a member of the executive branch. Our constitution mandates that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8.

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[5] We do not take lightly the dissent's concern that by addressing the merits of the Public Defender Association's argument we offend our rules of preservation, but remain convinced this issue falls easily within our exception. Moreover, if the issue is truly unpreserved, as the dissent contends, we are at a loss to understand why the dissent addresses the merits. Preservation in South Carolina is a threshold issue and if an issue is unpreserved, it is not properly before the court and the merits should not be reached. *See State v. Roach*, 377 S.C. 2, 3, 659 S.E.2d 107, 107 (2008) (noting that issues not preserved for review should not be addressed); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (same).

> One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.

State ex rel. McLeod v. McInnis, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

We begin by ascertaining where in our system of government solicitors fall. We note the only reference to solicitors in the constitution is in the article creating the judicial department. *See* S.C. Const. art. V, § 24. However, this section also provides that "[t]he General Assembly shall provide by law for their duties." *Id.* To that end, Section 1-1-110 of the South Carolina Code (2005) squarely places solicitors in the executive branch. Moreover, the Solicitors' Association of South Carolina unequivocally states in its own amicus brief defending section 1-7-330, "The Office of Solicitor is part of the Executive Branch of our state government." Accordingly, we conclude solicitors are members of the executive branch.

We must next determine whether vesting solicitors with the exclusive authority to prepare the dockets for General Sessions is an infringement on the court's powers. "[A] usurpation of powers exists, for purposes of [the] constitutional separation of powers doctrine, when there is a significant interference by one branch of government with the operations of another branch." 16A Am. Jur. 2d *Constitutional Law* § 246. This rule is not fixed and immutable, however, as there are grey areas which are "tolerated in complex areas of government." *McInnis*, 278 S.C. at 313, 295 S.E.2d at 636 (1982). There consequently is "some overlap of authority and some encroachment to a limited degree." *Id.*; *see also* 16A Am. Jur. 2d *Constitutional Law* § 244 ("Separation of powers does not require that the branches of government be hermetically sealed; the doctrine of separation requires a cooperative accommodation among the three branches of government; a rigid and inflexible classification of powers would render government unworkable."). At its core, the doctrine therefore "is directed only to those powers which belong exclusively to a single branch of government." 16A Am. Jur. 2d *Constitutional Law* § 246.

As we noted at the outset of this opinion, a court's power to hear and decide cases "carries with it the inherent power to control the order of its business." *Williams*, 274 S.C. at 279, 262 S.E.2d at 883. Setting the trial docket therefore is the prerogative of the court. Section 1-7-330, on the other hand, states,

"Preparation of the dockets for general sessions courts shall be *exclusively vested in the circuit solicitor* and the solicitor shall determine the order in which cases on the docket are called for trial." (emphasis added). Vesting a member of the executive branch with the exclusive authority to perform an inherently judicial function unquestionably is a violation of separation of powers. *See Hagy v. Pruitt*, 331 S.C. 213, 222, 500 S.E.2d 168, 173 (Ct. App. 1998) (Howard, J., concurring) ("[A] statute which attempts to exercise ultimate authority over the inherent power of the court is unconstitutional because it violates the separation of powers doctrine . . . ."), *aff'd*, 339 S.C. 425, 529 S.E.2d 714 (2000). This is not a grey area where some encroachment can be tolerated, but rather a complete invasion into the court's domain.

The dissent, however, takes a different approach and contends that finding the statute unconstitutional will somehow permit courts to infringe upon the powers of the solicitor.[6] Nevertheless, the dissent correctly acknowledges that the discretion afforded the solicitor "does not mean that the solicitor's authority is unrestrained by judicial oversight. The trial judge has the ultimate authority to determine whether a case called by the solicitor will be tried at a particular juncture." Thus, it appears the dissent truly believes the court has always had the authority to control the docket. In light of that position, we are at a loss as to why it believes our holding today infringes on the solicitor's power.

In fact, we believe our holding is consistent with the dissent's support for the importance of judicial restraint on prosecutorial power. However, unlike the dissent, we recognize that by providing that the "[p]reparation of the dockets for general sessions courts shall be *exclusively vested in the circuit solicitor* and the *solicitor shall* determine the order in which cases on the docket are called for trial" (emphasis added), the plain and unambiguous language of section 1-7-330 cannot be squared with this oversight. The statute must therefore yield.

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[6] Undoubtedly, the solicitor has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain. True too is the fact that he must grapple with marshaling witnesses, ranging from victims, to police officers, to experts. Because the State bears the burden of proof, the solicitor also does not want to call the case before he himself is ready. Moreover, he is the person most knowledgeable about the status of the case. These are all truisms we cannot dispute, and they are prerogatives of the solicitor (and, to a large degree, of defense counsel as well) and are unaffected by our decision.

Accordingly, we hold section 1-7-330 is unconstitutional beyond a reasonable doubt.

II. PREJUDICE

Our determination that section 1-7-330 violates separation of powers is not dispositive of Langford's appeal. To warrant reversal, Langford must demonstrate that he sustained prejudice as a result of the solicitor setting when his case was called for trial. As this case comes to us, two different forms of prejudice are alleged: (1) Langford was denied his right to due process because section 1-7-330 permitted the solicitor to judge shop, and (2) Langford was denied his right to a speedy trial. We disagree that Langford's trial suffered from any infirmities as a result of section 1-7-330 and therefore affirm his convictions.

A. Due Process

We consider first whether the power impermissibly granted to the solicitor by section 1-7-330 enabled him to violate Langford's due process rights. Although many different violations are discussed anecdotally, the only due process violation said to have occurred in this case is that section 1-7-330 permitted the solicitor to select the judge who would preside over Langford's trial. Although we question the extent to which section 1-7-330 actually permitted judge shopping, we proceed assuming *arguendo* that it did so.

A criminal defendant has a due process right to have his case heard by a fair and impartial judge. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."). Similarly, he has the right to have a judge assigned to his case "in a manner free from bias or the desire to influence the outcome of the proceedings." *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987) (Kozinksi, J.). On the other hand, he does not have a right to "any particular procedure for the selection of the judge." *Id.* Thus, there is no right to have one's judge selected randomly, nor is there one to have a case heard by any particular judge. *Sinito v. United States*, 750 F.2d 512, 515 (6th Cir. 1984). Moreover, a defendant has "no vested right in the order in which cases are assigned for trial." *Levine v. United States*, 182 F.2d 556, 559 (8th Cir. 1950).

