

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

20170

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Joseph Derham Cole, Circuit Court Judge

Case No. 11-CP-42-2032

Anthony C. Odom,

Appellant,

v.

Respondent.

ALAN WILSON, in his
official capacity as Attorney
General of the STATE OF
SOUTH CAROLINA, J.
STROM THURMOND, JR.,
BARRY BARNETT,
CHRISTINA T. ADAMS, in
their official capacities as
SOUTH CAROLINA
CIRCUIT SOLICITORS

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SC Court of Appeals

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Anthony C. Odom,
Plaintiff,

v.

Alan Wilson, etc., et al,
Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 11-CP-42-2032

ORDER OF DISMISSAL

This matter has come before this Court pursuant to Motions to Dismiss filed by the Defendants Attorney General and Solicitors Barnette, Adams and Thurmond.¹ Following a review of the memoranda submitted by the parties and a hearing on September 12, 2011, this Court grants these Motions to Dismiss for the reasons discussed below. The other Defendants were dismissed by a Notice of Dismissal filed by Plaintiff on September 2, 2011.

The instant case has, in effect, sought to stop an ongoing criminal prosecution of Plaintiff in the Court of General Sessions. See Order of the Honorable R. Lawton McIntosh, August 2011.² Although at the time of September hearing, the Court of General Sessions scheduled trial for a date certain of November 7, 2011, Plaintiff sought an injunction in this Common Pleas

¹ Subject to his Motion to Dismiss, the Attorney General moved to strike paragraphs 33-38 of the Complaint. This Court does not need to reach this Motion because it is dismissing this case.

² This Court may take judicial notice of the Order of Judge McIntosh setting this case for trial on a date certain of November 7, 2011, copy attached to Motion to Dismiss Solicitor Thurmond. *State v. Anthony Odom* (2010-GS-37-363, 364 (Oconee County)). A court may take judicial notice of matters of public record without converting a Motion to Dismiss into a Motion for Summary Judgment. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007); *Jenner v. Dooley*, 1999 SD 20, 590 N.W.2d 463, 470. Such records may include records in prior judicial proceedings (*Jenner*). Judge McIntosh's Order does not present facts from outside the complaint which were found objectionable in *Charleston County Sch. Dist. v. Harrell*, 713 S.E.2d 604 (S.C. 2011).

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case in Spartanburg County to block his trial as scheduled by Court of General Sessions in Oconee County, and also sought damages on his malicious prosecution claim. Although he did not ask for an injunction to be issued directly to that Oconee Court, the effect would be the same, as he requested that prosecutors be enjoined from prosecuting him.

I

**THE COURT OF COMMON PLEAS CANNOT OVERRULE
THE ORDERS OF THE COURT OF GENERAL SESSIONS OR ENJOIN
PROCEEDINGS IN THAT COURT**

This Court lacks the power to enjoin Plaintiff's prosecution in Oconee County and overrule decisions of the Court of General Sessions such as the Order setting this case for trial.³ *Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979); *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986); *Department of Social Services v. Laura D.* 386 S.C. 382, 688 S.E.2d 130 (Ct. App., 2009). Although the above cited cases appear to arise in the context of different circuit judges within the same case, it is consistent with other authority that the Court of Common Pleas lacks the power to enjoin the Court of General Sessions.

Stovall v. Sawyer, 181 S.C. 379, 187 S.E. 821 (1936) makes clear that a collateral attack such as this civil proceeding may not be made.

... It will thus be seen that the doctrine recognized in this state is that a court of equity will only restrain a criminal prosecution when (1) there is a suit pending in equity, (2) in which it is sought to try the same right in issue in the criminal proceeding, and (3) such criminal prosecution is instituted by one party to this pending suit against the other, except (1) when the prosecution is instituted under

³ Because this General Sessions Order is sufficient to establish that proceedings were underway in that Court and that a trial was scheduled, which limits the power of the Court of Common Pleas, the current status of the General Sessions trial or its outcome is not necessary for this Order regarding the Motions to Dismiss.

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an ordinance or statute which is clearly void, and (2) irreparable injury to property rights may result from its enforcement.@

Quoting *Palmetto Golf Club v. Robinson, Sheriff*, 143 S.C. 347, 141 S.E. 610, 616 (1928); see also *Folsoms v. South Carolina Highway Department*, 13 S.E. 2d 130 (S.C. 1941). None of the limited exceptions allowing restraint of a criminal prosecution are present in the instant case. Accordingly, Plaintiff is not entitled to injunctive relief.

II

THE DEFENDANTS ARE IMMUNE FROM ANY DAMAGE CLAIM

The Defendants, as prosecutors, are not subject suit for damages when sued in their official capacities, as here, under well settled law. *Williams v. Condon*, 347 S.C. 227, 235, 553 S.E.2d 496, 500 (S.C. Ct. App. 2001). "[T]he law is clear that a prosecutor cannot be sued in his official capacity under either §1983 for money damages or the Tort Claims Act when the acts complained of were 'judicial' or 'quasi-judicial' in nature." 553 S.E.2d at 509. *Williams* found that the case law "clearly supports the proposition that a prosecutor's typical duties are 'judicial' or 'quasi-judicial' in nature." *Williams v. Condon*, 347 S.C. 227, 249, 553 S.E.2d 496, 500 (Ct. App. 2001).

Although Plaintiff contends that this defense was not raised because the Motions Dismiss only referenced absolute prosecutorial immunity, he reads the Motions too narrowly. *Williams* discussed absolute immunity in personal capacity actions with the barriers to official capacity suits against prosecutor under §1983. The Defendants cited that authority in their memorandum and argued it in Court. As did the *Williams* Plaintiff, they also made their Motion under Rule 12(b)(6) for failure to state a cause of action which encompasses the defense to suit

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under §1983. Moreover, the instant Plaintiff concedes in his memorandum in opposition to the motion to dismiss, that §1983 damage actions cannot be maintained against State officials.

Plaintiff argues that he was not required to reference the Tort Claims Act in order have a recovery under that law, yet he contends that the Defendants should have expressly raised a defense to such an unpleaded cause of action in their Motions to Dismiss. Clearly, his specific allegation of a §1983 action suggests that Plaintiff was not proceeding under other theories of recovery such as the Tort Claims Act, and Defendants were not required to guess that the Act was a recovery theory. Nevertheless, Rule 12(b) does not require that the specific theories of the defense be stated other than the Rule's enumerated grounds such as 12(b)(1)(subject matter jurisdiction), (3) (improper venue) and (6)(failure to state a cause of action) set forth in the instant Motions to Dismiss. Those enumerated grounds do not include Tort Claims Act defenses, but such defenses would be encompassed within the Rule 12(b)(6) defense.

Williams makes clear that Plaintiff may not proceed against the Defendants under either the Tort Claims Act or §1983. Therefore, this action must be dismissed.

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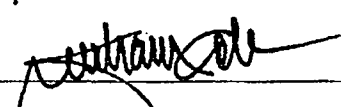
CONCLUSION

The Motion to Dismiss should be granted because this Court lacks the authority to enjoin proceedings in the Court of General Sessions and overrule decisions of that Court and also because the Defendants are barred by *Williams* from recovering against these Defendants under §1983 or the Tort Claims Act. Because this case is subject to dismissal on these grounds, this Court does not need to reach the ground of improper venue under Rule 12(b)(3).

Therefore, IT IS ORDERED, that this case be dismissed.

AND IT IS SO ORDERED.

3/2, 2012


JOSEPH DERHAM COLE
Judge, Seventh Judicial Circuit

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Anthony C. Odom,

Plaintiff(s)

vs.

Alan Wilson, in his official Capacity as
Attorney General of the State of South Carolina
et. al.,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011 - CP - 24 - 2032

(Please Print)

Submitted By: Brian McDaniel, Law Offc Brian McDaniel, LLC

Address: P. O. Box 2085

Beaufort, South Carolina 29907

SC Bar #: 68618

Telephone #: 843-379-5117

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E-mail: bmcDaniel@attorneymcdaniel.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|--|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☒ Permanent Injunction (830)
☐ Forfeiture (840)
☒ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate Civil (910)
☐ Magistrate Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☒ Other (699)
Vindictive Prosecution &
Constitutional violations | | |

Submitting Party Signature:

Date: May 5, 2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
ANTHONY C. ODOM)

Plaintiff,)

vs.)

ALAN WILSON, in his official Capacity)
as Attorney General of the STATE OF)
SOUTH CAROLINA; DAVID PASCOE; J.)
STROM THURMOND, JR.,; ERNEST)
FINNEY; WILLIAM B. ROGERS, JR.;)
DANIEL E. JOHNSON; DOUGLAS A.)
BARFIELD, JR.; BARRY BARNETT;)
JERRY W. PEACE; SCARLETT WILSON;)
CHRISTINA T. ADAMS; DONALD V.)
MYERS; EDGAR L. CLEMENTS, III;)
WILLIAM W. WILKINS, III; I.)
MCDUFFIE STONE, III; GREGORY)
HEMBREE; And KEVIN S. BRACKETT,)
in their official capacities as SOUTH)
CAROLINA CIRCUIT SOLICITORS)
Defendants.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
C.A. NO.: 2011-CP-42- 2032

SUMMONS

(JURY TRIAL REQUESTED)

TO: ALL ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribers hereunder at their offices located at 2015 Boundary Street, Suite 216, Post Office Box 2085, Beaufort, South Carolina, 29901, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in said Complaint.

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

ANTHONY C. ODOM)

Plaintiff,)

vs.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. NO.: 2011-CP-42- 2032

**COMPLAINT FOR IMMEDIATE
INJUNCTIVE AND OTHER RELIEF**

(JURY TRIAL REQUESTED)

ALAN WILSON, in his official Capacity)
as Attorney General of the STATE OF)
SOUTH CAROLINA; DAVID PASCOE; J.)
STROM THURMOND, JR.; ERNEST)
FINNEY; WILLIAM B. ROGERS, JR.;)
DANIEL E. JOHNSON; DOUGLAS A.)
BARFIELD, JR.; BARRY BARNETT;)
JERRY W. PEACE; SCARLETT WILSON;))
CHRISTINA T. ADAMS; DONALD V.)
MYERS; EDGAR L. CLEMENTS, III;)
WILLIAM W. WILKINS, III; I.)
MCDUFFIE STONE, III; GREGORY)
HEMBREE; And KEVIN S. BRACKETT,)
in their official capacities as SOUTH)
CAROLINA CIRCUIT SOLICITORS)

Defendants.)

TO: ALL ABOVE NAMED DEFENDANTS:

COMES NOW, the Plaintiff, Anthony C. Odom, demanding a jury trial and complaining of the
Defendants, Alan Wilson, in his official capacity as Attorney General of the State of South
Carolina (Hereinafter "AG") and all South Carolina Circuit Solicitors, as follows:

COMPLAINT

1. This is an action for declaratory and injunctive relief pursuant to 42 U.S.C § 1983

and the Declaratory Judgment Act, 28 U.S.C. § 2201 brought in this courts concurrent jurisdiction, as well as S.C. Codes §§ 15-53-10, 15-53-20, 15-53-60, 15-53-80, 15-53-90, and 15-53-110 brought by Anthony C. Odom ("Odom" or "Plaintiff") to enjoin the prosecution in violation of federal law, the U.S. Constitution, and Article 1, Section 3, South Carolina Constitution, and to obtain a declaration of the respective rights of the parties. Additionally, to declare S.C. Code § 16-15-342, known as Criminal Solicitation of a Minor, unconstitutional due to violation of the Equal Protection Clause under the Fourteenth Amendment of the US Constitution as well as the South Carolina Constitution, and enjoin its enforcement.

2. Odom is a citizen and resident of the County of Aiken, State of South Carolina, and has been involved in criminal litigation with the Office of the Attorney General for the State of South Carolina since 2006.

3. He was arrested on May 12, 2006 for an alleged violation of S.C. Code § 16-15-342.

4. This initial charge was brought in the County of Spartanburg, State of South Carolina (Spartanburg Charge). This charge has been called to trial on two separate occasions.

5. The first call of the case to trial was in July of 2007, which resulted in evidence being suppressed. The suppression of the evidence was ordered prior to the swearing of the selected jury. This suppression resulted in the order of the trial judge being appealed by the State of South Carolina.

6. During the pendency of the appeal the Office of the Attorney General for the State of South Carolina contacted the United States Attorney for the District of South Carolina to prosecute the Spartanburg Charge.

7. To date no federal charges have been brought.

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SPARTANBURG COUNTY

8. The suppression order was overturned by the South Carolina Supreme Court in State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009).

9. On February 22, 2010 the State of South Carolina called the Spartanburg Charge to trial for the second time. On March 2, 2010 the court granted a mistrial due to a deadlocked jury.

10. Defendant Alan Wilson ("Wilson" or "Defendant Wilson"), the Attorney General of the State of South Carolina, intends to prosecute additional charges in the County of Oconee, State of South Carolina (Oconee Communications). This charge would also be brought under S.C. Code § 16-15-342 and all facts relevant thereto have been known to the Office of the Attorney General since May of 2006 when the crime is alleged to have occurred.

11. In neither the Oconee Communications nor the Spartanburg Charge is it alleged Odom ever traveled to meet anyone.

12. In fact at a July 2007 hearing held in Spartanburg County, South Carolina, the then lead counsel on the Spartanburg Charge at the time David Stumbo, Esquire, stated that there was never any intention to bring the Oconee charge as a separate crime, but to attempt to use as evidence of other bad acts. David Stumbo, Esq. is the immediate predecessor of Megan Wines, Esq. and was the Chief ICAC Prosecutor until July 2007. See excerpt for the official transcript from the July 9, 2007 hearing below:

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11 THE COURT: ALL RIGHT. I JUST -- OBVIOUSLY YOU HAVE A
12 REASON WHY YOU WANT TO USE THEM.

13 MR. STUMBO: UNDER 404(B), YOUR HONOR, WE BELIEVE
14 SEVERAL OF THE EXCEPTIONS APPLY.

15 THE COURT: ALL RIGHT. DO YOU HAVE ANY INFORMATION TO
16 SUPPLEMENT, I MEAN, MR. SWERLING SAYS HE DOESN'T HAVE
17 ANYTHING TO BACK UP THESE STATEMENTS. DO YOU HAVE ANYTHING
18 THAT YOU CAN GIVE HIM?

19 MR. STUMBO: WE DON'T, YOUR HONOR. I ASKED THE
20 INVESTIGATOR. HE NEVER DID AN INCIDENT REPORT BECAUSE HE
21 NEVER -- WE NEVER INTENDED TO CHARGE, YOU KNOW, AT THAT TIME
22 IN OCONEE COUNTY. SO HE'S PROVIDED US WITH THE CHAT LOGS
23 AND CANTASIA, WHICH IS THE LIVE CAPTURE OF WHAT'S GOING ON
24 ON THE COMPUTER SCREEN.

25 THE COURT: ALL RIGHT.

13. Odom is entitled to immediate injunctive and declaratory relief preventing Defendant Wilson from continuing with criminal prosecution of Odom, because such prosecution, violates Odom's fundamental rights under the United States Constitution and South Carolina Constitution, as these new charges amounts to vindictive prosecution.

14. Additionally, S.C. Code § 16-15-342 violates the Equal Protection Clause of the Fourteenth Amendment of the US Constitution as well as the South Carolina Constitution and as such is an unconstitutional statute. As such S.C. Code § 16-15-342 should be declared unconstitutional and unenforceable.

15. On May 11, 2006 a search warrant was executed at the residence of Odom in the County of Aiken, State of South Carolina. Odom as a result gave a statement and then subsequently voluntarily waited three hours at the Aiken Department of Public Safety to allow the County of Spartanburg, State of South Carolina to obtain an arrest warrant.

16. As a result of the warrant for the Spartanburg Charge Odom was placed on interim suspension from the practice of law on May 17, 2006. Odom was engaged in private practice of law at the time of the arrest.

17. Odom's involvement in criminal litigation with the South Carolina Attorney General (AG) began on May 12, 2006 with his arrest for violation of S.C. Code § 16-15-342, also known as Criminal Solicitation of a Minor, which alleged Odom had communicated with and undercover officer in an Adult chat room called "South Carolina Romance".

18. Odom's bond hearing held on May 12, 2006, upon information and belief was specifically arranged to be televised at the request of the AG's office.

19. At the bond hearing held on the Spartanburg Charge Odom's counsel Andy Johnston, Esquire was notified by then Assistant Attorney General David Stumbo, Esq. (Stumbo), who was at the time the Chief ICAC Prosecutor, that an additional charge may be brought concerning alleged communications with an undercover officer operating out of the Town of Westminster, County of Oconee, State of South Carolina (Oconee Communications).

20. These communications allegedly occurred between May 4 and May 6, 2006 and occurred in an Adult chat room called "Romance South Carolina".

21. Upon information and belief the SC AG prosecutes all violations of S.C. Code 16-15-342 and controls the ICAC program.

22. During the pendency of the Spartanburg Charge, which was indicted by the Spartanburg County Grand Jury on June 22, 2006, there were several requests in writing made by Odom's counsel to Stumbo as to the existence of other communications besides the Spartanburg Charge. Stumbo responded to those requests specifically stating there were no other communications than the Spartanburg Communications.

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23. The Spartanburg charges were scheduled for trial in May of 2007, at which time Stumbo informed Odom's lead counsel at the time, Jack Swerling, Esq., that there were in fact other alleged communications, the Oconee Communications.

24. At that time, Stumbo expressed his intent to use the Oconee communications as evidence of other bad acts under the South Carolina Rules of Evidence. Due to the late revelation of this evidence Stumbo agreed with Odom's counsel to continue the Spartanburg Charge.

