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

**RECEIVED**

APR 23 2013

**S.C. Supreme Court**

April 23, 2013

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

Re: Gene Tony Cooper v. State of South Carolina

Dear Mr. Shearouse:

Enclosed is a copy of the petitioner's reply brief which I have filed today in the United States Supreme Court. Please contact me if you have any questions.

Sincerely,

Robert M. Dudek  
Chief Attorney

RMD/kam  
Enclosure

cc: William Edgar Salter, III, Esquire



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Wanda H. Carter, Deputy Chief Appellate Defender

April 23, 2013

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

Re: Gene Tony Cooper v. State of South Carolina

Dear Mr. Suter:

Enclosed is the petitioner's reply brief. The certificate of service is attached to the original brief. Representing the State of South Carolina is William Edgar Salter, III, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. His phone number is (803) 734-3970. I represent Petitioner Gene Tony Cooper. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

Sincerely,

Robert M. Dudek  
Attorney at Law

RMD\kam

Enclosure

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

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 2012

\_\_\_\_\_  
No. 12-8674  
\_\_\_\_\_

**RECEIVED**

APR 23 2013

**S.C. Supreme Court**

GENE TONY COOPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

\_\_\_\_\_  
PETITIONER'S REPLY BRIEF  
\_\_\_\_\_

ROBERT M. DUDEK  
Attorney at Law

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## ARGUMENT IN REPLY

The Attorney General of South Carolina argues that “despite the Court’s grant of certiorari in Boyer v. Louisiana, 11–9953, 133 S.Ct. 420 (2012), the Court should deny certiorari here because Cooper’s case is factually distinguishable from Boyer and the balance of factors under Barker<sup>1</sup> do not support relief.” Brief in opposition at 31. In fact, the factual distinctions between this case and Boyer, and the balance of factors under Barker show this case presents a much more compelling violation of a Petitioners’ Sixth Amendment right to a speedy trial. As the Attorney General stated in its brief: “The trial judge found that Cooper had consistently asserted his right to a speedy trial since 2003; that Cooper timely asserted his right; and that Judge Keesley had not considered defense counsel Bruck’s requests to accommodate his schedule.”<sup>2</sup> BIO at 22.

It is undisputed that petitioner repeatedly renewed his motions for a speedy trial. The first speedy trial motion hearing was held on August 18, 2003 before the Honorable Marc H. Westbrook. R. 4. A second speedy trial hearing was held on February 15, 2005 before the Honorable William P. Keesley. R. 22.

A third speedy trial hearing and motion to dismiss was held before Judge Keesley on July 12, 2005. R. 37. A fourth hearing, and a motion to dismiss hearing, was then held on Petitioner’s motion on February 8, 2006 before the Honorable Daniel F. Pieper. R. 101. Judge Pieper, while denying the motion to dismiss, expressed his concern and seeming disagreement South Carolina Sixth Amendment speedy trial jurisprudence in his written order dated April 21, 2006. In this order the judge noted the

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<sup>1</sup> Barker v. Wingo, 407 U.S. 514 (1972).

<sup>2</sup> Further, murder trials in South Carolina are comparatively not long. For example, in this case the trial was seven-and-a-half days actual trial days long. It began on May 22, 2006 and recessed for the Memorial Day weekend on Friday, May 26, 2006. It resumed on Tuesday, May 30, 2006. The verdict came in at 10:38 on June 1, 2006, and petitioner was sentenced that same morning.

delay of forty-four months was sufficient to “trigger review of the other [speedy trial] factors.” Order at page 5. R. 332. The Attorney General concedes that forty-four months is the operative delay for this Court’s consideration. BIO at 16.

Judge Pieper questioned the prosecution’s assertion that the procedures of Court Administration were an obstacle R. 335, and he noted that South Carolina case law had held that the delay must be due to the “neglect and willfulness of the State’s prosecution.” R.335 (Court’s emphasis). However, the judge strongly questioned this precedent: “It is not clear to this court whether such precedence requiring neglect and willfulness is in line with the jurisprudence of the United States Supreme Court.” R. 336 - 337. (emphasis added). The judge also reasoned, in denying the motion to dismiss, that Petitioner had benefited to some extent because the “State has now withdrawn its notice to seek the death penalty.” R. 342.

Thus, unlike the situation in Boyer where numerous continuance motions were made, here, conversely, petitioner never asked for a continuance, and furthermore he repeatedly reasserted his right to a speedy trial. The prosecution conceded that petitioner was not responsible for any of the delay. R. 218, l. 9 – 221, l. 1,

Consequently, the Attorney General’s present assertion before this court that the fact trial counsel became a Professor of Law at Washington and Lee University in Lexington, Virginia in the interim was responsible for part of the delay belies the record in this case. BIO at 21.

As to the Attorney General’s assertion that the delay was not caused by prosecutorial arrogance, the record in this case is his worst enemy. See BIO at 18. At the February 8, 2006 hearing Solicitor Myers, when asked what his office did to prepare for petitioner’s retrial testified: “I don’t know. You will have to ask him [Deputy Solicitor Riddle] *I didn’t do anything.*” R. 130, ll. 19 – 22. (emphasis added). The solicitor was unaware of any problem the State had with

evidence or otherwise that prevented him from calling this case for trial, and he had not asked Riddle for a status report.

