

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.

APPENDIX

May 9, 2016

Truslow & Truslow Law Firm

DOUGLAS N TRUSLOW

(SC BAR 5642)

NEAL D. TRUSLOW

(SC Bar 77806)

P.O. Box 1465

Columbia, SC 29202

(803) 256-6276

Fax (803) 256-7659

douglastruslow@truslowlaw.com

nealtruslow@truslowlaw.com

RECEIVED

MAY 11 2016

SC SUPREME COURT

Other Counsel of Record:

Hans W. Pauling
Joseph Y. Shenkar
Kristen Bales
Assistant Solicitors
Fifth Judicial Circuit
P.O. Box 192
Columbia, South Carolina 29202
(803) 576-1832
Fax: (803) 576-1718
PaulingH@rcgov.us
shenkarj@rcgov.us
balesk@rcgov.us

Alan McCrory Wilson
South Carolina Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3596
agwilson@scag.gov

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STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF RICHLAND)

FIFTH JUDICIAL CIRCUIT

STATE,)

Case Numbers: 2015-GS-40-01723;

~~2014-CP-40-07362;~~

v.)

2013A4010601092;

and I902097

BRIAN TALKINGTON,)

Defendant.)

**ORDER DENYING MOTION TO DISMISS,
TO QUASH, FOR INJUNCTIVE RELIEF,
FOR WRIT OF PROHIBITION, OR FOR
WRIT OF MANDAMUS**

Hearing Date: September 9, 2015

Attorneys for the State: Hans Pauling and Joseph Shenkar

Attorneys for Defendant: Douglas Truslow and Neal Truslow

RICHLAND COUNTY
FILED
OCT 13 PM 1:22
JENNIFER W. McCRID
C.P. & G.S.

This matter is before me on Defendant Brian Talkington's Motion to Dismiss, to Quash, for Injunctive Relief, for a Writ of Prohibition, or for a Writ of Mandamus. The essence of Talkington's motion is that this Court should prohibit the State from trying Talkington for Criminal Domestic Violence (CDV) of a High an Aggravated Nature (HAN) because the magistrate court previously dismissed a CDV charge against Talkington based on the same facts. After carefully considering the written submissions of counsel, the case files in 2015-GS-40-01723 and 2014-CP-40-07362, and arguments from counsel, Talkington's motion is respectfully denied for the reasons that follow.

BACKGROUND

The State initially charged Talkington with CDV 2nd offense on July 11, 2011. This was an error because Talkington had no predicate CDV 1st offense. Upon realizing this mistake, the State remanded the case to the magistrate court, but it did so without petitioning the circuit court, as required by section 22-3-545(B) of the South Carolina

Code. According to Talkington, he repeatedly brought this error to the State's attention, but the State forged ahead.

A jury trial in the magistrate's court was set for February 26, 2013. On the day of trial, a jury venire was qualified by the magistrate, and the parties selected a jury. Thereafter, Talkington moved to dismiss based, at least in part, on the magistrate's lack of jurisdiction over a CDV 2nd indictment that had not been properly remanded. According to Talkington, he made this motion after the State and the magistrate judge agreed that the motion would be heard as if the jury had been sworn. The magistrate, Judge Edmond, granted Talkington's motion to dismiss.

After the magistrate dismissed the case, Assistant Solicitor Sheila Mims emailed Talkington's attorney and informed him that she intended to appeal the magistrate's dismissal. However, the State did not appeal. Instead, approximately nine months after Judge Edmond's dismissal, the State *nolle prossed* the CDV 2nd indictment and charged Talkington with a CDV 1st offense, based on the same set of facts.

A different magistrate, Judge Stroman, held a pre-trial hearing on the CDV 1st charge. At the hearing, Talkington argued: (1) the new indictment should be dismissed based on double jeopardy and other constitutional grounds, (2) the procedural history should be presented to the magistrate judge who issued the warrant for CDV 1st, or (3) the matter should be referred to Judge Edmond. Judge Stroman referred the matter back to Judge Edmond; however, for reasons unknown, a second pre-trial hearing was set before a third magistrate, Judge Shealy.

Judge Shealy denied Talkington's motion to dismiss. Specifically, Judge Shealy found that because the magistrate court did not have jurisdiction over the initial charge for CDV 2nd, jeopardy did not attach.

Talkington appealed Judge Shealy's order to the circuit court, and Judge Kinard heard the appeal on March 6, 2015. At the hearing, Judge Kinard orally announced that the matter would be remanded to the magistrate court so that Judge Edmond could attempt to reconstruct the record of the motion to dismiss from February 26, 2013.

On April 8, 2015, before Judge Kinard had reduced his order to writing, Solicitor Hans Pauling indicted Talkington on a charge of CDVHAN, based on the same underlying facts. On May 8, 2015, Judge Edmond issued an order attempting to reconstruct the record.¹ In the order, Judge Edmond stated, among other things, that the CDV 2nd case was not properly remanded to the magistrate court because it lacked a signature from a circuit court judge, and as a result, the case remained one for CDV 2nd, a crime over which the magistrate did not have jurisdiction.

Talkington filed this motion to dismiss, to quash, for injunctive relief, for a writ of prohibition, or for a writ of mandamus on May 12, 2015.

LAW/ANALYSIS

I. Collateral Estoppel/Double Jeopardy

Talkington first argues the CDVHAN indictment should be dismissed based on the doctrine of collateral estoppel because the April 2015 indictment is the State's "third attempt to perfect a charge relating to the exact same conduct occurring on July 4, 2011 . . . [, and it is] the third different charge the State has referred against Talkington (CDV

¹ The parties did not receive this order until September 1, 2015.

2nd Offense, CDV 1st Offense, and now CDVAN) arising out of the exact same nucleus of operative facts.” (emphasis in original)

Collateral estoppel prevents a party from relitigating an issue that has already been decided in a previous action. See *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014). “[C]ollateral estoppel in the criminal context is derived from the Fifth Amendment Double Jeopardy Clause, which forbids any person from being ‘twice put in jeopardy of life or limb.’” *Id.* at 107, 760 S.E.2d at 821 (quoting *Ashe v. Swenson*, 397 U.S. 436, 442 (1970)).

The Double Jeopardy Clause provides three safeguards: “(1) protection from prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection from multiple prosecution for the same offense after an improvidently granted mistrial.” *State v. Kirby*, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977). “[O]ne is in jeopardy when a legal jury is shown and impaneled to try [a defendant] upon a valid indictment in a competent court.” *State v. Stephenson*, 54 S.C. 234, 32 S.E. 305 (1899).

Here, even though the parties dispute whether they had an agreement to proceed “as if the jury was sworn” prior to hearing Talkington’s motion to dismiss, there is no dispute that Judge Edmond determined the magistrate’s court was not “a competent court” in which to try the case because the charge for CDV 2nd had not been properly remanded. Thus, jeopardy did not attach, and the ultimate issue of Talkington’s guilt was never litigated.

II. Destruction of Evidence

Talkington next argues this case should be dismissed with prejudice because the State's actions have caused the destruction of the transcript from his motion to dismiss and that evidence was central to Talkington's argument. However, even assuming the transcript would reveal that the State had agreed to allow Talkington's motion to be heard "as if the jury had been sworn," jeopardy still would not have attached because the magistrate lacked subject matter jurisdiction over the CDV 2nd offense indictment. *Cf. State v. Whetstone*, 333 S.C. 376, 377, 510 S.E.2d 225, 226 (Ct. App. 1998) ("Absent compliance with 1993 S.C. Acts 174 section 1(B) [now codified as section 22-3-545(B)], the magistrate's court would have lacked jurisdiction of the subject matter to dispose of charges for second offense ill-treatment of animals"). Accordingly, the lack of a transcript does not make a difference to Talkington's double jeopardy argument, and in the words of Chief Judge Alex Sanders, "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

III. Prohibiting the State from Prosecuting Talkington for CDVHAN

Finally, Talkington asks this Court to enjoin the State from pursuing its indictment for CDVHAN, because the State was using it as a vehicle to circumvent the order of remand issued by Judge Kinard.² However, even though the State's indictment for CDVHAN *might* have circumvented the remand, in reality, it did not. Judge Edmond issued an order in response to the remand, setting forth his recollection of events. The order confirmed that Judge Edmond had dismissed the case because the magistrate court

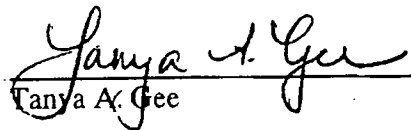
² In the alternative to an injunction, Talkington asks this Court to issue a Writ of Prohibition or a Writ of Mandamus to prevent the State from prosecuting the indictment for CDVHAN. These requests are also denied as they are based on the same reasons addressed in section III of this order.

lacked subject matter jurisdiction over the indictment. Thus, an injunction is not necessary because the circuit court's order was not circumvented. Moreover, the circuit court itself was without jurisdiction to hear the appeal from Judge Shealy's order denying Talkington's motion to dismiss because such an order is not subject to an immediate appeal. *See, e.g., State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986) ("[A]n order denying a double jeopardy claim is not immediately appealable.").

CONCLUSION

Based on the foregoing reasons, Talkington's motion is denied. Case number 2014-CP-40-07362 (the appeal from Judge Shealy's order denying Talkington's motion to dismiss) is ended.

AND IT IS SO ORDERED.


Tanya A. Gee

October 12, 2015

Neal Truslow

From: Neal Truslow
Sent: Monday, November 09, 2015 2:26 PM
To: 'Gee, Tanya Law Clerk (Emily Burgis)'; 'Hans Pauling'
Cc: 'Joseph Shenkar'; Douglas Truslow; Mackenzie Woodward; Amanda Hilley
Subject: RE: Brian Talkington- Motion to Reconsider
Attachments: DOC110915-11092015140838.pdf

Emily and Hans:

In the process of monitoring our cases, we looked to the public index to check on the status of Judge Gee's ruling as to Defendant's Motion to Reconsider as we had not received any notification of the Judge's determination and were surprised to discover that same had apparently been signed and filed on October 26, 2015. We had not (and still have not) received any notice/indication of the filing, electronically or in the mail. Presumably the Solicitor's Office likewise was unaware of the filing because on October 29, 2015, Assistant Solicitor Pauling filed a response to Defendant's motion.

I went to the Clerk of Court today and obtained a filed copy of the Order Denying Motion for Reconsideration. The Clerk's office did not provide any documentation from the file indicating that the Order had been sent to Defendant via mail or otherwise. As such, we would consider today (November 9, 2015) as the date of receipt of Judge Gee's Order denying Defendant's Motion to Reconsider.

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

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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: Neal Truslow

Sent: Monday, October 19, 2015 3:32 PM

To: 'Gee, Tanya Law Clerk (Emily Burgis)' <tgeelc@sccourts.org>; Hans Pauling <PaulingH@rcgov.us>

Cc: Joseph Shenkar <ShenkarJ@rcgov.us>; Douglas Truslow <douglastruslow@truslowlaw.com>; Mackenzie Woodward <mackenziewoodward@truslowlaw.com>; Amanda Hilley <amandahilley@truslowlaw.com>

Subject: RE: Brian Talkington- Motion to Reconsider

Emily and Hans:

Thanks for the prompt response. We'll look to hear from the Court.

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

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From: Gee, Tanya Law Clerk (Emily Burgis) [<mailto:tgeelc@sccourts.org>]

Sent: Monday, October 19, 2015 3:29 PM

To: Hans Pauling <PaulingH@rcgov.us>; Neal Truslow <nealtruslow@truslowlaw.com>

Cc: Joseph Shenkar <ShenkarJ@rcgov.us>; Douglas Truslow <douglastruslow@truslowlaw.com>; Mackenzie Woodward

<mackenziewoodward@truslowlaw.com>; Amanda Hilley <amandahilley@truslowlaw.com>

Subject: RE: Brian Talkington- Motion to Reconsider

Judge Gee agrees that this matter can be resolved on written submissions.

From: Hans Pauling [<mailto:PaulingH@rcgov.us>]

Sent: Monday, October 19, 2015 3:23 PM

To: Neal Truslow; Gee, Tanya Law Clerk (Emily Burgis)

Cc: Joseph Shenkar; Douglas Truslow; Mackenzie Woodward; Amanda Hilley

Subject: RE: Brian Talkington- Motion to Reconsider

State is amiable to a written response from the Court on the defense's request for reconsideration.

From: Neal Truslow [<mailto:nealtruslow@truslowlaw.com>]

Sent: Monday, October 19, 2015 3:20 PM

To: Hans Pauling; Gee, Tanya Law Clerk (Emily Burgis)

Cc: Joseph Shenkar; Douglas Truslow; Mackenzie Woodward; Amanda Hilley

Subject: RE: Brian Talkington- Motion to Reconsider

Emily:

At this time, I am scheduled to be in Rock Hill Municipal Court for a DUI trial (date certain) on November 2nd, and Doug has a conflict in Federal Court on November the 2nd and 3rd (Hipp and Sumter).

Additionally, my wife and I are expecting twins (she's 35 weeks as of yesterday) and "expected" arrival date is November 3rd, though there is no telling when they may come – if you were to ask her, she would tell you that they should have already come. I plan to take time off for the birth, as well as while Lauren and the babies have to be in the hospital (expected to be for at least 3 days after the surgery). Unfortunately, I do not have the luxury to pre-plan with any certainty when all this may transpire. If the babies are required to be in the NICU for any period of time... I will cross that bridge when I get to it.

Because of the above, and talking about this matter with Doug, if the Court and the State would be amenable, the Defense would be willing for Judge Gee to issue a decision on the Motion to Reconsider without a hearing on the matter. Perhaps that way the Court can deal with that matter expeditiously and at the appropriate time. However, if the Court wants a hearing on the motion, we would ask that the Court consider addressing same at the most convenient, later date.

If you need anything further, please feel free to give me a call.

Respectfully,

Neal

Neal D. Truslow
ATTORNEY AT LAW

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Phone: 803.256.6276
Fax: 803.256.7659
Website: <http://www.truslowlaw.com/>
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From: Hans Pauling [<mailto:PaulingH@rcgov.us>]

Sent: Monday, October 19, 2015 2:28 PM

To: Gee, Tanya Law Clerk (Emily Burgis) <tgeelc@sccourts.org>; Neal Truslow <nealtruslow@truslowlaw.com>

Cc: Joseph Shenkar <ShenkarJ@rcgov.us>; Douglas Truslow <douglastruslow@truslowlaw.com>

Subject: RE: Brian Talkington- Motion to Reconsider

State is available

From: Gee, Tanya Law Clerk (Emily Burgis) [<mailto:tgeelc@sccourts.org>]

Sent: Monday, October 19, 2015 2:27 PM

To: Neal Truslow; Hans Pauling

Cc: Joseph Shenkar; Douglas Truslow

Subject: RE: Brian Talkington- Motion to Reconsider

Judge Gee would like to schedule this hearing for another date. Her next Common Pleas term is the week of November 1.

From: Neal Truslow [<mailto:nealtruslow@truslowlaw.com>]

Sent: Friday, October 16, 2015 3:13 PM

To: Gee, Tanya Law Clerk (Emily Burgis); Hans Pauling

Cc: Joseph Shenkar; Dan Goldberg; Douglas Truslow

Subject: RE: Brian Talkington- Motion to Reconsider

All:

I have drill with the SCARNG this weekend and meetings scheduled for 10am and 2pm. Is another date possible? If not another date, is 3:30pm or later available?

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
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From: Gee, Tanya Law Clerk (Emily Burgis) [<mailto:tgeelc@sccourts.org>]
Sent: Friday, October 16, 2015 12:33 PM
To: Hans Pauling <PaulingH@rcgov.us>
Cc: Joseph Shenkar <ShenkarJ@rcgov.us>; Dan Goldberg <GoldbergD@rcgov.us>; Douglas Truslow <douglastruslow@truslowlaw.com>; Neal Truslow <nealtruslow@truslowlaw.com>
Subject: RE: Brian Talkington- Motion to Reconsider

Correct.

From: Hans Pauling [<mailto:PaulingH@rcgov.us>]
Sent: Friday, October 16, 2015 12:31 PM
To: Gee, Tanya Law Clerk (Emily Burgis)
Cc: Joseph Shenkar; Dan Goldberg; douglastruslow@truslowlaw.com; nealtruslow@truslowlaw.com
Subject: Re: Brian Talkington- Motion to Reconsider

Yes for State

Monday October 19 correct?

Sent from my iPhone

On Oct 16, 2015, at 11:48 AM, Gee, Tanya Law Clerk (Emily Burgis) <tgeelc@sccourts.org> wrote:

Counselors –

Judge Gee should have some time to hear this next Monday. Would that work for everyone?

From: Hans Pauling [<mailto:PaulingH@rcgov.us>]
Sent: Friday, October 16, 2015 8:22 AM
To: Gee, Tanya Law Clerk (Emily Burgis)
Cc: Joseph Shenkar; Dan Goldberg; douglastruslow@truslowlaw.com; nealtruslow@truslowlaw.com
Subject: Brian Talkington- Motion to Reconsider

Madame Clerk:

The State is in receipt of defense's Motion to Reconsider the ruling of Judge Gee dated October 12, 2015.

Can you inquire of Judge Gee if she would entertain this motion for the defense next week during her term in General Sessions and if so which day would be best for her?

Both Mr. Shenkar and myself have cases on the trial docket next week but we should be available either Monday or Tuesday for this hearing.

Thank you very much

<image003.jpg> **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

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

## JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4007362

State of South Carolina

Brian Talkington

PLAINTIFF(S)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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 15 October 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





conviction on February 26, 2013, despite vociferously arguing the contrary position to, *inter alia*, counsel for Defendant, Judge Edmond, Judge Davis, Judge Stroman, and Judge Shealy. Further, had Defendant not appeared for trial on February 26, 2013 as directed by the Summons, he would have been convicted in his absence and, because he is an active duty military Servicemember, he most likely would have suffered irreparable harm that could include, *inter alia*, dishonorable discharge. He had no choice but to defend the case based on the assertions of the State (i.e. that jurisdiction did lie in magistrate's court).

- ii. To allow such action denies Defendant the due process "fundamental fairness essential to the very concept of justice". *Lisenba v. California*, 314 U.S. 219, 236.
- c. The lack of justification and implication of the State waiting nine months after a case was dismissed (emphasis added) in February of 2013 to *nolle pross* and charge Defendant with a CDV 1st offense arising out of the same common nucleus of operative facts from July of 2011.
- d. The inconsistencies in Judge Edmond's May 8, 2015 Order and the State's own assertions regarding whether the initial case was dismissed or sent back to General Sessions Court, namely:
  - i. The State asserts "The defendant requested relief by a dismissal of the charge under a jurisdictional basis. Motion was granted by Judge Edmond in February 2013."<sup>1</sup> (Emphasis added)
  - ii. The State asserts "Under South Carolina law §22-3-545 (B)(1), the initial case against the defendant was dismissed for lack of subject matter jurisdiction."<sup>2</sup> (Emphasis added)
  - iii. In Judge Edmond's Order, the paragraph labeled "Jurisdiction" reads: "This is a Criminal Domestic Violence (CDV 1<sup>st</sup>) allegation against Mr.

---

<sup>1</sup> Page 1, Paragraph 1, last two sentences of Response to Defense Motion [to] Dismiss, to Quash, Injunctive Relief, for a Writ of Prohibition, or for a Writ of Mandamus.

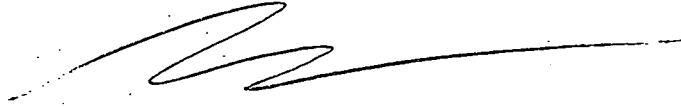
<sup>2</sup>Page 3, Paragraph 2, second sentence of Response to Defense Motion [to] Dismiss, to Quash, Injunctive Relief, for a Writ of Prohibition, or for a Writ of Mandamus.

Talkington, and this Court has jurisdiction pursuant to S.C. Code Ann. § 22-3-550.” (Emphasis added)

- iv. In Judge Edmond’s Order, the paragraph labeled “Conclusion” reads:  
“The court agreed with the defense that the Criminal Domestic Violence case was not properly remanded by the Solicitor’s office ... The court ordered the case to be sent back to the Circuit Court as this court no longer had jurisdiction...” (Emphasis added)

2. Therefore, Defendant requests that this Court reconsider or vacate its ruling.

Truslow & Truslow Law Firm



NEAL D. TRUSLOW  
DOUGLAS N. TRUSLOW  
Attorneys for Defendant Brian Talkington  
P.O. Box 1465  
Columbia, SC 29202  
(803) 256-6276  
Fax (803) 256-7659  
[nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)  
[douglastruslow@truslowlaw.com](mailto:douglastruslow@truslowlaw.com)

October 13, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

The State of South Carolina,

-vs-

Brian Talkington,

Defendant.

) IN THE COURT OF GENERAL SESSIONS  
) FIFTH JUDICIAL CIRCUIT  
)

Case No.: 2015-GS-40-1723; 2014-CP-40-07362  
2013A4010601092; and I902097

) ORDER DENYING MOTION  
) FOR RECONSIDERATION  
)  
)  
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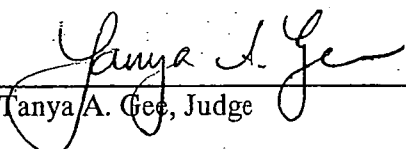
NOV 12 2015

SC Court of Appeals

Defendant Brian Talkington has filed a Motion to Reconsider or to Vacate this Court's

Order dated October 12, 2015. After careful consideration, the Defendant's motion is respectfully denied.

AND IT IS SO ORDERED.

  
Tanya A. Gee, Judge

October 26, 2015

JEANETTE W. McBRIDE  
C.C.P. & G.S.

2015 OCT 26 AM 10:13

FILED

RICHLAND COUNTY

COPY

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

Tanya A. Gee, Circuit Court Judge

Case No. 2015-GS-40-1723

RECEIVED

NOV 12 2015

SC Court of Appeals

The State,

Respondent,

v.

Brian Talkington,

Appellant.

NOTICE OF APPEAL

Brian Talkington appeals the denial of his Motion to Dismiss, to Quash, for Injunctive relief, for Writ of Prohibition, or for Writ of Mandamus (filed May 12, 2015) in this case.