25. The trial was then rescheduled to be called for trial in July 2006. During the hearing on the Oconee "Bad Act" evidence Stumbo made the statement shown above, that there was no intent by the AG or law enforcement to bring charges related to the Oconee Communications.

26. At this first trial evidence obtained via Orders (D Orders) under The Patriot Act were suppressed by the trial judge, before the swearing of the selected jury for the case. As a result of this suppression the State appealed the ruling, which was overturned by the South Carolina Supreme Court in State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009).

27. Stumbo at the time of the first trial had left the AG's Office and was an Assistant Solicitor with the County of Lexington, South Carolina but had obtained special permission to continue with the prosecution.

28. Megan Wines, Esq. at the time had already taken over Stumbo's ICAC duties at the AG's office and was present and participated at the first trial on the Spartanburg Charge.

29. Also present at the trial was the undercover officer alleged to have been communicated with during the Oconee communications, officer Mark Patterson (Patterson).

30. During the pendency of the appeal the AG had only the Spartanburg Charge

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SUPREME COURT
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OFFICE

reviewed by the S.C. US Attorney's Office.

31. To date, no federal charges have been brought.

32. In August 2006, and during the pendency of the Spartanburg Charge, Patterson left his former position to become an Aiken County Sheriff's Deputy.

33. On or about June 5, 2009 Patterson was arrested and subsequently fired from the Aiken County Sheriff's Office due to an alleged dispute with his wife.

34. The charges on Patterson were eventually dropped, however, Odom wished to obtain copies of the evidence. Said evidence allegedly includes voice communications of Patterson, pictures of text messages to his wife, and several statements by witnesses. (See Exhibit B, Letter from the City of Burnettown, County of Aiken, State of South Carolina.)

35. At the time of Patterson's firing the State had continued to indicate that the alleged communications would be use as bad act evidence.

36. Odom, through his counsel James B. Huff, Esq., made several attempts to obtain this documentation. It was subpoenaed and is considered Brady material. 37. The material requested has not been produced. but due to an order of the City Judge for the City of Burnettown, County of Aiken, State of South Carolina it is not to be destroyed (Exhibit B).

38. On or about February 18, 2010 Assistant Attorney General Megan Wines stated to Odom's counsel that Patterson had become upset due to the efforts by Odom's counsel to obtain the information regarding Patterson's arrest, so she (Wines) was just going to direct indict the Oconee Communications.

39. The Oconee communications are alleged to have occurred between May 4 and 6, 2006 and began in the Adult Chat Room "Romance South Carolina" and the February 2010 statement is the first indication, nearly 4 years after the alleged incident, that the State would

seek criminal charges on these communications.

40. On February 22, 2010 the Spartanburg Charge was called to trial for the second time. This Spartanburg Charge trial ended in a mistrial on March 2, 2010; due to a dead-locked jury.

41. During the trial, the State again stated after motions had been placed before the court, after the swearing of the jury, that the Oconee Communications might be used for bad act evidence. As such the court ordered at that time the State assist Odom in obtaining the information requested.

42. The State never presented the Oconee Communications and provided no assistance.

43. Furthermore, the Spartanburg Charge covers a time period between March 12, 2006 and May 4, 2006 and contains at least 17 separate communications, and resulted in a single indictment. The Oconee Charge(s) cover only two chats on only two separate days but, in contrast to the Spartanburg Charges, resulted in two indictments.

44. Odom asserts that the acts of the prosecutor in this action constitute a violation of Odom's Fifth Amendment Due Process Clause rights as well as his United States Constitutions rights afforded him by the Fourteenth Amendment. These facts present a case of vindictive prosecution. U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001).

45. The charges are being sought to penalize Odom for seeking information needed for his defense.

46. Upon information and belief, the failure of the State to obtain conviction on the Spartanburg Charge has resulted in more charges being prosecuted by the State in the pending action.

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47. The length of time from the alleged event to the charge in this case (nearly 4 years) is highly unusual, and upon information and belief such delay has never occurred for a charge under S.C. Code §16-15-342.

48. All of these prosecutorial decisions have occurred either after the first trial or the second on the Spartanburg Charge.

49. Also it would have been beneficial for the State if they had sought indictment soon after the alleged incident if their true intent was seeking justice.

50. See letter (Exhibit C) of December 5, 2006 stating no further exam of Odom's computer would be performed.

51. Since this letter and after indictment of the Oconee Communications the State obtained a search warrant to conduct further exam on Odom's computer in relation to the Oconee chat, for which no notice was given to the Defendant (See Exhibit D Search Warrant).

JURISDICTION AND VENUE

52. This case arises under the U.S. Constitution and the laws of the United States and presents a federal question within this Court's concurrent jurisdiction under Article III of the Constitution and 28 U.S.C. §§ 1331 and 1343(a)(3). It seeks remedies under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. §§ 1983 and 1988. Additionally, under S.C. Codes §§ 1 as well as S.C. Codes §§ 15-53-10, 15-53-20, 15-53-60, 15-53-80, 15-53-90, and 15-53-110 jurisdiction is established in this Court.

53. Venue is proper in this Circuit and Country per S.C. Code §15-7-30, as one of the Defendants upon information and believe resides within the County of Spartanburg, State of South Carolina and maintains a place of business herein, additionally many of the facts involved in this matter occurred or originated within this the County of Spartanburg, State of Carolina.

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THE PARTIES

54. Plaintiff Odom is a citizen and resident of the County of Aiken, State of South Carolina.

55. Defendant Alan Wilson is the Attorney General of the State of South Carolina and is sued in his official capacity. He is the chief law enforcement officer of the State of South Carolina. Attorney General Wilson retains general prosecutorial authority to ensure that the laws are faithfully executed and has statewide authority to prosecute criminal cases. Pursuant to the Constitution of the State of South Carolina, Defendant Wilson is "the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." S.C. CONST. ART. V, § 24.

56. Megan Wines, Assistant Attorney General is the Chief Prosecutor for the ICAC Program for the State of South Carolina.

57. Defendants David Pascoe, J. Strom Thurmond, Jr., Ernest Finney, William B. Rogers, Jr, Daniel E. Johnson, Douglas A. Barfield, Jr., Barry Barnett, Jerry W. Peace, Scarlett Wilson, Christina T. Adams, Donald V. Myers, Edgar L. Clements, III, William W. Wilkins, III, I. McDuffie Stone, III, Gregory Hembree and Kevin S. Brackett are the Solicitors for the sixteen Judicial Circuits in the State of South Carolina, and are sued in their official capacities as such. Defendant Barry Barnett is the Solicitor for the Seventh Circuit, which includes Spartanburg County, South Carolina.

58. Each of the persons named in paragraph 57 have authority to prosecute criminal violations in their respective circuits. The Solicitors have been named as defendants herein, and this Complaint seeks injunctive and declaratory relief with respect to them, because they are subordinates of Defendant Wilson who either may be compelled to act under his direction or may be directly or indirectly influenced to follow-through on the prosecution of Odom.

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Aiken County
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Causes of Action
Count I

**Violation of Odom's Rights as to Vindictive Prosecution under the Fifth Amendment and
Fourteenth Amendment of the United States Constitution**

59. Odom repeats and realleges paragraphs 1-58.

60. Odom must show that the prosecutor one acted with animus toward the defendant and that he would not have been prosecuted but for this animus.

61. The conduct of the prosecutor is retaliatory for both Odom attempting to acquire information which upset the State's witness and the failure to obtain a guilty verdict on the Spartanburg Charge.

62. This is shown by her statement to Odom's counsel; the timing of the indictments, as well as, the increase of the number of counts between the Spartanburg Charge and the proposed multiple indictments for the alleged Oconee Communications.

63. The facts show a realistic likely hood of vindictiveness and create a presumption of vindictiveness, which shifts the burden to the State. In particular due to the fact these decisions are all post trial. Additionally, other than the arrest of Patterson and his firing nothing has changed concerning the Oconee Communications since 2006.

64. Odom requests that an emergency restraining order be placed on Defendants to prevent them from further pursuing these charges.

65. Odom additionally prays that a permanent injunction be placed on Defendants to prevent the prosecution of such charges should they be indicted.

Count II

**S.C. Code § 16-15-342 violates the Equal Protection Clause of the US Constitution and the
Fourteenth Amendment as Applied to the States and the South Carolina Constitution.**

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66. Odom repeats and realleges paragraphs 1-65

67. Below are the excerpts from S.C. Code § 16-15-342 that are relevant to this cause of action:

(B) Consent is a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.

(D) It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.

68. S.C. Code § 16-15-342 (B) gives an individual the complete defense of consent.

and it does so when "the person reasonably believed to be under the age of eighteen, is at least sixteen years old."

69. In S.C. Code § 16-15-342(D) this defense of Consent is taken away if the "person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity."

70. These two provisions ((B) and (D)) create two classes of persons. The first is a class (B Class) in which one believes they are communicating with someone under the age of eighteen, but are in fact communicating with someone sixteen or older, but the person believed to be less than eighteen years of age happens not to be "a law enforcement agent or officer acting in an official capacity." The B Class person has the defense of consent under S.C. Code § 16-15-342 (B).

71. In the second class (D Class) the Defendant believes they are communicating to someone under eighteen, but the individual is communicating with "a law enforcement agent or

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officer acting in an official capacity.” Under S.C. Code § 16-15-342(D) this D-Class individual would not have the defense of consent.

72. Below is listed the portion of S.C. Code § 16-15-342 that defines the crime:

A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen

73. Under the Fourteenth Amendment of the United States Constitution to violate the Defendant’s rights to Equal Protection under the law certain showings must be made. One is that there exist similarly situated individuals.

74. Then one must show that there is disparate treatment under the law of the similarly situated individuals. Lastly, the State must have both a legitimate interest in treating the two individuals differently and must do so on a rational basis. Olson v. DHEC, 379 S.C. 57, 663 S.E.2d 497 (Ct.App. 2008), Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002), Village of Willowbrook v. Olech, 120 S.Ct. 1073, 528 U.S. 562 (2000)

75. Under S.C. Code § 16-15-342 it is clear that members of either the B class or D class would be similarly situated individuals. Both believe that the individual to whom they are communicating with is under Eighteen. Both have the required specific intent in the communication of “persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in

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Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen”.

76. There is simply no objective difference between the B Class and D Class individual.

77. However, the B Class individual is communicating with someone over sixteen who is not a law enforcement agent or officer acting in an official capacity, while the D Class individual is communicating with a law enforcement agent or officer acting in an official capacity. The law under S.C. Code § 16-15-342(B) gives the member of B Class a complete defense, but denies it to the member of the D Class under S.C. Code § 16-15-342(D).

78. The law is not treating the two similarly situated individuals the same. One (B-Class) has a full defense while the other (D-Class) does not have a defense based on consent. This disparity is true even when the classes' intents, beliefs, and communications are identical. The Fourteenth Amendment of the United States Constitution is therefore implicated and violated.

79. It appears clear that the purpose of S.C. Code § 16-15-342 is to protect those under the age of sixteen from solicitation of both sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60. With this being the expressed goal of the statute the State is unable to justify treating members of Class B and Class D so differently.

80. The State must have both a legitimate interest in treating the two individuals differently and must do so on a rational basis Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002). In this case there is none. Both hypothetical class members show the same criminal inclinations. Both class members are engaged in the same activity. Both class members are

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equally dangerous to those under the age of sixteen. There is no legitimate interest in treating the two individuals differently.

81. Should it be found there is a legitimate interest to treat members of B Class and D Class differently the State must show it is doing so on a rational basis Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002).

82. Given the purpose of the statute there can be no such rational basis.

83. S.C. Code § 16-15-342(D) violates the Fourteenth Amendment of the United State Constitution. It does so by depriving the Defendant of equal protection under the laws of this State and the United States. The classes under this statute are identical. There is no compelling State interest or other interest of the State to do so. Additionally, there is no rational basis for the disparity in treatment of the two classes under the law.

84. Odom requests this Court find that S.C. Code § 16-15-342 does in fact violate Equal Protection as provided by the Fourteenth Amendment of the US Constitution and Article 1, Section 2 of the South Carolina Constitution. As such that an emergency and permanent injunction be placed upon the Defendants from enforcement of this statute.

Count III

Declaration of the Parties Respective Rights under 28 U.S.C. § 2201, as well as S.C. Codes §§ 15-53-10, 15-53-20, 15-53-60, 15-53-80, and 15-53-90

85. Odom repeats and realleges paragraphs 1-84

86. Odom's rights are being violated by the pursuit of charges based upon the Oconee Communications as vindictive prosecution.

87. Odom's rights are violated by being subject to prosecution and prosecuted for

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alleged violations of S.C. Code 16-15-342, when such statute is unconstitutional in violation of the Fourteen Amendment of the United States Constitution and the South Carolina Constitution.

88. Odom requests this Court to enjoin the enforcement of S.C. Code §16-15-342, and declare that the prosecution of charges based on the Oconee Communications amounts to vindictive prosecution and enjoin these charges from being sought or prosecuted by the AG.

Count IV

42 U.S.C. § 1983

89. Odom repeats and realleges paragraphs 1-88

90. Odom's civil rights have been violated under color of state law due to prosecution that is vindictive.

91. Odom's civil rights have been violated under color of state law due to prosecution under an unconstitutional statute.

92. Odom requests monetary damages as allowed by law as well as attorneys fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Declare the prosecution of Odom for the Oconee Communications is impermissible as a violation of Odom's Filth Amendment Rights and Due Process as afforded him by the US Constitution and applied to the States by the Fourteenth

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Amendment and the South Carolina Constitution, since such prosecution would be vindictive,

B. Permanently enjoin Defendants, their officers, agents, servants, and attorneys from prosecuting any case in regard to the Oconee Communications against Odom,

C. Declare that S.C. Code § 16-15-342 is in violation of the Equal Protection Clause of the US Constitution as applied to the States by the Fourteenth Amendment, and the South Carolina Constitution,

D. Permanently enjoin Defendants, their officers, agents, servants, attorneys, from the Enforcement of S.C. Code 16-15-342 due to its unconstitutionality.

E. Hold a jury trial as request pursuant to S.C. Code §15-53-90,

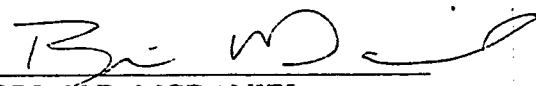
F. Award Odom his reasonable costs and attorney fees pursuant to 42 U.S.C. § 1988;

G. Award monetary damages as allowed by law under 42 U.S.C. §§ 1988 & 1983; and

H. Grant Odom such other and further relief as the Court deems just and proper.

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SPARTANBURG COUNTY
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M. HOE BLANCHLEY

LAW OFFICE OF BRIAN MCDANIEL, LLC

BY: 

BRIAN D. MCDANIEL

Post Office Box 2085

2015 Boundary Street, Suite 216

Beaufort, South Carolina 29901

PHONE (843) 379-5117

FAX (843) 379-5118

ATTORNEY FOR THE PLAINTIFF

Beaufort, South Carolina
May 5, 2011

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[NONE}

EXHIBIT A is omitted

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TOWN OF BURNETTOWN

HOME OF THE SASSAFRAS FESTIVAL

Burnettown Police Department

3144 Augusta Road
Burnettown, SC 29851

Post Office Box 994
Bath, SC 29816

14 December 2009

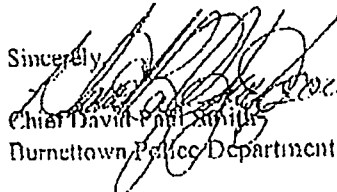
Burnettown Municipal Court
ATT: Honorable Rodger Edmonds
P.O. Box 994
Bath, Sc 29816

Reference: Investigative Case File Mark Patterson Case 2009-01092

This is to serve as official notice of retention of above listed case file and to list a table of content thereof. The case file is to be secured by the court until a resolution of this matter per your order.

Incident report of Chief Smith reference above case number.
6 copies of photographs of texts on Ellen Patterson's cell phone
1 cd containing voicemails left on Ellen Patterson's cell phone
3 page written statement of Ellen Patterson
1 Page written statement of Calvin McCravy
1 letter from DR. Dewitt
Crime victim intake forms

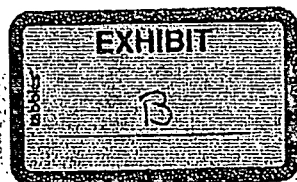
Sincerely,


Chief David Paul Smith
Burnettown Police Department

Town Hall
803-593-2676

Burnettown Police Department
David Paul Smith
Chief of Police
Office: 803-593-2100
Fax: 803-593-6275
ChiefDP@burnettown.com

Police Department
803-593-2100



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M. HOPE BLACKLEY

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CLERK OF COURT
SPARKLAND COUNTY

STATE OF SOUTH CAROLINA

Search Warrant

Form approved by
S.C. Attorney General
Section 17-13-140
March 15, 1978

COUNTY OF LEXINGTON

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF
COUNTY LEXINGTON

It Appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

Hitachi Deskstar 250 GB SATA HDD Serial Number T4CH8APE, item currently located in evidence storage at the South Carolina Law Enforcement Division Computer Crime Center located at 1731 Bush River Road. As a result of the execution of this search warrant, a search for any and all saved, archived or deleted data including but not limited to chat logs and or records related to the screen names 'danger6552000', 'Roge Wilson' and 'a_upstategurl93'; emails, ledgers, diaries, notes, documents, photographs and other items that reflect an interest in sexual activity between adults and minors. Also to be searched for are maps, directions, or internet searches that indicate travel or plans to travel to Oconee County or Westminster. All searches are pertaining to this investigation of Criminal Solicitation of a Minor

Now, therefore, you are hereby authorized to search the subject premises described below, and to seize such property if found

DESCRIPTION OF PROPERTY

As a result of the execution of this search warrant, a search for any and all saved, archived or deleted data including but not limited to chat logs and or records related to the screen names 'danger6552000', 'Roge Wilson' and 'a_upstategurl93', emails, ledgers, diaries, notes, documents, photographs and other items that reflect an interest in sexual activity between adults and minors. Also to be searched for are maps, directions, or internet searches that indicate travel or plans to travel to Oconee County or Westminster. All searches are pertaining to this investigation of Criminal Solicitation of a Minor

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to The Honorable

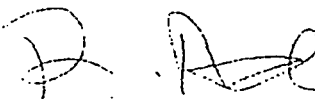
ADAMS
within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made

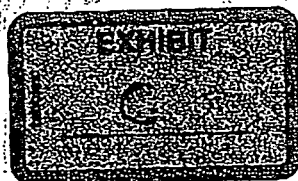
A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises

LEXINGTON, S.C.

