

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Perry H. Gravely, Circuit Court Judge

Unpublished Opinion No. 2026-UP-317
(S.C. Ct. App. filed June 24, 2026, Pet. Reh'g Den'd Aug. 24, 2026)
Appellate Case No. 2025-000364
S. Ct. Appellate Case No. 2026-002089

Richard A. Gorman Respondent,

v.

John C. Monarch Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Argument	1
I. All Questions Presented Are Preserved for Review	2
II. Rule 37(f) Required the Circuit Court to Determine How Information Was Lost Before It Could Sanction the Loss	4
A. The Return gives the deliberately deleted file the significance of the browsing history.....	4
B. The court never made the determination Rule 37(f) requires, and one of its grounds is purely a preservation finding.....	5
C. Choosing among affidavits is not a credibility finding entitled to deference	6
III. The Circuit Court Used Its April 2023 Threat to Impose Terminating Sanctions for Different, Earlier Conduct, After Finding No Violation of the Condition Imposed	7
A. The condition was production of the laptop, and the court found no violation	7
B. The grounds rest on events that predate the threat, and the threat supplied the reason for termination	8
C. The earlier grounds do not independently support termination	9
D. <u>QZO</u> is not this case.....	10
IV. Striking Petitioner’s Counterclaim Required Its Own Determination of Prejudice	11
V. Presumed Prejudice Cannot Substitute for Determining What the Loss Impaired and Why Only Termination Could Cure It	12
A. The Return does not defend the presumption the Court of Appeals adopted	12
B. The Return supplies findings the order does not make.....	12
C. The question is not what the lost data contained, but whether the kind of data lost could have mattered.....	14
D. A spoliation instruction is the remedy designed for this uncertainty.....	14
Concluding Statement	15

ARGUMENT

At the close of the January 2025 hearing, the circuit court remarked that “none of this is nearly as clear as either one of you all act like it is.” (R. 259:5-7.) The order that followed was considerably more certain. What it had once called “a close call” it now treated as settled. (R. 101.) And thirteen months after finding no violation of its conditional order, (R. 87), the court imposed the full threatened sanction of striking Petitioner’s pleadings because “[t]o do anything less . . . would only diminish the authority of this Court and its Order.” (R. 104.)

Petitioner does not ask this Court to reweigh the evidence. Discovery sanctions are reviewed for abuse of discretion, but deference assumes that discretion was exercised according to law. Morris v. BB&T Corp., 438 S.C. 582, 585-87, 885 S.E.2d 394, 396-97 (2023). Here, the distance between what the court said it could determine and the sanction it imposed is the very gap the law requires findings to fill, and the court made none of them. It never applied Rule 37(f), even though Respondent’s own expert attributed the loss of browsing history to an automatic software update. (R. 1330 ¶ 5.) It never explained why conduct that predated the conditional order warranted the sanction the order threatened, after finding no violation of the condition itself. (R. 87 & 102.) And it never determined what prejudice remained after the forensic production, or why only termination, including of Petitioner’s affirmative counterclaim, could cure it. (R. 104-05.) The Court of Appeals deferred to credibility findings made entirely on paper and presumed prejudice. (Ct. App. Op. ¶ 3 & n.4.)

The Return does not engage any of these defects. Instead, it retells the procedural history and describes the record as stronger than it is. (See Part V.B, infra.) It never mentions the January 2024 order, the “diminish the authority” rationale, the Safari concession, or Rule 37(f)’s

“exceptional circumstances” requirement. It merely responds to questions of law with a factual chronology.

