The Supreme Court of South Carolina

Re: Hurricane Matthew

ORDER

On October 4, 2016, the Governor of South Carolina directed the closure of State, County and Municipal Government Offices in twenty-six counties in South Carolina from October 5 through October 7, 2016.[1] This action was taken to facilitate the planned evacuations necessary due to Hurricane Matthew. As the administrative head of the Unified Judicial System in South Carolina, the Chief Justice directed all levels of the Judicial System to comply with this closure.

Subsequently, the Governor issued Executive Orders providing for evacuations in Jasper, Beaufort, Colleton, Charleston, Dorchester, Berkeley, Georgetown and Horry Counties.[2] Several hundred thousand South Carolina citizens evacuated these areas, and the impacts of these evacuations were felt in counties which were not subject to any closure or evacuation. Further, Hurricane Matthew caused significant damage in South Carolina, and this will adversely affect the ability of many lawyers and litigants to comply with deadlines in court proceedings through the end of this week.

Accordingly, this Court finds it appropriate to declare the days of Wednesday, October 5, 2016, though Friday, October 14, 2016, to be statewide "holidays" for the purposes of computing time under Rule 263 of the South Carolina Appellate Court Rules, Rule 6 of the South Carolina Rules Civil Procedure, Rule 35 of the

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[1] Executive Order 2016-29.

[2] Executive Orders 2016-31, - 32 and -33.

South Carolina Rules of Criminal Procedure, and Rule 3 of the South Carolina Rules of Magistrates Court.[3]

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

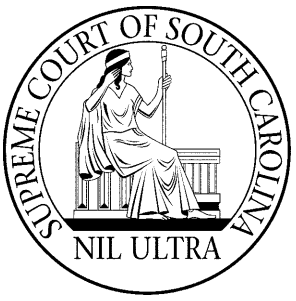
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
October 10, 2016

[3] Monday, October 10, 2016, is already a holiday under these rules since it is a federal holiday.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
October 12, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas Chad Hilton, Claimant, Petitioner,

v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company, Carrier, Defendants, Respondents.

Appellate Case No. 2015-000493

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the South Carolina Workers' Compensation Commission

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Opinion No. 27670
Heard January 13, 2016 – Filed October 12, 2016

VACATED AND REMANDED

Andrew Nathan Safran, of Columbia, for Petitioner.

Lawson Brenn Watson and Ian Charles Gohean, both of Willson Jones Carter & Baxley, P.A., of Greenville, for Respondents.

Gary Christmas, of Howell and Christmas, of Mt. Pleasant; Stephen Samuels, of Samuels Law Firm, of

Columbia; Michelle Powers, of Powers Law, of Greenwood; Ronald J. Jebaily and Suzanne H. Jebaily, both of Jebaily Law Firm, of Florence; Andrea Roche, of Mickle and Bass, of Columbia; John S. Nichols and Blake A. Hewitt, both of Bluestein Nichols Thompson and Delgado, of Columbia; Mary E. Jordan, of Hilton Head Island; David Pearlman, of The Steinberg Law Firm, of Charleston; and Linda McKenzie, of Bowen McKenzie Bowen, of Greenville, all for Amicus Curiae, Injured Workers' Advocates.

CHIEF JUSTICE PLEICONES: We granted certiorari to review an order of the Court of Appeals dismissing Petitioner Thomas Hilton's appeal of an admittedly interlocutory order of the South Carolina Workers' Compensation Commission's Appellate Panel (the Commission). *Hilton v. Flakeboard America Ltd.*, S.C. Ct. App. Order dated Sept. 19, 2014. Hilton contends the Commission's interlocutory order vacating and remanding the Workers' Compensation Commission's single commissioner's (single commissioner) order is immediately appealable pursuant to S.C. Code Ann. § 1-23-380(A) (Supp. 2015). Section 1-23-380(A) states, in relevant part, that "a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." We agree, under these unusual facts, that review of the final agency decision would not provide Hilton with an adequate remedy, and he is therefore entitled to an immediate appeal. Determining whether review of the final agency decision would give Hilton an adequate remedy requires us to reach the underlying merits of the Commission's order, and since we conclude that the order cannot stand, we vacate the Court of Appeals' order and remand the matter to the Commission. On remand, the Commission will limit consideration to Respondent Flakeboard's 102 specific exceptions to the single commissioner's order.

FACTS

Hilton suffered an admittedly compensable injury as the result of an insect or spider bite. The present dispute concerns whether he required further medical

treatment to reach maximum medical improvement (MMI). The single commissioner agreed with Hilton on the merits, finding he had not reached MMI, and further that any misrepresentations he had made during the life of his claim were a result of a serious cognitive deficit from a previous brain injury. Flakeboard appealed to the Commission raising four "General Exceptions" and 102 specific exceptions to the single commissioner's order. The four "General Exceptions" raised the issues of MMI, temporary disability, Hilton's entitlement to further medical treatment, and Hilton's credibility. Neither the four general exceptions nor the 102 specific exceptions raised issues of competency, the appointment of a Guardian ad Litem, or any claim that Flakeboard had been denied its right to have Hilton evaluated by a physician of its choice.

Following a hearing, the Commission—without observing Hilton— issued an order that first reproduced the single commissioner's order, then recited a paragraph entitled "Issues on Appeal," and finally concluded with these findings by the Commission:

FINDINGS OF THE FULL COMMISSION

> This matter was heard before the above-mentioned [Commission] during the last term of Review. The [Commission] considered the matter and **Vacate[s] and Remand[s]** the Decision and Order to [the single commissioner] to determine whether or not [Hilton] is competent to testify and whether or not [Hilton] needs a Guardian ad Litem pursuant to §42-15-55. They [sic] also order [Flakeboard] to send [Hilton] to a neurologist of [its] choice for an evaluation as to the causation and extent of [Hilton]'s problems.

ORDER

> **IT IS THEREFORE ORDERED** that this matter is **Vacated and Remanded** to the [single commissioner] for the purposes of making a determination as to whether or not [Hilton] is competent to testify and whether or not [Hilton] needs a Guardian ad Litem pursuant to §42-15-55. It is also Ordered that [Flakeboard] send [Hilton] to a neurologist of [its] choice

> for an evaluation as to the causation and extent of [Hilton's] problems. Such evaluation shall be made available to the [single commissioner] for his or her consideration.
>
> **AND SO IT IS ORDERED!**

(emphasis in original).

Hilton appealed the Commission's decision to the Court of Appeals. The Court of Appeals dismissed the appeal as not immediately appealable under S.C. Code Ann. § 1-23-380(A). This grant of certiorari followed.

ISSUE

> Did the Court of Appeals err in dismissing Hilton's appeal under S.C. Code Ann. § 1-23-380(A)?

ANALYSIS

Hilton argues the Court of Appeals erred in dismissing his appeal because the Commission's order was immediately appealable under section 1-23-380(A). We agree. We decide the merits of Hilton's challenge to the Commission's order and vacate the Court of Appeals' order and remand to the Commission with orders to only address the issues preserved in Flakeboard's Form 30.

