STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. R. Keith Kelly, Circuit Court Judge
Appellate Case Tracking No. 2016-001965

The State, Respondent,

v.

Daniel William Spade, Petitioner.

Opinion No. 2016-UP-352 (S.C. Ct. App. filed July 6, 2016)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural Statement of The Case.

Factual Background

The victim's mother and Appellant met at work and ultimately had a child together, the victim, who was born in September of 2006. (App. 255-257). Appellant, who lived in Virginia at the time, first saw the victim in January or February of 2007. (App. 257). Sometime in the year 2007, Appellant filed an action in family court seeking visitation with the victim. (App. 257-258). The victim's mother married her husband David in December 2007. (App. 257). The victim referred to David as "daddy." (App. 257). In 2008, the victim's mother and her husband filed an action in family court seeking to terminate Appellant's parental rights. (App. 258-59). The action was not successful and a visitation schedule was thereafter established. (App. 259). In the summer of 2010, the victim, then almost four years old, went to Virginia to visit with Appellant. (App. 260). The next two visitations took place in South Carolina in September 2010 and October 2010. (App. 261-65).

The September 2010 visit took place at a Holiday Inn Express in Spartanburg County. (App. 232-33; p. 263). During this visit, Appellant took the victim to the hotel's pool. (App. 244-46). At one point he took the victim into the private bathroom near the pool area and "stuck his private part in [her] mouth." (App. 244). Appellant told the victim that if she "didn't do it," he wouldn't take her home to her mother. (App. 246).

Following the September visit, the victim's mother noticed some behavioral changes in the victim. (App. 263). Because of the significant behavioral changes, after Appellant's October 2010 visit, the victim's mother decided to seek counseling for the victim. (App. 269). That same

month, the victim began counseling with Kim Rosborough. (App. 269-70). At the time counseling began, the victim's mother did not know of the sexual assault. (App. 270). Instead, the goal of the counseling was to figure out the cause of the victim's anxiety and to try to ease any anxiety she may have had regarding her visits with Appellant. (App. 271). Following the commencement of counseling, the victim had no further in-person visits with Appellant, and the victim's mother noticed an improvement in the victim's anxiety symptoms. (App. 272).

The victim disclosed the sexual abuse to her grandmother in late March of 2011. (App. 344-45). The grandmother was in shock regarding the disclosure, but after a day or two she told her husband about it. (App. 345-46). Her husband reported the disclosure immediately to the victim's family court guardian ad litem. (App. 348). He also called Ms. Rosborough and reported the disclosure. (App. 309-10). In response, Ms. Rosborough referred the victim for a forensic interview at the Child Advocacy Center. (App. 310). The victim's mother found out about the allegation from her parents around this time. (App. 272-73).

Tabitha Webber, a forensic interviewer at the Child Advocacy Center, conducted forensic interviews with the victim on several different dates in April and May of 2011. (App. 353-54). During the course of these interviews, the victim made a disclosure of sexual abuse that occurred "at a hotel with a pool" in South Carolina. (App. 354-55). The victim thereafter began counseling with Meredith Thompson-Loftis in May of 2011. (App. 365). The victim disclosed sexual abuse during the counseling sessions and provided a specific time period and location. (App. 376). Although the victim started out having a variety of symptoms of anxiety, she exhibited a great deal of improvement over the course of the counseling sessions. (App. 374-76). Appellant's parental rights were terminated in family court in November of 2012, and the victim's last name was subsequently changed to that of her adoptive father. (App. 383).

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court's decision not to admit testimony regarding who was present at the time of the child's panic attacks, especially when the trial court allowed Petitioner to call witnesses or cross-examine witnesses about the causes of the panic attacks and Petitioner failed to avail himself of the opportunity. Further, the issue is not preserved for review on appeal.

The Court of Appeals correctly found the trial court did not err in excluding the proffered testimony related to the people present when the child had her anxiety or panic attacks. The testimony was merely a backdoor attempt at admitting third-party guilt evidence. Further, Petitioner asked for and obtained the relief he sought which was permission to question individuals regarding the circumstances of the panic attacks. He did not avail himself of the opportunity. Finally, because he received the relief he requested, the issue is not preserved for review on appeal.

