STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
SEP 17 2013
S.C. Supreme Court

Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case Tracking No. 2012-206186

The State,

Respondent,

vs.

Anthony Clark Odom,

Appellant.

**RETURN TO MOTION TO EXCLUDE**

I.

Appellant filed a motion seeking to exclude from the Record on Appeal several items designated by the State. The State submits the following Return indicating why each item is proper and necessary for inclusion in the Record on Appeal.

II.

Pursuant to Rule 210(c), SCACR: "The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267." Most importantly, the Rule instructs: "The Record shall not, however, include matter **which was not presented to the lower court or tribunal.**"

Appellant's main objection to the majority of the items included in Respondent's Designation of Matter is based on the fact the items were presented to the Honorable Judge Macaulay prior to his recusal as trial judge and not resubmitted to the Honorable

Judge McIntosh when he presided over the case. The Rule does not require items presented only to the judge who conducted the trial be included in the Record; instead, it allows all matter which were presented to the "lower court or tribunal" to be included. Clearly, transcripts of hearings held in the circuit court in proceedings and hearings related to this action were before the lower court, even though they may not have been before the judge who ultimately conducted the trial. Further, many of the exhibits were entered into the circuit court record as Court's exhibits or exhibits by the parties and, therefore, maintained by the Clerk of Court in the Oconee case file.

Anything appearing in the Clerk of Court's file related to this action was clearly presented to the lower court and could have been viewed and considered by the trial court at any point. See e.g., South Carolina Dep't of Soc. Servs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) (finding family court could consider any documents filed with the family court because they were part of the court record). Further, the extent of the proceedings and the content of argument by counsel at these proceedings are necessary for this Court to have a complete picture from which it may properly consider the issues raised by Appellant, in particular the issue of prosecutorial vindictiveness. See e.g., South Carolina State Highway Dep't v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("Nothing should be omitted from the transcript of record that is necessary to a proper understanding and decision of the questions to be decided.").

Further, Pursuant to Rule 201, SCRE, courts are permitted to take judicial notice of facts at any stage of a case. In Wise v. Wise, the South Carolina Court of Appeals reiterated: "an appellate court can take judicial notice of something that was not before

the trial court if it is indisputable." Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011).

The State believes all items in its designation of matter are ones which were either presented to the lower court or of the type for this Court could take judicial notice. Each item will be discussed separately below.

**a. Page 12 of the July 9, 2007, transcript (Resp. Designation #2)**

This transcript originated in the Spartanburg case against Anthony Odom. Appellant has repeatedly referred to page 13 of the transcript for comments by then prosecuting attorney David Stumbo. The State believes the prior page, which explains the context in which the comments were made, is directly related to the prosecutorial vindictiveness claim. Further, the State has consistently maintained throughout the proceedings that the original theory for prosecution was to proceed in Spartanburg and to rely on the Oconee solicitations as evidence admitted pursuant to Rule 404, SCRE and Lyle. This page provides the basis for the State's contentions. Finally, to the extent the page was not presented to the lower court, its contents were mentioned and this Court should be able to take judicial notice of the contents of a transcript prepared by an Official Court Reporter for the State of South Carolina when there has been no contest to the contents or accuracy of that transcript in any proceeding.

**b. State's Objection to Motion Regarding Equal Protection June 23, 2011. (Resp. Designation #8).**

This Memorandum, as well as a supplemental memorandum, was filed with the Oconee County Clerk of Court on June 23, 2011. Both memoranda were maintained in this case and were readily available for consideration by the trial court. As demonstrated by the

file stamp on the attached copy, the memoranda were "presented to the lower court" and are properly included in the Record on Appeal. (See EXHIBIT A).

**c. Letter from Ms. Wines to The Honorable Judge Macaulay, dated April 28, 2011. (Resp. Designation #10).**

This letter was from counsel for the State to the trial court and opposing counsel. The letter contains material directly relevant to the prosecutorial vindictiveness claim by Appellant. Further, it was clearly "presented to the lower court" because the letter was addressed to and sent directly to the trial judge. Appellant again seems to argue because a different judge was involved at the time the letter was sent impacts its ability to be included in the Record on Appeal. The letter was sent to the trial judge conducting hearings in this case at the time. Additionally, as evidenced by the file stamp, the letter was made part of the official record of the Clerk of Court in this case and clearly was "presented to the lower court" and available for consideration by the trial judge. (See EXHIBIT B). The letter was before the trial court and was part of the State's overall attempt to provide the court with information relevant to one of the main issues in the case, the record of Investigator Mark Patterson. Appellant's counsel's attempt to obtain these records is the basis Appellant uses for claiming prosecutorial vindictiveness, so it is important for the Court to have a complete picture of the events and information known to the parties regarding these records in assessing the State's actions for the prosecutorial vindictiveness claim.

**d. Telephonic Hearing Transcript, dated April 9, 2010 (Resp. Designation #12)**

This transcript is from the Federal Court proceedings in which Appellant sought to enjoin the State Circuit Court from hearing the criminal case in Oconee County. The transcript

of this hearing was admitted as a **Court Exhibit by Appellant** during the June 27, 2011, hearing in the Oconee County Case. (See EXHIBIT C). Appellant has designated portions of the June 27, 2011, hearing as well as Court's Exhibits 15 and 18 from the same hearing in which this transcript was admitted as Court's Exhibit 17. Accordingly, the State asserts this matter was clearly "presented to the lower court" and should be included in the Record on Appeal.

**e. Order of the Honorable U.S. District Judge Seymour, dated August 2010 (Resp. Designation #13)**

This is the Order of the Honorable Judge Seymour entered in the Federal Case brought by Appellant seeking to enjoin the State from prosecuting Appellant in circuit court. (See EXHIBIT D). Part of the basis for his seeking Federal relief was the claim of prosecutorial vindictiveness. In her Order, Judge Seymour specifically found the State did not act in bad faith in making its prosecutorial decisions and, therefore, remanded the case to State Court under the Younger doctrine. The Order of Judge Seymour, as well as the specific language regarding bad faith, was referenced in the State's Memorandum of Law in Opposition of the Defendant's Motion to Quash Indictment. (See EXHIBIT E). Further, this Court can certainly take judicial notice, and to the extent necessary the State asks the Court to take judicial notice, of the contents of the Federal District Court Order filed in a case directly related to the case before this Court. The contents of the Order are indisputable and, as stated, the Order directly related to this case because Appellant brought the Federal action seeking to prevent the State Court action subject to this appeal.

**f. April 12, 2011, Transcript pages 24-31 (Resp. Designation #16)**

**g. July 27, 2011, Transcript pages 39-93 (Resp. Designation #17)**

**h. June 1, 2011, Transcript pages 1-45 (Resp. Designation #22)**

Appellant seems to contend these transcripts are not properly included in the Record on Appeal because they occurred before the Honorable Judge Macaulay and not Judge McIntosh. The transcripts are of hearings in the Oconee County Circuit Court proceedings of this case before the trial court hearing this case at the time. Appellant, just like the State, is bound by all statements and arguments presented in these hearings, even if they did occur before a judge who subsequently did not hear the trial because Appellant's motion for recusal was granted. Accordingly, these transcripts are part of the proceedings below and are properly included in the Record on Appeal.