Appeals from administrative agencies are governed by the Administrative Procedures Act. *Bone v. U.S. Food Service*, 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013). Section 1-23-380(A) of the APA states a "preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."[1] This Court has held

[1] The concurring opinion maintains that "the result the Court reaches today is directly contrary to" the decision in *Bone*. *Bone*, a plurality opinion, defined the issue it was addressing as "the meaning of a "final judgment" under [a prior version of S.C. Code Ann.] section 1-23-390," whereas the issue in this case is the meaning of the exception to a "final agency decision" in § 1-23-380(A). These two

that whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis i.e., whether a review of the final decision would not provide an adequate remedy. *The Island Packet v. Kittrell*, 365 S.C. 332, 339, 617 S.E.2d 730, 734 (2005) (interpreting identical language in a previous version of section 1-23-380).

Only issues raised to the Commission within the application for review of the single commissioner's order are preserved for review. *Ham v. Mullins Lumber Co*., 193 S.C. 66, 7 S.E.2d 712 (1952) (holding that all findings of fact and law by the Hearing Commissioner became and are the law of the case, unless within the scope of the appellant's exception to the Full Commission); *Brunson v. American Koyo Bearings,* 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding that the findings of fact and law by the single commissioner become and are the law of the case unless excepted to by appellant) *abrogated in part on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013); *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685 (Ct. App. 1993) (holding the findings of fact and law by the single commissioner become the law of the case, unless within the scope of the appellant's exception to the single commissioner's order) *abrogated in part on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013). This Court has also held that general exceptions, such as "the commission erred in making an award," are too ambiguous to fulfill the notice requirements of due process and do not preserve an issue for review. *See Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944).

The Commission has further emphasized the importance of including all appealed issues in the Form 30 through its own regulations. Each party "shall arrange and present all evidence at the hearing." 8 S.C. Code Ann. Regs. 67-613(A) (2012). And when a party decides to appeal the decision of the single commissioner:

> (3) The grounds for appeal must be set out in detail on the Form 30 in the form of questions presented.

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statutes, in addition to using different terminology, govern appealability in two different situations. Section 1-23-390, along with Rule 242, SCACR, govern this Court's review of a final decision by an intermediate judicial tribunal, while § 1-23-380 defines the circumstances under which a judicial body may review an agency decision. *See*, *e.g.*, *Shatto v. McLeod Reg. Med. Center*, 406 S.C. 470, 753 S.E.2d 416 (2013) fn. 2.

(a) Each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error.

8 S.C. Code Ann. Regs. 67-701 (2012).

Under these unique circumstances where the Commission has ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party, we find that requiring Hilton to wait until the final agency decision to appeal would not provide him an adequate remedy. Prior to the Commission's order, no issue regarding Hilton's competency had been raised by the attorneys for any party,[2] by the single commissioner who observed Hilton's live testimony, or by the medical experts who evaluated him. The Commission, nonetheless, without the benefit of personally observing Hilton, *sua sponte* raised the issues of competency, and potential appointment of a Guardian ad Litem. It further *ex mero motu* ordered Hilton to have his physical injuries evaluated by a physician of Flakeboard's choosing. Further, instead of simply remanding for a competency determination leaving open the possibility the single commissioner would find Hilton competent, it vacated the single commissioner's order; thus ordering both parties to begin anew, regardless of the ultimate competency determination. These extreme remedies, moreover, were ordered without any explanation from the Commission.

As with competency, Flakeboard never sought to have Hilton seen by a doctor of its choosing. The Commission *ex mero motu* ordered Hilton to be seen by a doctor of Flakeboard's choosing to determine the cause of his physical injuries. To be sure, S.C. Code Ann. § 42-17-30 (2015)[3] and S.C. Code Ann. § 42-15-80 (2015)[4]

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[2] Flakeboard's claim that its four general exceptions raised these issues to the Commission is contrary to this Court's jurisprudence. Each issue raised to the Commission must be done with specificity, not through blanket general exceptions. Further, we find no evidence in this record that Flakeboard was concerned with Hilton's competency or the need for an additional medical examination. *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952) (holding unchallenged findings of the single commissioner became the law of the case).

[3] Section 42-17-30 states, in pertinent part, "The commission or any member thereof may, upon the application of either party or upon its own motion, appoint a

grant the Commission the authority to require Hilton to be evaluated by a physician of its choosing. But instead, the Commission ordered Flakeboard "to send [Hilton] to a neurologist of their choice . . . ," despite no such request being made by Flakeboard under either statute. The Commission's order furthermore gives no explanation why further medical evaluation is required; a decision effectively granting Flakeboard a "do over" of the entire litigation.

Under these extraordinary circumstances, we are convinced that the standard set by section 1-23-380(A) has been met. The facts of this case—where the Commission has in effect ordered a new trial without regard to the matters raised by the appealing party and without any explanation why such an extreme remedy is appropriate—convince us that requiring Hilton to wait to appeal until the final agency decision would not provide an adequate remedy. If under the circumstances presented here, the Commission's order is allowed to stand, a party could face the possibility of repeated unexplained "do overs" before a final decision of the Commission. We caution that circumstances such as these that will permit the immediate appeal of an interlocutory administrative decision under section 1-23-380(A) "are about as rare as the proverbial hens' teeth." *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) (referring to appellate reversals of denial of continuance motions).

CONCLUSION

We vacate the Court of Appeals' order dismissing Hilton's appeal and remand the matter to the Commission for consideration only of Flakeboard's 102 specific exceptions to the single commissioner's order raised in the Form 30.

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disinterested and duly qualified physician or surgeon to make any necessary medical examination of any employee and to testify in respect thereto."

[4] Section 42-15-80 states, "After an injury and so long as he claims compensation, the employee, if so requested by his employer or ordered by the commission, shall submit himself to examination, at reasonable times and places, by a qualified physician or surgeon designated and paid by the employer or commission."

VACATED AND REMANDED.

Acting Justice James E. Moore, concurs. BEATTY, J., concurring in result only. KITTREDGE, J., concurring in a separate opinion in which HEARN, J., concurs.

JUSTICE KITTREDGE: I concur in result but write separately to note my view that the result the Court reaches today is directly contrary to this Court's decision in *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013). I joined the dissent in *Bone*, and I remain firmly convinced that *Bone* was wrongly decided and should be overruled. The majority maintains that this case is distinguishable from *Bone* because "the issue in this case is the meaning of the exception to a 'final agency decision' in § 1-23-380(A)." Specifically, the majority cites to the provision in section 1-23-380 that states, "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. § 1-23-380 (Supp. 2015). The majority correctly finds "that review of the final agency decision would not provide Hilton with an adequate remedy, and he is therefore entitled to an immediate appeal." But I respectfully disagree with the suggestion that *Bone* and this case involve "two different situations," for the petitioners in *Bone* made the identical argument based on section 1-23-380 as that made by Hilton, i.e., that review of a final agency decision would not provide an adequate remedy. The Court rejected that argument in *Bone*, where it was far more compelling than it is in this case. *See Bone*, 404 S.C. at 74, 744 S.E.2d at 556 (concluding, after the circuit court ruled the employee–respondent suffered a compensable injury as a matter of law, that review of the Workers' Compensation Commission's final decision would provide the petitioners with an adequate remedy).

