THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2015-002331

The State, Respondent,

v.

Brian Talkington, Appellant.

MEMORANDUM OF APPEALABILITY

Per the Clerk of Court's directive in the letter dated November 24, 2015 (received by counsel on November 30, 2015), Appellant Brian Talkington submits the following memorandum of appealability:

1. This matter is properly before this Court pursuant to S.C. Code Ann. §14-8-200(a) in that this Court "has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court." This Court should "apply the same scope of review that the Supreme Court would apply in a similar case." Further, the lower Court's order denying injunctive relief as well as his requests for the extraordinary writs of prohibition and mandamus is immediately appealable under S.C. Code Ann. § 14-3-

330(4) because it is in the nature of an injunction.[1], *to wit*: to prohibit the State from prosecuting Appellant ("Talkington") in multiple Courts at the same time after having the initial case dismissed, and so as to prevent there to be a transcript from the initial proceedings, to Talkington's prejudice. Alternatively, should the Court determine that the denial of Talkington's request for injunction and/or writs of prohibition and/or mandamus is not an appealable order to this Court, Talkington requests that this Court treat the within appeal as a petition to the appropriate Court for writs of prohibition and/or mandamus.

2. This matter dates back to July, 2011; involves no less than four (4) previous docketed actions (2015-GS-40-01723; 2014-CP-40-07362; 2013A4010601092; and I902097) in no less than three (3) courts of various jurisdiction (Richland County General Sessions Court, Richland County Common Pleas Court (as appellate authority over Richland County Magistrate's Court); and Richland County Magistrate's Court (at least twice)); in which the State has alleged three (3) separate and distinct crimes (Criminal Domestic Violence ("CDV"), Second Offense; CDV, First Offense; and Criminal Domestic Violence of a High and Aggravated Nature ("CDVHAN")) committed by Talkington. At the time of the within appeal, two (2) matters above (2015-GS-40-01723 charging CDVHAN and 2013A4010601092 charging CDV, First Offense) are pending, simultaneously, in both Richland County General Sessions Court and Richland County Magistrate's Court. This is so despite each of these docketed actions stemming from the exact same nucleus of operative facts. Additionally, the Circuit Court's Order subject to this appeal does not address, and Talkington has previously challenged over the better

[1] The Court of General Session has subject matter jurisdiction to issue injunctions where necessary to protect its proceedings. *Ex parte: The State-Record Co., Inc.*, 332 S.C. 346, 504 S.E.2d 592 (1998).

part of half a decade[2], the constitutionality of the State's actions[3] and their impact on Talkington's constitutional and due process rights.

3. By way of background:

   a. On July 11, 2011, Talkington was arrested and charged with CDV, Second Offense (Warrant I902097), a charge exclusively within the jurisdiction of the General Sessions Court (S.C. Code Ann. §16-25-20(B)(2)). Talkington consistently and correctly argued that there was no predicate CDV, First Offense conviction, such that the General Sessions Court would never have jurisdiction in the first place.

   b. Subsequent to a preliminary hearing being held (in Magistrate's Court), the State conceded that there was no predicate first offense conviction. The case was then assigned to a magistrate's level assistant solicitor. However, rather than following proper procedure, *to wit*: dismissing or deciding to "nolle prosse" the charge (over which the Court of General Sessions had no jurisdiction) and simply charging Talkington with CDV, First Offense, the State unilaterally "remanded" the case from General Sessions to Magistrate's Court, in clear violation of law, the directives of Court Administration, and the directives of the Supreme Court.[4]

   c. Talkington, through counsel, repeatedly made clear to the State that the procedure it was following was improper and that he would make the appropriate motion at the appropriate time.

   d. The matter was set for trial in Magistrate's Court on February 26, 2013. Talkington was advised by trial notice that, if he did not appear, he was subject to being tried and convicted in his absence. On February 26, 2015, Talkington

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[2] The delays in this case are through no fault of Talkington. Had the State followed the proper procedures from the inception, the case would be concluded. It is noteworthy that Talkington was even willing to have the matter tried before a judge alone, but the State insisted upon a jury trial.

[3] Including the State's current attempt to prosecute Talkington in two (2) different Courts (Richland County General Sessions Court and Richland County Magistrate's Court) at the same time.

[4] See Enclosure 1.

appeared. The State appeared for trial proclaiming its intent to proceed with the trial. A jury venire was qualified and a jury was selected. Thereafter, Talkington agreed to having his Motion to Dismiss heard upon the condition that it be as if the jury were sworn, such that jeopardy would attach. The Court (Judge Edmond) heard Talkington's Motion to Dismiss, and then dismissed the case over the State's objection. After dismissal of the case, the State repeatedly represented, verbally and in writing, that:

i. The State had engaged in (*ex parte*) communications with a Circuit Court Judge and that the case was being remanded;
ii. The State was appealing the dismissal of the case; and that
iii. The State had sought and/or was seeking an Attorney General's Opinion.

e. The State did not, in fact, appeal but failed to timely communicate that circumstance to Talkington or the Court. As a direct consequence, the retention time expired for preservation of the audio recording, transcript, and other pertinent record of the proceedings that led to the dismissal. In November of 2013, the State indicated that it had "decided to nolle prosse" the initial CDV, Second Offense charge against Talkington, and recharge him then on a statutory charge of CDV, First Offense – Warrant 2013A4010601092 (alleging the exact same facts/incident giving rise to the initial charge that had been dismissed). Talkington was re-arrested and jailed over a number of days during the Thanksgiving holiday weekend.

f. The "new" case was set for a pre-trial hearing in Magistrate's Court before Judge Stroman on July 24, 2014. Talkington argued that he was being subjected to Double Jeopardy and/or other constitutional violations, including violation of fundamental due process. Talkington submitted that the matter should be dismissed, or that the matter should be referred for disposition to the Magistrate Judge who issued the initial (and subsequent) warrant, since he was likely unaware of all of the circumstances. Alternatively, Talkington argued that the matter should be referred to the Magistrate Judge (Judge Edmond, who had initially dismissed the case) for a proper disposition and/or a making of a record.

The State agreed with the latter of Talkington's arguments. Judge Stroman ordered that the matter was to be referred to Judge Edmond.

g. On September 10, 2014, another pre-trial hearing was set, ostensibly to be heard before Magistrate Judge Edmond. However, instead of the matter being set before him (Judge Edmond), it was set before yet another Magistrate Judge. Instead of honoring the directive of Judge Stroman and referring the matter to Judge Edmond, that Magistrate ruled that the relief sought by Talkington could not be granted because the Magistrate's Court never had jurisdiction initially. From that ruling, Talkington appealed to the Circuit Court.

h. The matter was then heard by the late Circuit Court Judge Kinard on March 6, 2015. Judge Kinard determined that the matter should be remanded specifically to Magistrate Judge Edmond for the limited purpose of attempting to reconstruct a record. Otherwise, the Circuit Court retained jurisdiction.

i. Upon the Circuit Court directing that the matter be remanded for the limited purpose of attempting to reconstruct a record, the State had Talkington indicted for the General Sessions Offense of CDVHAN (arising out of the exact same, 2011 incident giving rise to the initial charge that had been dismissed and then recharged as a CDV, First Offense in November, 2013). Talkington was re-arrested (the third time for the exact same offense), booked, etc. on May 6, 2015. Talkington appropriately indicated his objection to the process to the State and to the lower Court.[5]

j. The matter was heard on September 9, 2015 and decided on October 12, 2015 in favor of the State by the lower Court (and Talkington's Motion for Reconsideration was denied on October 26, 2015 but not received by Talkington until November 9, 2015). However, the lower Court never fully addressed the implications of allowing the State to, in essence, prosecute Talkington in two Courts of varying jurisdictional authority for two (2) separately charged crimes arising out of the exact same nucleus of operative facts. Talkington contends that

[5] See Enclosure 2.

this is a (further) violation of his constitutional rights and that this Court should address the matter fully in the within appeal.

4. Alternatively, should the Court determine that the denial of Talkington's request for injunction and/or writs of prohibition and/or mandamus is not appealable, Talkington requests that this Court treat the within appeal as a petition to the appropriate Court for a writ of prohibition and/or mandamus.
5. There is a sufficient record available for purposes of this appeal, and should the matter not now be addressed, the State will be allowed to continue to circumvent the law, clear directives of Court Administration, and those of the Chief Justice of the Supreme Court.
6. Therefore, Talkington requests that the appeal be allowed to proceed or, in the alternative, that the Court treats the within appeal as a petition to the appropriate Court for a writ of prohibition. The issues herein are important to the administration of justice.

December 4, 2015

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ENCLOSURE 1

S.C. Code Ann. § 22-3-545

This document is current through all Legislation enacted in the 2014 Session

South Carolina Code of Laws Annotated > TITLE 22. MAGISTRATES AND CONSTABLES > CHAPTER 3. JURISDICTION AND PROCEDURE IN MAGISTRATES' COURTS > ARTICLE 5. CRIMINAL JURISDICTION

§ 22-3-545. Transfer of certain criminal cases from general sessions court.

(A) Notwithstanding the provisions of Sections 22-3-540 and 22-3-550, a criminal case, the penalty for which the crime in the case does not exceed five thousand five hundred dollars or one year imprisonment, or both, either as originally charged or as charged pursuant to the terms of a plea agreement, may be transferred from general sessions court if the provisions of this section are followed.

(B)

(1) The solicitor, upon ten days' written notice to the defendant, may petition a circuit court judge in the circuit to transfer one or more cases from the general sessions court docket to a docket of a magistrates or municipal court in the circuit for disposition. The solicitor's notice must fully apprise the defendant of his right to have his case heard in general sessions court. The notice must include the difference in jury size in magistrates or municipal court and in general sessions court. The case may be transferred from the general sessions court unless the defendant objects after notification by the solicitor pursuant to the provisions of this item. The objection may be made orally or in writing at any time prior to the trial of the case or prior to the entry of a guilty plea. The objection may be made to the chief judge for administrative purposes in the judicial circuit where the charges are pending, the trial judge, or the solicitor. Before impaneling the jury or accepting the guilty plea of the defendant, the trial judge must receive an affirmative waiver by the defendant, if present, of his right to have the case tried in general sessions court. The defendant must be informed that, if tried in general sessions court, the case would be tried in front of twelve jurors who must reach a unanimous verdict before a finding of guilty of the offense can be rendered in his case, and that if tried in magistrates or municipal court, the case would be tried in front of six jurors who must reach a unanimous verdict before a finding of guilty of the offense can be reached in his case. The defendant may waive any and all of the rights provided in this subsection, in writing, prior to the impaneling of the jury or the acceptance of the defendant's guilty plea.

(2) A case transferred to a magistrates or municipal court not disposed of in one hundred eighty days from the date of transfer automatically reverts to the docket of the general sessions court.

(C) All cases transferred to the magistrates or municipal court must be prosecuted by the solicitor's office. The chief magistrate of the county or the chief municipal judge of the municipality, upon petition of the solicitor, shall set the terms of court and order the magistrates and municipal judges to hold terms of court on specific times and dates for the disposition of these cases.

(D) Provision for an adequate record must be made by the solicitor's office.

(E) Notwithstanding another provision of law, all fines and assessments imposed by a magistrate or municipal judge presiding pursuant to this section must be distributed as if the fine and assessment were imposed by a circuit court pursuant to Sections 14-1-205 and 14-1-206. This section must not result in increased compensation to a magistrate presiding over a trial or hearing pursuant to this section or in other additional or increased costs to the county.

History

1992 Act No. 310, § 1; 1993 Act No. 174, § 1; 1994 Act No. 497, Part II, § 36K; 1994 Act No. 499, §§ 1, 2; 1995 Act No. 7, Part I, §§ 16, 21; 2000 Act No. 376, § 2; 2004 Act No. 214, § 1; 2012 Act No. 169, § 1, eff May 14, 2012.

2010-01

South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

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MEMORANDUM

TO: Magistrates and Municipal Judges

FROM: Robert L. McCurdy, Assistant Director

RE: Disposition of Cases Beyond Magistrate and Municipal Court Jurisdiction

DATE: April 8, 2010

Magistrates and municipal judges are sometimes asked to "handle" circuit court cases which have been "remanded" to them for disposition. Sometimes this is done as part of a plea bargain agreement in the Court of General Sessions. At other times, the attorneys "agree" that a civil case be tried in magistrate's court even though the amount in controversy exceeds $7,500.00. Chief Justice Toal has asked us to inform you of her specific instructions that magistrates and municipal judges should not hear cases outside their subject matter jurisdiction, even upon agreement of the parties. If you are ordered to dispose of such cases, you are asked to contact us immediately.

RLM/mhb

Cc: Solicitors
Circuit Court Judges

State v. Langford

Supreme Court of South Carolina

April 18, 2012, Heard: November 21, 2012, Filed

Opinion No. 27195

Reporter
400 S.C. 421; 735 S.E.2d 471; 2012 S.C. LEXIS 278

The State, Respondent, v. K.C. Langford, III, Appellant.

Subsequent History: Related proceeding at *State v. Phillips, 2012 S.C. Unpub. LEXIS 64 (S.C., Nov. 21, 2012)*
Rehearing denied by *State v. Langford, 2012 S.C. LEXIS 320 (S.C., Dec. 20, 2012)*
US Supreme Court certiorari denied by *Langford v. South Carolina, 2013 U.S. LEXIS 5561 (U.S., Oct. 7, 2013)*

Prior History: [***1] Appeal From Edgefield County. Appellate Case No. 2010-173128. William P. Keesley, Circuit Court Judge.

Disposition: AFFIRMED.

Core Terms

cases, general sessions, speedy trial, indictment, dockets, vested, days, speedy trial right, continuance, preserved, prepare, delays, separation of powers, courts, trial judge, partiality, prosecute, charges, issues, track, motion to dismiss, prosecutorial, appearance, infringes, violates, factors, amicus, arrest, roster, presumptively prejudicial

Case Summary

Procedural Posture

After a jury trial in the Edgefield County Circuit Court (South Carolina), defendant was convicted of armed robbery, kidnapping, first-degree burglary, and civil conspiracy. He appealed.

Overview

Defendant's case was not tried until nearly two years after his arrest. After his appeal was perfected, the state public defender association filed an amicus brief challenging the constitutionality of *S.C. Code Ann. § 1-7-330* (2005), which vested control of the criminal docket in the circuit solicitor. Although this issue had not been raised by defendant, the high court elected to address it because of its public importance. As *§ 1-7-330* was at odds with the court's inherent judicial power to control the order of its business, it violated the separation of powers principle embodied in *S.C. Const. art. I, § 8* and was unconstitutional. However, defendant did not suffer any prejudice from the solicitor's controlling when his case would be called for trial. It rejected his claim that the solicitor, part of the executive branch, engaged in judge-shopping, as there was no evidence the trial court ruled in favor of the State on various issues out of animus towards defendant or allegiance to the State. The two-year delay in bringing the case to trial did not violate defendant's constitutional right to a speedy trial because there was no evidence of any actual prejudice to his case.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Continuances

Governments > Courts > Authority to Adjudicate

HN1 The South Carolina Supreme Court has recognized that the authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants. *S.C. Code Ann. § 1-7-330* (2005), which vests control of the criminal docket in the circuit solicitor, is at odds with this intrinsically judicial power. The supreme court therefore holds that *§ 1-7-330* violates the separation of powers and therefore is unconstitutional.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Constitutional Issues

HN2 Constitutional questions must be preserved like any other issue on appeal.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN3 An issue must have been raised to and ruled upon to be preserved for review.

Criminal Law & Procedure > Appeals > Procedural Matters > Notice of Appeal

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN4 See S.C. App. Ct. R. 208(b)(1)(B).

Civil Procedure > Appeals > Amicus Curiae

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

Criminal Law & Procedure > Appeals > Procedural Matters > Notice of Appeal

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

HN5 S.C. App. Ct. R. 213 provide that an amicus brief shall be limited to argument of the issues on appeal as presented by the parties. Nevertheless, the South Carolina Supreme Court has considered arguments raised only by an amicus when they concern a matter of significant public interest. This exception to Rule 213 must be applied narrowly and only under the appropriate circumstances so as not to eviscerate the long-standing preservation requirements in the supreme court's jurisprudence.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

HN6 In reviewing the validity of a statute, the court is reluctant to find it unconstitutional. The court will therefore make every presumption in favor of its validity. The party challenging the statute bears the heavy burden of proving that its repugnance to the constitution is clear and beyond a reasonable doubt.

Constitutional Law > Separation of Powers

HN7 The South Carolina Constitution mandates that the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other. S.C. Const. art. I, § 8.

Constitutional Law > Separation of Powers

Governments > Local Governments > Employees & Officials

HN8 The only reference to government solicitors in the South Carolina Constitution is in the article creating the judicial department, S.C. Const. art. V, § 24. However, § 24 also provides that the general assembly shall provide by law for their duties. To that end, S.C. Code Ann. § 1-1-110 (2005) squarely places solicitors in the executive branch. Accordingly, the South Carolina Supreme Court concludes that solicitors are members of the executive branch.

Constitutional Law > Separation of Powers

HN9 A usurpation of powers exists, for purposes of the constitutional separation of powers doctrine, when there is a significant interference by one branch of government with the operations of another branch. This rule is not fixed and immutable, however, as there are grey areas which are tolerated in complex areas of government. There consequently is some overlap of authority and some encroachment to a limited degree. At its core, the doctrine therefore is directed only to those powers which belong exclusively to a single branch of government.