The Order denying Appellant's Motion was signed by the Honorable Tanya A. Gee on October 12, 2015 and filed on October 13, 2015. Appellant received an electronic copy of the written Order denying Appellant's Motion on October 13, 2015 and timely mailed a Notice of Motion and Motion to Reconsider or to Vacate, pursuant to SCRCrimP 29, on October 14, 2015 (filed October 19, 2015). This appeal is taken from the written Order of the Honorable Tanya A. Gee, dated October 26, 2015, which denied appellant's Motion to Reconsider or to Vacate. Appellant received written notice of entry of this order on November 9, 2015.<sup>1</sup>

November 9, 2015

[SIGNATURE ON FOLLOWING PAGE]

<sup>1</sup> See attached email correspondence.

Truslow & Truslow Law Firm



DOUGLAS N TRUSLOW

(SC BAR 5642)

✓ NEAL D. TRUSLOW

(SC Bar 77806)

P.O. Box 1465

Columbia, SC 29202

(803) 256-6276

Fax (803) 256-7659

douglastruslow@truslowlaw.com

nealtruslow@truslowlaw.com

Other Counsel of Record:

Hans W. Pauling

Assistant Solicitor

Fifth Judicial Circuit

P.O. Box 192

Columbia, South Carolina 29202

(803) 576-1832

Fax: (803) 576-1718

PaulingH@rcgov.us

Joseph Y. Shenkar

Assistant Solicitor

Fifth Judicial Circuit

P.O. Box 192

Columbia, South Carolina 29202

(803) 576-1832

Fax: (803) 576-1718

shenkari@rcgov.us



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1220 SENATE STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

November 24, 2015

Mr. Neal Douglas Truslow, Esquire  
PO Box 1465  
Columbia SC 29202

Mr. Hans William Pauling, Esquire  
1701 Main Street  
Columbia SC 29201

Mr. Joseph Yechiel Shenkar, Esquire  
1701 Main St.  
Columbia SC 29201

Re: The State v. Brian Talkington  
Appellate Case No. 2015-002331

Dear Counsel:

This Court has received a notice of appeal from the appellant. A preliminary review of the order(s) challenged on appeal indicates it might not be appealable.

Accordingly, it is requested that you serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memorandum.

Very truly yours,

  
CLERK

cc: Salley W. Elliott, Esquire  
Alan McCrory Wilson, Esquire

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

COPY

Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2015-002331

The State,

Respondent,

v.

Brian Talkington,

Appellant.

RECEIVED

DEC 07 2015

SC Court of Appeals

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.<sup>1</sup>, *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

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<sup>1</sup> 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<sup>2</sup>, the constitutionality of the State's actions<sup>3</sup> 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 prosequere" 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.<sup>4</sup>
- 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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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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 prosequere" 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.<sup>5</sup>
- 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

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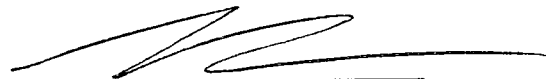
<sup>5</sup> See Enclosure 2.

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 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

Truslow & Truslow Law Firm



DOUGLAS N TRUSLOW  
(SC BAR 5642)

NEAL D. TRUSLOW  
(SC Bar 77806)

P.O. Box 1465

Columbia, SC 29202

(803) 256-6276

Fax (803) 256-7659

[douglastruslow@truslowlaw.com](mailto:douglastruslow@truslowlaw.com)

[nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)

Other Counsel of Record:

Hans W. Pauling  
Assistant Solicitor  
Fifth Judicial Circuit  
P.O. Box 192  
Columbia, South Carolina 29202  
(803) 576-1832  
Fax: (803) 576-1718  
[PaulingH@rcgov.us](mailto:PaulingH@rcgov.us)

Joseph Y. Shenkar  
Assistant Solicitor  
Fifth Judicial Circuit  
P.O. Box 192  
Columbia, South Carolina 29202  
(803) 576-1832  
Fax: (803) 576-1718  
[shenkarj@rcgov.us](mailto:shenkarj@rcgov.us)

# 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.

# South Carolina Court Administration

## South Carolina Supreme Court Columbia, South Carolina

ROSALYN W. FRIERSON  
DIRECTOR

1015 SUMTER STREET, SUITE 200  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1800  
FAX: (803) 734-1355

### 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

**HNI** 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.

400 S.C. 421, \*421; 735 S.E.2d 471, \*\*471; 2012 S.C. LEXIS 278, \*\*\*1

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] [v428] 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. [v429] 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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

<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> 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.

<sup>4</sup> 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*.<sup>5</sup> 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

<sup>5</sup> 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 [\*\*\*13] 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 (Cl. 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. <sup>6</sup> [\*\*\*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

<sup>6</sup> 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 [\*438] 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) ("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." Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987) (Kozinski, 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 [\*439] not geared towards influencing [\*440] 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. Trige, 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) [\*439] (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 [\*440] 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 Simeon 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.

<sup>7</sup> 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]

<sup>7</sup> 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.<sup>8</sup> *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 (Cl. 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

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> *See State v. Kennedy, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Cl. 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

<sup>9</sup> 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.

<sup>10</sup> 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 trial [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, 362 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)

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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

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### ORDER

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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

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## ORDER

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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

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

1. On July 11, 2011, Talkington was arrested and charged with Criminal Domestic Violence (“CDV”) 2<sup>nd</sup> 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 1<sup>st</sup> Offense conviction such that the General Sessions Court would not have jurisdiction in the first place.<sup>1</sup>
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 prosequere” the charge (over which the Court of General Sessions had no jurisdiction) and simply charging Talkington with CDV 1<sup>st</sup> Offense, the State unilaterally “remanded” the case from General Sessions to Magistrate’s Court.<sup>2</sup>
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.<sup>3</sup>

<sup>3</sup> 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 he did not appear, he was subject to being tried and convicted in his absence.
6. On February 26, 2015 Talkington 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;<sup>4</sup>
  - b. The State was appealing the dismissal of the case;<sup>5</sup> and that
  - c. The State had sought and/or was seeking an Attorney General's Opinion.<sup>6</sup>
9. The State did not, in fact, appeal but failed to timely communicate that circumstance to Talkington or the Court.<sup>7</sup> 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 prosequere" the initial CDV charge against Talkington, and recharge him then on a statutory charge of CDV 1<sup>st</sup> Offense – Warrant 2013A4010601092 (alleging the same facts/incident giving rise to the initial charge that had been dismissed).<sup>8</sup>
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

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<sup>4</sup> Ex. 3. Emails of February 27, 2013

<sup>5</sup> Ex. 4. Emails of May 2, 2013

<sup>6</sup> Ex. 5. Email of June 12, 2014.

<sup>7</sup> 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.

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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 1<sup>st</sup> 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.<sup>11</sup>
15. Talkington has indicated his objection to the State and to this Court.<sup>12</sup>

#### **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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<sup>9</sup> This conclusion was at odds with standard trial notices – that if Talkington did not appear he was subject to being convicted in his absence.

<sup>10</sup> Ex. 7. Order of Judge Kinard filed April 21, 2015.

<sup>11</sup> Ex. 8. Emails of April 13, 2015.

<sup>12</sup> 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 2<sup>nd</sup> Offense, CDV 1<sup>st</sup> 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.<sup>13</sup> 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 1<sup>st</sup> Offense. Moreover and/or alternatively, the Court may dismiss the CDVHAN on the grounds of collateral estoppel in that the CDV 1<sup>st</sup>

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<sup>13</sup> 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 1<sup>st</sup> 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

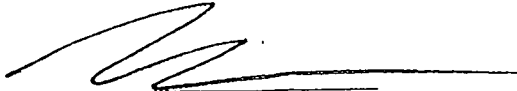
From its inception nearly four years ago, this matter has been mishandled by the State. What might have been viewed as minor mistakes have collectively "snowballed" into a complete miscarriage of justice by, *inter alia*, the State's repeated and fundamental procedural missteps.

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



NEAL D. TRUSLOW

DOUGLAS N. TRUSLOW

Attorneys for Defendant Brian Talkington

P.O. Box 1465

Columbia, SC 29202

(803) 256-6276

Fax (803) 256-7659

[nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)

[douglastruslow@truslowlaw.com](mailto:douglastruslow@truslowlaw.com)

May 6, 2015

EX. 1

RICHLAND COUNTY  
FILED  
2015 MAY 12 AM 11:19  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

## 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 2<sup>nd</sup>. 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

RICHLAND COUNTY  
FILED  
2015 MAY 12 AM 11:19  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

# Truslow & Truslow

Attorneys At Law

Telephone: 803-256-6276 Fax: 803-256-7659

Douglas N. Truslow  
*douglastruslow@truslowlaw.com*

Neal D. Truslow  
*nealtruslow@truslowlaw.com*

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

June 14, 2012

*Mailing Address:*  
P.O. Box 1465  
Columbia, SC 29202

**RE: State v. Brian Talkington  
Warrant: I902097**

**(VIA HAND DELIVERY)**

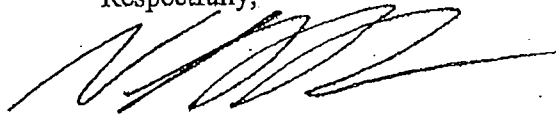
Dan Johnson, Esquire  
Richland County Solicitor  
P.O. Box 192  
Columbia, SC 29202

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

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EX. 3

RICHLAND COUNTY  
FILED

2015 MAY 12 AM 11:19

JEANNETTE W. MOBRIDE  
C.C.P. & G.S.

## 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

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

Mailing Address:  
PO Box 1465

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---

**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

RICHLAND COUNTY  
FILED

2015 MAY 12 AM 11:19

JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

## 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

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

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---

**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

RICHLAND COUNTY  
FILED

2015 MAY 12 AM 11:20

JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

## 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](mailto:nealtruslow@truslowlaw.com)

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

Mailing Address:  
PO Box 1465  
Columbia, SC 29202

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---

**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 week 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](mailto:nealtruslow@truslowlaw.com)

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

Mailing Address:  
PO Box 1465  
Columbia, SC 29202

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EX. 6

RICHLAND COUNTY  
FILED

2015 MAY 12 AM 11:20

JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

## 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  
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---

**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 prosequere Mr. Talkington's CDV 2<sup>nd</sup> warrant and recharge him with CDV 1<sup>st</sup>. 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 1<sup>st</sup>. 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

RICHLAND COUNTY  
FILED  
2015 MAY 12 AM 11:20  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

STATE OF SOUTH CAROLINA  
IN THE COURT OF COMMON PLEAS

2014-CP-40-7362

THE STATE,

vs.

BRIAN TALKINGTON,

Respondent

Appellant

RICHLAND COUNTY  
FILED  
2015 APR 21 PM 4:48  
JEANNETTE W. MCBRIDE  
C.C.P. & S.

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.<sup>1</sup> 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.

---

<sup>1</sup> The State had demanded a jury trial; Talkington was willing to have the case tried by a Judge alone.

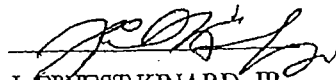
... It is elementary that both a defendant and this Court are entitled to have a record available for constitutional and appellate purposes. There is currently an inadequate record, through no fault of Appellant Talkington or his counsel.

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4007362

State of South Carolina

Brian Talkington

PLAINTIFF(S)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. No. suit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ 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 Janette W. McQuade

# EX. 8

RICHLAND COUNTY  
FILED

2015 MAY 12 AM 11:20

JEANNETTE W. MCERIDE  
C.C.P. & G.S.

## 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.  
Phone: 803.256.6276  
Fax: 803.256.7659  
Website: <http://www.truslowlaw.com/>  
Email: [nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)

Physical Address:

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

Mailing Address:

PO Box 1465  
Columbia, SC 29202

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---

**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](mailto: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  
Fax: 803.256.7659  
Website: <http://www.truslowlaw.com/>  
Email: [nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)

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

Mailing Address:  
PO Box 1465  
Columbia, SC 29202

EX. 9

RICHLAND COUNTY  
FILED

2015 MAY 12 AM 11:20

JEANNETTE W. MOBRIDE  
C.C.P. & G.S.

## Neal Truslow

---

**From:** Neal Truslow  
**Sent:** Friday, May 01, 2015 10:16 AM  
**To:** Hahs 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](mailto:nealtruslow@truslowlaw.com)

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

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**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 6<sup>th</sup>.

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

COUNTY OF RICHLAND

STATE,

v.

BRIAN TALKINGTON,

Defendant.

) IN THE COURT OF GENERAL SESSIONS

) FIFTH JUDICIAL CIRCUIT

) Docket Numbers: 2015-GS-40-01723;  
) 2014-CP-40-07362;  
) 2013A4010601092;  
) and I902097

**CERTIFICATE OF SERVICE**

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**

Mackenzie Woodward  
Mackenzie Woodward

Columbia, South Carolina

5/12, 2015

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

COPY

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

STATE,

v.

BRIAN TALKINGTON,

Defendant.

) IN THE COURT OF GENERAL SESSIONS

) FIFTH JUDICIAL CIRCUIT

) Docket Numbers: 2015-GS-40-01723;  
) 2014-CP-40-07362;  
) 2013A4010601092;  
) and I902097

**AFFIDAVIT OF BRIAN  
TALKINGTON**

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 2<sup>nd</sup> five days later. I insisted I had no CDV 1<sup>st</sup> 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 1<sup>st</sup>), 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 1<sup>st</sup>, (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 1<sup>st</sup> 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<sup>1</sup>. **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).<sup>2</sup>

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

---

<sup>1</sup> Ms. Mims did not disclose who the Circuit Judge was.

<sup>2</sup> 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.<sup>3</sup> 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 1<sup>st</sup> for the same event that gave rise to my initial arrest for CDV 2<sup>nd</sup>.

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.

---

<sup>3</sup> I sued for divorce and obtained an uncontested "no fault" divorce.

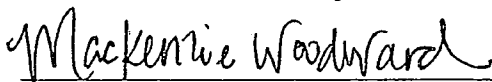
I felt at the time of my second arrest like my Constitutional rights had been seriously infringed upon by the State. In an attempt to conclusively establish same, the transcript I requested was absolutely necessary. It was only missing because of the State's misrepresentation and failure to tell my attorney 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 14<sup>th</sup> day of May, 2015

  
Notary Public for South Carolina

My Commission Expires: June 16, 2021 Commission Expires

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

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

STATE,

v.

BRIAN TALKINGTON,

Defendant.

) IN THE COURT OF GENERAL SESSIONS

) FIFTH JUDICIAL CIRCUIT

) Docket Numbers: 2015-GS-40-01723;  
) 2014-CP-40-07362;  
) 2013A4010601092;  
) and I902097

**SUPPLEMENTAL  
AFFIDAVIT OF CAMERON  
B. LITTLEJOHN, ESQUIRE**

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

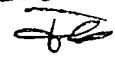
Subsequent to the hearing on May 6, 2015, I received an unexpected telephone call from Assistant Solicitor Hans Pauling. I understand Mr. Pauling is the prosecutor who indicted the Defendant, Brian Talkington, for Criminal Domestic Violent of a High and Aggravated Nature (CDVHAN) under docket number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

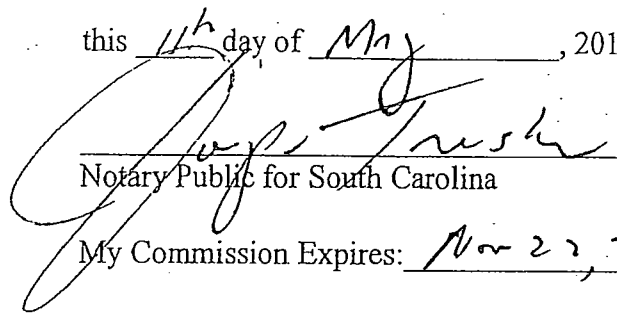
I stand by my Affidavit.

[SIGNATURE ON FOLLOWING PAGE.]

Cameron B. Littlejohn  
CAMERON B. LITTLEJOHN, ESQUIRE 

SWORN TO AND SUBSCRIBED BEFORE ME

this 11<sup>th</sup> day of May, 2015

  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: Nov 22, 2022

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

STATE,

v.

BRIAN TALKINGTON,

Defendant.

) IN THE COURT OF GENERAL SESSIONS

) FIFTH JUDICIAL CIRCUIT

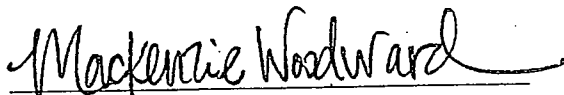
) Docket Numbers: 2015-GS-40-01723;  
) 2014-CP-40-07362;  
) 2013A4010601092;  
) and I902097

CERTIFICATE OF SERVICE

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

Columbia, South Carolina

5/11, 2015

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

COPY

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

STATE,

V.

BRIAN TALKINGTON,

Defendant.

IN THE COURT OF GENERAL SESSIONS

Docket Nos.: 2015-GS-40-01723  
2014-CP-40-07362  
2013A4010601092 and  
Warrant I-902097

AMICUS CURIAE MEMORANDUM

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 1<sup>st</sup> offense.

<sup>1</sup> The distinction between a CDV 1<sup>st</sup> and CDV 2<sup>nd</sup> is the existence of a prior/predicate CDV.

RICHLAND COUNTY  
 FILED  
 2015 AUG 17 AM 11:14  
 JEANETTE M. BRIDE  
 CLERK OF COURT

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 1<sup>st</sup>. 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 1<sup>st</sup>.
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 prosequere . . . CDV 2d and recharge him (Talkington) with CDV 1<sup>st</sup> . . ."

20. A second arrest warrant, 2013A4060192 was issued on November 29, 2013. The warrant was for CDV 1<sup>st</sup>, 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 1<sup>st</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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



State of South Carolina

Brian Talkington

PLAINTIFF(S)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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 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*



|                         |   |                                    |
|-------------------------|---|------------------------------------|
| 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,       | ) | <b>BRIEF IN SUPPORT OF REQUEST</b> |
|                         | ) | <b>TO CONSOLIDATE WITH</b>         |
|                         | ) | <b>DOCKET # 2014-CP-40-07362</b>   |
|                         | ) |                                    |
| 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.<sup>1</sup>
- 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") 2<sup>nd</sup> Offense (Warrant I902097).
  - a) Talkington consistently argued that there was no predicate CDV 1<sup>st</sup> Offense conviction such that the General Sessions Court would not have jurisdiction in the first place.<sup>2</sup>
  - 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 prosequere" the

<sup>1</sup> 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.

<sup>2</sup> CDV 1<sup>st</sup> 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 1<sup>st</sup> 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.<sup>3</sup>

#### **THE “SECOND CHARGE” – (Warrant 2013A4010601092)**

- 5) In November of 2013, the State indicated that it had “decided to nolle prosequere” the “First Charge” (Warrant I902097) against Talkington, and “recharge” him then on a statutory charge of CDV 1<sup>st</sup> 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

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<sup>3</sup> 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<sup>5</sup>, 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).

Truslow & Truslow Law Firm

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NEAL D. TRUSLOW  
DOUGLAS N. TRUSLOW  
Attorneys for Defendant Brian Talkington  
P.O. Box 1465  
Columbia, SC 29202  
(803) 256-6276  
Fax (803) 256-7659  
[nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)  
[douglastruslow@truslowlaw.com](mailto:douglastruslow@truslowlaw.com)

July 7, 2015

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<sup>5</sup> 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

APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2015-002331

RECEIVED

DEC 07 2015

SC Court of Appeals

The State,

Respondent,

v.

Brian Talkington,

Appellant.

COPY

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

*Mackenzie Woodward*

MACKENZIE WOODWARD

Paralegal

Truslow & Truslow Law Firm

P.O. Box 1465

Columbia, SC 29202

(803) 256-6276

Fax (803) 256-7659

# The South Carolina Court of Appeals

The State, Respondent,

v.

Brian Talkington, Appellant.

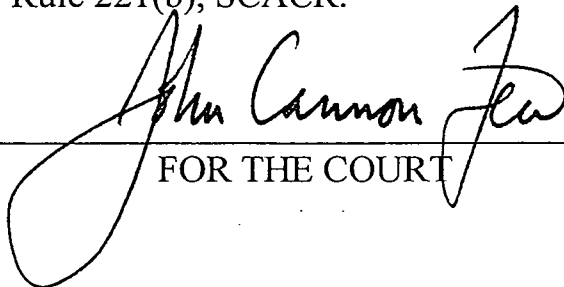
Appellate Case No. 2015-002331

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## ORDER

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After careful consideration, this appeal is dismissed because the underlying order is not immediately appealable. *See State v. Miller*, 289 S.C. 426, 426-27, 346 S.E.2d 705, 705-06 (1986) ("In South Carolina, a criminal defendant may not appeal until sentence has been imposed. Consistent with this rule, an order denying a double jeopardy claim is not immediately appealable." (citations omitted)).<sup>1</sup> The remittitur will be sent as required by Rule 221(b), SCACR.

  
\_\_\_\_\_  
FOR THE COURT

Columbia, South Carolina

cc:

Neal Douglas Truslow, Esquire  
Hans William Pauling, Esquire  
Joseph Yechiel Shenkar, Esquire  
Alan McCrory Wilson, Esquire

**FILED**

1/29/16

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<sup>1</sup> To the extent Appellant has requested this court to treat the notice of appeal as a "petition to the appropriate Court for a writ of prohibition and/or mandamus," that request is denied.

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

RECEIVED  
FEB 11 2016  
SC Court of Appeals

The State,

Respondent,

v.

Brian Talkington,

Appellant.

PETITION FOR REHEARING

Counsel for Appellant Brian Talkington is in receipt of this Court's Order filed January 29, 2016 (received by counsel on February 1, 2016).

Pursuant to Rules 219 and 221, SCACR, Appellant respectfully requests a rehearing or in the alternative, a rehearing *en banc*. If the Court is inclined to grant the relief requested, such action by the Court will have the effect of dismissing or finally deciding Appellant's appeal pursuant to Rule 240(i), SCACR.

Based on the above, Appellant would submit the following:

1. The Court should grant this matter a rehearing or in the alternative, a rehearing *en banc* because, as comprehended by Rule 219, SCACR, this proceeding involves a question of exceptional importance.
2. Appellant respectfully suggests that the Court was unaware of, overlooked, or misapprehended the following four issues:

- a. The scope of the within appeal covers more than a single, underlying order;
  - b. The State has taken further, improper actions during the pendency of the within appeal;
  - c. The State's action prior to the within appeal warrant intervention by this Court; and
  - d. Dismissal of the within appeal without a rehearing will result in irreparable harm to Appellant and have a chilling effect on any similarly situated individuals.
3. Further grounds are set forth in an attached memorandum with citation of authorities in support of this Petition, as required by Rule 240(c)(2), SCACR.
  4. Therefore, Appellant requests that this matter should be granted a rehearing *en banc*, or in the alternative, a rehearing. In the alternative, this Court should issue a Writ of Prohibition and/or Mandamus, preventing the State from prosecuting the Appellant.