September 7, 2010

SCCA-513 (3-78)


Signature of Judge



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MR. HOSKINS-ACOLEY

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

AFFIDAVIT

Personally appeared before me, one S/A Lucinda H McKellar
who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under
provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises
in this County: LEXINGTON

DESCRIPTION OF PROPERTY SOUGHT

As a result of the execution of this search warrant, a search for any and all saved, archived or deleted data including but
not limited to chat logs and or records related to the screen names 'danger6552000', 'Roge Wilson' and 'a_upstategurl93',
emails, ledgers, diaries, notes, documents, photographs and other items that reflect an interest in sexual activity between
adults and minors. Also to be searched for are maps, directions, or internet searches that indicate travel or plans to travel
to Oconee County or Westminster. All searches are pertaining to this investigation of Criminal Solicitation of a Minor.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

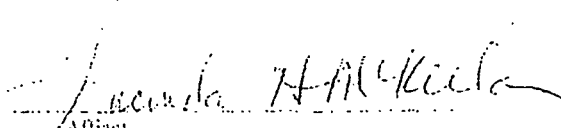
Huachi Deskstar 250 GB SATA HDD Serial Number T4CH8APE, item currently located in evidence storage at the South
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diaries, notes, documents, photographs and other items that reflect an interest in sexual activity between adults and
minors. Also to be searched for are maps, directions, or internet searches that indicate travel or plans to travel to Oconee
County or Westminster. All searches are pertaining to this investigation of Criminal Solicitation of a Minor.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

See attached affidavit.

Sworn to and Subscribed before me
This 7 day of Sept, 2010


Signature of Judge


Affiant
4400 Broad River Road
Columbia, SC 29210
U.S. 803-896-7001

M. HOPE BLACKLEY

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CLERK OF COURT
SPRINGFIELD COUNTY

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HENRY McMASTER
SECURITIES COMMISSIONER

December 5, 2006

Jack B. Swerling, Esquire
1720 Main Street, Suite 301
Columbia, SC 29601

Re: State v. Anthony C. Odom (2006-GS-42-2289)

Dear Mr. Swerling:

Thank you for your letter of November 30, 2006 inquiring about the forensic exam of Mr. Odom's computer. I received new some information from SLED last week regarding the progress of the exam, and can confirm that no further exam work has been done on the computer at the Computer Crimes Center. SLED does not intend to conduct a full forensics exam on Mr. Odom's computer. I will contact you this week and discuss the reason for this decision. The preview examination conducted on site at Mr. Odom's residence by SLED produced results that were disclosed in the "Preliminary Report" disc that I gave to you on June 30 in Spartanburg. The results of this preview exam will be the only evidence preserved from the computer for purposes of the prosecution of this case.

Thank you and I look forward to discussing these matters with you by phone this week.

With best wishes, I remain
Sincerely,

David M. Stumbo
Assistant Attorney General

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1 THE COURT: Alright, this is Odom vs. the Attorney
2 General and others?

3 MR. SMITH: Yes, Your Honor.

4 THE COURT: Alright, whose motion?

5 MR. SMITH: We've got two motions, the two groups of
6 motions to be heard today, Your Honor, one, the the defendants
7 that have been served have moved to dismiss, that is, the
8 Attorney General and Solicitors Barnette, Adams and Thurmond,
9 I believe that the plaintiff has served a notice of dismissal
10 as to the remaining defendants. We filed the motion to
11 dismiss Solicitor Thurmond on Friday, I emailed it to the
12 court coordinator here and asked that it be taken up today,
13 it's identical to the other motions except that the Attorney
14 General Wilson's motion also includes a motion to strike so I
15 think they can all be considered to today and and then in
16 addition, the plaintiff has got a motion for a TRO and
17 preliminary injunction, if the Court dismisses this case, that
18 would make unnecessary reaching that motion so I would suggest
19 to Your Honor that we proceed with the motion to dismiss but
20 however you wanna do it is fine with us.

21 THE COURT: Well I'm probly gonna have to hear it all
22 anyway. You you emailed some briefs and all before lunch?

23 MR. SMITH: Yes, I did, Your Honor, I'm sorry it was no
24 earlier than two hours ago but I I have and I've got memoranda
25 that I can hand up, I've given copies to counsel. I've got a

1 memorandum in support of the motions to dismiss and a
2 memorandum in opposition to the TRO motion, most ---

3 THE COURT: Are these copies for me?

4 MR. SMITH: Those are copies for you, Your Honor, I have
5 also mailed 'em to the clerk for filing, and, uh ---

6 MR. MCDANIEL: Your Honor, if I may as well give ya
7 the -- our memorandum in opposition to their motion to
8 dismiss.

9 THE COURT: Okay.

10 MR. MCDANIEL: That's your copy, Your Honor.

11 THE COURT: Alright, and who's the third solicitor that's
12 moving to be dismissed? We got Barnette, Thurmond and who?

13 MR. SMITH: Adams, Christy.

14 THE COURT: Adams, okay.

15 MR. SMITH: Yes, Christy Adams.

16 THE COURT: Alright, well we'll just begin with his one.
17 I'm gonna hear both of ya so we'll begin with either one.

18 MR. SMITH: Well since I'm already up here would you like
19 me to ---

20 THE COURT: That's fine.

21 MR. SMITH: --- deal with the motion to dismiss? Your
22 Honor, these cases, this case in this court attempts through
23 a civil action to enjoin proceedings in the court of general
24 sessions for Horry County.

25 (Whereupon, a discussion was held off the record.)

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS

Anthony C. Odom,)
Plaintiff,) TRANSCRIPT OF RECORD
-vs-) 2011-CP-42-2032

Alan Wilson, et al.)
Defendant.) September 12, 2011
Spartanburg, South Carolina

B E F O R E:

HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S:

BRIAN DEEN MCDANIEL, ESQ.
Attorney for the Plaintiff

J. EMORY SMITH, JR., ESQ.
Attorney for the Defendant

Margaret A. Woods
Circuit Court Reporter

ORIGINAL

1 THE COURT: Alright, this is Odom vs. the Attorney
2 General and others?

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23 MR. SMITH: Yes, I did, Your Honor, I'm sorry it was no
24 earlier than two hours ago but I I have and I've got memoranda
25 that I can hand up, I've given copies to counsel. I've got a

1 memorandum in support of the motions to dismiss and a
2 memorandum in opposition to the TRO motion, most ---

3 THE COURT: Are these copies for me?

4 MR. SMITH: Those are copies for you, Your Honor, I have
5 also mailed 'em to the clerk for filing, and, uh ---

6 MR. MCDANIEL: Your Honor, if I may as well give ya
7 the -- our memorandum in opposition to their motion to
8 dismiss.

9 THE COURT: Okay.

10 MR. MCDANIEL: That's your copy, Your Honor.

11 THE COURT: Alright, and who's the third solicitor that's
12 moving to be dismissed? We got Barnette, Thurmond and who?

13 MR. SMITH: Adams, Christy.

14 THE COURT: Adams, okay.

15 MR. SMITH: Yes, Christy Adams.

16 THE COURT: Alright, well we'll just begin with his one.
17 I'm gonna hear both of ya so we'll begin with either one.

18 MR. SMITH: Well since I'm already up here would you like
19 me to ---

20 THE COURT: That's fine.

21 MR. SMITH: --- deal with the motion to dismiss? Your
22 Honor, these cases, this case in this court attempts through
23 a civil action to enjoin proceedings in the court of general
24 sessions for Horry County.

25 (Whereupon, a discussion was held off the record.)

1 MR. SMITH: I thought I said Oconee.

2 (Whereupon, a discussion was held off the record.)

3 MR. SMITH: Oconee County and we believe that this cannot
4 be done for all the reasons set forth in our memoranda. Court
5 of common pleas cannot enjoin proceedings in the court of
6 general sessions. There's authority that we've cited on that
7 in our, in our memoranda, in particular the *Stovall* case, it
8 says that the court of common pleas cannot enjoin a a criminal
9 prosecution except under very narrow circumstances such as if
10 a statute were clearly void and the statute in this instance
11 is not clearly void, they've made no such showing whatsoever
12 and for this reason this court cannot enjoin proceedings in
13 the court of general sessions in Oconee County. We attached
14 an order from that court showing that a date certain has been
15 scheduled for trial in November, I believe the pre-trial is
16 scheduled, this court can't interrupt those processes and so
17 therefore they have -- they cannot obtain any relief on their
18 claim, this court can't entertain their claim. In addition,
19 they have tossed in a damage claim. Under the *Williams v.*
20 *Condon* decision damages cannot be recovered from the Attorney
21 General or solicitors and they're entitled to absolute
22 prosecutorial immunity. Now he contends in his supplemental
23 in his reply memoranda that that that's doesn't apply because
24 they're sued in their official capacities rather their
25 individual capacities but he seeks damages under 1983 and so

1 therefore to the extent that the suit is against them in their
2 official capacities then that is a suit against the State to
3 obtain damages and they cannot do that. They cannot obtain
4 damages under the Tort Claims Act because the Tort Claims Act
5 preserves existing immunities except where waived by the
6 Supreme Court and the s -- the prosecutori -- prosecutorial
7 immunity stands according to the *Williams* case. In addition,
8 that case noted that judicial immunities may apply also to the
9 solicitor so we believe that on botha these grounds they
10 cannot recover anything here, this court can't even entertain
11 this action. And a third ground for our motion to dismiss is
12 that this court this is improper venue. The prosecutions are
13 going on in Oconee County as I said and I attached an order of
14 that court scheduling the case for trial, that's where the
15 controversy is. The venue statute says the action should be
16 brought where the controversy is. The fact that there may
17 have been a conversation allegedly in Spartanburg County does
18 not alter the fact that the real controversy is in Oconee
19 County; if there weren't a controversy there, the prosecution
20 wouldn't be there and so for this reason this court lacks
21 venue and on that basis it really doesn't even need to reach
22 these issues of its authority to enjoin the court of general
23 sessions or award damages. These matters are ones that can be
24 taken up by the court of general sessions, the trial in that
25 case should go forward, this is an unwarranted, unprecedented

1 intrusion into the way this case ha -- this state has set up
2 its court system and it should be dismissed.

3 THE COURT: Okay, I thought this case was set to be heard
4 in in June or July.

5 MR. SMITH: It was, Your Honor, and in June you heard
6 motions to quash and for a protective order in ---

7 THE COURT: Right.

8 MR. SMITH: --- this case and you granted those motions.
9 I believe the protective order was to last until you made a
10 ruling on the motions to dismiss. At that time the case was
11 scheduled for trial at the end of June but at the end of June
12 Judge Macaulay who was hearing the case recused himself and
13 the case was continued and now it has been set by a different
14 judge for a day certain in November.

15 THE COURT: Okay.

16 MR. MCDANIEL: If I may respond.

17 THE COURT: Yeah.

18 MR. MCDANIEL: Sure, let me respond by each point that
19 was raised in their motion to dismiss if I can. First let me
20 make clear we're not asking to -- this court to enjoin another
21 court or just and make -- put an injunction on the judge,
22 we're asking for an injunction against the AG to enjoin them
23 from prosecuting Mr. Odom wherever that may be. There are
24 pending charges in Spartanburg County, he -- there's
25 indictment was against him that is still in Spartanburg

1 County, it was out of that indictment and his challenge, his
2 attempt to get information in that case which sprung the
3 vindictive prosecution claim resulting in the charges being
4 brought in Oconee and and I can explain that, Your Honor, as
5 far as how that occurred, I be -- if -- and I'll --- if I can
6 I'll come back to that in just a second.

7 THE COURT: Well ya'll might've explained that last time
8 but anyway go ahead if ya need to.

9 MR. MCDANIEL: Well let me, let me clarify. Last time we
10 were here the the what the order that you put forth was a, was
11 I believe a 90-day hold not until the dismi -- motion to
12 dismiss is heard which which ever occurred earlier so, ya
13 know, that that is not a, not a standing order. Certainly
14 this court can hear motions for injunction, there's nothing
15 out of the jurisdiction of the circuit court in Spartanburg
16 County that doesn't have subject matter jurisdiction to hear a
17 motion or a a complaint, I'm sorry, to enjoin an action, the
18 and again, action is to enjoin prosecution, not to enjoin a
19 court from hearing a case or an enjoin a judge, I I think this
20 is a a a kind of a backdoor way tryin' to pit courts against
21 each other and that's not what's bein' done here.

22 Let me also address the the damages matter that he's
23 brought forth about prosecutorial immunity. One of the bases
24 that they raise the motion has been for prosecutorial
25 immunity, that applies only if they're being sued personally.

1 It's very clear in the complaint throughout that they are not
2 being si -- sued personally, they're being sued it's in the
3 caption and throughout in their capacity so the defense that
4 has been raised of prosecutorial immunity is clearly not im --
5 is not active in this, in this instance. Now that that
6 they're also trying to raise an additional defense, um, of
7 sovereign immunity under the 1983 action as to the damages
8 portion and again this wouldn't affect the equity action that
9 we have goin' for an injunction but as to the damages claim
10 against the State, the the according as he said according to
11 the *Stovall* ca -- I mean, the *Condon* case the defense that the
12 State could raise there would be sovereign immunity, that they
13 cannot be sued for damages but they haven't raised that, Your
14 Honor, and according to the rules, and I would cite the 12,
15 Rule 12, specifically 12(g), consolidation of defense, of
16 defenses in motion, but they're gonna -- they haven't pled the
17 defense so far, they haven't pled an answer, excuse me,
18 instead they decided to do 12(b) motions or 12, Rule 12
19 motions and what what the rule indicates with that is if you
20 are gonna bring those motions ya have to bring all of 'em if
21 you're gonna bring any that are additional to jurisdiction and
22 venue the ones that are laid out. Well they have raised
23 additional ones, they've raised now prosecutorial immunity so
24 under the rule they they cannot and now also bring in another
25 motion for sovereign immunity. Whether they can present that

1 as a defense later, ya know, is we believe it may be barred as
2 well but as to today and to the ruling sovereign immunity was
3 not, was not noticed as a a defense and and we believe they've
4 now under Rule 12(g) waived the ability to bring that as a
5 defense or at least as a motion where it, where it indicates
6 there any therefore make a motion based on, he shall not
7 thereafter make a motion based on the defense or objection if
8 it wasn't brought in at the time of these additional defenses
9 beyond the the 12(b) normal defenses were raised.

10 As to venue, ya know, it it's completely a
11 mischaracterization to say a couple of conversations. This
12 action arose, let me just give ya the the background, in 2006
13 Mr. Odom was arrested based on conversations in March of 2006
14 that are allegedly had on the internet. There's about a three
15 or four week period as I recall of conversations with some
16 officer believed to be in Spartanburg County and then perhaps
17 another couple a days a a officer that was in Oconee County.
18 The claims were were known to the Attorney Generals from the
19 very beginning and they chose to bring the Spartanburg charges
20 and they didn't do anything with the Oconee charges; in fact,
21 indicated early on as we said that they were -- they did not
22 plan to bring those as charges. It wasn't until Mr. Odom in
23 the defense of his Spartanburg case his attorney, Mr. Huff,
24 and, Your Honor, he he testified to this in in Oconee, we made
25 this motion in Oconee and resu -- and the result was that

1 Judge Macaulay recused himself at the end of the motion but in
2 that motion Mr. Huff testified that his conversations with the
3 Attorney General's office Ms. Wines was such that he was
4 requesting certain information as to Patterson, Officer
5 Patterson who was involved in the Oconee chats, they were --
6 there was indication, there's indication that those Oconee
7 chats would be used in the Spartanburg ---

8 (Coughing.)