Constitutional Law > Separation of Powers

Governments > Courts > Authority to Adjudicate

HN10 A court's power to hear and decide cases carries with it the inherent power to control the order of its business. Setting the trial docket therefore is the prerogative of the court. S.C. Code Ann. § 1-7-330, on the other hand, states that preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. Vesting a member of the executive branch with the exclusive authority to perform an inherently judicial function unquestionably is a violation of separation of powers. This is not a grey area where some encroachment can be tolerated, but rather a complete invasion into the court's domain.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Courts > Authority to Adjudicate

Governments > Local Governments > Employees & Officials

HN11 By providing that the preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial, the plain and unambiguous language of *S.C. Code Ann. § 1-7-330* cannot be squared with judicial oversight of prosecutorial power. *Section 1-7-330* must therefore yield. Accordingly, the South Carolina Supreme Court holds *§ 1-7-330* is unconstitutional beyond a reasonable doubt.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN12 A criminal defendant has a due process right to have his case heard by a fair and impartial judge. Due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. Similarly, he has the right to have a judge assigned to his case in a manner free from bias or the desire to influence the outcome of the proceedings. On the other hand, he does not have a right to any particular procedure for the selection of the judge. Thus, there is no right to have one's judge selected randomly, nor is there one to have a case heard by any particular judge. Moreover, a defendant has no vested right in the order in which cases are assigned for trial. Accordingly, a state may use any method to select judges so long as it is impartial and not geared towards influencing the trial's outcome.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Criminal Law & Procedure > Trials > Defendant's Rights > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN13 The presumption that judges are unbiased is more than a pious hope. Furthermore, the right to a judge who is free from the mere appearance of partiality is not part of due process at all. Hence, an appellate court will not presume the trial judge is partial simply because he was selected by the prosecutor, for adopting such a rule would conflate the appearance of partiality with actual partiality. In order to be entitled to relief, a defendant therefore must establish actual partiality and prejudice on the part of the judge.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN14 Whether a statute may be unconstitutional in other circumstances has no bearing on whether it has been unconstitutionally applied in the case at hand.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Exceptions to Failure to Object

HN17 An appellant does not waive an objection by not presenting it to trial court when it would be futile to do so.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

HN15 See *U.S. Const. amend. VI*.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

HN16 See *S.C. Const. art. I, § 14*.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

HN18 The Supreme Court of the United States has deemed the right to a speedy trial generically different from any of the other rights enshrined in the U.S. Constitution for the protection of the accused. This is due in large part to the reality that delay is not an uncommon defense tactic and deprivation of the right to a speedy trial does not per se prejudice the accused's ability to defend himself. More important, however, is the vagueness of this right, which makes it nearly impossible to determine when it has been violated. Indeed, the various procedural safeguards built into the criminal process require that it move at a deliberate pace. Thus, there is no fixed point when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

HN19 The constitutional right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. A speedy trial does not mean an immediate

one; it does not imply undue haste. for the State, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay. Because of the vagaries of this unavoidably ad hoc inquiry, the U.S. Supreme Court has acknowledged that it can do little more than identify some of the factors for courts to examine. These factors include the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered. None of these factors is either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Instead, they are all related and must be considered along with such other circumstances as may be relevant. Thus, the Supreme Court has created a balancing test which is a rejection of inflexible approaches and weighs the conduct of both the prosecution and the defense. If a court concludes that this right has been violated, dismissal of the charges is the only possible remedy.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN20 A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN21 An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Evidence > Inferences & Presumptions > Presumptions

HN22 In reviewing a claim of a violation of the constitutional right to a speedy trial, an appellate court begins its analysis with the triggering mechanism of a speedy trial claim, which is the length of the delay. It should not even examine the remaining factors until there is some delay which is presumptively prejudicial. The clock starts running on a defendant's speedy trial right when he is indicted, arrested, or otherwise officially accused, and therefore the appellate court is to include the time between arrest and indictment. However, even the length of time necessary to trigger the full inquiry is necessarily dependent upon the peculiar circumstances of the case. Thus, a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Evidence > Inferences & Presumptions > Presumptions

HN23 With respect to a claim of a violation of the constitutional right to a speedy trial, depending on the nature of the charges, the lower courts have generally found post-accusation delay presumptively prejudicial at least as it approaches one year.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Criminal Law & Procedure > ... > Speedy Trial > Statutory Right > Excludable Time Periods

HN24 With respect to a claim of a violation of the constitutional right to a speedy trial, different weights should be assigned to different reasons for the delay. A deliberate attempt by the State to delay the trial as a means of impairing the accused's ability to defend himself should be weighted heavily against the government. Neutral reasons, which could include overcrowded dockets or negligence, are weighted less heavily but still count against the State because it bears the ultimate responsibility for these circumstances. Delays occasioned by the defendant, however, weigh against him. This is not only in accord with the reality that delay may be a defense tactic, but it is also a recognition that a defendant should not be able to procure a dismissal of the charges against him due to delays he caused.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > General Overview

Criminal Law & Procedure > ... > Speedy Trial > Statutory Right > Excludable Time Periods

HN25 A defendant who causes delays in his trial should not be able upon return to the trial court to reap the reward of dismissal for failure to receive a speedy trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

HN26 The third factor in the Barker v. Wingo analysis is the defendant's assertion of his constitutional right to a speedy trial. The failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

HN27 The U.S. Supreme Court has identified three different types of prejudice the constitutional right to a speedy trial seeks to prevent: (1) oppressive pretrial incarceration; (2) anxiety stemming from being publicly accused of a crime; and (3) the possibility that the accused's defense will be impaired due to the death or disappearance of witnesses or the loss of memory with the passage of time. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

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

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

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

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

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

Opinion by: HEARN

Opinion

[**475] [*428] **JUSTICE HEARN:** We must determine whether *Section 1-7-330 of the South Carolina Code* (2005), which vests control of the criminal docket in the circuit solicitor, violates the separation of powers principle embodied in *Article 1, Section 8 of the South Carolina Constitution*. [*429] In 1980, *HN1* we recognized that "[t]he authority of the court to grant continuances and [***2] to determine the order in which cases shall be heard is derived from its power to hear and decide cases." *Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)*. "This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." *Id.* The time has now come for us to acknowledge that *section 1-7-330* is at odds with this intrinsically judicial power. We therefore hold that *section 1-7-330* violates the separation of powers and therefore is unconstitutional. However, because K.C. Langford, III, the Appellant herein, suffered no prejudice as a result of *section 1-7-330*, we affirm his convictions.

FACTUAL/PROCEDURAL BACKGROUND

On August 14, 2008, Ji Quing Chen, along with his son, Li Guan Xin, and wife, Li Ai Ming, left the Chinese restaurant they own in Johnston, South Carolina, shortly after 10:00 p.m. and headed home. With them was a black bag containing the day's earnings. When they arrived home, Ji Quing stayed outside to water some plants while his wife and son entered the house. As he was tending to his garden, three men wearing masks came out from the bushes, forced him to the ground, [***3] hit him, and took his wallet. Concerned that his father had not yet come inside, Li Guan stepped out onto the porch to check on him. Once he was outside, the men forced Li Guan to the ground and asked where the restaurant's money was. He told them it was in the house, and one of the men went inside to find it. That man returned shortly with the black bag, and all three of them ran off. Because the men wore masks, the victims were unable to provide a useful description to law enforcement. Moreover, it does not appear the men left any forensic evidence during the commission of these crimes.

Investigators eventually met with Alvin Phillips, who in a statement dated September 28, 2008, confessed that he was

one of the men who robbed the family. He further identified his cousin and Langford as the two remaining suspects. In the absence of an eye-witness identification and forensic evidence, Phillips' statement was the only evidence implicating [*430] the other men. Langford was arrested shortly thereafter on October 3, and he was indicted for criminal conspiracy a few months later in December 2008. However, [**476] he was not indicted for armed robbery, first degree burglary, and kidnapping until May 5, [***4] 2010, nineteen months following his arrest. He would remain incarcerated until his trial.

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

On June 29, 2009, nearly nine months after he was taken into custody, Langford made what appears to be a *pro se* motion for a speedy trial. A [***5] hearing was held on May 17, 2010, and Langford renewed his motion at that time and joined it with a motion to dismiss. [1] This was the date on which the State originally planned to try Langford and his co-defendant, with Phillips serving as a cooperating witness who would testify against them. But the State received word that morning that Phillips decided to invoke his privilege against self-incrimination and would not testify at the trial. Allegedly, this was due to pressure Langford and Phillips' cousin continued to exert on him even after his transfer. Phillips now would not be available for cross-examination at trial, and the [*431] State therefore could not use his prior statement implicating Langford. [2] Because the State's case against Langford rested almost exclusively on Phillips' statement, without it the State effectively was prevented from going forward.

To remedy the situation, the State needed to try Phillips first or, presumably, obtain a guilty plea with the attendant waiver of his right to remain silent. However, Phillips had retained new counsel just eight days prior to the hearing who understandably was not ready to move forward during that term of court. The State therefore requested a continuance so it could proceed against Phillips at the next available opportunity, at which point it would then be able to try Langford. Although the court was "deeply concerned" by the twenty-month delay in the case, it found that "[n]one of this delay was occasioned by any impropriety on the part of the State." It also recognized that, for all intents and purposes, the State could not proceed in the absence of Phillips' testimony. The court accordingly denied Langford's motion to dismiss and granted the State a continuance. However, cognizant of the delays which had already accrued, the court ordered the State to try Langford within nine months, and it further directed that Langford [***7] could renew his motion at that time if the State failed to do so. [3]

Phillips pled guilty in August 2010 and once again agreed to testify for the State. Langford's case was then called for trial on September 7, 2010, nearly two years after his arrest. [4] The jury convicted Langford on all [*477] four charges, and the court sentenced him to twenty years' imprisonment on the armed robbery, kidnapping, and first degree burglary charges, and [*432] five years' imprisonment on the civil conspiracy charges, all to run concurrently. This appeal followed. After the appeal was perfected, the court of appeals granted permission for the South Carolina Public Defender Association to file an amicus curiae brief

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

[2] *See Bruton v. United States*, 391 U.S. 123, 126, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) [***6] (holding the *Confrontation Clause* bars the admission of a statement of a co-defendant who remains silent which is to be used against the other defendant at trial).

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

[4] This was only the second General Sessions term of court for Edgefield County after May 17, 2010, [***8] the term in which the State received the continuance.

challenging the constitutionality of section 1-7-330. This case subsequently was certified to us pursuant to Rule 204(b), SCACR.

ISSUES PRESENTED

I. Is section 1-7-330 constitutional?

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

LAW/ANALYSIS

I. SECTION 1-7-330

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

HN2 Constitutional questions must be preserved like any other issue on appeal. In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001). As the State correctly notes, this issue was not raised to or ruled upon by the circuit court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating *HN3* an issue must have been raised to and ruled upon to be preserved for review). Moreover, Langford's statements of the issue on appeal do not raise this question. *See* Rule 208(b)(1)(B), SCACR (*HN4* "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal"). Indeed, this issue is only before us by way of the amicus brief filed by the Public Defender Association, and [***9] *HN5* our rules provide that an amicus brief "shall be limited to argument of the issues on appeal *as presented by the parties*" Rule 213, SCACR (emphasis added):

> Nevertheless, we previously have considered arguments raised only by an amicus when they concern a "matter of significant public interest." Ex parte Brown, 393 S.C. 214, 216, [*433] 711 S.E.2d 899, 900 (2011). We stress that this exception to Rule 213 must be applied narrowly and only under the appropriate circumstances so as not to eviscerate the long-standing preservation requirements in our jurisprudence. However, we have little trouble concluding that who decides when criminal defendants in this State should be tried is a matter of significant public interest as envisioned by *Brown*. [5] We therefore proceed to analyze the constitutionality of section 1-7-330.

Section 1-7-330 states in full:

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

HN6 In reviewing the validity of this statute, we are reluctant to find it unconstitutional. *See* In re Treatment and Care of Luckabaugh, 351 S.C. 122, 134, 568 S.E.2d 338, 344 (2002). We will therefore make every presumption in [**478] favor of its validity. *Id.* The party challenging the statute bears the heavy [***11] burden of proving that "its repugnance to the constitution is clear and beyond a reasonable doubt." *Id.* at 134-35, 568 S.E.2d at 344.

The Public Defender Association contends section 1-7-330 violates the separation of powers by impermissibly conferring judicial responsibilities upon a member of the executive [*434] branch. *HN7* Our constitution mandates that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8.

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

State ex rel. McLeod v. McInnis, 278 S.C. 307, 312, 295

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[5] We do not take lightly the dissent's concern that by addressing the merits of the Public Defender Association's argument we offend our rules of preservation, but remain convinced this issue falls easily within our exception. Moreover, if the issue is truly unpreserved, as the dissent contends, we are at a loss to understand why the dissent addresses the merits. Preservation in South [***10] Carolina is a threshold issue and if an issue is unpreserved, it is not properly before the court and the merits should not be reached. *See* State v. Roach, 377 S.C. 2, 3, 659 S.E.2d 107, 107 (2008) (noting that issues not preserved for review should not be addressed); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (same).

S.E.2d 633, 636 (1982).

We begin by ascertaining where in our system of government solicitors fall. We note *HN8* the only [***12] reference to solicitors in the constitution is in the article creating the judicial department. *See* S.C. Const. art. V, § 24. However, this section also provides that "[t]he General Assembly shall provide by law for their duties." *Id.* To that end, Section 1-1-110 of the South Carolina Code (2005) squarely places solicitors in the executive branch. Moreover, the Solicitors' Association of South Carolina unequivocally states in its own amicus brief defending section 1-7-330, "The Office of Solicitor is part of the Executive Branch of our state government." Accordingly, we conclude solicitors are members of the executive branch.

We must next determine whether vesting solicitors with the exclusive authority to prepare the dockets for General Sessions is an infringement on the court's powers. *HN9* "[A] usurpation of powers exists, for purposes of [the] constitutional separation of powers doctrine, when there is a significant interference by one branch of government with the operations of another branch." 16A Am. Jur. 2d Constitutional Law § 246. This rule is not fixed and immutable, however, as there are grey areas which are "tolerated in complex areas of government." McInnis, 278 S.C. at 313, 295 S.E.2d at 636 (1982). [***13] There consequently is "some overlap of authority and some encroachment to a limited degree." *Id.*; *see also* 16A Am. Jur. 2d [*435] Constitutional Law § 244 ("Separation of powers does not require that the branches of government be hermetically sealed; the doctrine of separation requires a cooperative accommodation among the three branches of government; a rigid and inflexible classification of powers would render government unworkable."). At its core, the doctrine therefore "is directed only to those powers which belong exclusively to a single branch of government." 16A Am. Jur. 2d Constitutional Law § 246.

As we noted at the outset of this opinion, *HN10* a court's power to hear and decide cases "carries with it the inherent power to control the order of its business." Williams, 274 S.C. at 279, 262 S.E.2d at 883. Setting the trial docket therefore is the prerogative of the court. Section 1-7-330, on the other hand, states, "Preparation of the dockets for general sessions courts shall be *exclusively vested in the circuit solicitor* and the solicitor shall determine the order in which cases on the docket are called for trial." (emphasis added). Vesting a member of the executive branch with the exclusive [***14] authority to perform an inherently judicial function unquestionably is a violation of separation of powers. *See* Hagy v. Pruitt, 331 S.C. 213, 222, 500 S.E.2d 168, 173 (Ct. App. 1998) (Howard, J., concurring) ("[A] statute which attempts to exercise ultimate authority over the inherent power of the court is unconstitutional because it violates the separation of powers doctrine . . . ."), *aff'd*, 339 S.C. 425, 529 S.E.2d 714 (2000). This is not a grey area where some encroachment can be tolerated, but rather a complete invasion into the court's domain.

[**479] The dissent, however, takes a different approach and contends that finding the statute unconstitutional will somehow permit courts to infringe upon the powers of the solicitor. [6] [*436] Nevertheless, the dissent correctly acknowledges that the discretion afforded the solicitor "does not mean that the solicitor's authority is unrestrained by judicial oversight. The trial judge has the ultimate authority to determine whether a case called by the solicitor will be tried at a particular juncture." Thus, it appears the dissent truly believes the court has always had the authority to control the docket. In light of that position, we are at a loss as [***15] to why it believes our holding today infringes on the solicitor's power.

In fact, we believe our holding is consistent with the dissent's support for the importance of judicial restraint on prosecutorial power. However, unlike the dissent, we recognize that *HN11* by providing that the "[p]reparation of the dockets for general sessions courts shall be *exclusively vested in the circuit solicitor* and the *solicitor shall* determine the order in which cases on the docket are called for trial" (emphasis added), the plain [***16] and unambiguous language of section 1-7-330 cannot be squared with this oversight. The statute must therefore yield.

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

II. PREJUDICE

Our determination that section 1-7-330 violates separation of powers is not dispositive of Langford's appeal. To warrant reversal, Langford must demonstrate that he

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

sustained prejudice as a result of the solicitor setting when his case was called for trial. As this case comes to us, two different forms of prejudice are alleged: (1) Langford was denied his right to due process because *section 1-7-330* permitted the solicitor to judge shop, and (2) Langford was denied his right to a speedy trial. We disagree that Langford's trial suffered from any infirmities as a result of *section 1-7-330* and therefore affirm his convictions.

A. Due Process

We consider first whether the power impermissibly granted to the solicitor by *section 1-7-330* enabled him to [*437] violate Langford's due process rights. Although many different violations are discussed anecdotally, the only due process violation said to have occurred in this case is that *section 1-7-330* permitted the solicitor to select the judge [***17] who would preside over Langford's trial. Although we question the extent to which *section 1-7-330* actually permitted judge shopping, we proceed assuming *arguendo* that it did so.

HN12 A criminal defendant has a due process right to have his case heard by a fair and impartial judge. *See Schweiker v. McClure, 456 U.S. 188, 195, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982)* ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."). Similarly, he has the right to have a judge assigned to his case "in a manner free from bias or the desire to influence the outcome of the proceedings." *Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987)* (Kozinksi, J.). On the other hand, he does not have a right to "any particular procedure for the selection of the judge." *Id.* Thus, there is no right to have one's judge selected randomly, nor is there one to have a case heard by any particular judge. *Sinito v. United States, 750 F.2d 512, 515 (6th Cir. 1984)*. Moreover, a defendant has "no vested right in the order in which cases are assigned for trial." *Levine v. United States, 182 F.2d 556, 559 (8th Cir. 1950)*.