Accordingly, a state may use any method to select judges so long as it is impartial and not geared towards influencing the trial's outcome. Without a doubt, permitting solicitors—who represent a party in the case—to select the judge raises

the specter of partiality and calls the validity of the entire system into question. *See United States v. Pearson*, 203 F.3d 1243, 1257 (10th Cir. 2000) ("In our view, if the assignment of a case to an individual judge should not be based on 'the desire to influence the outcome of the proceedings,' then allowing a prosecutor to perform that task raises substantial due process concerns." (quoting *Cruz*, 812 F.2d at 574)); *Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir. 1995) (Posner, J.) ("The practice of allowing the prosecutor to choose the . . . trial judge is certainly unsightly, as the Indiana court of appeals opined; it does lack the appearance of impartiality . . . ."); *Cruz*, 812 F.2d at 574 ("The suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow, touching the entire criminal justice system . . . ."). Some courts have therefore struck down their systems of permitting prosecutors to select judges. *State v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (doing so on due process grounds); *McDonald v. Goodstein*, 83 N.Y.S.2d 620, 625 (Sup. Ct. 1948) (holding that granting prosecutors control over choosing the judge threatens the independence of the judiciary); *see also Rosemond v. Catoe*, 383 S.C. 320, 326 n.1, 680 S.E.2d 5, 8 n.1 (2009) ("We acknowledge the practice of the prosecutor selecting the trial judge is inappropriate and troubling.").

However, as Judge Posner wrote, "[t]he presumption that judges are unbiased is more than a pious hope." *Tyson*, 50 F.3d at 439. Furthermore, "[t]he right to a judge who is free from the mere *appearance* of partiality is not part of due process at all." *Id.* at 442. Hence, we will not presume the judge is partial simply because he was selected by the prosecutor, for adopting such a rule would "conflate[] the appearance of partiality with actual partiality." *Francolino v. Kuhlman*, 224 F. Supp. 2d 615, 636 (S.D.N.Y. 2002), *aff'd*, 365 F.3d 137 (2d Cir. 2004); *see also Pearson*, 203 F.3d at 1262 ("[W]e cannot presume that a federal judge selected by the prosecutor will be his agent or henchman."). In order to be entitled to relief, a defendant therefore must establish actual partiality and prejudice on the part of the judge. *Pearson*, 203 F.3d at 1263 (finding prosecutorial selection of judge harmless error because there was no evidence the judge decided any issue in a manner more favorable to the prosecution than other judges would have); *Tyson*, 50 F.3d at 442 (holding permitting the prosecutor to choose the judge "does lack the appearance of impartiality[,] but that is all, so far as the record of this case discloses, and it is not enough"); *Sinito*, 750 F.2d at 515 ("Even when there is an error in the process by which the trial judge is selected . . . the defendant is not denied due process as a result of the error unless he can point to some resulting prejudice."); *Francolino*, 224 F. Supp. 2d at 636 ("While the Court agrees that the former system gave the appearance of partiality, maintaining that Justice

Snyder was in fact partial is a separate matter."); *State v. Huls*, 676 So. 2d 160, 167 (La. Ct. App. 1996) (noting a showing of prejudice was required even after the Louisiana Supreme Court struck down the practice of prosecutorial selection of judges on due process grounds).

The only support offered for the allegation of bias by the presiding judge in this case, Judge Keesley, is the simple fact that he ruled in favor of the State on previous issues that arose. Yet, there is not a shred of evidence that he did so out of any animus towards Langford or allegiance to the State. The contention that a judge was biased *solely* because he ruled against a defendant is untenable and insulting towards the court, and it would set a dangerous precedent were we to sanction it. Moreover, Judge Keesley ordered in May 2010 that the State try the case within nine months, and he would have ordered the State to do so sooner but for scheduling conflicts. Simply put, there is no suggestion that Judge Keesley conducted Langford's trial in anything but a fair and impartial fashion. We therefore find no evidence of actual prejudice in the record.

Undoubtedly, section 1-7-330 leaves room for abuses which can deny a defendant due process. Not only can the State theoretically pick a judge to preside because he will favor the prosecution, but the Public Defender Association's brief contains very troubling examples of abuses occurring in other cases and in other forms. Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 Am. J. Crim. L. 325, 351-69 (2005) (detailing the potential ills of prosecutorial control of the docket). Perhaps this is why South Carolina until today has stood alone amongst our sister states in permitting the prosecutor to control the docket. *See id.* at 327 (noting that South Carolina is the only state with such a system). Of course, the vast majority of solicitors operate the criminal courts in a fair and even-handed manner, and the abuses cited generally are not associated with any nefarious intent. They do, however, inevitably stem from the nature of a system that allows the prosecution to control the criminal docket.

Nevertheless, we cannot equate the potential for abuse with it actually occurring in this case. Indeed, whether the statute may be unconstitutional in other circumstances has no bearing on whether it has been unconstitutionally applied in the case at hand. *See Simeon v. Hardin*, 451 S.E.2d 858, 871 (N.C. 1994) (holding prosecutorial control of the docket is facially constitutional and must be attacked on an as-applied basis). We must therefore determine whether Langford's rights were infringed based on the record before us. Under the lens of the only

deprivation alleged to have occurred in this case, we find no evidence that Langford's due process rights were violated even if the State was able to select Judge Keesley to preside.

B. Speedy Trial

Langford also contends the State's dilatory practices in calling his case deprived him of his right to a speedy trial.[7] The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy . . . trial." S.C. Const. art. I, § 14. The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense. *State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

The Supreme Court of the United States has deemed this right "generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Barker v. Wingo*, 407 U.S. 514, 519 (1972). This is due in large part to the reality that "[d]elay is not an uncommon defense tactic" and "deprivation of the right to a speedy trial does not per se prejudice the accused's ability to defend himself." *Id.* at 521. More important, however, is the vagueness of this right, which makes it nearly impossible to determine when it has been violated. *Id.* Indeed, the various procedural safeguards built into the criminal process require that it "move at a deliberate pace." *United States v. Ewell*, 383 U.S. 116, 120 (1966). Thus, "there is no fixed point . . . when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial." *Barker*, 407 U.S. at 521.