**State's Exhibit 6 (Resp. Designation #4)**

Appellant also contends the above exhibit should not be included because it includes chats by Appellant on May 6, 2006. The above Exhibit are the chats conducted with the Spartanburg County Investigator and are directly relevant because they were entered as evidence of prior acts and because the chats themselves set the stage for the May chats for which Appellant was indicted. To the extent he is challenging Exhibit 3, the chats from May 6 in Oconee County, Appellant was acquitted of charges stemming from these chats; however, the chats themselves clearly were before the trial court and are clearly relevant to provide a complete picture of the case.

III.

Appellant also asks this Court to relax the requirements of Rule 210(b), SCACR, regarding the number and type of filings to be made in this case. The State believes this could set a precedent without a corresponding change to the Rule, but takes no position on the filings with the Court as long as the State receives the hard copy it is entitled to

under the Rule. Further, the State asks to receive a digital copy (PDF or whatever format is provided to the Court) in the event this Court relaxes the Rule for Appellant and allows the filing of any copies via disk or other electronic submission.

IV.

The State believes all items designated in its Designation of Matter for inclusion in the Record on Appeal are appropriate, relevant, and necessary for inclusion based on Rule 210 and corresponding case law. The State believes the Court should deny the Motion to Exclude. Further, the State leaves it in the Court's discretion whether to relax Rule 210(b) related to the filings with the Court and only asks to receive the hard copy it is entitled to under the Rule and any electronic or digital copy submitted to the Court.

WHEREFORE, Respondent prays that the deny the Motion to Exclude, allow inclusion in the Record on Appeal of all the State's designated items; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

September 17, 2013

# EXHIBIT A

STATE OF SOUTH CAROLINA ) IN THE COURT OF GENERAL SESSIONS
COUNTY OF OCONEE ) TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,
vs.
ANTHONY C. ODOM,
Defendant

**MEMORANDUM OF LAW IN SUPPORT OF THE STATE'S OPPOSITION TO THE DEFENDANT'S MOTION TO DECLARE S.C. CODE § 16-15-342 UNCONSTITUTIONAL DUE TO EQUAL PROTECTION UNDER THE LAW**

2010-GS-37-363
2010-GS-37-364

**Now Comes the State of South Carolina** by and through the undersigned Assistant Attorney General and submits this Memorandum of Law in support of opposition to the Defendant's Motion to declare S.C. Code § 16-15-342 unconstitutional under Federal and State Equal Protection Clauses.

## LEGAL ARGUMENT

The criminal solicitation of a minor statute provides:

> A) A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.

S.C. Code Ann. § 16-15-342(A) (Supp. 2010).

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Sexual activity is defined in section 16-15-375:

> 5) "Sexual activity" includes any of the following acts or simulations thereof:
> (a) masturbation, whether done alone or with another human or animal;
> (b) vaginal, anal, or oral intercourse, whether done with another human or an animal;
> (c) touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female;
> (d) an act or condition that depicts bestiality, sado-masochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed;
> (e) excretory functions;
> (f) the insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

S.C. Code Ann. § 16-15-375 (Supp. 2010).

## I. Laws are presumed constitutional absent a clear showing to the contrary.

Laws are presumed constitutional absent a clear showing to the contrary. See State v. Brown, 317 S.C. 55, 59, 451 S.E.2d 888, 891 (1994). The Court will construe a statute to be valid, if it is possible to do so. See Hendrix v. Taylor, 353 S.C. 1, 19, 577 S.E.2d 190, 199 (2003). Further, an act will be declared unconstitutional only when there is "no room for reasonable doubt" that it is unconstitutional. See Westvaco Corp. v. S.C. Dept. of Revenue, 321 S.C. 59, 62-63, 467 S.E.2d 739, 741 (1995).

As such, the State asserts the Criminal Solicitation of a Minor statute is deemed constitutional and further, it passes a constitutional challenge under Equal Protection as there is no clear showing to the contrary.

## II. S.C. Code § 16-15-342 does not violate the Equal Protection Clause because the Defendant is not a member of a protected class and it meets a rational basis standard.

Under the Equal Protection Clauses of the federal and state constitutions, the State may not deny equal protection of the law to any person. See U.S. Const. amend XIV, § 1. Which means "no person, or class of persons, shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." City of Beaufort v. Holcombe, 369 S.C. 643, 648, 632 S.E.2d 894, 897 (S.C. Ct. App. 2006) (citation omitted).

When determining whether a statute affords equal protection, the court must first decide the level of scrutiny to apply. See id. (citing In re Luckabaugh, 351 S.C. 122, 147, 568 S.E. 2d 338, 351 (2002)). "'Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny.'" Id. (quoting Denene Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E. 2d 917, 920 (2004) (additional citations omitted)).

If the statute does not "implicate a suspect class or abridge a fundamental right, the rational basis test is used." Id. Inherently suspect classes include "those based on factors 'such as race, religion, or alienage.'' Id. (quoting Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 429, 593 S.E.2d 462, 469 (2004)).

Under rational basis, "to satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the same class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis." Id. See also See McKnight v. State, 378

S.C. 33, 52 661 S.E.2d 354, 364 (2008)[1]

A Court conducting an Equal Protection analyis "accords 'great deference to a legislatively created classification and the classification will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it.'" State v. Brown 317 S.C. at 59, 451 S.E.2d at 891-92. The party challenging the statute under Equal Protection has the burden of proving a lack of rational basis for the classification. Id., 451 S.E.2d at 892.

Accordingly, unless a statute classifies persons as a suspect class (or quasi-suspect class), or based on the exercise of a fundamental right, only the rational basis standard must be met. The Defendant bears the burden of showing the legislation lacks a rational basis. Id.

The State submits the statute in question, S.C. Code § 16-15-342, does not regulate based on a suspect or quasi-suspect classification, nor does it abridge a fundamental right. The State further submits the rational basis test is met and the Defendant cannot show why it is not.

First, the statute has a reasonable relation to the legislative purpose. The defining characteristic of the class at issue is adult persons who have acted by communicating with a minor with the specific intent to persuade, induce, entice or coerce the minor to engage

[1] Stating when the government groups individuals differently, it must treat similarly situated members in a class alike, the classification must be made on a reasonable basis, and the classification must bear a reasonable relationship to a legitimate legislative purpose.

in sexual activity[2]. The class, in essence, consists of adults preying and targeting minors and bears a reasonable relation to the purpose of protecting minors.

Secondly, S.C. Code § 16-15-342 treats alike all similarly situated individuals within a class because it has created one category of person choosing to communicate with minors with a specific intent of persuading, inducing, enticing, or coercing the minor to engage in sexual activity. Within this category, individuals are charged with the same offense, subject to the same penalties, and treated alike under similar factual circumstances including the ability to raise a defense of consent if the targeted minor is at least sixteen years of old.