Appellant's counsel informed the judge that he wished to proffer some testimony from Dale Smith, the victim's grandmother. (App. 327). Ms. Smith was called to the stand and briefly examined by Appellant's counsel. (App. 328-330). She recalled testifying in a family court proceeding in October 2012, and in that proceeding, she testified that she observed the victim having panic attacks. (App. 328). Ms. Smith then stated the following: (1) she had, on one occasion after October 2012, observed the victim have a panic attack in her backyard when she was alone with the victim; (2) prior to October 2012, she had never observed the victim having a panic attack when she was alone with the victim; (3) she had never, before October 2012, observed the victim having a panic attack when only herself and her husband were present; (4) she had never observed the victim having a panic attack when only herself and t-he victim's mother were present; (5) she had never observed the victim having a panic attack when only

herself and the victim's adoptive father, David Jolley, were present; (6) she had never observed the victim having a panic attack when only herself, the victim's mother, and the victim's adoptive father were present; (7) the victim's adoptive father was not present for the panic attack the victim had in the witness's backyard after October 2012; (8) both the victim's mother and the victim's adoptive father were present during all of the panic attacks she had observed prior to October 2012. (App. 328-30). On cross-examination, Ms. Smith testified that the following persons were present during the panic attacks she witnessed prior to October 2012: herself, her husband, the victim's mother, the victim's adoptive father, and the victim's little brother. (App. 331).

Appellant's counsel subsequently argued that "[t]his is a situation where there are allegations that the child is having panic attacks. That panic attacks in and of itself could or could not have anything to do with the fact that my client may have committed this act." (App. 334). He continued, "[w]hat we are trying to do is give potentially other reasons, non-criminal reasons, why the panic attacks are occurring." (App. 334). Finally, Appellant's counsel stated he was not attempting to establish third-party guilt but was trying to establish an **"explanation for symptoms."** (App.334) (emphasis added).

The trial judge told Appellant's counsel he was free to call an expert witness to testify that panic attacks could be caused by a number of other things in a child's life. (App.334). The judge also indicated Appellant's counsel could ask the State's own expert similar questions. (App. 335). However, he ruled that "this court looks at this as sort of a back door to third-party guilt, and I have already ruled on that yesterday in pre-trial motions. And the defendant has failed to show that the proper evidence is inconsistent with his guilt, so I'm not - I'm not going to allow that in." (App. 335). Nevertheless, the judge stated he would allow questions about what

was going on when the panic attacks occurred, where the child was, what the child was doing, or whether or not she was being disciplined at the time. (App. 335). After clarifying that he would indeed be permitted "to ask what was going on without mentioning a specific individual," Appellant's counsel stated, "Thank you." (App. 336).

When Ms. Smith was later called to testify, Appellant's counsel did not cross-examine her regarding panic attacks.[1] (App. 347-49). In fact, Appellant's counsel did not question any subsequent witness regarding panic attacks. Appellant did not call any defense witnesses. (App. 382). No expert witness or other witness was called to provide alternative explanations for the panic attacks as Appellant claimed was the basis for the needed testimony.

Appellant now contends on appeal that the trial court erred in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Petitioner were present. This issue is not preserved for appellate review, is patently without merit, and is wholly without support in the record.

Preservation

Following his proffer, Appellant received the relief he requested - i.e., to be permitted to ask questions regarding the circumstances surrounding the victim's panic attacks - and had no complaints about the trial judge's ruling. The trial judge even told Appellant's counsel that he could call an expert witness, or question the State's witness, regarding potential alternative causes for panic attacks. Where Appellant received the relief he requested below and made no complaint about the limitations of the judge's ruling, he should not be permitted to complain on appeal. See State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997) (an issue is not preserved for review if the objecting party accepts judge's ruling on a particular matter and does

[1] The prosecutor also did not ask Ms. Smith about panic attacks during direct examination. (App. 342-47).

not contemporaneously make an additional objection indicating his dissatisfaction with any limitations); State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (holding that where the defendant received the relief requested from the trial court, there is no issue for the appellate court to decide); State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 614-15 (Ct. App. 2012) (where defendant received the relief she sought she could not be heard to complain on appeal).

Merits

Regardless, this issue is patently without merit and is wholly without support in the record. In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

In Holmes, the United States Supreme Court articulated its approval of the rule adopted by this Court in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), for the admission of evidence of third party guilt. Holmes, 547 U.S. at 328. In Gregory, this Court explained:

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are **inconsistent with his own guilt**, and to such facts as raise a **reasonable inference or presumption as to his own innocence**; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. **Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.**

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941) (internal citations omitted) (emphasis added).