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[7] We reject the State's argument that this issue is not preserved for review due to Langford's failure to renew his motion to dismiss when his case was called for trial. In its May 2010 order denying Langford's original motions, the court required the State to try the case within nine months. It then said Langford could renew his motion to dismiss at that time if the State failed to do so. Because nine months had not yet passed when the case was tried, it would have been futile for Langford to raise the issue again. *See State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding appellant did not waive an objection by not presenting it to circuit court because it would have been futile to do so).

Accordingly, "[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). Stated differently, "[a] speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay." *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966). Because of the vagaries of this unavoidably ad hoc inquiry, the Supreme Court has acknowledged that it "can do little more than identify some of the factors" for courts to examine. *Barker*, 407 U.S. at 530. These factors include the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered.[8] *Id.*; *see also Waites*, 270 S.C. at 107, 240 S.E.2d at 653 (recognizing the same factors apply under South Carolina law).

The Supreme Court has counseled further that none of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U.S. at 533. Instead, they are all related and must be considered along "with such other circumstances as may be relevant." *Id.* Thus, the Supreme Court created a balancing test which is a rejection of "inflexible approaches" and weighs "the conduct of both the prosecution and the defense." *Id.* at 529-30. If a court concludes that this right has been violated, dismissal of the charges "is the only possible remedy." *Id.* at 522. A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. *See State v. Edwards*, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct. App. 2007) (applying abuse of discretion standard to speedy trial claim), *rev'd on other grounds*, 384 S.C. 504, 682 S.E.2d 820 (2009); *see also State v. Redding*, 561 S.E.2d 79, 80 (Ga. 2002) (noting the inquiry is whether court abused its discretion under *Barker*). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008)

We begin our analysis with the "triggering mechanism" of a speedy trial claim, which is the length of the delay. *Barker*, 407 U.S. at 530. We should not even examine the remaining factors "[u]ntil there is some delay which is

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[8] The circuit court did not cite to *Barker* or explicitly apply any of these factors. However, the court's analysis largely tracks the substance of the test, and no party has contended the court did not use the proper legal framework when ruling on Langford's motions.

presumptively prejudicial." *Id.* 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. *United States v. MacDonald*, 456 U.S. 1, 6 (1982). The Supreme Court was quick to remind in *Barker*, however, that even the length of time necessary to trigger the full inquiry "is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530-31. Thus, a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case. *Id.* at 531; *see also id.* at 531 n.31 (suggesting that a delay of nine months could have been presumptively prejudicial in a case that depended on eyewitness testimony (citing *United States v. Butler*, 426 F.2d 1275, 1277 (1st Cir. 1970))).

In the case before us, Langford's speedy trial clock began when he was arrested on October 3, 2008, and ran until he was tried twenty-three months later on September 7, 2010. Moreover, while the charges against him were serious, the factual proof was not complicated. Thus, this length of time is presumptively prejudicial and triggers the remaining *Barker* inquiry. *See Waites*, 270 S.C. at 108, 204 S.E.2d at 653 (holding a two-year-and-four-month delay in a prosecution for assault and battery of a high and aggravated nature and for pointing and presenting a firearm implicated the rest of the *Barker* analysis); *see also 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' at least as it approaches one year."); *Brooks v. State*, 674 S.E.2d 871, 873-74 (Ga. 2009) (finding a nineteen-month delay presumptively prejudicial in trial for murder, aggravated assault, and firearms offenses).

Turning to the second element, the Supreme Court has stated that "different weights should be assigned to different reasons" for the delay. *Barker*, 407 U.S. at 531. A deliberate attempt by the State to delay the trial as a means of impairing the accused's ability to defend himself "should be weighted heavily against the government." *Id.* Neutral reasons, which could include overcrowded dockets or negligence, are "weighted less heavily" but still count against the State because it bears the ultimate responsibility for these circumstances. *Id.*; *see also State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) ("The ultimate responsibility for the trial of a criminal defendant rests with the State."). Delays occasioned by the defendant, however, weigh against him. *Vermont v. Brillon*, 129 S. Ct. 1283, 1290 (2009). This is not only in accord with the reality that delay may be a defense tactic, but it is also a recognition that a defendant should not be able to procure a dismissal of the charges against him due to delays he caused. *See id.*

The State advances two different reasons for the delays in Langford's prosecution. First, it argues that the initial twenty-month delay in indicting him was due to its inability to have a "meaningful" conversation with the victims because it could not find an interpreter. Although we are not persuaded the State used its best efforts to secure an interpreter, there is no evidence that it intentionally tarried in finding one. At most, the State was negligent, and this is a neutral reason for delay which does not weigh heavily against it.

Next, the State contends the final four-month delay in trying Langford, running from May 2010 to September 2010, was the result of Langford coercing Phillips to not testify. From our review of the record, there is evidence that Langford and his co-defendant persuaded Phillips to remain silent. So long as he did so, he would be unavailable for cross-examination. Thus, the State would be unable to use Phillips' original statement as evidence against Langford. *See Bruton*, 391 U.S. at 126. The loss of this crucial piece of evidence therefore effectively gutted the State's case on the day of trial.

The State consequently needed to first procure a waiver of Phillips' right to remain silent, and then it could try Langford using the statement. Because Phillips' attorney was not ready to proceed during that term of court, however, a continuance was required for this to happen.[9] From that point on, the State moved with reasonable haste given the few General Sessions terms scheduled for Edgefield County during that time. We agree with the circuit court that the delays already incurred are troubling, but we cannot ignore the fact that this additional delay is the product of Langford's efforts to spoil the State's evidence. Therefore, we will not count it against the State. *See United States v. Loud Hawk*, 474 U.S. 302, 316 (1986) (holding a defendant who causes delays in his trial "should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial").

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[9] Langford's argument that the State simply could have redacted Phillips' references to him in the statement to avoid *Bruton* misses the point. Phillips was the key prosecution witness, and his testimony was essential to the State's case. Holding that the State was required to forego the use of Phillips' statement against Langford without consideration of why Phillips changed his mind would allow Langford to benefit from his tampering with the State's star witness.

