THE STATE OF SOUTH CAROLINA
In The Supreme Court

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, Petitioner.

PETITION FOR WRIT OF CERTIORARI,

May 9, 2016

Truslow & Truslow Law Firm

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CERTIFICATION BY COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Counsel for Petitioner Brian Talkington certifies that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals by way of Order filed April 13, 2016 (received by counsel on April 15, 2016).

QUESTIONS PRESENTED

I. Did the Court of Appeals err in dismissing this appeal without a hearing or rehearing because the State's actions in this case violate Talkington's constitutional rights?

II. Did the Court of Appeals err in dismissing this appeal without a hearing or rehearing without first reviewing the February 11, 2016 transcript from Richland County General Sessions?

III. Did the Court of Appeals err in failing to issue a Writ of Prohibition or a Writ of Mandamus?

STATEMENT OF THE CASE

On July 11, 2011, Petitioner Brian Talkington ("Talkington") was arrested and charged with Criminal Domestic Violence (CDV), Second Offense. Talkington asserted that he had no predicate CDV, First Offense conviction such that the CDV, Second Offense charge was improper. The State allowed the matter to proceed to a preliminary hearing, arguing that Talkington had the predicate offense for jurisdiction to ultimately vest exclusively in General Sessions. The matter was bound over to General Sessions. Subsequently, the State conceded that there was no predicate CDV, First Offense conviction. Rather than dismissing the case and recharging Talkington with the applicable Magistrate's-level offense or seeking Talkington's consent, the State unilaterally attempted to remand/transfer the case to Magistrate's Court. Aside from being improper, the correct procedure was not followed.

The matter was set for trial in Magistrate's Court on February 26, 2013 under the CDV, Second Offense charging document. Talkington appeared pursuant to a Summons warning that failure to appear would result in a conviction in his absence. The State appeared proclaiming its intent to proceed with a trial. Witnesses were all present. A jury was qualified and selected. Talkington made a motion to dismiss *nunc pro tunc* (as if the jury was sworn). The case was dismissed over the State's objection. The State then represented that it was appealing but did not do so.

In November 2013, the State notified counsel that it had dismissed the CDV, Second Offense warrant and that a "new" warrant charging CDV, First Offense (alleging the exact same facts/incident giving rise to the initial charge) had been obtained. The "new"

case was set for a pre-trial hearing in Magistrate's Court on July 24, 2014. Talkington argued that he was being subjected to certain constitutional violations, including violation of fundamental due process and double jeopardy. The hearing judge ordered the matter to be referred back to the judge who presided over the February 26, 2013 matter. On September 10, 2014, another pre-trial hearing was set; however, it was set before yet another judge. That judge ruled that the relief sought by Talkington could not be granted. From that ruling, Talkington appealed to the Circuit Court.

The appeal was heard by the late Circuit Court Judge Kinard on March 6, 2015. Judge Kinard ruled in Talkington's favor and determined that the matter should be remanded specifically to the judge who presided over the February 26, 2013 hearing for the limited purpose of attempting to reconstruct the record.[1] Otherwise, the Circuit Court retained jurisdiction. Judge Kinard's Order was not appealed.

After the Circuit Court's ruling in favor of Talkington, the State had him indicted for Criminal Domestic Violence of a High and Aggravated Nature (CDVHAN)[2]. At that time, Talkington was subject to being called to trial both for misdemeanor charges and felony charges in Magistrate's Court and in General Sessions Court, respectively, arising out of the exact same nucleus of operative facts. Talkington timely filed a Motion to Dismiss, to Quash, for Injunctive Relief, for a Writ of Prohibition, or for a Writ of Mandamus.

A hearing was held on Talkington's Motion on September 9, 2015. Approximately

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[1] After the initial dismissal, the State had waited for the transcript/record retention period to expire and only then recharged Talkington.

[2] CDVHAN is a Class E Felony carrying from one to ten years in prison. It also deemed violent under S.C. Code Ann. § 16-1-60 and there is no suspension of the mandatory minimum sentence of one year.

one week prior to this hearing, an Order dated May 8, 2015 was delivered to counsel. This Order purported to be a reconstruction of the record from the February 26, 2013 hearing; however, neither Talkington nor the State were ever before any judge for any reconstruction of the record proceeding.