To the extent Appellant is alleging he should have been allowed to introduce testimony and/or argument that the victim's panic attacks happened only in the presence of the victim's adoptive father, this testimony has no factual support in the proffer presented by Appellant's counsel and, in fact, no factual support in the record whatsoever. (App. 327-31). Further, the testimony presented in the proffer failed to negate Appellant's guilt, even if Appellant was not present at the time of the attack testified to by Ms. Smith.

Additionally, as both the trial court and Court of Appeals found, the testimony does not provide the context for the panic attacks and certainly does not offer the evidence Appellant claimed he was seeking regarding an alternative explanation for the panic attacks. It merely provided a list of individuals present at the panic attacks. Appellant presented no factual or expert testimony supporting an identifiable alternate cause or trigger for the victim's panic attacks despite the fact that the judge's ruling allowed him the opportunity to present testimony in this regard. There was absolutely no evidence provided to the jury that any person's physical presence triggered the victim's panic attacks. As a result, the Court of Appeals properly affirmed the trial court's exclusion of Appellant's attempt to backdoor improper third-party guilt evidence. This is especially true when the court allowed him opportunity to explore alternative causes for the panic attacks and he never once raised the issue. Appellant has failed to demonstrate the requisite prejudice to justify reversal. In sum, Appellant's issue is unpreserved for appellate review and is clearly without merit. This Court should deny the Petition for Writ of Certiorari as to this ground.

II. The Court of Appeals properly affirmed the trial court's decision to allow a private attorney to participate in the prosecution where no conflict of interest existed.

The Court of Appeals correctly found the trial court did not err in allowing Douglas Brannon to participate in the prosecution of Appellant when no conflict of interest existed. Prior to trial, defense counsel requested that the court not allow Douglas Brannon to serve as an appointed prosecutor in the case. (App. 120-23). Counsel indicated he had received a copy of a letter appointing Mr. Brannon as an appointed prosecutor that morning. (App. 120). Counsel did not dispute that the solicitor had the right to appoint a special prosecutor, but noted that he had no evidence "under Section 1-7-470 of the South Carolina Code that his appointment as special prosecutor has been in any way, shape or form commissioned by the Governor's office." (App.120). He also argued that the fact that Mr. Brannon, in October of 2012, represented the mother and adoptive father of the victim in family court created an "inherent conflict of interests." (App. 120). The trial judge denied Appellant's motion, stating that the solicitor had the right to appoint any licensed attorney to act as a special prosecutor and that he did not see a conflict of interest since Mr. Brannon had never represented Appellant. (App. 122).

Preservation

On appeal, Appellant now argues that Mr. Brannon's obligation of confidentiality to the victim's mother and adoptive father created a conflict of interest that violated Appellant's due process rights. However, this argument is clearly unpreserved because it was not made to the trial judge below. Although defense counsel made a general argument about an "inherent conflict of interests," he failed to make any arguments regarding Mr. Brannon's duty of confidentiality. Because Appellant is now attempting to raise an argument that was not brought to the trial judge's attention and was not ruled on by the trial judge, the issue argued on appeal is

not properly preserved. See, e.g., I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments; the "purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal"); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (noting "[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground ") (emphasis added); State v. Whitten, 375 S.C. 43, 47, 649 S.E.2d 505, 507 (Ct. App. 2007) (finding an appellate court is limited by appellate rules that allow the court to consider only the precise question that was before the trial judge and ruled upon by him or her). Accordingly, this issue is not properly preserved for review.

Merits

Additionally, the Court of Appeals correctly determined the trial judge properly allowed Mr. Brannon to serve as a special prosecutor in Appellant's case, and Appellant's contention that Mr. Brannon's service as a special prosecutor violated his constitutional rights is contrary to well-reasoned and settled precedent. In State v. Addis, a private attorney who had previously represented the victim's family in a civil claim against the defendant participated in the defendant's criminal trial alongside the solicitor. 257 S.C. 482, 486, 186 S.E.2d 415, 416 (1972). The civil claim was settled prior to trial. Id. In finding no error with respect to the private attorney's participation in the case, this Court found that "traditionally in this State private counsel has been permitted to assist the State in prosecutions." Id. at 487, 186 S.E.2d at 417. The Court also stated: "the defendant has no right to complain" where private counsel

"participates in the trial of a case and does only what a solicitor should do." Id. Finally, the Court held: "We cannot say that the participation of private counsel violates the constitution or any statutory or common law principle. Such ruling would appear to be in keeping with the weight of authority." Id. at 487-88, 186 S.E.2d at 417.