Review is warranted. See Rule 242(b)(1) & (3), SCACR. Rule 37(f) has never been construed in a published decision; its first appellate application came in an unpublished per curiam opinion issued without oral argument. See Rule 268(d)(2), SCACR. No South Carolina appellate court has addressed what follows when the condition of a “comply-or-be-stricken” order is satisfied. And the decision below lets a presumption of prejudice substitute for the degree-of-prejudice analysis this Court has required. See Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009). These questions will recur. Electronically stored information is now part of nearly every civil case, routine software processes delete data without anyone deciding to destroy it, and conditional “comply-or-be-stricken” orders are a common discovery-management tool. An unpublished opinion gives trial courts little guidance. In Innovative Waste Management, Inc. v. Crest Energy Partners GP, LLC, this Court reviewed an unpublished decision affirming terminating sanctions so that it could publish the governing analysis. 445 S.C. 19, 22, 911 S.E.2d 406, 407 (2025). It affirmed there because of continuing noncompliance with discovery orders, id. 445 S.C. at 30, 911 S.E.2d at 411; this case, by contrast, asks what follows once the ordered production has occurred. The questions are legal, the record is complete, and answering them does not require choosing between forensic experts. The Return does not argue otherwise, and never mentions Rule 242.

I. ALL QUESTIONS PRESENTED ARE PRESERVED FOR REVIEW.

The Return’s preservation argument, (Return 17-19), repeats the one Respondent made to the Court of Appeals, (compare id. with Resp.’s Br. 30-31), and that court did not adopt it. It decided each question on the merits: reliance on the expert affidavits, (Ct. App. Op. ¶ 2);

prejudice, (id. ¶ 3); lesser sanctions and proportionality, (id. ¶ 5); and Rule 37(f), (id. n.4). On Rule 37(f), it found “no error by the circuit court in declining to find Monarch is protected by this provision.” (Id.) The Return concedes that the Court of Appeals “correctly rejected this argument” and that the argument “failed on its merits.” (Return 17 n.1.)

These questions were also raised below. The Return asserts that Rule 37(f) “was not raised at all until he argued it to the Court of Appeals.” (Return 18.) But Petitioner described his device upgrades in 2020 as part of the “routine, good-faith operation of his electronic information systems,” (R. 523), and quoted the rule to the circuit court in opposing the sanctions motion that produced the April 28, 2023 order, also on appeal, (R. 1086). His January 2025 opposition argued that a court “must evaluate the degree of prejudice sustained by the party seeking sanctions prior to striking a pleading.” (R. 1407.) And the Return lists the counterclaim argument among those Petitioner made to the Court of Appeals, (Return 18), one page before calling it “new,” (Return 19).

Nor was a Rule 59(e) motion required, because the order ruled on each point. See Elam v. SCDOT, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (a Rule 59(e) motion is required for an issue “raised, but not ruled on”). It found the loss of data willful rather than innocent, (R. 101), resolving against Petitioner the question to which Rule 37(f) is addressed; whether it did so under the standard the rule requires is the merits-question presented. It also found severe prejudice, rejected lesser sanctions, and attributed the delay to Petitioner. (R. 102 & 104.)

Finally, the credibility point is not new. The Court of Appeals rejected the Rule 37(f) question, raised there and on rehearing, (Pet.’s Op. Br. 32-35; Pet. Reh’g 9-10), on the ground that “the credibility of the affiants was for the circuit court.” (Ct. App. Op. n.4.) Petitioner argued there that the forensic disputes “should have been resolved by the jury after testimony

from those experts, not decided by the trial court, on paper.” (Pet.’s Op. Br. 45-46.) Answering the Court of Appeals’ reason for rejecting a preserved question does not raise a new issue.

II. RULE 37(f) REQUIRED THE CIRCUIT COURT TO DETERMINE HOW INFORMATION WAS LOST BEFORE IT COULD SANCTION THE LOSS.

Rule 37(f) limits a court’s power to impose sanctions: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” The February 2025 order never cites the rule or mentions “exceptional circumstances.” (R. 94-106.) The Return’s only merits-answer is a footnote citing Watkins’ discussion of a command-history file. (Return 17 n.1.)