Talkington's Motion was denied by a General Sessions Order on October 12, 2015. (Appendix p. 1 – 13). Talkington timely moved for reconsideration, and that relief was denied. (Appendix p. 14 – 17). Talkington timely noticed an appeal to the Court of Appeals. (Appendix p. 18 – 19). Thereafter, the Court of Appeals requested, and both Talkington and the State timely provided, memoranda of appealability. (Appendix p. 20 – 125).

On January 8, 2016, before the Court of Appeals issued any decision on Talkington's appeal, the State notified Talkington that both charges, the CDVHAN and CDV, First Offense were going to be called for trial on February 8, 2016 and on January 27, 2016, respectively (i.e. two separate trials, on two separate charges, in two separate courts, in less than a two week period). Talkington appeared for the trial in Magistrate's Court and the State then dismissed the CDV, First Offense. (Appendix p. 127 – 143).

The Court of Appeals issued an Order dismissing Talkington's Appeal on January 29, 2016. (Appendix p. 126). Prior to any remittitur being sent pursuant to Rule 221(b), SCACR, the State attempted to set the CDVHAN for trial in General Sessions Court. (Appendix p. 157 – 173). Thereafter the Chief Administrative Judge, Honorable Clifton B. Newman, requested all parties and Talkington appear for a status conference on February 11, 2016, wherein Judge Newman inquired into the matter further. The State insisted that the case was properly before the Court and that a trial could go forward. Talkington argued that there was no jurisdiction to hear the case. Further, Talkington informed the Court that

a Petition for Rehearing had been filed with the Court of Appeals. Judge Newman determined that there was no jurisdiction for the Court of General Sessions to hear a case without a remittitur, analogizing this case to the case of Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566. (Appendix p. 189 – 219)

On March 7, 2016, Talkington filed an Addendum to his Petition requesting that any decision on a rehearing be made after receipt and review of the transcript of the February 11, 2016 hearing before Judge Newman. (Appendix p. 157 – 187). The transcript was timely ordered, but did not arrive to Talkington's counsel until April 11, 2016. Before the transcript could be sent to the Court of Appeals, it issued an Order denying Talkington's Petition for rehearing (filed April 13, 2016). (Appendix p. 188).

This Petition follows. Because the matter was dismissed without briefing, an Appendix of all pertinent documents is provided separately.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DISMISSING THIS APPEAL WITHOUT A HEARING OR REHEARING BECAUSE THE STATE'S ACTIONS IN THIS CASE VIOLATE TALKINGTON'S CONSTITUTIONAL RIGHTS

For nearly a half-decade, the State has abusively attempted to bring multiple charges in multiple courts at the same time against Talkington, ignoring proper process and procedure. These attempts, all by the same prosecuting office, have been malicious and vindictive and, *inter alia*, violate Talkington's constitutional rights. This Court should not turn a blind eye to such conduct.

Since July of 2011, the State has attempted to prosecute Talkington in no less than four (4) actions, in no less than three (3) courts of various jurisdiction; alleging at least three (3) separate and distinct crimes (CDV, Second Offense; CDV, First Offense; and CDVHAN) were committed by Talkington. From the time the very first charge (CDV, Second Offense) was brought against Talkington, the State was informed both appropriately and timely that it was trying to prosecute an improper charge. After acknowledging (eventually) that CDV, Second Offense was an improper charge, the State ignored statutory authority and directives from the Supreme Court and Court Administration and attempted to usurp proper process and attempt to try Talkington for CDV, First Offense on a warrant for CDV, Second Offense.

The matter was called for trial and, after a jury was selected, Talkington's counsel informed the Court that a Motion to Dismiss could be made, *nunc pro tunc*, if the Court would hear the motion as if the jury had been sworn. After the motion was made, the Court

dismissed the case over vehement objection from the State. The State then misrepresented, both verbally and in writing, that it was going to appeal the dismissal, that it had participated in *ex parte* communications with a circuit court judge who was prepared to approve of and facilitate the State's initial error, and later that it was seeking guidance on its appeal via an Attorney General's Opinion. Talkington relied on the State's assertions. The State's assertions were determined later to have been wholly inaccurate.