9 THE COURT: Excuse me.

10 MR. MCDANIEL: --- would be used in the Spartanburg case,
11 that they were gonna be used as other acts other bad
12 evidence -- no, other bad acts evidence so Mr. Huff, that is,
13 Mr. Odom's criminal attorney, requested the information about
14 Mr. Patterson's being arrested, being fired from the police
15 department and other allegations about Mr. Patterson which
16 they believe to be relevant to his defense. At the same time
17 Ms. Wines was trying to get Mr. Huff to agree to allow certain
18 internet Yahoo authentication without calling in the people
19 from Yahoo to authenticate it. There was a disagreement about
20 that, Ms. Wines has confirmed that in her statement, that she
21 went on the record and she was in the, in the Oconee matter
22 that there was contention. Mr. Huff his testimony is that at
23 the point that she said that that they said that they've
24 continued to want the Oconee Patterson information that she
25 said fine, we'll just indict it in Oconee then. Your Honor,

1 that fits I I -- perfectly with the, with the the statute for
2 vindictive prosecution, that is, if if I may just read quick,
3 It is well established that a prosecutor who violates the due
4 process clause of the Fifth Amendment by exacting a price for
5 a defendant's exercise of a clearly established right or by
6 punishing the defendant for doing what the law plainly
7 entitles him to do, if and if that's the case there's a
8 presumption of vindictiveness and and we believe that we
9 presented that in the -- in that matter. From that, from that
10 happening, the O -- the Oconee charges were then filed, are
11 are then indicted in in Oconee. Previous to that in two
12 trials and all the conversations were regarding the
13 Spartanburg matter and were held in Spartanburg, there was a a
14 week long trial in Spartanburg and there is the solicitor that
15 can still bring those charges is named as a defendant in this
16 action as it or his, or his business in Spartanburg, the the
17 the matter is not one of of simply tryin' to to stop Oconee
18 from hearin' the case, it's it's a much broader picture than
19 that and if -- and the the possibility and while we've named
20 Spartanburg, Oconee and Aiken as as well as the Attorney
21 General office -- offices 'cuz those are the counties we
22 believe that they could feasibly direct to prosecute Mr. Odom
23 for these claims and they're all interrelated claims and
24 they've made 'em that way, they didn't bring the Oconee claim
25 until four years or five year, I think four years after the

1 event occurred and and if I may, Your Honor, would just pass
2 up one more thing for Your Your Honor to consider. This was,
3 this was the the motion that was made in Oconee County that
4 lays out, um ---

5 (Whereupon, counsel handed the document to the Court.)

6 MR. MCDANIEL: --- claim for vindictive prosecution that
7 was set forth there. Um, ---

8 THE COURT: And this was heard by Judge Macaulay?

9 MR. MCDANIEL: It was heard by Judge Macaulay, Your
10 Honor, and what happened with that ---

11 MR. SMITH: Excuse me, ---

12 MR. MCDANIEL: --- was ---

13 MR. SMITH: --- Your Honor, if I, if I maybe address just
14 the nature of this document. As you know we're on a motion to
15 dismiss now and and and documents outside the record are are
16 not to be presented with certain narrow exceptions and we
17 attached a copy of the order scheduling the Oconee prosecution
18 for trial and set forth the reasons why that order could be
19 considered by the Court without converting this motion to a
20 motion for summary judgment. I believe that that same
21 authority would support this courts considering the motion to
22 dismiss due to prosecutorial vindictiveness and with that
23 caveat I don't object to it. I do object to converting this
24 motion to a motion for summary judgement but I believe that
25 under the narrow authority that we set forth in our memoranda

1 that this court can consider this and I've got no objection to
2 it.

3 THE COURT: Okay.

4 MR. MCDANIEL: Your Honor, in that -- in in the case in
5 Ocone, the the jury was was selected but not sworn, at the
6 end of the, enda that the day Judge Macaulay heard the motion
7 to dismiss for vindictive -- for prosecutorial vindictiveness
8 and I, and I would like to put in the the transcript from that
9 for Your Honor to read 'cuz I think it's it's needed in this
10 case. Whether it's needed for the motion to dismiss or kept
11 later for the -- for our motion, I would like to to provide
12 that copy of that hearing transcript to the -- to Your
13 Honor ---

14 (Whereupon, counsel handed the document to the Court.)

15 MR. MCDANIEL: --- and and I do that, Your Honor, because
16 I, at least for the purpose of you making your own
17 determination as to why Judge Macaulay recused himself. It it
18 appears to me the one of the allegations that we've made ---

19 MR. SMITH: Excuse me, Your Honor, I ---

20 MR. MCDANIEL: --- is vindictive pros -- vindictive
21 prosecution.

22 MR. SMITH: --- excuse me, Your Honor, I do object to the
23 receipt of the transcript for purposes of the motion to
24 dismiss. I think it's got, it's got testimony in it, it's got
25 discussions, the colloquys with the judge and I don't think

1 that that's appropriate ---

2 THE COURT: Well understood ---

3 MR. SMITH: --- for the motion to dismiss.

4 THE COURT: --- as I understood, I -- as I understood it
5 he he's handing it up 'cuz he's talkin' about it but he's
6 actually intending to offer it for the purposes of his own
7 motion, is that true or false?

8 MR. MCDANIEL: That's true, Your Honor, I think it bears
9 on the understanding of where where we're going with the
10 motion to dismiss, ---

11 MR. SMITH: Well ---

12 MR. MCDANIEL: --- we certainly intend to offer it ---

13 MR. SMITH: --- well I think ---

14 MR. MCDANIEL: --- for that purpose.

15 MR. SMITH: --- he can argue -- he can admit it for the
16 purposes of, it's admissible for purposes of his motion for a
17 TRO and a temporary injunction; I do not think it's admissible
18 and subject to consideration on motion to dismiss.

19 THE COURT: Alright, I understand.

20 MR. MCDANIEL: Your Honor, in that, in that hearing it's
21 my understanding that the judge heard evidence based on an
22 additional matter of the vindictive prosecution that we hadn't
23 really presented to you as far as the creation or the putting
24 the ac -- the Attorney General's office selecting Judge
25 Macaulay and telling him that there was a -- asking him to

1 hear a statewide grand jury case in a ---

2 MR. SMITH: Your Honor, I ---

3 MR. MCDANIEL: --- manner as shown ---

4 MR. SMITH: --- object to his saying ---

5 MR. MCDANIEL: --- when that was not the case ---

6 MR. SMITH: --- the Attorney General selecting Judge
7 Macaulay, there's no ---

8 MR. MCDANIEL: Your Honor, if I ---

9 MR. SMITH: --- evidence in ---

10 MR. MCDANIEL: --- can just finish ---

11 MR. SMITH: --- the record.

12 MR. MCDANIEL: --- my statement here.

13 THE COURT: Well I'll I'll let you respond to whatever he
14 tells me.

15 MR. MCDANIEL: That that there was a selection there of
16 indication to Judge Macaulay that this was a statewide grand
17 jury matter and on that basis Judge Macaulay agreed to move it
18 to Oconee County, it was -- is not, has never been a statewide
19 grand jury matter, that was the implication to Attorney Huff,
20 Mr. Odom's counsel, was not that this was a state, that it
21 never was a state grand -- wide grand jury case but it was
22 presented that way to Judge Macaulay, that was brought up in
23 the -- as part of the testimony as to how this got before
24 Judge Macaulay, how this ended up in in the court that it was
25 in. It was basically it it determined there was no Oconee

1 County term of court for an original hearing on the matter,
2 this was back in April before the actual trial happened, but
3 it, what it did was it bypassed Judge M -- McIntosh, the
4 administrative judge, and and got the judge that they were
5 seeking to get there. The result of that is that Judge
6 Macaulay had information about how that was done, that he said
7 he had inside or got information outside the records and that
8 he believed that because a that he couldn't be a witness and
9 the judge in the case and that was the reason for the recusal
10 of the case so just so Your Honor understands where where it's
11 now 'cuz I understand it's gone back to the administrative
12 judge like it should have to begin with and Judge McIntosh is
13 is putting it forward for sometime in November. The the basis
14 for that is and the reason that I guess that's that's brought
15 up; one, is to explain to the Court, ya know, what what's
16 happened with it but; two, this, all the prosecution all ties
17 back to the S -- the original case that was brought in
18 Spartanburg and let me I guess address the the the final
19 point: The general sessions court cannot hear the matters
20 that you're hearing, that is, they cannot offer the remedies
21 that you can offer. We cannot get an injunction in in in the
22 c -- general sessions court, we can't get damages in the
23 general sessions court. We're asking for a different that
24 they can't enjoin the AG's office from prosecuting Mr. Odom,
25 they can dismiss it but that's it and and certainly these

1 motions will continue to be made in those ongoing criminal
2 matters but we're seeking to end this in a way and have
3 somebody review the totality of the circumstances and make a
4 ruling is this vindictive, if it is, it it needs to stop and
5 it needs to, needs to end, that's, we'd offer that as as our
6 rebuttal, Your Honor.

7 THE COURT: Okay.

8 MR. SMITH: Your Honor, I hate to ter -- use the term
9 "ridiculous" in court but this is a ridiculous lawsuit. He
10 claims that he's not seeking to enjoin the criminal
11 prosecution in general session, not enjoin the general
12 sessions court but of course this is what this is trying to
13 do. The Court has scheduled this case for trial in Oconee
14 County and he wants an injunction saying that these
15 prosecutors can't prosecute that case so they're gonna go to
16 Oconee if such an injunction were issued say, Sorry, Judge, we
17 can't comply with your order because the common pleas court in
18 Spartanburg County that has no tie to this case has told us we
19 can't come. This is ridiculous. If this could be done in
20 this case, it could be done in any case. Any dissatisfied
21 defendant, and virtually all of them are dissatisfied, could
22 go to common pleas court and seek an injunction against their
23 criminal prosecution and tie things up while the common pleas
24 court and potentially the appellate court try to resolve
25 matters, that's not the way our criminal justice system and

1 our court system was set up and this should be dismissed,
2 I -- immediately, respectfully, Your Honor.

3 He claims that the the damages issue is somehow, the
4 immunity is somehow waived, Your Honor. We brought this
5 action under Rule 12(b)(6) as well as under 12(b)(3) for venue
6 and 12(b)(1) for subject matter jurisdiction. Under 12(b)(6)
7 that's failure to state a cause of action. They cannot state
8 a cause of action here for damages because there are
9 immunities from damages and they have conceded that in their
10 memoranda. They've conceded that they cannot get a judgment
11 for damages against the State under 1983 because the State is
12 not a person under that and of course they can't and the the
13 Supreme Court opinion and the Court of Appeal's opinion in
14 *Williams* that we cited it in our memorandum makes clear that
15 damages can't be recovered against them in their individual
16 capacity for prosecutorial immunity or under official immunity
17 for judicial and quasi-judicial acts which would include
18 setting this case for trial, having an indictment brought,
19 this ca -- and rule and the state Tort Claims Act by its own
20 terms preserves immunities which would include absolute
21 prosecutorial immunity. There is no reason why this court
22 can't consider that now and they cannot recover damages. If
23 they have a valid damage claim and they prevail in against the
24 criminal prosecution in Oconee County subject to any defenses
25 that the State might have, I'm not waiving 'em at this point,

1 they could come back if the law permits and seek a damage
2 claim for prosecutorial immunity if it's allowed, we believe
3 it's not allowable, but they should not be using this court as
4 a way of trying to obtain discovery about the criminal
5 prosecution by bringing a flimsy damage claim, this is not the
6 way our court systems were set up. Our court system was set
7 up with a court of general sessions for criminal proceedings,
8 we've got that here, was set up with a civil court for
9 considering civil causes of action and and it was not intended
10 to be used as a basis for blocking the court of general
11 sessions or getting around the limitations in that court, Your
12 Honor, and this is, this case is a waste of everybody's time
13 and we respectfully request that it be dismissed. If I may
14 just speak to other counsel.

15 (Whereupon, a discussion was held off the record.)

16 MR. SMITH: Just I'd like to note that under his venue
17 argument he could -- he claims he can bring an action anywhere
18 in the state to stop a criminal prosecution, so a a a
19 defendant could go to his home county way across the state and
20 seek a criminal prosecution against him in some county in
21 another part of the state, that's not the way and again, our
22 court system was set up or our venue statutes and this case
23 should be dismissed respectfully, Your Honor.

24 THE COURT: Alright.

25 MR. MCDANIEL: If I can just respond, Your Honor, quickly

1 and I I won't go into a lotta detail but if the Court agrees
2 that this matter would tie up a criminal action stopping it
3 somehow then that would only be a dismissal, they're asking to
4 dismiss the the case, the entire action going forward, the
5 only way this would stop the criminal action is if if Your
6 Your Honor issues an injunction but prior to a a preliminary
7 injunction or a temporary injunction at this point. Allowing
8 us to investigate this, to do some discovery, we believe it be
9 proper, it wouldn't stop what they're prosecuting again for
10 the fourth time going to trial up against Mr. Odom. Certainly
11 there is no remedy available in the, in the general sessions
12 court that is similar to the equitable we -- or the damages
13 remedies that are available. The -- I would just refer Your
14 Honor to the the *Condon* case, we did not sue the Attorney
15 Generals specifically in their personal capacity, it's in
16 their capacity as the Attorney General, there's
17 non-prosecutorial immunity for the office, it's only as to the
18 person so as far as that defense goes it is a separate defense
19 to argue state sovereignty, it's a separate defense. They're
20 tryin' to combine 'em as the same thing and and it's not, they
21 haven't raised the sovereignty of the state as a defense and I
22 would just ask the Court to recognize that. Again, this and
23 just finally, Mr. Odom, this -- the the Attorney General's
24 office has known about these potential claims if they believe
25 they are since two thou -- since March or at least April or

1 May of 2006, if there's a delay that's hurting someone it's
2 Mr. Odom at this point, it's not the Attorney General's
3 office, they could have brought this for the last five years
4 and they've waited and not done that and that's that again
5 that we just ask that you not -- that you deny the motion to
6 dismiss and allow the case to go forward.

7 THE COURT: Alright, what about your motion?

8 MR. MCDANIEL: Yes, Your Honor. Our motion is based on,
9 if you'll give me just one second, is based on two components,
10 two aspects of our motion: the equal protection argument as
11 well as a vindictive prosecution motion or or claim that we're
12 making and those are being brought under the 1983 action as
13 well as under the declaratory judgment acts of the federal and
14 state, those -- the 1983 action allows for damages, monetary
15 damages, the others would allow for equitable relief. As to
16 the statute itself, I can make quickly the or or for you the
17 we believe that the statute is is clearly violative of the
18 Constitution and equal protection on its face and if I can
19 make that argument for Your Honor the statute, and we put it
20 in our -- in in the complaint on Page 12, what it sets out to
21 do is stop solicitation of the minor and that is referred to
22 actually on Page 13 where the the statute sets out to define
23 as criminal activity the intent to perform a sexual activity
24 of a person believed believed to be under the age of 18 and
25 I'll let you, you can, you can get the details of that but the

1 significant part of the, of the statute is in the subsections
2 (b) and (d) and in those sections what it lays out in section
3 (b) is a a defense to this crime is if the person that you're
4 communicating with is actually over the age of 16, even if you
5 believe that they're under the age of 16, if they are over the
6 age of 16 and you're having these sexual conversations with
7 'em, the law says that you have an immunity, you have a
8 defense from prosecution because the person's not actually
9 under that age. It then goes into section (d) and says this
10 defense that we've given you we take back if the person is a
11 police officer acting in their official capacity. What that
12 does, Your Honor, different than other sting-related statutes
13 is it says you for for judged from the view of the class, that
14 is, what is the classes, people having these conversations
15 with someone they believe to be under the age of 16, sexual
16 communications, one of them can be prosecuted, one of 'em
17 cannot and the difference with them there is no difference,
18 there's not distinction between what they believed or what
19 they -- the activity they were doing. What that does it
20 creates an unequal protection to those groups, it's -- there
21 has to be, if they're gonna have that difference there has to
22 be a rational basis. The rational basis that's been put out
23 is defense of children. If that is the case, then why is one
24 a defense -- why is it a defense if someone is over the age of
25 16? If the, if the goal is to protect children as it is with

1 criminal, as it is with drug charges, it's always a crime to
2 do this, it's always a crime to do it. Even if there's a
3 provision that allows a sting-type operation to happen, it's a
4 crime regardless of whether you're caught or not. In this
5 situation they -- it's a very poorly drafted statute that's
6 that was patterned after Louisiana statute that got challenged
7 and changed and now this is the only one, only jurisdiction
8 that has a statute like this is my understanding where it sets
9 up these two classes of people and treats them differently and
10 we believe it's a, it's a violation of the Constitution that
11 the statute though possibly well-meaning is is violates the
12 Constitution, is unconstitutionally violates unequal
13 protect -- just violates equal protection provisions.