A. The Return gives the deliberately deleted file the significance of the browsing history.

The forensic evidence concerned two kinds of data: (1) the .bash_history file, which “records the history of commands entered in the Bash shell;” and (2) browsing history, which is a record of the web addresses a user visited and is kept in each browser’s own database. (R. 1236 ¶ 14; R. 1240 ¶ 21; R. 1250.) The Return merges the two, describing the deleted command-history file as data “that showed what websites Petitioner had used.” (Return 8.)

The distinction matters because browsing history is the one category whose loss Respondent’s own expert attributed to an automatic process: a September 2017 Safari update “automatically deleted browsing history that predated September 20, 2016,” and “this automated deletion explains the absence of older browsing history.” (R. 1329-30 ¶ 5.)

As for the command-history file, Watkins conceded that deleting it “does not directly delete the session files” in which later commands were recorded, (R. 1331 ¶ 8), and that “the regular timestamps and lack of gaps in the history suggest [selective deletion] might be

unlikely.” (R. 1332 ¶ 11.) No one explained how a record of shell commands bears on 2013 emails and internet postings. By merging the two, the Return attaches the relevance of the automatically lost browsing history to the one deletion that was purposefully made.

B. The court never made the determination Rule 37(f) requires, and one of its grounds is purely a preservation finding.

The circuit court made the same error, quoting Watkins’ first opinion that the “user selectively purged . . . internet browsing history data,” and describing his January 2025 affidavit as “confirming” it. (R. 100.) As to browsing history, the affidavit did no such thing, conceding that the missing portion of the browsing history was automatically deleted by the Safari update. (R. 1330 ¶ 5.) Watkins’ remaining criticism was that Petitioner “failed to properly back up or preserve this data prior to the update.” (R. 1330 ¶ 5.) Respondent’s counsel was more direct: “even if that’s right, . . . he didn’t take any steps to preserve it.” (R. 244:18-22.) Sanctioning a loss caused by routine, good-faith operation because the party did not prevent it is what Rule 37(f) forbids absent exceptional circumstances.

The order’s own structure confirms the problem. Its first ground for striking the pleadings was that Petitioner did “[n]ot maintain[] the integrity of his devices after receiving the letter of December 20, 2013.” (R. 102.) The Court of Appeals held that this finding and the finding of willful destruction “were independent and separate findings by the circuit court and they were not conflicting.” (Ct. App. Op. n.4.) If so, the device-integrity ground is a freestanding failure-to-preserve finding, which is exactly what Rule 37(f) governs, and the order made no Rule 37(f) determination about it.

Respondent argues that, without observing a litigation hold, there can be no good faith under Rule 37(f). (Resp.’s Br. 15 & 26.) That is an argument about how to apply Rule 37(f), not a reason to skip the rule. And on this record, the question was real. The update that deleted the

browsing history came in September 2017, (R. 1330 ¶ 5), nearly four years after the preservation letter and nearly three years before the first order concerning Petitioner’s devices, (R. 32 & 96). Whether a party acts in bad faith by failing to anticipate that a routine browser update will enforce a new retention limit on years-old history is a question Rule 37(f) requires a court to answer rather than assume. The circuit court could have found a lack of good faith, or exceptional circumstances; it found neither, because it conducted no analysis.

C. Choosing among affidavits is not a credibility finding entitled to deference.

The Court of Appeals acknowledged that the automatic-deletion explanation “could amount to routine, good-faith operation under appropriate circumstances,” then deferred because “the credibility of the affiants was for the circuit court.” (Ct. App. Op. n.4.) But there was no credibility contest over whether Petitioner intentionally deleted the browsing history; Respondent’s own expert conceded the Safari update was responsible for the loss of browsing history data. Therefore, the deference itself was misplaced.

The Return recasts the argument as a claim that a judge “could not make credibility determinations without live testimony.” (Return 14.) That is not the argument. A circuit court may weigh affidavits, but a choice made entirely on paper does not earn appellate deference, because a reviewing court can read the same paper. Deference to credibility findings exists “[b]ecause the appellate court lacks the opportunity for direct observation of the witnesses.” SCDSS v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984). The Return cites no case deferring to a choice among affidavits.