In State v. Nichols, a 1997 murder case, the defendant asserted it was unconstitutional to allow the solicitor to use three private attorneys hired by the victim's family to prosecute his case. 325 S.C. 111, 119, 481 S.E.2d 118, 122 (1997). This Court again rejected this argument, ruling as follows:

> Private counsel's participation in a trial to assist the solicitor has been sanctioned in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986); State v. Addis, 257 S.C. 482, 186 S.E.2d 415 (1972); State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971); and State v. Gregory, 172 S.C. 329, 174 S.E. 10 (1924).
>
> In State v. Addis, 257 S.C. at 487–88, 186 S.E.2d at 417, we declined to find error in the allowance of a private attorney's participation in a criminal trial. The trial court has discretion to allow the solicitor to have the assistance of counsel employed by the prosecuting witness or other person interested in securing a conviction with the consent of the solicitor. Id. A special assistant solicitor is not automatically disqualified because of his simultaneous representation of an interested party. **Disqualification occurs when a special assistant solicitor attempts to use his authority in the criminal action to the advantage of his civil client or otherwise compromises his neutrality in the criminal proceeding.** State v. Mattoon, 287 S.C. at 494–95, 339 S.E.2d at 869. There is no evidence the private attorneys who acted as special assistant solicitors here stood to gain an unfair advantage in the civil matter as frowned upon in In re Jolly, 269 S.C. 668, 239 S.E.2d 490 (1977). Further, the solicitor maintained control of the case. We do not find error in the use of private attorneys here.

Id. at 119, 481 S.E.2d at 122-23 (emphasis added).

The reasoning of Nichols and Addis applies squarely in Appellant's case.[2] The Seventh Circuit Solicitor's Office maintained control of Appellant's case and Mr. Brannon merely served

[2] This Court in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), discouraged the practice of appointing private counsel to prosecute criminal cases. The private attorney appointed to prosecute the case in Mattoon was the sole prosecutor and no one from the solicitor's office was

as a "third chair" and assisted with some aspects of the trial, including arguing two motions, examining one witness (the victim's therapist), and presenting the State's closing argument. (App p. 121; Petition for Writ of Certiorari at 13). Significantly, in Appellant's case, unlike in Nichols, Mr. Brannon did not "simultaneously" represent an interested party; instead, his representation of the victim's mother and adoptive father concluded in October of 2012, more than a year and three months before Appellant's trial. (App. 120). Mr. Brannon stood to gain nothing (other than a sense of personal satisfaction, perhaps) from providing *pro bono* assistance to the State, nor has there been any contention that he attempted to use his authority as a special prosecutor in some improper way. (App. 120). Therefore, contrary to Appellant's suggestion, Mr. Brannon was not "serving two masters at once." (See Petition for Writ of Certiorari at 15).

Appellant's argument is based on rank speculation that Mr. Brannon *might* have learned something during his representation of the victim's mother and adoptive father in the past that *might* have been helpful to the defense in this case, and assumes that Mr. Brannon failed to turn such information over to the defense. He further argues that his representation might require him to violate his oath of confidentiality to his former clients.

There has been **no** contention, either at trial or on appeal, that Mr. Brannon actually possessed pertinent information that was required to be turned over to the defense. Further, there has been no contention at trial or on appeal that Mr. Brannon, as special prosecutor, failed to actually comply with Brady or Rule 5 obligations. Additionally, pursuant to Rule 1.6 of the Rules of Professional Conduct, Rule 407, SCACR, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes is necessary: (7) to

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present during trial. Mattoon at 494-95, 339 S.E.2d at 868-69. In any event, despite the statement of discouragement in Mattoon, the decisions of our Supreme Court have consistently upheld the use of special private prosecutors when attacked by the defendant. The Nichols case decided about eleven years after Mattoon reiterates this view.

comply with other law or a court order." Clearly, Mr. Brannon would be able to avoid any conflict with his client in turning over information required by Brady, Rule 5, or other court order. In addition, Mr. Brannon is bound by Rule 3.3 of the Rules of Professional Conduct which prevent him from making any false statement to the court or offer evidence the lawyer knows to be false. Most significantly, if Mr. Brannon knew any witness intended provide false evidence, including those he previously represented, he "shall take reasonable remedial measure, including, if necessary, disclosure to the tribunal. Rule 3.3(a)(3), RPC, Rule 407, SCACR. Accordingly, if Mr. Brannon knew any information which needed to be divulged to the court, he was under an obligation to do so and the confidentiality of material learned during his prior representation would not have acted as a bar.

