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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

SC Court of Appeals No. 2014-000448

The State, ... Respondent,

vs.

Daniel William Spade ..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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Certificate of Counsel

I hereby certify that a Petition for Rehearing was filed on July 21, 2016. The Petition for Re-hear ing was denied by the South Carolina Court of Appeals on August 18, 2016.

Questions Presented

Question I: Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade was present when the occurrence of panic attacks was used by the State to prove Mr. Spade had abused his daughter?

Question II: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Question III: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

Question IV: Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the State had been ordered to turn over to the Defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the State did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

STATEMENT OF THE CASE

Procedural Facts

Daniel Spade was arrested on May 3 , 2011 and charged with criminal sexual conduct with a minor. The Spartanburg grand jury indicted him on June 17, 2011. An amended indictment was returned on February 21, 2014. He was tried before the Honorable R. Keith Kelley and a jury on February 24-26, 2014. Prior to the start of the trial, Solicitor Barry Barnett presented a letter written by him appointing Mr. Doug Brannon, the attorney who had represented the mother and adoptive father in the second termination of parental rights matter, as a special prosecutor in the trial. The jury convicted Mr. Spade of criminal sexual conduct with a minor. Judge Kelly sentenced him to 35 years in prison. Mr. Spade filed his notice of appeal on March 4, 2014.

Mr. Spade appealed his conviction to the South Carolina Court of Appeals. On July 6, 2016, the Court of Appeals affirmed his conviction in an unpublished opinion. *State v. Spade*, Opinion No. 2016–UP–352 (S.C. Ct. App. July 6, 2016). A petition for rehearing was filed on July 21, 2016. The Petition for Rehearing was denied on August 18, 2016.. On September 22, 2016 this Court granted a 20 day extension to file this Petition for Writ of Certiorari which is now due on October 10, 2016.

Facts of the Case

While Daniel Spade was employed with the same company as Heather Smith, they met and had a brief affair.[1] As a result of this affair, a daughter was born. Mr.

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[1] In December of 2007 Mrs. Smith married David Jolley who later adopted the minor child. App. at 257, ll 20-21.

Spade, who then resided in Virginia, came to Spartanburg a few months after the birth of his child to visit. App. at 257 ll 5-9. He visited numerous other times as she grew older. App. at 257, ll 15-17.

Mr. Spade expressed a desire to establish regular vitiation with his daughter. When the mother rebuked this attempt, he filed an action in August of 2007 seeking visitation. App. at 257, ll 15-17; App. at 279, ll 23-25. The parties agreed to mediate the matter prior to a hearing. During the mediation conference, the mother of the minor child decided that "Danny D" would be the appropriate name for their daughter to call Mr. Spade. App. at 258, ll 6-23. No explanation was given for the name chosen for the daughter to use.

As a result of the mediation, Mr. Spade was given visitation with his daughter. Before visitation could begin, Mrs. Jolley filed the first action to terminate Mr. Spade's parental rights. This action was filed in 2008. App. at 258, ll 24-25 to 259, ll 1-14;App. at 298, ll 20-23. After Mrs. Jolley lost the first termination of parental rights action, Mr. Spade started his visitation. He visited with the minor child several times in Spartanburg and for ten days in the summer of 2010 she went to Virginia to stay with him. App. at 260, ll 19-23. After the visitation in Virginia, Mr. Spade visited in Spartanburg, SC in September and October of 2010.

After the September of 2010 visit, Mrs. Jolley complained of their daughter having anxiety attacks, not sleeping well, crying for no reason and, after being potty trained, starting to wet herself. App. at 263, ll 8-25 to 265, ll 1-9. She sought out Kimberly Roseborough, a counselor who was qualified at trial as an expert in child abuse

and treatment. App. at 304, ll 19-22. At that time she also filed an action to stop all visitation. App. at 281, ll 20-23. The purpose of the minor child seeing the counselor was to resolve the anxiety issues. After about 6 months of counseling, during which no allegation of sexual abuse arose, the counselor, on March 28, 2011, told Mrs. Jolley she was recommending that visitation resume. App. at 286, ll 5-22; 319, ll 11-16. This counselor had also recommended to Mrs. Jolley that a "sit down" be held with Mr. Spade, the counselor, and Mr. And Mrs. Jolley. App. at 300, ll 3-8. This was the last contact Ms. Rosborough had with the minor child and Mrs. Jolley.