The authority relied on below involved live testimony. See QZO, Inc. v. Moyer, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004) (trial court “heard Appellant’s testimony and found it lacked credibility”). Here, no one testified. (R. 219-20.) Yet the court found both

Watkins' and Abrams' affidavits "convincing," (R. 100), even though Watkins found the hard drive "was not erased or replaced," (R. 1242 ¶ 23.b), contrary to Abrams' "initial feeling" that "much of the content of the hard drive must have been erased," (R. 1163).

Credibility determines what happened. Rule 37(f) determines the legal consequence of what happened. On the browsing history, what happened was conceded, and the legal consequence was never determined.

III. THE CIRCUIT COURT USED ITS APRIL 2023 THREAT TO IMPOSE TERMINATING SANCTIONS FOR DIFFERENT, EARLIER CONDUCT, AFTER FINDING NO VIOLATION OF THE CONDITION IMPOSED.

The Return defends the February 2025 order as a cumulative judgment, in which the eventual production of the laptop was "just more evidence" of misconduct, (Return 13), and invokes deference to a thought process that is "evident," (Return 9 (quoting Morris, 438 S.C. at 587, 885 S.E.2d at 397)). Here the thought process is evident, and it is the problem. The court threatened a terminating sanction to compel a specific production; the production occurred, and the court found no violation. A year later, it imposed the threatened sanction on other earlier grounds and rejected lesser sanctions *because* of having made the earlier threat.

A. The condition was production of the laptop, and the court found no violation.

The April 2023 order directed Petitioner to "fully comply with the March 28, 2022 Order of Judge Kinlaw within 45 days" or have his pleadings stricken. (R. 82.) The Return treats compliance as something more than production: a laptop whose data was completely preserved. (Return 12.) The circuit court did not. In January 2024, it defined the condition itself: "The relevant portion of Judge Kinlaw's Order, which was adopted by the April 28, 2023 Order, was that Defendant was to produce his 2013 MacBook Pro computer to a neutral third party forensic expert." (R. 85.) Finding the neutral's suggestion of erasure "clearly not sufficient for this Court

to impose the draconian sanctions requested,” and noting that Respondent had filed nothing more when given the chance, it concluded that Respondent “has not established [Petitioner’s] violation of the Court’s Order of April 28, 2023 at this time.” (R. 86-87.) The February 2025 order never found that Petitioner failed to produce his 2013 MacBook, and the data loss it describes is conduct it could not date and that the experts placed years before the condition was set. (R. 100-02; R. 1237-38 ¶ 18; R. 1330 ¶ 5.)

The February 2025 order says that “the information provided at this last hearing overcomes any previous perceived obstacles to sanctions,” (R. 101), but never says what that information was. The evidence submitted after January 2024 narrowed the case for deliberate destruction: both later experts attributed the gap in browsing history to an automatic Safari update. (R. 1321 ¶ 7; R. 1329-30 ¶ 5.)

B. The grounds rest on events that predate the threat, and the threat supplied the reason for termination.

At the hearing, Respondent asked the court to treat its earlier order as self-executing: “Have that order that Your Honor issued operate and strike his pleading.” (R. 247.) The court did so, but not on the ground the order specified. None of the four grounds in the February 2025 order is a failure to produce the laptop. (R. 102.) The specifically dated events underlying those grounds preceded April 28, 2023:

- deletions dated to 2017, (R. 1237-38 ¶ 18; R. 1330 ¶ 5);
- remote sessions that ended in January 2018, (R. 1238 ¶ 19);
- delay following the August 2020 consent order, which was the subject of the April 2023 order itself, (R. 82 & 102); and,
- a Telegram exchange that Respondent raised with the court in March 2023, (R. 1138).

