THE STATE OF SOUTH CAROLINA

In the Supreme Court



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ON PETITION FOR WRIT OF CERTIORARI

From Richland County Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

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Appellate Case No: 16-000975

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**The State**

Respondent,

v.

**Brian Talkington**

Petitioner.

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# RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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III. Petitioner's other issues raised on appeal have no merit.

## STATEMENT OF THE CASE

Petitioner has been charged, but not yet tried, for one count of Criminal Domestic Violence, 2nd Offense (CDV 2nd) from an incident that took place on July 4, 2011. On January 27, 2012, the Richland County Solicitor's Office moved to remand the case from General Sessions' Court to Magistrate's Court as a Criminal Domestic Violence, 1st Offense (CDV 1st) after reconciling an error on Petitioner's rap sheet. On April, 2012, Petitioner requested a jury trial. Both the first trial date, June 7, 2012, and the second trial date, October 17, 2012, were continued by Petitioner. Eventually, on February 26, 2013, the case proceeded to trial in Magistrate's Court in front of The Honorable Tomothy C. Edmond, Magistrate Court Judge. After the jury was picked, **but *before* it was sworn**, Petitioner made a motion to dismiss, arguing that the CDV 2nd charge was improperly remanded to the lower court. Judge Edmond agreed with Petitioner and concluded that the court had no jurisdiction to preside over the case.

On November 21, 2013, the State dismissed the CDV 2nd charge, and a new warrant was issued for CDV 1st and served on Petitioner. Following a notice for trial, on October 14, 2014, The Honorable Kirby Shealy, Magistrate Court Judge, entertained pre-trial motions from Petitioner to dismiss the case based on double jeopardy grounds. On October 16, 2014, Judge Shealy issued an order denying Petitioner's claim, finding that "jeopardy does not attach in a proceeding where the court lacks jurisdiction." (see attached Order dated October 16, 2014). Following this denial, Petitioner filed a Motion for Reconsideration on October 23, 2014, and Judge Shealy heard the motion on November 14, 2014. Three days later, on November 17, 2014, Judge Shealy issued a second order, consistent with his October 16th's order, denying Petition-

er's request for dismissal. The order specifically stated, "Even if it was undisputed that the jury had been sworn, *State v. Whetstone* makes it clear that Defendant's double jeopardy argument is without merit, as jeopardy does not attach in a proceeding where the court lacks jurisdiction. Therefore, I find no prejudice to the Defendant from the loss of the tape." (see attached Order dated November 17, 2014). Pursuant to this denial, Petitioner filed an appeal with the Circuit Court.

On March 6, 2015, the Honorable J. Ernest Kinard, Jr., Circuit Court Judge, heard the appeal. Petitioner motioned the Court for a remand to reconstruct the record from the February 26, 2013 proceedings. The State objected, stating that the remedy was improper. Nevertheless, Judge Kinard ordered the case to be remanded for the narrow purpose of reconstructing the record.

On March 2015, the Assistant Solicitor originally assigned the case resigned, and the case was re-assigned to another Assistant Solicitor, who conducted an independent review of the evidence. On April 8, 2015, Petitioner was indicted for Criminal Domestic Violence of A High and Aggravated Nature (CDVHAN). On May 12, 2015, Petitioner filed a motion with the Circuit Court, separate and apart from Petitioner's appeal, to Dismiss, to Quash, for Injunctive Relief, for a Writ of Prohibition, or for a Writ of Mandamus.

On September 9, 2015, the Honorable Tanya A. Gee, Circuit Court Judge, agreed to consolidate Petitioner's appeal and motion and heard oral arguments from the parties on both matters. On October 12, 2015, Judge Gee issued an order denying all of Petitioner's claims and affirmed Judge Shealy's orders from October 16 and November 17, 2014. Specifically, Judge Gee ruled that double jeopardy did not attach; that Petitioner's claim regarding the lack of a transcript

from Judge Edmond's proceeding was immaterial to the case; and that the State was not estopped from prosecuting Petitioner for CDVHAN. On October 12, 2015, Petitioner filed a Motion for Reconsideration with the Circuit Court, which was denied on October 26, 2016. An appeal to the South Carolina Court of Appeals followed.

On November 24, 2015, the Court of Appeals issued a letter requesting the parties to submit memoranda addressing the issue of appealability. The Court indicated that "[a] preliminary review of the order(s) challenged on appeal indicates it might not be appealable." (see COA Letter, Resp. Appendix, p.15). On January 29, 2016, after reviewing both parties' memoranda, the Court issued an Order dismissing Petitioner's appeal. Specifically, the Court ruled that "this appeal is dismissed because the underlying order is not immediately appealable." (see COA Order, Resp. Appendix, p.21). On February 11, 2016, Petitioner filed a Petition for Rehearing, which the Court denied on April 13, 2016. Petitioner's Petition for Writ of Certiorari followed.