HEARN, J. concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Alexander L. Hunsberger, Petitioner.

Appellate Case No. 2015-000083

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Edgefield County
Clifton Newman, Circuit Court Judge

Opinion No. 27671
Heard December 2, 2015 – Filed October 12, 2016

REVERSED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody Jane Brown, all of Columbia, and Solicitor Donald V. Myers, of Lexington, all for Respondent.

CHIEF JUSTICE PLEICONES: Petitioner Alexander L. Hunsberger (Alex) was sentenced to thirty-three years' incarceration for his part in the murder of Samuel Sturrup. Alex argued on appeal that the trial judge erred in denying his speedy trial motion. The Court of Appeals affirmed. *State v. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). We granted Alex's petition for a writ of certiorari to review the Court of Appeals' decision, and now reverse.

The acts that led to Alex's prosecution for murder are heinous. Sturrup allegedly stole money from Steven Barnes,[1] the purported head of a robbery and prostitution ring in Georgia. In an effort to force Sturrup to divulge where the stolen money was located, Barnes allegedly beat, and caused others to beat, Sturrup at a location in Augusta, Georgia. Sturrup was then placed in the trunk of a vehicle and brought from Georgia to South Carolina by Alex and his brother Julio Hunsberger.[2] Sturrup was taken into a field and shot by several individuals including the Hunsberger brothers. Barnes is alleged to have fired the fatal shot.

In January 2002, Alex was arrested in South Carolina and in March 2002, he was indicted for the murder of Sturrup. In June 2002, Alex's request for bail was denied and his renewed request was denied in April 2004. In November 2004, Alex moved for an order requiring the State to try him during the next two terms of court, or if no trial were held, that he be released on bail, citing S.C. Code Ann. § 17-23-90 (2014)[3] and the state and federal constitutional guarantees of due process and speedy trial. While this motion was denied in December 2004, the circuit court judge found the delay "clearly bordering on the excessive" and admonished

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[1] Steven Barnes' capital conviction was reversed on direct appeal. *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014).

[2] Julio's conviction is also being set aside on speedy trial grounds in an opinion filed today. *State v. Hunsberger*, Op No. 2016-MO-029(S.C. Sup. Ct. filed October 12, 2016).

[3] This statute is derived from Section 7 of the Habeas Corpus Act of 1679. *See* 1 Statutes at Large 117, 119-120. Section 17-23-90 provides that, upon demand, a prisoner who is not indicted or tried by the second term following the demand be released without bail. *E.g.*, *State v. Campbell*, 277 S.C. 408, 288 S.E.2d 395 (1982).

the State to either try Alex or release him to Georgia which had placed a hold on him.

In an effort to resolve the case, Judge Keesley offered to seek a special February 2005 term of court to allow the State to try Alex then, but the solicitor declined. Following notification that the State would not go forward with Alex's trial, in January 2005 Judge Keesley granted Alex bail but ordered him held unless Georgia released its hold. Alex was subsequently extradited to Georgia, and in September 2006, he was convicted there of kidnapping with bodily injury of Sturrup, and sentenced to life imprisonment. While imprisoned in Georgia, Alex repeatedly declined to be a witness against Steven Barnes in Barnes' South Carolina death penalty case. Barnes was tried and convicted in November 2010.

In early 2011, Alex was extradited to South Carolina. In January 2012, the State called Alex's case for trial and Alex moved for dismissal of his charges, claiming his state and federal rights to a speedy trial had been violated. The motion was denied, as was his renewed request made at mid-trial.

ISSUE

Did the Court of Appeals err in affirming the trial court's denial of Alex's motion to dismiss his charges under both the United States and South Carolina Constitutions due to a violation of his right to a speedy trial?

ANALYSIS

Alex argues that his right to a speedy trial under both the United States and South Carolina Constitutions was violated, and therefore, his murder charge should be dismissed. We analyze the issue under the Sixth Amendment, and agree.

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution provides that "Any person charged with an offense shall enjoy the right to a speedy and public trial." S.C. Const. art. I, § 14. A speedy trial means a trial without unreasonable and unnecessary delay. *State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012) (quoting *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)).

The remedy for a speedy trial violation is dismissal of the charges. *Langford*, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted). The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard. *Id.* at 442, 735 S.E.2d at 482 (internal citation omitted). An abuse of discretion occurs when the court's decision is based on an error of law or upon factual findings that are without evidentiary support. *Id.* at 442, 735 S.E.2d at 482 (internal citation omitted).

An accused's speedy trial right begins when he is "indicted, arrested, or otherwise officially accused." *Langford*, 400 S.C. at 442, 735 S.E.2d at 482 (citing *United States v. MacDonald*, 456 U.S. 1, 6 (1982)). To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. *Doggett v. U.S.*, 505 U.S. 647, 652 (1992). Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness. *See Doggett*, 505 U.S. at 651-52 (1992). Once the accused has met this initial burden, a court must look to four factors, among the totality of the circumstances, to decide whether the defendant's right to a speedy trial has been denied. *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972); *see also Langford*, 400 S.C. at 441, 735 S.E.2d at 482. These factors are: (1) length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused. *Barker* at 531-32. A speedy trial claim must be "analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." *State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008) (citing *Barker*, 407 U.S. at 530).

Because the timeline is essential to determining whether Alex was denied a speedy trial, the important dates are outlined below:

- January 25, 2002: Arrest.
- March 2002: Indictment
- November 17, 2004: Alex makes first Speedy Trial motion.

- December 2, 2004: Judge Keesley declines to release Alex on bail but admonishes the State to be prepared to try Alex in February 2005 unless the solicitor notifies the court he will allow Georgia to take custody. Court order acknowledges problems arising from multiple defendants and different jurisdictions in addition to the possibility that South Carolina will seek the death penalty against Alex. Judge Keesley then writes: "However, Georgia has disposed of the cases involving the co-defendants over a year ago, and the court has instructed the Solicitor's office on at least two prior occasions that it must make a decision about whether to serve the death penalty notice."

- January 28, 2005: The State declines Judge Keesley's offer to try Alex during a special February 2005 term of Court; Judge Keesley grants Alex bail, subject to hold placed on him by Georgia.

- Early 2005: Alex is extradited to Georgia.

- September 12, 2006: Alex is convicted in Georgia of kidnapping Sturrup with bodily injury and sentenced to life imprisonment. Alex appeals.

- November 2010: Barnes is convicted and sentenced to death in South Carolina.

- September 2011: Alex is made aware South Carolina is seeking his extradition.

- October 2011: Alex is extradited to South Carolina.

- January 3, 2012: Alex's murder case is called in South Carolina, and he makes a motion for dismissal based on the denial of his right to a speedy trial. He renews this motion after the State rests.