February 11, 2016

Truslow & Truslow Law Firm



DOUGLAS N TRUSLOW

(SC BAR 5642)

NEAL D. TRUSLOW

(SC Bar 77806)

P.O. Box 1465

Columbia, SC 29202

(803) 256-6276

Fax (803) 256-7659

[douglastruslow@truslowlaw.com](mailto:douglastruslow@truslowlaw.com)

[nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)

Other Counsel of Record:

Hans W. Pauling  
Assistant Solicitor  
Fifth Judicial Circuit  
P.O. Box 192  
Columbia, South Carolina 29202  
(803) 576-1832  
Fax: (803) 576-1718  
[PaulingH@rcgov.us](mailto:PaulingH@rcgov.us)

Joseph Y. Shenkar  
Assistant Solicitor  
Fifth Judicial Circuit  
P.O. Box 192  
Columbia, South Carolina 29202  
(803) 576-1832  
Fax: (803) 576-1718  
[shenkarj@rcgov.us](mailto:shenkarj@rcgov.us)

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

Tanya A. Gee, Circuit Court Judge

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Appellate Case No. 2015-002331

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The State,

Respondent,

v.

Brian Talkington,

Appellant.

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MEMORANDUM WITH CITATION OF AUTHORITIES  
IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rule 240(c)(2), SCACR, Appellant would submit the following  
Memorandum with citation of authorities in support of his Petition for Rehearing:

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## MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

1. The Court should grant this matter a rehearing or in the alternative, a rehearing *en banc* because, as comprehended by Rule 219, SCACR, this proceeding involves a question of exceptional importance.
2. The stated reason this Court indicated it dismissed this appeal is that “the underlying order is not immediately appealable”. *See* Order filed January 29, 2016.<sup>1</sup> Appellant respectfully suggests that the Court was unaware of, overlooked, or misapprehended the following four issues:
  - a. Scope. This matter is not limited simply to one, underlying Order denying a double jeopardy claim. Rather, it involves multiple underlying Orders and 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 misapplication of proper legal process and procedure. The tortured history of this entire proceeding requires this Court’s intervention, if only to prevent further harm to Appellant.
  - b. Improper Prosecution(s) During this Appeal. At the time the within appeal was filed, there were two cases<sup>2</sup> pending, simultaneously, in both Richland County General Sessions Court and Richland County Magistrate’s Court.<sup>3</sup> On January 8, 2016, and even before this Court ever issued a decision on Appellant’s appeal, the State notified Appellant through counsel that both docketed matters (CDVHAN and CDV, First Offense) were going to be

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<sup>1</sup> Enclosure 1.

<sup>2</sup> 2015-GS-40-01723 charging CDVHAN and 2013A4010601092 charging CDV, First Offense.

<sup>3</sup> This was the case even though each of these docketed actions stems from the exact same nucleus of operative facts which took place in July, 2011; and the State indicated both to Appellant’s counsel in writing and to the lower Court (at the hearing of Appellant’s Motion to Dismiss, To Quash, For Injunctive Relief, For a Writ of Prohibition, or For a Writ of Mandamus) that the most recent CDV, First Offense charge would be dismissed after Appellant was served and arrested for CDVHAN.

called for trial on February 8, 2016 and on January 27, 2016, respectively.<sup>4</sup> Thus, Appellant was forced to prepare for two separate trials, on two separate charges, in two separate courts, in less than a two week period (despite the separate charges in each matter stemmed from the exact same nucleus of operative facts). To complicate matters further, the State provided approximately 48 hours' notice to Appellant's counsel that it would not be proceeding with either trial, and that it was dismissing the Magistrate's Court case on January 27, 2016. The underlying charge of CDV, First Offense is now dismissed and gone forever. This Court should reconsider Appellant's appeal to determine if what the State has done, especially while this case was on appeal, necessitates intervention from this Court preventing further loss of Appellant's due process rights.

c. Improper Prosecutions Prior to this Appeal. Despite the State representing no less than seven (and possibly eight) times to various judges that this case is not a CDVHAN, the State is now attempting to pursue a CDVHAN charge in violation of, *inter alia*, Appellant's due process rights. Appellant is concerned that the threat of increased punishment through "upgraded charges" is based on, or at least has the potential for vindictiveness or such other retaliatory motivation by the State, as warned of and discussed in *Blackledge v. Perry*, 417 U.S. 21.<sup>5</sup>

i. On July 11, 2011, Appellant was arrested and charged with CDV, Second Offense (Warrant I902097). In obtaining this warrant, **the State did not indicate to the judge that this matter was a CDVHAN (#1)**. Talkington consistently and correctly argued that there was no predicate CDV, First Offense conviction such that the CDV, Second Offense charge was improper.

ii. The State allowed the matter to proceed to a preliminary hearing,

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<sup>4</sup> Enclosure 2.

<sup>5</sup> Enclosure 3.

where **the State again represented to the preliminary hearing judge that the matter was not a CDVHAN (#2)**. Subsequent to the preliminary hearing the State conceded that there was no predicate first offense conviction and that the proper charge should have been CDV, First Offense. However, rather than following proper procedure, the State unilaterally “remanded” the case in clear violation of law, the directives of Court Administration, and the directives of the Supreme Court.

- iii. The matter was set for trial in Magistrate’s Court on February 26, 2013 under the improper charging document. Appellant 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 and, again **the State did not indicate to the judge that this matter was a CDVHAN (#3)**. This matter was subsequently dismissed over the State’s objection.<sup>6, 7</sup>
- iv. In November 2013, the State indicated it had dismissed Warrant I902097, CDV Second Offense.<sup>8</sup> Further, the State indicated that a “new warrant” charging CDV, First Offense (alleging the exact same facts/incident giving rise to the initial charge) was obtained. Again, **the State did not indicate to the judge that this matter was a CDVHAN (#4)**.
- v. The “new” case was set for a pre-trial hearing in Magistrate’s Court

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<sup>6</sup> Appellant argues that jeopardy attached prior to the dismissal. The State disagrees. The State’s actions have made it impossible to determine that fact.

<sup>7</sup> After dismissal, the State repeatedly represented, verbally and in writing, that: it had engaged in (*ex parte*) communications with a Circuit Court Judge and that the case was being remanded to Magistrate’s Court (implying that this matter was not a CDVHAN); the State was appealing the dismissal of the case; and that the State had sought and/or was seeking an Attorney General’s Opinion.

<sup>8</sup> Appellant unaware of any hearing regarding the disposal of this matter.

on July 24, 2014. At that time, **the State did not indicate to the judge that this matter was a CDVHAN (#5)**. Appellant argued that he was being subjected to Double Jeopardy and/or other constitutional violations, including violation of fundamental due process. That judge ordered that the matter was to be referred back to the judge who proceeded over the February 26, 2013 matter.

- vi. On September 10, 2014, another pre-trial hearing was set, ostensibly to be heard by the judge who proceeded over the February 26, 2013 matter. However, instead of the matter being set before him, it was set before yet another judge. At that time, **the State did not indicate to the judge that this matter was a CDVHAN (#6)**. That judge ruled that the relief sought by Appellant could not be granted. From that ruling, Appellant appealed to the Circuit Court.
- vii. The matter was 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 (#7)**. Judge Kinard determined that the matter should be remanded specifically to the judge who proceeded over the February 26, 2013 matter for the limited purpose of attempting to reconstruct the record. Otherwise, the Circuit Court retained jurisdiction.

**Only after the Circuit Court directed relief in favor of Appellant did the State, for the first time, have Appellant indicted for CDVHAN.** The “upgraded charge” of CDVHAN appears to have been retaliatory in nature, levied as a penalty for Appellant’s exercising his right to appeal. The result is that this case has dragged on and Appellant has been arrested, re-arrested, and arrested a third time between 2011 and 2015 because the State refuses to follow proper, legal procedure. Appellant is seeking relief from this Court not only from denial of a double jeopardy claim, but also from the extensive and pervasive denial of fundamental fairness and due process the State has exhibited over the last half-decade.

- d. Chilling Effect. This matter is ripe for decision now. Because Appellant is an Active Duty Servicemember, the harm done allowing the State to go forward and possibly secure a conviction will be irrevocable. Dismissal of this Appeal at this juncture and without a rehearing will have a chilling effect, *to wit*: it will allow the State to, in essence, prosecute Appellant both concurrently and successively in various Courts of varying jurisdictional authority for multiple, separately charged crimes (all arising out of the exact same nucleus of operative facts), only to dispose of the charges and re-charge them again, or “upgrade” them in an attempt to gain an improper, collateral advantage.<sup>9</sup> The Court needs to hear this appeal and determine whether this type of conduct by the State should be sanctioned. The issues herein are important to the administration of justice, and certainly to Appellant.
3. Alternatively, this Court should issue a Writ of Prohibition and/or Mandamus, preventing the State from further prosecution of Appellant.

### CONCLUSION

Appellant requests that this matter should be granted a rehearing *en banc*, or in the alternative, a rehearing. In the alternative, this Court should issue a Writ of Prohibition and/or Mandamus, preventing the State from prosecuting the Appellant.

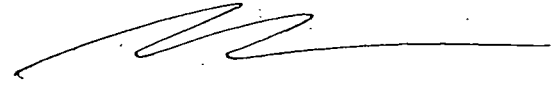
February 11, 2016

[SIGNATURE ON FOLLOWING PAGE]

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<sup>9</sup> See Enclosure 3.

Truslow & Truslow Law Firm



DOUGLAS N TRUSLOW

(SC BAR 5642)

NEAL D. TRUSLOW

(SC Bar 77806)

P.O. Box 1465

Columbia, SC 29202

(803) 256-6276

Fax (803) 256-7659

[douglastruslow@truslowlaw.com](mailto:douglastruslow@truslowlaw.com)

[nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)

Other Counsel of Record:

Hans W. Pauling

Assistant Solicitor

Fifth Judicial Circuit

P.O. Box 192

Columbia, South Carolina 29202

(803) 576-1832

Fax: (803) 576-1718

[PaulingH@rcgov.us](mailto:PaulingH@rcgov.us)

Joseph Y. Shenkar

Assistant Solicitor

Fifth Judicial Circuit

P.O. Box 192

Columbia, South Carolina 29202

(803) 576-1832

Fax: (803) 576-1718

[shenkarj@rcgov.us](mailto:shenkarj@rcgov.us)

# ENCLOSURE

1

# The South Carolina Court of Appeals

The State, Respondent,

v.

Brian Talkington, Appellant.

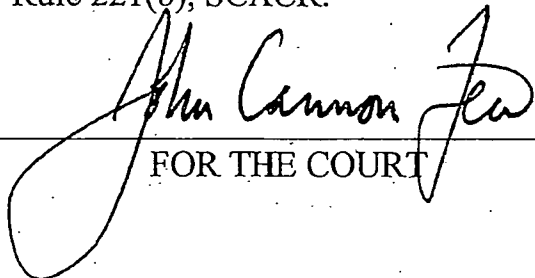
Appellate Case No. 2015-002331

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## ORDER

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After careful consideration, this appeal is dismissed because the underlying order is not immediately appealable. *See State v. Miller*, 289 S.C. 426, 426-27, 346 S.E.2d 705, 705-06 (1986) ("In South Carolina, a criminal defendant may not appeal until sentence has been imposed. Consistent with this rule, an order denying a double jeopardy claim is not immediately appealable." (citations omitted)).<sup>1</sup> The remittitur will be sent as required by Rule 221(b), SCACR.

  
FOR THE COURT

Columbia, South Carolina

cc:

Neal Douglas Truslow, Esquire  
Hans William Pauling, Esquire  
Joseph Yechiel Shenkar, Esquire  
Alan McCrory Wilson, Esquire

---

<sup>1</sup> To the extent Appellant has requested this court to treat the notice of appeal as a "petition to the appropriate Court for a writ of prohibition and/or mandamus," that request is denied.

**FILED**  
11/29/16

# ENCLOSURE

2

**STATE OF SOUTH CAROLINA**  
**COUNTY OF Richland**

Neal Douglas Truslow  
PO Box 1465  
Columbia, SC 29202

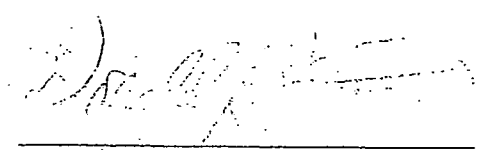
**SUMMARY COURT SUMMONS**

|             |                                                      |
|-------------|------------------------------------------------------|
| STATE VS.   | Brian Darrell Talkington                             |
| TICKET #(S) | 2013A4010601092                                      |
| OFFICER     | Unger, David                                         |
| AGENCY      | Richland County Sheriff                              |
| CHARGE      | Criminal Domestic Violence - 1st offense(1107039304) |

Please be advised that the above referenced case is scheduled to be heard on  
**January 27, 2016 at 12:00 PM.**

You are hereby summoned to appear in the **Richland COUNTY Central Court**,  
**1400 Huger Street, Columbia, SC, Courtroom 1-B** on that date. Please notify any  
witnesses you may have of this court date.

**HEREIN FAIL NOT, ON PAIN OF FORFEITING THE LAWFUL PENALTY IN  
SUCH CASES MADE AND PROVIDED.**

  
\_\_\_\_\_  
Chief Magistrate

**Richland COUNTY Central Court**  
**P O Box 192**  
**1400 Huger Street**  
**Columbia, SC 29202**  
**PHONE: (803) 576-2301**  
**FAX: (803) 576-2304**

**January 8, 2016**

*The State of South Carolina*



Dan Johnson  
Solicitor

-----  
Paulette Edwards  
Deputy Solicitor

SOLICITOR'S OFFICE  
Fifth Judicial Circuit  
1701 Main Street  
Post Office Box 192  
Columbia, South Carolina 29201

Phone: (803) 576-1800  
Fax: (803) 576-1718

Daniel R. Goldberg  
Deputy Solicitor

-----  
Brett Perry  
Deputy Solicitor

January 8, 2016

Doug Truslow, Esquire  
Neal Truslow, Esquiner  
Truslow & Truslow  
Post Office Box 1465  
Columbia, South Carolina 29202

**RE: State vs. Brian D. Talkington**  
Indictment/Warrant Number(s): 2015GS4001732

Dear Doug & Neal:

Please be advised that the case regarding the above-named defendant will be called to trial the week(s) of Monday, February 8, 2016 and/or each week forward until the case is called to trial, at 9:00 a.m. at the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina. Please make sure your client is available for Court.

Should the defendant fail to appear a bench warrant will be issued for his arrest and/or his bond will be estreated and/or he will be tried in his/her absence.

Please contact me at a suitable time to arrange for a meeting to ensure that you have all available discovery pertaining to your client's case.

Sincerely,

A handwritten signature in cursive script that reads "Hans Pauling".

Hans Pauling  
Assistant Solicitor

NS/aja

cc: Brain D. Talkington

# ENCLOSURE

## 3

 Questioned

As of: February 9, 2016 4:48 PM EST

## *Blackledge v. Perry*

Supreme Court of the United States

February 19, 1974, Argued ; May 20, 1974, Decided

No. 72-1660

### Reporter

417 U.S. 21; 94 S. Cl. 2098; 40 L. Ed. 2d 628; 1974 U.S. LEXIS 54

BLACKLEDGE, WARDEN, ET AL. v. PERRY

Prior History: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Disposition: Affirmed.

### Core Terms

sentence, guilty plea, trial de novo, indictment, vindictiveness, convicted, misdemeanor, assault, due process, felony, Appeals, cases, double jeopardy, serious charge, felony charge, retrial, consequences, collateral, Jeopardy, requires, corpus, constitutional claim, criminal defendant, increased sentence, statutory right, proceedings, two-tiered, attacked, rights, constitutional violation

### Case Summary

#### Procedural Posture

Petitioner state appealed a judgment from the United States Court of Appeals for the Fourth Circuit, which granted respondent individual's petition for a writ of habeas corpus and reversed his conviction on the grounds that petitioner violated respondent's *U.S. Const. amend. XIV* due process rights by charging a more serious offense in respondent's de novo retrial pursuant to *N.C. Gen. Stat. §§ 7A-290* and 15-177.1.

#### Overview

Respondent individual exercised his right under *N.C. Gen. Stat. §§ 7A-290* and 15-177.1 to a de novo retrial of his misdemeanor conviction. Petitioner state charged a felony offense for the same conduct, and respondent was convicted of that offense. Holding that the charging of a more serious offense on the retrial threatened to unconstitutionally deter a defendant's exercise of his right of appeal and that the assertion of this due process right was not barred by a guilty

plea, the U.S. Supreme Court affirmed the issuance of the writ. The Court held that petitioner's asserted discretion to charge a greater offense on retrial carried the same potential for vindictiveness that tainted the prohibited imposition by a judge of a sentence on a conviction after retrial that was greater than that imposed by that judge in the original trial. Moreover, the Court held that the right impinged by the threat of vindictiveness was the right not to be hauled into court on the greater charge at all. This was distinguished from other rights that a defendant was precluded from pursuing in a habeas proceeding after the entry of a plea of guilty broke "the chain of events" of the criminal process.

#### Outcome

The Court affirmed the issuance of a writ of habeas corpus, because petitioner's charging a greater offense for the same conduct in respondent individual's de novo retrial of lower court conviction had the potential for vindictive abuse, and could unconstitutionally deter defendants from pursuing their appeal rights, and review by writ of habeas corpus of such a violation of due process was not precluded by respondent's guilty plea.

### LexisNexis® Headnotes

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

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Findings

Criminal Law & Procedure > Sentencing > Vindictiveness

Governments > Legislation > Statutory Remedies & Rights

**HNI** Imposition of a penalty upon a defendant for having successfully pursued a statutory right of appeal or collateral remedy is a violation of due process of law. Because vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial, an increased sentence may not be imposed upon retrial unless the sentencing judge places certain specified findings on the record.

417 U.S. 21, \*21; 94 S. Ct. 2098, \*\*2098; 40 L. Ed. 2d 628, \*\*\*628

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

Criminal Law & Procedure > Sentencing > Vindictiveness

**HN2** The U.S. Const. amend XIV is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness."

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

Criminal Law & Procedure > Sentencing > Vindictiveness

Criminal Law & Procedure > Appeals > Right to Appeal > General Overview

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Governments > Legislation > Statutory Remedies & Rights

**HN3** Since the fear of vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, also without apprehension that the state will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Types of Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Competency

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Knowing & Intelligent Requirement

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Voluntariness

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

**HN4** The guilty plea is a break in the chain of events which has preceded it in the criminal process. Accordingly, when a criminal defendant enters a guilty plea, he may not

thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. Rather, a person complaining of such antecedent constitutional violations is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not within the range of competence demanded of attorneys in criminal cases.

## Lawyers' Edition Display

### Summary

A North Carolina penitentiary inmate, having become involved in an altercation with another inmate, was charged in the District Court of Northampton County with the misdemeanor of assault with a deadly weapon, was convicted, and was given a 6-month sentence to be served upon completion of his current prison term. On his filing notice of appeal to the Northampton County Superior Court, in which he was entitled to a trial de novo, the prosecutor obtained a grand jury indictment charging him with the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury. The inmate pleaded guilty and was sentenced to a 5-to-7-year term to be served concurrently with his current identical sentence. On his application for a writ of habeas corpus, the United States District Court for the Eastern District of North Carolina dismissed the petition for failure to exhaust available state remedies. The United States Court of Appeals for the Fourth Circuit reversed on the ground that resort to the state courts would be futile. On remand, the District Court granted the writ, and the Court of Appeals affirmed.

On certiorari, the United States Supreme Court affirmed. In an opinion by Stewart, J., expressing the views of seven members of the court, it was held that (1) upon appeal from a misdemeanor conviction, entitling the convicted defendant to a trial de novo, the state denies due process by bringing a felony charge against him for the same conduct, unless the state shows that it was impossible to proceed on the felony charge at the outset, and (2) the accused's guilty plea to the felony charge did not foreclose his post-conviction attack on his conviction, since he thereby challenged the state's right to bring any felony charge against him.

Rehnquist, J., dissented on the grounds that (1) the bringing of the felony charge did not violate the accused's due process rights, (2) the accused's guilty plea waived the objection to the bringing of the felony charge, and (3) in any event, the defect could be cured by a remand for resentencing rather than an order completely annulling the conviction.

417 U.S. 21, \*21; 94 S. Ct. 2098, \*\*2098; 40 L. Ed. 2d 628, \*\*\*628

Powell, J., joined in that part of Mr. Justice Rehnquist's dissenting opinion that the guilty plea waived the bringing of the felony charge.

the same conduct, unless the state shows that it was impossible to proceed on the felony charge at the outset.

CORPUS §56 > guilty plea — improper grand jury —  
> Headnote:

## Headnotes

LAW §493 > appeals — equal protection — > Headnote:

LEdHN[6] [6]

LEdHN[1A] [1A] LEdHN[1B] [1B]

The equal protection clause requires that once a state establishes avenues of appellate review, those avenues be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

A state prisoner, pleading guilty with the advice of counsel, may not later obtain release through federal habeas corpus by proving only that the indictment through which he pleaded was returned by an unconstitutionally selected grand jury.

LAW §63 > guilty plea — waiver — > Headnote:

LAW §848 > increased penalty on retrial — > Headnote:

LEdHN[7] [7]

LEdHN[2] [2]

The due process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of vindictiveness.

When a criminal defendant enters a guilty plea, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

LAW §848 > reconviction — sentence — > Headnote:

LAW §63 > CORPUS §47 > guilty plea — > Headnote:

LEdHN[3] [3]

LEdHN[8] [8]

Since the fear of vindictiveness against a defendant for having successfully attacked his first conviction may unconstitutionally deter a defendant's exercise of the right to appeal his first conviction, due process requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

A person complaining of the deprivation of his constitutional rights that occurred prior to the entry of his guilty plea is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not within the range of competence demanded of attorneys in criminal cases.

LAW §848 > de novo trial — enhanced punishment —  
> Headnote:

LAW §22 > double jeopardy — > Headnote:

LEdHN[4] [4]

LEdHN[9] [9]

A person convicted of an offense is entitled to pursue his statutory right to a trial de novo without apprehension that the state will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

The double jeopardy clause differs from procedural guarantees in that its practical result is to prevent a trial from taking place at all rather than to prescribe the procedural rules that govern the conduct of a trial.