For reasons unknown at that time to Talkington, the State waited approximately nine (9) months to bring "new" charges against Talkington. In actuality, they were the exact same charges stemming from the July, 2011 event; however, this time a warrant was sworn out for a CDV, First Offense. By waiting for so long, the State ensured that there would be no record or transcript from the initial hearing. The result is that critical and exculpatory evidence was destroyed and Talkington is not being afforded due process. The State insisted that the "new" charges, CDV, First Offense only, were proper and represented that position to Talkington and numerous judges. Talkington was thus arrested and booked again and, due to the State's mistakes, jailed for approximately four days.

Talkington advanced his due process arguments. After a ruling in magistrate's court that was adverse to Talkington, he exercised his right to appeal to the Circuit Court. The Circuit Court granted the relief Talkington requested and remand the case to Magistrate's Court to attempt a reconstruction of the record. That Circuit Court Order was not appealed. The record was never properly reconstructed. Instead, and in an attempt to punish Talkington for his success in Circuit Court, the State vindictively indicted Talkington with the more serious, felony offense of CDVHAN. Importantly, the indictment nearly four (4) years later covered the exact same conduct for which Talkington had been charged giving

rise to the CDV, First Offense charge.

Following service of the indictment, Talkington was arrested and booked for (at least) the third time for the same event. Further evidence of the State's malicious attempt to punish Talkington for appealing (and in an attempt to jeopardize his status as an Active Duty Servicemember) is demonstrated by the State continuing to press the CDV, First Offense charge in Magistrate's Court (even calling it for trial, and then dismissing same with limited notice to Talkington and while also attempting to set the CDVHAN for trial), all while the Court of Appeals was considering Talkington's initial appeal.

The State should not be allowed to misrepresent charges to Talkington or judges in various jurisdictions resulting in manipulation of the legal system. Likewise, Talkington should have been entitled to pursue his appeal to the Circuit Court without the fear that the State would retaliate and substitute the more serious, felony charge of CDVHAN in place of the misdemeanor charge of CDV, First Offense. Talkington urges that the State's indictment of him on the felony charge of CDVHAN constituted a penalty, maliciously levied by the State, for Talkington exercising his statutory right to appeal, and thus contravenes the Due Process Clause of the Fourteenth Amendment. Further, the State's multiple assertions to multiple Courts that the case was a CDV, First Offense triable in the exclusive jurisdiction of Magistrate's Court is juxtaposed against its current theory that the case is a CDVHAN.

Because the Court of Appeals misapprehended and/or failed to consider the constitutional violations perpetrated by the State, which are analogous to those in the case of Blackledge v. Perry, 417 U.S. 21, Talkington asks that this Court grant his Petition.

II. THE COURT OF APPEALS ERRED IN DISMISSING THIS APPEAL WITHOUT A HEARING OR REHEARING WITHOUT FIRST REVIEWING THE FEBRUARY 11, 2016 TRANSCRIPT FROM RICHLAND COUNTY GENERAL SESSIONS

A highlight of the State's misconduct took place while this matter was on appeal and was preliminarily discussed in a hearing in General Sessions. Talkington requested that the Court of Appeals refrain from making any decision until such time as it could review the February 11, 2016 transcript of the hearing before Judge Newman, as it contained representations that were instructive on the State's misconduct. Nonetheless, the Court of Appeals issued its order without receiving or reviewing the transcript.

Judge Newman specifically inquired into why a case that had never previously been represented to be a CDVHAN was, nearly four (4) years later, indicted as a CDVHAN. Talkington presented the Court with the case of Blackledge v. Perry, 417 U.S. 21, asserting that this matter involved the State trifling with the legal system and maliciously attempting to prosecute this case because of Talkington's success on appeal to the Circuit Court. Had the Court of Appeals reviewed the transcript, it would have found, in pertinent part, the following exchanges:

> THE COURT: So maybe they were -- concluded that you all were being difficult, so they upped the ante by indicting him for a more serious offense rather than Magistrate's Court.
>
> MR. NEAL TRUSLOW: Which –
>
> THE COURT: Maybe. I have no clue.
>
> MR. NEAL TRUSLOW: Judge, I'll -- I'll leave that where it is.
>
> MR. PAULING: Your Honor –

MR. NEAL TRUSLOW: That has been cited to the Court of Appeals in the --

THE COURT: But that's –

MR. NEAL TRUSLOW: -- petition for rehearing.