S.C. Code § 16-15-342 provides a defense to individuals who had the consent of the minor, if the minor is over the age of sixteen, but the defense of consent is withdrawn in instances where the targeted minor recipient of the communications was actually an undercover law enforcement officer or agent acting in his official capacity. Where the defendant has received consent from a minor legally capable of consenting, he may use that consent as a defense to prosecution. Withdrawing the defense where the targeted minor is a law enforcement officer does not change the nature of the proscribed conduct or the categorization.

Similarly, the Criminal Sexual Conduct with a Minor statute, S.C. Code § 16-3-355, allows a defense of mistake of age for the second degree offense but not for the first degree offense. In both statutes, the State affords a limited defense to defendants, a defense which only certain defendants will be able to raise. That the circumstances of individual cases means that certain defendants, but not others, may raise a particular

[2] The State recognizes the CSM statute also criminalizes an adult persuading, inducing, enticing, or coercing a child to engage in a violent crime. However, the facts at hand relate to sexual activity and the State's legal analysis would be the same or similar.

defense does not make the statutory provision, or denial, of the defense a violation of Equal Protection.

S.C. Code § 16-15-342 satisfies the third requirement that the classification rest on some rational basis as it is designed to protect children from exposure to harmful sexual communication. The statute separates adults who engage in sexual conversation with minors from those who do so with other adults, as well as from those who engage in conversation of a sexual nature with children for educational, medical, or other beneficial purposes.

Perhaps most importantly, the statute encourages early intervention by law enforcement to apprehend child predators by conducting undercover operations in which they portray themselves as minors. This allows the State to charge an adult who chooses to target a person he believes to be a minor, without requiring a child to be exposed to the harmful communications or physical harm to a child. Early intervention is appropriate in light of the serious nature of the crime and the potential harm to children. See State v. Reid, 383 S.C. 285, 300 n.6, 679 S.E.2d 194, 201 n.6 (Ct. App. 2009).

The statute puts a potential offender on notice that the person he targets may be a law enforcement officer and not a minor. Similar to the deterrent effect that neighborhood crime watch signs have on crime in residential neighborhoods, sexual predators may be deterred by not knowing for certain if their target is a child or a law enforcement officer.

Finally, the Defendant may allege that the statute affords the consent defense to an adult who solicits a minor to commit a violent crime. This argument fails at least in part because a statute's provisions are to be construed within the context of the statutory scheme. Koenig v. South Carolina Dept. of Public Safety, 325 S.C. 400, 480 S.E.2d 98

(Ct. App. 1996). The context of this statute indicates that the consent defense is applicable to the offense of solicitation for sexual purposes, not to the solicitation for a violent crime.

**Conclusion**

S.C. Code § 16-15-342 is deemed constitutional and the Defendant has failed to show under an Equal Protection analysis how the statute fails to meet a rational basis standard. Therefore, the State respectfully requests this Honorable Court deny the Defendant's Motion to Declare S.C. Code § 16-15-342 unconstitutional under Equal Protection.

Respectfully submitted,

ALAN WILSON
ATTORNEY GENERAL

By: Megan Burleson Wines
Megan Burleson Wines
Assistant Attorney General

Columbia, South Carolina

June 1, 2011

STATE OF SOUTH CAROLINA ) IN THE COURT OF GENERAL SESSIONS
COUNTY OF OCONEE ) TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,
vs.
ANTHONY C. ODOM,
Defendant

**STATE'S SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANT'S MOTION TO DECLARE S.C. CODE § 16-15-342 UNCONSTITUTIONAL (EQUAL PROTECTION)**

2010-GS-37-363
2010-GS-37-364

**NOW COMES the State of South Carolina** by and through the undersigned Assistant Attorney General further opposing the Defendant's Motion to Declare S.C. Code 16-15-342 unconstitutional under the Equal Protection clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the State of South Carolina Constitution.

## LEGAL ARGUMENT

The State reiterates and relies upon argument presented to the Court in its' previously submitted Legal Memorandum in opposition to the Defendant's Motion and further submits as follows.

### I. The Defendant does not have standing to challenge S.C. Code §16-15-342 under Equal Protection.

It is the State's position S.C. Code §16-15-342 does not create separate classes, and therefore, the Defendant is not within a class to have standing to challenge the statute as violating Equal Protection. Assuming arguendo S.C. Code §16-15-342 creates classes as the Defendant asserts, he does not fall within the class he alleges and still lacks standing to claim the statute unconstitutional under Equal Protection.

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## II. The Defendant's claim no other state has a similar provision is not relevant to Equal Protection analysis and is also in error

The State asserts whether other States have similar provisions as in Section 16-15-342 is not relevant to a constitutional challenge and does not impact the constitutionality of South Carolina's law. Our legislature enacted Section 16-15-342 as it deemed necessary and its' constitutionality under Equal Protection has nothing to do with whether sister states have enacted identical laws or similar provisions, and should be evaluated independently.

Further, assuming arguendo laws of sister states are of significance, the Defendant incorrectly asserts no other states have a similar provision. For example, Florida and Tennessee both have similar clauses. Florida's Computer Pornography and Child Exploitation Prevention Act, applicable to acts committed by the perpetrator against victims younger than 16 years of age, provides "an undercover operative or law enforcement officer involved in the detection and investigation of an offense under this subsection shall not constitute a defense to a prosecution under this subsection." Fla. Stat. Ann. § 847.0135 (West 2011). No consent exception is given in Florida's statute because the statute covers only those minors who are younger than the age of consent.

Tennessee's equivalent statute, "Solicitation of a person under 18 years of age" provides:

> (a) It is an offense for a person eighteen (18) years of age or older . . . to intentionally command, request, hire, persuade, invite or attempt to induce a person whom the person making the solicitation knows, or should know, is less than eighteen (18) years of age, *or solicits a law enforcement officer posing as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age.* Tenn. Code Ann. § 39-13-528 (West 2011) (emphasis added)

See Tenn. Code Ann. § 39-13-506) (age of consent in Tennessee is eighteen, with

certain exceptions for statutory rape based on age difference). Tennessee does not provide a consent exception because the age of consent is eighteen.

The age of consent in South Carolina is sixteen. As such, it is consistent with South Carolina law to specifically designate the defense of consent for minors over the age of sixteen in Section 16-15-342.

## III. The Defendant's reliance on Louisiana's revision of its' statute is in error.

The Defendant refers to the revision of Louisiana's similar statute to remove provisions regarding the defense of consent following a state supreme court case involving the statute. In that case, the Louisiana Supreme Court did not decide the validity of the provisions, but decided the case on other grounds, and noted that

> had this Court reached the constitutional issue and determined the trial court was correct in declaring La. R.S. 14:81.3(C)(3) [the provision making the defense unavailable] unconstitutional, the defendant could still be charged under La. R.S. 14:81.3 in the absence of La. R.S. 14:81.3(C)(3). *Once that section is severed, the statute can still be used to charge the offense*, however the defendant would now be entitled to assert the consent defense.

State v. Hatton, 985 So.2d 709, 718 (La. 2008) (emphasis added).