During the time visitation stopped, Mr. Spade did have telephone contact with his daughter. App. at 290, ll 13-13-16; 292, ll 14-18. Mrs. Jolley testified she was "not happy" that Mr. Spade had told their daughter "[Minor child], you can say I love you too, daddy." App. at 291, ll 11-18.

Three days after the recommendation that visitation resume, Dale Smith, the grandmother of the minor child, first reported that the child told her of an incident of alleged sex abuse. App. at 32, ll 9-21. A "day or two" after Mrs. Smith was first told of the alleged incident, she told her husband. App. at 345, ll 16-25 to 346, ll 1-2 After a few more days, Mrs. Smith reported what had been said to Mrs. Jolley. App. at 347, ll 20-22.

The child's mother then took the child to Tabitha Webber for a forensic interview. She was qualified at trial as an expert in family counseling and child therapy. App. at 363, ll 17-20. Ms. Webber testified that as a result of her interview she contacted the local police and made arrangements for the minor child to enter therapy. App. at 355, ll

2-13. As a result of the statement by the minor child, Mr. Spade was arrested.

The minor child testified that during a visit at the hotel Mr. Spade was staying in, he put his private parts in her mouth. App. at 244, ll 7. The minor child further testified that no other act of sexual abuse occurred. App. at 246, ll 8-9. She did not identify on which visit this occurred, but that it occurred in the restroom near the pool. App. at 244, ll 8-25. She further testified that the pool was on the same floor as their room. App. at 250, ll 15-22. The testimony by the witness from the hotel was that Mr. Spade stayed on the second floor on one visit and the third floor on the other stay. App. at 340, ll 18-25 to 341, ll 1-13. The pool was located on the first floor. App. at 341, ll 1-2. The minor child also testified that a lot of people were present at the pool. App. at253, ll 23-24. These people would have had ready access to the restroom at the pool. She further stated that the bathroom did not contain a stall. App. at 251, ll 13-18. The record did not establish on which day Mr. Spade stayed at the hotel that this incident allegedly occurred.

Argument

Question I

Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the State to prove Mr. Spade had abused his daughter?

At trial defense counsel proffered the testimony of Dale Smith to establish that the minor child had had panic attacks when people other than Mr. Spade were present. Rec. on App. at 330, ll 11-17. The proffered testimony also established that a panic attack had occurred in the presence of Mrs. Smith over two years after Mr. Spade's last visit. App. at 329, ll 1-7; 330, ll 15-17. The State argued that this was proof of third party guilt which had been excluded in a pre-trial hearing. App. at 331, ll 21-25. The State further argued the testimony should be excluded because it tended to show "[a]nd even in the best light I don't think you could say that it's just David Jolley. It could be any male person, or whatever, that could cause these panic attacks from there but there were other people available." App. at 331, ll 23-25 to 332, ll 1-2. The State then concluded "To me, even if it is relevant in this case, it's highly prejudicial. It outweighs the probative effect in this case." App. at 332, ll 20-22. In response, defense counsel appropriately pointed out "We are not establishing third party guilt. We are establishing explanation for symptoms, which the State of South Carolina is going to argue is a symptom of child sexual abuse and she's having panic attacks because of what her biological father did." App. at 334, ll 15-19. The testimony was excluded.[2]

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[2] The trial judge cautioned defense counsel concerning this testimony "Don't point to any