The cases cited by Appellant in support of his position are distinguishable in that those cases involved situations where the private attorney simultaneously represented a financially interested party and was in total control of the prosecution. In Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987), private attorneys served as special prosecutors in a criminal contempt action regarding a violation of a trademark infringement injunction. The injunction and consent decree contained a liquidated damages provision in the amount of $750,000 for a violation of the injunction. Id. at 805. The private attorneys were appointed by the district court and, significantly, the United States Attorney's Office had no involvement in the case at all. Id. at 791-92. Because the private attorneys simultaneously represented Vuitton in the trademark matter, and in light of the $750,000 liquidated damages provision for a violation of the injunction, there was the potential for "private interest to influence the discharge of public duty." Id. at 805-806. Therefore, the private prosecutors were "interested" and their appointment was improper. Id. at 814. The Court refused to employ a harmless error analysis under these

circumstances because the error was "fundamental" where the appointment of interested private prosecutors - with no involvement of the United States Attorney's Office - raised doubts about "the integrity of the criminal proceeding." Id. at 809-810.

In Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967), the Fourth Circuit Court of Appeals held the defendant's conviction for assaulting his wife was constitutionally invalid because the attorney prosecuting the criminal case simultaneously represented the defendant's wife in a divorce action **then pending** against the defendant, and the divorce action was based upon the same assault involved in the criminal matter. Id. at 711-12. Significantly, the private prosecuting attorney improperly used his influence as a prosecutor because he offered to drop the criminal assault charge if the defendant would make a favorable property settlement in the divorce action. Id. A favorable settlement, of course, would have likely impacted the amount of his fee in the divorce matter. Id. at 713. Because of the prosecuting attorney's "self-interest" in the outcome of the criminal case, he was not in a position to exercise fair-minded judgment with respect to prosecution of the criminal case. Id. at 712-13. This conflict of interest - wherein the prosecuting attorney was actively attempting to serve two masters at the same time - violated the defendant's due process rights. Id. at 714. A harmless error analysis was not appropriate because the *sole* prosecuting attorney was not "free to exercise the fair discretion which he owed to all persons charged with crime in his court." Id.

Appellant's case is distinguishable from both Young and Ganger. Mr. Brannon merely assisted the State with the trial as a third-chair prosecutor, and he did not have control over Appellant's prosecution from the inception of the case. Furthermore, Mr. Brannon was not "interested" as were the private prosecutors in Young and Ganger because he was not simultaneously representing the victim's mother and adoptive father since that matter concluded

in October 2012. Mr. Brannon performed his work as an appointed prosecutor *pro bono* and there was no possibility of pecuniary gain or unfair advantage in any pending, related civil matter. Accordingly, Young and Ganger do not apply to Appellant's case and there was no "fundamental" trial error here.

Notably, in a case subsequent to Ganger, the Fourth Circuit Court of Appeals distinguished Young and held that although Young "flatly proscribes turning the prosecution completely over to private counsel for interested parties," it "certainly did not proscribe all participation by such counsel." Person v. Miller, 854 F.2d 656, 663 (4th Cir. 1988). The court then stated:

> We therefore read *Young* at least implicitly to approve (or certainly not to forbid) the practice of allowing private counsel for interested parties to participate formally with government counsel in the prosecution of contempt citations so long as that participation (1) has been approved by government counsel; (2) consists solely of rendering assistance in a subordinate role to government counsel; and (3) does not rise in practice to the level of effective control of the prosecution. As indicated, we find authority for this rule of limited participation at least implicit in *Young* and we think it wholly conformable to *Young* 's underlying principles. Accordingly, we adopt it as the appropriate rule governing the participation of private counsel for interested parties in contempt prosecutions.

Id. The court also noted that the evil at which the Young rule was aimed - "the possibility that the criminal contempt sanction would be invoked and prosecuted by private counsel, operating in the adversarial mode, solely to secure advantage to his client and hence without regard for any interests of the defendant and the public in fairness of the criminal process" - is sufficiently guarded against, both in appearance and reality, by "the presence of disinterested government counsel effectively in a position and manifestly prepared to exercise control over the critical prosecutorial decisions - most critically, whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant." Id. at 664. Significantly, the reasoning of this Fourth Circuit case is fully

in keeping with Nichols and Addis.