Even if the removal of the consent defense within the SC statute when law enforcement agents are solicited is invalid, the Defendant's motion should be denied because invalidity of one provision does not render the rest of the statute invalid. See Curtis v. State, 345 S.C. at 571, 549 S.E.2d at 598 ("[A] statute may be constitutional and valid in part and unconstitutional and invalid in part.").

In deciding whether an invalid provision is severable from the remainder of the statute, the test is "whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the

constitution." Id. Here, the statute is not so dependent on the provision removing the consent defense that it cannot be severed.

## CONCLUSION

WHEREFORE, the State respectfully requests for the reasons above set-forth, as well as the State's initial Memorandum of Law in Support of the State's Opposition to Dismiss, the Defendant's Motion to Dismiss and declare the Criminal Solicitation of a Minor statute unconstitutional under equal protection be denied.

Respectfully submitted,

ALAN WILSON
ATTORNEY GENERAL

By:

Megan Burleson Wines
Assistant Attorney General

Columbia, South Carolina

June 17, 2011

# EXHIBIT B

COPY

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2011 APR 29 P 4:40

ALAN WILSON
ATTORNEY GENERAL

April 28, 2011

The Honorable Alexander S. Macaulay
P.O. Drawer 428
Walhalla, SC 29691

VIA FACSIMILE AND U.S. MAIL

**Re: State v. Anthony C. Odom**
**(Indictment No(s): 2010-GS 37-363, -364)**

Dear Judge Macaulay:

As you are aware from discussion with counsel and the pre-trial hearing on April 12, 2011, a significant issue exists in this case concerning the release of records relating to the arrest of Mark Patterson, the main witness in the State's case. While in chambers on that date, the State expressed concern about the retention of the arrest records and informed the court and defense counsel we may look further into the issue.

During the pre-trial hearing, the State expressed concern that a hearing resulting in the stay of destruction of Mark Patterson's arrest records was held at Mr. Huff's request, and we took the position no one is entitled to these documents because they should not exist. You requested defense counsel provide a proposed order for release of the arrest records. To date, we have not received a proposed order from Mr. Huff.

At the pre-trial hearing, the State understood the charge against Officer Patterson was nolle prossed, and all records regarding his arrest had been expunged and destroyed. The State investigated the matter, and this letter is to inform the Court of the following findings.

- On June 5, 2009, Officer Patterson was arrested by the Burnettown Police Department and charged, by Ticket No.: 94300ED, with Unlawful Communication, a 30-day Misdemeanor. This charge was nolle prossed on November 4, 2009.

- Pursuant to SC Code Sections 17-22-950 and 17-1-40, the summary court judge found Officer Patterson was entitled to have all records relating to

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Based on the information obtained by the State, the relevant statutory law, and the Order of Destruction issued December 8, 2009, the State respectfully renews its objection to any person or agency involved in the pending criminal case against Mr. Odom having possession of records relating to the arrest of Officer Patterson. The State reiterates its position these records are not Rule 5 material, not only because they are irrelevant to Mr. Odom's pending criminal case, but also because they should not even exist in light of the December 8, 2009 Order of Destruction.

Respectfully,

Megan Burleson Wines

Megan Burleson Wines
Assistant Attorney General

MBW/

Enclosures

cc: The Honorable Beverly Whitfield, Oconee County Clerk of Court
The Honorable Rodger Edmonds
Chief David Paul Smith, Burnettown Police Department
James B. Huff, Esquire
Andrew J. Johnston, Esquire
J. Andrew Anderson, Esquire
Mark Patterson
Paul K. Simons, Jr., Esquire
John W. McIntosh, Chief Deputy Attorney General

ORDER FOR EXPUNGEMENT OF ARREST RECORDS

THE STATE OF SOUTH CAROLINA

Race WHITE Sex MALE

DOB 10-13-75 SSN - -

vs.

SID #

**MARK ANTHONY PATTERSON**
Defendant
FOURTH STREET
Address
WARRENVILLE SC 29851

Charges were disposed of in the court indicated below:

☐ Magistrate ☒ Municipal

**MARK PATTERSON**
AKA

IT APPEARS that, pursuant to Sections 17-22-950 and 17-1-40 of the South Carolina Code of Laws, the defendant is entitled to have all records relating to this offense expunged and destroyed at no cost to the defendant. Summary Court expungements pursuant to S.C. Code of Laws Section 17-22-950 have been preapproved by SLED.

| | | | | | | |
|---|---|---|---|---|---|---|
| Warrant/Ticket/ Courtesy Summons | 94300ED | Date of Arrest/Service | 06-05-09 | Place of Arrest/Service | **TOWN OF BURNETTOWN** | **AIKEN** County, S.C. |
| Warrant/Ticket/ Courtesy Summons | | Date of Arrest/Service | - - | Place of Arrest/Service | **TOWN OF BURNETTOWN** | **AIKEN** County, S.C. |

Charge(s) **UNLAWFUL COMMUNICATIONS**

The above charge is eligible for expungement because it is a summary level offense and:

☐ The charge was dismissed on - - (Date).

☒ The charge was *nol prossed* on 11-04-2009 (Date).

☐ The defendant was found not guilty on - - (Date).

☐ The defendant was charged pursuant to Section 34-11-90, made restitution, and paid the administrative fee to the County resulting in a dismissal on - - (Date).

IT IS ORDERED that all records relating to such arrest/court summons and subsequent discharge pursuant to the above-referenced section be dismissed, expunged and immediately destroyed and that no evidence of such records pertaining to such charge shall be retained by any municipal, county or state agency except nonpublic information retained by SC Law Enforcement Division (SLED).

Signed this 08 day of DECEMBER , 2009

Summary Court Judge

Prosecutor/Prosecuting Officer/Affiant (Circle One)
(To Verify Accuracy of Disposition)

Expunged by SLED by: _____ Date: _____ (For SLED internal use only)

SCCA 223B (07/2009)

**TOWN OF BURNETTOWN**

*HOME OF THE SASSAFRAS FESTIVAL*

3144 Augusta Road
Burnettown, SC 29851

Post Office Box 994
Bath, SC 29816

**Burnettown Police Department**

14 December 2009

Burnettown Municipal Court
ATT: Honorable Rodger Edmonds
P.O. Box 994
Bath, Sc 29816

Reference: Investigative Case File Mark Patterson Case 2009-01092

This is to serve as official notice of retention of above listed case file and to list a table of contest thereof. The case file is to be secured by the court until a resolution of this matter per your order.

Incident report of Chief Smith reference above case number.
6 copies of photographs of texts on Ellen Patterson's cell phone
1 cd containing voicemails left on Ellen Patterson's cell phone
3 page written statement of Ellen Patterson
1 Page written statement of Calvin McCravy
1 letter from DR. Dewitt
Crime victim intake forms

Sincerely,

Chief David Paul Smith
Burnettown Police Department

# EXHIBIT C

MR. MCDANIEL: AND I'D LIKE TO PLACE INTO THE RECORD AS WELL THE APRIL 9TH, 2010, THERE WAS A FEDERAL ACTION THAT WAS INITIALLY FILED, IT WAS MOVED BACK AND DISMISSED BECAUSE OF THE ABSTENTION DOCTRINE AND MOVED BACK TO CIVIL COURT. BUT THERE WAS A HEARING ON THAT MOTION AND I WOULD LIKE TO PUT THE TRANSCRIPT INTO THE RECORD AS WELL AS A COURT'S EXHIBIT.