True to the prediction by defense counsel, the State argued in closing the anxiety attacks were caused by the sexual abuse. Mr. Brannon said in closing "Then what we found out was that he got to take Peyton to Virginia for an extended period of time. And then you hear that Peyton becomes anxious You hear that a potty trained little girl wets herself. You hear that a four year old girl, is afraid of the dark. You hear that a four year old little girl has to sleep under a table like this. You hear that this baby does this just so she can close her eyes and not be afraid." App. at 403, ll 3-10. He further argued "But what we know is before that meeting Peyton was curled up under a table. Peyton was fearful. Peyton was clinging. Peyton, potty trained, stands behind a door in the bathroom in her mommy's house and pees herself." App. at 405, ll 10-15. But what the jury did not hear was that anxiety attacks had occurred two years after the last visit of Mr. Spade. They also did not hear that anxiety attacks had occurred in the presence of David Jolley, the adoptive father. The jury, unfortunately, was left with only one impression - the attacks were caused by the alleged sexual abuse. With no other explanation for the anxiety attacks and no testimony that the attacks occurred at a time other than Mr. Spade's visitation, the conclusion of the jury was both logical and compelled by the incomplete evidence.

The alternative explanation for the anxiety attacks was relevant evidence as it tended to prove the anxiety attacks were not caused by any alleged sexual abuse by Mr. Spade. As this court has said "Evidence is relevant and admissible if it tends to establish

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particular individual." App. at 336, ll 8-9. This admonishment apparently did not apply to the prosecution as Mr. Brannon, in his closing argument, pointed to only one individual - Mr. Spade.

or make more or less probable the matter in controversy." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); Rule 401, South Carolina Rules of Evidence. The trial court mistakenly viewed the testimony as being evidence of third party guilt which he had excluded in a pre-trial motion. He failed to recognize, and therefore did not use his discretion in so ruling, that the testimony was relevant on the issue of the cause of the anxiety attacks. Defense counsel never argued the testimony related to third party guilt. Nor did the trial judge explain how the testimony related to third party guilt. Defense counsel only argued that panic attacks had occurred at times other than around Mr. Spade.

As the State argued below, an alternative explanation for the anxiety would have been prejudicial to the theory of the State's case. Mr. Spade agrees. But when one argues that evidence is prejudicial, this is not what is meant. As this Court has said "Moreover, the standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of unfair prejudice that substantially outweighs the probative value of the evidence." *State v. Collins*, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014). Evidence that supplies an alternative explanation for the anxiety attacks is probative of a very relevant issue. Any alleged prejudice to the State in admitting the testimony is not outweighed by the Defendant being able to explain a series of facts in a manner inconsistent with the State's theory of guilt. As has been said by another court "Unfair prejudice does not mean the damage to [the State's] case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir.1993)

The trial judge used an improper basis to rule that the testimony was not admissible. This ruling prevented the jury from hearing relevant evidence that would have established that the anxiety attacks occurred when Mr. Spade was not around and therefore lessened the probability that he was the cause of the anxiety attacks. This testimony would not have caused the jury to decide the case on an improper basis. In fact, the testimony would have aided the jury in deciding the case on a proper basis.

The Court of Appeals in addressing this issue issued an opinion that is contradictory and did not consider the facts of the case. The Court of Appeals properly noted that the proffered testimony did establish that panic attacks did occur when David Jolly and his wife Heather were present. The Court then concluded "Appellant failed to show that the evidence was inconsistent with Appellant's guilt." *State v. Spade,* Op. No. 2016–UP–352 (S.C. Ct. App. July 6, 2016) App. at 89. What the Court of Appeals failed to consider was that as the State argued to the jury the panic attacks happened only concerning the visitation of Mr. Spade, panic attacks at times other than visitation with Mr. Spade would be inconsistent with Mr. Spade's guilt. Certainly a panic attack two years after his last visit would be relevant to prove the State's theory was not correct or reliable.

In making the analysis as to the panic attacks, the Court of Appeals stated " No context was provided as to the circumstances existing before and during the attacks, and there was no indication of whether the panic attacks did or did not occur around the time of Appellant's visits with Victim." *Spade*, App. At 89. What the Court of Appeals failed to consider was that the proffered testimony did establish a panic attack that occurred

after October of 2012. App. at 329, ll 1-7. That date was two years after Mr. Spade last saw his child. The Court of Appeals in essence judged the weight of the testimony as to the other panic attacks, not its admissibility. As panic attacks in the presence of Mr. Jolly would tend to make the State's argument less likely, then the testimony was admissible. In cross examination of Ms. Smith, the State never argued or suggested that the timing was improper or not probative. All that was asked was who else was around during the panic attacks. During argument against the admissibility of the other panic attacks the State argued that the panic attack occurred around Mr. Jolly and other males. They argued:

> And I understand the defense's point that it's going to be - - they are going to argue that the only time the panic attacks occurred is when David Jolly was there, but I think you heard evidence of the witness testify it could be any kind of factors. Therefore, I think it's not reliable. It's not relevant. And even if it is relevant in this case, it's highly prejudicial. It outweighs the probative effect in this case." App. at 333, ll 14-22.