The third factor in the *Barker* analysis is the defendant's assertion of his right to a speedy trial. While Langford first filed what seems to be a *pro se* speedy trial motion in June 2009, the record suggests that he never sought a ruling on it until the May 2010 hearing. Moreover, while Langford did file a *pro se* motion for a speedy trial/motion to dismiss days after the court issued its May 2010 order, it was never ruled upon and he never renewed his motion when the case was called for trial. Although it may have been futile for him to raise the issue again from an error preservation standpoint, the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *See Barker*, 407 U.S. at 532.

Finally, we must consider the prejudice Langford suffered. The Supreme Court has identified three different types of prejudice the right to a speedy trial seeks to prevent: (1) oppressive pre-trial incarceration; (2) anxiety stemming from being publicly accused of a crime; and (3) the possibility that the accused's defense will be impaired due to the death or disappearance of witnesses or the loss of memory with the passage of time. *Id.* "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Langford was in jail for nearly two years pending trial. "The time spent in jail awaiting trial has a detrimental impact on the individual" through its attendant job loss, disruption of family life, and encouragement of "idleness." *Id.* While we are cognizant of not minimizing the deleterious effects of lengthy pre-trial incarceration, the two-year delay in bringing this case to trial does not amount to a constitutional violation in the absence of any actual prejudice to Langford's case.[10] *See State v. Kennedy*, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) ("While Kennedy may have been slightly prejudiced by the twenty-six month pretrial incarceration, the more important question is whether he was prejudiced because the delay impaired his defense."). To that end, Langford has not demonstrated how his own defense was prejudiced by the delay. Although he does argue the final delay enabled the State to secure Phillips' testimony and thereby bolster its case against him, he fails to recognize that the State only had to do so

[10] While extreme delays may warrant relief based solely on pre-trial incarceration, this case has not crossed that threshold. *See Doggett*, 505 U.S. at 657 ("[T]o warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice.").

because of his interference. Moreover, he cannot point to any evidence of anxiety caused by the stigma of being accused of these crimes.

Looking at these factors and the case as a whole, and taking into account the balance of the State's interests and Langford's, we do not believe the circuit court abused its discretion in finding Langford was not denied a speedy trial in the constitutional sense.

CONCLUSION

For the foregoing reasons, we hold section 1-7-330 is unconstitutional under the separation of powers clause of our constitution. The General Sessions docket will henceforth be managed pursuant to the administrative order issued in conjunction with this opinion. Nevertheless, we affirm Langford's convictions because he has not shown he was prejudiced by the solicitor's control over calling his case for trial. In particular, we find no due process violation or a denial of his right to a speedy trial.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent from that part of the opinion that finds S.C. Code Ann. § 1-7-330 (2005) unconstitutional.

As explained below, the constitutionality of the statute is not before us. It is axiomatic that this Court will not address a constitutional issue unless it is necessary to a resolution of the case. *E.g., S.C. Dep't of Soc. Servs. v. Cochran*, 356 S.C. 413, 589 S.E.2d 753 (2003). It is also axiomatic that we sit to review the lower court's order based upon the issues properly presented by the parties for our consideration. *E.g., Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011). Constitutional issues are not exempt from issue preservation requirements. *Id.* Further, our rule restricts amicus to the issues presented by the parties, Rule 213, SCACR: to strike down a statute as unconstitutional based upon an amicus brief is tantamount to a *sua sponte* declaration. Unless a statute infringes upon our jurisdiction, we may not *sua sponte* declare it unconstitutional. *See State v. Keenan*, 278 S.C. 361, 296 S.E.2d 676 (1982). We should not decide the constitutionality of § 1-7-330 on this record.

Even if the constitutionality of § 1-7-330 were before us, under our existing precedents I find that the statute does not offend the separation of powers doctrine. I agree that solicitors are executive officers. S.C. Code Ann. § 1-1-110 (2005). Further, I agree that § 1-7-330 vests the exclusive authority to prepare the general sessions docket in the solicitor, and also authorizes her to determine the order in which the docketed cases are called. Finally, I do not disagree with the majority that by vesting exclusive authority in the solicitor to prepare the general sessions docket, and by permitting the solicitor to call cases from that docket in his desired order, § 1-7-330 could lead to unnecessary delay, oppressive haste, and other abuses. As I interpret the statute, however, I do not believe that it violates the South Carolina Constitution.

We have recently addressed a separation of powers challenge to prosecutorial authority:

> Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case. Both the South Carolina Constitution [footnote 5 citing S.C. Const. art. V, § 24] and South Carolina case law [footnote 6 citing *McLeod v. Snipes*, 266 S.C. 415, 223 S.E.2d 853 (1976)] place

> the unfettered discretion to prosecute solely in the prosecutor's hands. The Attorney General as the State's chief prosecutor may decide when and where to present an indictment, and may even decide whether an indictment should be sought. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion . . . .
>
> *State v. Thrift*, 312 S.C. 282, 291-292, 440 S.E.2d 341, 346-347 (1994) cited with approval in *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998); *State v. Burdette*, 335 S.C. 34, 40, 515 S.E.2d 525, 528 (1999).

Further, "[a]ll the authorities agree that, in the exercise of a discretionary official act, an executive officer cannot be restrained, coerced, or controlled by the judicial department." *State v. Ansel*, 76 S.C. 395, 57 S.E. 185 (1907).

Subject to the limitations discussed below, the solicitor has the discretion to decide when to prosecute and how to prosecute a case. This does not mean that the solicitor's authority is unrestrained by judicial oversight. The trial judge has the ultimate authority to determine whether a case called by the solicitor will be tried at a particular juncture. *See State v. Mikell*, 257 S.C. 315, 185 S.E.2d 814 (1971) ("In the calling of cases for trial the solicitor has a broad discretion in the first instance, and the trail [sic] judge has a broad discretion in the final analysis."). This is so because the trial judge has "the inherent power to control the order of [the court's] business to safeguard the rights of litigants" through her discretion to grant a continuance. *Williams v. Bordon's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980). In *Williams*, the Court held the General Assembly violated the separation of powers doctrine by enacting a statute which purported to limit the court's discretion to grant a continuance in any case which involved an attorney-legislator as "attorney of record, witness, or otherwise." If we read § 1-7-330 as preventing a trial judge from exercising her discretion to require a solicitor to place a case upon a future docket if necessary to safeguard the rights of the defendant, then we would render the statute unconstitutional. Such an interpretation would create a separation of powers issue, not between the executive and the judiciary, but between the legislative branch and the judicial branch since we would find the

statute unconstitutionally infringes upon judicial authority. *Williams, supra.* Nothing in § 1-7-330 affects the court's inherent authority to safeguard litigants' rights; rather, the statute represents the reasonable delegation of preparing the general sessions docket to the solicitor.