THE COURT: That's what you're arguing to the Court of Appeals.

MR. NEAL TRUSLOW: That is a portion of what has been submitted in the petition for a rehearing; yes, sir.

THE COURT: That the State is attempting to be punitive in denying your client due process.

MR. NEAL TRUSLOW: I believe the case is Blackledge, but that's exactly what it states, Judge.

(Transcript Page 13, Line 7 – Page 14, Line 2)

And;

THE COURT: What happened in this case, Blackledge?

MR. NEAL TRUSLOW: Judge, in fact, there was – this case involved a gentleman who was already incarcerated who was charged with a crime. He decided to exercise his appeal rights, and the prosecuting authority in that case did very similar to what you just said. They decided to up the ante to make his -- the new charge far more punitive in nature against -- essentially, Judge, it was retaliatory for -- for exercising a constitutionally afforded right. Like here, Mr. Talkington has done what the rules have allowed him to do. It's in good faith. Judge, had -- had this been handled right in 2011, we might not be here today.

THE COURT: Okay. I forgot your recitation. Has he won at any stage of the proceeding, or has he lost every battle?

MR. NEAL TRUSLOW: Judge, the case was initially dismissed in Magistrate's Court in February of 2013, and the State brought new charges. I don't know if you'd call that a win or a loss.

THE COURT: New charges charging the same thing?

MR. NEAL TRUSLOW: Yes, Judge, in Magistrate's Court, not CDV/HAN which is most noteworthy. Judge, again Judge Kinard in the Circuit Court in his appellate capacity ruled in our favor and asked that the matter be sent back to Magistrate's Court for the recreation of record. Only at that time, only after that ruling in favor of the defense was this new upgraded charge brought.

THE COURT: All right.

MR. NEAL TRUSLOW: And, Judge, if it makes any difference along those lines, at least by my count eight separate times, the State has -- has told various judges and various courts in various jurisdiction that this case is not a CDV/HAN. It was only upgraded to that charge after Judge Kinard's ruling in –

THE COURT: What is he accused of doing?

MR. NEAL TRUSLOW: Judge, he is accused of -- it's a domestic violence charge with him and his wife. He is accused of harming his wife, then wife.

THE COURT: Serious injury or threatening or shooting or –

MR. NEAL TRUSLOW: Judge -- I'm very glad you asked that question. I think it's -- I think it's a very important question.

THE COURT: You said it's not a –

MR. NEAL TRUSLOW: Judge, the -- I believe that the injuries would show if they're to the extent that what we have known about any injuries, they are not serious enough to warrant CDV/HAN. In fact, we would contend that this is a completely inappropriate place for this -- for this trial to be held. It should have been as they have represented to us and all of these judges along the way over the last four-and-a-half plus years that it's a charge – the appropriate charge should be CDV. Whoever the trial judge is I hope has the exact same question that you just had, Judge.

(Transcript Page 14, Line 16 – Page 16, Line 23)

And;

...

THE COURT: So we don't want Mr. Talkington to be in that situation of us going through this case, and it's getting litigated up and down. Number one, Mr. Truslow says well, we never really got the remittitur because it's the -- the order we had said it would be sent in 15 days; number two, we filed a petition for a rehearing in the Court of Appeals, and while our petition is

> pending, Mr. Pauling brought this case to trial. So, Judge, all of this is a nullity. You all wasted your time. Didn't they have something better to do than to try a case that was pending on appeal? That's probably what we hear. So we don't want to go through all of that. We want to make sure that we're clear on everything before we proceed, and there has to be some clarity now. They -- if the Court of Appeals are tired of Mr. Talkington and through with him, you know, a petition can be made for an expedited ruling or whatever on the rehearing because sometimes it just stays up there. A rehearing -- and we look through the advance sheets online and petition for a rehearing pending, pending, pending. You need to get a ruling on it. It needs to be definitive so that when and if the case proceeds, and you know, I agree with the defense in the case of with the history of this, him winning his CDV. And then the State is upping the ante and indicting him for CDV HAN while the CDV is pending, and all of these -- Judge Kinard siding with the defense, and you know, it's just so much confusion there. I mean, I don't know who is right and who is wrong, but let's get some clarity before we proceed.