Contrary to Appellant's argument, prejudice must be shown in order for Appellant to receive relief. In State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), there existed a potential conflict of interest arising from the fact that one of the prosecutors in the solicitor's office had previously worked for the public defender's office during the pendency of Smart's charges. Smart at 517-18, 299 S.E.2d at 687-88. This Court stated although Appellant's claim had "merit in the abstract," there was no "constitutional grounding" for it and held the defendant was required to show "actual prejudice" from the trial court's failure to disqualify the solicitor's office. Id. at 518, 299 S.E.2d at 688. The Court rejected Appellant's assertion prejudice must be "presumed," stating: "Creating artificial dilemmas does not relieve appellant of his burden to show actual prejudice in this case." Id. at 519, 299 S.E.2d at 688; see also State v. Bell, 374 S.C. 136, 143-44, 646 S.E.2d 888, 892 (Ct. App. 2007) (absent deliberate prosecutorial misconduct (such as intentionally eavesdropping on a confidential conversation between the defendant and his attorney) or actual prejudice to the defendant, the trial judge did not abuse his discretion in refusing to disqualify the solicitor's office).

The Court of Appeals correctly relied on Nichols in finding the trial court did not err in allowing Brannon to act as an appointed prosecutor. This case is controlled by Nichols and Addis, and under these cases, the trial judge did not err in allowing Mr. Brannon to assist the State in Appellant's trial. No actual prejudice has even been alleged, much less shown, and Appellant is not entitled to reversal on this ground. This Court should deny the Petition for Writ of Certiorari as to this Question.

III. The Court of Appeals properly found the issue related to application of section 1-7-470 of the South Carolina Code in this case was not preserved for review on appeal. Further, the issue is entirely without merit because section 1-7-470 is not applicable and Appellant cannot demonstrate any prejudice from the appointment.

The Court of Appeals correctly found this issue is not preserved for review on appeal because Appellant never received a ruling on his argument related to the application of section 1-7-470 of the South Carolina Code to this case. Further, even if preserved the issue is entirely without merit because the section is not applicable in this case. Finally, even if applicable the failure to have a Governor's commission did not prevent Mr. Brannon from acting as a prosecutor and Appellant cannot demonstrate any prejudice from that appointment.

Preservation

"Our law is clear that a party must make a contemporaneous objection that is *ruled upon by the trial judge* to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011) (emphasis added). "To be preserved for appellate review, an issue must be both presented to *and passed upon* by the trial court." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) (emphasis added). "If the issue is raised but not ruled on, it is not preserved for appeal." Id.

Appellant argues that the trial judge erred in allowing Mr. Brannon to participate in the trial as a special prosecutor on the ground that the solicitor failed to produce a commission from the governor as required by S.C. Code § 1-7-470. However, although counsel mentioned below that "I don't have any evidence under Section 1-7-470 of the South Carolina Code that his appointment as special prosecutor has been in any way, shape or form commissioned by the Governor's office," (App.120), the judge did not issue a ruling on this particular point nor did counsel request that the judge include this issue in his ruling. (App.122). In fact, the judge did

not even rule that S.C. Code § 1-7-470 was applicable, since defense counsel conceded that the solicitor "does have the right to appoint a special prosecutor." (App. 120). Accordingly, the issue was not properly preserved for appellate review.

Merits

Even assuming the issue was somehow preserved for review, Appellant's argument is without merit. Initially, it is not clear that section 1-7-470 is necessarily applicable to Appellant's case, since the Seventh Circuit Solicitor appointed Mr. Brannon as a volunteer special prosecutor for the duration of one trial, rather than as a paid "assistant solicitor" as discussed in the statute.[3] This is further illustrated by reference to sections 1-7-405 and 1-7-406 of the South Carolina Code, which appear in the same Article and clearly contemplate a full time hired assistant solicitor and not a one-time special appointment. The case of State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), cited by Appellant, is distinguishable because, in addition to dealing with a different statutory provision (S.C. Code § 1-7-405), the private attorney in Mattoon was appointed as a "special assistant solicitor" and had an agreement (presumably for pay) to prosecute "a series of obscenity cases" in the county.

Regardless, even if the statute was applicable, it does not require that the Governor's commission occur prior to the commencement of the service; it merely requires that the commission occur "after appointment." As noted in other contexts, it is the appointment that confers the powers and not the ministerial requirement of the commission. See State v. Griffin, 413 S.C. 258, 776 S.E.2d 87 (2015) (finding failure to comply with ministerial acts does not render deputy sheriff appointment invalid), Kottman v. Ayer, 34 S.C.L. (3 Strob) 92, 94 (1848)

[3] As mentioned previously, defense counsel conceded that the solicitor "does have the right to appoint a special prosecutor." (App.120). Counsel did not reference a particular statute for this point.