The State never argued that "no context" of the panic attacks was given. They conceded the cause of the panic attacks "could be any kind of factors," which is the precise reason defense counsel wanted to introduce the other panic attacks. If the State believed attacks were "confusing" to the jury, they should have at least made some argument before the trial judge to explain their position. As the evidence of the panic attacks was relevant, the Court of Appeals erred in holding the exclusion of the evidence of other panic attacks was proper. This Court should grant the Petition for Writ of Certiorari and reverse the decision of the Court of Appeals. As the Court of Appeals has said "Few rights are more fundamental than that of an accused to present witnesses in his

own defense." *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). The State never offered a compelling reason to exclude the testimony Mr. Spade proffered. As the testimony of Mrs. Smith was the only testimony as to another cause of the panic attacks, the exclusion was prejudicial to Mr. Spade. As the Fourth Circuit has said rerversing the exclusion of the only testimony to support the defense theory " [T]he excluded testimony was the only evidence that would have corroborated the Defendant's own testimony of assertedly innocent conduct." *United States v. Ibisevic*, 675 F.3d 342, 351 (4th Cir. 2012). This Court should grant the Petition for writ of Certiorari and reverse the decision of the Court of Appeals.

Question II

Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

A criminal justice system simply cannot operate with a prosecutor in the criminal case having an ethical obligation of confidentiality to a witness or potential witness. If before an attorney becomes a prosecutor, he had previously represented a key witness or potential witness in a civil case or a family court matter, he should not prosecute the criminal case unless he obtains the consent of defense counsel or a waiver of the attorney client privilege by the witness or potential witness. The reason is obvious. As the former attorney for the witness or potential witness, he would have an ethical obligation not to reveal any impeaching knowledge he may have. He would have an ethical obligation to keep a potential witness off the stand if he knew the witness would not testify truthfully. But as a prosecuting attorney he would also have an ethical obligation to inform the

defense counsel of the impeaching information, which he, as a private attorney, is also ethically obligated not to disclose. Which master does he serve?

The constitutionality of private prosecutors and its impact on the criminal justice system has been called into question. As one author said:

> Thus, to ensure the reliability of criminal convictions, the use of private prosecutors must be strictly prohibited. Such prosecutors have strong incentives to please their private clients, and consequently, the potential for prosecutorial misconduct is particularly high. Specifically, private prosecutors may charge an accused inappropriately, fail to deliver complete Brady materials, seek a harsher punishment than is deserved, or engage in misconduct at trial. Because the discretion of prosecutors is virtually unchecked and nearly impossible to monitor, the only way to ensure the reliability of convictions is to prohibit the use of private prosecutors.
> John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511 (1994).

Against these concerns, the facts of this case must be evaluated. On the morning of trial, the solicitor for the Seventh Judicial Circuit gave counsel for Daniel Spade a letter stating that Doug Brannon, the attorney who represented the mother and the adoptive father in the second action involving the termination of the parental rights of Mr. Spade, would be a special prosecutor in the case. Counsel for Mr. Spade asked that Mr. Brannon be disqualified on two grounds. First, he had not been appointed in keeping with the provisions of S.C. Code § 1-7-470. Second, counsel pointed out that Mr. Brannon had represented both the natural mother and the adoptive father in the action in Family Court to terminate the parental rights of Mr. Spade and "that creates an inherent conflict of interest . . . ." App. at 120, ll 1-25. The TPR action was based upon the same allegations as this present action.