(Court's Ex. # 17, APRIL 9, 2010, FEDERAL ACTION CIVIL MOTION, was marked for identification.)

MR. MCDANIEL: I'D LIKE TO SUBMIT THIS DECEMBER 5, 2006, LETTER FOR MR. HUFF TO IDENTIFY.

BY MR. MCDANIEL:

Q. MR. HUFF, IS THAT PART OF THE RECORD THAT YOU RECEIVED WHEN YOU TOOK OVER MR. ODOM'S DEFENSE IN THIS CASE?

A. YES, SIR. THIS IS A LETTER DATED DECEMBER 5, 2006. IT'S A LETTER FROM DAVID STUMBO, ASSISTANT ATTORNEY GENERAL, WRITTEN TO MR. JACK SWERLING. HE REPRESENTED MR. ODOM FROM THE BEGINNING OF THE SPARTANBURG CASE, AND HE SUBSEQUENTLY WITHDREW AND I MOVED TO BE ALLOWED TO REPRESENT MR. ODOM. PART OF THE DOCUMENTS THAT I RECEIVED FROM MR. SWERLING'S OFFICE, ONCE I TOOK OVER THE CASE, WAS THIS DOCUMENT.

Q. AND YOUR UNDERSTANDING OF THAT DOCUMENT -- IT

# EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

| | |
|---|---|
| Anthony Odom,<br><br>Plaintiff,<br><br>vs.<br><br>Henry D. McMaster, in his official capacity as the Attorney General of the State of South Carolina; David Pascoe; J. Strom Thurmond, Jr.; C. Kelly Jackson; William B. Rogers, Jr.; W. Barney Giese; Douglas A. Barfield, Jr.; Trey Gowdy, III; Jerry W. Peace; Scarlett Wilson; Christina T. Adams; Donald V. Myers; Edgar L. Clements, III; Robert M. Ariail; I. McDuffie Stone, III; Gregory Hembree; and Kevin S. Brackett, in their official capacities as South Carolina Circuit Solicitors,<br><br>Defendants. | C.A. No. 2:10-cv-00873-MBS<br><br>**ORDER AND OPINION** |

## BACKGROUND

This is an action for declaratory and injunctive relief. Plaintiff filed the within action on April 7, 2010, against Defendants Henry D. McMaster ("McMaster"), in his capacity as Attorney General of the State of South Carolina; and David Pascoe; J. Strom Thurmond, Jr.; C. Kelly Jackson; William B. Rogers, Jr.; W. Barney Giese; Douglas A. Barfield, Jr.; Trey Gowdy, III; Jerry W. Peace; Scarlett Wilson; Christina T. Adams; Donald V. Myers; Edgar L. Clements, III; Robert M. Ariail; I. McDuffie Stone, III; Gregory Hembree; and Kevin S. Brackett; in their official capacities as South Carolina Circuit Solicitors. Plaintiff alleges a claim for vindictive prosecution in violation of his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and 42

U.S.C. § 1983. Plaintiff seeks declaratory and injunctive relief to prevent or discontinue state criminal proceedings against him for criminal solicitation of a minor in violation of S.C. Code § 16-15-342. Plaintiff filed a motion for a Temporary Restraining Order (TRO) on April 7, 2010. An emergency TRO hearing was held on April 9, 2010. The court denied Plaintiff a TRO because he failed to make the necessary showing on all four prongs of the test set out by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374-76 (2008). The Summons and Complaint were served on McMaster on April 15, 2010.

The case is before the court on McMaster's Motion To Dismiss, which was filed April 30, 2010. Plaintiff filed its response on May 12, 2009. McMaster filed a reply memorandum on May 28, 2010.

## FACTS

The facts in the light most favorable to Plaintiff are as follow. Plaintiff was arrested in May 2006, and charged in Spartanburg County, South Carolina, with one count of criminal solicitation of a minor (hereinafter "Spartanburg Indictment"). This count is based on internet communications from March 2006 to May 4, 2006, between Plaintiff and a Spartanburg County law enforcement officer who was acting in an undercover capacity (hereinafter "Spartanburg Communications"). Plaintiff's license to practice law in South Carolina was suspended on May 17, 2006 as a result of these charges.

The trial on the Spartanburg Communications (hereinafter "Spartanburg Trial") was originally set for May 2007 but was continued until July 2007 to allow Plaintiff's counsel an opportunity to review evidence of additional internet communications dated May 4, 5, and 6, 2006 between Plaintiff and a Westminster (Oconee County, South Carolina) law enforcement officer, who

was also acting in an undercover capacity (hereinafter "Oconee County Communications"). The Oconee County Communications were not part of the Spartanburg Indictment. In July 2007, before the swearing of the selected jury in the Spartanburg Trial, the trial court granted Plaintiff's motion to suppress evidence the state deemed crcual to its case. The State appealed. On March 30, 2009 the South Carolina Supreme Court reversed the suppression order, and the case proceeded to trial.

The Spartanburg trial began on February 22, 2010 and ended on March 2, 2010. The Oconee County Communications were not introduced at the Spartanburg Trial. At the end of the Spartanburg Trial, the court declared a mistrial due to a deadlocked jury. Shortly after the mistrial, the State submitted the Oconee County Communications charges to a grand jury. On April 12, 2010, the grand jury returned two indictments for criminal solicitation of a minor: one for internet communications dated May 4 and 5, 2006, and a second for communications on May 6, 2006.

Plaintiff alleges that he was told that the Oconee County Communications would not be prosecuted. Plaintiff contends that the State's decision to submit the Oconee County Communications to the grand jury was a reaction to Plaintiff's attempt to gain information in support of his defense in the Spartanburg Trial. Specifically, Plaintiff sought to discover the details surrounding the Oconee County undercover officer's arrest and subsequent termination from the force. Plaintiff also contends that two separate indictments for three communications in Oconee County over only three days, when compared with the single indictment in the Spartanburg Trial which covered seventeen separate communications over a two-month time period, is evidence of vindictive prosecution. Plaintiff argues that the nearly four years between the charged conduct and the actual charges for the Oconee County Communications is unusually long for this type of crime, also evidencing vindictive prosecution.

Plaintiff seeks: (1) a declaration that the prosecution for the Oconee County Communications is impermissible as a violation of due process; (2) to permanently enjoin Defendants from prosecuting Plaintiff for the Oconee County Communications; and, (3) full discovery on his vindictive prosecution claim.

## DISCUSSION

### Younger Abstention

Defendant argues that the court should dismiss this case based on the *Younger* abstention doctrine. It is well established that, except under certain narrow circumstances, a federal district court should abstain from hearing a case to enjoin or stay an ongoing state court proceeding. The United States Supreme Court, in *Younger v. Harris*, recognized a "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. 37, 41 (1971). The recognized three-prong test for *Younger* abstention is: "(1) an ongoing state judicial proceeding, instituted prior to any substantial progress [on the merits] in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and, (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit." *Nivens v. Gilchrist*, 319 F.3d 151 (4th Cir. 2003) (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432 (1982)).