In this case appellate review of the trial court's ruling is complicated by the court's failure to make specific findings, relying instead on general statements about the

complexity of the cases, problems involving multiple jurisdictions, and Alex's failure to show actual prejudice.[4]

A. Triggering Factor and Length of Delay

The Court of Appeals held that the three-year period between Alex's arrest in 2002, and his release to Georgia in 2005, was sufficient to trigger the speedy trial analysis. *State v. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). We agree.

The Court of Appeals held that the three-year period between Alex's arrest[5] and extradition to Georgia from South Carolina was sufficient to trigger further review.[6] Alex argues that using three years instead of ten years is an error of law that affects the entire Court of Appeals' analysis. We hold, whether three years or ten years, the delay between Alex's arrest and trial meets the threshold requirement for a speedy trial claim, and requires an analysis of the four *Barker* factors. *See*

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[4] We note our concern that both the trial court and the Court of Appeals seem to find an absence of prejudice since Alex "was not deprived of his liberty because he was incarcerated in Georgia under another sentence." The dissent echoes this sentiment when it makes a factual finding that Alex's "pretrial incarceration and anxiety concerns were minimal." We have searched the record for any evidence to support this statement, and have found none. Both of the lower tribunals ignored the Supreme Court's decision in *Smith v. Hooey*, 393 U.S. 374 (1969), and the dissent purportedly distinguishes it by citing to an unpublished federal district court opinion, which held that incarceration in one jurisdiction does not lessen the accused's constitutional right to a speedy trial on charges pending in another jurisdiction, noting "an outstanding untried charge . . . can have fully as depressive an effect upon a prisoner as upon a person who is at large." *Id.* at 378. *See also Betterman v. Montana*, 578 U.S. ____ (2016) fn. 5 (confirming *Smith's* holding).

[5] The time period for speedy trial analysis begins with "formal accusation," which can be earlier than an accused's arrest. *Langford*, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted). Alex uses his arrest as the date his speedy trial right attached, and we do so as well.

[6] The trial judge never explicitly stated that the delay here was sufficient to trigger the speedy trial analysis but instead proceeded to immediately analyze the question of prejudice.

Langford, 400 S.C. at 442-443, 735 S.E.2d at 482 (holding a twenty-three month delay was presumptively prejudicial) (internal citation omitted); *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009) (reaching the *Barker* factors when there was a forty-four month delay); *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978) (holding a twenty-eight month delay triggered speedy trial analysis). Having found that Alex satisfied the threshold standard, we turn now to a review of the four *Barker* factors we consider when analyzing a speedy trial claim: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his speedy trial right; and (4) prejudice to the defendant from the delay. *See State v. Reaves*, 414 S.C. 118, 777 S.E.2d 213 (2015).

We agree with the trial judge and with the Court of Appeals that the full ten-year delay between Alex's South Carolina arrest in 2002, and his South Carolina trial in 2012, is not entirely attributable to the State. *See Langford*, 400 S.C. at 443, 735 S.E.2d at 483 (holding that delays occasioned by the defendant weigh against him). The State should not bear responsibility for the time that Alex was awaiting trial in Georgia, for when a defendant violates the laws of multiple sovereigns, one jurisdiction must necessarily wait at the "prosecutorial turnstile." *See U.S. v. Grimmond*, 137 F.3d 823, 828 (4th Cir. 1998). Therefore, we hold the time from the January 28, 2005 order requiring Alex's extradition to Georgia or his release on bail, until his Georgia conviction on September 12, 2006, should not be counted against the State. This reduces the ten-year period by approximately one year and seven months.

It appears from the record that Alex did not affirmatively consent to extradition to South Carolina in 2011, and therefore delayed his trial by four months. The State argues Alex contested extradition by refusing to consent, although Alex testified that after being presented with the extradition form in September 2011 he sought advice from an attorney on the effect his consent would have on his pending Georgia appeal. For purposes of our analysis, we weigh the four-month delay in the extradition proceedings slightly against Alex. Therefore, with the delay from Alex's Georgia proceedings and the extradition deducted from the total, the State is responsible for an eight-year delay between arrest and trial. This extraordinary delay, during which time Alex was continuously in custody and for the most part available for trial in South Carolina, weighs heavily against the State.

We turn next to the reasons given by the State for the delay.

B. Reasons for Delay

The State's justifications for delay in trying a defendant are weighted differently: (1) a deliberate attempt to delay trial as a means to hamper the defense weighs heavily against the State; (2) negligence or overcrowded dockets weigh less heavily against the State, but are ultimately its responsibility; (3) a valid reason, such as a missing witness, justifies an appropriate delay; and (4) delays occasioned by the accused weigh against him. *Langford*, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted). Ultimately, justifying the delay between charge and trial is the responsibility of the State. *Langford*, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted).

The trial court held the State gave legitimate reasons for the delay, pointing to the complexity of the cases and the problems involved in cross border prosecutions. The Court of Appeals did not specifically address the reasons for the State's delay, but held that under the totality of the circumstances, the trial court did not abuse its discretion. *State v. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). We find the reliance on complexity and cross border issues patently insufficient in this case in light of the findings of Judge Keesley in his December 2004 order.

To the extent the Court of Appeals upheld the trial court's ruling on the basis of "complexity," it erred. There is no evidence that Alex's case, while serious, was complex. *See Langford,* 400 S.C. at 442, 735 S.E.2d at 482 (making the distinction between complex and serious crimes). Three individuals (other than Barnes and the Hunsberger brothers) were codefendants in the Georgia and South Carolina cases involving the beating of Sturrup in Georgia and his murder in South Carolina. These three eyewitnesses, who all testified against Alex in this January 2012 trial, had pleaded guilty in Georgia by December 2003. From at least that time forward, all three were available to law enforcement in South Carolina, and available to testify against Alex in South Carolina. No new evidence was sought or discovered during the almost nine-year delay between their Georgia pleas and Alex's South Carolina trial. This was not a complicated conspiracy that required years to unravel, instead, all of the evidence used to prosecute Alex for Sturrup's murder was known at the time of or shortly after Alex's arrest. The lower courts erred in agreeing with the State that the "complexity" of Alex's case justified the delay.

The second reason the trial court found justified the delay in Alex's South Carolina trial was "the problems involved in cross-border prosecutions." Again, we find no evidence in the record to support this finding. The State had the opportunity to bring Alex to trial for three years before he was extradited to Georgia. Moreover, the State waited another five years after Alex was convicted in Georgia to begin extradition proceedings. Excepting the year and eight months that Georgia took to try Alex's case, and the four months delay caused by Alex (allegedly) contesting extradition, the record does not demonstrate that "cross-border" issues had any bearing on the State's delay. We find no evidence that the issues resulting from Alex's prosecution in Georgia justified the lengthy delay of his South Carolina trial.