14 Our second aspect of our request for injunction is a
15 vindictive prosecution. Your Honor, again, I I don't wanna go
16 into every, all the facts of that, I do ask the Court to read
17 the the transcript that was presented because in that we did
18 go through a lot more detail with Mr. Huff, that is, Anthony
19 Odom's attorney, testifying as to all the events that have
20 occurred. Those events include the fact that the prosecution
21 of the Oconee criminal matter was initially said that they
22 were not gonna prosecute that, there was no incident report
23 done for that. It was years later during the Spartanburg or
24 just before the Spartanburg trial that during this fight over
25 this contentious battle over the evidence of Mr. Mark of

1 Officer Mark Patterson that the Attorney General stated at
2 that time, Well we are gonna bring, if you're gonna do this,
3 we're gonna go ahead and indict him in Oconee County, that
4 basically those statements have been and you, you know, Your
5 Honor, obviously interpret it for yourself but have been
6 basically ratified by Ms. Wines in that motion where she
7 admits that it was, it was a confrontational conversation and
8 that she was frustrated and decided at that time to go
9 forward, changed trial strategy, said decided to prosecute him
10 in Oconee County. Your Honor, ya know, the the motion, the
11 memo that I, that I handed up again about vindictive
12 prosecution clearly lays out when you exact a price, when you
13 punish someone for doing something in a criminal prosecution
14 that they have the right to do there's a prohibition against
15 that, it's the the vindictive prosecution is intended not only
16 to prevent against prosecution actually motivated by animus
17 but also to present the chilling of the exercise of
18 constitutional rights by the defendant, no evidence of actual
19 bad faith is necessary to establish it. Once a presumption of
20 vindictiveness has arisen, the burden shifts to the
21 prosecution to show that the independent reasons or
22 intervening circumstances dispel the appearance of
23 vindictiveness. We believe that we established that not only
24 through the the prosecution how it came about, the length of
25 time, but in addition the what we consider manipulation of the

1 court system in Oconee County to to get the ju -- to get into
2 court and on false pretenses when there was no court session,
3 it was based on there being a statewide grand jury case which
4 the Attorney General's office knew this was not, they had
5 control of that docket so they were able to move the court to
6 Oconee County, this was an Oconee County case and again, ya
7 know, Judge Macaulay's recusal based on his information of
8 that we would ask that the Court issue an injunction halting
9 the the prosecution or halting the AD from prosecuting
10 Mr. Odom whether it be here, Oconee and and again, they
11 indicate they have indicated they intend to to to re-indict
12 him here, there's at least been some indication that that
13 would or could happen. We would ask that there be some remedy
14 and we believe this is the the proper venue for that to get
15 the remedy, that he be able to stop the prosecutions of him
16 while these matters are bein' heard. He's expending huge
17 amounts a money in in his defense throughout the again, the
18 trial, this this new trial as well as he hasn't been able to
19 practice law and he's suffering that harm on an ongoing basis.
20 As soon as these these charges were brought, ya know, they
21 they resulted in Mr. Odom's law license being being moved to
22 inactive or being dis -- not disbarred but suspended, he
23 hasn't been able to practice, he have hasn't been able to
24 practice his chosen profession of living for five years
25 waiting for this to get done. We just ask Your Honor to

1 please carefully review the transcript, there's other
2 evidence: the Attorney General McMaster in -- was in the
3 newspaper saying Mr. Odom was guilty and predators like him
4 should be in jail, violating the rules of professional
5 conduct, again, all that is in in the transcript, we refer to
6 it and I'll I'll rest on on my -- the brief as to their other
7 arguments, Your Honor.

8 THE COURT: Okay, Mr. Smith.

9 MR. SMITH: Your Honor, first before I forget it I just
10 wanted to note that on the regarding the motion to dismiss,
11 the Attorney General's motion to dismiss included a motion to
12 strike allegations that refer to arrest records of
13 Mr. Patterson because the records were ordered destroyed
14 pursuant to an order of destruction on December 8th 2009.
15 The -- that motion does not need to be reached if this court
16 dismisses the case. If for the sake of argument the case were
17 not dismissed, we would like those references struck because
18 there is an order of destruction of records. I didn't wanna
19 attach that order to this because our position is that these
20 records should've been destroyed and so we shouldn't be
21 presenting evidence about that to the Court but if Your Honor
22 would like to see that order I can hand it up. Uh, ---

23 THE COURT: These are records that you are saying are
24 referenced in this transcript?

25 MR. SMITH: He refers to the re -- the the records in

1 the -- to to these matters in the complaint and the
2 allegations in the complaint which are at paragraphs 33
3 through 38 refer to the arrest of Mr. Patterson and those
4 references should be struck because they are covered by an
5 order regarding destruction of records and I can hand up that
6 order to you. Of course as I said Your Honor does not need to
7 reach that issue if you dismiss the entire case which we
8 believe ---

9 THE COURT: Okay.

10 MR. SMITH: --- is what should be done.

11 MR. MCDANIEL: Your Honor, I'd like like to reply just
12 briefly and that is to ---

13 THE COURT: Well you'll you'll be able to when he's
14 through but right ---

15 MR. MCDANIEL: Okay.

16 THE COURT: --- now he's replyin' to your motion.

17 MR. MCDANIEL: I know he's going back to his motion is
18 why I wanted to ---

19 THE COURT: Well you're gonna be able to respond.

20 MR. MCDANIEL: Alright.

21 MR. SMITH: And I would would just note again the
22 immunity issues are preserved because it's a 12(b)(6) motion
23 for failure to state a cause of action when we're immune,
24 that's a failure to state a cause of action and it's set forth
25 in the quotation from the *Williams* case and he concedes that

1 in his memoranda about the scope of 1983 actions for damages
2 that when they're against an officer their effect against the
3 state and bar.

4 As to the motion for a temporary injunction, we believe
5 for the same reasons set forth in our motion to dismiss they
6 should be denied. We also would ask we've also got some
7 additional reasons in there that are not before the Court on
8 motion dismiss and that is that this court has first of all,
9 to get a temporary injunction or TRO, he has to meet certain
10 standards, he's got to show irreparable harm and a likelihood
11 of success and an inadequate remedy at law. Taking these in
12 reverse, he's got an adequate remedy because he's in the court
13 a general sessions and he can deal with these issues there and
14 in fact he's done so. He has a unlikelihood of success on the
15 merits because in the pages of the transcript we cite, we
16 attach to our memoranda and in the transcript he handed up,
17 the complete transcript, it makes clear that the court of
18 general sessions has already ruled that the statute does not
19 deny him the equal protection of the laws, it also addressed
20 the First Amendment claim that he made there that he did not
21 make in this action and found that it would -- did not violate
22 the First Amendment. The Court was in the process of
23 considering the vindictive prosecution claim when the judge
24 recused himself but in the federal action that Mr. Odom just
25 brought last year, Judge Seymour ruled in August of 2010 that

1 this case was subject to dismissal under *Younger* abstention
2 grounds and an exception to *Younger* exten -- ex -- abstention
3 is when a prosecution was instituted in bad faith and that was
4 his ground for arguing against the application of abstention
5 and she found there was no bad faith and that's very similar
6 to vindictive prosecution, it's not *res judicata* on this
7 proceeding but it certainly shows for purposes of his
8 obtaining a temporary injunction that he is not likely to
9 succeed on that claim because she found no bad faith, hence no
10 likelihood of a vindictive prosecution claim. We and more
11 importantly the vindictive prosecution claim that's before the
12 court of general sessions and the court a common pleas should
13 not interrupt that decision-making to reach its own conclusion
14 about it when it's already before a different court and that
15 matter will be taken up at tre -- pretrial before the trial is
16 scheduled in November or at that trial and so therefore this
17 court does not need to address it.

18 Your Honor, on the equal protection issue, I had not
19 submitted this to to you yet or to Mr. McIntyre [sic] because
20 I did not know whether we would get that far in this argument
21 if Your Honor ruled from the bench that the case would be
22 dismissed but I prepared a supplemental memorandum on equal
23 protection that I would like to hand up now. I'd like that
24 made a part of the record in this case ---

25 THE COURT: Well ---

1 MR. SMITH: --- if I may, that's the ---

2 THE COURT: You have ---

3 MR. SMITH: --- original.

4 THE COURT: --- a copy of it?

5 MR. SMITH: That's the original ---

6 THE COURT: I'll file the original with the Court.

7 MR. SMITH: And here's a copy too for your record.

8 (Whereupon, counsel handed the document to the Court.)

9 MR. SMITH: And, Your Honor, governed by a rational basis
10 standard here and and I I'm certainly not attempting to argue
11 against the Court of general sessions because they've already
12 ruled on it but to the extent that we go into it here for the
13 sake of argument he's clearly not entitled to any relief on
14 the equal protection claim because he cannot bring himself
15 within the class of persons that the statute was intended to
16 be directed. He's alleged to have communicated with a person
17 posing as a 13-year-old, therefore he is not alleged to have
18 had any expectation of communication with a person 16 or older
19 that is exempt under the statute. He claims it's unfair that
20 he's not entitled to the exemption for communications with
21 persons 16 or older because this was a law enforcement officer
22 but he didn't have any expectation of communicating with such
23 a person because the person with whom he was communicating
24 represented that it was a sixteen -- 13-year-old girl. He
25 would not have been entitled to this exemption if the person

1 had in fact been 13, he would only have been entitled to this
2 exemption if a non-law enforcement officer 16 or older posed
3 as a 13-year-old, a highly unlikely possibility but even if
4 for the sake of argument he were within the class of persons
5 to which the paragraph the exceptions were directed, the
6 General Assembly acted reasonably in treating conversations
7 with undercover officers 16 and older differently from
8 conversations with non-law enforcement officers 16 and older.
9 The legislature had a purpose of protecting children from
10 conversations with persons who had the intent of persuading,
11 inducing, enticing, or coercing the person to engage in or
12 participate in a sexual activity as defined in Section
13 16-15-375 or a violent crime. Allowing a consent defense of a
14 person communications with persons 16 and older reflects an
15 legislative intent to exempt consensual conversations with
16 older minors disallowing that defense for persons who are
17 confu -- communicating with law enforcement officers reflects
18 a legislative intent to allow undercover officers to do their
19 work of finding persons praying on minors in violation of
20 16-15-342 which is what happened here so for these reasons,
21 Your Honor, we believe he cannot show a a likelihood of
22 success on the merits and he also cannot show irreparable harm
23 because the Court of common pleas has already decided his
24 constitutional claim and the vindictive prosecution claim
25 that's pending before that court and he didn't even raise the

1 vindictive prosecution claim until June, the end of June right
2 before trial even though there have been several pretrials in
3 the case and Judge Seymour had dismissed his federal action in
4 August so he waits nearly a year and at trial to raise the
5 vindictive prosecution claim and yet he's claiming that he
6 needs a TRO and a preliminary injunction from this court, it's
7 absurd. He is before the court of general sessions on this
8 issue and this is where it should proceed. Again, if he can
9 do this in this case then any criminal defendant can do it in
10 any criminal case by simply bringing a parallel civil case
11 raising alleging vindictive prosecution, making constitutional
12 claims, trying to use that as a vehicle either to stop the
13 criminal prosecution or to obtain discovery that is not set
14 forth under the ordinary rules of procedure in criminal
15 courts. Our court systems were not set up this way and this
16 de -- plaintiff should not be allowed to attempt to take
17 advantage of these arguments in that way. We ask that this
18 case be dismissed, Your Honor, and with that the motion for a
19 TRO and preliminary injunction be denied.

20 THE COURT: Mr. McIntyre [sic].

21 MR. MCDANIEL: Yeah, Your Honor, it's just not accurate
22 to say the Court can't do this, again, I just refer the Court
23 to the *Stovall* case. In that case it's a, there was the
24 ruling on that particular case was they couldn't do it but
25 it's clearly laid out in that case that there are bases and

1 exceptions when when it can be done, this type of action can
2 be brought.

3 Just to kinda go back to some of that the arguments that
4 were raised that the idea that the general sessions court of
5 Oconee has already made a ruling on the equal protection claim
6 just ignores the the rights of Mr. Odom in a sense that that
7 was a ruling that cannot be appealed, it was not a final
8 ruling and it has to be a final ruling before *res judicata* can
9 set in. It was a -- in, a motion *in limine* before the trial,
10 it was before the jury got sworn, he can't appeal this the
11 equal protection until it comes back up at trial, he could
12 potentially then but at this point there is -- it's inaccurate
13 to say that that precludes him now from bringing that equal
14 protection claim and and we cite that in our brief as to the
15 *res judicata* requiring requiring that be a final judgment or a
16 final order.

17 The belief Mr. Smith went into the belief as to with
18 regard to the statute that it doesn't matter, the equal
19 protection claim doesn't take into account and doesn't require
20 his belief of anything, the way this statute reads is it's a
21 consent, is a defense to a prosecution pursuant to this
22 section if the person under the age of 18 comma or the person
23 reasonably believed to be under the age of 18 is at least
24 16-years-old, so that or says either they're 18, is un --
25 they're under the a -- age of 18 or and at least 16-years-old

1 or the person reasonably believes them to be under the age of
2 18, so there's also a two years in there, the person if
3 they're 16 to 18-years-old it it doesn't matter, the -- that
4 is an or statement if you read that carefully as to the belief
5 of the person. Even with that as a, even with that in this
6 situation, this was an adult chat room, you had to be over 18
7 to get into the chat room, there were pictures at least in the
8 and I can present, Your Honor, I'd like to to put this up, it
9 was sent to Mr. Odom, was presented in the ---

10 MR. SMITH: Object, ---

11 MR. MCDANIEL: --- other case if I can present it ---

12 MR. SMITH: --- object, Your Honor. This is not -- he
13 hadn't noticed these exhibits before now ---

14 MR. MCDANIEL: Your Honor, I didn't know that ---

15 MR. SMITH: --- and we're not here to try the criminal
16 case.

17 MR. MCDANIEL: --- I didn't know that he was gonna bring
18 up this idea of belief of Mr. Odom as to the reasonable belief
19 of the age, I believe it goes to that, to that argument in
20 rebut, he's opened the door to the, to the rebuttal.

21 THE COURT: Alright, admitted.

22 MR. SMITH: Your Your Honor, respectfully take exception --
23 exception to that and object to the admission of the
24 documents.

25 THE COURT: Alright; note your exception.

1 MR. MCDANIEL: Now that this is a picture that at least
2 and and the, ya know, admittedly the factual allegations of
3 this are not completely been litigated in the criminal matter
4 but there's certainly reasonable belief if Your Honor believes
5 that is a legitimate standard to to weigh the equal protection
6 claim that Mr. Odom believed this person to be over the age of
7 18, the chats themselves would indicate that. Aside from
8 that, Your Honor, the constitutional basis for this doesn't
9 require even looking at Mr. Odom's belief, getting into his
10 belief at all in this matter, it's simply the statute as
11 written says that that you can be over the age of if you
12 communicate with someone and they happen to be over the age of
13 16 then you have a a a defense; if they, if they happen to be
14 a cop over the age of 16 or a police officer then you do not
15 have that defense, it creates two classes, ya know, that the
16 reasonable basis for that is a good basis as far as the the
17 the theory of why they would do it is good as far as
18 protecting from child predators but the statute doesn't do it,
19 the statute is not effective in doing that, it doesn't, the
20 distinction that's made does not stand up to the to to why
21 that would be the case because then if that were truly the
22 case then the classes could be treated the same, there's no
23 reason to have this distinction that you let some people off
24 because they're not saying the same communications to a police
25 officer that they're saying to someone else.

1 Your Honor, the the only ruling in the federal case was
2 one on abstention, there i -- there were not other rulings, I
3 would refer to that order, we can -- as I can supplement that.
4 The order refer only to the fact that the federal court was
5 was believed that this was better held in the state court
6 which is where we've now brought it and that those actions
7 they didn't dismiss the actions, they merely said this this is
8 a, these claims in fact I think it leads credence to the fact
9 that that these claims are viable in the state action because
10 they weren't dismissed, they were merely -- under the
11 abstention doctrine it was to dismiss without prejudice to be
12 heard in the state court. It's not accurate to say that those
13 were dismissed on any merits ground of of the action. And
14 again, I, ya know, I just I think that there's clearly the the
15 argument that's being made that sovereign immunity is somehow
16 implied it isn't -- that is not the case, sovereign immunity
17 is an affirmative defense that must be plead specifically,
18 they didn't do it, they want to imply it in their brief, it's
19 not there, it's not in the motion, it it wasn't, it wasn't put
20 forth and it shouldn't rightly be heard by the Court at this
21 time and under the 12, the Rule 12(g) they shouldn't be
22 allowed to amend to include it later because they have added,
23 as I said before they've added these defenses which were
24 beyond the 12(b), the 12(b) normal motion. It's a separate
25 defense from lack of venue or lack of jurisdiction, it's

1 simply another -- sovereign immunity doesn't -- isn't a --
2 isn't the same as not having jurisdiction in the matter and
3 even if the Court does believe that, the sovereign immunity
4 only applies as to the damages claim. We've asked for damages
5 as well as equitable remedies so even if the, even if the
6 Court gets by or allows them to effectively argue sovereign
7 immunity, that would only limit as to the 1983 claims for
8 damages, it doesn't -- the the the case law does not preclude
9 the case going forward as to the injunction or in the
10 injunctive relief for for any of those claims only as to a
11 damages claim against the Attorney General the idea the state
12 coffers not having to to bear that burden respectfully, Your
13 Honor. Thank you.

14 MR. SMITH: Your Honor, I hate to be beating a horse on
15 this but ---

16 THE COURT: Well don't.

17 MR. SMITH: --- to listen to his argument it appears that
18 according to him that Rule 12(b) lists immunity as a ground
19 for a 12(b) motion, it does not. It lists subject matter
20 jurisdiction, lacka jurisdiction over the person, improper
21 venue, insufficiency of process, insufficiency of service of
22 process, failure to state facts that are sufficient to
23 constitute a cause of action, sovereign immunity is not a
24 specific 12(b) ground that has to be included in that motion.
25 This is not an a answer in which something has to be in an

1 affirmative offense, this is included within the ground
2 failure to state facts sufficient to cause a -- to constitute
3 a cause of action, it doesn't even have to be in the motion to
4 dismiss at all as long as 12(b)(6) was in there and it is so
5 therefore it is before this court, it was in our -- the the
6 immunity was in there in the *Williams* quotation, not just
7 absolute prosecutor -- prosecutorial immunity from damages
8 against persons in their individual capacity. He ackn --
9 concedes the issue in his memoranda and so therefore it's
10 before the Court. He didn't stop there and say it's not
11 before the Court, he said here's what the law is, he conceded
12 it and we'd be glad to provide to you additional authority on
13 immunity if you would like it, Your Honor, but it's quite
14 clear and more importantly than that just this whole action,
15 damages and injunctive relief, is an improper attempt to
16 bypass proceedings that have already been brought. This is
17 before the Court in Oconee County. He can proceed with his
18 defense there, carry it forward to the appellate courts.
19 We're not arguing that at this stage that the ruling in Oconee
20 is *res judicata* but it has already been decided by that court
21 and this court lacks the authority to overrule another circuit
22 court, in particular a court of general sessions on that
23 issue, it lacks authority to grant relief of any kind on
24 vindictive prosecution when that issue is before the court of
25 general sessions and he has made a motion on that basis so all

1 of that takes us away from this court, there is nothing before
2 this court to decide and he suggested in his argument that
3 somehow there should be an injunction issued as to any
4 prosecution. This lawsuit is about Oconee, the -- he hasn't
5 asked for any relief as to Spartanburg County and so this
6 court would lack -- certainly should issue an injunction as to
7 Oconee County but it also has not been requested that it issue
8 any relief as to Spartanburg County. The whole case is a a
9 waste of everyone's time and should be dismissed, Your Honor.
10 If I may just --

11 (Whereupon, a discussion was held off the record.)