(Transcript Page 29, Line 16 – Page 30, Line 21)

Had the Court of Appeals reviewed the entire transcript before issuing its order, it would have been aware of the State's misconduct on multiple levels – destroying the record from February 26, 2016 – upgrading the charges as a penalty for exercising appeal rights, and attempting to call a case for trial over which General Sessions has no jurisdiction – all in an attempt to maliciously prosecute Talkington. The State's mentality in this case has been not to be ministers of justice, but to win at all costs. Because the Court of Appeals failed to consider the transcript before issuing an order of dismissal, as Talkington had requested, it was not able to appreciate fully the serious constitutional violations perpetrated by the State both prior to, and during the time the case was on appeal. Accordingly, Talkington asks that this Court grant his Petition.

III. THE COURT OF APPEALS ERRED IN FAILING TO ISSUE A WRIT OF PROHIBITION OR A WRIT OF MANDAMUS

The Court has the power in its original jurisdiction to issue writs of mandamus and prohibition. S.C. Const. art. V, § 5; S.C. Code Ann. § 14-3-310. The Court of Appeals failed to recognize and/or consider that this matter involves a systematic usurpation of Appellant's constitutionally guaranteed due process rights from the inception of this case in 2011, caused by the State's fundamental misunderstanding and/or intentional misapplication of proper legal process and procedure.

Initially, the Court of Appeals should have issued a Writ of Mandamus or a Writ of Prohibition enforcing Judge Kinard's unappealed Order requiring a proper reconstruction of the record and preventing the matter from proceeding further until such a proper record was made. That Order (from the Magistrate who heard the case in February of 2013) was not provided to Talkington until September 1, 2015, and same was not the product of any hearing or other consultation with counsel. In essence, that document was never a proper reconstruction of the record as Ordered by Judge Kinard. Allowing the State to continue on without following proper procedure and process is wrong, damaging, and unjust, and the Court should enforce Talkington's right to proper and due process.

Further, the Court of Appeals should have issued a Writ of Mandamus or a Writ of Prohibition forcing the State to abandon the CDVHAN charge. Initially, in July 2011, Appellant was arrested and charged with CDV, Second Offense. In obtaining this warrant, the State did not indicate to the judge that this matter was a CDVHAN. The matter proceeded to a preliminary hearing, where the State again represented to the preliminary hearing judge that the matter was not a CDVHAN. The matter was set for trial in Magistrate's Court on February 26, 2013. The State did not indicate to the judge that this

matter was a CDVHAN. In November 2013, the State obtained a "new" warrant charging CDV, First Offense – not CDVHAN. The "new" case was set for a pre-trial hearing and, at that time, the State did not indicate to the judge that this matter was a CDVHAN. Another subsequent pre-trial hearing was set and, at that time, the State did not indicate to that judge at that time, or when the matter was reconsidered later, that this matter was a CDVHAN. The case was appealed and then heard by the late Circuit Court Judge Kinard on March 6, 2015. At that time, the State did not indicate to the judge that this matter was a CDVHAN.

The CDVHAN charge was brought only in retaliation for Talkington's success on appeal. The State should not be permitted to proceed on a CDVHAN charge when it has been representing to various judges in various courts for years that the matter was not a CDVHAN. To allow the State to do so is wrong, damaging, and unjust, and the Court should enforce Talkington's right to due process.

The State's actions in this case include misrepresentation of: charges against Talkington to multiple judges, *ex parte* communications with a Circuit Court Judge, destroying exculpatory evidence, and retaliatory prosecution. The tortured history of this entire proceeding now requires this Court's intervention. Accordingly, Talkington asks that this Court grant his Petition.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his request for a Writ of Certiorari, Writ of Prohibition and/or Writ of Mandamus.

May 9, 2016

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PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari, with Appendix on The State by hand-delivering a copy of it, on May 11, 2016, to The State's attorneys of record, Hans W. Pauling, Joseph Y. Shenkar, and Kristen Bales, Assistant Solicitors, Fifth Judicial Circuit Solicitor's Office, located at 1701 Main Street, Columbia, South Carolina 29201.

A copy has also been hand-delivered to South Carolina Attorney General Alan McCrory Wilson at 1000 Assembly Street, Columbia, South Carolina 29211.

May 11, 2016

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