LAW §848 > de novo trial — charges — > Headnote:

LAW §63 > CORPUS §47 > guilty plea — > Headnote:

LEdHN[5] [5]

LEdHN[10] [10]

Upon appeal from a misdemeanor conviction, entitling the convicted defendant to a trial de novo, the state denies due process of law by bringing a felony charge against him for

An accused's guilty plea to a felony charge in state court does not foreclose him from attacking his conviction on the plea, through a writ of federal habeas corpus, on the ground that the state denied him due process by bringing the felony

417 U.S. 21, \*21; 94 S. Ct. 2098, \*\*2098; 40 L. Ed. 2d 628, \*\*\*628

charge against him on a trial *de novo* on his appeal from his misdemeanor conviction in a lower state court.

## Syllabus

Respondent, a North Carolina prison inmate, had an altercation with another prisoner, and was charged with the misdemeanor of assault with a deadly weapon, of which he was convicted in the State District Court. While respondent's subsequent appeal was pending in the Superior Court, where he had the right to a trial *de novo*, the prosecutor obtained an indictment covering the same conduct for the felony offense of assault with a deadly weapon with intent to kill and inflict serious bodily injury, to which respondent pleaded guilty. Thereafter, respondent applied for a writ of habeas corpus in Federal District Court, claiming, *inter alia*, that the felony indictment deprived him of due process. The District Court granted the writ, and the Court of Appeals affirmed. *Held*:

1. The indictment on the felony charge contravened the Due Process Clause of the Fourteenth Amendment, since a person convicted of a misdemeanor in North Carolina is entitled to pursue his right under state law to a trial *de novo* without apprehension that the State will retaliate by substituting a more serious charge for the original one and thus subject him to a significantly increased potential period of incarceration. Cf. North Carolina v. Pearce, 395 U.S. 711, Pp. 24-29.

2. Since North Carolina, having chosen originally to proceed against respondent on the misdemeanor charge in the State District Court, was precluded by the Due Process Clause from even prosecuting respondent for the more serious charge in the Superior Court, respondent's guilty plea to the felony charge did not bar him from raising his constitutional claim in the federal habeas corpus proceeding. Tollett v. Henderson, 411 U.S. 258, distinguished. Pp. 29-31.

Counsel: Richard N. League, Assistant Attorney General of North Carolina, argued the cause for petitioners. With him on the brief was Robert Morgan, Attorney General.

James E. Keenan, by appointment of the Court, 414 U.S. 1020, argued the cause and filed a brief for respondent.

Judges: Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and Douglas, Brennan, White, Marshall,

and Blackmun, JJ., joined. Rehnquist, J., filed a dissenting opinion, in Part II of which Powell, J., joined; post, p. 32.

Opinion by: STEWART

## Opinion

[\*22] [\*\*\*631] [\*\*2099] MR. JUSTICE STEWART delivered the opinion of the Court.

While serving a term of imprisonment in a North Carolina penitentiary, the respondent Perry became involved in an altercation with another inmate. A warrant issued, charging Perry with the misdemeanor of assault with a deadly weapon, N. C. Gen. Stat. § 14-33 (b)(1) (1969). Under North Carolina law, the District Court Division of the General Court of Justice has exclusive jurisdiction for the trial of misdemeanors. N. C. Gen. Stat. §§ 7A-272. Following a trial without a jury in the District Court of Northampton County, Perry [\*2100] was convicted of this misdemeanor and given a six-month sentence, to be served after completion of the prison term he was then serving.

Perry then filed a notice of appeal to the Northampton County Superior Court. Under North Carolina law, a person convicted in the District Court has a right to a trial *de novo* in the Superior Court. N. C. Gen. Stat. §§ 7A-290, 15-177.1. The right to trial *de novo* is absolute, there being no need for the appellant to allege error in the original proceeding. When an appeal is taken, the statutory scheme provides that the slate is wiped clean; the prior conviction is annulled, and the prosecution and the defense begin anew in the Superior Court.<sup>1</sup>

[\*23] After the filing of the notice of appeal, but prior to the respondent's appearance for trial *de novo* in the Superior Court, the prosecutor obtained an indictment from a grand jury, charging Perry with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury, N. C. Gen. Stat. § 14-32 (a) (1969). The indictment covered the same conduct for which Perry had been tried and convicted in the District Court. Perry entered a plea of guilty to the indictment in the Superior Court, and was sentenced to a term of five to seven years in the penitentiary, to be served concurrently with the identical [\*\*\*632] prison sentence he was then serving.<sup>2</sup>

A number of months later, the respondent filed an application for a writ of habeas corpus in the United States District

<sup>1</sup> See generally State v. Spencer, 276 N. C. 535, 173 S. E. 2d 765; State v. Sparrow, 276 N. C. 499, 173 S. E. 2d 897.

<sup>2</sup> The respondent's guilty plea was apparently premised on the expectation that any sentence he received in the Superior Court would be served concurrently with the sentence he was then serving, as contrasted with the consecutive sentence imposed in the District Court.

417 U.S. 21, \*23; 94 S. Ct. 2098, \*\*2100; 40 L. Ed. 2d 628, \*\*\*632

Court for the Eastern District of North Carolina. He claimed that the indictment on the felony charge in the Superior Court constituted double jeopardy and also deprived him of due process of law. In an unreported opinion, the District Court dismissed the petition for failure to exhaust available state remedies. The United States Court of Appeals for the Fourth Circuit [\*24] reversed, holding that resort to the state courts would be futile, because the Supreme Court of North Carolina had consistently rejected the constitutional claims presented by Perry in his petition. 453 F.2d 856.<sup>3</sup> The case was remanded to the District Court for further proceedings.

On remand, the District Court granted the writ. It held that the bringing of the felony charge after the filing of the appeal violated Perry's rights under [\*2101] the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, Beuton v. Maryland, 395 U.S. 784. The District Court further held that the respondent had not, by his guilty plea in the Superior Court, waived his right to raise his constitutional claims in the federal habeas corpus proceeding. The Court of Appeals affirmed the judgment in a brief *per curiam* opinion. We granted certiorari, 414 U.S. 908, to consider the seemingly important issues presented by this case.

I

**LEdHN[1A] [1A]** As in the District Court, Perry directs two independent constitutional attacks upon the conduct of the [\*25] State in haling him into court on the felony charge after he took an appeal from the misdemeanor conviction.

First, he contends that [\*\*\*633] the felony indictment in the Superior Court placed him in double jeopardy, since he had already been convicted on the lesser included misdemeanor charge in the District Court. Second, he urges that the indictment on the felony charge constituted a penalty for his exercising his statutory right to appeal, and thus contravened the Due Process Clause of the Fourteenth Amendment.<sup>4</sup> We find it necessary to reach only the latter claim.

Perry's due process arguments are derived substantially from North Carolina v. Pearce, 395 U.S. 711, and its progeny. In Pearce, the Court considered the constitutional problems presented when, following a successful appeal and reconviction, a criminal defendant was subjected to a greater punishment than that imposed at the first trial. While we concluded that such a harsher sentence was not absolutely precluded by either the Double Jeopardy, or Due Process Clause, we emphasized that *HNI* "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law." *Id.* at 724. Because "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives [\*26] after a new trial," *id.* at 725, we held that an increased sentence could not be imposed upon retrial unless the sentencing judge placed certain specified findings on the record.

In Colten v. Kentucky, 407 U.S. 104, the Court was called upon to decide the applicability of the Pearce holding to Kentucky's two-tiered system of criminal adjudication. Kentucky, like North Carolina, allows a misdemeanor

That expectation was fulfilled, but it turned out that the guilty plea resulted in increasing the respondent's potential term of incarceration. Under applicable North Carolina law, the five- to seven-year assault sentence did not commence until the date of the guilty plea, October 29, 1969. By that time, Perry had already served some 17 months of the sentence he was serving at the time of the alleged assault. Thus, the effect of the five- to seven-year concurrent sentence on the assault charge was to increase his potential period of confinement by these 17 months, as opposed to the six-month increase envisaged by the District Court's consecutive sentence.

<sup>3</sup> The Court of Appeals further instructed the District Court to await the ruling of this Court in Rice v. North Carolina, 434 F.2d 297 (CA4), cert. granted, 401 U.S. 1008. Rice involved a challenge to the constitutionality of an enhanced penalty received after a criminal defendant had sought a trial *de novo* under North Carolina's two-tiered misdemeanor adjudication system. This Court did not reach the merits of this issue in Rice, instead vacating and remanding to the Court of Appeals for consideration as to whether the case had become moot. 404 U.S. 244.

Subsequently, in Colten v. Kentucky, 407 U.S. 104, we dealt with the merits of this issue, and held that the imposition of an increased sentence on trial *de novo* did not violate either the Due Process or the Double Jeopardy Clause. The District Court in the present case had the benefit of the Colten decision before issuing its opinion granting habeas corpus relief.

<sup>4</sup> **LEdHN[1B] [1B]**

This Court has never held that the States are constitutionally required to establish avenues of appellate review of criminal convictions. Nonetheless, "it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Rinaldi v. Yeager, 384 U.S. 305, 310. See also Griffin v. Illinois, 351 U.S. 12; Douglas v. California, 372 U.S. 353; Lane v. Brown, 372 U.S. 477; Draper v. Washington, 372 U.S. 487; North Carolina v. Pearce, 395 U.S. 711, 724-725; Chaffin v. Strychcombe, 412 U.S. 17, 24 n. 11.

417 U.S. 21, \*26; 94 S. Ct. 2098, \*\*2101; 40 L. Ed. 2d 628, \*\*\*633

defendant convicted in an inferior trial court to seek a trial *de novo* in a court of general jurisdiction.<sup>5</sup> The appellant in *Colten* claimed that the Constitution prevented the court of general jurisdiction, after trial *de novo*, from imposing a sentence in excess of that imposed in the court of original trial. This Court rejected the *Pearce* analogy. Emphasizing that *Pearce* was directed at insuring the absence of "vindictiveness" against a criminal [\*2102] defendant who attacked his initial conviction on appeal, the Court found such dangers greatly minimized on the facts presented in *Colten*. In contrast to *Pearce*, the court that imposed the increased sentence after retrial in *Colten* was not the one whose original judgment had prompted an appellate reversal; thus, there was little possibility that an increased sentence on trial *de novo* could have been motivated by personal vindictiveness on the part of the sentencing judge. Hence, the Court thought the prophylactic rule of *Pearce* unnecessary in the *de* [\*\*\*634] *novo* trial and sentencing context of *Colten*.

The *Pearce* decision was again interpreted by this Court last Term in *Chaffin v. Strychcombe*, 412 U.S. 17, in the setting of Georgia's system under which sentencing responsibility is entrusted to the jury. Upon retrial following the reversal of his original conviction, the [\*27] defendant in *Chaffin* was reconvicted and sentenced to a greater term than had been imposed by the initial jury. Concentrating again on the issue of vindictiveness, the Court found no violation of the *Pearce* rule. It was noted that the second jury was completely unaware of the original sentence, and thus could hardly have sought to "punish" Chaffin for his successful appeal. Moreover, the jury, unlike a judge who had been reversed on appeal, could hardly have a stake in the prior conviction or any motivation to discourage criminal defendants from seeking appellate review. Hence, it was concluded that the danger of vindictiveness under the circumstances of the case was "*de minimis*," *id.*, at 26, and did not require adoption of the constitutional rule set out in *Pearce*.

LEdHN[2] [2] The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that HN2 the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." Unlike the circumstances presented by those cases, however, in the situation here the central figure is not the judge or the jury, but the prosecutor.

The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case. We conclude that the answer must be in the affirmative.

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such [\*28] appeals — by "upping the ante" through a felony indictment whenever a convicted misdemeanor pursues his statutory appellate remedy — the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.

LEdHN[3] [3] LEdHN[4] [4] There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that " HN3 since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S., at 725. We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, [\*2103] thus subjecting him to a significantly increased potential [\*\*\*635] period of incarceration. <sup>6</sup> Cf. *United States v. Jackson*, 390 U.S. 570.

LEdHN[5] [5] Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond [\*29] to Perry's invocation of his statutory right to

<sup>5</sup> For a more exhaustive list of States employing similar two-tiered procedures, see *Colten*, *supra*, at 112 n. 4.

<sup>6</sup> Moreover, even putting to one side the potentiality of increased incarceration, conviction of a "felony" often entails more serious collateral consequences than those incurred through a misdemeanor conviction. See generally Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 955-960; Note, Civil Disabilities of Felons, 53 Va. L. Rev. 403, 406-408. Cf. *O'Brien v. Skinner*, 414 U.S. 524 (involving New York law under which convicted misdemeanants retain the right to vote).

417 U.S. 21, \*29; 94 S. Ct. 2098, \*\*2103; 40 L. Ed. 2d 628, \*\*\*635

appeal by bringing a more serious charge against him prior to the trial *de novo*.<sup>7</sup>

## II

The remaining question is whether, because of his guilty plea to the felony charge in the Superior Court, Perry is precluded from raising his constitutional claims in this federal habeas corpus proceeding. In contending that such is the case, petitioners rely chiefly on this Court's decision last Term in *Tollett v. Henderson*, 411 U.S. 258.

LEdHN[6] [6] LEdHN[7] [7] LEdHN[8] [8] The precise issue presented in *Tollett* was "whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury." *Id.*, at 260. The Court answered that question in the negative. Relying primarily on the guilty-plea trilogy of *Brady v. United States*, 397 U.S. 742, *McMann v. Richardson*, 397 U.S. 759, and *Parker v. North Carolina*, 397 U.S. 790, the Court characterized HN4 the guilty plea as "a break in the chain of events which has preceded it in the criminal process." 411 U.S., at 267. Accordingly, the Court held that when a criminal defendant enters a guilty plea, "he may not thereafter raise independent claims relating to the deprivation of constitutional [\*30] rights that occurred prior to the entry of the guilty plea." *Ibid*. Rather, a person complaining of such "antecedent constitutional violations," *id.*, at 266, is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases." See *McMann*, *supra*, at 771.

While petitioners' reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying [\*22]636] claims presented in *Tollett* and the *Brady* trilogy were of

constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. The defendants in *McMann v. Richardson*, for example, could surely have been brought to trial without the use of the allegedly [\*2104] coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been "cured" through a new indictment by a properly selected grand jury. In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. Unlike the defendant in *Tollett*, Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U.S., at 266, 267. Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge. The very initiation of the proceedings against [\*31] him in the Superior Court thus operated to deny him due process of law.

LEdHN[9] [9] LEdHN[10] [10] Last Term in *Robinson v. Neil*, 409 U.S. 505, in explaining why the *Double Jeopardy Clause* is distinctive, the Court noted that "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Id.*, at 509. While our judgment today is not based upon the *Double Jeopardy Clause*, we think that the quoted language aptly describes the due process right upon which our judgment is based. The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.<sup>8</sup>

<sup>7</sup> This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz v. United States*, 223 U.S. 442. In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in *Diaz* to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death.

<sup>8</sup> Contrary to the dissenting opinion, our decision today does not "assure that no penalty whatever will be imposed" on respondent. *Post*, at 39. While the *Due Process Clause of the Fourteenth Amendment* bars trial of Perry on the felony assault charges in the Superior Court, North Carolina is wholly free to conduct a trial *de novo* in the Superior Court on the original misdemeanor assault charge. Indeed, this is precisely the course that Perry has invited, by filing an appeal from the original judgment of the District Court.

The dissenting opinion also seems to misconceive the nature of the due process right at stake here. If this were a case involving simply an increased sentence violative of the *Peurce* rule, a remand for resentencing would be in order. Our holding today, however, is not that

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[\*32] Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is affirmed.

*It is so ordered.*

Dissent by: REHNQUIST

## Dissent

[\*\*637] MR. JUSTICE REHNQUIST, dissenting.

I would find it more difficult than the Court apparently does in Part I of its opinion to conclude that the very bringing of more serious charges against respondent following his request for a trial *de novo* violated due process as defined in *North Carolina v. Pearce*, 395 U.S. 711 (1969). Still more importantly, I believe the Court's conclusion that respondent may assert the Court's newfound *Pearce* claim in this federal habeas action, despite his plea of guilty to the charges brought after his invocation of his statutory right to a trial *de novo*, marks an unwarranted departure from the principles we have recently enunciated in *Tollett v. Henderson*, 411 U.S. 258 (1973), and the *Brady* trilogy, *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); and *Parker v. North Carolina*, 397 U.S. 790 (1970).

[\*\*2105] I

As the Court notes, in addition to his claim based on *Pearce*, respondent contends that his felony indictment in the Superior Court violated his rights under the *Double Jeopardy Clause of the Fifth Amendment*, made applicable to the States through the *Fourteenth Amendment*. *Benion v. Maryland*, 395 U.S. 784 (1969). Presumably because we have earlier held that "the jeopardy incident to" a trial does "not extend to an offense beyond [the trial court's] jurisdiction," *Diaz v. United States*, 223 U.S. 442, 449 (1912), the Court rests its decision instead on the *Fourteenth Amendment* due process doctrine of *Pearce*. In so doing, I think the Court too readily equates the role of the prosecutor, who is a natural adversary of the defendant and who, we observed in [\*33] *Chaffin v. Stynchcombe*, 412 U.S. 17, 27 n. 13 (1973), "often request[s] more than [he] can reasonably expect to get," with that of the sentencing judge in *Pearce*. I also think the Court passes too lightly over the reasoning of *Cotten v. Kentucky*, 407 U.S. 104 (1972), in which we held that imposition of the prophylactic rule of *Pearce* was not

necessary in Kentucky's two-tier system for *de novo* appeals from justice court convictions, even though the judge at retrial might impose a more severe sentence than had been imposed by the justice court after the original trial.

The concurring opinion in *Pearce*, 395 U.S. 711, 726, took the position that the imposition of a penalty after retrial which exceeded the penalty imposed after the first trial violated the guarantee against double jeopardy. But the opinion of the Court, relying on cases such as *United States v. Ball*, 163 U.S. 662 (1896), and *Stroud v. United States*, 251 U.S. 15 (1919), specifically rejected such an approach to the case. The Court went on to hold "that neither the double jeopardy provision nor the *Equal Protection Clause* imposes an absolute bar to a more severe sentence upon reconviction." 395 U.S., at 723. [\*\*\*638] The Court concluded by holding that due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id.*, at 725. To make certain that those requirements of due process were met, the Court laid down the rule that "whenever a judge imposes a more severe sentence upon a defendant after [\*34] a new trial, the reasons for his doing so must affirmatively appear." *Id.*, at 726. Thus the avowed purpose of the remedy fashioned in *Pearce* was to prevent judicial vindictiveness from resulting in longer sentences after a retrial following successful appeal.

Since in theory if not in practice the second sentence in the *Pearce* situation might be expected to be the same as the first unless influenced by vindictiveness or by intervening conduct of the defendant, in theory at least the remedy mandated there reached no further than the identified wrong. The same cannot be said here. For while indictment on more serious charges after a successful appeal would present a problem closely analogous to that in *Pearce* in this respect, the bringing of more serious charges after a defendant's exercise of his absolute right to a trial *de novo* in North Carolina's two-tier system does not. The prosecutor here elected to proceed initially in the State District Court where felony charges could not be prosecuted, for reasons which may well have been unrelated to whether he believed

Perry was denied due process by the length of the sentence imposed by the Superior Court, but rather by the very institution of the felony indictment against him. While we reach this conclusion in partial reliance on the analogy of *Pearce* and its progeny, the due process violation here is not the same as was involved in those cases, and cannot be remedied solely through a resentencing procedure in the Superior Court. Cf. n. 6, *supra*.

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respondent was guilty of and could be convicted of the felony with which he [\*2106] was later charged. Both prosecutor and defendant stand to benefit from an initial prosecution in the District Court, the prosecutor at least from its less burdensome procedures and the defendant from the opportunity for an initial acquittal and the limited penalties. With the countervailing reasons for proceeding only on the misdemeanor charge in the District Court no longer applicable once the defendant has invoked his statutory right to a trial *de novo*, a prosecutor need not be vindictive to seek to indict and convict a defendant of the more serious of the two crimes of which he believes him guilty. Thus even if one accepts the Court's equation of prosecutorial vindictiveness with judicial vindictiveness, here, unlike *Pearce*, the Court's remedy reaches far beyond the wrong it identifies.

[\*35] Indeed, it is not a little puzzling that the Court's remedy is the same that would follow upon a conclusion that the bringing of the new charges violated respondent's rights under the *Double Jeopardy Clause*. And the Court's conclusion that "the very initiation of the proceedings against [respondent] in the Superior Court thus operated to deny him due process of law" surely sounds in the language of double jeopardy, however it may be dressed in due process garb.

## II

If the Court is correct in stating the consequences of upholding respondent's constitutional claim here, and indeed the State lacked the very power to bring him to trial, [\*\*\*639] I believe this case is governed by cases culminating in *Tollett v. Henderson*, 411 U.S. 258 (1973). In that case the State no doubt lacked "power" to bring Henderson to trial without a valid grand jury indictment; yet that constitutional disability was held by us to be merged in the guilty plea. I do not see why a constitutional claim the consequences of which make it the identical twin of double jeopardy may not, like double jeopardy, be waived by the person for whose benefit it is accorded. *Kepner v. United States*, 195 U.S. 100, 131 (1904); *Harris v. United States*, 237 F.2d 274, 277 (CA8 1956); *Kistner v. United States*, 332 F.2d 978, 980 (CA8 1964).

In *Tollett v. Henderson*, *supra*, we held that "just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, . . . respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury." 411 U.S. at 266. Surely the due process violation found by the Court

today is no less "antecedent" than the constitutional violations claimed to make the [\*36] grand jury indictment invalid in *Tollett v. Henderson*, the confession inadmissible in *McMann*, or the exercise of the right to a jury trial impermissibly burdened in *Brady* and *Parker*. As the Court notes, we reaffirmed in *Tollett v. Henderson* the principle of the *Brady* trilogy that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." 411 U.S. at 267. We went on to say there:

"When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*." *Ibid*.

The assertion by the Court that this reasoning is somehow inapplicable here because the claim goes "to the very power of the State to bring the defendant into court to answer the charge brought against him" is little other than a conclusion. Any difference between the issue resolved the other way in *Tollett v. Henderson* and the issue before us today is at most semantic. But the Court's "test" not only fails to distinguish *Henderson*; it also fails to provide any reasoned basis on which to approach such questions as whether a speedy trial claim is merged in a guilty plea. I believe the Court's departure today from the principles of *Henderson* and the cases preceding it must be recognized as a potentially major breach in the wall of certainty surrounding guilty pleas for which we have found constitutional sanction in those cases.