("It is the appointment that confers the office"), and Billy ads. State, 11 S.C.L. (2 Nott & McCord) 356, 358 (S.C. Const. App. 1820).

However, even assuming the statute did apply and the "commissioned by the Governor" requirement was not complied with prior to Brannon's service as an appointed prosecutor, Appellant has utterly failed to show the required prejudice. See, e.g., State v. Huntley, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002) (finding the trial court erred in automatically suppressing a breath test's results when no prejudice to the defendant was shown as a result of the implied consent statute's violation); see also State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations . . . .").

Contrary to Appellant's argument, the case of Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967), does not illustrate prejudice by way of a due process violation because the case is distinguishable for the many reasons discussed above in the previous section. Brannon made no decisions regarding whether to prosecute Appellant, the crime for which Appellant was prosecuted, or how the trial would proceed against Appellant. The entire prosecution of Appellant would have occurred in the same manner even if Brannon had never been appointed. Accordingly, Appellant cannot demonstrate prejudice based on the appointment. As a result, this Court should deny the Petition for Writ of Certiorari as to this Question.

IV. The Court of Appeals correctly affirmed the trial court's decision to allow the testimony of the victim's counselor.

The Court of Appeals correctly found the trial court did not abuse its discretion in allowing some testimony by the victim's counselor and excluding some testimony as it related to the counseling notes and records turned over by the State to Appellant. As a summary of the relevant facts[4], on February 27, 2013, the Honorable J. Mark Hayes, II, filed an order that stated, in pertinent part: "The State shall not be required to turn over any mental health records of the alleged victim from Meredith Thompson-Loftis at this time; however, if the State intends to call her as a witness in their case, they must turn over all such records within a reasonable time prior to the trial of this case." (App. 105). The order did not provide for any particular remedy in the event a violation occurred. On February 11, 2014, approximately two weeks prior to Appellant's trial, defense counsel filed a motion to exclude the testimony of Meredith Thompson Loftis on the ground that the State had not yet turned over all of Ms. Loftis' records and that "it is no longer a reasonable time prior to the February 24, 2014 call of the case." (App. 110).

On February 24, 2014, the day the case was called for trial, defense counsel raised the issue of Judge Hayes' order and argued the State violated it by failing to turn over records within a reasonable period of time prior to trial. (App. 136-37). Specifically, defense counsel asserted that although the State, on October 31, 2013, turned over records covering the dates of May 17, 2011 through February 16, 2012, it was not until "last week," February 20, 2014, that the State turned over records spanning the dates of February 23, 2012 through December 30, 2013. Defense counsel also stated that no records for any dates after December 30, 2013, had been turned over. (App.137). Counsel argued, "in essence, Your Honor, four days before this trial

4 The State craves reference to its Final Brief of Respondent for a more thorough recitation of the facts.

was to begin they handed over the last twenty-two months of counseling records. I believe that is contradictory to Judge Hayes' ruling. I don't believe they turned over her records within a reasonable time. Therefore, I would ask that any testimony of Meredith Thompson-Loftis be excluded under the terms of Judge Hayes' order, which were issued and filed with the court on February 27 of 2013." (App.137-38).

In response, the State noted that the "twenty-two months" of records in fact included only twenty-five pages of counseling notes: "[i]t was five pages that included some writings and then twelve pages that included drawings." (App. 138). The solicitor also pointed out that the defense had access to the majority of Ms. Loftis' records prior to this; that defense counsel personally cross-examined Ms. Loftis in the family court trial that took place in October of 2012; and that the victim had made no new disclosures to the counselor. (App. 138-39).

Defense counsel agreed that these records were turned over upon receipt and stated, "I'm not saying you withheld it." (App.139). The judge then asked defense counsel if there was anything new or surprising in the records that had recently been turned over. (App. 141). Defense counsel responded that he had learned the "number of appointments this child had with Meredith Thompson-Loftis in the year, plus, since the hearing, but nothing of major significance that I could see or that I could translate in the four days that I have had to take a look at it." (App. 141). The judge responded that the records looked "pretty straightforward" and said that he was able to read Ms. Loftis' handwriting. He also offered assistance with "translating" the records but defense counsel declined. The judge then denied counsel's motion to exclude the testimony of Ms. Loftis. (App. 141). Defense counsel stated, "All right. Thank you, Your Honor." (App. 141).