Accordingly, a state may use any method to select judges so long as it is impartial and [***18] not geared towards influencing [**480] the trial's outcome. Without a doubt, permitting solicitors—who represent a party in the case—to select the judge raises the specter of partiality and calls the validity of the entire system into question. *See United States v. Pearson, 203 F.3d 1243, 1257 (10th Cir. 2000)* ("In our view, if the assignment of a case to an individual judge should not be based on 'the desire to influence the outcome of the proceedings,' then allowing a prosecutor to perform that task raises substantial due process concerns." (quoting *Cruz, 812 F.2d at 574*)); *Tyson v. Trigg, 50 F.3d 436, 442 (7th Cir. 1995)* (Posner, J.) ("The practice of allowing the prosecutor to choose the . . . trial judge is certainly unsightly, as the Indiana court of appeals opined; it does lack the appearance of impartiality . . . ."); *Cruz, 812 F.2d at 574* ("The suggestion that the case assignment process is being manipulated for motives other [*438] than the efficient administration of justice casts a very long shadow, touching the entire criminal justice system . . . ."). Some courts have therefore struck down their systems of permitting prosecutors to select judges. *State v. Simpson, 551 So. 2d 1303, 1304 (La. 1989)* [***19] (doing so on due process grounds); *McDonald v. Goldstein, 83 N.Y.S.2d 620, 625, 191 Misc. 863 (Sup. Ct. 1948)* (holding that granting prosecutors control over choosing the judge threatens the independence of the judiciary); *see also Rosemond v. Catoe, 383 S.C. 320, 326 n.1, 680 S.E.2d 5, 8 n.1 (2009)* ("We acknowledge the practice of the prosecutor selecting the trial judge is inappropriate and troubling.").

However, as Judge Posner wrote, *HN13* "[t]he presumption that judges are unbiased is more than a pious hope." *Tyson, 50 F.3d at 439*. Furthermore, "[t]he right to a judge who is free from the mere *appearance* of partiality is not part of due process at all." *Id. at 442*. Hence, we will not presume the judge is partial simply because he was selected by the prosecutor, for adopting such a rule would "conflate[] the appearance of partiality with actual partiality." *Francolino v. Kuhlman, 224 F. Supp. 2d 615, 636 (S.D.N.Y. 2002), aff'd, 365 F.3d 137 (2d Cir. 2004)*; *see also Pearson, 203 F.3d at 1262* ("[W]e cannot presume that a federal judge selected by the prosecutor will be his agent or henchman."). In order to be entitled to relief, a defendant therefore must establish actual partiality and prejudice on the [***20] part of the judge. *Pearson, 203 F.3d at 1263* (finding prosecutorial selection of judge harmless error because there was no evidence the judge decided any issue in a manner more favorable to the prosecution than other judges would have); *Tyson, 50 F.3d at 442* (holding permitting the prosecutor to choose the judge "does lack the appearance of impartiality[,] but that is all, so far as the record of this case discloses, and it is not enough"); *Sinito, 750 F.2d at 515* ("Even when there is an error in the process by which the trial judge is selected . . . the defendant is not denied due process as a result of the error unless he can point to some resulting prejudice."); *Francolino, 224 F. Supp. 2d at 636* ("While the Court agrees that the former system gave the appearance of partiality, maintaining that Justice Snyder was in fact partial is a separate matter."); *State v. Huls, 676 So. 2d 160, 167 (La. Ct. App. 1996)* (noting a [*439] showing of prejudice was required even after the Louisiana Supreme Court struck down the practice of prosecutorial selection of judges on due process grounds).

The only support offered for the allegation of bias by the presiding judge in this case, Judge Keesley, is [***21] the simple fact that he ruled in favor of the State on previous issues that arose. Yet, there is not a shred of evidence that he did so out of any animus towards Langford or allegiance to the State. The contention that a judge was biased *solely* because he ruled against a defendant is untenable and insulting towards the court, and it would set a dangerous precedent were we to sanction it. Moreover, Judge Keesley ordered in May 2010 that the State try the case within nine months, and he would have ordered the State to do so sooner but for scheduling conflicts. Simply put, there is no suggestion that Judge Keesley conducted Langford's trial in anything but a fair and impartial fashion. We therefore find no evidence of actual prejudice in the record.

Undoubtedly, *section 1-7-330* leaves room for abuses which can deny a defendant due process. Not only can the State theoretically pick a judge to preside because he will favor [**481] the prosecution, but the Public Defender Association's brief contains very troubling examples of abuses occurring in other cases and in other forms. Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, [***22] *32 Am. J. Crim. L. 325, 351-69 (2005)* (detailing the potential ills of prosecutorial control of the docket). Perhaps this is why South Carolina until today has stood alone amongst our sister states in permitting the prosecutor to control the docket. *See id. at 327* (noting that South Carolina is the only state with such a system). Of course, the vast majority of solicitors operate the criminal courts in a fair and even-handed manner, and the abuses cited generally are not associated with any nefarious intent. They do, however, inevitably stem from the nature of a system that allows the prosecution to control the criminal docket.

Nevertheless, we cannot equate the potential for abuse with it actually occurring in this case. Indeed, ***HN14*** whether the statute may be unconstitutional in other circumstances has no bearing [*440] on whether it has been unconstitutionally applied in the case at hand. *See Simcon v. Hardin, 339 N.C. 358, 451 S.E.2d 858, 871 (N.C. 1994)* (holding prosecutorial control of the docket is facially constitutional and must be attacked on an as-applied basis). We must therefore determine whether Langford's rights were infringed based on the record before us. Under the lens of the only deprivation [***23] alleged to have occurred in this case, we find no evidence that Langford's due process rights were violated even if the State was able to select Judge Keesley to preside.

B. Speedy Trial

Langford also contends the State's dilatory practices in calling his case deprived him of his right to a speedy trial. [7] The *Sixth Amendment to the United States Constitution* provides, in part, ***HN15*** "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." *U.S. Const. amend. VI*. Similarly, the South Carolina Constitution guarantees that***HN16*** "[a]ny person charged with an offense shall enjoy the right to a speedy . . . trial." *S.C. Const. art. I, § 14*. The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense. *State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)*.

HN18 The Supreme Court of the United States has deemed this right "generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Barker v. Wingo, 407 U.S. 514, 519, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*. This is due in large part to the reality that "[d]elay is not an uncommon defense tactic" and "deprivation of the right to a speedy trial does not per se prejudice the [*441] accused's ability to defend himself." *Id. at 521*. More important, however, is the vagueness of this right, which makes it nearly impossible to determine when it has been violated. *Id.* Indeed, the various procedural safeguards built into the criminal process require that it "move at a deliberate pace." *United States v. Ewell, 383 U.S. 116, 120, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966)*. Thus, "there [***25] is no fixed point . . . when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial." *Barker, 407 U.S. at 521*.

Accordingly, ***HN19*** "[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Beavers v. Haubert, 198 U.S. 77, 87, 25 S. Ct. 573, 49 L. Ed. 950 (1905)*. Stated differently, "[a]

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[7] We reject the State's argument that this issue is not preserved for review due to Langford's failure to renew his motion to dismiss when his case was called for trial. In its May 2010 order denying Langford's original motions, the court required the State to try [***24] the case within nine months. It then said Langford could renew his motion to dismiss at that time if the State failed to do so. Because nine months had not yet passed when the case was tried, it would have been futile for Langford to raise the issue again. *See State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994)* (finding ***HN17*** appellant did not waive an objection by not presenting it to circuit court because it would have been futile to do so).

speedy trial does not mean an immediate one: it does not imply undue haste. for the [S]tate, too, is entitled to [**482] a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay." *Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)*. Because of the vagaries of this unavoidably ad hoc inquiry, the Supreme Court has acknowledged that it "can do little more than identify some of the factors" for courts to examine. *Barker, 407 U.S. at 530*. These factors include the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered. [8] *Id.*; *see also Waites, 270 S.C. at 107, 240 S.E.2d at 653* (recognizing the same factors apply under South Carolina law).

The Supreme Court has counseled further that none of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker, 407 U.S. at 533*. Instead, they are all related and must be considered along "with such other circumstances as may be relevant." *Id.* Thus, the Supreme Court created a balancing test which is a rejection of "inflexible approaches" and weighs "the conduct of both the prosecution [*442] and the defense." *Id. at 529-30*. If a court concludes that this right has been violated, dismissal of the charges "is the only possible remedy." *Id. at 522*.*HN20* A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. *See State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct. App. 2007)* (applying abuse of discretion standard to speedy trial claim), *rev'd on other grounds, 384 S.C. 504, 682 S.E.2d 820 (2009)*; *see also State v. Redding, 274 Ga. 831, 561 S.E.2d 79, 80 (Ga. 2002)* (noting the inquiry [***27] is whether court abused its discretion under *Barker*). *HN21* "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008)*

HN22 We begin our analysis with the "triggering mechanism" of a speedy trial claim, which is the length of the delay. *Barker, 407 U.S. at 530*. We should not even examine the remaining factors "[u]ntil there is some delay which is presumptively prejudicial." *Id.* The clock starts running on a defendant's speedy trial right when he is "indicted, arrested, or otherwise officially accused," and therefore we are to include the time between arrest and indictment. *United States v. MacDonald, 456 U.S. 1, 6, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982)*. The Supreme Court was quick to remind in *Barker*, however, that even the length of time necessary to trigger the full inquiry "is necessarily dependent upon the peculiar circumstances of the case." *407 U.S. at 530-31*. Thus, a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case. *Id. at 531*; *see also id. at 531 n.31* [***28] (suggesting that a delay of nine months could have been presumptively prejudicial in a case that depended on eyewitness testimony (citing *United States v. Butler, 426 F.2d 1275, 1277 (1st Cir. 1970)*)).

In the case before us, Langford's speedy trial clock began when he was arrested on October 3, 2008, and ran until he was tried twenty-three months later on September 7, 2010. Moreover, while the charges against him were serious, the factual proof was not complicated. Thus, this length of time is [*443] presumptively prejudicial and triggers the remaining *Barker* inquiry. *See Waites, 270 S.C. at 108, 204 S.E.2d at 653* (holding a two-year-and-four-month delay in a prosecution for assault and battery of a high and aggravated nature and for pointing and presenting a firearm implicated the rest of the *Barker* analysis); *see also Doggett v. United States, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)* (*HN23* "Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."); *Brooks v. State, 285 Ga. 246, [**483] 674 S.E.2d 871, 873-74 (Ga. 2009)* (finding a nineteen-month delay presumptively prejudicial in trial for murder, aggravated assault, and [***29] firearms offenses).

Turning to the second element, the Supreme Court has stated that *HN24* "different weights should be assigned to different reasons" for the delay. *Barker, 407 U.S. at 531*. A deliberate attempt by the State to delay the trial as a means of impairing the accused's ability to defend himself "should be weighted heavily against the government." *Id.* Neutral reasons, which could include overcrowded dockets or negligence, are "weighted less heavily" but still count against the State because it bears the ultimate responsibility for these circumstances. *Id.*; *see also State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007)* ("The ultimate responsibility for the trial of a criminal defendant rests with the State."). Delays occasioned by the defendant, however, weigh against him. *Vermont v. Brillon, 556 U.S. 81, 129 S. Ct. 1283, 1290, 173 L. Ed. 2d 231 (2009)*. This is not only in accord with the reality that delay may be a defense tactic, but it is also a recognition that a defendant should not be

[8] The circuit court did not cite to *Barker* or explicitly apply [***26] any of these factors. However, the court's analysis largely tracks the substance of the test, and no party has contended the court did not use the proper legal framework when ruling on Langford's motions.

able to procure a dismissal of the charges against him due to delays he caused. *See id.*

The State advances two different reasons for the delays in Langford's prosecution. First, it argues that the initial twenty-month [***30] delay in indicting him was due to its inability to have a "meaningful" conversation with the victims because it could not find an interpreter. Although we are not persuaded the State used its best efforts to secure an interpreter, there is no evidence that it intentionally tarried in finding one. At most, the State was negligent, and this is a neutral reason for delay which does not weigh heavily against it.

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

The State consequently needed to first procure a waiver of Phillips' right to remain silent, and then it could try Langford using the statement. Because Phillips' attorney was not ready to [***31] proceed during that term of court, however, a continuance was required for this to happen. [9] From that point on, the State moved with reasonable haste given the few General Sessions terms scheduled for Edgefield County during that time. We agree with the circuit court that the delays already incurred are troubling, but we cannot ignore the fact that this additional delay is the product of Langford's efforts to spoil the State's evidence. Therefore, we will not count it against the State. *See United States v. Loud Hawk, 474 U.S. 302, 316, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986)* (holding *HN25* a defendant who causes delays in his trial "should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial").

HN26 The third [***32] factor in the *Barker* analysis is the defendant's assertion of his right to a speedy trial. While Langford first filed what seems to be a *pro se* speedy trial motion in June 2009, the record suggests that he never sought a ruling on it until the May 2010 hearing. Moreover, while Langford did file a *pro se* motion for a speedy trial/motion to dismiss days after the court issued its May 2010 order, it was never [*445] ruled upon and he never renewed his motion when the case was called for trial. Although it may have been futile for him to raise the issue again from an [**484] error preservation standpoint, the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *See Barker, 407 U.S. at 532*.

Finally, we must consider the prejudice Langford suffered. *HN27* The Supreme Court has identified three different types of prejudice the right to a speedy trial seeks to prevent: (1) oppressive pre-trial incarceration; (2) anxiety stemming from being publicly accused of a crime; and (3) the possibility that the accused's defense will be impaired due to the death or disappearance of witnesses or the loss of memory with the passage of time. *Id.* "Of these, the most [***33] serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Langford was in jail for nearly two years pending trial. "The time spent in jail awaiting trial has a detrimental impact on the individual" through its attendant job loss, disruption of family life, and encouragement of "idleness." *Id.* While we are cognizant of not minimizing the deleterious effects of lengthy pre-trial incarceration, the two-year delay in bringing this case to trial does not amount to a constitutional violation in the absence of any actual prejudice to Langford's case. [10] *See State v. Kennedy, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000)* ("While Kennedy may have been slightly prejudiced by the twenty-six month pretrial incarceration, the more important question is whether he was prejudiced because the delay impaired his defense."). To that end, Langford has not demonstrated how his own defense was prejudiced by the delay. Although he does argue the final delay enabled the State to secure Phillips' testimony and thereby bolster its case against him, he fails to recognize that the State only had to do so because of his interference. [***34] [*446] Moreover, he cannot point to

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

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

any evidence of anxiety caused by the stigma of being accused of these crimes.

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

CONCLUSION

For the foregoing reasons, we hold section 1-7-330 is unconstitutional under the separation of powers clause of our constitution. The General Sessions docket will henceforth be managed pursuant to the administrative order issued in conjunction with this opinion. Nevertheless, we affirm Langford's convictions because he has not shown he was prejudiced by the solicitor's control over calling his case for trial. In particular, we find no due process violation or a denial of his right to a speedy [***35] trial.

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

Dissent by: PLEICONES

Dissent

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

As explained below, the constitutionality of the statute is not before us. It is axiomatic that this Court will not address a constitutional issue unless it is necessary to a resolution of the case. *E.g.*, S.C. Dep't of Soc. Servs. v. Cochran, 356 S.C. 413, 589 S.E.2d 753 (2003). It is also axiomatic that we sit to review the lower court's order based upon the issues properly presented by the parties for our consideration. *E.g.*, Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). Constitutional issues are not exempt from issue preservation requirements. *Id.* Further, our rule restricts amicus to the issues presented by the parties, Rule 213, SCACR: to strike down a statute as unconstitutional based upon an amicus brief is tantamount to a *sua sponte* declaration. Unless a statute [**485] infringes upon our jurisdiction, we may not *sua sponte* declare it unconstitutional. *See* State v. Keenan, 278 S.C. 361, 296 S.E.2d 676 [*447] (1982). We should not decide [***36] the constitutionality of § 1-7-330 on this record.

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

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

> Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case. Both the South Carolina Constitution [***37] [footnote 5 citing S.C. Const. art. V, § 24] and South Carolina case law [footnote 6 citing McLeod v. Snipes, 266 S.C. 415, 223 S.E.2d 853 (1976)] place the unfettered discretion to prosecute solely in the prosecutor's hands. The Attorney General as the State's chief prosecutor may decide when and where to present an indictment, and may even decide whether an indictment should be sought. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion . . . .
>
> State v. Thrift, 312 S.C. 282, 291-292, 440 S.E.2d 341, 346-347 (1994) cited with approval in State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998); State v. Burdette, 335 S.C. 34, 40, 515 S.E.2d 525, 528 (1999).

Further, "[a]ll the authorities agree that, in the exercise of a discretionary official act, an executive officer cannot be restrained, [*448] coerced, or controlled by the judicial department." State v. Ansel, 76 S.C. 395, 57 S.E. 185 (1907).

Subject to the limitations discussed below, the solicitor has the discretion to decide [***38] when to prosecute and how to prosecute a case. This does not mean that the solicitor's authority is unrestrained by judicial oversight. The trial judge has the ultimate authority to determine whether a case called by the solicitor will be tried at a particular juncture. *See* State v. Mikell, 257 S.C. 315, 185 S.E.2d 814 (1971) ("In

the calling of cases for trial the solicitor has a broad discretion in the first instance, and the trail [sic] judge has a broad discretion in the final analysis."). This is so because the trial judge has "the inherent power to control the order of [the court's] business to safeguard the rights of litigants" through her discretion to grant a continuance. *Williams v. Bordon's Inc., 274 S.C. 275, 262 S.E.2d 881 (1980)*. In *Williams*, the Court held the General Assembly violated the separation of powers doctrine by enacting a statute which purported to limit the court's discretion to grant a continuance in any case which involved an attorney-legislator as "attorney of record, witness, or otherwise." If we read *§ 1-7-330* as preventing a trial judge from exercising her discretion to require a solicitor to place a case upon a future docket if necessary to safeguard [***39] the rights of the defendant, then we would render the statute unconstitutional. Such an interpretation would create a separation of powers issue, not between the executive and the judiciary, but between the legislative branch and the judicial branch since we would find the statute unconstitutionally infringes upon judicial authority. *Williams, supra.* Nothing in *§ 1-7-330* affects the court's inherent authority to safeguard litigants' rights; rather, the statute represents the reasonable delegation of preparing [**486] the general sessions docket to the solicitor.