The first prong of the *Younger* abstention doctrine requires that there be an ongoing state judicial proceeding. In *Hicks v. Miranda*, 422 U.S. 332 (1975), the Supreme Court found that the ongoing state judicial proceeding prong was met in a case where the federal suit was filed before the state criminal proceedings began. In *Hicks*, Miranda filed suit in federal court seeking to prevent the enforcement of an obscenity statute. 422 U.S. at 337. The district court denied Miranda's request

for a TRO, but ordered a three-judge panel to review the constitutionality of the statute. *Id.* at 338. Before the panel considered the constitutionality question, Miranda was added to a state criminal proceeding for violation of the obscenity statute. *Id.* at 339. The federal panel subsequently declared the California statute unconstitutional. *Id.* at 341. On certiorari, the United States Supreme Court held that the district court should have abstained "where state criminal proceedings are begun against the federal plaintiff[] [Miranda] after the federal complaint is filed[,] but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." *Id.* at 349.

*Hicks* indicates that in cases where state criminal proceedings are instituted after a plaintiff's federal complaint was filed and TRO hearing held, there is an ongoing state proceeding for the purposes of the first prong of the *Younger* abstention doctrine. 422 U.S. at 349. Because a TRO hearing is not a proceeding of substance on the merits and no other proceedings have taken place in this case, the first prong of the *Younger* abstention doctrine has been met.

The second prong of the *Younger* abstention doctrine requires that the state proceeding implicate important, substantial, or vital state interests. The Fourth Circuit has recognized the efficient operations of a state's criminal justice system as an important, substantial, or vital state interest. *Nivens*, 319 F.3d at 154 (citing *Cooper v. Oklahoma*, 517 U.S. 348 (1996)). Moreover, protecting minors from sexual predators is an important state interest. *See State v. Reid*, 679 S.E.2d 194, 201 n.6 (S.C. Ct. App. 2009) (discussing South Carolina's important public policy of protecting minors from harm in the context of an internet solicitation of a minor case). Thus, the second prong of the *Younger* abstention doctrine has been met.

The third prong of the *Younger* abstention doctrine requires that the state proceeding provide an adequate opportunity for the plaintiff to advance his federal constitutional claim. With regard to this prong, the Supreme Court has placed the burden on the federal plaintiff to show that state procedural law bars the presentation of his claim. *Pennzoil Co. v. Texaco*, 481 U.S. 1, 14 (1987). The Supreme Court stated: "when a litigant has not attempted to present his federal claim in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.* at 15. The Fourth Circuit, in applying *Younger*, explained that: "a federal court *must* abstain from interfering with an ongoing state proceeding where a litigant has an 'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved' and . . . no bad faith, harassment, or other exceptional circumstances dictate to the contrary." *Nivens*, 319 F.3d at 154 (citing *Middlesex*, 457 U.S. at 437) (emphasis added).

Plaintiff argues that his claim of vindictive prosecution cannot be adequately raised in state court because in a South Carolina criminal proceeding there is no right to discovery. The court disagrees. Both of the cases Plaintiff cites in support of his argument were decided prior to the creation of Rule 5 of the South Carolina Rules of Criminal Procedure, governing disclosure in criminal cases. S.C.R. Crim. P. 5. Rule 5 permits discovery in criminal cases:

> [u]pon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

S.C.R. Crim. P. 5(a)(1)(C). Rule 5 also gives courts discretion to permit discovery if a party has refused to comply with a discovery request. S.C.R. Crim. P. 5(a)(2). The South Carolina Supreme Court has recognized the right to discovery for state criminal defendants. *State v. Northcutt*, 641 S.E.2d 873, 878 (S.C. 2007) (recognizing that Rule 5 creates a right to reciprocal discovery but does not compel defense experts to create written reports for the opposing side). Plaintiff cites no authority, nor provides examples, to support the proposition that his right of discovery under Rule 5 will be insufficient to adequately develop his vindictive prosecution claim. Plaintiff has failed to meet his burden of proving that state procedural law bars his federal constitutional claim.

In addition, in *State v. Fletcher*, 471 S.E.2d 702 (S.C. Ct. App. 1996) a criminal defendant was permitted to present a vindictive prosecution claim in that proceeding. *Id.* at 703. This case demonstrates that South Carolina courts are capable of hearing allegations of vindictive prosecution in criminal cases and indicates that state procedures are adequate to address Plaintiff's claim. Thus, the third prong of the *Younger* abstention doctrine has been met. Based on the foregoing, the court finds that *Younger* abstention is appropriate in this case unless one of the exceptions applies.

Exceptions to Younger Abstention

Courts have recognized exceptions to the *Younger* abstention doctrine where a state prosecution is: "(1) commenced in bad faith or to harass, (2) based on a flagrantly and patently unconstitutional statute, or (3) related to any other such extraordinary circumstances creating a threat of 'irreparable injury' both great and immediate." *Phelps v. Hamilton*, 59 F.3d 1058, 1063-64 (10th Cir. 1995) (citing *Younger*, 401 U.S. at 53-54). Plaintiff advances the bad faith exception to argue against the application of *Younger*.

The three factors courts use to evaluate the bad faith exception are:

> (1) [W]hether it was frivolous or undertaken with no reasonably objective hope of success; (2) whether it was motivated by the defendant's suspect class or in retaliation for the defendant's exercise of constitutional rights; and, (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions.

*Phelps*, 59 F.3d at 1064-65 (citing *Kugler v. Helfant*, 421 U.S. 117, 126 n.6; *Younger*, 401 U.S. at 48). Mere allegations of bad faith do not suffice; a plaintiff "must *prove* bad faith or harassment before intervention is warranted." *Id.* at 1066 (citing *Perez v. Ledesma*, 401 U.S. 82, 85 (1971); *Juidice v. Vail*, 430 U.S. 327, 338 (1977)).

Plaintiff submits that his prosecution for the Oconee County Communications constitutes retaliation for the exercise of his constitutional rights in defending himself at the Spartanburg Trial. Plaintiff contends that his prosecution for the Oconee County Communications constitutes abuse of prosecutorial discretion due to the oppressive use of multiple prosecutions. Additionally, Plaintiff argues that this case should be allowed to move forward simply because bad faith is an inherent element of his vindictive prosecution claim. McMaster disputes Plaintiff's allegations of prosecutorial misconduct and motivation for bringing charges on the Oconee County Communications, contending that this was a strategic decision. During the pendency of the Spartanburg trial, the position of Chief Prosecutor for the South Carolina Internet Crimes Against Children Task Force changed from David Stumbo to Megan Wines. Because prosecutors have discretion to decide which crimes to prosecute, this personnel change lends support to McMaster's strategy explanation. The court finds that Plaintiff has failed to prove bad faith. Therefore, abstention under the *Younger* abstention doctrine is appropriate.