The order acknowledges that “some of the conduct may have occurred prior to the issuance of these Orders.” (R. 101.) It then rejected a spoliation instruction as “a mere tap on the hand” and explained: “To do anything less at this point, more than twenty-one months later and in view of the egregious conduct of the defendant would only diminish the authority of this Court and its Order.” (R. 104.)

The Return does not address that passage. It recasts Petitioner’s argument as a claim that sanctions are unavailable unless each sanctioned act violated “the language of a specific order.” (Return 13.) That is not the argument. A conditional sanction cannot compel compliance with conduct that is already complete. When a court sanctions earlier conduct, that conduct must justify termination on its own, and a threat made to compel something else is not a reason to reject a lesser sanction. The Court of Appeals has reversed a terminating sanction for exactly this error. In Balloon Plantation, a judge struck the defendants’ counterclaim and held them in default under an earlier order threatening sanctions, explaining, “I have no authority to alter or amend that order.” Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 155, 399 S.E.2d 439, 440-41 (Ct. App. 1990). The court reversed because the judge “imposed the sanction, not in the exercise of his discretion, but because he thought he had no choice under the prior order.” Id., 303 S.C. at 155, 399 S.E.2d at 441. The circuit court here did not disclaim its discretion; but it exercised that discretion by reference to the threat, rejecting anything less because it “would only diminish the authority of this Court and its Order.” (R. 104.) In both cases, the earlier order, not the conduct before the court, drove the sanction.

C. The earlier grounds do not independently support termination.

Delay. The third ground counts “a two-and-a-half-year delay through Motions and Appeals.” (R. 102.) The April 2023 order had already sanctioned that delay with contempt and

fees. (R. 82.) This Court has distinguished seeking protective relief from sanctionable noncompliance, Innovative Waste, 445 S.C. at 30, 911 S.E.2d at 411, and Petitioner’s objection proved sound: the court’s neutral found the ordered protocol “wholly inapplicable to whole disk encrypted hard drives.” (R. 1146 ¶ 7.)

The remotely accessed “device(s).” The Watkins affidavit on which this ground rests identifies no device; it says only that the laptop connected to something that could have been another computer or any of a list of common network equipment, from “routers” and “wireless access points” to “Internet of Things devices.” (R. 102 & 1238-39 ¶ 19.) The order never found that discovery required Petitioner to identify all such devices. (Id.)

The Telegram exchange. The court knew of the exchange when it entered the April 2023 order and still made production the only condition, (R. 80, 82 & 1138), and the February 2025 order identifies no prejudice from any lost messages.

D. QZO is not this case.

The Return calls this case “a lot like” QZO. (Return 11.) In QZO, the hard drive was reformatted the day before the computer was turned over under a restraining order; the erasure was undisputed and total, and it was made while the order was in force. 358 S.C. at 251, 257, 594 S.E.2d at 544, 547. Here, Respondent’s own expert found that the drive “was not erased or replaced,” (R. 1242 ¶ 23.b), and dated the only deliberate deletion to June 2017, more than three years before the first order concerning the devices. (R. 32, 1237-38 ¶ 18.) And the laptop was far from empty. The neutral reported “many examples of [Petitioner] sending people a link to” the 2013 posting at issue. (R. 1165 ¶ 12.) A user intentionally purging his laptop would not have left that there.

IV. STRIKING PETITIONER’S COUNTERCLAIM REQUIRED ITS OWN DETERMINATION OF PREJUDICE.

The order struck Petitioner’s counterclaim along with his answer, with no separate analysis. (R. 104-05.) The Return’s defense is one sentence, asserting that the discovery conduct confounded Respondent’s “ability to defend Petitioner’s defamation claim on a truth basis,” (Return 3), and one footnote, reasoning that “it is easy to see how Petitioner’s computer malfeasance hampered the defense of the counterclaim,” (Return 19 n.2). It also calls the question “new.” (Return 19.) But Respondent himself argued to the Court of Appeals that the alleged data loss “had the effect of eliminating Respondent’s truth defense.” (Resp.’s Br. 25-26; see Part I, supra.) Petitioner raised the issue there and on rehearing. (Pet.’s Op. Br. 44-45; Pet.’s Reply Br. 21-23; Pet. Reh’g 14-15.)