12 MR. SMITH: That's all. Thank you, Your Honor.

13 THE COURT: Alright, I'll review all the submissions by
14 ya in the briefs and issue an order.

15 MR. MCDANIEL: Thank you, Your Honor.

16 MR. SMITH: Thank you, Your Honor. Do you want anything
17 else on immunity, Your Honor?

18 THE COURT: No, sir, I don't need it.

19 MR. SMITH: Thank you.

20 THE COURT: Thank you.

21 MR. SMITH: Thank you, Your Honor.

22 THE COURT: Thank you.

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CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on September 12, 2011 at the time and place heretofore set forth; and that the foregoing pages numbered from 2 through 39, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

April 20, 2012



Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF OCONEE)

CRIMINAL SOLICITATION OF A MINOR

At a Court of General Sessions, convened on April 12, 2010, the Grand Jurors of Oconee County present upon their oath:

That Anthony C. Odom, on or about May 4, 2006 and/or May 5, 2006, did willfully and knowingly commit the crime of criminal solicitation of a minor. To wit: Anthony C. Odom, a person eighteen years of age or older, did knowingly contact and communicate with a person located in Oconee County that he reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5), or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person reasonably believed to be under the age of eighteen. This is in direct violation of Section 16-15-0342, of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

OFFICE OF THE ATTORNEY GENERAL



HENRY McMASTER (MBW)
ATTORNEY GENERAL

DOCKET NO. 2010-GS-37-

364A

WITNESSES

Sgt. Gordon Hopkins, WPD

The State of South Carolina

County of Oconee

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

APRIL TERM 2010

I hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

Direct Presentment

THE STATE

VS.

ANTHONY C. ODOM
D.O.B. 6/22/1973

Defendant

Witness:

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

William H. Hample
Foreperson of Grand Jury

Date: APR 12 2010

VERDICT

True Bill

Indictment for

CRIMINAL SOLICITATION
OF A MINOR

SC Code: 16-15-0342
CDR Code: 2999

Foreperson of Petit Jury
Date:

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2010 APR 12 P 3:17

BW

677900

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF OCONEE)

CRIMINAL SOLICITATION OF A MINOR

At a Court of General Sessions, convened on April 12, 2010, the Grand Jurors of Oconee County present upon their oath:

That Anthony C. Odom, on or about May 6, 2006, did willfully and knowingly commit the crime of criminal solicitation of a minor. To wit: Anthony C. Odom, a person eighteen years of age or older, did knowingly contact and communicate with a person located in Oconee County that he reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5), or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person reasonably believed to be under the age of eighteen. This is in direct violation of Section 16-15-0342, of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

OFFICE OF THE ATTORNEY GENERAL


HENRY McMASTER (MBW)
ATTORNEY GENERAL

DOCKET NO. 2010-GS-37-

363A

WITNESSES

Sgt. Gordon Hopkins, WPD

The State of South Carolina

County of Oconee

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

APRIL TERM 2010

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

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Witness:

C.C.C. PLS. AND G.S.

ARREST WARRANT NUMBER

Direct Presentment

THE STATE

VS.

ANTHONY C. ODOM
D.O.B. 6/22/1973

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: APR 12 2010

VERDICT

Not Guilty

Indictment for

CRIMINAL SOLICITATION
OF A MINOR

SC Code: 16-15-0342
CDR Code: 2999

Foreperson of Petit Jury
Date:

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2010 APR 12 P 3:17

6/2/2010

BW

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-24- 2032

ANTHONY C. ODOM

Plaintiff,

vs.

ALAN WILSON, in his capacity as Atty
General of the State of South Carolina et al

Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:
Brian McDaniel, Bar No. 68618
Address:
PO Box 2085, BEaufort SC 29901
Phone: 843-379-5117 Fax 843-379-5118
E-mail:
bmcdaniel@attorneymcdaniel.com Other: _____

Defendant's Attorney:
_____, Bar No. _____
Address:

Phone: _____ Fax _____
E-mail: _____ Other: _____

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: TRO

Estimated Time Needed: 1 hour

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

5-5-2011
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$ _____
☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

- ☐ MOTION FEE COLLECTED: \$ _____
☐ CONTESTED - AMOUNT DUE: \$ _____

000030

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
ANTHONY C. ODOM

Plaintiff,

vs.

ALAN WILSON, in his official Capacity
as Attorney General of the STATE OF
SOUTH CAROLINA; DAVID PASCOE; J.
STROM THURMOND, JR.; ERNEST
FINNEY; WILLIAM B. ROGERS, JR.;
DANIEL E. JOHNSON; DOUGLAS A.
BARFIELD, JR.; BARRY BARNETT;
JERRY W. PEACE; SCARLETT WILSON;
CHRISTINA T. ADAMS; DONALD V.
MYERS; EDGAR L. CLEMENTS, III;
WILLIAM W. WILKINS, III; I.
MCDUFFIE STONE, III; GREGORY
HEMBREE; And KEVIN S. BRACKETT,
in their official capacities as SOUTH
CAROLINA CIRCUIT SOLICITORS

Defendants.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
C.A. NO.: 2011-CP- 24 - 2032

**PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT**

Plaintiff Anthony C. Odom ("Odom") requests that the Court, pursuant to Rule 65, South Carolina Rules of Civil Procedure, issue:

(1) an order temporarily restraining Defendant Alan Wilson ("Wilson" or "Defendant Wilson"), in his official capacity as Attorney General of the State of South Carolina, and the other Defendants, in their official capacities as South Carolina Circuit Solicitors, and all of their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from engaging in the following conduct until the Court may consider

Odom's motion for preliminary injunction: from pursuing the prosecution involving the Westminster Chats ("Oconee Communications") in as much as they amount to Vindictive Prosecution; and from enforcing South Carolina Code § 16-15-342 (also known as Criminal Solicitation of a Minor) due to its unconstitutionality as it is in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Article 1, Section 2 of the South Carolina Constitution.

(2) an order preliminarily enjoining Defendant Wilson, in his official capacity as Attorney General of the State of South Carolina, and the other Defendants, in their official capacities as South Carolina Circuit Solicitors, and all of their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from engaging in the following conduct until the Court may fully adjudicate the merits of this action: from pursuing the prosecution involving the Westminster Chats in as much as they amount to Vindictive Prosecution; and from enforcing South Carolina Code § 16-15-342 (also known as Criminal Solicitation of a Minor) due to its unconstitutionality as it is in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the South Carolina Constitution.

Absent immediate court intervention, Defendant Wilson's criminal prosecution of Odom will, and will continue to: (a) violate the rights of Odom as the Oconee Communications it amounts to a violation of his Fifth Amendment Rights and Due Process Rights under the United States Constitution and as applied to the States as the bringing of such charge(s) would be vindictive prosecution, (b) violate the Equal Protection right's of Odom due to the unconstitutionality of South Carolina Code § 16-15-342, as it is in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the South

Carolina Constitution.

This motion is based on the argument herein and the Complaint in this case

I. INTRODUCTION AND STATEMENT OF FACTS

This is an action for declaratory and injunctive relief pursuant to 42 U.S.C § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201 brought in this courts concurrent jurisdiction, as well as S.C. Codes §§ 15-53-10, 15-53-20, 15-53-60, 15-53-80, 15-53-90, and 15-53-110 brought by Anthony C. Odom ("Odom" or "Plaintiff") to enjoin the prosecution in violation of federal law, the U.S. Constitution, the South Carolina Constitution, and to obtain a declaration of the respective rights of the parties. Additionally, to declare S.C. Code § 16-15-342, known as Criminal Solicitation of a Minor, unconstitutional due to violation of the Equal Protection Clause under the Fourteenth Amendment of the US Constitution as well as the South Carolina Constitution, and enjoin its enforcement.

Odom is a citizen and resident of the County of Aiken, State of South Carolina, and has been involved in criminal litigation with the Office of the Attorney General for the State of South Carolina since 2006. He was arrested on May 12, 2006 for violation of S.C. Code § 16-15-342. This initial charge was brought in the County of Spartanburg, State of South Carolina (Spartanburg Charge). This charge has been called to trial on two separate occasions. The first call of the case to trial was in July of 2007, which resulted in evidence being suppressed. The suppression of the evidence was ordered prior to the swearing of the selected jury.

This suppression resulted in the order of the trial judge being appealed by the State of South Carolina. During the pendency of the appeal the Office of the Attorney General for the State of South Carolina contacted the United States Attorney for the District of South Carolina

to prosecute the Spartanburg Charge. To date no federal charges have been brought. The suppression order was overturned by the South Carolina Supreme Court in State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009). On February 22, 2010 the State of South Carolina called the Spartanburg Charge to trial for the second time. On March 2, 2010 the court granted a mistrial due to a deadlocked jury.

Defendant Alan Wilson ("Wilson" or "Defendant Wilson"), the Attorney General of the State of South Carolina, intends to prosecute additional charges in the County of Oconee, State of South Carolina (Oconee Communications). This charge would also be brought under S.C. Code § 16-15-342 and all facts relevant thereto have been known to the Office of the Attorney General since May of 2006 when the crime is alleged to have occurred. In neither the Oconee Communications nor the Spartanburg Charge is it alleged Odom ever traveled to meet anyone.

In fact at a July 2007 hearing held in Spartanburg County, South Carolina, the then lead counsel on the Spartanburg Charge at the time David Stumbo, Esquire, stated that there was never any intention to bring the Oconee charge as a separate crime, but to attempt to use as evidence of other bad acts. David Stumbo, Esq. is the immediate predecessor of Megan Wines, Esq. and was the Chief ICAC Prosecutor until July 2007. See excerpt for the official transcript from the July 9, 2007 hearing below:

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11 THE COURT: ALL RIGHT. I JUST -- OBVIOUSLY YOU HAVE A
12 REASON WHY YOU WANT TO USE THEM.

13 MR. STUMBO: UNDER 404(B), YOUR HONOR, WE BELIEVE
14 SEVERAL OF THE EXCEPTIONS APPLY.

15 THE COURT: ALL RIGHT. DO YOU HAVE ANY INFORMATION TO
16 SUPPLEMENT, I MEAN, MR. SWERLING SAYS HE DOESN'T HAVE
17 ANYTHING TO BACK UP THESE STATEMENTS. DO YOU HAVE ANYTHING
18 THAT YOU CAN GIVE HIM?

19 MR. STUMBO: WE DON'T, YOUR HONOR. I ASKED THE
20 INVESTIGATOR. HE NEVER DID AN INCIDENT REPORT BECAUSE HE
21 NEVER -- WE NEVER INTENDED TO CHARGE, YOU KNOW, AT THAT TIME
22 IN OCONEE COUNTY. SO HE'S PROVIDED US WITH THE CHAT LOGS
23 AND CANTASIA, WHICH IS THE LIVE CAPTURE OF WHAT'S GOING ON
24 ON THE COMPUTER SCREEN.

25 THE COURT: ALL RIGHT.

Odom is entitled to immediate injunctive and declaratory relief preventing Defendant Wilson from continuing with criminal prosecution of Odom, because such prosecution, violates Odom's fundamental rights under the United States Constitution and South Carolina Constitution, as these new charges would amount to vindictive prosecution. Additionally, Odom asserts that S.C. Code § 16-15-342 violates the Equal Protection Clause of the Fourteenth Amendment of the US Constitution as well as the South Carolina Constitution and as such is an unconstitutional statute. As such S.C. Code § 16-15-342 should be declared unconstitutional and unenforceable.

II. STATEMENT OF FACTS

On May 11, 2006 a search warrant was executed at the residence of Odom in the County of Aiken, State of South Carolina. Odom as a result gave a statement and then subsequently

voluntarily waited three hours at the Aiken Department of Public Safety to allow the County of Spartanburg, State of South Carolina to obtain an arrest warrant.

As a result of the warrant for the Spartanburg Charge Odom was placed on interim suspension from the practice of law on May 17, 2006. Odom was engaged in private practice of law at the time of the arrest.

Odom's involvement in criminal litigation with the South Carolina Attorney General (AG) began on May 12, 2006 with his arrest for violation of S.C. Code § 16-15-342, also known as Criminal Solicitation of a Minor, which alleged Odom had communicated with and undercover officer in an Adult chat room called "South Carolina Romance". Odom's bond hearing held on May 12, 2006, upon information and belief was specifically arranged to be televised at the request of the AG's office.

At the bond hearing held on the Spartanburg Charge Odom's counsel Andy Johnston, Esquire was notified by then Assistant Attorney General David Stumbo, Esq. (Stumbo), who was at the time the Chief ICAC Prosecutor, that an additional charge may be brought concerning alleged communications with an undercover officer operating out of the Town of Westminster, County of Oconee, State of South Carolina (Oconee Communications). These communications allegedly occurred between May 4 and May 6, 2006 and occurred in an Adult chat room called "Romance South Carolina". Upon information and belief the SC AG prosecutes all violations of S.C. Code 16-15-342 and controls the ICAC program.

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During the pendency of the Spartanburg Charge, which was indicted by the Spartanburg County Grand Jury on June 22, 2006, there were several requests in writing made by Odom's counsel to Stumbo as to the existence of other communications besides the Spartanburg Charge.

Stumbo responded to those requests specifically stating there were no other communications than the Spartanburg Communications.

The Spartanburg charges were scheduled for trial in May of 2007, at which time Stumbo informed Odom's lead counsel at the time, Jack Swerling, Esq., that there were in fact other alleged communications, the Oconee Communications. Stumbo expressed his intent to use the Oconee communications as evidence of other bad acts under the South Carolina Rules of Evidence. Due to the late revelation of this evidence Stumbo agreed with Odom's counsel to continue the Spartanburg Charge.

The trial was then rescheduled to be called for trial in July 2006. During the hearing on the Oconee "Bad Act" evidence Stumbo made the statement shown above, that there was no intent by the AG or law enforcement to bring charges related to the Oconee Communications.

At this first trial evidence obtained via Orders (D Orders) under The Patriot Act were suppressed by the trial judge, before the swearing of the selected jury for the case. As a result of this suppression the State appealed the ruling, which was overturned by the South Carolina Supreme Court in State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009).

Stumbo at the time of the first trial had left the AG's Office and was an Assistant Solicitor with the County of Lexington, South Carolina but had obtained special permission to continue with the prosecution. Megan Wines, Esq. at the time had already taken over Stumbo's ICAC duties at the AG's office and was present and participated at the first trial on the Spartanburg Charge. Also present was the undercover officer alleged to have been communicated with during the Oconee communications, officer Mark Patterson (Patterson).

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During the pendency of the appeal the AG had only the Spartanburg Charge reviewed by the S.C. US Attorney's Office. To date, no federal charges have been brought. In August 2006, and during the pendency of the Spartanburg Charge, Patterson left his former position to become an Aiken County Sheriff's Deputy.

On or about June 5, 2009 Patterson was arrested and subsequently fired from the Aiken County Sheriff's Office due to an alleged dispute with his wife. The charges on Patterson were eventually dropped, however, Odom wished to obtain copies of the evidence. Said evidence allegedly includes voice communications of Patterson, pictures of text messages to his wife, and several statements by witnesses. (See Exhibit B, Letter from the City of Burnetttown, County of Aiken, State of South Carolina.) At this point the State had continued to indicate that the alleged communications would be use as bad act evidence.

Odom, through his counsel James B. Huff, Esq., made several attempts to obtain this documentation. It was subpoenaed and is considered Brady material. The material has not been produced, but due to an order of the City Judge for the City of Burnetttown, County of Aiken, State of South Carolina it is not to be destroyed (Exhibit B).

On or about February 18, 2010 Assistant Attorney General Megan Wines stated to Odom's counsel that Patterson had become upset due to the efforts by Odom's counsel to obtain the information regarding Patterson's arrest, so she (Wines) was just going to direct indict the Oconee Communications. These communications are alleged to have occurred between May 4 and 6, 2006 and began in the Adult Chat Room "Romance South Carolina". This is the first indication, nearly 4 years after the alleged incident, that the State would seek criminal charges on these communications.

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On February 22, 2010 the Spartanburg Charge was called to trial for the second time. This Spartanburg Charge trial ended in a mistrial on March 2, 2010; due to a dead-locked jury.

During the trial, the State again stated after motions had been placed before the court, after the swearing of the jury, that the Oconee Communications might be used for bad act evidence. As such the court ordered at that time the State assist Odom in obtaining the information requested. The State never presented the Oconee Communications and provided no assistance.

Furthermore, the Spartanburg Charge covers a time period between March 12, 2006 and May 4, 2006 and contains at least 17 separate communications, and resulted in a single indictment. The Oconee Charge(s) cover only two chats on only two separate days but, in contrast to the Spartanburg Charges, resulted in two indictments.