Rule 12(b)(6) Motion

Plaintiff argues that if this court looks outside the pleadings to decide the motion to dismiss, the Rule 12(b)(6) motion is converted into a motion for summary judgment, entitling Plaintiff to discovery. The Fourth Circuit has recognized that courts can take judicial notice of public information without converting a 12(b)(6) motion into a motion for summary judgment stating: "[i]n reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record." *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (citing *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004)). This court has routinely allowed reference to public records in 12(b)(6) motions to dismiss. *See Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 550-51 (D.S.C. 2008) (explaining that a police report may be considered by the court in a 12(b)(6) motion as a matter of public record); *Tobin v. Bodman*, No. 1:06-492-RBH, 2007 WL 1068253, at *2, *4 (D.S.C. Mar. 29, 2007) (allowing proof of plaintiff's earlier conviction to bar a current claim of illegal arrest); *Larch v. Gintoli*, No. 8:04-1962CMBH, 2006 WL 895019, at *2 (D.S.C. Mar. 31, 2006) (permitting exhibits attached to defendant's 12(b)(6) motion to be considered by the court because the exhibits were public records from an earlier state court action).

Thus, the court may take judicial notice of the state court indictments without converting McMaster's 12(b)(6) motion into a motion for summary judgment.

CONCLUSION

McMaster's motion to dismiss is **granted.** (Entry 11). The court will abstain from exercising jurisdiction in this case under the *Younger* abstention doctrine. Therefore, the entire case is dismissed without prejudice. Defendants Edgar L. Clements; C. Kelly Jackson; Gregory Hembree;

William B. Rogers, Jr.; Christina T. Adams; Trey Gowdy, III; J. Strom Thurmond, Jr.; Robert M. Ariail; Douglas A. Barfield, Jr.; Kevin S. Brackett; David Pascoe; I. McDuffie Stone, III; Scarlett Wilson; W. Barney Giese; Donald V. Myers; and Jerry W. Peace have also filed motions to dismiss this case under the *Younger* abstention doctrine. These motions are now **moot.** (Entries 19, 20, 39, 40, and 41). Edgar L Clement, III and C. Kelly Jackson's motion to amend or correct their motion to dismiss is also moot. (Entry 42).

**IT IS SO ORDERED.**

s/ Margaret B. Seymour
The Honorable Margaret B. Seymour
District Court Judge

Columbia, South Carolina
August 6, 2010

# EXHIBIT E

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|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF OCONEE | IN THE COURT OF GENERAL SESSIONS<br>TENTH JUDICIAL CIRCUIT |
| STATE OF SOUTH CAROLINA,<br>vs.<br>ANTHONY C. ODOM,<br>Defendant | **MEMORANDUM OF LAW IN OPPOSITION OF THE DEFENDANT'S MOTION TO QUASH INDICTMENT**<br>2010-GS-37-363<br>2010-GS-37-364 |

2011 JUN 27 P 4:55

**NOW COMES the State of South Carolina** by an through the undersigned Assistant Attorney General opposing the Motion by the defendant to Quash the Indictments in this case for prosecutorial vindictiveness and in support thereof states as follows.

## FACTUAL BACKGROUND

In February 2010, the defendant was tried for Criminal Solicitation of a Minor in Spartanburg County (Indictment number 2006-GS-42-2006-2289), for communications the defendant had with an undercover Detective of the Spartanburg County Sheriff's Office between March and May 2006, which resulted in a mis-trial.

Prior to calling the case for trial in Spartanburg, the State intended to introduce communications the defendant had with an undercover investigator of the Westminster Police Department between the dates of May 4 and 6, 2006 as evidence of prior bad acts (hereinafter "Oconee Chats").

The week before trial began in Spartanburg County, Counsel for the State advised Defense Counsel during a telephone conference that rather than attempting to admit the Oconee Chats as prior bad acts evidence, pursuant to SCRE Rule 404(B), in the Spartanburg trial, charges would be submitted to the Oconee County Grand Jury for True Bill as a separate case.

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____other_____
__Boxed____handed__✓

Just prior to presentment of the charges to the Grand Jury, the State was notified by a phone call from the Federal District Court that the defendant had filed an action against the Attorney General and all Circuit Solicitors in the United States District Court for the District of South Carolina seeking temporary and permanent declaratory and injunctive relief to prevent the State from submitting said indictments to the Oconee County Grand Jury. The Honorable Margaret B. Seymour denied the temporary injunction and by Order dated August 6, 2010, granted the State's Motion to Dismiss.

The Defendant was indicted by the Oconee County Grand Jury on April 12, 2010 for two (2) counts of Criminal Solicitation of a Minor. The Oconee Chats were not included in the Spartanburg County indictments, nor were any Spartanburg communications included in the Oconee County indictments.

## LEGAL ARGUMENT

The State anticipates the defendant will move to quash the indictments in this case for prosecutorial vindictiveness based upon the following:

- Prosecution in Oconee County is retaliation for the defendant exercising his constitutional right to trial and to defend himself in Spartanburg County;
- The defendant was told the Oconee Chats would not be prosecuted;
- Four years between the conduct and indictment of the Oconee Chats is vindictive; and
- Two (2) indictments (one for each of the Oconee Chats) is vindictive when compared to a single indictment in Spartanburg County for multiple communications.

The State asserts these arguments are without merit and the indictments must stand.

South Carolina recognizes "[i]n our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." State v. Fletcher 322 S.C. 256, 261-2, 471 S.E.2d 702, 705 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978)).

In State v. Dawkins, our Supreme Court states

> an initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution. The mere fact that a defendant refused to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent charging decisions are unjustified.

297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989)(referencing United States v. Godwin, 457 U.S. 368, 102 S. Ct.2485, 73 L.Ed.2d. 74 (1982) (There is no presumption of prosecutorial vindictiveness when a prosecutor brings additional charges after a defendant refuses a plea bargain.), see United States v. Wilson 262 F.3d 305, 315 (4TH Cir 1981)(citations omitted) (stating "[a]n initial decision should not freeze future conduct.").

"A prosecutor should remain free before trial to exercise that broad discretion entrusted to him to determine the extent of the societal interest in prosecution."[1] Wilson 262 F.3d at 315(citations omitted). While decisions to prosecute must not be made in retaliation against defendants for exercising their legal rights, "courts must nonetheless be cautious not to intrude unduly in the broad discretion given to prosecutors in making charging decisions. A prosecutor's charging decision is presumptively lawful." Id. (citing United States v Armstrong 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L.Ed.2d 687 (1996)).

[1] "[A] change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than a pre-trial decision." Id. at 316 (quoting Godwin at 381, 102 S. Ct. 2485).

In Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), the Supreme Court recognized that certain limited circumstances pose a "realistic likelihood of vindictiveness" by a prosecutor, and warrant the application of a "presumption of vindictiveness." "The inquiry, however, is not focused solely on the presence or absence of actual vindictive motive, but includes whether the action taken, which exposes the accused to an increased punishment, poses such a "reasonable likelihood of vindictiveness" as to require a presumption of vindictiveness." State v. Fletcher, 322 S.C. 256, 260, 471 S.E.2d 702, 704 (Ct. App. 1996). "Where there is no such reasonable likelihood, the burden is on the defendant to prove actual vindictiveness." Fletcher, 322 S.C. at 261, 471 S.E.2d at 705 (citing Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).)