Later in trial, after Ms. Loftis testified that the victim was still a client of hers to date, defense counsel renewed his motion to exclude. (App. 369-70). He stated that if the victim is a continuing patient of Ms. Loftis, there must be records dated after December 30, 2013 which had not been turned over. He argued that the State was therefore not in compliance with Judge Hayes' order and asked that Ms. Loftis be excluded as a witness and that all of her testimony be stricken from the record. (App. 370). The State noted that it was not in possession of any records dated after December 30, 2013. (App. 371). Ms. Loftis then told the court she did have records for January 2014. (App. 372). Over defense counsel's objection, the judge ruled that Ms. Loftis would not be excluded as a witness but would not be permitted to testify as to anything that occurred with respect to sessions after December 30, 2013, since defense counsel had not been privy to those records prior to trial. (App. 372-74).

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

Appellant argues that the trial court erred in refusing to exclude the testimony of Ms. Loftis due to the State's failure to turn over portions of her counseling records within a reasonable time prior to trial. However, despite Judge Hayes' order requiring the State to turn

over the counseling records, Appellant was not in fact entitled to receive the counselor's notes under Rule 5. See State v. Trotter, 322 S.C. 537, 542, 473 S.E.2d 452, 455 (1996) (holding that counseling sessions do not constitute "physical or mental examinations" for purposes of Rule 5, SCRCrimP, and that even if they did, a counselor's notes from such sessions would not be subject to disclosure under Rule 5(a)(1)(D)); see also Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). In that vein, Appellant's receipt of *any* of the counseling notes in advance of trial allowed Appellant to reap a benefit to which he was not entitled and that most defendants do not receive. Appellant cannot predicate reversible error upon his failure to timely receive something he was never actually entitled to receive in the first place under our discovery rules.

In any event, Judge Hayes' order requiring the records to be turned over "within a reasonable time prior to the trial of the case" did not provide for a remedy in the event of noncompliance. Therefore, it was up to the trial judge to determine whether or not a remedy was warranted, and if so, what remedy was appropriate under the circumstances. Cf. State v. Salisbury, 330 S.C. 250, 267, 498 S.E.2d 655, 664 (Ct. App. 1998) ("Even if the State failed to comply with Salisbury's Rule 5 request, the trial court had discretion to provide a proper remedy."), *affirmed as modified on other grounds by* 343 S.C. 520, 541 S.E.2d 247 (2001). Here, after learning (1) the State did not intentionally withhold the records turned over the week before trial (as defense counsel conceded); (2) the records contained only twenty-five pages, some with drawings, and that the records were "pretty straightforward;" and (3) the records had little overall significance to the defense, the trial judge denied Appellant's motion to exclude Ms. Loftis' testimony. (App. 136-41). It cannot be said that this decision was an abuse of discretion under these circumstances. Further, after discovering there were records that had never been in

the possession of the State, and therefore never turned over, the trial judge precluded the State from eliciting any testimony pertaining to those particular records. (App. 369-74). Likewise, this was not an abuse of discretion and was a fair remedy.

Moreover, Appellant, at trial and on appeal, has failed to show any prejudice from the delay in his receipt of the records. See State v. South, 285 S.C. 529, 535-36, 331 S.E.2d 775, 779 (1985) (applying a harmless error analysis to a violation of a discovery order in a death penalty case); cf. State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006) ("A violation of Rule 5 is not reversible unless prejudice is shown."). He has not asserted, at trial or on appeal, that any of the records, including the post-December records, contained anything relevant or material to either the State or the defense. In fact, Appellant did not even request that the post-December records be made a court's exhibit. (App. 369-74). Significantly, although on appeal Appellant contends that "[a]t the very least the trial judge should have continued the case to permit defense counsel to evaluate the evidence," (Petition for Writ of Certiorari at 19), defense counsel below **never** requested a continuance of trial nor even request further time to evaluate the new records or consult with an expert. Cf. Curtis v. Blake, 392 S.C. 494, 503, 709 S.E.2d 79, 83 (Ct. App. 2011) (pointing out that exclusion of a witness is a harsh sanction not to be lightly invoked and noting that the defendant could have but did not move for a continuance prior to the witness' testimony).

Finally, as suggested above, it is impossible for Appellant to show prejudice from his failure to receive counseling notes, which he was never entitled to receive in the first place. In sum, Appellant has failed to show that the trial judge committed a prejudicial abuse of discretion. This Court should deny the Petition for Writ of Certiorari as to this Question.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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November 1, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. R. Keith Kelly, Circuit Court Judge
Appellate Case Tracking No. 2016-001965

The State, Respondent,

v.

Daniel William Spade, Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 1st day of November, 2016.

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