The solicitor is a party to every general sessions proceeding, and has the information and resources necessary to determine when a case is ready to be called. If the solicitor is perceived to be unlawfully delaying the call of a case, the defendant has available the remedy of a speedy trial motion: If it is called with undue haste, the defendant may seek a continuance. It is only logical to have the solicitor initially set the docket since he knows the status of the law enforcement investigation, of the examination of the forensic evidence, of any codefendant's [*449] case, and of the defendant's other charges. *See State v. Mikell, supra* ("A [***40] prosecuting attorney normally has many cases for disposition. He must plan ahead to expedite the work of the court. . . ."). The solicitor bears the burden of proof in every case and should not ordinarily be compelled to call his case before he is ready. *Id.*("solicitor has authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, **subject to the broad discretion of the trial judge.**")(emphasis supplied). In my opinion, there is no separation of powers problem with *§ 1-7-330*. *E.g., State v. Thrift, supra.*

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

In my opinion, however, we [***41] cannot reach the constitutionality of that statute in this case. Were we to reach the issue, I would interpret the statute in a way that does not offend the separation of powers doctrine. If the Court is nonetheless determined to declare *§ 1-7-330* unconstitutional, then we must both deal with our precedents and describe the new system in sufficient detail that the parties most intimately involved in the process can implement the necessary changes.

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

RE: DISPOSITION OF CASES IN GENERAL SESSIONS

ORDER

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

[*450] IT IS ORDERED that:

Cases in General Sessions Court shall proceed as follows:

(A) All cases shall be assigned to a 180 day track consistent with the Uniform Differentiated Case Management Order which is incorporated herein and made a part hereof by reference. The Chief Judge for Administrative Purposes (CJAP) may entertain motions to remove any case [***42] from the track and establish a scheduling order where appropriate.

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

(1) General Docket. The General Docket consists of all pending General Sessions matters. Absent the grant of a speedy trial motion, the Solicitor shall have the initial responsibility for designating when a case is ready for trial. Upon determining that a

case is ready for trial, the Solicitor shall file with the Clerk of Court a "NOTICE OF COURT DOCKETING" on a form prescribed by the Supreme Court and shall serve all parties and counsel of record. Upon receiving such notice, the Clerk shall place the case on the Court Docket and the matter may be called for [**487] trial any time after thirty (30) days from the filing of the NOTICE OF COURT DOCKETING. The Court Docket consists of all matters that the Solicitor has deemed ready for trial. Once the case is placed on the Court Docket, the Court assumes the responsibility for setting a trial date and the Clerk, under the direction and supervision of the CJAP, shall publish a trial roster [***43] from the Court Docket of cases subject for trial at least twenty-one (21) days before each term of court. Publication shall be effected once the Clerk makes the trial roster available in the Clerk's office or on the Clerk's internet site. The Clerk shall also distribute the trial roster to those attorneys listed upon it by Fax, US Mail, hand delivery, or electronic delivery. Cases on the trial roster not reached for trial will be subject to being called for the next two terms of court before being republished. It is the responsibility of each defense attorney to notify the [*451] defendant that the case is scheduled for trial and to remind the defendant of the right and obligation to be present at trial. Motions for continuance or other relief from a published trial roster shall be made in accordance with *Rule 7, SCRCrimP*. The CJAP or presiding judge shall rule on the motion.

(2) Nothing herein shall affect the Court's ability to schedule motions or other pretrial proceedings as may be appropriate, or the right of the CJAP to add cases to any trial roster or designate cases for a day certain as the CJAP deems appropriate, subject to the notification requirements set forth in paragraph B(1), [***44] above.

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

(1) Judicial Docket. If the Solicitor has not filed a NOTICE OF COURT DOCKETING in accordance with Paragraph (B) (1) above for any case more than one (1) year beyond its assigned track, it will be automatically transferred to the Judicial Docket, which the Clerk shall maintain separate and apart from the regular Court Docket. The CJAP will administer and supervise the Judicial Docket. The Solicitor must notify the Clerk within fifteen (15) days after expiration of this period of time of all cases that are in this category and furnish the following information: (1) Indictment number; (2) Defendant's name; (3) Date of Arrest; (4) Assigned Assistant Solicitor; (5) Defense Counsel; (6) Date of Indictment (True Bill); (7) Track expiration date; (8) Prior request(s) for continuance. The Clerk will maintain the Judicial Docket which will include this information.

(2) Upon placement on the Judicial Docket, the CJAP shall arrange for the scheduling of trial or other disposition of the case. Additionally, the CJAP may upon the request of any party transfer the case [***45] to the trial roster in accordance with Paragraphs (B) (1) and (2).

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

(D) Non-Track Cases:

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

(E) Old Case Disposition:

[**488] Any case, including non-track cases, pending four (4) or more years from the date of indictment by the Grand Jury shall be dismissed by the CJAP, unless the Solicitor shall show good cause why it should not be dismissed. Such dismissal is without prejudice, unless otherwise specified by the CJAP and the Solicitor shall have the right to re-present the matter to the Grand Jury. Before [***46] ordering dismissal, the Clerk of Court shall notify the Solicitor and the defendant of the Court's intention to dismiss the case. The Solicitor shall: (1) within ten (10) days of receiving the notice from the Court, notify the victim(s) in writing of the Court's intended disposition and invite the victim(s) to file a written response with the Solicitor within ten (10)

days: and (2) within thirty (30) days file a written response with the Court setting forth in detail the reasons, including the response(s) of the victim(s), why the case should not be dismissed and advising the court of the expected time of disposition. The defendant may submit a written response within thirty days of the Solicitor's filing. The CJAP may schedule a hearing, dismiss the case without a hearing, or take such further action as may be appropriate. Failure to respond as set forth herein will result in the matter being dismissed pursuant to this provision. If the Solicitor shows [*453] good cause, the case shall automatically be transferred to the Judicial Docket.

This order shall be effective February 4, 2013.

/s/ Jean H. Toal C.J.

/s/ Donald W. Beatty J.

/s/ John W. Kittredge J.

/s/ Kaye G. Hearn J.

Because I dissent [***47] from the opinion, I respectfully do not join in this order.

/s/ Costa M. Pleicones J.

November 21, 2012

Columbia, South Carolina

The Supreme Court of South Carolina

RE: DISPOSITION OF CASES IN GENERAL SESSIONS

ORDER

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

IT IS ORDERED that:

Cases in General Sessions Court shall proceed as follows:

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

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

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

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

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

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

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

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

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

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

(D) Non-Track Cases:

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

(E) Old Case Disposition:

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

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

This order shall be effective February 4, 2013.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

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

s/ Costa M. Pleicones J.

November 21, 2012

Columbia, South Carolina

2012-11-21-03

The Supreme Court of South Carolina

Re: Uniform Differentiated Case Management

ORDER

Pursuant to the provisions of Article V, § 4, of the South Carolina Constitution, and in furtherance of this Court's decision in *State v. Langford*, Op. No. 27195 (S.C. Sup. Ct. filed November 21, 2012),

IT IS ORDERED that all General Sessions cases shall be processed under the procedures set forth in this order. This Uniform Differentiated Case Management Order supplements the Disposition of Cases in General Sessions Order dated November 21, 2012, and supersedes all previous Administrative Orders implementing Differentiated Case Management in each county. This Order shall be effective February 4, 2013.

The Court directs that in each General Sessions case arising before the various Magistrates and Municipal Courts of the county, the following procedure is to be followed:

A. Bond Hearing

1. Magistrates and Municipal Judges are required to transmit warrants to the Clerk of Court within fifteen (15) days as required by Rule 3(a) of the South Carolina Rules of Criminal Procedure.

2. All Defendants will be screened by the Magistrate at their bond hearing to determine if they qualify for appointment of counsel. The screening will be conducted by the on-duty Magistrate for all Defendants, including those charged by other jurisdictions. If the Defendant qualifies, the Public Defender (PD) will be appointed provided the Defendant takes the necessary steps for that office to assume the case.

3. The Defendant will be served with a Notice of Initial Appearance at his or her bond hearing. The date of the Initial Appearance will be assigned in accordance with the schedule prepared and distributed by the Chief Judge for Administrative Purposes (CJAP). The Defendant's attendance at the initial appearance will be made a condition of that Defendant's bond by

noting this under Section III of a Personal Recognizance Bond Form or Section D of a Surety Bond Form. At the time that the initial appearance is set, the Judge setting the Defendant's bond will inform the Defendant, orally and in writing, of his or her right to a Preliminary Hearing.

B. Initial Appearance

1. The Initial and Second Appearances will be presided over by the CJAP or a Judge designated by the CJAP for that purpose. The Initial Appearance will be held and a roll call will be conducted as necessary to ensure attendance. The Clerk of Court is authorized to issue a bench warrant for any Defendant who fails to appear and has not been excused by the CJAP.

2. There will be no continuances of the Initial Appearance.

3. A preliminary hearing must be requested in writing on or before the Initial Appearance date.

4. The following issues will be addressed at the Initial Appearance:

a. If a Defendant qualifies for Court-appointed counsel and has not retained private counsel by his or her initial appearance, the PD will continue to represent the Defendant.

b. If a Defendant qualifies for a PD but has retained private counsel prior to the initial appearance date, that attorney must file a general notice of representation with the Clerk of Court and serve a copy on the Solicitor's Office. The PD will be relieved of representation at that time.

c. If a Defendant did not qualify for a PD, and private counsel has been retained, a letter of representation must be filed with the Clerk of Court and served on the Solicitor's Office.

d. Unrepresented Defendants must apply for a PD at the Initial Appearance. The PD's Office will take applications and if approved, a PD will be assigned that day.

e. Defendants who remain unrepresented at or after the Initial Appearance must appear on their Second Appearance date and remain in court throughout that term until excused by the Court. These Defendants must appear for each successive term of court as required by their bond until their case is disposed.

f. Any mental health issues.

g. Any issues related to the analysis of drugs or other types of evidence.

h. Any other issue that may affect the timing of the disposition of the criminal case including issues related to conflicts of representation.

i. During the Initial Appearance the Solicitor may administratively dismiss case(s) without prejudice based upon insufficient evidence with which to prosecute. Within ten (10) days of such an administrative dismissal, the Solicitor's office shall notify the Clerk of Court of the dismissal based upon insufficient evidence and shall return the matter to law enforcement for further investigation. Administrative dismissals for this reason shall be coded by the Clerk of Court as a dismissal for insufficient evidence and should not be reported as a dismissal by the Solicitor.

5. In all cases where the Defendant is represented by the PD, the PD will assess the case prior to the Initial Appearance for possible conflicts of interest and resolve those conflicts readily identifiable on that date. The Clerk of Court will, upon Affidavit of Conflict, appoint the next attorney from the list of available attorneys and advise the Defendant of the identity of his or her attorney. The newly appointed counsel will also be notified on that date and a preliminary hearing will be automatically scheduled for the Defendant.

6. The Solicitor and Defendant's attorney should exchange discovery as early in this process as possible. Accordingly, when feasible, Defendant's attorney and the State will enter into negotiations concerning pleas at the Initial Appearance. Any plea offer(s) must be communicated in writing to Defendant or the Defendant's attorney at least fourteen (14) days prior to Defendant's Second Appearance and accepted or rejected in writing prior to Defendant's Second Appearance. Likewise, the decision not to negotiate or extend a plea offer shall be communicated to Defendant or the Defendant's attorney in writing by the Solicitor at least fourteen (14) days prior to Defendant's Second Appearance. Should the plea offer be accepted by the Defendant a written acceptance signed by the Defendant and the Defendant's attorney must be served on the Solicitor assigned to the case. All plea negotiation documents must be filed in the Office of the Clerk of Court upon issuance by the Solicitor or acceptance by the Defendant.

7. Not later than the Initial Appearance, the Solicitor will provide

discovery to Defendant or Defendant's attorney of record in all cases in which the appropriate motions have been filed with the Clerk of Court and served on the Solicitor's Office.

8. All law enforcement agencies are required to forward all existing case reports; investigative reports; and, incident reports, as well as other discovery, to the Solicitor's Office within thirty (30) days of a warrant being issued, but not later than fifteen (15) days prior to Defendant's Initial Appearance, if the Initial Appearance is less than thirty (30) days from the date the warrant is issued.

If the law enforcement agency fails to provide discovery within this deadline, the warrant(s) may be dismissed without prejudice by the CJAP or another Circuit Judge designated by him as his judicial representative.

Notification will be provided to the Defendant, or Defendant's attorney of record, and Defendant's bondsman that Defendant is not required to appear at the Initial Appearance when the warrants are dismissed. Prior to the issuance of another warrant after dismissal without prejudice of the original warrant for failure to timely comply with discovery transmittal, the requesting law enforcement agency must establish good cause for its initial failure to timely transmit discovery to the CJAP or to another Circuit Judge to whom that authority has been delegated by the CJAP. Failure to present good cause will result in the refusal to issue the second warrant. Application must be made to the CJAP before a new warrant is issued in a case initially dismissed for failure to provide timely discovery.

9. At the Initial Appearance all cases will be assigned to a 180 day track. The CJAP may entertain motions to remove any case from the track and establish a scheduling order where appropriate.

10. At the Second Appearance the court will inquire whether a matter is for plea or for trial. If the matter is a plea, the Court will assign a date and time for the plea hearing to be held. All sentencing sheets and other paperwork must be completed by the parties prior to the day the matter is set for a plea hearing. The plea affidavit must be completed by the Defendant, if self-represented, and by the Defendant and the Defendant's attorney prior to the time scheduled for the taking of the plea.

11. If the plea negotiations are unsuccessful at the Second Appearance the case will be scheduled for trial before one of the presiding General Sessions judges. Except for good cause shown to the CJAP, the CJAP must hear any plea taken after the case is scheduled for trial; or such information will be provided to the court as may be required by the CJAP prior to the taking of the plea.

12. Cases may be resolved at any time prior to any of the scheduled proceedings or the times allowed by the guidelines set out herein.

C. Preliminary Hearing

1. Preliminary hearings will be held at the appropriate Court issuing the charge against the Defendant.

2. Continuances of preliminary hearings may be granted only in extreme circumstances.

3. The Defendant or the Defendant's attorney must be present in order for a preliminary hearing to proceed. If a hearing has been requested in a case that involves an individual affiant, the failure of that affiant to appear and give testimony after notice, will result in the dismissal of the warrant upon motion for dismissal by the Defendant or defense counsel.

D. General Sessions Court Practice

Chambers Availability: The presiding Judges will be available from 9:00-9:30 AM on Tuesday through Friday of each General Sessions term to hold case status conferences with attorneys for the State and defense counsel. Either party may request conferences.

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

1. General Docket:

a. The General Docket consists of all pending General Sessions matters. Absent the grant of a speedy trial motion, the Solicitor shall have the initial responsibility for designating when a case is ready for trial. Upon determining that a case is ready for trial, the Solicitor shall file with the Clerk of Court a "NOTICE OF COURT DOCKETING" on a form prescribed by the Supreme Court and shall serve all parties and counsel of record. Upon receiving such notice, the Clerk shall place the case on the Court Docket and the matter may be called for trial any time after thirty (30) days from the filing of the NOTICE OF COURT DOCKETING. The Court Docket consists of all matters that the Solicitor has deemed ready for trial. Once the case is placed on the Court Docket, the Court assumes the responsibility for setting a trial date and the Clerk, under the direction and supervision of the CJAP, shall publish a trial roster from the Court Docket of cases subject for trial at least twenty-one (21) days

before each term of court. Publication shall be effected once the Clerk makes the trial roster available in the Clerk's office or on the Clerk's internet site. The Clerk shall also distribute the trial roster to those attorneys listed upon it by Fax, US Mail, hand delivery, or electronic delivery. Cases on the trial roster not reached for trial will be subject to being called for the next two terms of court before being republished. It is the responsibility of each defense attorney to notify the Defendant that the case is scheduled for trial and to remind the Defendant of the right and obligation to be present at trial. Motions for continuance or other relief from a published trial roster shall be made in accordance with Rule 7, SCRCrimP. The CJAP or presiding Judge shall rule on the motion.

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

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

2. Judicial Docket:

a. If the Solicitor has not filed a NOTICE OF COURT DOCKETING in accordance with Paragraph (D)(1)(a) above for any case more than one (1) year beyond its assigned track, it will be automatically transferred to the Judicial Docket, which the Clerk shall maintain separate and apart from the regular Court Docket. The CJAP will administer and supervise the Judicial Docket. The Solicitor must notify the Clerk within fifteen (15) days after expiration of this period of time of all cases that are in this category and furnish the following information: (1) Indictment number; (2) Defendant's name; (3) Date of Arrest; (4) Assigned Assistant Solicitor; (5) Defense Counsel; (6) Date of Indictment (True Bill); (7) Track expiration date; (8) Prior request(s) for continuance. The Clerk will maintain the Judicial Docket which will include this information.

b. Upon placement on the Judicial Docket, the CJAP shall arrange for the scheduling of trial or other disposition of the case. Additionally, the CJAP may

upon the request of any party transfer the case to the trial roster in accordance with Paragraphs (D)(1)(a) and (b).

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

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

4. Old Case Disposition: Any case, including non-track cases, pending four (4) or more years from the date of indictment by the Grand Jury shall be dismissed by the CJAP, unless the Solicitor shall show good cause why it should not be dismissed. Such dismissal is without prejudice, unless otherwise specified by the CJAP and the Solicitor shall have the right to re-present the matter to the Grand Jury. Before ordering dismissal, the Clerk of Court shall notify the Solicitor and the Defendant of the Court's intention to dismiss the case. The Solicitor shall: (1) within ten (10) days of receiving the notice from the Court, notify the victim(s) in writing of the Court's intended disposition and invite the victim(s) to file a written response with the Solicitor within ten (10) days; and (2) within thirty (30) days file a written response with the Court setting forth in detail the reasons, including the response(s) of the victim(s), why the case should not be dismissed and advising the court of the expected time of disposition. The Defendant may submit a written response within thirty (30) days of the Solicitor's filing. The CJAP may schedule a hearing, dismiss the case without a hearing, or take such further action as may be appropriate. Failure to respond as set forth herein will result in the matter being dismissed pursuant to this provision. If the Solicitor shows good cause, the case shall automatically be transferred to the Judicial Docket.