## ARGUMENT

### I. This Court should not grant the Petition for Writ of Certiorari because no special or important reason exists to merit such extraordinary relief

This Court has held that it will grant certiorari to the Court of Appeals "only where special reasons justify the exercise of that power." *State v. Lyles*, 381 S.C. 442, 443, 673 S.E.2d 811, 812 (2009) (quoting *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (1990)). Furthermore, the South Carolina Appellate Court

Rules provide that a "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Typically, the grant of certiorari is limited to cases wherein: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision by the Court of Appeals is in conflict with a prior decision of this Court; (4) substantial constitutional issues are directly involved; or (5) a federal question is included, and the decision by the Court of Appeals conflicts with a decision of the Supreme Court of the United States. *Id.* As discussed below, the present case does not fit within any of these categories, and no "special and important" reason exists to merit further review.

## II. The Court of Appeals correctly dismissed Petitioner's Appeal for lack of appealable issues

As a basis for denying Petitioner's appeal, the Circuit Court found it "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." *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."). Subsequently, the Court of Appeals dismissed Petitioner's appeal and denied the motion for rehearing based on the same grounds. Specifically, the Court declined to address the merits of the issues and dismissed the appeal based on finding the underlying order was not immediately appealable.

"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." *Miller*, 289 S.C. at 426-27, 346 S.E.2d at 705-06. No sentence has been imposed, nor a trial held, in this case. Petitioner's claim that the Magistrate Court erred in denying his motion to dismiss on double jeopardy grounds is not immediately appealable. Thus, this Court should dismiss Petitioner's appeal.

## III. Petitioner's other issues raised on appeal have no merit

The Magistrate Court and Circuit Court correctly concluded that none of the other issues raised by Petitioner have merit. In his consolidated appeal before the Circuit Court, Petitioner asserted three arguments: (1) the case should be dismissed because double jeopardy attached following Judge Edmond's ruling , (2) dismissal was appropriate because the State's actions caused destruction of the transcript from the motion hearing before Judge Edmond, and (3) the State should be enjoined from, or the court should issue a Writ of Prohibition or Writ of Mandamus preventing the State from, proceeding on the CDVHAN indictment because "the State was using it as a vehicle to circumvent the order of remand issued by Judge Kinard." (see Resp. Appendix, p.12.).

### A. Double Jeopardy

Double jeopardy did not attach at that February 26, 2013 hearing because the Magistrate Court lacked jurisdiction to hear the case. *See State v. Whetstone*, 333 S.C. 376, 377, 510 S.E.2d 225, 226 (Ct. App 1998) (holding magistrate court lacked jurisdiction to dispose of charges against defendant and State was not barred from continued prosecution of those charges in a court of competent jurisdiction). "[O]ne is in jeopardy when a legal jury is shown and impaneled to try the defendant upon a valid indictment in a *competent court*." *State v. Stephenson*, 54 S.C. 234, 32 S.E. 305, 306 (1899) (emphasis added). No one is disputing the case in question was dismissed for lack of subject matter jurisdiction on February 26, 2013.

In considering Petitioner's claim of double jeopardy, the Circuit Court found that

> [E]ven 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.

(see Resp. Appendix, p.11). In deciding so, the Circuit Court reaffirmed the Magistrate Court's findings from October 16 and November 17, 2014 that double jeopardy did not attach.

### B. Loss of Magistrate Court Transcript

Petitioner argues his case should be dismissed due to the loss of the transcript from the February 26, 2013 pre-trial hearing before Judge Edmond. Following Judge Kinard's ruling, Judge Edmond attempted to reconstruct the transcript and issued an order finding that ***prior to***

***the jurors being sworn*** (emphasis added), the Petitioner made a motion to ***dismiss*** his case due to the improper remand of his charge from the General Sessions Court. (see Resp. Appendix, p.1-2). Moreover, although the Court accepted Petitioner's argument for lack of jurisdiction, the court ***bound over*** (emphasis added) the CDV 2nd back to the General Sessions Court. *Id.* Although Petitioner now argues Judge Edmond's order was insufficient and a new hearing should have been held to reconstruct the transcript, such an argument was never raised to the Magistrate Court—the only court that could have remedied Petitioner's complaint. Because the manner of reconstruction of the record is within the trial court's discretion, *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 658, 726 S.E.2d 9, 13, (Ct. App. 2012) (stating "the trial court has discretion in determining how to reconstruct missing portions of a transcript") and Petitioner's objection was not raised to the Magistrate Court, the argument is not preserved for appellate review. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Regardless, the Circuit Court found that "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." (see Resp. Appendix, p.12). The Circuit Court went on to state, "the lack of a transcript [did] not make a difference to Talkington's double jeopardy argument, and in the words of Chief Justice Alex Sanders, 'whatever doesn't make any difference, doesn't matter.'" (citing *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)). Respondent agrees with the analysis.