In arguing against the motion the solicitor argued:

> MR. BARNETTE: Your honor, I think the solicitor has the right to appoint a special prosecutor.
>
> Mr. Brannon has been involved in this case almost from the beginning. He knows it inside and out. He's been very helpful to our prosecutors. We have actually gotten Jennifer Jordan and Kim Leskanic going to be trying this case, Your Honor, from that standpoint.
>
> * * *
>
> This weekend I made that decision going through, and we actually met with Ms. Jordan, and I said "why don't we just appoint you as special prosecutor to help out in case some issue comes up and potentially help with a witness or help with the situation within the trial itself."
>
> App. at 121, ll 3-21.

Mr Brannon did more than just "help out" on some issue. He argued the *Batson* motion. App. at 193, ll 18-25 to 201, ll 1-16. He assisted the minor child from the stand. App. at 255, ll 9-11. He conducted the direct examination of Meredith Thompson-Loftis and the motions related to her testimony. App. at 356, ll 3-25 to378, ll 1-14. He argued the issue of the order of closing arguments. App. at 387, ll 21-25 to 389, ll 1-18; 394, ll 6-18. Finally he made the only closing argument for the State. App. at 398, ll 15 to 25, to 408, ll 1-8.

In denying the motion on both grounds, the trial judge simply said "Well, I don't see a conflict, though Mr. Shabel. I really don't. Mr. Barnette, as the solicitor of this circuit, can appoint any licensed attorney to act as a special prosecutor. That's my understanding." App. at 122, ll 7-10. He further said "[A]s far as the conflict, I don't see the conflict. Certainly there would be a conflict had he represented your client - - . . . but he didn't." App. at 122, ll 14-19.

The inherent conflict of the special prosecutor mentioned by defense counsel below violates the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fifth and Fourteenth Amendments to the Constitution of the United States of America. A Defendant in a criminal case has the right to be prosecuted by a prosecutor who is free from any conflict of interest, potential or actual.

The United States Supreme Court has held that an attorney for a company cannot be appointed as special prosecutor in a trademark criminal contempt action for violation of a restraining order where the attorney also represents the company who owned the trademark. The Court said "[A]s will generally be the case, the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety." *Young v. United States*, 481 U.S. 787, 807 (1987)(emphasis in original).

The reason for such a rule is clear. As the United States Supreme Court said in *Berger v. United States*, 295 U.S. 78, 88 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

No prosecutor should have the obligation of confidentiality to the natural mother and adoptive father that Mr. Brannon has. The obligation of confidentiality to a client is exactly what creates the conflict. A prosecutor has an ethical duty to share with defense

counsel all conversations with prosecution witnesses which may be inconsistent with prior statements. The private lawyer has the exact opposite obligation. His conversations with his client must remain sacrosanct. In holding that a prosecutor who had represented the wife in a divorce action could not also prosecute the husband on a criminal assault charge, the Fourth Circuit Court of Appeals said " We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967); *See also, State v. Eldridge,* 951 S.W.2d 775 (Tenn. Ct. Cr. App.)

An argument has been made that the rule of confidentiality is so strong that even with a waiver, a trial court should disqualify a prosecutor from handling a case that involves his former client. "Moreover, given the public interest in reserving confidentiality, the court may exercise its inherent power and disqualify the district attorney even if the former client waives his confidentiality." Eli Wald, *Disqualifying a District Attorney When a Government Witness Was Once the District Attorney's Client: The Law Between the Courts and the State,* 85 DENV. U. L. REV. 369, 383 (2007). In denying the right of private counsel to prosecute the case, a New York court said "In the case of the prosecutor, all of these obligations flow not to the complainant, but to the public, which is the client." *Sedore v. Epstein*, 864 N.Y.S.2d 543, 548 (2008).

To the extent *State v. Addis*, 257 S.C. 482, 186 S.E.2d 415 (1972) is contrary to the argument of Mr. Spade in this matter, the case should be overruled. *Addis* recognizes

that privately retained counsel "assumes the same obligations to the court as the solicitor himself." *Id.* at 417, 257 S.E.2d at 487. The case does not address the inherit conflict involved in this dual representation as discussed in this brief. The Court further stated "If he participates in the trial of a case and does only what a solicitor should do, the Defendant has no right to complain." *Id.* As noted above, as a matter of ethics, a private attorney cannot do only what a solicitor does. The private attorney is required to honor the confidentiality of his conversations with his client. The solicitor does not have such a requirement.