Riddle flatly denied the assertion he was responsible for preparing the case as his boss, Solicitor Myers had claimed under oath. R. 137, ll. 7-15; r.154, ll. 2 – 12; R. 296 - 327. Riddle stated he did not receive any instructions from Solicitor Myers about this case, R.169, l. 14 – 176, l. 5, and, “I don’t think Mr. Cooper or Mr. Southerland ever appeared on my roster, my personal roster.” R. 166, ll. 1 – 3. Riddle also did not know of anyone else in the solicitor’s office that was working on this case. R. 168, ll. 12 – 20. Petitioner reiterates that the delay in this case was caused by the arrogance of the prosecution, and its total disregard for petitioner’s right to a speedy trial under the Sixth Amendment.

Finally, South Carolina Court of Appeals reasoned petitioner received some benefit from the delay because the prosecution removed its request for the death penalty during the long delay. However, in South Carolina virtually every murder contains an aggravating circumstance, and the solicitor could choose to seek the death penalty if he or she so chose. In South Carolina, pursuant to South Carolina Code §16-3-20 (C) (a)(1)(a)-(k) a person is eligible for the death penalty if he or she commits a murder during:

- A criminal sexual conduct in any degree;
- A kidnapping;
- trafficking in persons;
- a burglary in any degree;
- a robbery while armed with a deadly weapon;
- a larceny with use of a deadly weapon;
- killing by poison;

- drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-3-445;
- physical torture;
- dismemberment of a person; or
- arson in the first degree as defined in Section 16-11-110(A), or pursuant to South Carolina Code §16-3-20 (C) (a)(2)-(12) a person is eligible for the death penalty if he or she commits a murder and:
  - The murder was committed by a person with a prior conviction for murder.
  - The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.
  - The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.
  - It is the murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.
  - The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
  - It is the murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

- It is murder of a family member of a [law enforcement official or solicitor listed] above with the intent to impede or retaliate against the official. “Family member” means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.
- Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.
- The murder [is] of a child eleven years of age or under.
- It is the murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.
- The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to Section 44-48-120.

A prosecutor could, under this “received a benefit” logic, express his statutory intent to seek the death penalty against virtually any person charged with murder and always be immunized against a Sixth Amendment speedy trial challenge simply by removing the death penalty from the equation.<sup>3</sup> While “practicality and not logic” is the lifeblood of the law, to deny petitioner his compelling Sixth Amendment’s speedy trial claim because the solicitor finally removed death from the table, given the highly unusual facts of this case, would not only ignore the fact that almost

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<sup>3</sup> The Attorney General makes the odd assertion that there was “[o]verwhelming evidence of Cooper’s guilt” because Bo Southerland was the “primary witness” against petitioner. However, this same Attorney General’s Office moved to bar Southerland’s guilt phase issues in the state Supreme Court on direct appeal of his conviction for murdering the victim here because he had confessed to killing the victim, and he previously had told numerous people that he committed the murder and that Petitioner Cooper was not involved.

every murder in South Carolina could be a death penalty case, it would also turn a blind eye to the practicality of the unbridled discretion that solicitors have in South Carolina enjoy when determining whether to seek the death penalty in a murder case. See State v. Whipple, 324 S.C. 43, 48-49, 476 S.E.2d 683, 686 (1996)<sup>4</sup> citing State v. Thompson, 278 S.C. 1, 5, 292 S.E.2d 581, 584 (1982).<sup>5</sup>

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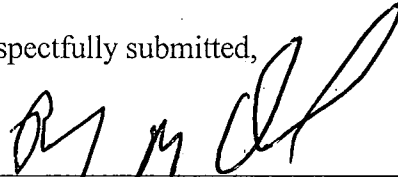
<sup>4</sup> *Cert. denied* Whipple v. South Carolina, 519 U.S. 1045 (1996).

<sup>5</sup> *Overruled in part on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

CONCLUSION

WHEREFORE, petitioner having responded to the Brief in Opposition, this Court should grant certiorari.

Respectfully submitted,



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ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

April 23, 2013.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

\_\_\_\_\_  
No. 12-8674  
\_\_\_\_\_

GENE TONY COOPER,

Petitioner,

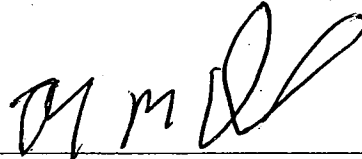
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STATE OF SOUTH CAROLINA,

Respondent

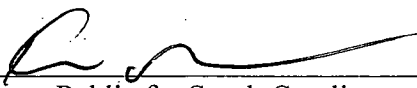
\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that copies of the petitioner's reply brief in this case has been served upon opposing counsel, William Edgar Salter, III, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 23rd day of April, 2013.



\_\_\_\_\_  
ROBERT M. DUDEK  
*Counsel of Record*

SWORN TO BEFORE me this  
23rd day of April, 2013.

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



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

April 23, 2013

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APR 23 2013

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

**S.C. Supreme Court**

Re: Gene Tony Cooper v. South Carolina

Dear Mr. Suter:

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

Sincerely,

Robert M. Dudek  
Attorney at Law

RMD:kam

Enclosure

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

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

\_\_\_\_\_  
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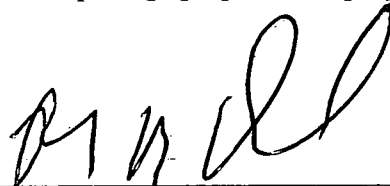
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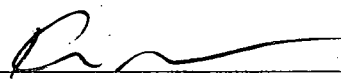
\_\_\_\_\_  
CERTIFICATE OF FILING BY MAIL  
\_\_\_\_\_

I hereby certify that I am a member of the Bar of this Court and that on April 23, 2013, I filed the petitioner's reply brief in the above-referenced case, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.



\_\_\_\_\_  
Robert M. Dudek  
*Counsel of Record*

SUBSCRIBED AND SWORN TO before me  
this 23rd day of April, 2013.

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