The State now argues, and we agree, that "collecting" witnesses can be a legitimate reason for delay. The State, however, neither presented evidence that it was looking for additional witnesses in Alex's case nor did the trial judge make such a finding. The State seeks to distort this otherwise legitimate reason by applying it not to a witness, but instead to the defendant. Alex was neither a "missing witness" nor a witness that needed "collecting." Instead, he was at all times a prisoner in either South Carolina or Georgia. The State admitted it delayed trying Alex in hopes he would agree to be a witness against Barnes in Barnes' South Carolina's capital trial, which itself did not take place until approximately nine years after Sturrup's skeletal remains were found in a South Carolina field. The State's characterization of Alex as a witness needing to be "collected," or "missing" suggests its true reason for delay was its hope that Alex would be coerced by the delay in his trial into testifying against Barnes. *See Barker*, 407 U.S. at 531 n.32 (indicating it is improper for the prosecution to intentionally delay to gain a tactical advantage over a defendant (internal citation omitted)). The State's desire to have Alex testify against Barnes in South Carolina did not, under the circumstances present here, justify the delay in Alex's trial. Further, that the State placed a higher priority on strengthening its case against Barnes than on bringing Alex's case to trial cannot, alone, justify the delay of Alex's trial. The purpose of the right to a speedy trial is to vindicate a defendant's and society's interest in a speedy resolution of cases. *Barker* at 519. This purpose is not served when the constitutional right of a low priority defendant is sacrificed in hopes that defendant will help the State in a higher priority trial. *Cf.*, *Doggett*, 505 U.S. at 657 (holding that condoning unjustifiable delays would encourage the government to gamble with the interests of those assigned a low prosecutorial priority). The State's desire to present the strongest case against Barnes, especially when the three other

eyewitnesses who had pled guilty to the Georgia charges in 2003 were available and willing to testify against him, does not justify the delay in prosecuting Alex's case.

Finally, there is simply no evidence that the delay was the result of the State's decision-making process whether to seek the death penalty against Alex. The State does not assign a specific amount of delay to this decision, nor does it explain why this capital decision took such an especially long time. Further, this purported reason is undermined by Judge Keesley's order issued in early December 2004, in which he wrote he had already "instructed the Solicitor's Office on at least two prior occasions that it must make a decision about whether to serve the death penalty notice [on Alex]." While the decision to seek the death penalty must be weighed carefully by the State, here all facts necessary to such a decision were known to it well before December 2004. There is simply no evidence that the State was actually debating the capital decision during the period between December 2004 and Alex's trial in January 2012.

The justifications advanced by the State for its delay are unsupported by the evidence, which in turn suggests that the State was using this murder charge as leverage to coerce Alex's testimony in Barnes' capital trial. The reasons for the delay is a factor that weighs heavily against the State.

C. Accused's Assertion of the Right to a Speedy Trial

Whether a defendant previously asserted the right to a speedy trial is not alone dispositive of whether he is entitled to relief. *See Barker*, 407 U.S. at 533 (holding none of the four factors are either necessary or sufficient to find a denial of the right to a speedy trial). The accused's assertion of the right, however, is entitled strong evidentiary weight in determining whether the accused is being deprived of the right. *Barker*, 407 U.S. at 531-32. Failure by the accused to assert the right will make it more difficult for the accused to carry his burden of proving that he was denied a speedy trial. *Id.* at 532.

The trial court did not specifically address Alex's assertions of his right to speedy trial, other than to note it had been almost five years since Alex was tried in Georgia. The Court of Appeals noted that Alex asserted his right three times.

It is undisputed that Alex moved for a speedy trial in November 2004 and twice during January 2012. While the State argues that it is significant that Alex did not move for a speedy trial between January 2005 and January 2012, we hold that under the circumstances of this case, including the fact that Alex's appeal from his 2006 Georgia conviction was still unresolved when the State sought extradition in 2011, his failure to press his right during this period is understandable. While Alex's assertion of his right to a speedy trial three times was sufficient to demonstrate Alex's desire for a speedy resolution of his charges, we find his seven-year silence renders this factor largely neutral in our overall evaluation.

D. Prejudice to the Accused

The trial court held:

> the only way that prejudice can be determined in an instance like this is based on something you demonstrated if there's a trial. . . . prejudice [cannot] be assumed given the facts I have heard. . . . Who knows what may develop during the course of the trial. We may get some indication that the defendant's due process rights have been violated or right to a fair trial has been violated. Due to the length of time involved, but I believe that the—based on what I've heard the State has shown that it has acted properly under the circumstances and that the defendant has not shown any prejudice that might affect his right to a fair trial or his due process rights.

After the State presented its case, Alex renewed his motion for dismissal. In making this midtrial motion, Alex pointed out specific discrepancies in the testimony of two of the three eyewitnesses between their earlier statements or testimony at earlier proceedings.[7] The trial court again denied the motion, stating Alex had not been prejudiced because the memories of the witnesses were "pretty vivid." The Court of Appeals held the trial court did not abuse its discretion in finding Alex did not demonstrate prejudice from the trial delay, speculating that Alex may have received a benefit from the delay because the State no longer sought the death penalty. *State v. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct.

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[7] Most importantly, whether one or both of the Hunsberger brothers exited their car with a gun, and who was outside the car when Sturrup was forced in the Hunsbergers' car's trunk.

App. filed Nov. 5, 2014). We agree with Alex that these prejudice rulings are erroneous.

First, we note that the trial court's ruling was influenced by an error of law in so much as it rested on a belief that actual prejudice —to the exclusion of presumptive prejudice —was the only type of prejudice that would support a speedy trial claim. In fact, an accused can assert actual prejudice or presumptive prejudice as the result of the State's violation of his right to a speedy trial. Actual prejudice occurs when the trial delay has weakened the accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. *See Doggett*, 505 U.S. at 655 (accepting the State's definition of actual prejudice). The United States Supreme Court also recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify. *Id* (internal citation omitted). This is so because "time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett*, 505 U.S. at 655 (citing *Barker*, 407 U.S. at 532). When the government persistently fails to try an accused and the delay is excessive, the accused need not show actual prejudice in order to prevail in his speedy trial claim. *Doggett,* 505 U.S. at 657-58. While presumptive prejudice cannot alone support a speedy trial claim, it is part of the mix of relevant facts, and its importance increases with the length of time. *Doggett*, 505 U.S. at 656 (internal citation omitted).

We hold the Court of Appeals erred in affirming the trial court's failure to consider presumptive prejudice. As the United States Supreme Court held, "When the Government's negligence . . . causes delay six times as long as that generally sufficient to trigger judicial review . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief." *Doggett*, 505 U.S. at 658 (holding an accused's right to a speedy trial was violated when his trial was delayed eight years with no showing of actual prejudice); *see also U.S. v. Ingram*, 446 F.3d 1332, 1340 (11th Cir. 2006) (holding that a two-year delay from indictment to trial resulted in a speedy trial violation when the first three factors weighed against the State and there was no actual prejudice). While not every lengthy delay results in presumptive prejudice, *see State v. Evans*, 386 S.C. 418, 688 S.E.2d 583 (2009) (holding a twelve year delay did not violate the right to speedy trial), on this record it appears the State's delay was not merely negligent but intentional. Further, there was some evidence of actual prejudice in the

discrepancies in the eyewitnesses' testimony. We hold that Alex met his burden of demonstrating prejudice.