5. Defendant's Failure to Appear:

a. Ninety (90) days after a bench warrant is issued for a Defendant who fails to appear, the case will be administratively transferred to FAILURE TO APPEAR status and removed from the docket. The Clerk shall

transmit this information to Court Administration and that office shall remove the case from its list of active cases.

b. The case may be transferred from the FAILURE TO APPEAR DOCKET to active case status upon written request of the Solicitor to the Clerk of Court who shall restore the case and notify the S.C. Judicial Department of this restoration. The case shall then follow the disposition procedure set forth in Paragraphs (D)(1), (2), and (4).

s/Jean H. Toal C.J.

s/Donald W. Beatty J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

Because I dissent from the *State v. Langford* opinion, I respectfully do not join in this order.

s/Costa M. Pleicones J.

November 21, 2012
Columbia, South Carolina

ENCLOSURE 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
STATE,	)	Docket Numbers: 2015-GS-40-01723; 2014-CP-40-07362; 2013A4010601092; and I902097
v.	)	
BRIAN TALKINGTON,	)	**MOTION TO DISMISS, TO QUASH, FOR INJUNCTIVE RELIEF, FOR A WRIT OF PROHIBITION, OR FOR A WRIT OF MANDAMUS**
Defendant.	)	

Defendant (hereinafter, "Talkington") moves for the relief requested herein:

BACKGROUND FACTS

1. On July 11, 2011, Talkington was arrested and charged with Criminal Domestic Violence ("CDV") 2nd Offense (Warrant I902097), a charge exclusively within the jurisdiction of the General Sessions Court (S.C. Code Ann. §16-25-20(B)(2).
2. Talkington consistently argued that there was no predicate CDV 1st Offense conviction such that the General Sessions Court would not have jurisdiction in the first place.[1]
3. Subsequent to a preliminary hearing being held, the State conceded that there was no predicate first offense conviction. The case was then assigned to a magistrate's level assistant solicitor. However, rather than following proper procedure, *to wit*: dismissing or deciding to "nolle prosse" the charge (over which the Court of General Sessions had no jurisdiction) and simply charging Talkington with CDV 1st Offense, the State unilaterally "remanded" the case from General Sessions to Magistrate's Court.[2]
4. Talkington repeatedly made clear to the State that the procedure it was following was improper and that he would make the appropriate motion at the appropriate time.[3]

[1] CDV 1st Offense is, by statute, exclusively within the jurisdiction of the Magistrate's Court.
[2] Ex. 1. Attached: Email of February 7, 2012.
[3] Ex. 2. Attached Letter of June 14, 2012 and Email of February 22, 2013.

5. The matter was set for trial in Magistrate's Court on February 26, 2013. Talkington was advised by trial notice that, if did not appear, he was subject to being tried and convicted in his absence.
6. On February 26, 2015Talkington appeared. The State appeared for trial proclaiming its intent to proceed with the trial. A jury venire was qualified and a jury was selected.
7. Thereafter, Talkington agreed to having his Motion to Dismiss heard upon the condition that it be as if the jury were sworn, such that jeopardy would attach. The Court (Judge Edmond) heard Talkington's Motion to Dismiss, and then dismissed the case over the State's objection.
8. After dismissal of the case, the State repeatedly represented, verbally and in writing, that:
    a. The State had engaged in (*ex parte*) communications with a Circuit Court Judge and that the case was being remanded;[4]
    b. The State was appealing the dismissal of the case;[5] and that
    c. The State had sought and/or was seeking an Attorney General's Opinion.[6]
9. The State did not, in fact, appeal but failed to timely communicate that circumstance to Talkington or the Court.[7] As a direct consequence, the retention time expired for preservation of the audio recording and other record of the proceedings that led to the dismissal.
10. In November of 2013, the State indicated that it had "decided to nolle prosse" the initial CDV charge against Talkington, and recharge him then on a statutory charge of CDV 1st Offense – Warrant 2013A4010601092 (alleging the same facts/incident giving rise to the initial charge that had been dismissed).[8]
11. The "new" case was set for a pre-trial hearing in Magistrate's Court before Judge Stroman on July 24, 2014. Talkington argued that he was being subjected to Double Jeopardy and/or constitutional violations. Talkington submitted that the matter should be dismissed, or that the matter should be referred for disposition to the Magistrate Judge who issued the initial (and subsequent) warrant, since he was likely unaware of all of the

[4] Ex. 3. Emails of February 27, 2013
[5] Ex. 4. Emails of May 2, 2013
[6] Ex. 5. Email of June 12, 2014.
[7] Likewise, the State's representation that it had sought an Attorney General's Opinion was not accurate. AG Opinions are public records. No such opinion was sought.
[8] Ex. 6. Emails of November 13 and 18, 2013

circumstances. Alternatively, Talkington argued that the matter should be referred to the Magistrate Judge (Judge Edmond, who had initially dismissed the case) for a proper disposition and/or a making of a record. The State agreed with the latter of Talkington's arguments. Judge Stroman ordered that the matter was to be referred to Judge Edmond.

12. On September 10, 2014, another pre-trial hearing was set, ostensibly before Magistrate Judge Edmond. However, instead of the matter being set before him (Judge Edmond), it was set before yet another Magistrate Judge. Instead of honoring the directive of Judge Stroman and referring the matter to Judge Edmond, that Magistrate ruled that the relief sought by Talkington could not be granted because the Magistrate's Court never had jurisdiction initially.[9] From that ruling, Talkington appealed to the Circuit Court.
13. The matter was then heard by Circuit Court Judge Kinard on March 6, 2015. Judge Kinard determined that the matter should be remanded specifically to Magistrate Judge Edmond for the limited purpose of attempting to reconstruct a record.[10] Otherwise, the Circuit Court retained jurisdiction.
14. Upon the Circuit Court directing that the matter be remanded for the limited purpose of attempting to reconstruct a record, the State had Talkington indicted for the General Sessions Offense of CDV High and Aggravated Nature ("CDVHAN") (arising out of the same, 2011 incident giving rise to the initial charge that had been dismissed and then recharged as a CDV 1st Offense in November, 2013). The State has indicated that it intends to "dismiss" the charge remanded to the Magistrate's Court, thus depriving the Circuit Court of appellate jurisdiction, and have Talkington re-arrested (for a third time for the same offense), booked, etc. on May 6, 2015.[11]
15. Talkington has indicated his objection to the State and to this Court.[12]

RELIEF REQUESTED

16. This Court should quash the indictment and determine that the State is collaterally estopped from prosecuting this case.

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[9] This conclusion was at odds with standard trial notices – that if Talkington did not appear he was subject to being convicted in his absence.
[10] Ex. 7. Order of Judge Kinard filed April 21, 2015.
[11] Ex. 8. Emails of April 13, 2015.
[12] Ex. 9. Emails of May 1, 2015.

17. In the alternative, this Court should dismiss this case with prejudice.
18. In the alternative, this Court should enjoin the State from attempting to usurp the Order of Judge Kinard.
19. In the alternative, this Court should issue a Writ of Prohibition that forbids the General Sessions Court from hearing any attempted prosecution of the CDVHAN charge pending a resolution of the remand to Summary Court and the resolution of the appeal before the Circuit Court.
20. In the alternative, this Court should issue a Writ of Mandamus directing the State to cease attempted prosecution of the CDVHAN charge pending a resolution of the remand to Summary Court and the resolution of the appeal before the Circuit Court.

ARGUMENTS

Talkington submits the following arguments, each in the alternative:

I. Quash the Indictment based on collateral estoppel.

The Indictment filed April 10, 2015 is the State's (at least) third attempt to perfect a charge relative to the exact same conduct occurring on July 4, 2011. It is also (at least) the third different charge the State has referred against Talkington (CDV 2nd Offense, CDV 1st Offense, and now CDVHAN), arising out of the exact same nucleus of operative facts.

The U.S. Supreme Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), held that the principle of collateral estoppel is embodied in the double-jeopardy protections afforded under the Fifth Amendment of the U.S. Constitution. Its application in our adversary system of justice "means simply that when an issue ... has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443; *see State v. Hewins*, 409 S.C. 93.

When Judge Edmond dismissed the case, Defendant was effectively acquitted of the charge. Because the initial charge was dismissed after jeopardy attached, the State should be collaterally estopped from attempting further, successive prosecution against Talkington. This is especially true where the State inaccurately represented that it was appealing the dismissal of the case. Accordingly, without an appeal by the State, such a

ruling was and is a valid and final judgment. The doctrine of collateral estoppel further applies to bar the State from relitigating the issue.

Compounding this tragic comedy of errors is the unassailable fact that the State's conduct and repeated misrepresentations about the status of the initial case are the very reason that there is no record of the proceedings before Judge Edmond. The State repeatedly represented that it was appealing, but utterly failed to perfect an appeal or otherwise take adequate steps to preserve a record.[13] Such a record would conclusively set forth the circumstances under which the initial charge against Talkington was dismissed after jeopardy attached. Talkington has an inability to produce the critical evidence and findings because the State procured the destruction of the evidence reflecting on the disposition and constitutional claims. Given the power and resources of the State, a patently inequitable result should not be allowed.

II. Dismiss this case with prejudice.

At every procedural fork in the road, the State has taken the proverbial "wrong turn" and, while each of these missteps individually could be viewed as merely a failure to understand/appreciate proper procedure and constitutional safeguards, cumulatively there is every appearance of prosecutorial misconduct. Without having to so find, at this time, the State's actions appear to rise to the level of malicious, blatantly vindictive, prosecutorial misconduct, the Court can see that the State has, by its documented actions, caused the destruction of evidence which, if preserved, would be central to the arguments of, and exculpatory to, Talkington. Analogous reasoning under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and due process require that the case should be dismissed.

The Court may also dismiss the CDVHAN on the grounds of collateral estoppel in that the State has repeatedly represented to the Courts that the charge against Talkington was, at most, a CDV 1st Offense. Moreover and/or alternatively, the Court may dismiss the CDVHAN on the grounds of collateral estoppel in that the CDV 1st

[13] Whether the State acted intentionally or was negligent in depriving the Courts of necessary information to make a disposition decision need not be determined conclusively in this proceeding. What is incontrovertible is that the State's conduct is the reason that there is no record, and the State's current, overt attempt to deprive the Circuit Court of jurisdiction over this matter is unjustifiable.

Offense has no elements that the CDVHAN does not, and it has already been judicially determined that the State will not be able to get to a jury on an element (i.e. CDV) of CDVHAN. The CDV 1st Offense statute, S.C. Code Ann. § 16-25-20(A) elements are to: "(1) cause physical harm or injury to a person's own household member; or (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." The CDVHAN statute, S.C. Code Ann. § 16-25-65(A) elements include "a person who violates Section 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death." (emphasis added).

It is elementary that the State can attempt to pursue a lesser charge when a greater charge has been dismissed, but not the other way around. This is true because some element of the greater charge has already been found lacking as a matter of law. Here, based on the prior dismissal after jeopardy attached, the violation of S.C. Code Ann. § 16-25-20(A) has already been judicially determined to be lacking as an element. Therefore, the State cannot proceed on a CDVHAN prosecution and the case should be dismissed.

III. Injunction.

Whether the State has bad intentions or not, it has every appearance that the State is attempting to dismiss a case which the Circuit Court has remanded to the Magistrate's Court in an attempt to circumvent the Circuit Court's jurisdiction and the very result Judge Kinard's Order sets forth. The reason the State would wish to do so is equally as disappointing as it is clear: if the State can simply dismiss the underlying case, Talkington will not be able to advance his constitutional arguments. Under the State's theory, it would then have the unfettered ability to get a third "bite at the apple", having procured the unavailability of the records that would succinctly prove that the State's case against Talkington was dismissed and concluded with finality.

An injunction is necessary to protect Talkington's legal rights and because the actions of the State create, and have created, definite, substantial, continuing injury. That injury has already occurred, occurs presently, and the threat of continued injury in the future is imminent. As an Active Duty Servicemember, Talkington faces certain, irreparable harm by virtue of the State's misconduct if an injunction is not granted. Talkington will likely succeed on the merits of the litigation in that he will likely win an appeal in which there is no record because of the State's misconduct and misrepresentations.

At present, there is an inadequate remedy at law and an injunction, temporary and/or permanent, is necessary to protect Talkington's rights and to protect him from the continual harm caused by the State's conduct until such time as an adequate remedy at law can be had. The Court should enjoin the State from proceeding with prosecuting the CDVHAN indictment and allow the matter to be remanded to Judge Edmond as outlined in Judge Kinard's Order. Otherwise, the State will have prevented his Order from having any effect.

IV. Writ of Prohibition.

The individual justices and all judges of "courts of record" have the power to issue writs of prohibition. S.C. Const. Ann. Art. V, § 20.

Prohibition is one of the common law extraordinary writs directed to a judge or other official to command or prevent performance of a specified action. It prevents encroachment, excess, or improper assumption of jurisdiction or acting in excess of legitimate powers. *Ex parte Jones*, 160 S.C. 63. It is well settled that a writ of prohibition will also lie to prevent a "usurpation" of jurisdiction, as well as "to prevent some great outrage upon the settled principles of law and procedure." *id.*

In this case, the Court has the authority, and Talkington requests that the Court to act to prevent the improper prosecution through prosecutorial mechanisms amounting to a usurpation of jurisdiction of the Circuit Court and/or creating great outrage. The consequent damages to Talkington are clear: allowing the State to proceed in this manner subjects him to a third attempt to take his liberties after it was determined with finality in the first instance that the State could not do so. Should the Court find that an injunction

will not grant an adequate or applicable remedy, the Court should consider granting a Writ of Prohibition.

V. Writ of Mandamus.

Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy. *Littlefield v. Williams*, 343 S.C. 212; *Willimon v. Greenville*, 243 S.C. 82.

A writ of mandamus is a coercive writ that orders a public official to perform a ministerial duty. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30. Mandamus will issue only to compel a public official to perform a mandatory legal duty. *Redmond v. Lexington County School Dist. No. Four*, 314 S.C. 431. The primary purpose of a writ of mandamus is to enforce an established right and a corresponding imperative duty created or imposed by law. *Littlefield.* When the legal right is doubtful, or the performance of duty rests in discretion, or when there is another adequate remedy, a writ of mandamus cannot rightfully be issued. *In the Interest of Lyde*, 284 S.C. 419.

Here, the Court has the authority, and Talkington requests that the Court direct the State to cease attempted prosecution of the CDVHAN charge pending a resolution of the remand to Magistrate's Court and resolution of the appeal. Such a ruling by this Court should be considered a ministerial function and should not be considered a matter of discretion where a writ of mandamus would be inappropriate. A cursory review of the tortured history of this case reveals that it has been so tormented, not because of any conduct of Talkington, but directly due to conduct of the State.

CONCLUSION

From its inception nearly four years ago, this matter has been mishandled by the State. What might have been viewed as minor mistakes have collectively "snowballed" into a complete miscarriage of justice by, *inter alia*, the State's repeated and fundamental procedural missteps.

The Constitution, the South Carolina Code of Laws, and case law make clear that there is a process that must be followed if the State wishes to attempt to take away someone's freedom. That process does not vest the State with the power to ignore constitutionally mandated separation of powers and accuse a person of a crime, definitively lose a case at the trial level,

procure the destruction of the pertinent part of that record, then attempt successively to use the lack of the record against the person.

Accordingly, Talkington asks this Court to grant him the relief requested herein.

Truslow & Truslow Law Firm

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May 6, 2015

EX. 1

Neal Truslow

From: Saquisha Tobin <TobinS@rcgov.us>
Sent: Tuesday, February 07, 2012 8:05 AM
To: Neal Truslow
Cc: Sheila Mims
Subject: RE: State v. Talkington

Neal,

After doing some research, I remanded this case because it's not a CDV 2nd. He was charged in CO with domestic violence, but he pled to harassment and trespassing, even though he's on probation here for CDV. I spoke with the magistrate CDV prosecutor and told her about the information you provided me regarding Dr. Gates. I've copied her on this email, in case you want to contact her. Her number is 576-2302. Also, just want to inform you that one of the JAG officers at Ft. Jackson left me a message yesterday. I forwarded it to Sheila to contact him so she can update you on that once she speaks to him. It was very nice working with you.

Sheila, if you want to contact Dr. Gates, Neal can give you her number.

Thanks,

Saquisha O. Tobin
Assistant Solicitor
Fifth Judicial Circuit

1701 Main Street, Suite 302 • PO Box 192 (29202)
Columbia, SC 29201
Phone: 803.576.1811 • Fax: 803.576.1718

From: Neal Truslow [mailto:NealTruslow@truslowlaw.com]
Sent: Friday, January 20, 2012 3:21 PM
To: Saquisha Tobin
Cc: AmandaHilley@truslowlaw.com; 'Mackenzie Woodward'
Subject: State v. Talkington

Saquisha:

Thanks again for meeting with me today.

As I indicated, our firm has spoken to Dr. Gates (who has accepted an assignment in Hawaii) regarding this matter and she has indicated that the information that she would provide (essentially, only if subpoenaed due to her licensing and duties of confidentiality) would be problematic and that it would be in the best interest of all parties were she to remain "out of it".

Dr. Gates was a professional counselor at Ft. Jackson and knows both of the parties. Both the victim and defendant have confided in Dr. Gates. Were she called to testify, she may have to disclose that the victim had discussed the transfer of "benefits" from defendant to herself. As well, there is other "unhelpful" information out there and, simply put, it would be better for her not to come testify.

EX. 2

Truslow & Truslow

Attorneys At Law

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Physical Address:
914 Richland Street, Suite B-102
Columbia, SC 29201

Mailing Address:
P.O. Box 1466
Columbia, SC 29202

June 14, 2012

RE: State v. Brian Talkington
Warrant: I902097

(VIA HAND DELIVERY)
Dan Johnson, Esquire
Richland County Solicitor
P.O. Box 192
Columbia, SC 29202

Dear Solicitor Johnson:

This office has worked very closely with the assigned prosecutor, Sheila Mims, and based on the totality of the circumstances, we are requesting a meeting with you to discuss whether this case warrants a dismissal, without prejudice. There are some compelling issues and both sides need your considered experience and good judgment to help us reach a resolution in the ends of justice. Without giving you an exhaustive list, I have enclosed SSG Talkington's ERB, Certificate of Completion of Domestic Violence Training, and Public Service Time Sheet and more will be provided at our meeting.