In a case such as this one when a prosecutor merely exercises his or her discretion in charging and when to bring those charges, no such presumption should arise. As a result, the defendant is required to prove actual vindictiveness and "any inference of vindictiveness which can be derived from the timing of the direct indictment is insufficient to prove an improper motivation . . ., where, as here, the evidence established probable cause to believe the crime had occurred." Fletcher, 322 S.C. at 262-63, 471 S.E.2d at 706.

The Fourth Circuit in Wilson enumerates a two-prong test, which must be clearly met to establish prosecutorial vindictiveness. The defendant must show that (1) the prosecutor acted with genuine animus toward the defendant, and (2) but for that animus, the defendant would not have been prosecuted. See Wilson, 262 F.3d at 314 (citing Godwin, 457 U.S. at 380 n. 12, 102 S. Ct. 2485; United States v. Sanders, 211 F.3d 711, 717 (2d Cir. 2000). In other words, the defendant must prove the prosecutor harbored vindictive animus and pursues prosecution *solely* to punish the defendant. See id.

If actual vindictiveness is not established, the circumstances of the case may support a presumption of vindictiveness. However, any such presumption, must be evaluated against "the background presumption that charging decisions of prosecutors are made in the exercise of broad discretion and are presumed to be regular and proper." Id. at 318 (citing Armstrong 517 U.S. at 464, 116 S.Ct. 1480). [2]

Quite simply, the defendant cannot overcome the presumption that counsel's decision, in exercise of her broad discretion, to present these charges to the Oconee County Grand Jury is presumed proper. See Wilson 262 F.3d at 315. In the case at bar, the State has probable cause to believe the defendant committed the crime charged, and, the decision to prosecute is discretionary. See Fletcher 322 S.C. at 261, 471 S.E.2d at 705.

Further, the defendant cannot show actual or genuine animus by counsel and but for that animus he would not have been prosecuted. See Wilson, 262 F.3d at 315. Nor does a presumption of vindictiveness arise from the facts of this case, as nothing suggests counsel for the State harbored vindictive animus and pursued prosecution *solely* to punish the defendant. See id. at 316 (citation omitted); Wilson, 262 F.3d at 315-16 (citation omitted).

The Honorable Margaret B. Seymour in granting the State's Motion to Dismiss the defendant's request for injunctive relief from indictment in Federal District Court, stated:

> [d]uring the pendency of the Spartanburg trial, the position of Chief Prosecutor for the South Carolina Internet Crimes Against Children Task Force changed from David Stumbo to Megan Wines. Because prosecutors have discretion to decide which crimes to prosecute, this personnel change lends support to [the Attorney General's] strategy explanation. The court finds that [Odom] has failed to prove bad faith.

Order and Opinion August 6, 2010 (granting the State's Motion to Dismiss).

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[2] A presumption of vindictiveness typically arises when, at the time the prosecutor initially tried the defendant, the decision was made not to try the defendant on an additional available charges later brought only after a defendant has had a successful appeal. Id. at 319.

(A) Prosecution in Oconee County is not retaliation for the defendant exercising his constitutional right to trial and to defend himself in Spartanburg County

Indictments for the Oconee Chats are not a *change* in charging after an initial trial is complete *nor a continuation* of prosecution because (1) the defendant is charged with criminal acts separate from those in Spartanburg, which rest on separate and sufficient evidence; (2) counsel for the defendant was advised prior to calling the Spartanburg case for trial that indictments would be submitted to the Oconee Grand Jury; and (3) the Spartanburg indictment is still pending further prosecution.

It is of no consequence the State's strategy of introducing the Oconee chats in the Spartanburg trial changed. See Godwin at 381, 102 S. Ct. 2485). As above-noted, "[a]n initial decision should not freeze future conduct." Wilson at 315 (citations omitted). The State has a societal interest in protecting minors and pursuing prosecution of the defendant for his acts. See Wilson at 315 (citations omitted).

Further, the defendant not pleading guilty and requiring the State to try him in Spartanburg does not refute that subsequent indictments are justified and proper. See State v. Dawkins, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989)(citations omitted). The United States Supreme Court has stated "there is no presumption of prosecutorial vindictiveness when a prosecutor files additional charges after a defendant refuses a plea bargain." Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), see State v. Dawkins, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (quoting Goodwin).

(B) The defendant was not told by counsel for the State that the Oconee Chats would not be prosecuted, and even if he were, it is of no consequence.

The defendant cannot establish he was actually advised the Oconee communications would not be prosecuted. Present Counsel for the State did not advise as such, and were a

statement of the kind made it would have been by prior Counsel for the State and most probably in the course of plea negotiations. In fact, at pre-trial hearings held in Spartanburg County on July 9, 2007, David Stumbo, on behalf of the State, when asked about the Oconee chats said "we never intended to charge... *at that time* in Oconee County." Hearing Transcript page 13.

As previously mentioned, the defendant not entering a guilty plea does not merit any presumption of vindictiveness. See id. Assuming arguendo a statement had been made not to indict the Oconee Chats, it is clear the defendant did not rely on it and the State is not bound by discussions.

(C) Four years between the conduct and indictment of the Oconee Chats is not vindictive.

Indictment of the Oconee chats after the trial in Spartanburg and four (4) years after the conduct is not significant. Again, the defendant's counsel was advised prior to the State calling the trial in Spartanburg. Moreover, timing of indictment does not establish improper motive if probable cause exists to believe a crime occurred. See Fletcher 322 S.C. at 263, 471 S.E.2d at 706.

In this case, the State has probable cause to believe the defendant committed the crimes charged in both Oconee and Spartanburg separately. Prosecution in Oconee County is not the continuation of a currently existing charge, but rather, the defendant is being prosecuted for crimes separate and additional to those charged in Spartanburg County, as a result the State may elect to submit these charges to an Oconee County Grand Jury at anytime.

(D) Two (2) indictments (one for each of the Oconee Chats) is not vindictive.

The State submits how the Oconee chats are indicted is wholly discretionary and accordingly, is proper. Current Counsel for the State inherited the sole Spartanburg indictment and determined it in the State's interest to proceed under a "per chat" basis in Oconee County.

## CONCLUSION

Wherefore the State respectfully prays a Motion by the Defendant to Dismiss based on prosecutorial vindictiveness be denied as such argument lacks merit.

Respectfully submitted,

ALAN WILSON
ATTORNEY GENERAL

By: Megan Burleson Wines
Megan Burleson Wines
Assistant Attorney General

Columbia, South Carolina

April 11, 2011

RECEIVED
SEP 17 2013
S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case Tracking No. 2012-206186

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The State,

Respondent,

vs.

Anthony Clark Odom,

Appellant.

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PROOF OF SERVICE

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I, Sally Ellison, certify that I have served the Return to Motion to Exclude on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

Brian McDaniel, Esquire
Post Office Box 2085
Beaufort, South Carolina 29901

I further certify that all parties required by Rule to be served have been served. This 17th day of September, 2013.

SALLY ELLISON
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727