There is no indication in this record that respondent's guilty plea was the result of an agreement with the prosecutor. [\*37] But the Court's basis for distinguishing the *Henderson* and *Brady* cases seems so insubstantial as to permit the doctrine of this case to apply to guilty pleas which have been obtained as a result of "plea bargains." In that event [\*\*\*640] it will be not merely the State which stands to lose, but the accused defendant in the position of the respondent as well. Since the great majority of criminal cases are resolved by plea bargaining, defendants as a class have at least as great an interest in the finality of voluntary guilty pleas as do prosecutors. If that finality may be swept aside with the ease exhibited by the Court's approach today, prosecutors will have a reduced incentive to bargain, to the detriment of the many defendants for whom plea bargaining offers the only hope for ameliorating the consequences to them of a serious criminal charge.

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## III

But if, as I believe, a proper analysis of respondent's constitutional claim produces at most a violation of the standards laid down in *North Carolina v. Pearce, supra*, I agree with the Court, though not for the reasons it gives, that respondent's claim was not merged in his guilty plea. Imposition of sentence in violation of *Pearce* is not an "antecedent constitutional violation," since sentence is customarily imposed after a plea of guilty, and is a separate legal event from the determination by the Court that the defendant is in fact guilty of the offense with which he is charged.

If respondent's claim is properly analyzed in terms of *Pearce*, I would think that a result quite different from that mandated in the Court's opinion would obtain. *Pearce* and the decisions following it have made it clear that the wrong lies in the increased sentence, not in the judgment of conviction, and that the remedy for a *Pearce* defect is a remand for sentencing consistent with due [\*38] process. *North Carolina v. Rice, 404 U.S. 244, 247-248 (1971)*. In *Rice* we concluded that the Court of Appeals had erred in ruling that *Pearce* authorized the expunging of Rice's conviction after his trial *de novo* in North Carolina:

"It could not be clearer . . . that *Pearce* does not invalidate the conviction that resulted from Rice's second trial . . . . *Pearce*, in short, requires only resentencing; the conviction is not *ipso facto* set aside and a new trial required. Even if the higher sentence imposed after Rice's trial *de novo* was vulnerable under *Pearce*, Rice was entitled neither to have his conviction erased nor to avoid the collateral consequences flowing from that conviction and a proper sentence." *Ibid*.

Since Rice had completely served his sentence, rather than reaching the merits of Rice's *Pearce* claim, we remanded for a determination whether any collateral consequences flowed from his service of the longer sentence imposed after retrial, or whether the case was moot.

Here, while respondent faced the prospect of a more severe sentence at the conclusion of his felony trial in the Superior

Court of North Carolina, it was by no means self-evident that this would be the result. The maximum sentence which he could receive on the misdemeanor count was one and one-half years, but nothing in the record indicates that the Superior Court judge might not impose a lesser penalty than that, or even grant probation. Nor is [\*2108] there any indication in the habeas record, which contains only a fragment of the state court proceedings, that the Superior Court judge might not at the conclusion of the trial and after a verdict of guilty [\*641] have before him for sentencing purposes information which would support an augmented sentence under *Pearce*. In fact, the habeas court found that the sentence actually [\*39] imposed was more severe than that which could have been imposed under the misdemeanor charge. But the remedy for that violation should be a direction to the state court to resentence in accordance with *Pearce*, rather than an order completely annulling the conviction. Respondent was originally convicted of assaulting a fellow inmate with a deadly weapon, and later pleaded guilty to a charge of assaulting the inmate with a deadly weapon with intent to kill him. But in spite of both a verdict of guilty on one charge and a plea of guilty to the other, the Court's decision may well, as a practical matter, assure that no penalty whatever will be imposed on him.

MR. JUSTICE POWELL joins in Part II of this opinion.

## References

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References:.....

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

**RECEIVED**  
FEB 11 2016  
SC Court of Appeals

The State,

Respondent,

v.

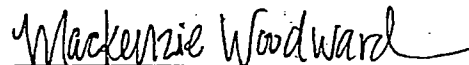
Brian Talkington,

Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing and Memorandum in Support of Appellant's Petition for Rehearing with Citation of Authorities on The State by hand-delivering a copy of it, on February 11, 2016, to The State's attorneys of record, Hans W. Pauling and Joseph Y. Shenkar, Assistant Solicitors, Fifth Judicial Circuit Solicitor's Office, located at 1701 Main Street, Columbia, South Carolina 29201.

February 11, 2016

  
MACKENZIE WOODWARD  
Paralegal  
Truslow & Truslow Law Firm  
P.O. Box 1465  
Columbia, SC 29202  
(803) 256-6276  
Fax (803) 256-7659

THE STATE OF SOUTH CAROLINA  
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MAR 07 2016

**SC Court of Appeals**

The State,

Respondent,

v.

Brian Talkington,

Appellant.  
\_\_\_\_\_

ADDENDUM TO APPELLANT'S MEMORANDUM WITH CITATION OF  
AUTHORITIES  
IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING  
\_\_\_\_\_

Appellant would submit the following Addendum to Appellant's Memorandum  
with Citation of Authorities in Support of his Petition for Rehearing:

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ADDENDUM TO APPELLANT'S MEMORANDUM WITH CITATION OF  
AUTHORITIES  
IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

1. As an supplementary and further supporting reason for this Court to grant a rehearing on this appeal and to determine whether the type of conduct exhibited by the State should be sanctioned is as follows:
  - a. While this matter was still within the exclusive jurisdiction of the Court of Appeals, the State attempted to call this case (2015-GS-40-01723, charging CDVHAN) for a jury trial.
  - b. Appellant indicated multiple times that the case could not go forward.
  - c. The State continued to press forward with attempting to try the CDVHAN, even going so far as setting this trial on the roster, and with higher priority than cases for murder and armed robbery.<sup>1</sup>
  - d. After being presented with the proposed jury trial docket from the State and receiving conflicting opinions of the ability of the Court of General Sessions to hear the case, the Chief Administrative Judge, Honorable Clifton B. Newman, requested all parties and Defendant appear for a status conference.<sup>2</sup>
  - e. A status conference was held on February 11, 2016. Appellant has ordered a transcript from the Court reporter<sup>3</sup> and respectfully suggests that this Court should review same prior to making any decisions on Appellant's Petition. Especially noteworthy were the following:
    1. The State insisted that the case was properly before the Court.
    2. Appellant argued that it was axiomatic that there is no jurisdiction to hear a case in General Sessions where the underlying matter was appealed and no remittitur had been sent from the Court of Appeals.
  - f. Judge Newman determined that there was no jurisdiction for the Court of General Sessions to hear a case without a remittitur. He analogized the

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<sup>1</sup> Enclosure 1.

<sup>2</sup> Enclosure 2.

<sup>3</sup> Enclosure 3.

procedural posture and pitfalls of this case to that of Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566, and inquired of the State, "Don't y'all have anything better to do than attempt to try cases that are on appeal?", or words to that effect.

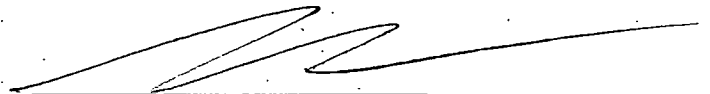
2. Two conclusions can be drawn from the State's attempted actions as outlined above:
  - a. The State does not appreciate/understand proper legal procedure and/or process; or
  - b. The State does appreciate/understand proper legal procedure and/or process, but has chosen to simply ignore it and is trifling with the legal system and maliciously attempting to prosecute this case.

Neither conclusion is particularly flattering for the State.

3. Because of the developments outlined above, this Court should grant Appellant's Petition for Rehearing after reviewing the transcript of the hearing before Judge Newman. As soon as Appellant's counsel has received same, it will be appropriately forwarded.

March 7, 2016

Truslow & Truslow Law Firm



DOUGLAS N TRUSLOW  
(SC BAR 5642)

NEAL D. TRUSLOW  
(SC Bar 77806)

P.O. Box 1465

Columbia, SC 29202

(803) 256-6276

Fax (803) 256-7659

[douglastruslow@truslowlaw.com](mailto:douglastruslow@truslowlaw.com)

[nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)

Other Counsel of Record:

Hans W. Pauling  
Assistant Solicitor  
Fifth Judicial Circuit  
P.O. Box 192  
Columbia, South Carolina 29202  
(803) 576-1832  
Fax: (803) 576-1718  
[PaulingH@rcgov.us](mailto:PaulingH@rcgov.us)

Joseph Y. Shenkar  
Assistant Solicitor  
Fifth Judicial Circuit  
P.O. Box 192  
Columbia, South Carolina 29202  
(803) 576-1832  
Fax: (803) 576-1718  
[shenkarj@rcgov.us](mailto:shenkarj@rcgov.us)

Kristen Bales  
Assistant Solicitor  
Fifth Judicial Circuit  
P.O. Box 192  
Columbia, South Carolina 29202  
(803) 576-1832  
Fax: (803) 576-1718  
[BalesK@rcgov.us](mailto:BalesK@rcgov.us)

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I certify that I have served the Addendum to Appellant's Memorandum in Support of Appellant's Petition for Rehearing with Citation of Authorities on The State by hand-delivering a copy of it, on February 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.

March 7, 2016

*Mackenzie Woodward*

MACKENZIE WOODWARD

Paralegal

Truslow & Truslow Law Firm

P.O. Box 1465

Columbia, SC 29202

(803) 256-6276

Fax (803) 256-7659

# Enclosure 1

## Neal Truslow

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**From:** Dan Goldberg <GoldbergD@rcgov.us>  
**Sent:** Wednesday, February 03, 2016 5:30 PM  
**To:** 'Newman, Clifton Law Clerk (Elizabeth Gunby)'; 'cnewmanj@sccourts.org'  
**Cc:** DOUG STRICKLER; Fielding Pringle; Jennifer Davis; Hans Pauling; Douglas Truslow; Neal Truslow; LUCK CAMPBELL; Robert Bank; John Conrad; 'Justin Kata'; Meghan Walker; Rhodes Bailey; Bruce Greenberg; Lucas Hawks; RICHARD CATHCART; Anastasia L. Walker  
**Subject:** Trial Docket for February 15, 2016

Below you will find the trial docket for the week of February 15, 2016:

|                   |              |            |                      |
|-------------------|--------------|------------|----------------------|
| Brian Talkington  | H. Pauling   | D. Truslow | CDVHAN               |
| Holly Jo Thompson | L. Campbell  | R. Bank    | Murder               |
| David Gray        | J. Conrad    | J. Kata    | Bank Fraud, Forgery  |
| Zachery Smith     | M. Walker    | R. Bailey  | AR, Kid, AB 1st, etc |
| John McFatter     | B. Greenberg | L. Hawks   | Drugs, HTO           |
| Jerrold Sims      | R. Cathcart  | A. Walker  | A & B 1st            |



### Daniel R. Goldberg

Deputy Solicitor  
Fifth Judicial Circuit

1701 Main Street, Suite 302 • P.O. Box 192 (29202)  
Columbia, South Carolina 29201  
Phone: 803.576.1822 • Fax: 803.576.1718

# Enclosure 2

## Neal Truslow

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**From:** Newman, Clifton Law Clerk (Elizabeth Gunby) <CNewmanLC@sccourts.org>  
**Sent:** Wednesday, February 10, 2016 5:10 PM  
**To:** Hans Pauling; Neal Truslow; Dan Goldberg  
**Subject:** RE: Trial Docket for February 15, 2016

Counsel,

Judge Newman has scheduled a status conference on the below matter for tomorrow at 1:30PM. The Defendant should also be present.

We will be in Courtroom 2A.

Thank you,

Elizabeth Gunby  
Law Clerk to the Honorable Clifton Newman

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**From:** Hans Pauling [mailto:PaulingH@rcgov.us]  
**Sent:** Wednesday, February 10, 2016 5:04 PM  
**To:** 'Neal Truslow'; Newman, Clifton Law Clerk (Elizabeth Gunby); Dan Goldberg  
**Subject:** RE: Trial Docket for February 15, 2016

The State intends to call this case on Tuesday February 16<sup>th</sup>, 2016.

---

**From:** Neal Truslow [mailto:nealtruslow@truslowlaw.com]  
**Sent:** Wednesday, February 10, 2016 4:41 PM  
**To:** 'Newman, Clifton Law Clerk (Elizabeth Gunby)'; Dan Goldberg  
**Cc:** Hans Pauling; DOUG STRICKLER; Fielding Pringle; Jennifer Davis; Douglas Truslow; LUCK CAMPBELL; Robert Bank; John Conrad; 'Justin Kata'; Meghan Walker; Rhodes Bailey; Bruce Greenberg; Lucas Hawks; RICHARD CATHCART; Anastasia L. Walker  
**Subject:** RE: Trial Docket for February 15, 2016

Ms. Gunby:

We believe that the State's case against Brian Talkington is not properly postured, jurisdictionally or otherwise, to go forward as scheduled at this time.

Additionally, though in context it appears inconsequential given the above, we've been notified that we (both Doug and I) will be required to be before Judge Joseph F. Anderson, Jr. in Federal District Court at 9:30am on February 18, 2016 at 9:30am (Case Name: Desa Ballard et al. v. Combis, et al. Case Number: 0:14-cv-01839-JFA). For your convenience, I have provided a copy of that hearing notice.

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](mailto:nealtruslow@truslowlaw.com)

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

Mailing Address:  
PO Box 1465  
Columbia, SC 29202

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---

**From:** Hans Pauling [<mailto:PaulingH@rcgov.us>]  
**Sent:** Tuesday, February 09, 2016 12:33 PM  
**To:** 'Newman, Clifton Law Clerk (Elizabeth Gunby)' <[CNewmanLC@sccourts.org](mailto:CNewmanLC@sccourts.org)>; Dan Goldberg <[GoldbergD@rcgov.us](mailto:GoldbergD@rcgov.us)>  
**Cc:** DOUG STRICKLER <[STRICKLERD@rcgov.us](mailto:STRICKLERD@rcgov.us)>; Fielding Pringle <[PringleF2@rcgov.us](mailto:PringleF2@rcgov.us)>; Jennifer Davis <[DavisJe@rcgov.us](mailto:DavisJe@rcgov.us)>; Douglas Truslow <[douglastruslow@truslowlaw.com](mailto:douglastruslow@truslowlaw.com)>; Neal Truslow <[nealtruslow@truslowlaw.com](mailto:nealtruslow@truslowlaw.com)>; LUCK CAMPBELL <[CAMPBELL@rcgov.us](mailto:CAMPBELL@rcgov.us)>; Robert Bank <[BankR@rcgov.us](mailto:BankR@rcgov.us)>; John Conrad <[ConradJ@rcgov.us](mailto:ConradJ@rcgov.us)>; 'Justin Kata' <[jkata@thegieselawfirm.com](mailto:jkata@thegieselawfirm.com)>; Meghan Walker <[WalkerM@rcgov.us](mailto:WalkerM@rcgov.us)>; Rhodes Bailey <[BaileyR@rcgov.us](mailto:BaileyR@rcgov.us)>; Bruce Greenberg <[GreenbergB@rcgov.us](mailto:GreenbergB@rcgov.us)>; Lucas Hawks <[HawksL@rcgov.us](mailto:HawksL@rcgov.us)>; RICHARD CATHCART <[CATHCART@rcgov.us](mailto:CATHCART@rcgov.us)>; Anastasia L. Walker <[WalkerA@rcgov.us](mailto:WalkerA@rcgov.us)>  
**Subject:** RE: Trial Docket for February 15, 2016

Brian Talkington is going forward next week.

---

**From:** Newman, Clifton Law Clerk (Elizabeth Gunby) [<mailto:CNewmanLC@sccourts.org>]  
**Sent:** Tuesday, February 09, 2016 12:04 PM  
**To:** Dan Goldberg  
**Cc:** DOUG STRICKLER; Fielding Pringle; Jennifer Davis; Hans Pauling; 'douglastruslow@truslowlaw.com'; 'Neal Truslow'; LUCK CAMPBELL; Robert Bank; John Conrad; 'Justin Kata'; Meghan Walker; Rhodes Bailey; Bruce Greenberg; Lucas Hawks; RICHARD CATHCART; Anastasia L. Walker  
**Subject:** RE: Trial Docket for February 15, 2016

Good afternoon,

Please provide updates to the below-referenced cases by the end of the day tomorrow.

Thank you,

Elizabeth Gunby

**From:** Dan Goldberg [mailto:GoldbergD@rcgov.us]

**Sent:** Wednesday, February 03, 2016 5:30 PM

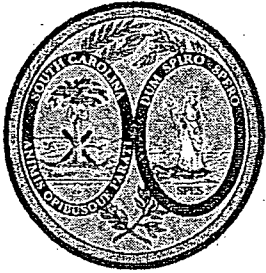
**To:** Newman, Clifton Law Clerk (Elizabeth Gunby); Newman, Clifton

**Cc:** PD 5th Circuit; Fielding Pringle; Jennifer Davis; Hans Pauling; 'douglastruslow@truslowlaw.com'; 'Neal Truslow'; LUCK CAMPBELL; Robert Bank; John Conrad; 'Justin Kata'; Meghan Walker; Rhodes Bailey; Bruce Greenberg; Lucas Hawks; RICHARD CATHCART; Anastasia L. Walker

**Subject:** Trial Docket for February 15, 2016

Below you will find the trial docket for the week of February 15, 2016:

|                   |              |            |                      |
|-------------------|--------------|------------|----------------------|
| Brian Talkington  | H. Pauling   | D. Truslow | CDVHAN               |
| Holly Jo Thompson | L. Campbell  | R. Bank    | Murder               |
| David Gray        | J. Conrad    | J. Kata    | Bank Fraud, Forgery  |
| Zachery Smith     | M. Walker    | R. Bailey  | AR, Kid, AB 1st, etc |
| John McFatter     | B. Greenberg | L. Hawks   | Drugs, HTO           |
| Jerrold Sims      | R. Cathcart  | A. Walker  | A & B 1st            |



**Daniel R. Goldberg**

Deputy Solicitor  
Fifth Judicial Circuit

1701 Main Street, Suite 302 • P.O. Box 192 (29202)  
Columbia, South Carolina 29201  
Phone: 803.576.1822 • Fax: 803.576.1718

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Enclosure 3

Neal Truslow

From: Neal Truslow
Sent: Tuesday, February 16, 2016 10:40 AM
To: 'Ambroziak, Karen'; Mackenzie Woodward
Cc: Douglas Truslow
Subject: RE: State v. Talkington (2015GS4001723) Transcript Request

Karen:

That would be perfectly acceptable. Just let me know when you have an invoice ready and we will arrange payment!

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

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-----Original Message-----

From: Ambroziak, Karen [<mailto:kambroziak@sccourts.org>]
Sent: Tuesday, February 16, 2016 10:39 AM
To: Mackenzie Woodward <mackenziewoodward@truslowlaw.com>
Cc: Neal Truslow <nealtruslow@truslowlaw.com>; Douglas Truslow <douglastruslow@truslowlaw.com>

Subject: RE: State v. Talkington (2015GS4001723) Transcript Request

?Mr. Truslow has always paid my invoices without any difficulty and has a reputation for promptly paying court reporters. I'll send an invoice with the completed transcript and payment can be made upon delivery when I know the exact dollar amount. Is a digitally signed PDF all right? That's the preferred method, but I always like to ask.

Karen Ambroziak, RPR

Court Reporter for the Honorable Robert E. Hood _____

From: Mackenzie Woodward <mackenziewoodward@truslowlaw.com>

Sent: Tuesday, February 16, 2016 10:30 AM

To: Ambroziak, Karen

Cc: Neal Truslow; Douglas Truslow

Subject: State v. Talkington (2015GS4001723) Transcript Request

Ms. Ambroziak:

I believe you were the court reporter for Judge Newman on February 11 at 1:30 p.m. in Richland County GS for a Status Conference in the State v. Talkington (2015GS4001723) case. Mr. Truslow would like to order a transcript of that status conference. Please let me know how much and I will forward payment to you ASAP.

Thank you.

Sincerely,

Mackenzie Woodward
Paralegal

Truslow & Truslow

ph (803) 256-6276

fax (803) 256-7659

www.truslowlaw.com<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.truslowlaw.com_&d=CwMFAg&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=Syj6cN0o-cb-WXk2lV73LqvOiFyh5ucCt6t3A94nyxo&m=G8QBv1z3EK3C_E5d_GGQWbqib40N4DYqbsAr_x1aRYg&s=kNwfv8UxeBpu47E57kuA8gHaWEx5-RFMPLhxZ_DS1s&e=>

3A__www.truslowlaw.com_&d=CwMFAg&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=Syj6cN0o-cb-

WXk2lV73LqvOiFyh5ucCt6t3A94nyxo&m=G8QBv1z3EK3C_E5d_GGQWbqib40N4DYqbsAr_x1aRYg&s=kNwfv8UxeBpu47E57kuA8gHaWEx5-RFMPLhxZ_DS1s&e=>

Mailing Address:

P.O. Box 1465

Columbia, SC 29202

Physical Address:

914 Richland St., Suite B-102

Columbia, SC 29201

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## *Limehouse v. Hulsey*

Supreme Court of South Carolina

March 6, 2013. Heard; June 26, 2013, Filed

Opinion No. 27279

### Reporter

404 S.C. 93; 744 S.E.2d 566; 2013 S.C. LEXIS 157; 2013 WL 3200608

Lawton Limehouse, Sr., Respondent, v. and The Hulsey Litigation Group, LLC, Petitioners, and Lawton Limehouse, Jr., Respondent, v. and The Hulsey Litigation Group, LLC, Appellants.

**Prior History:** [\*\*\*1] Appeals From Charleston County. Appellate Case No. 2011-196246, Appellate Case No. 2010-151573. Daniel F. Pieper, Circuit Court Judge, Roger M. Young, Circuit Court Judge.

*Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211, 2011 S.C. App. LEXIS 171 (S.C. Ct. App., 2011)

**Disposition:** REVERSED, VACATED, AND REMANDED.

### Core Terms

state court, federal court, remand order, mailing, damages, default, Appeals, removal, district court, jurisdictional, certified copy, notice, cases, proceedings, entry of default, punitive damages, tolled, subject matter jurisdiction, cross-examination, days, pleadings, courts, circuit court, resuming, parties, lack of subject matter jurisdiction, divested, entry of the order, appellate court, federal law

### Case Summary

#### Overview

**HOLDINGS:** [1]- As the federal court's order remanding a case back to state court was not certified, as required by 28 U.S.C.S. § 1447(c), the state court proceedings conducted after the federal court's entry of the remand order were void; therefore, the default judgments the state court entered in favor of respondents and against appellant could not stand; [2]-The 30-day time period for appellant to file an answer was tolled until the state court resumed jurisdiction; [3]-Pursuant to *Howard v. Holiday Inns, Inc.*, which remained good law after the enactment of S.C. R. Civ. P. 55(b)(2), the trial court properly precluded the defaulting appellant from engaging in discovery and limited his

participation in the hearing on damages to cross-examination and objection to respondent one's evidence.