The practice of appointing "special prosecutors" has been criticized by the this Court. This Court has said "Although we find no error in this practice, we express our disapproval of the practice of appointing private counsel to prosecute criminal cases. Because of the increased possibility of a conflict when private counsel is involved, we believe the practice should be discouraged." *State v. Mattoon,* 287 S.C. 493, 495, 339 S.E.2d 867, 869 (1986). The Court of Appeals failed to discourage the practice. No case in South Carolina involving special prosecutors has discussed or mentioned the inherent conflict of the duty to disclose evidence by a prosecutor and the duty of the private attorney to honor the confidentiality.

Mr. Spade is not required to prove actual prejudice in this case. As noted by the United States Supreme Court "Given the fundamental and pervasive effects of such an appointment, we therefore hold that harmless-error analysis is inappropriate in reviewing the appointment of an interested prosecutor in a case such as this." *Young* at 814. In fact, to develop prejudice Mr. Spade would have to be permitted to examine Mr. Brannon

under oath and ask that he obtain a waiver from his clients of the attorney-client privilege. If Mr. Spade were to examine Mr. and Mrs. Jolley about their conversation with Mr. Brannon they would have the absolute right to refuse to answer the questions. The simplest solution is for this Court to reverse the conviction of Mr. Spade with a decision barring in this case and in all future cases, the use of a special prosecutor who has represented parties involved in the same incident as the criminal prosecution.

Question III

Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

The Court of Appeals found that Mr. Spade did not preserve this issue for review. The Court of Appeals apparently held the lower court did not rule upon the issue and not that counsel for Mr. Spade failed to raise the issue. The Court of Appeals erred in this ruling. Beginning on page 120 of the Appendix, a discussion of the issue involving Douglas Brannon being a special prosecutor begins. The issue involving the statute is raised at line 11 of the page. The issue involving the conflict of interest is found beginning at line 17. At that point, the trial judge had two issues before him. His ruling begins on page 122 at line 7. In ruling against the statute issue, the trial judge states "Mr. Barnette, as the solicitor of this circuit, can appoint any licensed attorney to act as a special prosecutor. That's my understanding. In fact, I have had it happen to me before Mr. Barnette was the prosecutor in a case." App. at 122, ll 8-12.[3] Defense counsel then

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[3] Trial counsel's acknowledgment that the solicitor has the right to appoint a special prosecutor is nothing more than an acknowledgment that the solicitor may do so if the

acknowledges the ruling saying "we understand. Thank you." App. at 122, l 13. In that ruling the trial judge only mentions the appointment of a special prosecutor. He does not at that point discuss the conflict issue. The statute only relates to the appointment of a special prosecutor.

After this acknowledgment by defense counsel, the trial judge then rules on the conflict issue. He then begins by saying "And the other - - as far as the conflict, I don't see the conflict." App. 122, ll 14-15. When he begins his ruling by saying "And on the other" he obviously had concluded ruling on the issue involving the statute. His ruling on that issue had even been acknowledged by defense counsel. The record shows that everyone understood the first ruling had been on the statute issue. The issue was preserved. As this Court has said "We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

In *State v. Matton,* 287 S.C. 493, 339 S.E.2d 867 (1986) the South Carolina Supreme Court held that S. C. Code § 1-7-405 applies to special prosecutors. Thus, S. C. Code § 1-7-470 should also apply to the special prosecutor in this case. Defense counsel called to the attention of the trial court that Doug Brannon had not been commissioned by the governor's office as required by the statute. App. at 120, ll 12-16. The trial court simply ignored this argument and permitted Mr. Brannon to act as a counsel in the case.

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solicitor goes through the proper procedure. The trial judge obviously understood that or the trial judge would have used the trial counsel's words against him.