At this point and given the concerns noted both Ms. Mims and this firm, dismissing the case with leave to restore will not prejudice Mrs. Talkington, and will not only be beneficial to the State of South Carolina in terms of valuable time and resources, but also allow a decorated soldier to continue to serve his Country and maintain his means of support.

Respectfully,

Neal D. Truslow

cc: Sheila Mims, Esquire (*via email*)
Brian Talkington (*via email*)

Neal Truslow

From: Neal Truslow <NealTruslow@truslowlaw.com>
Sent: Friday, February 22, 2013 10:23 AM
To: Sheila Mims; Douglas Truslow
Cc: Amanda Hilley; Mackenzie Woodward
Subject: RE: Talkington

Sheila:

Mackenzie is going to pick up the photos and 911 paperwork this morning – we have a CD of the 911 call.

The only other thing we need is a dismissal... As previously indicated on a number of occasions, we have considerable concerns relative to the State pursuing this case at this point/in this manner. Please understand that (and as I've reiterated) this is in no way intended to be critical of you – decisions were made by the State, and you are apparently simply charged with trying the case, with no discretion. We are not asking for a continuance.

That said, and at the risk of being redundant, we continue to believe that the arrest warrant should have been initially dismissed (with a secondary benefit of allowing the Colorado matter to be resolved), and then SSG Talkington could be (re)charged if the State wished to do so. We could then dispose of this matter without the complications that exist. Of course, I respect the State's position and recognize that reasonable minds may differ on the issue.

It still puzzles me that Christie Talkington is adamant to pursue this matter as a CDV knowing SSG Talkington's compelling defense and knowing full well that a conviction will adversely impact her (and the children) from a financial perspective. That said, and unless I hear something else from you, I suppose we'll have to show up on Monday with a briefcase and will deal with all the issues then. Hopefully, it'll be dismissed, but...

Have a nice weekend.

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

Truslow & Truslow, P.A.
Phone: 803.256.6276
Fax: 803.256.7659
nealtruslow@truslowlaw.com

Physical Address:
914 Richland Street, Ste. B-102
Columbia, SC 29201

Mailing Address:
PO Box 1465
Columbia, SC 29202

EX. 3

Neal Truslow

From: Neal Truslow <NealTruslow@truslowlaw.com>
Sent: Wednesday, February 27, 2013 9:16 AM
To: Sheila Mims; Douglas Truslow
Cc: Amanda Hilley; Mackenzie Woodward
Subject: RE: Talkington

Sheila:

Please excuse the minor delay. You apparently sent a text to my phone last evening, but I was home with my family. I'm sure you understand. I'm just now getting into the office this morning to see your email.

As to the content of your text and email request, as we have previously stated and with all due respect, we do not think the process works that way. That said we recognize that the prosecution now faces legal hurdles, difficult choices, etc. We had suggested a number of ways to avoid those problems, to no avail. While we remain disappointed that we were not able in court to see eye to eye or to reason together in a way that certainly would be beneficial to all concerned, I am told that it "comes with the territory" (especially in criminal cases) as emotions unfortunately sometimes can get the better of some of us.

Perhaps now is not the time to reiterate the viable options, but we remain willing to discuss them again if the State is willing. When things settle down a bit, and other cases that temporarily have been put on hold can be addressed, can we meet? We've got an impending briefing deadline in a Fourth Circuit criminal appeal, and my dad is involved in the federal "Bloods" case that needs some immediate attention. However, we would like to discuss the case with you as soon as is mutually convenient. What about next Thursday or Friday?

PS. After preparing this, I got a voicemail on my phone indicating you had or were having a GS judge "remand" the case today – to be tried this morning. Again, with all due respect, we do not think that is proper. At a minimum, we would have a right to notice and to be heard; we do not believe that an *ex parte* "remand order" is appropriate. If the State decides/has decided to make such an application, it is at its own peril. We are not trying to be inordinately difficult, rather we believe that there is a proper legal course that must be followed.

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

Truslow & Truslow, P.A.
Phone: 803.256.6276
Fax: 803.256.7659
nealtruslow@truslowlaw.com

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CONFIDENTIAL & PRIVILEGED

Unless otherwise indicated or obvious from the nature of the above communication, the information contained herein is attorney-client privileged and confidential information/work product. The communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic or otherwise, which you may have of this communication.

From: Sheila Mims [mailto:MimsSh@rcgov.us]
Sent: Wednesday, February 27, 2013 8:31 AM
To: Neal Truslow; Douglas N. Truslow
Cc: Amanda Hilley; Mackenzie Woodward
Subject: RE: Talkington

We have a general sessions Judge who will remand the Talkington case first thing this morning. We could then try the case immediately after. Are you available to try the case today? The email is being sent to all kinds of people in your office so surely someone can get me an answer ASAP. My number is 576-2302 or 546-9648.

From: Neal Truslow [mailto:NealTruslow@truslowlaw.com]
Sent: Friday, February 22, 2013 1:26 PM
To: Sheila Mims; 'Douglas N. Truslow'
Cc: 'Amanda Hilley'; 'Mackenzie Woodward'; Dan Johnson
Subject: RE: Talkington

Jury is not being selected on Monday?

From: Sheila Mims [mailto:MimsSh@rcgov.us]
Sent: Friday, February 22, 2013 11:50 AM
To: Neal Truslow; Douglas N. Truslow
Cc: Amanda Hilley; Mackenzie Woodward; Dan Johnson
Subject: RE: Talkington

Sorry – I meant I'll see you Tuesday at 8:30. Thanks!

From: Sheila Mims
Sent: Friday, February 22, 2013 11:37 AM
To: 'Neal Truslow'; 'Douglas N. Truslow'
Cc: 'Amanda Hilley'; 'Mackenzie Woodward'; Dan Johnson
Subject: RE: Talkington

Hi Neal

I don't really understand why you think the case should have been dismissed. There was definitely probable cause to make an arrest in this case. Mr. Talkington had committed this same crime previously in Colorado and was given a very generous sentence yet, allegedly, committed the same crime again. He is not being unduly prosecuted. And while I appreciate and respect his time in the military, it does not excuse this assault. It is not the State's fault for not dismissing the case because it adversely affected Mr. Talkington – it's his fault. I will see you on Monday.

EX. 4

Neal Truslow

From: Neal Truslow <NealTruslow@truslowlaw.com>
Sent: Thursday, May 02, 2013 2:02 PM
To: Sheila Mims
Cc: Amanda Hilley; Mackenzie Woodward
Subject: RE: TALKINGTON

Sheila:

Thank you for your email. Of course, a lot of what you've reported is information that we are unaware of. For example, we are not aware that the State has appealed.

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

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Phone: 803.256.6276
Fax: 803.256.7659
nealtruslow@truslowlaw.com

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Columbia, SC 29201

Mailing Address:
PO Box 1465
Columbia, SC 29202

From: Sheila Mims [mailto:MimsSh@rcgov.us]
Sent: Thursday, May 02, 2013 8:50 AM
To: NealTruslow@truslowlaw.com
Subject: TALKINGTON

I have been contacted by the probation officer in Colorado. It seems there is an attorney named Karen Adams who is trying to convince Probation that Mr. TAlkington's case has been dismissed. To be very clear, this case has not been, nor

will be dismissed. It is currently being appealed and we are only waiting to hear where the appropriate venue is before we try this case.

Sheila Mims
Assistant Solicitor
Richland County
Criminal Domestic Violence Court

EX. 5

Neal Truslow

From: Sheila Mims <MimsSh@rcgov.us>
Sent: Thursday, June 12, 2014 10:37 AM
To: Neal Truslow
Subject: RE: lunch

You can call Dan Goldberg at 576-1800 and he can give you the details. It was my understand that we were going to appeal in the beginning and then Dan informed me that we would be asking for the AG opinion.

From: Neal Truslow [mailto:nealtruslow@truslowlaw.com]
Sent: Thursday, June 12, 2014 10:35 AM
To: Sheila Mims
Cc: Amanda Hilley
Subject: RE: lunch

Sheila:

That's news to me based on our previous correspondence.

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

Truslow & Truslow, P.A.
Phone: 803.256.6276
Fax: 803.256.7659
Website: http://www.truslowlaw.com/
Email: nealtruslow@truslowlaw.com

Physical Address:
914 Richland Street, Ste. B-102
Columbia, SC 29201

Mailing Address:
PO Box 1465
Columbia, SC 29202

From: Sheila Mims [mailto:MimsSh@rcgov.us]
Sent: Thursday, June 12, 2014 10:32 AM
To: Neal Truslow
Subject: RE: lunch

We didn't appeal – we asked for an opinion from the Attorney General. Dan Goldberg was handling that. I have no record of the proceedings from feb. 2013. And, for the record, we followed your advice from your brief and had Mr. Talkington's CDV 2nd dismissed and recharged. But we can hash that out later... ☺

From: Neal Truslow [mailto:nealtruslow@truslowlaw.com]
Sent: Thursday, June 12, 2014 10:29 AM
To: Sheila Mims
Cc: Amanda Hilley
Subject: RE: lunch

Sheila:

Let me check the calendar to confirm that week/those dates. That weeks is cutting things kind of close after this trip to Bogota with your boss... what are the next dates just in case?

I'm still convinced that too much happened the "wrong way" the first time for this matter to go through a trial, but it sounds as though your office feels adamantly the other way. I've tried to explain various legal defenses and objections, and I suppose we'll just have to agree to disagree. We still do not stipulate to jurisdiction, or that there is a constitutional basis to attempt to "retry" this case.

Can you confirm that the State does not have a record of the proceedings from February 2013? You had indicated that the State had appealed.

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

Truslow & Truslow, P.A.
Phone: 803.256.6276
Fax: 803.256.7659
Website: http://www.truslowlaw.com/
Email: nealtruslow@truslowlaw.com

Physical Address:
914 Richland Street, Ste. B-102
Columbia, SC 29201

Mailing Address:
PO Box 1465
Columbia, SC 29202

EX. 6

Neal Truslow

From: Neal Truslow <NealTruslow@truslowlaw.com>
Sent: Monday, November 18, 2013 9:39 AM
To: Sheila Mims
Cc: Amanda Hilley; Mackenzie Woodward
Subject: RE: talkington

Sheila:

Your email raises a lot of questions, especially in light of the magistrate judge's previous decision back in February. We thought that our role had ended, subject to the State's appeal. We will contact SSG Talkington and schedule an appointment. Assuming that we're retained for the purposes of a "new charge", we'll see what we can do.

I would respectfully suggest that any "new" warrant would need to go before Judge Davis (to avoid the appearance of Judge/forum shopping), would not be sought *ex parte*, and would not be sought without notice and an opportunity to be heard. That would seemingly inure to the benefit of all sides.

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

Truslow & Truslow, P.A.
Phone: 803.256.6276
Fax: 803.256.7659
nealtruslow@truslowlaw.com

Physical Address:
914 Richland Street, Ste. B-102
Columbia, SC 29201

Mailing Address:
PO Box 1465
Columbia, SC 29202

From: Sheila Mims [mailto:MimsSh@rcgov.us]
Sent: Wednesday, November 13, 2013 10:33 AM

To: NealTruslow@truslowlaw.com
Subject: talkington

Neal
My office has decided to nolle prosse Mr. Talkington's CDV 2nd warrant and recharge him with CDV 1st. I have been waiting on the investigator on the case to return from Pennsylvania where he has been in training. He will return on Thursday so I am hoping to have the new warrant ready sometime next week. I will let you know when the warrant has been signed by the Judge so that Mr. Talkington can turn himself in at the jail early in the day, get a PR bond and walk out the door.

The probation office in Colorado is aware that the old charge is being nolle prossed and that Mr. Talkington is being charged with CDV 1st. It will not change his status in Colorado.

I would like to try this case on Dec. 10. Please let me know if that date works for you.
Sheila

Sheila Mims
Assistant Solicitor
Richland County
Criminal Domestic Violence Court

EX. 7

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

2014-CP-40-7362

THE STATE,

Respondent,

vs.

BRIAN TALKINGTON,

Appellant.

ORDER

This matter came before the court on March 6, 2015 by way of an appeal from Summary Court. Present for the State was Joseph Shenkar, Assistant Solicitor. The Appellant, Brian Talkington, was represented by attorneys Douglas Truslow and Neal Truslow.

Appellant Talkington seeks a reversal of the Order(s) of the lower court dated October 16, 2014 and November 17, 2014, the latter Order being a denial of a motion for reconsideration. In the alternative, Appellant seeks an Order remanding the case to the lower court so that a proper, reconstructed record can be attempted for appellate purposes.

When questioned, Appellant's counsel detailed the following procedural history: On July 11, 2011, Appellant ("Talkington") was arrested and charged with the statutory offense of Criminal Domestic Violence (CDV), second offense [sic]. He was so charged and the case initially proceeded despite Talkington's continuous contention that there was no predicate CDV conviction to vest jurisdiction with the Court of General Sessions Court. See S.C. Code Ann. § 16-25-20 (B)(1)(2).

The State thereafter conceded that Talkington had no predicate first offense conviction. However, rather than dismissing the case for lack of jurisdiction and properly

charging Talkington with an offense within the jurisdiction of the Summary Court (*to wit*, CDV, first offense), the State unilaterally attempted to "remand" the case and call it for trial on February 26, 2013. A Summons was issued indicating that if Talkington did not appear he would be subject to being tried and convicted in his absence. Defendant appeared for trial with counsel and witnesses. The State appeared for trial with counsel and witnesses and indicated its intent to proceed with the trial. A jury venire was qualified and a panel was selected. While a suitable courtroom for trial was being arranged, Talkington agreed to have his Motion to Dismiss heard upon the condition that it was heard as if the jury were sworn, such that jeopardy would attach.[1] The Court (Summary Court Judge Edmond) heard Talkington's Motion, and then dismissed the case over the State's objection. The State repeatedly (mis)represented thereafter, verbally and in writing, that it was appealing the dismissal of the case. The State did not, in fact, appeal but failed to timely communicate that circumstance to Talkington and, as a direct consequence, the time expired for preservation of the audio recording and other record of the court proceedings that led to the dismissal.

On November 21, 2013, the State had Talkington rearrested, this time on a statutory charge of CDV, first offense (for the same incident giving rise to the initial charge that had been dismissed at trial on February 26, 2013).

The case was then set for a pre-trial hearing before Summary Court Judge Stroman on July 24, 2014. Talkington submitted that he was being subjected to double jeopardy and/or due process violations and that the record of proceedings before Judge Edmond must be reconstructed in order to advance his arguments. The State agreed to that process, and it was ordered that the matter was to be sent to Judge Edmond to attempt to reconstruct a suitable record of what had transpired before him.

On or about October 16, 2014, another pre-trial hearing was set. However, instead of the matter being set before Judge Edmond, it was set before Summary Court Judge Shealy, who had had nothing to do with the case at that point. Instead of then referring the matter to Judge Edmond, Judge Shealy ruled that the relief sought by Talkington was not well founded and that the case would proceed to trial. Based on that ruling, Talkington appealed.

---

[1] The State had demanded a jury trial; Talkington was willing to have the case tried by a Judge alone.

... It is elementary that both a defendant and this Court are entitled to have a record available for constitutional and appellate purposes. There is currently an inadequate record, through no fault of Appellant Talkington or his counsel.

Good cause having been shown, the relief sought by Appellant is granted, *to wit*: the matter is and shall be remanded to the lower court to be set before Judge Edmond so that a proper record for appellate purposes may be attempted.

IT IS THEREFORE ORDERED, the matter is and shall be remanded to Judge Edmond for the purposes of attempting to reconstruct a record of what had transpired relative to the initial dismissal of the case on February 26, 2013. This Court is mindful of the extended passage of time that has elapsed. In the event Judge Edmond is unable to reconstruct the record due to the passage of time and/or a fundamental disagreement between the parties and/or an inability to recall precise events, that shall be reported to the Court.

The appeal shall remain stayed pending remand and a good faith attempt to reconstruct the record and its submission to this Court.

AND IT IS SO ORDERED.

J. ERNEST KINARD, JR.
Presiding Judge
Fifth Judicial Circuit

Camden, South Carolina
April 16, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4007362

State of South Carolina
PLAINTIFF(S)

Brian Talkington
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 April 2015 to attorneys of record or to parties (when appearing pro se) as follows:

State of S C — Joseph Yechiel Shenkar — Neal Douglas Truslow

State of S C
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

FILED
RICHLAND COUNTY, S.C.
2015 APR 24 AM 10:03
JEANETTE W. McBRIDE
C.C.P. & G.S.

SCRCP Form 4C (10/2011)

ANNED

EX. 8

Neal Truslow

From: Hans Pauling <PaulingH@rcgov.us>
Sent: Monday, April 13, 2015 5:01 PM
To: Neal Truslow; Douglas Truslow
Cc: Amanda Hilley; Mackenzie Woodward
Subject: RE: Brian Talkington

I am leaving in a minute.

The magistrate case will be dismissed once the defendant is served and arrested for Criminal Domestic Violence of a High and Aggravated Nature. This is a class E felony which carries from 1 year to 10 years in prison. It is violent under 16-1-60 and there is no suspension of the mandatory minimum sentence of one year.

I need a date which to notice the defendant into court for the service of the True Billed Indictment. The bond setting can be done at the same time.

Defendant will be transported from the courthouse to ASGDC and booked/fingerprinted in on CDVHAN. Once that process is completed then the State will dismiss the CDV case in Magistrate court.

This matter will be handled in General Sessions.

From: Neal Truslow [mailto:nealtruslow@truslowlaw.com]
Sent: Monday, April 13, 2015 4:54 PM
To: Hans Pauling; Douglas Truslow
Cc: Amanda Hilley; Mackenzie Woodward
Subject: RE: Brian Talkington

Hans:

I had a meeting run over so I am just now seeing these emails.

I think the question that Doug and I have is centered around the disposition of the matter that was just before Judge Kinard. In essence, it was remanded for the purpose of Judge Edmond making a record. Are you saying that the State is dismissing that charge (again) once it gets back to Judge Edmond?

I'm here at the office if you've got time to talk – I think Doug's still here too so we could get on a conference call...