The solicitor is a party to every general sessions proceeding, and has the information and resources necessary to determine when a case is ready to be called. If the solicitor is perceived to be unlawfully delaying the call of a case, the defendant has available the remedy of a speedy trial motion: If it is called with undue haste, the defendant may seek a continuance. It is only logical to have the solicitor initially set the docket since he knows the status of the law enforcement investigation, of the examination of the forensic evidence, of any codefendant's case, and of the defendant's other charges. *See State v. Mikell, supra* ("A prosecuting attorney normally has many cases for disposition. He must plan ahead to expedite the work of the court . . . ."). The solicitor bears the burden of proof in every case and should not ordinarily be compelled to call his case before he is ready. *Id.*("solicitor has authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, **subject to the broad discretion of the trial judge.**")(emphasis supplied). In my opinion, there is no separation of powers problem with § 1-7-330. *E.g., State v. Thrift, supra.*

Finally, I disagree with the premise of the majority's opinion, "that section 1-7-330 is at odds with [the courts'] intrinsically judicial power." Even if one were to grant that the statute creates some overlap of executive and judicial authority, it cannot be said that preparing a docket and calling cases from that docket usurps the judicial power vested in the unified judicial system under S.C. Const. art. V, §1 (1977). *See Carolina Glass Co. v. Murray,* 87 S.C. 270, 291-292, 69 S.E. 391, 399 (1910) *overruled in part on other grounds McCall v. Batson,* 285 S.C. 243, 329 S.E.2d 741 (1985).

In my opinion, however, we cannot reach the constitutionality of that statute in this case. Were we to reach the issue, I would interpret the statute in a way that does not offend the separation of powers doctrine. If the Court is nonetheless determined to declare § 1-7-330 unconstitutional, then we must both deal with our precedents and describe the new system in sufficient detail that the parties most intimately involved in the process can implement the necessary changes.

I concur in the majority's decision to affirm this appeal and in the sentiment that our General Sessions docketing system needs reform, but dissent from so much of that opinion as reaches and decides the constitutionality of § 1-7-330.

The Supreme Court of South Carolina

RE: DISPOSITION OF CASES IN GENERAL SESSIONS

ORDER

Pursuant to the provisions of S.C. CONST. Art. V §4, and in furtherance of this Court's decision in *State v. Langford*,

IT IS ORDERED that:

Cases in General Sessions Court shall proceed as follows:

(A) All cases shall be assigned to a 180 day track consistent with the Uniform Differentiated Case Management Order which is incorporated herein and made a part hereof by reference. The Chief Judge for Administrative Purposes (CJAP) may entertain motions to remove any case from the track and establish a scheduling order where appropriate.

(B) Cases within the 180 day track or cases that have exceeded the 180 day track by less than one (1) year, shall remain under the control of the Solicitor, subject to the provisions set forth below:

(1) General Docket. The General Docket consists of all pending General Sessions matters. Absent the grant of a speedy trial motion, the Solicitor shall have the initial responsibility for designating when a case is ready for trial. Upon determining that a case is ready for trial, the Solicitor shall file with the Clerk of Court a "NOTICE OF COURT DOCKETING" on a form prescribed by the Supreme Court and shall serve all parties and counsel of record. Upon receiving such notice, the Clerk shall place the case on the Court Docket and the matter may be called for trial any time after thirty (30) days from the filing of the NOTICE OF COURT DOCKETING. The Court Docket consists of all matters that the Solicitor has deemed ready for trial. Once

the case is placed on the Court Docket, the Court assumes the responsibility for setting a trial date and the Clerk, under the direction and supervision of the CJAP, shall publish a trial roster from the Court Docket of cases subject for trial at least twenty-one (21) days before each term of court. Publication shall be effected once the Clerk makes the trial roster available in the Clerk's office or on the Clerk's internet site. The Clerk shall also distribute the trial roster to those attorneys listed upon it by Fax, US Mail, hand delivery, or electronic delivery. Cases on the trial roster not reached for trial will be subject to being called for the next two terms of court before being republished. It is the responsibility of each defense attorney to notify the defendant that the case is scheduled for trial and to remind the defendant of the right and obligation to be present at trial. Motions for continuance or other relief from a published trial roster shall be made in accordance with Rule 7, SCRCrimP. The CJAP or presiding judge shall rule on the motion.

(2) Nothing herein shall affect the Court's ability to schedule motions or other pretrial proceedings as may be appropriate, or the right of the CJAP to add cases to any trial roster or designate cases for a day certain as the CJAP deems appropriate, subject to the notification requirements set forth in paragraph B(1), above.

(C) Cases more than one year beyond their 180 day track will be automatically transferred to the CJAP's supervision as follows:

(1) Judicial Docket. If the Solicitor has not filed a NOTICE OF COURT DOCKETING in accordance with Paragraph (B) (1) above for any case more than one (1) year beyond its assigned track, it will be automatically transferred to the Judicial Docket, which the Clerk shall maintain separate and apart from the regular Court Docket. The CJAP will administer and supervise the Judicial Docket. The Solicitor must notify the Clerk within fifteen (15) days after expiration of this period of time of all cases that are in this category and furnish the following information: (1) Indictment number; (2) Defendant's name; (3) Date of Arrest; (4) Assigned Assistant Solicitor; (5) Defense Counsel; (6) Date of Indictment (True Bill); (7) Track

expiration date; (8) Prior request(s) for continuance. The Clerk will maintain the Judicial Docket which will include this information.

(2) Upon placement on the Judicial Docket, the CJAP shall arrange for the scheduling of trial or other disposition of the case. Additionally, the CJAP may upon the request of any party transfer the case to the trial roster in accordance with Paragraphs (B) (1) and (2).

(3) If the case has not been disposed of more than one (1) year following its transfer to the Judicial Docket, the CJAP will dismiss the case, absent the Solicitor establishing good cause. Both the Solicitor and the defendant shall be notified of the pending dismissal and be given an opportunity to be heard. Cases dismissed pursuant to this provision will be without prejudice, unless otherwise specified by the CJAP. The Solicitor will notify the victim(s) of cases dismissed pursuant to this provision.