### C. Indictment for CDVHAN

The Circuit Court addressed Petitioner's motion to prohibit the State from prosecuting him for CDVHAN. The Circuit Court found no merit in such a claim, and denied all of Petitioner's motions, including his requests for the court to issue a Writ of Prohibition, or a Writ of Mandamus, and to Quash the Indictment. Particularly, the Circuit Court found that "even though the State's indictment for CDVHAN *might* have circumvented the remand, in reality it did not since the Magistrate Judge concluded that he did not have jurisdiction to hear the case." (see Resp. Appendix, p.2). Hence, the Circuit Court ruled that an injunction against the Respondent was improper since the remand order was ***never circumvented***. (see Resp. Appendix., p.13). While the Court of Appeals did not address the merits of Petitioner's arguments, it included a footnote in its order stating, "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." (see Resp. Appendix, p.21).

In the petition for certiorari, Petitioner attempts to assert a separate argument that the State's conduct is evidence of vindictive prosecution. (see Petitioner's Petition for Writ of Certiorari, p.7, 8, 9, 13, 15). This argument is a derivative of the assertion to the Circuit Court that the State circumvented the remand order by bringing a charge for CDVHAN, which the Circuit

Court squarely addressed and denied in its order.[1] On the merits, the facts of this case do not support a valid claim for vindictive prosecution.[2]

### D. February 11, 2016 hearing transcript

Finally, Petitioner argues the Court of Appeals erred in dismissing the appeal without first reviewing the February 11, 2016 hearing transcript from the Richland County General Session court. (see Petitioner's Petition for Writ of Certiorari, p.10). Petitioner is referring to a hearing that was held before the Honorable Clifton B. Newman, Chief Administrative Judge for the Fifth Cicruit Court, ***after*** Petitioner filed his appeal with the Court of Appeals. The purpose of the hearing was to determine whether the Respondent was allowed to place the CDVHAN case on the Master Trial Docket. In relying on Judge Gee's Order from October 12, 2015, which effectively ended Petitioner's appeal, the Respondent understood that it was not estopped from trying

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[1] As stated in a footnote in the order, "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."

[2] *State v. Odom*, 412 S.C. 253, 264, 772 S.E.2d 149, 154 (2015) ("[A] defendant asserting prosecutorial misconduct carries a 'heavy burden of proving that the . . . prosecution could not be justified as a proper exercise of prosecutorial discretion." (quoting *United States v. Wilson,* 262 F.3d 305, 316 (4th Cir. 2001) (internal quotation marks and citation omitted))); *see State v. Dawkins*, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989) ("[A]n initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution."); *see also United States v. Goodwin*, 457 U.S. 368, 382, 102 S. Ct. 2485, 2493, 73 L. Ed. 2d 74 (1982) ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution."); *United States v. Esposito*, 968 F.2d 300, 306 (3d Cir.1992) ("We will not apply a presumption of vindictiveness to a subsequent criminal case where the basis for that case is justified by the evidence and does not put the defendant twice in jeopardy. Such a presumption is tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts of the first prosecution. It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an indictment or forever hold their peace . . . . We reject such a proposition for it undermines lawful exercise of discretion as well as plain practicality."); *cf. State v. Langford*, 400 S.C. 421, 435 n. 6, 735 S.E.2d 471, 479 n. 6 (2012) (stating a prosecutor "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.").

the CDVHAN case. Thus, the hearing before Judge Newman should have no bearing on the substance of Petitioner's appeal.

Regardless, the Respondent submits this issue is not properly preserved for appellate review because it was not raised to and ruled upon by the Magistrate or the Circuit Court. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 ("Issues not raised and ruled upon in the trial court will not be considered on appeal."); *Murphy v. Hagan*, 275 S.C. 334, 339, 271 S.E.2d 311, 313 (1980) (stating that issues were either not raised in the lower court and therefore may not be raised on review, or were not properly preserved by timely exception, and therefore may not be heard on appeal). Instead, this issue was raised for the first time in the petition for rehearing filed with the Court of Appeals. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."); *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of South Carolina*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding an issue raised for the first time in a petition for rehearing was not preserved). In fact, it could not have been raised before the petition for rehearing was filed because Petitioner's appeal to the Court of Appeals was filed on November 12, 2015 and the hearing before Judge Newman was held on February 11, 2016, almost three months after the filing of the appeal.

## CONCLUSION

Respectfully, the Court should decline to grant certiorari as the requirements have not been met. Additionally, the correct result has been reached, and the Respondent is entitled to call the CDVHAN case to trial.

Respectfully Submitted,

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## APPEAL FROM RICHLAND COUNTY

Court of Common Pleas



Tanya A. Gee, Circuit Court Judge

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Appellate Case No. 2016-000975

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The State, Respondent,

v.

Brian Talkington, Petitioner.

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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PROOF OF SERVICE

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I certify that I have served the Return to Petition for Writ of Certiorari with attachment on the Petitioner by U.S. mail a copy of it, on June 9, 2016 to the Petitioner's counsel of record, Douglas N. Truslow and Neal D. Truslow of Truslow & Truslow Law Firm located at P.O. Box 1465 Columbia, South Carolina 29202.

A copy was also mailed to South Carolina Attorney General Alan McCory Wilson at 1000 Assembly Street, Columbia, South Carolina 29211.

June 9, 2016.

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