### Outcome

The judgments were reversed.

### LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

**HN1** 28 U.S.C.S. § 1446(d) provides that after an action has been removed to federal court, the state court shall proceed no further unless and until the case is remanded.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

Governments > Courts > Authority to Adjudicate

**HN2** A remand order that is based on lack of subject matter jurisdiction is governed by 28 U.S.C.S. § 1447(c). Section 1447(c), entitled "Procedure after removal generally," provides that a motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under 28 U.S.C.S. § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the state court. The state court may thereupon proceed with such case. § 1447(c).

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter  
Jurisdiction > General Overview

Governments > Courts > Authority to Adjudicate

**HN3** Jurisdiction is generally defined as the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause. Specifically, jurisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested.

Civil Procedure > Preliminary Considerations > Jurisdiction >  
General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction  
Over Actions > Concurrent Jurisdiction

Civil Procedure > Preliminary Considerations > Federal &  
State Interrelationships > General Overview

Governments > Courts > Authority to Adjudicate

**HN4** Although federal and state courts form one system of jurisprudence, federal courts have no general supervisory power over the state courts, and there is nothing a state court can do to affect federal practice and procedure. The courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction  
Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Removal >  
General Overview

**HN5** A case filed in state court may be removed to federal court only when the case originally could have been filed in federal court. 28 U.S.C.S. § 1441(a) authorizes a defendant to remove any civil action brought in a state court of which the district courts of the United States have original jurisdiction. Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.

Civil Procedure > ... > Diversity Jurisdiction > Amount in  
Controversy > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal  
Questions > General Overview

**HN6** A federal court has subject matter jurisdiction over primarily two types of cases: (1) those involving federal

question jurisdiction, which arise under the Constitution, laws, or treaties of the United States; and (2) those involving diversity jurisdiction, which include parties who are residents of different states and the amount in controversy exceeds \$ 75,000. 28 U.S.C.S. §§ 1331, 1332.

Civil Procedure > ... > Jurisdiction > Subject Matter  
Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Removal >  
General Overview

**HN7** Removal proceedings impact the jurisdiction of the state court in that removal of a state case to federal court divests the state court of jurisdiction. Although most cases speak in terms of "divesting" the state court of jurisdiction during removal proceedings, the more accurate terminology is a "suspension" of the state court's jurisdiction.

Civil Procedure > ... > Jurisdiction > Subject Matter  
Jurisdiction > General Overview

**HN8** Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In  
Personam Actions > General Overview

Civil Procedure > ... > Pleadings > Complaints > General  
Overview

Civil Procedure > ... > Service of Process > Service of  
Summons > General Overview

**HN9** A court acquires personal jurisdiction over the parties once the action is commenced by the filing and service of the summons and complaint.

Civil Procedure > ... > Jurisdiction > Subject Matter  
Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Equity > Relief

Civil Procedure > Remedies > General Overview

Governments > Courts > Authority to Adjudicate

**HN10** "Power" refers to the court's ability, when it has subject matter jurisdiction, to grant equitable and legal relief to a party.

Civil Procedure > Preliminary Considerations > Removal >  
General Overview

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

*HN11* Because removal proceedings encroach upon a state court's jurisdiction, removal statutes must be strictly construed and any doubts are to be resolved in favor of state court jurisdiction and remand. The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.

Governments > Legislation > Interpretation

*HN12* As the rules of statutory construction dictate, it is necessary for courts to consider the legislative history in order to effectuate the purpose of the statute. Where the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself.

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

*HN13* The history and plain language of 28 U.S.C. § 1447(c) leave no doubt that Congress made the mailing of a certified copy of the remand order the determinable jurisdictional event after which the state court can exercise control over the case without fear of further federal interference. Congress purposefully included the mailing of a certified order as a jurisdictional requirement and, thus, the mere entry of an order is not self-executing as to the jurisdiction of the state court. A § 1447(c) order of remand is not self-executing. This provision creates legal significance in the mailing of a certified copy of the remand order in terms of determining the time at which the district court is divested of jurisdiction. On that basis, the federal court is not divested of jurisdiction until the remand order, citing the proper basis under § 1447(c), is certified and mailed by the clerk of the district court.

Governments > Courts > Judicial Precedent

Governments > Legislation > Interpretation

*HN14* While a state court is bound only by the United States Supreme Court, if the lower federal courts are uniform on their interpretation of a federal statute, the state court, in the interest of preserving unity, will give considerable weight to those courts' interpretations of federal law and find them to be highly persuasive. However, if the federal courts are split, the state court may elect to follow those decisions it believes to be better reasoned.

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Default & Default Judgments > Default Judgments > Entry of Default Judgments

*HN15* See S.C. R. Civ. P. 77(d).

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Answers

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

*HN16* Once a case is removed to federal court, the state court's jurisdiction is suspended or held in abeyance until the case is properly remanded. When the state court resumes jurisdiction, it has a duty to proceed as though no removal had been attempted. Thus, the time for filing an answer is tolled until the state court resumes jurisdiction.

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Answers

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

*HN17* Removal of a state court case to federal court tolls the time period for filing responsive pleadings.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > Remedies > Damages > General Overview

*HN18* S.C. R. Civ. P. 55(b)(2) provides that, in cases where default has been entered and the plaintiff's damages are not a sum certain, a trial judge may schedule a hearing on damages if it would enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > Remedies > Damages > General Overview

*HN19* The Supreme Court of South Carolina has assessed three approaches as to how a defaulting defendant can contest the issue of damages. It has noted that it could allow damages to be determined: (1) in an ex parte proceeding, denying the defendant any right to participate; (2) after a full adversary contest, including the right of the defendant to produce evidence in rebuttal or in mitigation; or (3) with defense counsel's participation limited to cross-examination and objection to plaintiff's evidence. The supreme court has found the third approach to be the proper one and has approved it for use in the courts of South Carolina.

Counsel: A. Camden Lewis, Keith M. Babcock, and Ariail Elizabeth King, all of Lewis Babcock & Griffin, LLP, of Columbia; Robert H. Hood and James Bernard Hood, of Hood Law Firm, LLC, of Charleston, Deborah Harrison Sheffield, of Columbia, John K. Weedon, of Hinshaw & Culbertson LLP, of Jacksonville, FL, for Petitioners and Appellants.

Frank M. Cisa, of The Law Firm of Cisa & Dodds, LLP, of Mt. Pleasant, for Respondents.

Judges: JUSTICE BEATTY, TOAL, C.J., HEARN, J., and Acting Justice James E. Moore, concur. KITTREDGE, J., concurring in result only.

Opinion by: BEATTY

## Opinion

[\*95] [\*\*567] JUSTICE BEATTY: Lawton Limehouse, Sr. ("Father") and Lawton Limehouse, Jr. ("Son") separately sued Paul Hulsey, an attorney, and Hulsey's law practice (collectively, "Hulsey") for defamation arising out of statements Hulsey [\*\*568] made regarding L&L Services, LLC ("L&L"), a staffing agency owned and operated by Father and Son. Hulsey removed the case to federal court based on an underlying RICO action<sup>1</sup> involving the [\*96] operation of L&L. The federal court remanded [\*\*\*2] the case to state court on the ground it lacked federal question jurisdiction over the issues presented. After the remand, the state court clerk of court entered a default against Hulsey.

Following a damages hearing, a jury awarded Father \$2.39 million in actual damages and \$5 million in punitive

damages. The Court of Appeals affirmed. *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Cl. App. 2011). While the appeal in Father's case was pending, a damages hearing was held for Son's case. A jury awarded Son \$1 million in actual damages and \$2.6 million in punitive damages.

This Court granted Hulsey's petition for a writ of certiorari to review the opinion of the Court of Appeals. Subsequently, this Court issued an order certifying the appeal in Son's case pursuant to *Rule 204(b), SCACR*. Because the dispositive issue in each case is identical, we consolidated the matters for oral argument and for the purpose of this opinion.<sup>2</sup> As will be discussed, we find the state court proceedings are void as the lack of a certified remand order precluded the state court from resuming jurisdiction [\*\*\*3] over the cases. Accordingly, we reverse the decision of the Court of Appeals, vacate the state court proceedings, and remand to the circuit court to recommence the cases from the procedural point at which the state court received a certified remand order from the federal court.

### I. Factual/Procedural History

Father and Son owned and operated an employment staffing agency known as L&L Services, LLC, which was located in Charleston County. Between February 11, 2004, and February 24, 2004, *The Post and Courier* published four articles concerning housing raids performed on homes rented by L&L and fines assessed for overcrowding, inadequate heating and plumbing, and running illegal boarding houses. On Sunday, March 21, 2004, *The Post and Courier* published a front page article entitled, "The Hidden Economy: Local company accused of trafficking in illegal immigrant labor." Several of L [\*97] &L's employees were interviewed and quoted [\*\*\*4] in the article. The employees admitted they were undocumented and accused L&L of selling them false citizenship documents and failing to pay for overtime work.

On April 23, 2004, Hulsey filed a class action lawsuit in federal court on behalf of former employees of L&L, alleging violations of the RICO Act and other state and federal laws (the "RICO case"). Hulsey named Father, Son, and L&L as defendants in the RICO case. In the Complaint, it was alleged that defendants hired undocumented workers and exploited them under the threat of deportation by failing to pay overtime wages, manufacturing and providing false

<sup>1</sup> "RICO" is an acronym for the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C.A. §§ 1961-1968.

<sup>2</sup> See *Rule 214, SCACR* ("Where there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order the appeal to be consolidated.").

identification and immigration documents and reports, and harboring them in substandard housing.<sup>3</sup>

On April 24, 2004, *The Post and Courier* printed an article entitled, "Lawsuit Targets Staffing Agency." The article quoted Hulsey as stating:

- (1) L&L engaged in a "classic racketeering scheme";
- (2) L&L's conduct set "the community back 150 years";
- (3) L&L engaged in "a blatant case of indentured servitude"; and
- (4) L&L "created a perfect racketeering enterprise, just like Tony Soprano."

Neither Father [\*\*\*5] nor Son was mentioned by name in the article. Evidence was presented that the estimated readership for *The Post & Courier* on April 24, 2004 was 237,952.

[\*\*569] On April 19, 2006, Father and Son, separately but with identical pleadings, initiated the current defamation action against Hulsey in state court, alleging the statements in the article were false and damaged their reputation, health, and business. Hulsey's law practice was served with a copy of the Complaint on April 20, 2006, and Hulsey was served individually on April 21, 2006. On May 5, 2006, before Hulsey's Answer was due in state court, Hulsey filed a notice of removal to federal district court. On June 2, 2006, Father and Son filed a motion to remand the cases to state court.

[\*98] By order dated July 19, 2006, the federal district court remanded the cases to state court on the ground that federal question jurisdiction was not present. The federal court electronically transmitted the order to counsel on July 20, 2006; however, the electronic copy was neither manually embossed nor did it contain an electronic seal. The Charleston County Clerk of Court received an uncertified copy of the remand order on July 21, 2006, which it filed the [\*\*\*6] same day. On July 27, 2006, the clerk mailed notice of the filing to the parties.

On August 21, 2006, Father and Son moved for entry of default in state court on the ground Hulsey failed to timely file an Answer to the Complaint. The Charleston County Clerk of Court entered default on August 21, 2006, and filed it on August 22, 2006. The clerk mailed the Form 4 order to all parties on August 24, 2006, noticing the entry of default.

On August 29, 2006, upon receipt of the Form 4 order, Hulsey filed an Answer and a motion to set aside the entry of default pursuant to Rule 55(c), SCRPC. Following a hearing, then Circuit Court Judge Daniel F. Pieper issued a written order denying the motion.

On February 4-6, 2008, Circuit Court Judge Roger M. Young presided over the damages hearing involving Father's case. Because Hulsey was deemed in default, Judge Young limited Hulsey's participation in the hearing to cross-examination and objection to Father's evidence. The jury returned a verdict against Hulsey for \$2.39 million in actual damages and \$5 million in punitive damages. On February 15, 2008, Hulsey filed several post-trial motions, including a motion to dismiss for lack of subject matter [\*\*\*7] jurisdiction after discovering the Charleston County Clerk of Court had not received a certified copy of the remand order from the federal court. Following a hearing, Judge Young denied Hulsey's post-trial motions. Hulsey appealed to the Court of Appeals.

In a divided opinion, the Court of Appeals affirmed. Limehouse v. Hulsey, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011). In so ruling, the majority held: (1) the circuit court had subject matter jurisdiction over the action upon remand as the mailing of a certified order is a procedural, rather than jurisdictional, requirement; (2) Judge Pieper properly denied [\*\*99] Hulsey's motion to set aside the entry of default as Hulsey's explanation for the untimely Answer did not support a finding of good cause; (3) Judge Young properly limited Hulsey's participation in the damages hearing to cross-examination and objection to Father's evidence; (4) Judge Young did not comment on the facts of the case when he responded to a question posed by the jury during deliberations; (5) Judge Young properly submitted to and instructed the jury on the issue of punitive damages; and (6) the award of punitive damages was supported by the evidence. *Id.* at 60-80, 723 S.E.2d at 217-28.

In [\*\*\*8] contrast, the dissent found the circuit court was without jurisdiction over the proceeding as the federal court's failure to mail a certified copy of the remand order precluded jurisdiction from re-vesting in the state court. *Id.* at 81, 723 S.E.2d at 228-32. Alternatively, the dissent believed Judge Pieper erred in ruling on Hulsey's motion to set aside the entry of default in light of this Court's decision in Sundown Operating Co. v. Intedje Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). Because the dissent believed *Sundown* changed the analytical framework for ruling on "good cause," the dissent would have reversed

<sup>3</sup> The RICO case was never certified as a class action and ultimately settled for \$20,000.

Judge Pieper's order and remanded the case for a determination of whether good cause existed under *Sundown*. *Id.* at 89-94, 723 S.E.2d at 233-35.

[\*\*570] This Court granted Hulsey's petition for a writ of certiorari to review the decision of the Court of Appeals.

While the appeal of Father's case was pending before the Court of Appeals, Judge Young presided over a jury trial for damages in Son's case on November 9-13, 2009.<sup>4</sup> Because Hulsey was deemed in default, Judge Young again limited Hulsey's participation in the hearing to cross-examination and objection to Son's evidence. [\*\*\*9] The jury returned a verdict in favor of Son in the amount of \$1 million actual damages and \$2.6 million in punitive damages. Hulsey appealed to the Court of Appeals.

After granting the writ of certiorari to review the Court of Appeals' decision in *Linehouse v. Hulsey*, 397 S.C. 49, 723 [\*\*100] S.E.2d 211 (Ct. App. 2011), this Court certified the appeal in Son's case pursuant to *Rule 204(b), SCACR*. We now consider the consolidated matters.

## II. Discussion

### A. Jurisdiction of the State Court

Hulsey asserts the circuit court was without subject matter jurisdiction over the proceedings as the federal removal statutes require the state court to receive a *certified* order for jurisdiction to be re-vested.

*HNI Section 1446(d)* of the United States Code provides that after an action has been removed to federal court, "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C.A. § 1446(d) (West 2013). *HN2 A*

remand order that is based on lack of subject matter jurisdiction is governed by *section 1447(c), Section 1447(c)*, [\*\*\*10] entitled "Procedure after removal generally," provides in relevant part:

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under *section 1446(a)*. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . A *certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.*

*Id.* § 1447(c) (emphasis added).

In ruling on this issue, a majority of the Court of Appeals focused on whether *mailing* was required to divest the federal court of jurisdiction. *Linehouse*, 397 S.C. at 60, 723 S.E.2d at 217. Although the court recognized that "a majority of federal circuits take the position that the finality of the remand and the accompanying loss of federal jurisdiction requires both entry of the order with the federal clerk of court *and* a certified copy being mailed to the state court," it adopted the minority view espoused by the Fourth Circuit Court of Appeals. *Id.* at 60, 723 S.E.2d at 217.

Relying on the reasoning [\*\*\*11] of *In re Lowe*, 102 F.3d 731 (4th Cir. 1996),<sup>5</sup> the majority of [\*\*571] the Court of Appeals concluded that [\*\*101] mailing of the certified remand order is not a jurisdictional requirement, but instead the federal court lost jurisdiction when the remand order was entered. *Linehouse*, 397 S.C. at 61-62, 723 S.E.2d at 217-18.

<sup>4</sup> Hulsey filed a motion to stay the trial of Son's case due to the pending appeal in Father's case. Judge Young, however, denied this motion and set the matter for a damages trial.

<sup>5</sup> In *Lowe*, Katherine Lowe sued her employer, "Wal-Mart Stores", and two Wal-Mart managers in North Carolina state court. *Lowe*, 102 F.2d at 732. After Wal-Mart removed the case to federal court, Lowe moved to remand the case to state court based on a lack of diversity jurisdiction. *Id.* at 733. The remand order was entered on the district court docket on August 25, 1995. *Id.* The federal court mailed a copy of the order to the state court. However, the state court's copy of the remand order lacked the blue backing necessary to show the order was certified. *Id.* Wal-Mart moved before the federal court for reconsideration of its remand order. *Id.* Ultimately, the federal court reinstated the case to the federal docket. *Id.* Lowe filed a petition for a writ of mandamus in the Fourth Circuit Court of Appeals asking the court to order the district court to return her case to the state court. *Id.* [\*\*\*12] In analyzing whether the district court had jurisdiction when it reconsidered the remand order, the Fourth Circuit was required to determine the point at which the district court lost jurisdiction over the case. *Id.* at 734. Lowe claimed the district court lost jurisdiction when it entered the remand order. In contrast, Wal-Mart asserted the district court retained jurisdiction until it mailed a certified copy of the remand order to the state court. *Id.* The Fourth Circuit ruled in favor of Lowe. In so ruling, the court found that "[l]ogic . . . indicates that it should be the action of a court (entering an order of remand) rather than the action of a clerk (mailing a certified copy of the order) that should determine the vesting of jurisdiction." *Id.* at 735 (quoting *Van Ryn v. Korean Air Lines*, 640 F. Supp. 284, 285 (C.D. Cal. 1985)). The court stated that to "hold otherwise would impermissibly elevate substance over form." *Id.*

In analyzing whether jurisdiction re-vested in the state court upon mailing of the remand order to the clerk, the majority noted the state court's jurisdiction is general as it is derived exclusively from our state constitution and not federal law. *Id.* at 62, 723 S.E.2d at 218. The majority proceeded to compare the general jurisdiction of the state court to the limited jurisdiction of the federal court and found the state court's jurisdiction is limited only by the federal court's proper exercise of jurisdiction over a case pursuant to a congressional act, "which according to Fourth Circuit jurisprudence in *Lowe*, ceased upon entry of the remand order." *Id.* at 63, 723 S.E.2d at 218.

[\*102] Because the majority found jurisdiction transferred to the state court upon entry of the order in federal court, the court believed it was unnecessary to determine whether the federal court had to mail a certified order. *Id.* at 62, 723 S.E.2d at 218. The court, however, found that since the issue of mailing was procedural and not jurisdictional, it was not preserved for appellate review as Hulsey failed to make a timely objection. *Id.* at 65, 723 S.E.2d at 220. Additionally, the court noted [\*\*\*14] that to warrant reversal on procedural grounds, Hulsey was required to show that he was prejudiced by the fact that the Charleston County Clerk of Court did not receive a certified copy of the order. *Id.* at 66, 723 S.E.2d at 220. Because Hulsey received personal notice of the remand order, the majority found that Hulsey failed to demonstrate he was prejudiced by the procedural defect. *Id.* at 67, 723 S.E.2d at 221.

In contrast, the dissent found the plain language of *section 1447(c)* requires that a certified copy of the remand order be mailed before the state court is re-vested with jurisdiction. *Id.* at 81, 723 S.E.2d at 228. Because a certified copy of the remand order was never mailed to the state court clerk, the dissent concluded the state court had no power to proceed. *Id.* The dissent explained that "[b]ecause the state court

acted when federal law prohibited it from doing so, the resulting judgment was void." *Id.* Accordingly, the dissent found the trial court's failure to grant relief from the judgment was error and warranted reversal. *Id.*

In reaching its ultimate conclusion, the dissent rejected the majority's reliance on *Lowe*. *Id.* at 82, 723 S.E.2d at 228-29. The dissent found [\*\*\*15] *Lowe* distinguishable from the instant case as the Fourth Circuit considered the point in time when the federal court's decision to remand becomes unreviewable. *Id.* at 83-84, 723 S.E.2d at 229. The dissent further contended that whether the mailing requirement was procedural or jurisdictional was irrelevant because the prohibition contained in *section 1447(c)*, which provides that a state court cannot proceed until a certified copy of the remand order is mailed to it, cannot be avoided by labeling the mailing requirement procedural. *Id.* at 84, 723 S.E.2d at 230. Additionally, the dissent believed the majority incorrectly relied on the Fourth Circuit's decision in *Bryan* because the remand order in that [\*103] case was not based on lack of subject matter jurisdiction and, thus, was governed by another clause of *section 1447(c)*. *Id.* at 86-87, 723 S.E.2d at 231.

Although the dissent acknowledged that a plain reading of *section 1447(c)* creates a brief period of time in which neither the federal court nor the state court has the power to act, i.e., a "jurisdictional hiatus," it concluded that a certified copy of a remand order based on lack of subject matter jurisdiction must be mailed to the state [\*\*\*16] court before the state court can proceed. *Id.* at 88, 723 S.E.2d at 232.

Undoubtedly, there is support for both positions espoused by the Court of Appeals as the federal and state courts are divided on [\*\*572] the jurisdictional implications of *section 1447(c)*.<sup>6</sup> See 14C Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Joan E. Steinman, *Federal Practice*

Our Court of Appeals also referenced the Fourth Circuit case of *Bryan v. BellSouth Communications, Inc.*, 492 F.3d 231 (4th Cir. 2007), wherein the court stated in a footnote that a remand order based on lack of subject matter jurisdiction is effective when entered. [\*\*\*13] *Id.* at 235 n.1.