(D) Non-Track Cases:

The Solicitor shall furnish to the CJAP a quarterly status report of all non-track cases. The report shall contain information regarding the progress of the case and the expected disposition date.

(E) Old Case Disposition:

Any case, including non-track cases, pending four (4) or more years from the date of indictment by the Grand Jury shall be dismissed by the CJAP, unless the Solicitor shall show good cause why it should not be dismissed. Such dismissal is without prejudice, unless otherwise specified by the CJAP and the Solicitor shall have the right to re-present the matter to the Grand Jury. Before ordering dismissal, the Clerk of Court shall notify the Solicitor and the defendant of the Court's intention to dismiss the case. The Solicitor shall: (1) within ten (10) days of receiving the notice from the Court, notify the victim(s) in writing of the Court's intended disposition and invite the victim(s) to file a written response with the Solicitor within ten (10) days; and (2) within thirty (30) days file a written response with the Court setting forth in detail the reasons, including the response(s) of the victim(s), why the case should

not be dismissed and advising the court of the expected time of disposition. The defendant may submit a written response within thirty days of the Solicitor's filing. The CJAP may schedule a hearing, dismiss the case without a hearing, or take such further action as may be appropriate. Failure to respond as set forth herein will result in the matter being dismissed pursuant to this provision. If the Solicitor shows good cause, the case shall automatically be transferred to the Judicial Docket.

This order shall be effective February 4, 2013.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Because I dissent from the opinion,
I respectfully do not join in this order.

s/ Costa M. Pleicones J.

November 21, 2012

Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Edgefield County
William P. Keesley, Circuit Court Judge
Appellate Case No. 2010-173307

The State,

Respondent,

vs.

Bryan Phillips,

Appellant.

PETITION FOR REHEARING

On November, 21, 2012, this Court Affirmed Appellant's conviction and sentence. State v. Phillips, Op. No. 2012-MO-049 (S.C. Sup. Ct. Filed November 21, 2012). However, the Court ruled, consistent with its opinion in State v. Langford, Op. No. 27195 (S.C. Sup. Ct. filed November 21, 2012), section 1-7-330 of the South Carolina Code was unconstitutional as violating the separation of powers clause. The State submits this Court, in reaching the decision it reached in Langford and applied in this case, overlooked or misapprehended significant constitutional provisions, historical precedent of this Court, and the history behind the relevant provisions of the South Carolina Constitution. Pursuant to Rule 221, SCACR, the Court should grant the petition for rehearing, find section 1-7-330 constitutional, and affirm the conviction and sentence of Appellant.

In Langford, this Court found section 1-7-330 unconstitutional as violating the separation of powers clause under Article I section 8 of the South Carolina Constitution.

Section 1-7-330, however, is explicitly provided for by Article V section 4 of the South Carolina Constitution. As quoted in the State's Final Brief of Respondent, this section of the State Constitution provides as follows:

> The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. . . . The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. . . . The Supreme Court shall make rules governing the administration of all the courts of the State. **Subject to the statutory law**, the Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

S.C. Const. Art. V § 4 (Emphasis added). This Court has construed the meaning of this provision: "The clause 'subject to the statutory law' establishes the intent to subordinate to the General Assembly the Court's rule-making power in regard to practice and procedure." Stokes v. Denmark Emergency Medical Services, 315 S.C. 263, 433 S.E.2d 850 (1993) (finding a statute limiting the ability to seek a new trial solely on the issue of damages was not enacted unconstitutionally simply because the Supreme Court did not promulgate it). Accordingly, this Court's ruling in Langford appears to contradict its tacit recognition in Stokes of the plenary authority of the legislature in the field of a court's practice and procedure.

Additionally, under Article V, section 24: "The General Assembly also may provide by law for . . . the selection, duties, and compensation of other appropriate officials to enforce the criminal laws of the State, to prosecute persons under these laws, **and to carry on the administrative functions of the courts of the State.**" (Emphasis added).

Further, as this Court has historically noted, and recently reaffirmed:

> The power of our state legislature is plenary, and therefore, the authority given to the General Assembly by our Constitution is a limitation of legislative power, not a grant. This means that "the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitutions...."

City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (quoting Moseley v. Welch, 209 S.C. 19, 26, 39 S.E.2d 133, 137 (1946)).

Accordingly, the Constitution provides that the legislature may promulgate the kind of statute, one that governs the practice and procedure in this State's courts, found in section 1-7-330. However, this Court did not address the applicability of these constitutional provisions, nor the plenary power of the Legislature, in determining the constitutionality of section 1-7-330.

Respondent respectfully submits this Court should consider the historical framework and the original intent of the framers and the people in the adoption of Article V section 4 and its language "Subject to the statutory law ... ." Again, this Court recently recognized:

> When this Court is called to interpret our Constitution, it is guided by the principle that both the citizenry and the General Assembly have worked to create the governing law. See Miller v. Farr, 243 S.C. 342, 133 S.E.2d 838, 841 (1963) (stating that the Court's efforts in construing the South Carolina Constitution are aimed at assessing the intent of the framers and the people who adopted it). Therefore, the Court will look at the "ordinary and popular meaning of the words used," keeping in mind that amendments to our Constitution become effective largely through the legislative process. For this reason, "the Court applies rules similar to those relating to the construction of statutes" to arrive at the ultimate goal of deriving the intent of those who adopted it.

Harris, 391 S.C. at 153, 705 S.E.2d at 54-55 (some internal citations omitted). In this regard, the Court has often given great deference to the work of the "West Committee," a legislatively created Committee to Study the South Carolina Constitution, chaired by then Senator John C. West, in 1966. The purpose of the West Committee "was to develop and recommend amendments to the Constitution that would eliminate archaic provisions and 'strengthen it in such areas, so that it [would] provide a workable framework with proper safeguards for sound State, County and local governments.'" Hosp. Assn. of South Carolina, Inc. v. County of Charleston, et al., 320 S.C. 219, 224-225, 464 S.E.2d 113, 117 (1995). See also, Diamonds v. Greenville Co., 325 S.C. 154, 480 S.E.2d 718, 720 (1997) ("Connor's holding is supported by the comments of the drafters of the proposed section, which was added as part of major revisions made to the state constitution in the early 1970s"); Williams v. Morris, 320 S.C. 196, 203, 464 S.E.2d 97, 100 (1995) (referencing "West Committee" as support for this Court's interpretation of Constitution).