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

Truslow & Truslow, P.A.
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Fax: 803.256.7659
Website: http://www.truslowlaw.com/
Email: nealtruslow@truslowlaw.com

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Columbia, SC 29201

Mailing Address:
PO Box 1465
Columbia, SC 29202

From: Hans Pauling [mailto:PaulingH@rcgov.us]
Sent: Monday, April 13, 2015 2:51 PM
To: Douglas Truslow
Cc: Neal Truslow; Amanda Hilley; Mackenzie Woodward
Subject: RE: Brian Talkington

I am not dealing with a magistrate case. I took the facts and the evidence and directly presented the felony charge CDVHAN.

Once defendant is served then the state will dismiss the magistrate offense.

State will proceed on the felony.

From: Douglas Truslow [mailto:douglastruslow@truslowlaw.com]
Sent: Monday, April 13, 2015 2:48 PM
To: Hans Pauling
Cc: Neal Truslow; Amanda Hilley; Mackenzie Woodward
Subject: Re: Brian Talkington

Hans:

What happened to the case in magistrate's court and when?

Sent from my iPhone

On Apr 13, 2015, at 1:43 PM, "Hans Pauling" <PaulingH@rcgov.us> wrote:

> Neal:
>
> I indicted this case as Criminal Domestic Violence of a High and Aggravated Nature on April 8,2015.
>
> This indictment removes the case from Magistrate Court.

I need to serve the defendant. Mr. Talkington needs to be arrested and booked for CDVHAN. The bond hearing can be done the same day as the service of the indictment.

If you are available next week for the hearing then I can send the defendant a notice to appear if you provide me with a date.

Thank you

From: Neal Truslow [mailto:nealtruslow@truslowlaw.com]
Sent: Monday, April 13, 2015 1:18 PM
To: Hans Pauling
Cc: Douglas Truslow; Amanda Hilley; Mackenzie Woodward
Subject: Brian Talkington

Hans:

I understand that you spoke with my dad about a possible new development in the Talkington matter – truth be told, I hope I misunderstood what I thought I heard.

Just in case I heard him correctly, please let me know when it would be convenient for us to meet or discuss this over the telephone. I am going to be on military orders tomorrow (Tuesday) as I try to finalize preparations for a legal engagement between the Colombian military and the SC Army National Guard. Solicitor Johnson knows all about it since he's deeply involved with it, too... I'm available here at the office after 4pm, and tentatively available Wednesday or Thursday morning if any of those work for you. After we speak, I'll be able to get in touch with Mr. Talkington and take the appropriate steps.

For your purposes (and you may already have this), I've attached what was submitted to Judge Kinard after the last hearing about this matter. I've not yet received the signed/filed order, but will submit same to you (or do you not need it?) once I get it.

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

Truslow & Truslow, P.A.
Phone: 803.256.6276
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Website: http://www.truslowlaw.com/
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Mailing Address:
PO Box 1465
Columbia, SC 29202

EX. 9

Neal Truslow

From: Neal Truslow
Sent: Friday, May 01, 2015 10:16 AM
To: Hans Pauling
Cc: Douglas Truslow; Amanda Hilley; Mackenzie Woodward; rhoodlc@sccourts.org
Subject: RE: DP Service- Wednesday PM

Mr. Pauling and Ms. Senn:

We have received notification from the Solicitor's Office that it intends to take the steps outlined below.

The defense (including co-counsel, Doug Truslow) want to call it to the Court's attention that we strenuously object to this procedure taking place under the unique circumstances that surround this case. We intend to appear with our client as we've indicated previously to the Solicitor's Office.

Have a nice weekend.

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

Truslow & Truslow, P.A.
Phone: 803.256.6276
Fax: 803.256.7659
Website: http://www.truslowlaw.com/
Email: nealtruslow@truslowlaw.com

Physical Address:
914 Richland Street, Ste. B-102
Columbia, SC 29201

Mailing Address:
PO Box 1465
Columbia, SC 29202

From: Hans Pauling [mailto:PaulingH@rcgov.us]
Sent: Friday, May 01, 2015 9:50 AM
To: rhoodlc@sccourts.org
Cc: Neal Truslow
Subject: DP Service- Wednesday PM

Karlen:

I have to serve a DP Indictment on Wednesday afternoon to Brian Talkington for CDVHAN.

This will also be a bond setting and defendant has requested to turn himself in following court for booking.

Neal Truslow is defense counsel. Can this be added to motions docket or will we be able to advise Judge Gee prior to court start time? Defense has been noticed for 2PM on May 6th.

Advise and thank you

Hans W. Pauling
Assistant Solicitor
Fifth Judicial Circuit

1701 Main Street, Suite 302 • P.O. Box 192 (29202)
Columbia, South Carolina 29201
Phone: 803.576.1832 • Fax: 803.576.1718

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
STATE,	)	Docket Numbers: 2015-GS-40-01723;
	)	2014-CP-40-07362;
	)	2013A4010601092;
v.	)	and I902097
	)	
	)	**CERTIFICATE OF SERVICE**
BRIAN TALKINGTON,	)	
	)	
Defendant.	)	
	)	

I, Mackenzie Woodward, paralegal for Douglas N. Truslow, Esquire and Neal D. Truslow, Esquire, attorneys for Defendant, certify I have this date served the foregoing document(s) on the individual(s) listed below by placing a copy in the United States Mail, postage prepaid to the following address:

Hans Pauling
Assistant Solicitor
Fifth Judicial Circuit
P.O. Box 192
Columbia, SC 29202

DOCUMENT(S): 1. **Motion to Dismiss, to Quash, for Injunctive Relief, for a Writ of Prohibition, or for a Writ of Mandamus**

RICHLAND COUNTY FILED
2015 MAY 12 AM 11:31
JEANNETTE W. MCBRIDE C.C.P. & G.S.

Mackenzie Woodward
Mackenzie Woodward

Columbia, South Carolina
5/12, 2015

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
STATE,	)	Docket Numbers: 2015-GS-40-01723;
	)	2014-CP-40-07362;
	)	2013A4010601092;
v.	)	and I902097
	)	
	)	**AFFIDAVIT OF BRIAN**
BRIAN TALKINGTON,	)	**TALKINGTON**
	)	
Defendant.	)	
	)	

PERSONALLY APPEARED BEFORE ME, Brian Talkington, who being duly sworn, deposes and says (in his words):

On the night of July 4, 2011, my (then) wife Christie and I were in bed, asleep as I recall. My phone rang. It was my former wife who was just calling to chat – we had not had a bad marriage – it was just that I was deployed as a combat soldier so many times that it took a toll on our marriage and we divorced. I had not seen her in about 4 years, but we talked infrequently; we shared a mutual interest in mountain biking (she had recently won a race). She lived in the State of Washington. I told her it was not a good time to talk and ended the telephone conversation.

I knew Christie was extremely jealous and was prone to go off the deep end, so when she asked who had called, I said "don't worry about it" and rolled over. Looking back, that was probably not the best response on my part, but it is the truth. The next thing I knew, Christie was yelling and screaming and threw a glass of water in my face. She accused me of still having a relationship with my ex-wife (which was not true). Christie was very angry. I tried to just leave for the night. Christie tried to keep me from leaving and shoved me. I tried to protect myself and at the same time calm her down, all to no avail. I did not hit her or use any mean spirited or undue physical force under the circumstances. Christie was out of control. I ultimately left. She had repeatedly told me she hated the Army, hated South Carolina, hated its people and the weather, etc. and her son by a prior relationship had had substantial problems at school. Christie also said she wanted to go back to Colorado and did not want me to redeploy. I had been deployed five times over a short period of time and was injured in combat the last time for which I received a

Bronze Star Medal (for Valor) and a Purple Heart. Christie said she was terrified I would go back into combat (which I was planning to do), and she wanted me out of the military or at least assigned to a non-combat role. I say this not to be critical of Christie, but to put matters in context.

I was arrested for CDV 2nd five days later. I insisted I had no CDV 1st as a predicate offense. A preliminary hearing was held. Ultimately, the State agreed that I had no predicate offense. As the Court can see from the exhibits, the State agreed it had erred.

To her credit, the General Sessions Assistant Solicitor who was then assigned to the matter handed the case off to a Magistrate's Court Assistant Solicitor and acknowledged the State's initial error in overcharging me, but talked in terms of a "remand". My attorney timely met with Solicitor Johnson and explained why a "remand" was inappropriate (because there was no jurisdiction, no Court Order, I had not consented). Solicitor Johnson deferred to his Magistrate's Assistant Solicitor Sheila Sims, as I would assume would be appropriate under a chain of command. That said, he is ultimately responsible and the steps taken thereafter by his underling Magistrate's Court Assistant Solicitor were clearly in error.

The more my attorneys explained to the Solicitor and then Magistrate's Assistant Solicitor Mims the proper manner to get my case to Magistrate's Court (dismissal of the General Sessions case and properly recharging me with a CDV 1st), it seemed obvious that she was digging in her heels and insisting on doing things the wrong way. She indicated that the State had remanded [sic] the case and thereafter set it for trial. No opportunity was provided or requested by the State for a pretrial hearing. I was noticed that, if I did not appear for trial on the date set, I was at risk of being tried and convicted in my absence.

I appeared at trial, and the State appeared with its witnesses. A jury panel was there in the main court room. It was qualified, voir dired and a jury was selected. There was a lull while the Court personnel were trying to secure a courtroom for trial. I did understand that our intent was to make a Motion to Dismiss once the jury was sworn. Ms. Mims and my lawyers discussed the timing of any motions. As I recall, my attorneys had said that they would make our dispositive motions once the jury was sworn, but with Court's approval, we were willing to make the motion as if the jury were sworn; otherwise we'd wait. I understood the Court to agree to the process proposed by my attorneys. That said, the transcript of the proceedings, if available, would seemingly reflect what was said and what actually occurred, and under what circumstances.

The Court heard arguments. Significantly, the State represented that (a) the proper charge for what I was accused of was CDV 1st, (b) the Magistrate's Court had exclusive jurisdiction over the events that led to the charge against me, (c) I was on trial for the charge of CDV 1st at that time and the State expected to continue with the trial.

After hearing the argument, I understood that the Court refused to hear the case; the charge was "over" and dismissed. I drew that conclusion in that I understood we were free to leave and that the jury was released. The Magistrate and his court personnel left the court room. Moreover, the State claimed it was appealing. As my attorney and I were leaving the Courthouse, Richland County Sheriff's Deputy Lauriano (who was a State's witness) approached us and indicated we were not free to leave. I did not understand exactly what he was saying, except it was to the effect that Magistrate's Court Assistant Solicitor Mims was then on the phone with a Circuit Court Judge who was going to remand the case, overrule the Magistrate, that the trial would go forward at that time and I was not free to leave. My attorneys told Deputy Lauriano that they did not think that was the proper process, but we remained at the Court for some time thereafter. Nothing happened. No court personnel told us we were not free to leave. My attorneys and I subsequently left. The State (Magistrate Court's Assistant Solicitor Mims) then contacted my attorney by text after hours that day and indicated that the State has in fact engaged in an *ex parte* communication with a Circuit Court Judge who was prepared to send the case back for trial. The State attempted to set the case for the next day based on its representation that it had in fact engaged in the *ex parte* communication with a Circuit Court Judge who was prepared to immediately send the case back for trial[1]. **The representation of the State in this regard was conclusively untrue**. All this Court has to do to verify this is to compare the emails of February 27, 2013 to Ms. Sims later statements to the Magistrate's Court at a subsequent hearing (see page 30, 31, 34 and 35).[2]

Thereafter, the State repeatedly misrepresented that it was appealing. That also was not true. My attorneys have graciously opined that the State's misrepresentations relative to it

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[1] Ms. Mims did not disclose who the Circuit Judge was.

[2] Ms. Mims first claimed that the State had engaged in *ex parte* communications with the Circuit Court – once through Deputy Lauriano, then by text and then by email. Later, Ms. Mims appears on the record to say the State had not done it. Then, with conclusive proof that she had in fact said it, she then offered a seemingly disingenuous statement to the effect that she had "discussed it" with her superiors in the Solicitor's Office , but had never acted upon it notwithstanding her email to the contrary. See transcript page 28, L 18-29, and L 17 in comparison to her email of February 27, 2013. Once proof (i.e. her email) was produced conclusively establishing that what she was asserting was not the truth, she then capitulated and then admitted that what had been represented by her to my attorneys was not true.

appealing and later about seeking an Attorney General's opinion were due to an internal "miscommunication" within the Solicitor's Office and its "simple neglect or oversight" in failing to so advise my attorneys, albeit to my prejudice. I was inclined to agree. Subsequent events call that into question. That said, the State has now conclusively admitted that it did not in fact do as it was representing. I stress that it repeatedly misrepresented the truth to my prejudice. Whether it was intentional or not is moot. The result was to mislead us and to accomplish the destruction of the record of events that led to dismissal in the first instance and which would frustrate my attempts to argue double jeopardy, estoppel and dismissal with prejudice (i.e. without timely appealing) (See transcript pages 2 and 3, pages 5-17, and 19-22 of a subsequent hearing in which I sought dismissal). If this were but one misrepresentation by the State, and the State did not have me **arrested twice more**, I would maybe accept that it was unintentional. However, given the State's admittedly false representation about contacting a Circuit Court Judge, falsely misleading us by claiming it was appealing, falsely trying to explain away its repeated misstatements by stating that it was seeking an Attorney General's opinion and by only having me rearrested the second time **after** it procured the destruction of the transcript, it seems to me that the situation has the appearance of at least, at a minimum, gross misrepresentation on material issues and prosecutorial misconduct.

At or about the time of my second arrest, I was involved in my divorce from Christie. The State then communicated to my counsel through Ms. Mims words to the effect that Christie would not appear for trial if I would agree to forego custody and visitation. The State wanted to know if I was going to agree to Christie's domestic case demand because, if I was, then there would be no need to set the case for trial and it would be dismissed. I felt like this was an abuse of process to use the criminal process in an attempt to use gain a collateral advantage in our divorce case.[3] I explained that I would not agree to give up my parental rights in exchange for dismissal of the criminal case. I was arrested a second time for CDV 1st for the same event that gave rise to my initial arrest for CDV 2nd.

The prosecutor should have had no interest in my domestic case and I feel like its communication that Christie would not come back to South Carolina if I would agree to give up my parental rights was improper.

[3] I sued for divorce and obtained an uncontested "no fault" divorce.

I felt at the time of my second arrest like my Constitutional rights had been seriously infringed upon by the State. In an attempt to conclusively establish same, the transcript I requested was absolutely necessary. It was only missing because of the State's misrepresentation and failure to tell my attorney that it was going to recharge me when I would not concede to waiving any parental rights. As an alternative, I hoped that perhaps the initial Magistrate who dismissed the case might possibly be able to reconstruct a record. If not, I would have made my point and seemingly would have the case conclusively ended. I appealed from the third Magistrate's ruling that double jeopardy would not be applicable. When I was successful and the Circuit Court granted the relief I sought, the newly assigned Assistant Solicitor (Hans Pauling) indicated that he was having me indicated for CDV HAN and went to the extreme of pointing out the penalty. He said he had taken this action in consideration of having discussed the matter with the initial Magistrate Assistant Solicitor Sheila Mims; who was no longer employed with the Richland County Solicitor's Office but felt it was a case of CDVHAN all along.

My attorneys can argue about why this is so wrong, but to me the State's actions have the appearance of being vindictive and a further abuse of process. In support, I would stress that the State had repeatedly represented to the Courts that the matter was at most a CDV. Once it appeared that the extent of the State's misconduct would be formally exposed and I would at long last be conclusively acquitted/case ended once and for all, the State has attempted to overcharge me and threaten me with a felony and mandatory jail time in order to gain a collateral advantage. This is apparent in that, among other factors, the State has repeatedly conceded to various courts that this was at most a simple CDV.

Brian Talkington

SWORN TO AND SUBSCRIBED BEFORE ME

this 11th day of May, 2015

Mackenzie Woodward

Notary Public for South Carolina

My Commission Expires: June 16, 2021

RICHLAND COUNTY FILED
2015 MAY 12 AM 11:31
JEANNETTE W. McBRIDE C.C.P. & G.S.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
STATE,	)	Docket Numbers: 2015-GS-40-01723;
	)	2014-CP-40-07362;
	)	2013A4010601092;
v.	)	and I902097
	)	
	)	**SUPPLEMENTAL**
BRIAN TALKINGTON,	)	**AFFIDAVIT OF CAMERON**
	)	**B. LITTLEJOHN, ESQUIRE**
Defendant.	)	
	)	

PERSONALLY APPEARED BEFORE ME, Cameron B. Littlejohn, Esq., who being duly sworn, deposes and says (in his words):

Subsequent to the hearing on May 6, 2015, I received an unexpected telephone call from Assistant Solicitor Hans Pauling. I understand Mr. Pauling is the prosecutor who indicted the Defendant, Brian Talkington, for Criminal Domestic Violent of a High and Aggravated Nature (CDVHAN) under docket number 2015-GS-40-01723 in Richland County.

We talked for some time; I listened and answered his questions. One question he seemed to focus on was whether a jury was actually sworn at the first Summary Court's trial date for the first CDV charge. I reiterated that I understood that the jury had not been sworn, but Mr. Talkington's attorney offered to make his Motion to Dismiss as if the jury was sworn. I understand that the State objected to that process but the Summary Court allowed the motion to proceed.

Regardless, the State represented it was going to file an Appeal, but failed to do so. The State did not timely notify Defendant's counsel of that fact until the time expired for the preservation of the record of the proceeding in question, therefore the record was destroyed.

I stand by my Affidavit.

[SIGNATURE ON FOLLOWING PAGE.]