Odom asserts that the acts of the prosecutor in this action constitute a violation of Odom's Fifth Amendment Due Process Clause rights as well as his United States Constitutions rights afforded him by the Fourteenth Amendment. These facts present a case of vindictive prosecution. U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001). The charges are being sought to penalize Odom for seeking information needed for his defense. Additionally, the failure of the State to obtain conviction on the Spartanburg Charge has also resulted in more charges being prosecuted by the State.

The length of time from the alleged event to the charge in this case (nearly 4 years) is highly unusual, and upon information and belief such delay has never occurred for a charge under S.C. Code §16-15-342. All of these prosecutorial decisions have occurred either after the first trial or the second on the Spartanburg Charge.

Also it would have been beneficial for the State if they had sought indictment soon after the alleged incident if their true intent was seeking justice. See letter (Exhibit C) of December 5, 2006 stating no further exam of Odom's computer would be performed. Since this letter and after indictment of the Oconee Communications the State obtained a search warrant to conduct further exam on Odom's computer in relation to the Oconee chat, for which no notice was given to the Defendant (See Exhibit D Search Warrant).

III. ARGUMENT

A. Standards for Issuance of Temporary Restraining Order and Preliminary Injunction

In order for Odom to be entitled to a temporary restraining order of preliminary injunction certain elements must be met.

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). The plaintiff's complaint must allege facts sufficient to constitute a cause of action for injunction and demonstrate it is reasonably necessary to protect the legal rights of the plaintiff pending in the action. Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct.App. 2005); County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App. 2002). Generally, for a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. Scratch Golf Co., 361 S.C. at 121, 603 S.E.2d at 908; Peek, 367 S.C. at 454-55, 626 S.E.2d at 36. "Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party

and determine which side, if any, is more entitled to equitable relief." Peek, 367 S.C. at 455, 626 S.E.2d at 36-37. The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation. *Id.*

The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right. *Id.* at 456, 626 S.E.2d at 37. "When a court is requested to issue a temporary injunction it may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate." Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009).

In this case, an emergency temporary restraining order and a preliminary injunction are both necessary and appropriate because Odom has a strong likelihood of prevailing on its claims and would suffer imminent and irreparable harm if such interim relief were to be denied. Defendant Wilson, in contrast, will not be meaningfully harmed by the issuance of the requested temporary restraining order and preliminary injunction, and this relief will best serve the public interest the US Constitution and South Carolina Constitution.

Alternatively, Odom's strong showing of irreparable injury should such relief not be granted coupled with the grave and serious threat to constitutionality and individual liberties, merits the relief requested. Defendant Wilson has been aware of the Oconee Communications since May of 2006 and chose not to bring charges until April 2010, Odom's freedom and liberties hang in the balance and as such the balance of equities between the parties strongly

favors Odom.

B. The Standards for Issuing a Temporary Restraining Order and a Preliminary Injunction are Satisfied

The standards for granting interim injunctive relief are satisfied in this case.

1. Odom is likely to succeed on the merits

For the reasons discussed below, Odom has a substantial likelihood of proving that Defendant Wilson's criminal prosecution is barred by the doctrine of vindictive prosecution as expressed in U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001), and that S.C. Code § 16-15-342 is in violation of the Equal Protection Clause of the Fourteenth Amendment of the US Constitution and the South Carolina Constitution. Each of these claims entitles Odom to injunctive relief.

a. Prosecution of the Oconee Communications amounts to vindictive prosecution and is in violation of Odom's Fifth Amendment Due Process Rights under the US Constitution and as applied to the State under the Fourteenth Amendment of the US Constitution

It is well established that a prosecutor violates the Due Process Clause of the Fifth Amendment by exacting a price for a defendant's exercise of a clearly established right or by punishing the defendant for doing what the law plainly entitles him to do. See United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982); North Carolina v. Pearce, 395 U.S. 711, 724, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Thus, if a prosecutor responds to a defendant's successful exercise of his right to appeal by bringing a more serious charge against him, he acts unconstitutionally. See Blackledge v. Perry, 417 U.S. 21, 28-29, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). Such retaliatory conduct amounts to vindictive prosecution and is unconstitutional. Indeed, "[t]o punish a person because he has done what the law plainly allows

him to do is a due process violation of the most basic sort Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

Under U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001) for a claimant to be successful under a vindictive prosecution claim they must be able to show the following:

To establish prosecutorial vindictiveness, a defendant must show, through objective evidence, that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus. See Goodwin, 457 U.S. at 380 n. 12, 102 S.Ct. 2485 (noting that the charges must be brought "solely to 'penalize' the defendant and could not be justified as a proper exercise of prosecutorial discretion"); United States v. Sanders, 211 F.3d 711, 717 (2d Cir. 2000).

The following facts meet the required showing for this cause of action:

On May 11, 2006 a search warrant was executed at the residence of Odom in the County of Aiken, State of South Carolina. Odom as a result gave a statement and then subsequently voluntarily waited three hours at the Aiken Department of Public Safety to allow the County of Spartanburg, State of South Carolina to obtain an arrest warrant.

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Odom asserts that the acts of the prosecutor in this action constitute a violation of Odom's Fifth Amendment Due Process Clause rights as well as his United States Constitutions rights afforded him by the Fourteenth Amendment. These facts present a case of vindictive prosecution. U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001). The charges are being sought to penalize Odom for seeking information needed for his defense. Additionally, the failure of the State to obtain conviction on the Spartanburg Charge has also resulted in more charges being prosecuted by the State.

The length of time from the alleged event to the charge in this case (nearly 4 years) is highly unusual, and upon information and belief such delay has never occurred for a charge under S.C. Code §16-15-342. All of these prosecutorial decisions have occurred either after the first trial or the second on the Spartanburg Charge.

Also it would have been beneficial for the State if they had sought indictment soon after the alleged incident if their true intent was seeking justice. See letter (Exhibit C) of December 5, 2006 stating no further exam of Odom's computer would be performed. Since this letter and after indictment of the Oconee Communications the State obtained a search warrant to conduct further exam on Odom's computer in relation to the Oconee chat, for which no notice was given to the Defendant (See Exhibit D Search Warrant).

In the event that the Court feels the above facts do not show direct evidence of vindictive prosecution Odom may still show and improper motive by presenting evidence of circumstances from which an improper vindictive motive may be presumed. In such case Odom must show

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that the circumstances "pose a realistic likelihood of `vindictiveness.'" Blackledge, 417 U.S. at 27, 94 S.Ct. 2098. By recognizing the possibility of creating a presumption that shifts the burden to the government to justify its conduct, not only is vindictive prosecution deterred, but also defendants are "freed of [the] apprehension of such a retaliatory motivation." Goodwin, 457 U.S. at 376, 102 S.Ct. 2485. But such a presumption is warranted only when circumstances warrant it for all cases of the type presented. See *id.* at 381, 102 S.Ct. 2485.

Because the presumption of vindictiveness must be applicable to all cases presenting the same circumstances, it will rarely, if ever, be applied to prosecutors' pretrial decisions. See *id.* Because of the broad discretion given prosecutors and the wide range of factors that may properly be considered in making pretrial prosecutorial decisions, "a prosecutor should remain free before trial to exercise [that] broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." *Id.* at 382, 102 S.Ct. 2485. "Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than a pretrial decision." *Id.* at 381, 102 S.Ct. 2485.

When a presumption of vindictiveness is warranted, the burden shifts to the government to present objective evidence justifying its conduct. See *id.* at 374, 376 n. 8, 102 S.Ct. 2485. This is direct language from U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001). Odom shows that circumstances "pose a realistic likelihood of `vindictiveness.'" It is important to note that the only change that has occurred concerning the Oconee Communications is that Patterson was fired and arrested, no other relevant facts have emerged since May of 2006.

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The sought prosecution on the Oconee Communications is vindictive. The facts also show circumstances which "pose a realistic likelihood of `vindictiveness.'" As such Odom would be entitled to the presumption under U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001).

b. S.C. Code § 16-15-342 is unconstitutional as it violates the Equal Protection clause of the Fourteen Amendment to the US Constitution and that of the South Carolina Constitution.

Odom asserts that under the Fourteenth Amendment of the United States Constitution and under the Article 1, Section 2 of the South Carolina Constitution his rights to Equal Protection under the law has been violated.

In order to assert this claim Odom must show he has standing to make it. Our courts in South Carolina have accepted that being prosecuted under a specific statute allows one standing to assert a violation of equal protection State v. McKnight, 352 S.C. 625, 576 S.E.2d 168 (2003) and Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001) allowing such challenge to a criminal statute and finding that all classes under the statute were treated alike.

S.C. Code § 16-15-342 is unconstitutional due to the relevant portions of the statute stated below:

(B) Consent is a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.

(D) It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.

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As can be seen from the wording of the statute, the provisions of S.C. Code § 16-15-342

(B) give an individual the complete defense of consent, this defense exists when "the person

reasonably believed to be under the age of eighteen, is at least sixteen years old. S.C. Code § 16-15-342(D) then takes away this defense if the “person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.”

The effect of these provisions is to create two classes of communicators. The first is a class (B Class) in which one believes they are communicating with someone under the age of eighteen, but are in fact communicating with someone sixteen or older. This person believed to be less than Eighteen years of age happens not to be “a law enforcement agent or officer acting in an official capacity.” The B Class person gets the benefit of S.C. Code § 16-15-342 (B), due to the consent defense being available regardless of the “Defendant’s” believe as to age.

In the second class (D Class) you have a Defendant who believes they are communicating to someone under eighteen. However, this individual, though also communicating with someone in fact over sixteen years of age, is communicating with “a law enforcement agent or officer acting in an official capacity.” Under S.C. Code § 16-15-342(D) this individual would not have the defense of consent.

Below is listed the portion of S.C. Code § 16-15-342 that defines the crime:

A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen

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Under the Fourteenth Amendment of the United States Constitution to violate Odom's rights to Equal Protection certain showings must be made. One requirement is that there exists

similarly situated individuals. Then one must show that there is disparate treatment under the law of the similarly situated individuals. Lastly, the State must have both a legitimate interest in treating the two individuals differently and must do so on a rational basis. Olson v. DHEC, 379 S.C. 57, 663 S.E.2d 497 (Ct.App. 2008), Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002), Village of Willowbrook v. Olech, 120 S.Ct. 1073, 528 U.S. 562 (2000).

Under S.C. Code § 16-15-342 it is clear that members of either the B class or D class would be similarly situated individuals. Both persons believe that the individual to whom they are communicating is less than eighteen years old. Both have the required specific intent in the communication of “persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen”. Additionally, we can assume for the sake of argument that both could have word for word identical communications with such individual. Therefore, there is simply no difference between the B Class and D Class individual in action, intent, belief or in any other relevant way.

However, since the B Class individual is communicating with someone over sixteen who is not a law enforcement agent or officer acting in an official capacity, while the D Class individual is communicating with a law enforcement agent or officer acting in an official capacity, the law under S.C. Code § 16-15-342(B) gives the member of B Class a complete defense (it simply puts makes it not a crime), but denies it to the member of the D Class under S.C. Code § 16-15-342(D). The law is not treating the two similarly situated individuals the same. One (B Class) has a full defense while the other (D Class) has none based on consent. This is true even when the classes’ intents, beliefs, and communications are identical. Olson v.

DHEC, 379 S.C. 57, 663 S.E.2d 497 (Ct.App. 2008), Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002), Village of Willowbrook v. Olech, 120 S.Ct. 1073, 528 U.S. 562 (2000).

It appears clear that the purpose of S.C. Code § 16-15-342 is to protect those under the age of Eighteen from solicitation of both sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60. With this being the expressed goal of the statute how does the State justify treating members of Class B and Class D so differently? The State must have both a legitimate interest in treating the two individuals differently and must do so on a rational basis Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002). However in this case there is no such legitimate interest nor is there a rational basis. Because both class members show the same criminal inclinations, both class members are engaged in the same activity, both class members are equally dangerous to those under the age of eighteen there can be no legitimate interest in treating the two individuals differently.

However, should it be found there is a legitimate interest to treat members of B Class and D Class differently the State must show it is doing so on a rational basis Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002). The State may claim that a rational basis is to avoid the use of an impossibility defense for individuals charged with violations of S.C. Code § 16-15-342, that without S.C. Code § 16-15-342(D) internet stings would not be possible in South Carolina. However, is it clear that an impossibility defense is dependent on the belief of the defendant, not the fact that the person being communicated with is in reality over sixteen if charged with attempted solicitation which is already available in the text of the statute. The law found in S.C. Code § 16-15-342(D) is not needed, since the defendant must be proven to believe the person to be less than eighteen (18) years of age for there to be liability. As such the statute resolves the

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need for the S.C. Code § 16-15-342(D) exception in itself, and this therefore is not a rational basis.

Another possible argument may be fear that without such a provision the law would allow anyone to conduct "sting" operations in these matters. Further, that in such "sting operations" no safeguards would be available to protect the evidence or procedures to follow. However, this argument ignores the fact that as written S.C. Code § 16-15-342(D) would only stop individuals over sixteen from such conduct. Under the provisions of S.C. Code § 16-15-342(B) so long as you are less than sixteen you can conduct such "stings" at will. The statute in those situations would not preclude the admission of evidence gained as a result. This argument also ignores the existence of prosecutorial discretion under South Carolina Law as stated in State v. Standard, 351 S.C. 199, 569 S.E.2d 323 (2002). The state does not need S.C. Code § 16-15-342(D) to prevent others conducting such "stings" and this argument is not rational and invites all manner of misuse.

The consent provision as written in S.C. Code § 16-15-342(D) also leads to other instances that are not legitimate or rational. A person can communicate under this statute with someone believed to be less than eighteen, but who is in fact over sixteen about commission of a violent crime, so long as the individual being communicated with is not a "law enforcement agent or officer acting in an official capacity." This individual, even soliciting a violent crime as defined in Section 16-1-60, would have the absolute defense of consent. This is not rational nor furthers any legitimate State or public safety interest. The defense only does not exist when the defendant is communicating with someone unlikely to commit such an offense due to S.C. Code § 16-15-342(D).

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No other State in the Union has such a provision in similar laws. This however was not always the case. The State of Louisiana had a nearly identical law to S.C. Code § 16-15-342.

Below is its' version of S.C. Code § 16-15-342(B) and (D), under La.R.S. 14:81.3:

(C. (1) Consent is a defense to a prosecution brought pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.

(C. (3) It is not a defense to a prosecution brought pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement officer or peace officer acting in his official capacity.

As is clear, the statutes are in meaning identical. The equal protection argument under the United States Constitution and the Constitution of Louisiana were argued before the Honorable Wilford D. Carter, J. His Honor found the statute did in fact violate the Fourteenth Amendment of the United States Constitution as well as the Constitution of Louisiana. The Defendant in that case was denied equal protection of the laws. This case was then appealed to the Supreme Court of Louisiana. The case was State v. Hatton, 2007-2377 (La. 7/1/08; 985 So. 2d 709 (2008)). In the Hatton case, the Court reversed the judgment, but on procedural grounds and did not reach the issue of the violation. After Hatton was decided the Louisiana State Legislature revised the law in its entirety removing completely La.R.S. 14:81.3 (C. (1) and (C. (3)). The State of Louisiana removed the consent defense and as such resolved the Equal Protection Clause Violation. Although, the Court is not bound by these findings it is offered as persuasive support for Odom's assertions.

Additionally, under the South Carolina test this statute fails. The South Carolina test states that to satisfy the Equal Protection Clause, a classification must (1) bear a reasonable

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relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis.

D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 23, 482 S.E.2d 558, 562 (1997) (citing Jenkins v. Meares, 302 S.C. 142, 394 S.E.2d 317 (1990)). A legislative enactment will be sustained against constitutional attack if there is "any reasonable hypothesis" to support it. Id. (citing Thomas v. Spartanburg Ry., Gas & Elec. Co., 100 S.C. 478, 85 S.E. 50 (1915)). Lee v. Dept. of Natural Resources, 339 S.C. 463, 530 S.E. 2d 112 (2000).

S.C. Code § 16-15-342(D) violates the Fourteenth Amendment of the United State Constitution and the South Carolina Constitution. It does so by depriving the Defendant of equal protection under the laws of this State and the United States. The aforementioned statute sets up classes of individuals and treats them completely differently under the law. The classes under this statute are identical. There is no compelling State interest or other interest of the State to do so. Additionally, there is no rational basis for the disparity in treatment of the two classes under the law and as such the statute should be declared unconstitutional and unenforceable.

Odom Has, and Will Continue To, Suffer Irreparable Harm if Defendants Are Not Restrained

The AG intends to prosecute Odom for the Oconee Communications. If such prosecution is allowed, Odom will be required to expended monetary resources to defend yet more charges. Odom will suffer further loss of reputation in his community. Odom will be forced to defend additional charges and continue to suffer from violations of his constitutional rights. Odom also would again be placed in jeopardy of loss of his freedom and liberty. This threat is unacceptable, and immediate injunctive relief is therefore necessary.

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Additionally, Odom suffers from specific harms which would not normally follow prosecution due to the fact he is a licensed attorney in this State. For instance, as a result of the charges Odom has had his license for the practice of his profession suspended. He must continue, however, to perform all the ethical duties required of an attorney to include the attendance and expense of CLE classes. He additionally is barred not only from the practice of law but from working in any law office even if the work would not be considered the practice of law. In effect he must endure a scarlet letter and is ousted from any connection with his chosen profession without conviction. This suspension has been an ongoing embarrassment and humiliation since May 2006. No other class of defendant in a criminal matter would suffer such harm of economic hardship, freedom to be employed, and judicially imposed shame. The granting of a temporary restraining order or preliminary injunction in this matter would give Odom cause to motion to have his suspension to practice law lifted.