According to the West Committee's Report, issued in 1969, the Committee proposed a virtually identical sentence to the one contained in the current Article V, section 4, i.e. "[s]ubject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts." The only difference between the West Committee's recommendation and the version which emerged as the one adopted by the voters in 1972 and ratified by the General Assembly in 1973, was the West Committee used the phrase "[s]ubject to the law ..." rather than "[s]ubject to the statutory law ... ." According to the West Committee Report, the purpose of this provision was to give the Supreme Court "rule making power to **supplement the rules enacted by the General Assembly.**" Final Report

of the Committee To Make a Study of the South Carolina Constitution of 1895, p. 63 (emphasis added).

Professor James Underwood, in his landmark treatise on the South Carolina Constitution, discussed at length the West Committee's intent in recommending this "subject to the [statutory] law" language. He explained as follows:

> Recommendations made by expert consultants for the ... (West Committee) as well as the minutes and final report of that body, together with state Senate action, reveal an intent explicitly to give the Supreme Court a major role in rule making **but also to insist that rules be consistent with legislative enactments**. Language can be found that is subject to the interpretation that the General Assembly was intended to be a key participant in rule formulation.

James Lowell Underwood, The Constitution of South Carolina, Vol. I, p. 158. (emphasis added). Professor Underwood chronicled the West Committee's deliberations. and the subsequent actions taken by the Senate Judiciary Committee, as what became Article V, section 4 took shape:

> Committee debate produced the following colloquy between Abernathy, Robert Stoudemire, Executive Director, and Committee member Huger Sinkler:
>
> *Mr. Abernathy:* Actually the question here is to take a middle ground between what we have now, which makes it totally regulated by the General Assembly, and what is proposed in several of the constitutions, to allow the courts to make its [sic] own rules even including rules of ethics.
>
> *Mr. Stoudemire:* You'll really be opening up a Pandora's box there.
>
> *Mr. Abernathy:* Right. I wasn't about to propose that. I am merely suggesting an intermediate position to allow the courts to make rules in the manner provided by rules of the Supreme Court and under such regulations as the General Assembly may, by law prescribe; to allow the courts to participate

> through the necessary rule-making power within the authority given to it by the legislature.
> *Mr. Stoudemire:* Professor Abernathy and I agree that we might make two sentences out of this which would be clearer "and subject to the law" and so on. Put a period after the second sentence ending in "in all the courts of the state." Then start off "subject to the law, the Supreme Court shall make" and pick up again. I was a bit worried about the reference "subject to law." We can make two sentences.
> *Mr. Sinkler:* Well, we don't use the phrase in South Carolina "subject to the law." What we're talking about there, I assume is statute law. So you want to say "subject to such law as the General Assembly shall enact."
> *Mr. Stoudemire:* Bring in the General Assembly. ...
>
> The insertion of the period clearly divided the rule-making function into two categories: (1) rules of court administration, and (b) rules of practice and procedure. The Court had total control over the former but was to make **rules of practice and procedure subject to law**. The Senate Judiciary Committee later changed the wording of section 4 so that it made the Court's power to promulgate rules of practice and procedure "subject to statutory law."

Id. at 159. (emphasis added).

This key colloquy by the committee makes clear that the framers of the words "subject to the statutory law" in the Constitution intended for the General Assembly to play a key role in the development of rules of "practice and procedure" and the Constitution would protect procedural enactments by the Legislature such as section 1-7-330. Further, this interpretation is consistent with the plenary power of the Legislature and this Court's precedent in Moseley and Harris discussed above. Finally, there can be no constitutional violation of the separation of powers under Article I, §8, when the people sanctioned in the very same Constitution, pursuant to Article V, § 4, statutes like section 1-7-330 that relate to a court's "practice and procedure." See Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 136

(1975) (finding statute enacted pursuant to Article XI of the Constitution does not violate Article VIII's local law prohibition).

Section 1-7-330, amended to its present form by Act No. 462 of 1980, represents a codification of a time honored practice, and was enacted with the assurance that the Court had upheld the Solicitor's control of the docket **both before and after** the amendment of Article V, section 4. See, State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977), citing State v. Mikell, 257 S.C. 315, 185 S.E.2d 814, 816-17 (1971). The Legislature thus fully believed, in enacting present section 1-7-330, the compromise contained in Article V, section 4, ratified by the Legislature in 1973, and consisting of a sharing of power between Legislature and Court, would validate the amended statute. Procedural as well as substantive statutes were covered by the language contained in Article V, section 4, which made court rules "subject to the statutory law." This compromise, required the Court's rule making necessarily had to be **consistent with statutory law**. Respondent believes this was the clear intent of the framers and a current requirement of the Constitution.

As Justice Pleicones astutely notes in his dissent in the Langford case:

> Subject to the limitations discussed below, the solicitor has the discretion to decide when to prosecute and how to prosecute a case. This does not mean that the solicitor's authority is unrestrained by judicial oversight. The trial judge has the ultimate authority to determine whether a case called by the solicitor will be tried at a particular juncture. . . . If [this Court] read[s] § 1-7-330 as preventing a trial judge from exercising her discretion to require a solicitor to place a case upon a future docket if necessary to safeguard the rights of the defendant, then we would render the statute unconstitutional. Such an interpretation would create a separation of powers issue, not between the executive and the judiciary, but

> between the legislative branch and the judicial branch since we would find the statute unconstitutionally infringes upon judicial authority.

State v. K.C. Langford, Op. No. 27195 (S.C. Sup. Ct., filed November 21, 2012).

However, as evidenced in the instant case and discussed in Respondent's Final Brief, the Legislature has not encroached on the judiciary's ability to safeguard the rights of litigants, as the trial courts retain the ability to continue cases called prematurely and order the trial of cases as necessary to protect a defendant's right to speedy trial. The trial court may also dismiss cases as a possible remedy to a speedy trial violation.

Respondent would note this Court relied on its opinion in Williams v. Bordon's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980), to hold a court possesses the inherent power to carry on the order of its business. In that case, this Court struck a statute that mandated the courts continue any cases while the legislature was in session where a legislator was counsel of record. Unlike the statute at issue in Bordon's, the trial court retains discretion to grant a continuance, notwithstanding section 1-7-330, even if the solicitor calls the case, and the court retains the power to grant a speedy trial motion when the delays become inexcusable.