This Court has held that a violation of a statute does not cause a reversal of a trial unless the defendant can establish prejudice. *State v. Huntley*, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002)("Evidence the simulator test was not run in conformity with Act 434 goes to the weight, not the admissibility, of Huntley's breathalyzer results."). In this case Mr. Spade can establish prejudice. As the Fourth Circuit has said "We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967). By permitting Mr. Brannon to assist in prosecuting this matter, the due process right of Mr. Spade to have a truly independent prosecutor prosecute his case has been violated.

Question IV

Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the State had been ordered to turn over to the Defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the State did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

The order of the Honorable J. Mark Hayes filed on February 27, 2013 specifically required the State, within a reasonable time before trial, to turn over the file of Meredith Thompson-Loftis in the event they elected to use her as a witness in the case. Order of J. Mark Hayes filed February 22, 2013, App. at 106. On October 31, 2013 the State sent to defense counsel the records of Ms. Loftis from May 17, 2011 through February 16, 2012. App. at 137, ll 15-21. This act advised defense counsel that the State intended to use Ms. Thompson-Loftis and the Defendant concedes this was a reasonable time before trial. On

Thursday before the trial, the State sent to the Defendant records of Ms. Loftis from February 23, 2012 until December 31, 2013. App. at 137, ll 18-25 to 138, ll 1-6. The majority of the records were available to the State when they sent the records on October 23, 2013. No reason was ever offered for not disclosing all the available documents when the previous disclosure was made. Assuming that at least 30 days prior to trial was a reasonable time to make the disclosure, the State had over 270 days, excluding week-ends, to make the disclosure ordered by Judge Hayes. They apparently made a decision not to make the full disclosure.

During the testimony of Ms. Loftis, defense counsel learned that the minor child had continued to see Ms. Loftis for January and February of 2014. App. at 370, ll 10-25. These notes were not given to defense counsel prior to trial. The trial judge, in rejecting defense counsel's motion to strike her testimony and exclude her testimony from the record, ruled that the State could not use any testimony from the counseling sessions in January and February of 2014. App. at 373, ll 4-23.[4]

The violation of the discovery rules in this case is more than a violation of Rule 5 of the South Carolina Rules of Criminal Procedure. Arguably the notes from Ms. Loftis may not have been obtainable under Rule 5. *See, State v. Trotter,* 322 S.C. 537, 473

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[4] The fact that the trial judge did exclude any testimony from January 2014 until February of 2014 (App. at 268-269) only serves to point out the State had not seriously taken their obligations under the order of Judge Hayes. Ms. Thompson-Loftis had seen the child into 2014 and this issue should have been brought to the trial court's attention at the pre-trial Motion. A defense used by Mr. Brannon that the records were not under the "control" of the State flies in the face of the plain wording of the Order. App. at 269, ll 2-4. It further illustrates Mr. Brannon did not understand his obligations as a prosecutor as opposed to a private lawyer.

S.E.2d 452 (1996). Defense counsel, in preparation for the trial, and not relying entirely upon Rule 5, had over a year before trial obtained a specific order from Judge Hayes requiring that the notes be turned over a reasonable time before trial. As defense counsel appropriately pointed out to the trial judge "Furthermore, Your Honor, just for the record, it does - - you know, the fact that we got it prevents us from being able to have any experts, should we have wanted to have an expert look at it." App. at 140, ll 18-21.

The courts of South Carolina have held on several occasions that a violation of Rule 5 discovery is not reversible unless the defendant can show actual prejudice. *See, State* v. *Kerr*, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1999). The Defendant contends that this analysis should not apply here because the State has violated a specific order of a circuit judge to produce the information in time for the Defendant to be able to use the information at trial. When a specific order is involved, this court should not use a prejudice standard for the State had knowledge of the specific court order and what it required. The State simply failed to comply with the order.

A defendant would not know how the information may be helpful until defense counsel has had the opportunity to further review and evaluate the information with an expert. The State had ample notice to provide the Defendant with the proper information. In fact had the State simply provided all the notes from Ms. Loftis that it had available on October 31, 2013 this issue might not have arisen. At the trial below the State never offered an explanation as to why they did not produce all of Ms. Loftis' notes that were in fact available when they made a partial disclosure. The State cannot assert a good faith effort to comply with the order.