CONCLUSION

After considering the totality of the circumstances, we hold that the Court of Appeals erred in affirming the trial court's ruling that Alex's right to a speedy trial was not violated and therefore the Court of Appeals' decision is

REVERSED.

BEATTY and HEARN, JJ., concur. Acting Justice Jean H. Toal, dissenting in a separate opinion in which KITTREDGE, J., concurs.

ACTING JUSTICE TOAL: I respectfully dissent. Because I would affirm the court of appeals' decision finding that the trial court did not abuse its discretion in refusing to dismiss the murder charge against Alexander Hunsberger (Petitioner) on the basis of the State's failure to provide a speedy trial, I would dismiss the writ of certiorari as improvidently granted.

I. Facts and Procedural Background

On September 3, 2001, Samuel Sturrup (the victim) was murdered. The State alleged Steven Barnes, Richard Cave, Antonio Griffin, and Charlene Thatcher began an assault on the victim in Georgia because Barnes believed the victim had stolen money from him. Barnes called Petitioner and Julio, who drove from South Carolina to Augusta, where the group placed the victim in the trunk of Julio's car. Barnes, Cave, Griffin, and Thatcher followed Petitioner and Julio in another car to a remote area of Edgefield County, South Carolina. When they arrived, Barnes ordered everyone in the group to shoot the victim, and Barnes fired the fatal shot into the back of the victim's head.

On January 25, 2002, Petitioner was arrested in South Carolina for the murder of the victim and was held without bond. On March 25, 2002, a grand jury indicted Petitioner for murder. On June 14, 2002, Petitioner was denied bail. Another bond hearing was held on April 29, 2004, before the Honorable William P. Keesley. While Judge Keesley denied bail, he provided that Petitioner could renew his motion if the State failed to try Petitioner during the next term of court. On November 17, 2004, Petitioner filed a motion to dismiss the charges against him or release him on a personal recognizance bond based upon the State's failure to give him a speedy trial, denial of due process, unreasonable confinement without bail, and violation of S.C. Code Ann. § 17-23-90.[8] Judge Keesley heard arguments on the motion in December 2004, and by order filed December 3, 2004, Judge Keesley denied the motions. However, Judge Keesley expressed "deep[] concern[] about the length of time that ha[d] transpired without bringing [Petitioner] to trial" and noted that "[t]hree years in jail awaiting trial on this charge [was] clearly bordering on excessive." Judge Keesley further offered to create a special term of court for the purpose of proceeding with Petitioner's trial in February 2005, and in his order, permitted Petitioner to renew his motion if he had

[8] *See* S.C. Code Ann. § 17-23-90 (2014) (providing for bail and release from imprisonment should the State fail to prosecute a defendant within a certain time frame).

not been tried by February 2005. The Court "again admonished [the State] that unless immediate steps [were] taken to bring this case to trial promptly, the court [would] have no option under the constitutions of the United States and South Carolina except to release the defendant from jail in South Carolina."

The State subsequently notified Judge Keesley that it did not intend to try the case in February, and Petitioner filed a second speedy trial motion. On January 28, 2005, Judge Keesley issued an order denying Petitioner's motion to dismiss the charges, but granted Petitioner a $50,000 personal recognizance bond. However, Judge Keesley placed a condition on the bond that Petitioner was not to be released from custody until Georgia released its hold on Petitioner. Judge Keesley also invited Georgia officials to begin extradition proceedings. Thereafter, the State relinquished custody of Petitioner to Georgia. Petitioner and Julio were jointly tried in Georgia and were convicted of kidnapping in September 2006. They were sentenced to life imprisonment.

After the State obtained a death penalty conviction in Barnes's case in November 2010, the State sought to extradite Petitioner to South Carolina in early 2011. It is unclear when exactly Petitioner was extradited to South Carolina; however, Petitioner proceeded to trial on January 3, 2012. During pre-trial motions, Petitioner sought to have his South Carolina charges dismissed because the State had violated his constitutional right to a speedy trial. The trial court denied the motion, and Petitioner appealed. The court of appeals affirmed. *See State v. Alexander L. Hunsberger*, Op. No. 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). We granted certiorari to consider Petitioner's claim that he was denied his constitutional right to a speedy trial.

II. Analysis

"In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI; *see also* S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right to a speedy . . . trial."). The right has been described as "necessarily relative," in that "[i]t is consistent with delays and depends upon circumstances." *State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 481 (2012) (quoting *Beavers v. Haubert*, 198 U.S. 77 (1905)). In other words, "[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." *Id.* at 441, 735 S.E.2d at 481–82 (quoting *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)).

Even though the United States Supreme Court has provided that speedy trial issues should be resolved on an ad hoc basis, the Court has identified several factors to be considered when deciding speedy trial issues, including: (1) the length of the delay; (2) the reason(s) the government provides to justify the delay; (3) the timing of the defendant's assertion of his right to speedy trial; and (4) the prejudice resulting to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *see also State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) (recognizing *Barker* factors as applicable under South Carolina law). The Supreme Court has explained that not one 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. Rather, the factors are interrelated and "must be considered along 'with such other circumstances as may be relevant.'" *Langford*, 400 S.C. at 441, 735 S.E.2d at 482 (quoting *Barker*, 407 U.S. at 533). Thus, courts should weigh "'the conduct of both the prosecution and the defense.'" *Id.* at 441–42, 735 S.E.2d at 482 (quoting *Barker*, 407 U.S. at 529–30).

The "triggering mechanism" of the *Barker* analysis is the length of the delay. *Id.* at 442, 735 S.E.2d at 482 (citing *Barker*, 407 U.S. at 530). When a defendant asserts his speedy trial right, the court "should not even examine the remaining factors '[u]ntil there is some delay which is presumptively prejudicial.'" *Id.* (quoting *Barker*, 407 U.S. at 530). "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." *Id.* (quoting *United States v. MacDonald,* 456 U.S. 1, 6 (1982)). Notably, however, "even the length of time necessary to trigger the full inquiry 'is necessarily dependent upon the peculiar circumstances of the case.'" *Id.* (quoting *Barker*, 407 U.S. at 530–31). Further, the Supreme Court has explained that "as the term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Doggett v. United States*, 505 U.S. 647, 652, n.1 (1992).

A. Triggering Factor and Length of Delay

I agree with the majority and the court of appeals that Petitioner's incarceration South Carolina from January 2002 until January 2005 is presumptively prejudicial and therefore triggers further analysis into the causes of the delay using the *Barker* factors. *See id.*; *State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (finding a two year, four month delay was sufficient to trigger further review of the *Barker* factors). I also agree with the majority's analysis of the length of time factor within the context of the *Barker* inquiry. Under the majority's formulation, the State is responsible for an eight-year delay in prosecuting Petitioner. I disagree, however, with how the majority analyzed the delay within the context of the remaining *Barker* factors.