Additionally, under Article V, section 4A of the South Carolina Constitution, this Court is required to submit all rules governing the practice and procedure in its courts as follows:

> All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to

> the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first date of February during each session. . . .

S.C. Const. Art. V, §4A. Then Chief Justice Bruce Littlejohn described Article V, section 4A "as a rational expression of the principle of checks and balances that underlies the separation of powers doctrine." Underwood, supra, Vol I, p. 173. The Chief Justice explained: "It assures the right of the court to take the lead in rule-making while allowing the Assembly the right to participate by reviewing a rule, rejecting it and suggesting other approaches. It pleases me to announce that the plan has the endorsement of our court." Id.

This Court's Order, incorporated in the Langford opinion, appears to qualify as a new set of rules governing the practice and procedure in General Sessions. By comparison, Rule 40, SCRCP, represents a similar set of procedures that govern the administration of the docket for the Court of Common Pleas. Accordingly, the State would respectfully suggest that the content of this Order should be submitted to the General Assembly as it appears is required by our State's Constitution.

Respondent would respectfully submit that section 1-7-330 is constitutional, as the legislature was empowered to enact such rules of procedure under Article V, section 4. Additionally, as discussed at length in the State's brief, allowing solicitors to administer and determine the order of criminal cases called before the General Sessions Court does not infringe on the judiciary's function in light of the remedies available to it when it perceives

the need to safeguard the rights of a defendant in the administration of the docket. As evidenced by this Court's opinion, no misconduct occurred in this case, and the Public Defender Association's brief only makes vague, non-specific allegations of prosecutorial abuses occurring elsewhere, which the Court expressed concern over in its opinion. The State disagrees with the factual accuracy of the Public Defender Association's parade of horribles. Further, Respondent would respectfully submit that under Article V, section 4A, the order attached and incorporated into the opinion represents a new rule subject to legislative approval.

CONCLUSION

Accordingly, the State of South Carolina requests this Court grant the petition for rehearing; reconsider its holding in Langford that section 1-7-330 is unconstitutional and, instead, find it constitutional; apply the reconsidered holding to the instant case; and affirm Appellant's conviction and sentence.

Respectfully submitted,

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BY: _____
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ATTORNEYS FOR RESPONDENT

December 6, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Edgefield County
William P. Keesley, Circuit Court Judge
Appellate Case No. 2010-173307

The State,

Respondent,

v.

Bryan Phillips,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served. This 6th day of December, 2012.

Ellen R. DuBois

ELLEN R. DuBOIS
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The Supreme Court of South Carolina

The State, Respondent,

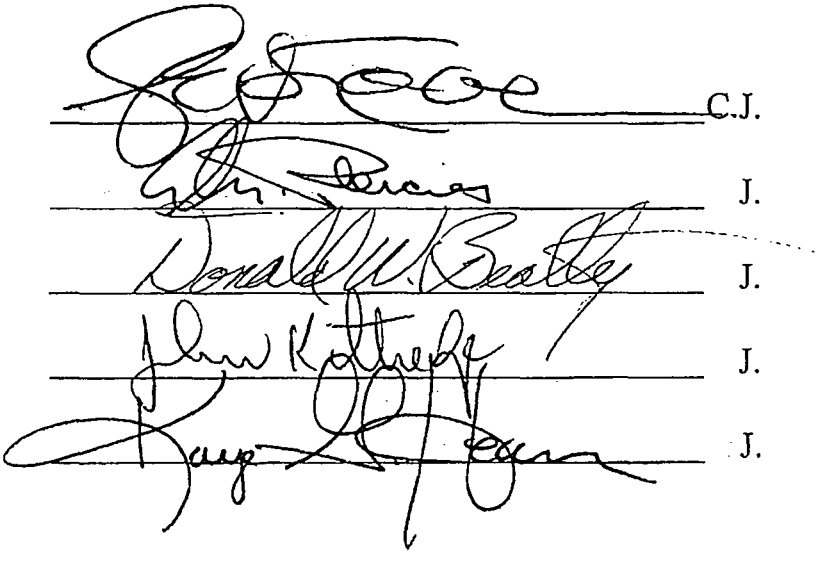
v.

Bryan Phillips, Appellant.

Appellate Case No. 2010-173307

ORDER

After 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. Accordingly, the petition for rehearing is denied.



C.J.

J.

J.

J.

J.

Columbia, South Carolina
December 20, 2012

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William P. Keesley

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

BRYAN PHILLIPS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Bryan Phillips 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,

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(803) 734-1330

March 14, 2013

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

BRYAN PHILLIPS,

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 M. Blitch, Jr., 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 14th day of March, 2013.

LaNelle Cantey DuRant
Counsel of Record

SUBRSCRIBED AND SWORN TO before me
This 14th day of March, 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 - _____

STATE OF SOUTH CAROLINA,

RESPONDENT

v.

BRYAN PHILLIPS

PETITIONER

AFFIDAVIT OF BRYAN PHILLIPS
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Bryan Phillips, 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?

   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.

No

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.

N/A

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.

Family.

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

Bryan Phillips

SWORN to and subscribed before me
this 22 day of January, 2013.

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

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

March 14, 2013

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

Re: Bryan Phillips 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 Bryan Phillips in support of the motion to proceed *in forma pauperis*.

The certificate of service is attached to the original petition. Representing the State of South Carolina is William M. Blitch, Jr., Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. His phone number is (803) 734-3372. I represent Petitioner Bryan Phillips. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

Sincerely,

LaNelle Cantey DuRant
Attorney at Law

LCD/mch

Enclosure

cc: Honorable Daniel E. Shearouse
William M. Blitch, Jr., Esquire

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

March 14, 2013

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

Re: Bryan Phillips v. South Carolina

Dear Mr. Suter:

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

Sincerely,

LaNelle Cantey DuRant
Attorney at Law

LCD/mch

Enclosure

cc: William M. Blitch, Jr., Esquire
Honorable Daniel E. Shearouse, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

BRYAN PHILLIPS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of the Court and that on March 14, 2013, I filed the petition for writ of certiorari in the Above-reference 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 Court.

LaNelle Cantey DuRant
Counsel of Record

SUBRSCRIBED AND SWORN TO before me
This 14th day of March, 2013.

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

My Commission Expires: October 2, 2013