<sup>6</sup> In addition to *Lowe*, a few federal and state courts have held that jurisdiction transfers back to the state court upon entry of the order of remand. See, e.g., *Whiddon Farms, Inc. v. Delta & Pine Land Co.*, 103 F. Supp. 2d 1310 (S.D. Ala. 2000); *Van Ryn v. Korean Air Lines*, 640 F. Supp. 284 (C.D. Cal. 1985); *Health for Life Brands, Inc. v. Powley*, 203 Ariz. 536, 57 P.3d 726 (Ariz. Ct. App. 2002); *Citizens Bank & Trust Co. v. Carr*, 583 So. 2d 864 (La. Ct. App. 1991); *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1993- NMCA 147, 119 N.M. 169, 889 P.2d 204 (N.M. Ct. App. 1993); [\*\*\*17] *aff'd*, 1994- NMSC 126, 119 N.M. 150, 889 P.2d 185 (N.M. 1994); *Int'l Lottery, Inc. v. Kerouac*, 102 Ohio App. 3d 660, 657 N.E.2d 820 (Ohio Ct. App. 1995).

However, the majority of courts considering this issue have held that the federal court is not divested of jurisdiction until a certified copy of the remand order is mailed to the state court. See, e.g., *Fed. Deposit Ins. Corp. v. Santiago Plaza*, 598 F.2d 634 (1st Cir. 1979); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3d Cir. 1995); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984); *Seedman v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 837 F.2d 413 (9th Cir. 1988); *Yarbrough v. Blake*, 212 F. Supp. 133 (W.D. Ark. 1962); *Cook v. J.C. Penney Co.*, 558 F. Supp. 78 (N.D. Iowa 1983); *Louisiana v. Sprint Commc'ns Co.*, 899 F. Supp. 282 (M.D. La. 1995); *Hubbard v.*

and Procedure § 3739 (4th ed. 2013) (discussing section 1447(c) and outlining state and federal court decisions applying this provision). [\*104] Thus, we are now confronted with definitively deciding when jurisdiction resumes in the state court following the federal court's entry of an order of remand.

In answering this question, it is instructive to consider the concept of jurisdiction in general as well as the jurisdictional distinctions between state and federal courts. The word "jurisdiction" does not in every context connote subject matter jurisdiction, but rather, is "a word of many, too many, meanings." Rockwell Int'l Corp. v. U.S., 549 U.S. 457, 467, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)).

HN3 Jurisdiction is generally defined as "the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." 32A Am. Jur. 2d Federal Courts § 581 (2007) (footnotes omitted). Specifically, "[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested." Indep. Sch. Dist. No. 1 of Okla. County v. Scott, 2000 OK CIV APP 121, 15 P.3d 1244, 1248 (Okla. Civ. App. 2000).

HN4 "Although [\*\*\*19] federal and state courts form one system of jurisprudence, federal courts have no general supervisory power over the state courts, and there is nothing a state court can do to affect federal practice and procedure." 21 C.J.S. Courts § 274 (Supp. 2013). The United States Supreme Court ("USSC") has explained that "the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." Haywood v. Drown, 556 U.S. 729, 735, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009) (quoting Clafflin v. Houseman, 93 U.S. 130, 136-37, 23 L. Ed. 833 (1876)).

HN5 A case filed in state court may be removed to federal court only when the case originally could have been filed in federal court. 28 U.S.C.A. § 1441(a) (West 2013) (authorizing

a defendant to remove "any civil action brought in a State court of [\*105] which the district courts of the United States have 'original jurisdiction'"); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.").

HN6 [\*\*573] A federal court has subject matter jurisdiction over primarily two types [\*\*\*20] of cases: (1) those involving "federal question jurisdiction," which "aris[e] under the Constitution, laws, or treaties of the United States"; and (2) those involving "diversity jurisdiction," which include parties who are residents of different states and the amount in controversy exceeds \$75,000. 28 U.S.C.A. §§ 1331, 1332 (West 2013).

HN7 Removal proceedings impact the jurisdiction of the state court in that removal of a state case to federal court "divests" the state court of jurisdiction. See Michael J. Kaplan, Annotation, Effect, on Jurisdiction of State Court, of 28 U.S.C.A. § 1446(e), Relating to Removal of Civil Case to Federal Court, 38 A.L.R. Fed. 824 (1978 & Supp. 2013) (analyzing jurisdictional and procedural implications of removal of state court case to federal court).

Although most cases speak in terms of "divesting" the state court of jurisdiction during removal proceedings, we believe the more accurate terminology is a "suspension" of the state court's jurisdiction. Here, the circuit court had subject matter jurisdiction over the defamation claims and acquired personal jurisdiction over the parties upon the filing and service of their pleadings. See Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008).

[\*\*\*21] (HN8 "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." (citations omitted)); Brown v. Evatt, 322 S.C. 189, 470 S.E.2d 848 (1996) (citing Rule 3(a), SCRPC, and recognizing that circuit HN9 court acquires personal jurisdiction over the parties once the action is commenced by the filing and service of the summons and complaint); Boan v. Jacobs, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1998) ("The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction).").

Combustion Eng'g, Inc., 794 F. Supp. 221 (E.D. Mich. 1992); City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc., 147 F.R.D. 122 (S.D. Miss. 1993); Campbell v. Int'l Bus. Machs., 912 F. Supp. 116 (D. N.J. 1996); Rosenberg v. GWV Travel, Inc., 480 F. Supp. 95, 97 n.3 (S.D.N.Y. 1979); McManus v. Glassman's Wynnefield, Inc., 710 F. Supp. 1043 (E.D. Pa. 1989); Blazer Elec. Supply Co. v. Bertrand, 952 P.2d 857 (Colo. Ct. App. 1998); [\*\*\*18] State v. Lehman, 203 Neb. 341, 278 N.W.2d 610 (Neb. 1979); Quaestor Invs., Inc. v. State of Chiapas, 997 S.W.2d 226 (Tex. 1999).

[\*106] Neither of these jurisdictional elements was affected by Hulsey's motion to remove the case to federal court.<sup>7</sup> Instead, the remaining element, i.e., the state court's power to render the particular judgment requested, was suspended or held in abeyance until a determination was made as to whether the cases involved a federal question more appropriately decided by the federal court. *See Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1052 (Fed. Cir. 2012) (HN10 "'Power' refers to the court's ability, when [\*\*\*22] it has subject matter jurisdiction, to grant equitable and legal relief to a party.").

HN11 Because removal proceedings encroach upon a state court's jurisdiction, removal statutes must be strictly construed and any doubts are to be resolved in favor of state court jurisdiction and remand. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999); *Gau's v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The USSC has explained:

The removal statute[,] which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.

*Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). Furthermore, HN12 as the rules of statutory [\*\*\*23] construction dictate, it is also necessary for courts to consider the legislative history in order to effectuate the purpose of the statute. *See Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) (stating that where "the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself").

Applying these rules, the California Court of Appeal explained:

[\*\*574] [\*107] Before 1948, the statute governing remand stated in relevant part, "Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from

whence it came, such remand shall be immediately carried into execution, and no appeal . . . from the decision of the district court so remanding such cause shall be allowed." (Judicial Code § 28 (1911), italics added; *see also* 28 U.S.C. § 71 (1940).) In 1948, Congress revised title 28 of the United States Code, and placed the procedures governing remand in *section 1447*. In doing so, Congress deleted the former provision [\*\*\*24] stating that the "remand shall be immediately carried into execution," replacing it with a command that the district court clerk mail a certified copy of the remand order to the state court clerk, and providing that "[t]he state court may thereupon proceed with [the] case." (§ 1447, as enacted June 25, 1948, ch. 646, 62 Stat. 939.) Although some courts—including the Ninth Circuit—had interpreted even the former provision as requiring a certified copy of the remand order to be filed with the clerk of the state court before jurisdiction was transferred (*see, e.g., Bucy v. Nevada Const. Co.*, (9th Cir. 1942) 125 F.2d 213, 217), the new statutory language makes that requirement explicit.

*Spanair S.A. v. McDonnell Douglas Corp.*, 172 Cal. App. 4th 348, 357, 90 Cal. Rptr. 3d 864 (Cal. Ct. App. 2009). Although the California Court of Appeal recognized its interpretation appeared to elevate "form over substance," it emphasized HN13 "the history and plain language of *section 1447(c)*, leave no doubt that Congress made the mailing of a certified copy of the remand order the 'determinable jurisdictional event after which the state court can exercise control over the case without fear of further federal interference.'" *Id.* (quoting [\*\*\*25] *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 225 (3d Cir. 1995)). Despite legitimate concerns over the wisdom of this rule, the court declined to "second-guess Congress by rewriting the statute." *Id.*

As evidenced by the language in *Spanair*, Congress purposefully included the mailing of a certified order as a jurisdictional requirement and, thus, the mere entry of an order is not self-executing as to the jurisdiction of the state [\*108] court. *See Arnold v. Garlock, Inc.*, 278 F.3d 426, 437-38 (5th Cir. 2001) ("A § 1447(c) order of remand is not self-executing . . . This provision creates *legal significance* in the mailing of a certified copy of the remand order in terms of determining the time at which the district court is divested of jurisdiction. On that basis, the federal court is not divested of jurisdiction until the remand order, citing the proper basis under § 1447(c), is certified and mailed by the

<sup>7</sup> Indeed, if a state court was divested of personal jurisdiction and subject matter jurisdiction following removal proceedings, the parties would have to re-file a lawsuit each time a federal court issued an order remanding the case to state court.

of the certified order precluded jurisdiction from resuming in the state court. Although this Court often defers to [\*109] Fourth Circuit decisions interpreting federal law, which in the instant case would be *Lowe*, it is not obligated to do so in view of the lack of uniformity amongst the federal circuits. *See State Bank of Cherry v. CGB Enters.*, 2013 IL 113836, 984 N.E.2d 449, 459, 368 Ill. Dec. 503 (Ill. 2013) (HN14 "While we are bound only by the United States Supreme Court, if the lower federal courts are uniform on their interpretation of a federal statute, this court, in the interest of preserving unity, will give considerable weight to those courts' interpretations of federal law and find them to be highly persuasive. However, if the federal courts are

S.C. 208, 229 S.E.2d 841 (1976) (concluding that all orders issued by state court after proceeding was removed to federal court were void); *Peoples Trust & Sav. Bank v. Humphrey*, 451 N.E.2d 1104 (Ind. Ct. App. 1983) (noting that, during the pendency of the removal petition, any proceedings by the state trial court are void until remand by the federal court); 77 C.J.S. *Removal of Cases* § 154 (Supp. 2013) ("Proceedings in the state court after the requirements for removal are met are not merely erroneous, but null and void. No subsequent pleadings can be filed in the state court." (footnotes omitted)).

Although this [\*\*\*30] ruling would be dispositive of both appeals, we believe the bench and bar would benefit from a

<sup>8</sup> On March 5, 2009, the Charleston County Clerk of Court received the certified remand order from the federal district court. Hulsey filed and served his Answer on March 13, 2009.

by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered." (citations omitted)). Moreover, trial judges and appellate courts conduct [\*\*\*43] a review of the award to ensure the verdict is not excessive and is supported by the evidence. See Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009) (discussing the history of due process limitations on punitive damages awards and identifying guideposts for post-judgment review of punitive damages awards).

Having found that *Howard* still governs post-default proceedings, we hold that Judge Young correctly precluded Hulsey [\*117] from engaging in discovery and limited his participation to cross-examination and objection to the plaintiff's evidence.

### III. Conclusion

Based on the foregoing, we hold the lack of a certified remand order precluded jurisdiction from resuming in the state court. Accordingly, we reverse the decision of the Court of Appeals and vacate the state court proceedings. We remand the cases to recommence from the procedural point at which the Charleston County Clerk of Court received the federal court's certified remand order. Additionally, we find the time for filing responsive pleadings was tolled during the removal proceedings as no subsequent pleadings could be filed in state court until jurisdiction resumed. Finally, we reaffirm our decision in *Howard* wherein [\*\*\*44] we limited a defendant's participation in a post-default hearing to cross-examination and objection to the plaintiff's evidence as we find this effectuates the purpose of default proceedings and is consistent with Rule 55(b)(2).

**REVERSED, VACATED, AND REMANDED.**

TOAL, C.J., HEARN, J., and Acting Justice James E. Moore, concur. KITTREDGE, J., concurring in result only.

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: Good afternoon.

2 MR. NEAL TRUSLOW: Good morning.

3 THE COURT: This is a status conference for this  
4 Brian Talkington matter.

5 Yes, sir.

6 MR. PAULING: Your Honor, we have noticed the defense  
7 for trial next week, and I'm guessing they have an issue  
8 with the trial date. They didn't file a motion for a  
9 continuance, so I'm not sure exactly why we're here, but  
10 we do have a copy of --

11 THE COURT: Well, you received a copy of the email he  
12 sent, right?

13 MR. PAULING: Yes, sir, I did.

14 THE COURT: All right. So there's no guess about it.  
15 They raised an issue. That's why I scheduled a status  
16 conference.

17 MR. PAULING: Again, Your Honor, I requested them to  
18 file a motion for a continuance back on February 3rd, and  
19 we never received anything.

20 THE COURT: All right.

21 Yes, sir.

22 MR. NEAL TRUSLOW: Good afternoon, Judge.

23 THE COURT: Good afternoon.

24 MR. NEAL TRUSLOW: Neal Truslow for the defendant  
25 Brian Talkington.

1           Judge, I believe we're here today because a  
2 remittitur from the Court of Appeals has not yet been  
3 received. The problem is that the State can't go forward.  
4 The Court is not vested with jurisdiction until a  
5 remittitur is received.

6           THE COURT: Well, let me explain to you, Mr. Truslow,  
7 obviously, the notice from the Solicitor, the Solicitor's  
8 Office, of a trial docket for next week.

9           Other than that, there have been some e-mails sent  
10 saying various things. I know nothing about the case at  
11 all. I haven't seen an arrest warrant, an indictment, any  
12 pleadings.

13           I know nothing of this matter. I know nothing of any  
14 appeal. I know nothing of anything other than that this  
15 matter is on the trial docket for next week. Go ahead.

16           MR. NEAL TRUSLOW: Judge, very well. I think that  
17 it's going to take a little bit of time to give you some  
18 of the background and history in this case, but it  
19 actually starts in 2011 with an arrest in July of 2011. A  
20 warrant was sworn out. A case was eventually brought in  
21 Magistrate's Court in 2013. That case was dismissed at  
22 some point months later.

23           The State brought another arrest warrant for  
24 Mr. Talkington for the charge of CDV first offense. The  
25 matter was then sent for various status conferences and

1     hearings in Magistrate's Court. A ruling was made in  
2     Magistrate's Court in 2014. The matter was appealed to  
3     Judge Kinard in his appellate capacity in the Circuit  
4     Court in 2015.

5             THE COURT: What kind of ruling was made in  
6     Magistrate's Court?

7             MR. NEAL TRUSLOW: Judge, it was essentially a due  
8     process double jeopardy ruling. That was our -- our  
9     argument was that double jeopardy -- excuse me, jeopardy  
10    had attached at the first proceeding, and the magistrate  
11    judge ruled not in our favor.

12            THE COURT: Okay.

13            MR. NEAL TRUSLOW: The matter then went to Judge  
14    Kinard in his appellate capacity here in the Circuit  
15    Court. Judge Kinard ruled, essentially, for the defense  
16    that the matter should be sent back to the Magistrate's  
17    Court for the recreation of a record.

18            Before Judge Kinard's written order came down, the  
19    State in May of 2015 had Mr. Talkington indicted for the  
20    instant offense which is a CDV high and aggravated nature.

21            The defense has filed a motion to quash, dismiss.  
22    That was heard by Judge Gee. Judge Gee issued an opinion  
23    adverse to the defense at that point. We asked Judge Gee  
24    to reconsider. She, not surprisingly, went with her  
25    original order against the defense.

1           That motion -- excuse me, that ruling of Judge Gee  
2       has been appealed. The appellate court has had it since  
3       November or December. I believe it was November of 2015,  
4       and they issued an order on January 29th, I believe,  
5       indicating that they were going to dismiss the appeal.

6           However, importantly, Judge, they also indicated that  
7       they would send a remittitur as permitted by the Appellate  
8       Court Rules which as I believe Your Honor is aware, they  
9       don't send a remittitur back for 15 days from the date of  
10      the ruling.

11          Fifteen days would be at its earliest tomorrow, I  
12      believe, Judge, and as of today, we have actually filed a  
13      petition for rehearing because we respectfully suggest  
14      that the Court of Appeals in its dismissal of the appeal  
15      made a -- had a misapprehension and a misunderstanding of  
16      what the issues were.

17          So that has been filed with the Court of Appeals and  
18      delivered to the Solicitor's Office prior to this hearing.  
19      Judge, again, I think if I could go back to my original  
20      short synopsis, there is a right way to do things, a wrong  
21      way to do things.

22          There's jurisdiction when there is jurisdiction and  
23      there's not when there is not, and the Solicitor's Office  
24      is in charge of scheduling the cases. We all have the  
25      same set of rules to work out of. We're all fed out the

1 same spoon, so to speak, and I don't know how we could  
2 have made it any clearer to them that jurisdictionally  
3 speaking, there is no way to proceed.

4 I'll be happy to answer any further questions you  
5 might have.

6 THE COURT: What's the Charleston case on remittitur?

7 MR. NEAL TRUSLOW: I beg your pardon?

8 THE COURT: What's the Charleston case on the  
9 remittitur, the attorney malpractice case that -- the  
10 lawyer from Motley Rice firm? He was sued. Default  
11 judgment, millions. Limestone sued him, so it's Limestone  
12 v. -- Limestone v. Early or something like that. Are you  
13 familiar with it?

14 MR. NEAL TRUSLOW: I am not, Judge.

15 THE COURT: All right. Well, I'll come back to you.  
16 I'll tell you about it in a moment.

17 MR. NEAL TRUSLOW: Thank you, Judge.

18 THE COURT: All right.

19 Yes, sir.

20 MR. PAULING: Thank you very much, Your Honor. As  
21 far as the procedural history of the case, when Judge Gee  
22 denied motions for the defense, they filed their appeal.

23 You know, we did receive an order on or about  
24 January 29th that after careful consideration, the appeal  
25 is dismissed because the underlying order was not

1 immediately appealable.

2 We would argue, obviously, that double jeopardy never  
3 attached at the Magistrate level. Since everyone seems to  
4 agree, the Magistrate said he had no subject matter  
5 jurisdiction over the case.

6 Under State v. Whetstone, you can't have a double  
7 jeopardy issue in a case that does not have subject matter  
8 jurisdiction. We did --

9 THE COURT: Say that -- you can't have what now?

10 MR. PAULING: You can't have double jeopardy in a  
11 court that does not have subject matter jurisdiction over  
12 the case.

13 THE COURT: All right.

14 MR. PAULING: And that was the same case law that had  
15 been applied since the defense started this argument  
16 several years ago, Your Honor.

17 Judge Gee also heard this in a hearing back in  
18 September and made a ruling on it. Your Honor, when we  
19 received a copy of the order from the Court of Appeals  
20 that we were able -- that the appeal was being dismissed,  
21 we made sure that we wanted to go ahead and schedule this  
22 trial to be heard.

23 It is several years old, Your Honor, and we have  
24 scheduled the case for trial next week. We arranged  
25 for --

1 THE COURT: Did Judge Gee issue a written order?

2 MR. PAULING: Yes, she did, Your Honor.

3 THE COURT: Do you have any clue as to where it might  
4 be?

5 MR. PAULING: It's in the Clerk of Court, Your Honor.  
6 I mean, I can go get it for you, but that was basis for  
7 their appeal.

8 THE COURT: This is the only court that I know of in  
9 the state that functions without files, copies of  
10 anything, just show up and starting arguing to the judge  
11 without any papers.

12 Go ahead.

13 MR. PAULING: Anyway, Your Honor, as the assigned  
14 prosecutor in the case, I did go ahead and schedule the  
15 case for trial.

16 THE COURT: Okay. What about what Mr. Truslow is  
17 arguing regarding the Court of Appeals and no remittitur  
18 and all of that?

19 MR. PAULING: Well, it's -- he said that the  
20 remittitur will be executed tomorrow. So I still don't --  
21 I didn't receive anything about an appeal or  
22 reconsideration.

23 They might have filed that like five minutes ago. I  
24 mean, we haven't received anything prior to this  
25 afternoon, Your Honor.

1 THE COURT: Well, his argument is that this court has  
2 no jurisdiction because Judge Gee's order was appealed,  
3 and the appeal is still pending in the Court of Appeals  
4 because it has not officially been remanded because  
5 remittitur takes 15 days, and after it's remanded, then  
6 they intend to ask for a reconsideration that will tie it  
7 up some more time.

8 MR. PAULING: Well, Your Honor, yes. I understand  
9 but if the remittitur were to be received before the trial  
10 date, I still don't understand once that jurisdiction  
11 transferred why we can't go forward.

12 THE COURT: How does that relate to having a trial on  
13 Monday?

14 MR. PAULING: On Tuesday, Your Honor?

15 THE COURT: Or Tuesday. Monday is a holiday, right?

16 MR. PAULING: Yes, sir.

17 THE COURT: All right.

18 MR. PAULING: I scheduled it for that day because it  
19 seemed reasonable on the calendar, Your Honor.

20 THE COURT: I mean, you're saying that a remittitur  
21 is not needed or...

22 MR. PAULING: No. I'm saying if we are to receive  
23 the remittitur prior to the trial date, then jurisdiction  
24 would be transferred at that time.

25 THE COURT: So this is a scheduling contingent upon

1 receiving the remittitur prior to the trial?

2 MR. PAULING: No. I wasn't -- Your Honor, I  
3 scheduled a trial based on the order and giving the Court  
4 and giving ourselves 14 or 15 days from the date we  
5 received the order which was sometime around February 1st  
6 or February 2nd.

7 THE COURT: All right. What else do I need to know  
8 from the State?

9 MR. PAULING: That's it, Your Honor.

10 THE COURT: All right. How about that, Mr. Truslow?  
11 Do you follow that argument?

12 MR. NEAL TRUSLOW: I do, Judge. I think you actually  
13 worded it pretty clearly, a contingent scheduling.

14 Judge, just one point of clarification. The defense  
15 has already submitted a petition for rehearing to the  
16 Court of Appeals that has been delivered to the  
17 Solicitor's Office as of this morning. So even with 15  
18 days.