Cameron B. Littlejohn

CAMERON B. LITTLEJOHN, ESQUIRE

SWORN TO AND SUBSCRIBED BEFORE ME

this 11th day of May, 2015

Notary Public for South Carolina

My Commission Expires: Nov 27, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
STATE,	)	Docket Numbers: 2015-GS-40-01723;
	)	2014-CP-40-07362;
	)	2013A4010601092;
v.	)	and I902097
	)	
	)	**CERTIFICATE OF SERVICE**
BRIAN TALKINGTON,	)	
	)	
Defendant.	)	
	)	

I, Mackenzie Woodward, paralegal for Douglas N. Truslow, Esquire and Neal D. Truslow, Esquire, attorneys for Defendant, certify I have this date served the foregoing document(s) on the individual(s) listed below by placing a copy in the United States Mail, postage prepaid to the following address:

Hans Pauling
Assistant Solicitor
Fifth Judicial Circuit
P.O. Box 192
Columbia, SC 29202

DOCUMENT(S):

1. **Affidavit of Brian Talkington**
2. **Affidavit of Cameron B. Littlejohn, Esquire**

Mackenzie Woodward

Mackenzie Woodward

Columbia, South Carolina

5/11, 2015

RICHLAND COUNTY
FILED
2015 MAY 12 AM 11:32
JEANNETTE W. McBRIDE
C.C.P. & G.S.

COPY

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND	)	
STATE,	)	Docket Nos.: 2015-GS-40-01723 2014-CP-40-07362 2013A4010601092 and Warrant I-902097
V.	)	
BRIAN TALKINGTON,	)	**AMICUS CURIAE MEMORANDUM**
Defendant.	)	

The undersigned has been retained by counsel for Defendant Brian Talkington to provide an *amicus curiae* memorandum, addressing certain of the issues before the court relative to Defendant's Motion to Dismiss, to Quash, For Injunctive Relief, For A Writ of Prohibition, or For A Writ of Mandamus, dated May 6, 2015. For purposes of this memorandum, I have reviewed numerous records from the case files referenced above, including pleadings, multiple emails exchanged between Defendant's counsel and the Fifth Judicial Circuit Solicitor's Office, as well as online documentation for each case; I have also spoken to counsel for Mr. Talkington, and with Hans Pauling, Assistant Solicitor for Richland County.

From my review of pertinent documents and conversations with counsel, I believe the following to be true:

1. An arrest warrant was issued in Richland County on July 8, 2011 charging Defendant with Criminal Domestic Violence ("CDV") 2d offense, with the offense dated as occurring on July 4, 2011. The arrest warrant bore number I-902097.
2. Talkington had no prior or predicate CDV 1st offense.

[1] The distinction between a CDV 1st and CDV 2nd is the existence of a prior/predicate CDV.

3. Talkington appeared for a preliminary hearing, at which time the Solicitor's Office erroneously advised the court that Talkington had a predicate conviction for CDV 1st. Probable cause was found to exist and the case was bound over, based on the erroneous representation by the State of a predicate CDV conviction. It is now conceded by the State that its position was inaccurate; there is no prior CDV conviction and never has been.
4. The online docket for Case I-902097 reflects that the case was "disposed" on January 27, 2012.
5. The Fifth Judicial Circuit Assistant Solicitor assigned to the General Sessions case advised counsel for Defendant via email on February 2, 2012 that "after research, I remanded this case because it's not a CDV 2d."
6. There is no documentary evidence to establish "remand" actually occurred, much less being properly remanded. Talkington did not consent to a remand. The online docket for Richland County simply reflects that Docket I-902097 ended on January 27, 2012 by "remand to mag/muni ct/Sent to Family Ct." Presumably, the case was "remanded" unilaterally by the Solicitor's Office without a court order effecting the remand.
7. Talkington's counsel received no notice for a remand hearing, nor any order of remand. No documents reflecting a proper "remand" have been produced.
8. Defense counsel timely objected to the procedure undertaken by the Solicitor's Office; both to the unilateral remand and again when the case was set for trial by the Solicitor in Magistrate's Court. Talkington was notified by the State that if he

did not appear at trial he was subject to being convicted in his absence. No new warrant was obtained.

9. The "remanded" case came before Judge Tomothy C. Edmond for trial on February 26, 2012. A jury was qualified and selected but not sworn.
10. The Court allowed the Defendant to proceed with dispositive motions to dismiss under circumstances in which it was agreed as being done as if the jury was sworn. The State insisted that the proper procedure had been followed and that the Magistrate's Court had exclusive jurisdiction over the "remanded" case since it was in fact a CDV 1st.
11. Defense counsel made a Motion to Dismiss the action based, *inter alia*, on lack of subject matter jurisdiction and other procedural grounds.
12. The parties dispute the nature of the ruling made by Judge Edmond, other than that it was disposed of in a manner adverse to the State
13. The case did not proceed to trial. The jury was discharged. No relevant documentation now exists regarding Judge Edmond's specific ruling on the Motion to Dismiss (*i.e.* the basis to dismiss). Defense counsel contends the motion to dismiss was granted.
14. The State indicated that it would be appealing the dismissal. However, no appeal was filed and the time to obtain the record (if any existed) of the proceedings expired without a record of the proceedings before Judge Edmonds having been produced.

15. The State subsequently contended that Judge Edmond "ruled on the issue of whether the solicitor's office could remand a matter after a preliminary hearing had been held." (Email from Mims dated 11-18-2013).

16. On the morning of February 27, 2012, the day after the "remanded" case before Judge Edmond was dismissed, Talkington's counsel received from the State an assertion that it had engaged in an *ex parte* discussion with an unspecified "General Sessions Judge" who was remanding the case "first thing this morning." The State inquired as to Talkington's availability of a trial at that time. (Email from Mims dated 2-27-2013). Talkington's counsel questioned that assertion and objected to the *ex parte* communication. (Truslow response 2-27-2013). The State has subsequently admitted/asserted no such contract with any General Sessions Judge actually ever occurred.

17. On May 5, 2012, the State reiterated to Talkington's counsel that Judge Edmond's ruling was "currently being appealed" and "we are waiting to hear where the appropriate venue is before we try this case." (Mims email 5-2-2013). Talkington's counsel advised they were unaware of an appeal and presumed the matter was concluded. (Truslow response 5-2-2013). Had the State actually appealed, Judge Edmond's office would have been placed on notice to preserve the record of the proceedings. Since the statement about an appeal was inaccurate, the records of the hearing before Judge Edmond were not preserved.

18. There is no evidence Judge Edmond's ruling, whatever it was, was properly or timely appealed. The State's representation that it was appealing was false and

created the circumstance that the tape recording of the events before Judge Edmond were not preserved.

19. Six months later, in November, 2013, the assistant Solicitor said she was going to "nolle prosse. . . CDV 2d and recharge him (Talkington) with CDV 1st. . ."

20. A second arrest warrant, 2013A4060192 was issued on November 29, 2013. The warrant was for CDV 1st, arising from the same July 4, 2011 incident and charge that had been dismissed on February 26, 2012.

21. Talkington's counsel contacted the assistant Solicitor and again asked about the status of the appeal. Counsel was informed at that time that no appeal had in fact been taken, and that an opinion had been requested from the Attorney General instead. No evidence of the request to the Attorney General has been produced and no public documents reflect the request being made. The State has now admitted that it had never in fact sought an Attorney General's opinion.

22. On July 3, 2013, the assistant Solicitor advised that the recording from the proceedings before Judge Edmond was only kept for thirty (30) days after the proceeding (and because her office had not appealed, the record/transcript of proceedings before Judge Edmund was no longer available). She stated that she had entrusted the appeal to someone else in her office, then learned no appeal had been filed and no Attorney General's opinion had been sought.

23. The case of 2013A4060192 came before Magistrate Stroman on July 24, 2014. Talkington's counsel argued, *inter alia,* that the prior proceedings before Judge Edmond on case I-902097 had disposed of the original charge, the State had not appealed, that dismissal of the case was final and that double jeopardy prevented

the second charge for the same incident (2013A4060192) from proceeding. The State argued that Magistrate's Court had jurisdiction over the case because it was in fact a CDV 1st offense, exclusively within the jurisdiction of Magistrate's Court. Judge Stroman verbally ordered that the matter be reconvened before Judge Edmond.

24. For reasons that do not appear in the public record, a hearing on the second charge was instead held before Magistrate Judge Kirby Shealy on October 14, 2014. Talkington argued, *inter alia*, that the matter should be before Judge Edmund. Talkington's motion was heard at that time, and Judge Shealy ruled that the prior proceedings before Judge Edmond did not bar the (second) prosecution in Case 2013A4060192 because there was never jurisdiction over the first case from the inception. (Order dated October 16, 2014). Judge Shealy denied Talkington's motion to reconsider by order dated October 23, 2014.

25. Talkington (through counsel) appealed Judge Shealy's Order to the Circuit Court. Circuit Judge J. Ernest Kinard heard the appeal on March 6, 2015 Judge Kinard verbally indicated he was remanding the case to Judge Edmond to reconstruct the record. That appeal remains pending, awaiting the order on remand.

26. While awaiting Judge Kinard's formal order, on April 8, 2015, another assistant Solicitor obtained a direct indictment against Talkington for the same July 4, 2011 event.[2] This third charge, 2015-GS-4001723, charged CDV of a high and aggravated nature. The charges in all three (3) cases relate to the same incident

[2] The online docket shows the indictment date as April 9, 2015.

from July 4, 2011 which the State has repeatedly submitted was within the exclusive jurisdiction of Magistrate's Court.

27. By Order dated April 16, 2015 in Case 2014-CP-40-7362, Judge Kinard remanded the second charge, case 2013A4060192, to Judge Edmond to attempt to reconstruct the record for appellate purposes. (Order dated April 16, 2014). That remand hearing has not yet been heard.

28. Talkington's counsel filed a Motion to Dismiss, to Quash, For Injunctive Relief, for a Writ of Prohibition or a Writ of Mandamus as to Case No. 2015-GS-40-01723, which was heard before Circuit Judge Tonya Gee on May 6, 2015.

DISCUSSION

29. In my opinion Judge Edmond had jurisdiction to determine if he had jurisdiction and to address Defendant's motion when the matter came before him on February 26, 2012. " 'Every court has the power and duty to determine whether . . . it has jurisdiction . . . which includes the power to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction." [internal citations omitted] Chew w. Newsome Chevrolet, 315 S.C. 201, 431 S.E.2d 631, 632 (Ct.App. 1993). Whatever it was that Judge Edmond decided on February 26, 2012, he had jurisdiction to make the decision. I disagree with Judge Shealy.

30. In Case No. 2014-CP-40-07362, Judge Kinard remanded 2013A4060192 to Judge Edmond to attempt to reconstruct the record of proceedings that led to the initial disposition or dismissal of the case in the first place. Until Judge Edmond issues a

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND	)	
STATE,	)	Docket Nos.: 2015-GS-40-01723 2014-CP-40-07362 2013A4010601092 and Warrant I-902097
V.	)	
BRIAN TALKINGTON,	)	**CERTIFICATE OF SERVICE**
Defendant.	)	

I, Amanda Douglas Hilley, paralegal for Truslow & Truslow, attorneys for Defendant, certify I have this date served the foregoing document(s) on the individual(s) listed below by placing a copy in the United States Mail, postage prepaid to the following address:

Mr. Hans Pauling, Esquire
Fifth Circuit Solicitor's Office
1701 Main Street
Columbia, SC 29201

DOCUMENT(S): **1. Amicus Curiae Memorandum**

Amanda Douglas Hilley

Columbia, South Carolina

August 17, 2015

RICHLAND COUNTY
FILED
2015 AUG 17 AM 11:14
JEANETTE W. McBRIDE
C.C.P. & G.S.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMEI . N A CIVIL CASE

CASE NUMBER: 2014CP4006591

State of South Carolina

PLAINTIFF(S)

Brian Talkington

DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

FILED
2015 JUL 10 AM 11 9
RICHLAND COUNTY
CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 10 July 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Kristen Ann Bales

Douglas Neal Truslow

Neal Douglas Truslow

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
STATE,	)	Docket Number: 2014-CP-40-06591
v.	)	
BRIAN TALKINGTON,	)	**CONSENT ORDER TO CONSOLIDATE WITH DOCKET # 2014-CP-40-07362**
Defendant.	)	

THIS MATTER CAME BEFORE ME on July 7, 2015. The Court is advised that the State and counsel for Defendant agree that this matter (Docket # 2014-CP-40-06591) should be consolidated, to the degree necessary, with a "parallel" appeal (Docket # 2014-CP-40-07362) for purposes of clarification of the record.

Good cause having been shown,

NOW, THEREFORE based upon the foregoing, it is

ORDERED that this matter (Docket # 2014-CP-40-06591) shall be consolidated with the "parallel" appeal (Docket # 2014-CP-40-07362).

AND IT IS SO ORDERED.

Columbia, South Carolina
July 7, 2015

PRESIDING JUDGE
FIFTH JUDICIAL CIRCUIT

WE SO MOVE AND CONSENT:

NEAL D. TRUSLOW

JOSEPH Y. SHENKAR

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
STATE,	)	Docket Number: 2014-CP-40-06591
	)	
	)	
v.	)	
	)	
	)	
BRIAN TALKINGTON,	)	**BRIEF IN SUPPORT OF REQUEST TO CONSOLIDATE WITH DOCKET # 2014-CP-40-07362**
	)	
	)	
	)	
Defendant.	)	
	)	

Defendant (hereinafter, "Talkington") would show:

1) This matter has a convoluted, tortured history that is essentially set forth in Talkington's Motion to Dismiss, to Quash, for Injunctive Relief, for a Writ of Prohibition, or for a Writ of Mandamus dated May 6, 2015 and filed May 15, 2015 in Docket # 2015-GS-40-01723.[1]
2) In an effort to provide some historical context, Talkington would show the following:

THE "FIRST CHARGE" – (Warrant I902097)

3) On July 11, 2011, Talkington was arrested and charged with Criminal Domestic Violence ("CDV") 2nd Offense (Warrant I902097).
   a) Talkington consistently argued that there was no predicate CDV 1st Offense conviction such that the General Sessions Court would not have jurisdiction in the first place.[2]
   b) Subsequent to a preliminary hearing being held, the State conceded that there was no predicate first offense conviction.
   c) The case was then assigned to a magistrate's level assistant solicitor. However, rather than following proper procedure, *to wit*: dismissing or deciding to "nolle prosse" the

[1] The State directly indicted Talkington with CDVHAN (filed April 10, 2015) for an offense arising out of the same common nucleus of operative facts as outlined herein.
[2] CDV 1st Offense is, by statute, exclusively within the jurisdiction of the Magistrate's Court.

charge (over which the Court of General Sessions had no jurisdiction) and simply charging Talkington with CDV 1st Offense, the State unilaterally "remanded" the case from General Sessions to Magistrate's Court (under Warrant I902097).

4) The matter (Warrant I902097) was set for trial in Magistrate's Court on February 26, 2013. The Court (Judge Edmond) heard Talkington's Motion to Dismiss, and then dismissed the case over the State's objection.[3]

THE "SECOND CHARGE" – (Warrant 2013A4010601092)

5) In November of 2013, the State indicated that it had "decided to nolle prosse" the "First Charge" (Warrant I902097) against Talkington, and "recharge" him then on a statutory charge of CDV 1st Offense (Warrant 2013A4010601092) alleging the same facts/incident giving rise to the "First Charge" that had been dismissed.
6) A pre-trial hearing in Magistrate's Court before Judge Stroman was set for July 24, 2014. Talkington argued that he was being subjected to Double Jeopardy and/or constitutional violations.
   a) Talkington submitted that the matter should be dismissed, or that the matter should be referred for disposition to the Magistrate Judge who issued the initial (and subsequent) warrant, since he was likely unaware of all of the circumstances.
   b) Alternatively, Talkington argued that the matter should be referred to the Magistrate Judge (Judge Edmond, who had initially dismissed the case) for a proper disposition and/or a making of a record.
   c) The State agreed with the latter of Talkington's arguments.
7) Judge Stroman ordered that the matter was to be referred to Judge Edmond.
8) On September 10, 2014, another pre-trial hearing was set (ostensibly before Magistrate Judge Edmond). However, instead of the matter being set before Judge Edmond, it was set before yet another Magistrate Judge (Judge Shealy).
9) Instead of honoring the directive of Judge Stroman and referring the matter to Judge Edmond, Judge Shealy ruled that the relief sought by Talkington could not be granted

[3] The manner in which this occurred is the subject of pending matters in both Docket # 2015-GS-40-01723 and Docket # 2014-CP-40-07362.

record, the State had Talkington indicted for the General Sessions Offense of CDV High and Aggravated Nature under Docket # 2015-GS-40-01723 (arising out of the same, 2011 incident giving rise to the "First Charge" (Warrant I902097) that had been dismissed and then "recharged" in the "Second Charge" (Warrant 2013A4010601092).

16) The State has indicated that it intends to "dismiss" the "Parallel Appeal" (Docket # 2014-CP-40-07362) that has been remanded to the Magistrate's Court[5], but has failed to do so at this point in time. Thus, Talkington is facing a charge in Magistrate's Court (Docket # 2014-CP-40-07362) and a charge in General Sessions (Docket # 2015-GS-40-01723) arising out of the exact same circumstances.

17) Accordingly, Talkington asks this Court to consolidate the within appeal (Docket # 2014-CP-40-06591) with the other appeal (Docket # 2014-CP-40-07362).

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July 7, 2015

[5] Thus depriving the Circuit Court of appellate jurisdiction in the "Other Appeal" (Docket # 2014-CP-40-07362).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2015-002331

The State, Respondent,

v.

Brian Talkington, Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Memorandum of Appealability on The State by depositing a copy of it in the United States Mail, postage prepaid, on December 4, 2015, addressed to The State's attorneys of record, Hans W. Pauling and Joseph Y. Shenkar, Assistant Solicitors, Fifth Judicial Circuit, P.O. Box 192, Columbia, South Carolina 29202.

December 4, 2015

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December 4, 2015

RE: State v. Brian Talkington
Appellate Case Number: 2015-002331

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Dear Ms. Kitchings:

Please find enclosed the ~~original and four copies of the~~ MW Appellant's Memorandum of Appealability and Proof of Service in reference to the above captioned matter.

If you should have any questions, please contact our office.

Sincerely,

Mackenzie Woodward

Mackenzie Woodward
Paralegal for Truslow & Truslow

cc: Hans W. Pauling, Esquire
Assistant Solicitor, Fifth Judicial Circuit
P.O. Box 192, Columbia, South Carolina 29202

Joseph Y. Shenkar, Esquire
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