A thorough review of the counseling notes reveals some notations that the defendant would want to review with an expert or even cross examine upon if counsel had had the time to read and understand the notes. For example, on page 466 of the Record on Appeal the note suggests that Ms. Thompson-Loftis is preparing the child for the upcoming trial and not counseling her. His notation near the top states "Plan for upcoming trial." Page 568 reflects a discussion with the child about "court trial - mid February." At the bottom of the page the therapist is again going over events that allegedly occurred almost three years earlier. Page 572 continues to prepare the child for court. On page 573 again there is a discussion about the upcoming trial. Had the Defendant had time to consult with an expert, he could have determined whether continuing to discuss the alleged abuse almost three years after it allegedly occurred is appropriate therapy. In addition, should the child's therapist be the one who is "prepping" her for court. These practices become suspicious. As the Court of Appeals said about the same therapist:

> Ms. Stichnoch was highly critical of Ms. Loftis' interviewing techniques, specifically her continuing to have therapy sessions with Anna G. about the sexual abuse allegations until a full assessment was conducted. Ms. Stichnoch stated a child of Anna G.'s age is easily influenced, and repetitive sessions and questions about the allegations could inadvertently and inappropriately reinforce those allegations with the child.
> *S. C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 23, 720 S.E.2d 503, 507 (Ct. App. 2011).

Trial counsel requested that the testimony of Ms. Loftis be excluded. The trial judge refused. But this was not the only alternative available to the trial court. "[O]nce a trial court determines that a discovery violation has occurred, the court may order further

discovery, grant a continuance, exclude the evidence, or impose any sanction which, in its discretion, it deems just under the circumstances." *People v. Aguilar*, 218 Ill. App. 3d 1, 9, 578 N.E.2d 109, 115 (1991). At the very least the trial judge should have continued the case to permit defense counsel to evaluate the evidence. Only after an evaluation by an expert can the Defendant clearly establish harm.

By requiring Mr. Spade to show how he was prejudiced by the late discovery, the trial court applied the wrong standard. The trial court should have presumed the late disclosure was prejudicial to Mr. Spade. When a specific court order had been violated, the State should be required to over come this presumption of prejudice. To require Mr. Spade to show prejudice simply rewards the party that violated the court order. As the Court of Appeals has said "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required." *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). The same rule should apply in a criminal case. As the Court of Appeals has issued a conflicting standard of review between civil and criminal cases, this Court should grant this Petition to resolve the conflict.

If a discovery order is to have any meaning, there must be sanctions for the failure to comply with the Order. A failure to sanction is as much an abuse of discretion as to under sanction an offender of a discovery order. As the United States Supreme Court said in applying an exclusion sanction against a defendant for a discovery violation , "It may well be true that alternative sanctions are adequate and appropriate in most cases, but

it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and the harm to the adversary process." *Taylor v. Illinois*, 484 U.S. 400, 413 (1988). If exclusion is an appropriate sanction when a defendant fails to comply with discovery obligations, how much more is the same sanction appropriate when the State violates the discovery obligations. In the context of a violation of the civil discovery rules, the Court of Appeals has held "Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes should serve to protect the rights of discovery provided by the Rules. Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery. *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 217 (Ct. App. 1997)(internal citations omitted) *See also Duke v. Westvaco Dev. Corp.*, 279 S.C. 464, 467, 309 S.E.2d 293, 295 (Ct. App. 1983).

CONCLUSION

For the foregoing reasons this Court should grant the Petition for Writ of Certiorari, reverse the conviction of Daniel Spade and remand the case for a new trial.

October 5, 2016

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
OCT 11 2016
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

SC Court of Appeals No. 2014-000448

The State, ... **Respondent,**

vs.

Daniel William Spade ..... **Petitioner.**

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on October 6, 2016, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari in the above case addressed to William M. Blitch, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211, and to Jenny Abbott Kitchings, Clerk, SC Court of Appeals, P.O. Box 11629, Columbia, SC 29211.

SWORN to and Subscribed

Sandy Trayhnam

before me this 6 day

of October, 2016.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22