B. Reason for Delay

In assessing this element, this Court has interpreted *Barker* as follows:

> The ultimate responsibility for the trial of a criminal defendant rests with the State. *Barker*, 407 U.S. at 531. Therefore, the court should weigh heavily against the State any intentional delays to impede the defense. *Id.* Where the reason for the delay is more neutral, the court should weigh it less heavily against the State. *Id.* A valid reason presented by the State may justify an appropriate delay. *Id.* However, the Court must also consider and weigh the defendant's contribution to the delay in determining whether the defendant's Sixth Amendment rights have been violated. *Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (holding defendant's contribution to the delay of the trial militated against a finding of a violation of the right to a speedy trial).

State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007).

As noted by the majority, the State has provided the following reasons for the delay: (1) the complexity of the case; (2) the fact that there were two separate jurisdictions endeavoring to prosecute Petitioner; (3) the need to collect witnesses; and (4) the decision to seek the death penalty in Petitioner's case. The majority finds that this was a simple crime, and therefore, to the extent the court of appeals found it to be complex, the court of appeals erred. In my opinion, this case was

unique in that it required a great deal of coordination within the Solicitor's office and amongst the jurisdictions to pursue these prosecutions. As astutely explained by the trial judge:

> It's a rather unique case for a lot of reasons. It's unique in the sense that you have cross-border issues, you have Georgia wanting to pursue Georgia's case, but South Carolina wanting to pursue South Carolina's cases, each defendant asserting their individual constitutional rights and the State having a capital case that [it is] wanting to pursue and [has] successfully pursued. So this case doesn't follow the normal framework of cases where a person is—has a charge outstanding and simply wants to get it tried, wants to get it over with. This is a case that has a number of complicated factors that bring us to this moment in time.

The trial judge found that the State had "demonstrated legitimate reasons for the delay given the complex nature of the cases, [and] the problems involving prosecutions in multiple jurisdictions in this state as well as the State of Georgia."

In my opinion, the trial court did not abuse its discretion in finding the State presented legitimate reason for the delay. *See, e.g.*, *State v. Kennedy*, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) ("While Kennedy asserted his right to a speedy trial fourteen months prior to the commencement of his trial, the case was clearly complicated and required substantial time to investigate and prepare. Further, there is an absence of evidence in this case that the State purposefully delayed Kennedy's trial. Finally, we conclude the prejudice to Kennedy, if any, is minimal."). Here, the State was dealing with the potential for six separate prosecutions (one of which involved the State seeking the death penalty and two that involved the possibility of the death penalty); the various defendants were asked to be witnesses in the other cases; and the crime occurred in two states, both of which were seeking to prosecute the defendants.[9] In light of these unique facts,

[9] Ultimately, the Hunsbergers and Barnes were released to Georgia to stand trial prior to their trials in South Carolina. Barnes received a life sentence in Georgia for crimes related to running a prostitution ring separate from this murder. The Hunsbergers were both convicted of kidnapping in Georgia and received life sentences. Cave, Griffon, and Thatcher all pleaded guilty to aggravated assault in Georgia and received eighteen-year sentences. Barnes and the Hunsbergers were then prosecuted in South Carolina.

it is my opinion that the court of appeals did not err in upholding the trial court's finding that the reasons given for the delay were reasonable. *See Pittman*, 373 S.C. at 552, 647 S.E.2d at 156–57 ("The record does not reflect any intentional or malicious delays by the prosecution, nor does the record reflect any negligent prosecutorial behavior in connection with this case. Additionally, the delays attributable to the defense were also reasonable in light of the circumstances of this case. Although it took a long time for the case to come to trial, any delay was the result of the complexities of this case. The justifications for the delay offered by both parties in this case weigh in favor of a finding that Appellant was not deprived of his right to a speedy trial.").

C. Accused's Assertion of the Right to a Speedy Trial

Unlike the majority, I would find that Petitioner's assertion of his speedy trial right in November 2004 and January 2005 is not dispositive under the facts of this case. In response to Petitioner's assertion of the speedy trial right in conjunction with his motions for bail, Petitioner was granted relief under section 17-23-90 in the form of a personal recognizance bond. *See State v. Campbell*, 277 S.C. 408, 288 S.E.2d 395 (1982) (denying speedy trial claim where section 17-23-90 provides for release if not indicted and tried within a certain time frame, not dismissal of the charge). Petitioner did not again assert his speedy trial right until his trial in January 2012. At this point Petitioner had been prosecuted in Georgia and incarcerated there for seven years (from January 2005 until January 2012). In my opinion, Petitioner's failure to assert his right during this time period weighs against him. *See Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (noting "the manner in which the defendant asserts his right [to a speedy trial] is an important factor to be considered" when analyzing whether a defendant speedy trial motion should be granted, and *Barker* "'emphasize[d] that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.'" (quoting *Barker*, 407 U.S. at 532))); *State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) ("The record offers no reason for the failure of the defendants to assert their right sooner, and under [*Barker*], a failure to assert the right will make it difficult for the defendants to prove that they were denied a speedy trial").[10]

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[10] In my opinion, it can be inferred from the record that Petitioner did not, in fact, want a speedy trial. *See Barker*, 407 U.S. at 536 (stating, where the defendant did not object to the Commonwealth of Kentucky seeking sixteen separate continuances in his trial date, "barring extraordinary circumstances, we [should] be

Therefore, in my opinion the majority erroneously weighs this factor against the State.

D. Prejudice

Petitioner argues that he was prejudiced by the passage of time because the witnesses' memories were impaired. The trial court found Petitioner's right to a fair trial was not impacted by the delay and therefore no prejudice resulted, in that every witness was still available to testify, the prior transcripts were available to Petitioner for impeachment purposes and to refresh the witnesses' recollections, and in fact Petitioner did "an effective job at pointing out to the witnesses in cross-examining them and impeaching them on prior inconsistent statements." Significantly, as noted by the court of appeals, Petitioner "did not allege any witnesses or evidence were lost, the delay impacted his case, or an earlier trial would have resulted in a different verdict and sentence." *See Hunsberger*, Op. No. 2014-UP-381. However, the majority asserts that the mere passage of time is enough to find prejudice in this case. I disagree. *See Pittman*, 373 S.C. at 551, 647 S.E.2d at 156 (rejecting Pittman's argument that a delay of three years, two months between arrest and trial was so lengthy that it was presumptively prejudicial); *Foster*, 260 S.C. at 515, 197 S.E.2d at 281 (finding a delay of more than five years was sufficient to require analysis of the other factors without finding presumptive prejudice).

This Court has noted that "the most serious interest to be protected by the guarantee to a speedy trial is the possibility of impairment of the defense." *Pittman*, 373 S.C. at 550, 647 S.E.2d at 155–56. In *Doggett*, the United States Supreme Court has also observed that:

> Unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including 'oppressive pretrial

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reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, *that the defendant did not want a speedy trial*." (emphasis added)). Petitioner testified that one of the reasons he did not want to be extradited to South Carolina was that he "needed to find out" how extradition would affect his Georgia appeal. In addition, the record indicates that the State was considering seeking the death penalty against Petitioner, which might explain Petitioner's failure to assert his speedy trial right during his Georgia incarceration.

> incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence.