19 THE COURT: Prior to the remittitur being received?

20 MR. NEAL TRUSLOW: Yes, Judge. As I read the  
21 Appellate Court Rules --

22 THE COURT: All right. I haven't read it, so what  
23 does it say?

24 MR. NEAL TRUSLOW: I believe I'm looking at Rule 221  
25 of the Appellate Court Rules regarding remittiturs and

1 rehearings.

2 THE COURT: All right. What does it say?

3 MR. NEAL TRUSLOW: Rule 221(A) regarding rehearings  
4 says, "Petitions for rehearing must be actually received  
5 by the Appellate Court no later than 15 days after the  
6 filing of the opinion, order, judgment, or decree of the  
7 court. A petition for rehearing shall be in accordance  
8 with Rule 240 and shall state with particularity, a point  
9 supposed to have been overlooked, misapprehended by" --  
10 excuse me, "or misapprehended by. No petition for  
11 rehearing shall be allowed from an order denying a  
12 petition for a writ of certiorari under Rule 242."

13 THE COURT: Well, what's the effect of filing for a  
14 rehearing? What -- how does that impact on jurisdiction?

15 MR. NEAL TRUSLOW: Judge, again -- until -- until the  
16 Court of Appeals issues a final decision, I look at -- if  
17 you can allow me to analogize this, I look at it like  
18 we've got a strike against us, and we're still in batter's  
19 box.

20 The case is still before the Court of Appeals simply  
21 put, Judge, until it's not, and this petition for  
22 rehearing was filed at least in part because the State  
23 has -- during the pendency of the appeal in this case, the  
24 State had called for trial a CDV first also against  
25 Mr. Talkington in Magistrate's Court and then on two day's

1 notice told us that they were going to dismiss it.

2 It's -- frankly, Judge, it's the exact same common  
3 nucleus of operative facts as this case. So we were -- we  
4 were subject to being called for trial in parallel courts  
5 of varying jurisdictions and -- the entire time the appeal  
6 was going on.

7 THE COURT: So maybe they were -- concluded that you  
8 all were being difficult, so they upped the ante by  
9 indicting him for a more serious offense rather than  
10 Magistrate's Court.

11 MR. NEAL TRUSLOW: Which --

12 THE COURT: Maybe. I have no clue.

13 MR. NEAL TRUSLOW: Judge, I'll -- I'll leave that  
14 where it is.

15 MR. PAULING: Your Honor --

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

18 THE COURT: But that's --

19 MR. NEAL TRUSLOW: -- petition for rehearing.

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

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

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

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

3 THE COURT: Blackledge. What does that say?

4 MR. NEAL TRUSLOW: Judge, I've got a copy of the case  
5 if you'd like one.

6 THE COURT: Sure.

7 (Pause).

8 Imposition of a penalty upon a defendant for having  
9 successfully pursued the statutory right of appeal or a  
10 collateral remedy is a violation of due process of the  
11 law.

12 All right.. That's what you highlighted for me in  
13 the case. I don't know what the case is.

14 MR. NEAL TRUSLOW: I think there's some additional in  
15 there, Judge.

16 THE COURT: What happened in this case, Blackledge?

17 MR. NEAL TRUSLOW: Judge, in fact, there was -- this  
18 case involved a gentleman who was already incarcerated who  
19 was charged with a crime.

20 He decided to exercise his appeal rights, and the  
21 prosecuting authority in that case did very similar to  
22 what you just said. They decided to up the ante to make  
23 his -- the new charge far more punitive in nature  
24 against -- essentially, Judge, it was retaliatory for --  
25 for exercising a constitutionally afforded right.

1           Like here, Mr. Talkington has done what the rules  
2           have allowed him to do. It's in good faith. Judge,  
3           had -- had this been handled right in 2011, we might not  
4           be here today.

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

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

12          THE COURT: New charges charging the same thing?

13          MR. NEAL TRUSLOW: Yes, Judge, in Magistrate's Court,  
14          not CDV/HAN which is most noteworthy. Judge, again Judge  
15          Kinard in the Circuit Court in his appellate capacity  
16          ruled in our favor and asked that the matter be sent back  
17          to Magistrate's Court for the recreation of record.

18          Only at that time, only after that ruling in favor of  
19          the defense was this new upgraded charge brought.

20          THE COURT: All right.

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

1 after Judge Kinard's ruling in --

2 THE COURT: What is he accused of doing?

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

6 THE COURT: Serious injury or threatening or shooting  
7 or --

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

11 THE COURT: You said it's not a --

12 MR. NEAL TRUSLOW: Judge, the -- I believe that the  
13 injuries would show if they're to the extent that what we  
14 have known about any injuries, they are not serious enough  
15 to warrant CDV/HAN.

16 In fact, we would contend that this is a completely  
17 inappropriate place for this -- for this trial to be held.  
18 It should have been as they have represented to us and all  
19 of these judges along the way over the last  
20 four-and-a-half plus years that it's a charge -- the  
21 appropriate charge should be CDV.

22 Whoever the trial judge is I hope has the exact same  
23 question that you just had, Judge.

24 THE COURT: All right. Are you all a father/son  
25 team?

1           MR. NEAL TRUSLOW: We are, Judge. I'm the son in  
2 case you couldn't tell.

3           THE COURT: Very good.

4           MR. NEAL TRUSLOW: Thank you, Judge.

5           THE COURT: All right. Back to the State.

6 Mr. Pauling?

7           MR. PAULING: Thank you, Your Honor.

8           Your Honor, I do have a copy of Judge Gee's order for  
9 you.

10          THE COURT: All right.

11          MR. PAULING: If you need it.

12          THE COURT: Yes, sir.

13          MR. PAULING: I'd to like approach if you...

14          THE COURT: As I said, I know nothing about anything.  
15 I'm just here to figure it out if I can.

16          MR. PAULING: Thank you, sir.

17          And, Your Honor, I'd like to be clear that the  
18 initial trial on the case in Magistrate's Court, that  
19 charge was dismissed for a lack of subject matter  
20 jurisdiction because the defense argued that it was  
21 improperly remanded from the General Sessions court.

22          It was not dismissed for a lack of evidence. A jury  
23 was not sworn in that case, and that's why double jeopardy  
24 never attached. You had subject matter jurisdiction. In  
25 the end, Your Honor, they have been making this argument.

1           THE COURT: Are you saying the magistrate agreed that  
2 the judge from Circuit Court improperly remanded it to  
3 Magistrate's Court?

4           MR. PAULING: He agreed with the defense's argument  
5 that he did not have subject matter jurisdiction over a  
6 CDV second warrant that was remanded as a CDV first.  
7 That's why he said he didn't want to hear the case.

8           THE COURT: Because the magistrate cannot hear a CDV  
9 second?

10          MR. PAULING: Yes, sir. At the time, yes, sir.

11          THE COURT: All right. So Judge Gee says you all  
12 charged him with a CDV second, but he never had a CDV  
13 first.

14          MR. PAULING: Yeah. His -- his predicate offense,  
15 Your Honor, was a criminal domestic violence case, but in  
16 Colorado, he ended up pleading to a criminal trespass and  
17 I think a harassment. He was placed on a deferred  
18 sentence with probation.

19          THE COURT: The State realizes their mistake. Then  
20 you all remanded it to Magistrate's Court without  
21 petitioning the Circuit Court to remand it according to  
22 Talkington. He repeatedly brought this error to the  
23 State's attention, but the State forged ahead.

24          Jury trial said Magistrate's Court -- on the day of  
25 the trial, the panel was qualified, the jury selected.

1 Talkington moved to dismiss based on the magistrate's lack  
2 of jurisdiction over CDV second, had it not been properly  
3 remanded.

4 After the State -- after the Magistrate dismissed the  
5 case, agreed and dismissed the case, then the Solicitor  
6 indicated they wanted to appeal the Magistrate's  
7 dismissal, but the State didn't appeal. Instead, nine  
8 months after the dismissal, the State nolle prossed the  
9 CDV second and charged CD first again.

10 A different magistrate heard the CDV first, and  
11 Talkington argued the new indictment should be dismissed  
12 on double jeopardy, et cetera, and that the judge who  
13 heard it before should hear the same thing and have it  
14 sent back to that judge.

15 It then went to Judge Shealey and stood that judge  
16 who denied that motion to dismiss. Judge Shealey found  
17 that because the Magistrate did not have jurisdiction over  
18 the initial charge for CDV second, jeopardy did not  
19 attach.

20 That was appealed by Talkington, and then Judge  
21 Kinard heard that and announced that it would be remanded  
22 to the Magistrate Court so that Judge Edmonds could  
23 reconstruct the record.

24 Before Judge Kinard's order was reduced to writing,  
25 Solicitor Hans Pauling indicated -- indictment of --

1 Hans -- Hans Pauling indicted Talkington on the charge of  
2 CDV HAN based on the same underlying facts.

3 The next month, Judge Edmonds issued an order  
4 attempting to reconstruct the record with Judge Kinard.  
5 In the order, Judge Edmonds stated among other things that  
6 the CDV second case had not -- was not properly remanded  
7 to the Magistrate's Court because it lacked the signature  
8 from a Circuit Court Judge.

9 As a result, the case would remain one for CDV second  
10 upon which the Magistrate did not have jurisdiction.  
11 Talkington filed this motion to dismiss, to quash, for  
12 injunction, writ of prohibition, writ of mandamus,  
13 everything.

14 Then, Judge Gee goes into this analysis of collateral  
15 estoppel, and double jeopardy -- double jeopardy did not  
16 attach because the ultimate issue was never litigated.  
17 Then Talkington states case should be dismissed because  
18 the State has caused the destruction of the transcript  
19 from his motion to dismiss.

20 Judge Gee says the party -- lack of the transcript  
21 does not make a difference to the argument citing Alex  
22 Sanders. Whatever, doesn't make any difference, doesn't  
23 matter.

24 Regarding a CDV HAN, Talkington asked for the State  
25 being enjoined because State was using it as a vehicle to

1 circumvent the order of Judge Kinard. Judge Gee said it  
2 didn't circumvent it.

3 The Circuit Court was without jurisdiction to hear  
4 the appeal in Judge Gee's order because such an order is  
5 not subject to immediate appeal. Based on the foregoing,  
6 Talkington denied case number -- the appeal from Judge  
7 Shealey's order. Case number 2014-CP-40-7362 has ended.

8 All right. What does that tell me?

9 MR. PAULING: I think we can go forward, and I think  
10 we need to go forward.

11 Your Honor, we did receive a copy of --

12 THE COURT: Go forward with what?

13 MR. PAULING: -- with the trial on criminal domestic  
14 violence high and aggravated nature.

15 THE COURT: And ignore the appellate court, ignore  
16 the contention that is -- the case is on appeal --

17 MR. PAULING: The --

18 THE COURT: -- from Judge Lee's various order --  
19 well, Judge Gee's order.

20 MR. PAULING: Well, Your Honor, the -- yeah, we had  
21 no knowledge of -- that the case was actually being asked  
22 for a rehearing. I mean, they just told you that today.  
23 We didn't even -- weren't even aware of that.

24 THE COURT: He said he gave you a copy of the  
25 petition this morning for a rehearing.

1           Isn't that what you said?

2           MR. NEAL TRUSLOW: Yes, Your Honor. We had a copy  
3 dropped off at the Solicitor's Office right upstairs.

4           THE COURT: Attention to Mr. Pauling or to the  
5 Solicitor, Dan Johnson?

6           MR. NEAL TRUSLOW: To the attention of Mr. Pauling  
7 and Mr. Joe Shenkar who was previously on the case, so two  
8 copies were dropped off.

9           MR. PAULING: That's an oversight on my part, Your  
10 Honor. I didn't receive it yet.

11          THE COURT: Okay. Well, assuming that you now know  
12 they have asked for a rehearing, do you still believe you  
13 can proceed with a General Sessions trial where first,  
14 number one, he says he hasn't received the remittitur yet,  
15 but he has nevertheless filed for a rehearing; is that  
16 right?

17          MR. NEAL TRUSLOW: That's correct, Judge.

18          THE COURT: So first -- you first have to get a  
19 remittitur from the Court of Appeals because they sent you  
20 a what?

21          MR. NEAL TRUSLOW: They sent us an order of  
22 dismissal.

23          THE COURT: By email or by what, by letter?

24          MR. NEAL TRUSLOW: Judge, I got it by letter.

25          THE COURT: All right. And that says what about a

1 remittitur?

2 MR. NEAL TRUSLOW: Judge, the pertinent line is the  
3 last line. The remittitur will be sent as required by  
4 Rule 2.1 South Carolina Appellate Court Rules.

5 THE COURT: Okay. So do you have to get a remittitur  
6 before the order of the Court of Appeals is official?

7 MR. NEAL TRUSLOW: That's exactly what our contention  
8 is, Judge.

9 THE COURT: All right.

10 MS. BALES: Your Honor, if I may?

11 THE COURT: Yes. Well, you may in a moment.

12 MS. BALES: Certainly.

13 THE COURT: And even if the -- in addition to  
14 receiving the remittitur, you're saying that the -- a  
15 petition for a rehearing stays having a General Sessions  
16 Court?

17 MR. NEAL TRUSLOW: Judge, what I'm saying is --

18 THE COURT: Or interlocutory or not appealable or  
19 some other -- some other similar language as the judge  
20 would order? Denying double jeopardy claims not  
21 immediately -- immediately appealable or on the issue of  
22 stay? If you filed for a rehearing as a continuance of --  
23 deprive this court of jurisdiction until they rule on the  
24 petition for rehearing?

25 MR. NEAL TRUSLOW: I think what I'm saying, Judge, is

1     that no remittitur will be sent until there is a ruling on  
2     the petition for rehearing.

3           THE COURT:   So it's still with the Court of Appeals?

4           MR. NEAL TRUSLOW:   Absolutely, Judge.

5           THE COURT:   All right.   Yes, ma'am.   I'm ready for  
6     you, madam.

7           MS. BALES:   Your Honor, just in reference to  
8     remittitur, in looking at the actual rule cited, in  
9     essence, Your Honor, the remittitur is merely the more  
10    formal version, if you will, of the final order.

11           There is nothing in the Rule that states that after  
12    having received the actual order stating that the case is  
13    dismissed, that we wouldn't be able to schedule it for  
14    trial and go forward.

15           So in that aspect, the State is fully within its  
16    rights to go ahead schedule it because as far as we knew  
17    at the time for sure, we were --

18           THE COURT:   All right.

19           MS. BALES:   We would be able to go forward since we  
20    have received the final ruling.

21           THE COURT:   Well, we're getting into the State  
22    scheduling it.   As Mr. Pauling says, it was scheduled in  
23    anticipation of something being received prior to actually  
24    having the trial.   So are you agreeing with him or  
25    disagreeing with him when you say it's okay to schedule

1 it, or is it okay to have the trial, or what's okay?

2 MS. BALES: It's okay to move forward with the trial,  
3 Your Honor.

4 THE COURT: Without receiving the remittitur or a  
5 ruling on their petition for a rehearing?

6 MS. BALES: Well, for certain, I would say because  
7 the rule does not, in the remittitur rule, specifically  
8 require that it be received before a judgment is deemed  
9 completely at its end that having received the actual  
10 order, it states that the proceeding is at its end; that  
11 we would be able -- that we would be within our right to  
12 go forward with the CDV HAN charge at that time.

13 THE COURT: So the petition for rehearing is  
14 meaningless. What if it's granted, or am I to assume that  
15 they have no chance of winning it? If they grant a  
16 petition for rehearing, then what happens if we had a  
17 trial in the mean -- in the interim?

18 MR. PAULING: Your Honor --

19 MS. BALES: Your Honor, I do have another thing, if I  
20 may. Regarding 221, the rehearing of motions, the  
21 Appellate Court will not entertain petitions for rehearing  
22 on a motion or petition unless the action of the court on  
23 the motion or petition has the effect of dismissing or  
24 finally deciding the party's appeal.

25 This -- we already have the order. We already have

1     that that is a conclusion of the appellate appeal process,  
2     so it's the State's position that given the fact that we  
3     have already received this rule, the remittitur rule does  
4     not require that they be in receipt of the actual  
5     remittitur in order for us to be able to go forward with  
6     the trial.

7           THE COURT: I think the order should -- I think the  
8     Rule says the -- just the opposite of what you just said,  
9     what you just argued.

10           It says the Appellate Court will not entertain  
11     petitions for rehearing on a motion unless the action of  
12     the Court on the motion or petition has the effect of  
13     dismissing or finally deciding the party's appeal.  
14     Wouldn't it have that effect in this case; is that right?

15           MR. NEAL TRUSLOW: Certainly it's our contention,  
16     Judge.

17           THE COURT: I mean I...

18           MS. BALES: But, Your Honor, because of the type of  
19     the basis which is the double jeopardy argument, the  
20     State's -- the State's position is that the petition is  
21     still being based on no law that double jeopardy is not  
22     applicable. So --

23           THE COURT: But don't you all have better things to  
24     do than attempting to try cases that are pending in the  
25     Court of Appeals?

1 MR. PAULING: Your Honor, the appeal is based on  
2 double jeopardy. It's never attached. It's been going on  
3 for four years. I'll give him a trial. If he's  
4 convicted, it will attach then. He can make the argument.

5 The bottom line is what are they going to rehear?  
6 That double jeopardy has never attached.

7 THE COURT: I don't know. It's a pretty convoluted  
8 set of facts, and the question is who has caused the  
9 confusion with these convoluted set of facts. I don't  
10 know.

11 Let me just say this.

12 MR. PAULING: Yes, sir.

13 THE COURT: And there is a case in Charleston, and I  
14 asked Mr. Truslow whether he -- what was the Charleston  
15 case. It's Limestone v. Hulsey -- Limehouse. I keep  
16 saying Limestone, and that's a legal malpractice case in  
17 which the case was removed to Federal Court and remanded  
18 back to State Court, and the lawyers had it remanded to  
19 Federal Court maybe about 15 days or so after it was  
20 served on them.

21 Of course, in civil court, you have got 30 days to  
22 file an answer. So when it was remanded, the lawyers  
23 assumed that they got a new 30 days.

24 My facts may be skewed some, but I think they're the  
25 facts. But the -- the -- after the other 15 days, the

1 plaintiff filed to hold them in default saying that they  
2 miscalculated the time; that they didn't have a new 30  
3 days. They only had a remaining 15 days.

4 The judge agreed with the plaintiff and held Hulsey  
5 in default and got two default judgments against Mr.  
6 Hulsey, Attorney Hulsey, record numbers. One was for  
7 5 million; 2.3 million in actual, 5 million in punitive on  
8 one case, tried to get rehearing and denied all of that.

9 So this case went all the way up to the Supreme  
10 Court, switched lawyers a few times, and Justice Beatty  
11 issued an opinion in this case based -- because Hulsey  
12 ended up with the Hood Law Firm in Charleston, and looking  
13 through the papers, Mr. Hood -- not one of the Hood sons  
14 but Hood daddy, Mr. Hood, he found on the paper that the  
15 seal from the Federal Court was not on the order remanding  
16 the case back to State Court, and because it did not  
17 contain the Federal seal, the case was not officially  
18 remanded until they got a sealed copy in State Court.

19 They vacated all of the default judgments against Mr.  
20 Hulsey based on that remand not officially or correctly  
21 being done meaning that they didn't get the official seal.

22 So I'm in Charleston for court last year when the  
23 retrial of the case came up. We retried the case for the  
24 entire week, and guess what the verdict -- who the verdict  
25 was for? The verdict was for the defense.

1           So the lawyer went from owing \$9 million in damages  
2 to winning the case based on an issue very similar to this  
3 question here today, and that is the case had not  
4 officially been remanded.

5           So in this case, we're arguing back and forth what is  
6 required for the case to officially be decided by the  
7 Court of Appeals and when it's officially remanded and all  
8 of that.

9           I mean, the Court has sort of answered the question  
10 in that narrow sense in vacating that \$9 million verdict  
11 plus, you know, Mr. Hulsey had made a lot of money off the  
12 tobacco case.

13           After the plaintiff won that case, they even sought  
14 to attach the -- all of his future earnings from the --  
15 from Motley Rice, the tobacco money he was getting.

16           In the end, he has won his case. So we don't want  
17 Mr. Talkington to be in that situation of us going through  
18 this case, and it's getting litigated up and down.

19           Number one, Mr. Truslow says well, we never really  
20 got the remittitur because it's the -- the order we had  
21 said it would be sent in 15 days; number two, we filed a  
22 petition for a rehearing in the Court of Appeals, and  
23 while our petition is pending, Mr. Pauling brought this  
24 case to trial.

25           So, Judge, all of this is a nullity. You all wasted

1 your time. Didn't they have something better to do than  
2 to try a case that was pending on appeal? That's probably  
3 what we hear. So we don't want to go through all of that.  
4 We want to make sure that we're clear on everything before  
5 we proceed, and there has to be some clarity now.

6 They -- if the Court of Appeals are tired of Mr.  
7 Talkington and through with him, you know, a petition can  
8 be made for an expedited ruling or whatever on the  
9 rehearing because sometimes it just stays up there.

10 A rehearing -- and we look through the advance sheets  
11 online and petition for a rehearing pending, pending,  
12 pending. You need to get a ruling on it. It needs to be  
13 definitive so that when and if the case proceeds, and you  
14 know, I agree with the defense in the case of with the  
15 history of this, him winning his CDV. And then the State  
16 is upping the ante and indicting him for CDV HAN while the  
17 CDV is pending, and all of these -- Judge Kinard siding  
18 with the defense, and you know, it's just so much  
19 confusion there. I mean, I don't know who is right and  
20 who is wrong, but let's get some clarity before we  
21 proceed.

22 MR. PAULING: Yes, sir, thank you.

23 THE COURT: All right.

24 MR. PAULING: Your Honor, would it be all right if we  
25 reschedule for a status conference with you whenever we

1 get a definitive --

2 THE COURT: Oh absolutely. I'll be ready to try it  
3 or have one else try it.

4 MR. NEAL TRUSLOW: Thank you, Judge.

5 THE COURT: All right.

6 (Whereupon, the proceedings were concluded.)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA           )  
                                                  )  
COUNTY OF RICHLAND                )

I, Karen Ambroziak, Official Court Reporter for the  
5th Judicial Circuit of the State of South Carolina, do  
hereby certify that the foregoing is a true, accurate and  
complete Transcript of Record of the proceedings had and  
evidence introduced in the trial of the captioned case,  
relative to appeal, in the Court of General Sessions for  
Richland County, South Carolina, on the 11th day of  
February, 2016.

April 11, 2016

*Karen Ambroziak*

Karen Ambroziak, RPR  
Circuit Court Reporter