The Return is right that there is some overlap. The counterclaim alleges that Respondent published a 2018 post accusing Petitioner of blackmail, and a 2017 post calling him an extortionist. (R. 213 ¶¶ 78 & 80.) Evidence about whether Petitioner was behind the 2013 scheme would bear on whether those accusations were true. But the counterclaim also rests on a September 2017 post that “accuses Defendant of involvement in criminal bank fraud,” (R. 214 ¶ 82), and on the statement that “[a] suicide even occurred in accordance to this guy’s actions,” (R. 213 ¶ 78). Neither the order nor the Return explains how anything lost from a 2013 laptop bears on the truth of those statements.

Even as to the overlapping statements, the truth defense never depended on the laptop. The blackmail post, as alleged, told readers in 2018 that Respondent’s investigators had traced “the blackmail back to Monarch,” (R. 213 ¶ 80), more than five years before any forensic examination, and Respondent has since admitted that his evidence connecting Petitioner to the blackmail email is “circumstantial.” (R. 1432.) Striking the counterclaim relieved Respondent

of ever having to prove the truth of his statements, on the strength of a loss the court could not describe. That is the windfall Karppi forbids: a sanction that strikes a claim beyond what is necessary to redress the discovery wrong and conferring an unjustified, inequitable benefit. Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 542-45, 489 S.E.2d 679, 682-83 (Ct. App. 1997).

V. PRESUMED PREJUDICE CANNOT SUBSTITUTE FOR DETERMINING WHAT THE LOSS IMPAIRED AND WHY ONLY TERMINATION COULD CURE IT.

A. The Return does not defend the presumption the Court of Appeals adopted.

The Court of Appeals rejected Petitioner’s prejudice argument with one sentence from Scott: “when discovery rights are trampled, prejudice must be presumed.” (Ct. App. Op. ¶ 3 (quoting Scott v. Greenville Hous. Auth., 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003)).) A presumption that prejudice exists does not measure its degree or show that only termination could cure it, and those are the determinations that a terminating sanction requires. See Historic Charleston, 381 S.C. at 435, 673 S.E.2d at 457; Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003) (reversing a discovery sanction where the trial court “made no specific finding of prejudice”).

Scott itself makes the point. It reversed because the trial court “never addressed whether [the opposing party] would be prejudiced.” 353 S.C. at 651-52, 579 S.E.2d at 157-58. Scott required a court to address prejudice; it did not excuse a court from measuring it. The Return cites none of these cases, much less distinguishes them.

B. The Return supplies findings the order does not make.

Below, Respondent acknowledged that it “has sometimes been—and continues to be—difficult to ascertain exactly what it is [Petitioner] did with electronic data,” (R. 1323), and that “[w]hat happened with some of it is not known,” (R. 1325). The order reflects the same

uncertainty: the court “cannot determine at what point this data was removed or destroyed.” (R. 100-01.) The Return now fills those gaps with a confidence the record does not support:

The Return	The order and the record
The destroyed evidence “had a strong likelihood of determining whether Petitioner had or had not used his laptop to work on the internet postings” and “had high potential to be relevant to Respondent’s truth defense to the defamation counterclaim.” (Return 15 & 19 n.2.)	The court “cannot determine at what point this data was removed or destroyed,” and “the timing cannot be determined.” (R. 100-01.) No finding identifies what was lost and the order does not address the substance of the counterclaim.
The deleted “.bash data . . . showed what websites Petitioner had used.” (Return 8.)	Watkins: the file “records the history of commands entered in the Bash shell.” (R. 1236 ¶ 14.) Browsing history is kept in separate browser databases. (R. 1240 ¶ 21.)
“Both these experts” found the laptop was used “to access a ‘virtual machine,’ using the laptop to work on another computer device.” (Return 8.)	Watkins does not use the term. Respondent’s 2023 motion, quoting Abrams, used it to argue that the laptop was a disguised substitute, not a means of reaching another device. (R. 1157.) In January 2024, the court found that unproven. (R. 86-87.)
Petitioner’s “acts in removing data made the computer useless from an evidentiary standpoint.” (Return 12.)	The neutral identified more than four million files, 9,235 responsive to the parties’ search terms, and an iPhone backup with more than 200,000 messages. (R. 1147-48 ¶¶ 9-10.) The Return says the laptop held “components of defamatory internet postings.” (Return 7.)

Respondent’s characterization of the Telegram exchange reflects the same pattern. Respondent first told the circuit court that Petitioner and Shpetrik used Telegram “to discuss this case.” (R. 1138.) By May 2024, the messages “most likely included ones about how Mr. Shpetrik should testify at his deposition.” (R. 1221.) Now, the Return states as fact that the messages concerned “how the witness should testify in his deposition.” (Return 13.) No witness said so.

These are not differences of tone. Each of Respondent’s assertions supplies a finding the law required the circuit court to make (but did not make) before selecting a terminating sanction. The order instead reasoned that Petitioner “had within his means the ability to provide the

necessary information to clear himself,” (R. 101), shifting to the sanctioned party the burden of disproving the case against him.

C. The question is not what the lost data contained, but whether the kind of data lost could have mattered.

The Return says Petitioner would require the court to “determine[] what was in data that the Petitioner had made unreviewable.” (Return 15.) Instead, Petitioner’s argument is that, before treating a loss as a reason to end the case, a court must find at least that the *kind* of data lost could reasonably have helped the moving party and assess how much of that help was rendered lost. Here, browsing history has an evident connection to the postings, but Respondent’s expert attributed its loss to an automatic update, (R. 1330 ¶ 5), and browsing records from 2013 survived in another browser and in Petitioner’s 2013 iPhone backup, (R. 1240-41 ¶¶ 21-22). The one file deliberately deleted is a record of shell commands, (R. 1236 ¶ 14), whose potential relevance to the case no one has explained. The order quotes broader concerns about removed data and tampering, (R. 99-100), but never connects them to the degree of evidentiary impairment that remained after production. None of this amounts to a measurement of prejudice.

D. A spoliation instruction is the remedy designed for this uncertainty.

If the court could not determine what was lost, the law provides a remedy built for exactly that situation. The order described it correctly: a spoliation charge “would allow the jury to draw an inference that destroyed evidence would have been unfavorable to the Defendant.” (R. 104.) The jury could have heard the experts, weighed the competing explanations, and drawn the inference if the evidence warranted it. See Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394-95, 396 S.E.2d 369, 371-72 (1990) (adverse inference adequate; dismissal “too severe”). The order rejected that remedy as “a mere tap on the hand,” reasoning

that the missing information “severely hampers” Respondent’s proof. (R. 104.) But “severely hampers” is a conclusion, not an assessment of whether an inference could address the particular impairment in light of the evidence that was produced. Neither decision below makes that assessment, and the Return does not try.

CONCLUDING STATEMENT

The Return closes by saying the circuit court gave Petitioner “plenty of slack in the rope” and that “[h]e decided to hang himself with it.” (Return 20.) But the court set one condition: production of the laptop within 45 days; Petitioner produced it, and the court found no violation. (R. 85-87.) What followed was a terminating sanction for different, earlier conduct, imposed because a lesser one “would only diminish the authority of this Court,” without the determinations Rule 37(f) and this Court’s sanctions decisions require. Petitioner respectfully requests that the Court grant the petition for a writ of certiorari on the questions presented.

Respectfully submitted,

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