505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532). Under the circumstances of this case, where Petitioner was serving a life sentence in Georgia, it is my opinion that the pretrial incarceration and anxiety concerns were minimal.[11] Most, importantly, the delay did not in any way impair his defense. In fact, the delay may have worked to Petitioner's advantage. The Supreme Court has explained this paradox as follows:

> The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused . . . .

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[11] In making this finding, the majority claims I ignore the Supreme Court's holding in *Smith v. Hooey*, 393 U.S. 374 (1969). There, the Supreme Court noted that incarceration in another jurisdiction "can have fully as depressive an effect upon a prisoner as upon a person who is at large." *Id.* at 378. In my opinion, this case is distinguishable. As one federal court has explained:

> *Smith* involved a prisoner who remained in federal custody for six years during which the State of Texas ignored his repeated requests to be brought to trial on an outstanding state charge. The Supreme Court there rejected the argument propounded by Texas that federalism concerns and respect for equal sovereigns barred it from seeking to try a defendant in federal custody even when that defendant vociferously and repeatedly requested to be tried as quickly as possible. Thus, the Supreme Court, as it made clear in *Barker*, attaches significant weight in the balance of interests that is dispositive of speedy trial claims to a defendant's assertion or failure to assert his speedy trial right with respect to an outstanding charge.

United States v. Wade, No. 08-CR-0120 LAK, 2015 WL 4475178, at *3 (S.D.N.Y. July 22, 2015) (footnotes omitted). Here, unlike in *Smith*, Petitioner never once asserted his speedy trial right while incarcerated in Georgia.

. . .

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

Barker, 407 U.S. at 521.

I see two benefits accruing to Petitioner's defense as a result of the passage of time in this case. First, as the trial judge pointed out, Petitioner was able to cross-examine and impeach the witnesses using their prior testimony. Second, as the court of appeals pointed out, Petitioner "may have received a benefit as a result of the delay because the State ultimately decided not to pursue the death penalty against him." *State v. Hunsberger*, Op. No. 2014-UP-381; *see State v. Cooper*, 386 S.C. 210, 218, 687 S.E.2d 62, 67 (Ct. App. 2009) (noting because the State withdrew its notice to seek the death penalty, "the withdrawal could be construed as a benefit to Cooper resulting from the delay."). Because I cannot identify any prejudice befalling Petitioner as a result of the delay, I would find the trial court did not abuse its discretion when assessing this factor. *See Langford*, 400 S.C. at 445, 735 S.E.2d at 484 (finding a two-year delay in bringing the case to trial did not amount to a constitutional violation in the absence of any actual prejudice to the defendant's case); *State v. Brazell*, 325 S.C. 65, 76, 480 S.E.2d 64, 70–71 (1997) (noting the three-year-and-five-month delay was negated by the lack of prejudice to the defense); *Kennedy*, 339 S.C. at 251, 528 S.E.2d at 704 ("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.").

III. Conclusion

No single *Barker* factor 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. Rather, the factors are interrelated and "must be considered along 'with such other circumstances as may be relevant.'" *Langford*, 400 S.C. at 441, 735 S.E.2d at 482 (quoting *Barker*, 407 U.S. at 533). Under this particular constellation of facts, I would hold that the trial court did not abuse its discretion in refusing to dismiss the charges against Petitioner, and consequently, the court of appeals did not err in upholding the trial court's finding that Petitioner's speedy trial right was not violated. Accordingly, I would dismiss the writ of certiorari as improvidently granted.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

In the Matter of Darryl D. Smalls, Respondent.

Appellate Case No. 2016-002070
Appellate Case No. 2016-002071

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Peyre T. Lumpkin, Esquire, pursuant to Rule 31, RLDE.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

This Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

Finally, within fifteen (15) days of the date of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, respondent may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

s/ Costa M. Pleicones C.J.

Columbia, South Carolina

October 10, 2016

The Supreme Court of South Carolina

Amendment to Rule 31(g) and (h) of the Rules for
Lawyer Disciplinary Enforcement, Rule 413, SCACR

Appellate Case No. 2015-001286

ORDER

By order dated September 28, 2016, the Court amended Rule 31(g) and (h) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The order contained a scrivener's error inadvertently leaving out a portion of the text not affected by the amendment. Rule 31(g) and (h), RLDE, as amended, are stated in full below:

> **(g) Termination of Receivership.** When the provisions of (d) above and the order of receivership have been complied with, the receiver shall apply to the Supreme Court for termination of the receivership. The application shall contain the written releases of clients to whom files and other property were returned, information regarding the efforts made to contact the lawyer's remaining clients, an inventory of the files and other property remaining in the receiver's possession, an itemized account of the expenses incurred in carrying out the order of receivership, and documentation of time spent by the receiver and the receiver's staff in carrying out the order of receivership. The Supreme Court may order the lawyer to reimburse the receiver for expenses incurred and time spent in carrying out the order of receivership. Expenses and fees for the receiver and the receiver's staff time which are approved and awarded by the Supreme Court shall be paid from funds remaining in the lawyer's accounts. If either no such funds exist or the remaining funds are insufficient, the Supreme Court may direct that payment be made from the Lawyers' Fund for Client Protection. If the receiver's expenses or fees are paid by the Lawyers' Fund for Client Protection, the Supreme Court may order the lawyer to reimburse that Fund. Upon approval of the application by the Supreme Court, all files and property remaining in the receiver's possession shall be retained by the Commission. Unless otherwise ordered by the Supreme Court, the files shall be retained

by the Commission for a period of 3 years at which time they shall be destroyed in a manner which protects their confidentiality. Other client property remaining in the possession of the Commission after 3 years shall be disposed of in a manner as ordered by the Supreme Court.

(h) Appointment of Attorneys to Assist the Receiver. Upon petition of the receiver, the Supreme Court may appoint members of the South Carolina Bar as needed to assist the receiver in performing duties under this rule. With the exception of reasonable and necessary expenses, such as postage, telephone bills, copies, supplies and the cost of publishing legal notice in the newspaper, an appointed attorney shall serve without compensation as a service to the legal profession. However, the Supreme Court may order that the appointed attorney be reimbursed a reasonable amount for other expenses, such as the appointed attorney's time or the time of support staff, when it determines that extraordinary time and services were necessary for the completion of the required duties or when the appointment has worked a substantial hardship on the appointed attorney's practice. The Supreme Court shall determine the reasonableness of necessary expenses and other expenses. Expenses which are approved and awarded by the Supreme Court shall be paid from funds remaining in the lawyer's accounts.[1] If either no such funds exist or the remaining funds are insufficient, the Supreme Court may direct that payment be made from the Lawyers' Fund for Client Protection. If the appointed attorney's expenses are paid by the Lawyers' Fund for Client Protection, the Supreme Court may order the lawyer to reimburse that Fund.

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[1] For purposes of this rule, the following rates are currently established for reimbursement of fees, expenses, and the costs of copies but are subject to change at the discretion of the Court.

Receiver and Attorneys to Assist the	
Receiver Fees	$75.00 per hour
Receiver Staff and Other Support Staff	$15.00 per hour
Copies	$ 0.15 per page

s/ Costa M. Pleicones C.J.

October 12, 2016
Columbia, South Carolina