In addition, granting a temporary restraining order or preliminary injunction allows for the merits of this pending complaint to be fully developed through discovery without Odom suffering the loss of freedom or civil liberties or threat of loss thereof. In addition, Odom's current action presents a claim of vindictive prosecution which should rightly be considered as a cause of action, and a bar to any criminal trial in this matter. The discovery sought by Odom in this cause of action will likely include prosecutorial statistical information, information related to other similar cases, charging criteria, internal communications, and communications with law enforcement entities, and none of these items are available to Odom under criminal discovery rules. There is no other mechanism for this cause of action to be pursued and no remedy at law.

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**Defendants Will Suffer No Meaningful Harm From Complying With a
Temporary Restraining Order and Preliminary Injunction**

A temporary restraining order and preliminary injunction enjoining Defendants from commencing a prosecution of Odom for the Oconee Communications will result, at most, in a temporary delay to any enforcement effort by Defendants. The Oconee Communications have been known to the Defendant Wilson since May of 2006 and no action to charge until now has ever been taken. A delay for this matter to be fully heard poses no harm when the AG has already not pursued the Oconee Communications as a criminal charge in almost four (4) years.

As to the Equal Protection challenge to S.C. Code § 16-15-342 due to the seriousness of the allegation of unconstitutionality a temporary restraining order or preliminary injunction enjoining enforcement of S.C. Code § 16-15-342 to determine the merits of the claim is justified. The Defendants will suffer little harm in that collection of evidence would still be allowed to continue which can be preserved. Should the Court find S.C. Code 16-15-342 does not violate the Equal Protection Clause of the Fourteenth Amendment of the US Constitution it would simply amount to a delay to any enforcement effort by Defendants.

**Issuance of a Temporary Restraining Order and a Preliminary Injunction Will
Serve the Public Interest**

It cannot be questioned that upholding constitutional rights, Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 520-21 (4th Cir. 2002), serves the public interest. Both claims in this case present grave and serious questions as to rights under the US Constitution and South Carolina Constitution as such the granting of the relief requested serves the public interest.

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Odom Should Not Be Required to Post a Bond

Federal courts construing Federal Rule of Civil Procedure 65 permit a trial court to require no bond where the nonmoving party failed to demonstrate any injury. "[T]he trial judge has wide discretion in the manner of requiring security and if there is an absence of proof showing the likelihood of harm, certainly no bond is necessary." Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782 (10th Cir. 1964); accord Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996); Here, there is no indication that Defendants will suffer any cognizable harm during the time that the temporary restraining order and preliminary injunction, if granted, would be in effect. Granting of the current motion simply preserves the status quo as to Odom's claim of vindictive prosecution.

As to the Equal Protection challenge to S.C. Code § 16-15-342 due to the seriousness of the allegation of unconstitutionality a temporary restraining order or preliminary injunction enjoining enforcement of S.C. Code § 16-15-342 to determine the merits of the claim is justified. The Defendants will suffer little harm in that collection of evidence would still be allowed to continue which can be preserved. Should the Court find S.C. Code 16-15-342 does not violate the Equal Protection Clause of the Fourteenth Amendment of the US Constitution and the South Carolina Constitution and it would simply amount to a delay to any enforcement effort by Defendants.

Because Defendants will not be harmed by the issuance of a temporary restraining order or preliminary injunction, Odom should not be required to post a bond.

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IV. CONCLUSION

For the foregoing reasons, Odom respectfully requests that its motion for a temporary restraining order and preliminary injunction be granted. In the alternative, in the event the Court denies Odom requests for a temporary restraining order and preliminary injunction, Odom requests that the Court order a speedy hearing on Odom's request for declaratory judgment, as provided for in Rule 65, SCRCP and Rule 57, SCRCP.

LAW OFFICE OF BRIAN MCDANIEL, LLC

BY: 
BRIAN D. MCDANIEL
Post Office Box 2085
2015 Boundary Street, Suite 216
Beaufort, South Carolina 29901
PHONE (843) 379-5117
FAX (843) 379-5118
ATTORNEY FOR THE PLAINTIFF

Beaufort, South Carolina
May 5, 2011

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[NONE}

EXHIBIT A is omitted

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TOWN OF BURNETTOWN

HOME OF THE SASSAFRAS FESTIVAL

Burnettown Police Department

3144 Augusta Road
Burnettown, SC 29851

Post Office Box 994
Bath, SC 29816

14 December 2009

Burnettown Municipal Court
ATT: Honorable Rodger Edmonds
P.O. Box 994
Bath, Sc 29816

Reference: Investigative Case File Mark Patterson Case 2009-01092

This is to serve as official notice of retention of above listed case file and to list a table of
contest thereof. The case file is to be secured by the court until a resolution of this matter
per your order.

Incident report of Chief Smith reference above case number.
6 copies of photographs of texts on Ellen Patterson's cell phone
1 cd containing voicemails left on Ellen Patterson's cell phone
3 page written statement of Ellen Patterson
1 Page written statement of Calvin McCravy
1 letter from DR. Dewitt
Crime victim intake forms

Sincerely,

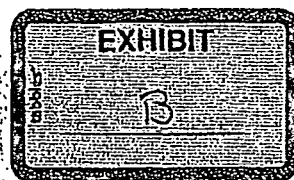

Chief David Paul Smith
Burnettown Police Department

Town Hall
803-593-2676

Burnettown Police Department
David Paul Smith
Chief of Police
Office: 803-593-2160
Fax: 803-593-6275
ChiefMP@Burnettown.com

Police Department
803-593-2160

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000111

STATE OF SOUTH CAROLINA }

Search Warrant

Issued, approved by
Sgt. Anthony Central
Section 17-13-101
March 15, 1978

COUNTY OF LEXINGTON

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF

COUNTY LEXINGTON

It Appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-101, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

Hitachi Deskstar 250 GB SATA HDD Serial Number T4CH8APE, item currently located in evidence storage at the South Carolina Law Enforcement Division Computer Crime Center located at 1731 Bush River Road. As a result of the execution of this search warrant, a search for any and all saved, archived or deleted data including but not limited to chat logs and or records related to the screen names 'danger6552000', 'Roge Wilson' and 'a_upstategurl93', emails, ledgers, diaries, notes, documents, photographs and other items that reflect an interest in sexual activity between adults and minors. Also to be searched for are maps, directions, or internet searches that indicate travel or plans to travel to Oconee County or Westminster. All searches are pertaining to this investigation of Criminal Solicitation of a Minor

Now, therefore, you are hereby authorized to search the subject premises described below, and to seize such property if found

DESCRIPTION OF PROPERTY

As a result of the execution of this search warrant, a search for any and all saved, archived or deleted data including but not limited to chat logs and or records related to the screen names 'danger6552000', 'Roge Wilson' and 'a_upstategurl93', emails, ledgers, diaries, notes, documents, photographs and other items that reflect an interest in sexual activity between adults and minors. Also to be searched for are maps, directions, or internet searches that indicate travel or plans to travel to Oconee County or Westminster. All searches are pertaining to this investigation of Criminal Solicitation of a Minor

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to The Honorable

ADAMS
within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises

LEXINGTON, S.C.

September 7, 2010

SCCA-513 (3-78)

Signature of Judge



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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

AFFIDAVIT

Personally appeared before me, one S/A Lucinda H McKellar
who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under
provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises
in this County: LEXINGTON

DESCRIPTION OF PROPERTY SOUGHT

As a result of the execution of this search warrant, a search for any and all saved, archived or deleted data including but
not limited to chat logs and or records related to the screen names 'danger6552000', 'Roge Wilson' and 'a_upstategurl93',
emails, ledgers, diaries, notes, documents, photographs and other items that reflect an interest in sexual activity between
adults and minors. Also to be searched for are maps, directions, or internet searches that indicate travel or plans to travel
to Oconee County or Westminster. All searches are pertaining to this investigation of Criminal Solicitation of a Minor.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

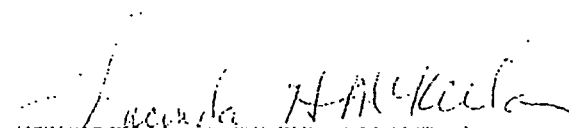
Hitech Deskstar 250 GB SATA HDD Serial Number T4CH8APE, item currently located in evidence storage at the South
Carolina Law Enforcement Division Computer Crime Center located at 1731 Bush River Road. As a result of the
execution of this search warrant, a search for any and all saved, archived or deleted data including but not limited to chat
logs and or records related to the screen names 'danger6552000', 'Roge Wilson' and 'a_upstategurl93', emails, ledgers,
diaries, notes, documents, photographs and other items that reflect an interest in sexual activity between adults and
minors. Also to be searched for are maps, directions, or internet searches that indicate travel or plans to travel to Oconee
County or Westminster. All searches are pertaining to this investigation of Criminal Solicitation of a Minor.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

See attached affidavit.

Sworn to and Subscribed before me
This 7 day of Sept, 2010


Signature of Judge


Affiant
4400 Broad River Road
Columbia, SC 29210
(L.S.) 803-896-7001

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HENRY MCMASTER
SECURITIES COMMISSIONER

December 5, 2006

Jack B. Swerling, Esquire
1720 Main Street, Suite 301
Columbia, SC 29601

Re: State v. Anthony C. Odom (2006-GS-42-2289)

Dear Mr. Swerling:

Thank you for your letter of November 30, 2006 inquiring about the forensic exam of Mr. Odom's computer. I received new some information from SLED last week regarding the progress of the exam, and can confirm that no further exam work has been done on the computer at the Computer Crimes Center. SLED does not intend to conduct a full forensics exam on Mr. Odom's computer. I will contact you this week and discuss the reason for this decision. The preview examination conducted on site at Mr. Odom's residence by SLED produced results that were disclosed in the "Preliminary Report" disc that I gave to you on June 30 in Spartanburg. The results of this preview exam will be the only evidence preserved from the computer for purposes of the prosecution of this case.

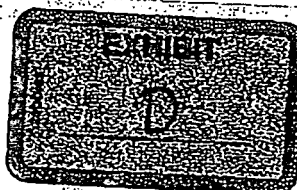
Thank you and I look forward to discussing these matters with you by phone this week.

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With best wishes, I remain
Sincerely,

David M. Stumbo
Assistant Attorney General

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IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
C.A.: 2011-CP-42-2032

PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO THE
DEFENDANTS' MOTION TO DISMISS.

PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO THE
DEFENDANTS' MOTION TO DISMISS.

PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO THE
DEFENDANTS' MOTION TO DISMISS.

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In the Defendant's Motion to dismiss the following grounds are relied upon. Each ground will be responded to below:

**As to Ground One of Defendants Motion to Dismiss:
(Lack of Jurisdiction)**

It must first be pointed out that this action contains both matters of equity and matters of law. Upon review of the Defendant's brief in this matter it appears that they are seeking the dismissal on lack of jurisdiction grounds as to the equity portions of the complaint. As the matters of law seeking damages for the violations are separate and independent from the action for injunction which sound in equity. The Defendant's appear to rely primarily upon the Stovall v. Sawyer, 181 S.C. 379, 187 S.E. 821 (1936) referenced in a previous brief in this case.

Defendant's reliance on Stovall v. Sawyer, 181 S.C. 379, 187 S.E. 821 (1936) is misplaced. Since 1936 and the advent of the Declaratory Judgement Acts first implemented in South Carolina in 1948 courts have been moving away from the rule set forth in Stovall. Furthermore, as the courts of equity and law continue to merge the distinction has grown less and less pronounced. Bacon v. Neer, 631 F.3d 875 (8th Cir. 2011), Miller v. Mitchell, 598 F.3d 139 (3rd Cir 2010) *of particular interests is foot note number 12*, Younger v. Harris, 401 U.S 37, 91 S.Ct. 746 (1971) all cases showing a movement away from this strict rule.

Below are sections of the South Carolina Declaratory Judgement Act which are relevant to this issue:

§ 15-53-130. Chapter shall be construed liberally. This chapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered. HISTORY: 1962 Code § 10-2013; 1952 Code § 10-2013; 1948 (45) 2014.

§ 15-53-140. Chapter intended to make uniform the laws of the states. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact substantially identical legislation and to harmonize, as far as possible, with Federal laws and regulations on the subject of declaratory judgments and decrees.

Therefore, it is the Plaintiff's position that subsequent Federal case law and the enactment of the South Carolina Declaratory Judgement Act supersede Stovall v. Sawyer, 181 S.C. 379, 187 S.E. 821 (1936).

In any case even if Stovall is still law its requirements are met in this action. A suit requesting an injunction does pre date the filing of the criminal action. The Plaintiff's initial suit was filed in the S.C. U.S. District Court (MBS 2:10-873) prior to the criminal indictments and in fact requested an injunction from indictment upon the ground of vindictive prosecution (2).

The same right is involved in this action as was implicated in the previous action, in that the prosecution of the Plaintiff by the Attorney General is vindictive as to the Oconee Charges; and (3). the criminal prosecution was instituted by a party to the pending suit. As such the requirements of Stovall were met in this case.

In addition, since the original federal lawsuit brought by the Plaintiff was dismissed upon motion of the Defendants. After the State proceeded with obtaining an indictment which allowed the application of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971). The Defendants should not now be allowed to benefit from the fact that the Plaintiff is seeking remedy in a State Court. When due to respect for the State system the Federal Court backed due to the motion of the Defendants.

The additional case used by Defendant (Morgan v. Giese) is an unpublished opinion and per Rule 268(d)(2), SCRAP should not be used for any precedent value and should not be cited except in proceedings in which they are directly involved. This case is also off point and deals with a case which, other than the fact it is criminal in nature, has little to do with the issue at hand. Morgan involves a claim that a portion of the South Carolina Constitution is unconstitutional which is not been brought in the current matter. Also since the courts are not going to give legal strategy advice, the fact that the Court did not tell the Defendant that action to file in the Court of Common Pleas is without import.

There is a second exception set forth in Stovall which allows the Plaintiff's claims to be equity to be maintained. The exception is met by one asking for a clearly void statute to be enjoined, the failure to do so would create irreparable injury to property rights of the Plaintiff. In this case, as listed in Plaintiff's motion for an injunction (which is incorporated into this response as well as the Complaint in this action verbatim), the injury to the property rights result from the suspension of Plaintiff's license to practice law, which is considered property.

**As to Ground Two of Defendants' Motion to Dismiss:
(Court of General Sessions Orders and Rulings)**

The fact that the General Session trial has been scheduled has no legal bearing as to the dismissal of this action. Additionally, any prior ruling in that court has no binding control on this motion or this action. First and foremost this case has nothing to do with The Honorable Judge McIntosh, it is an action seeking damages, injunction and other relief against the listed Defendants to the action. The Honorable Judge McIntosh is not involved. This action is not about enjoining or usurping a member of the Judicial Branch of government, but about the

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Executive branch of government. This should be obvious from the complaint, but it appears to be in need of clarification.

It seems that this argument is more a backdoor attempt to use the doctrine of Res Judicata to bar Plaintiff's access to this court. The argument is without merit. Indeed, for Res Judicata to apply you must have the following:

Res Judicata is a rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and, as to them, constitutes an absolute bar to a subsequent action. Black's Law Dictionary 1174 (5th ed. 1979). To establish res judicata, the following elements must be shown: (1) identities of the parties; (2) identity of the subject matter and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures Inc., 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992).

It is clear as crystal that in South Carolina pre-trial rulings are not final judgments. However, because defense counsel failed to make a contemporaneous objection, this issue is not preserved for our review. "[M]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837 (2001). As such any orders of the General Session Court may at most be persuasive authority but in no way act as a bar to this action.

**As to Ground Three of Defendants Motion to Dismiss:
(Prosecutorial Immunity)**

The doctrine of prosecutorial immunity has no effect in this matter. Plaintiff agrees that absolute prosecutorial immunity does exist for "traditional functions of a prosecutor", however, it only applies when a prosecutor is sued in their **individual capacity** Williams v. Condon, 347

S.C. 227, 553 S.E.2d 496 (Ct.App. 2001)(emphasis added). The complaint of the Plaintiff is brought in the official capacity of the agents of the State of South Carolina and as such is an action against the State and not that of an individual prosecutor. As such prosecutorial immunity does not apply. Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 (1976).

Under Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct.App. 2001) it is stated that such a claim under 42 U.S.C. 1983 for monetary damages can not be maintained against agents named in their official capacities due to the fact that the State is not a person. This very notion was addressed in Nivens v. Gilchrist, 444 F.3d 237 (4th Cir 2006) and is based on the concepts of sovereign immunity. "The Eleventh Amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign States." U.S. Const. amend. XI. The Amendment has been read to make "an unconsenting State . . . immune from suits brought in federal courts by her own citizens as well as by citizens of another State." Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974). In the Nivens case, Appellants made a claim for monetary damages against Gilchrist in his official capacity. Such a claim, in effect, is against the governmental entity employing Gilchrist. *See Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (noting that the government entity is "the real party in interest" in an official capacity suit). Thus, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945)"

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However, this is an action in a court of this State and sufficient facts are within the complaint to constitute an action under the South Carolina Tort Claims Act. In the event the 42 U.S.C 1983 action was found barred, the fact the Defendants did not plead the affirmative defense of sovereign immunity would allow the case to move forward. Per Rule 12 (H)(1)(A) S.C.R.C.P. and Rule 12 (g), S.C.R.C.P. this defense is now waived. This is so due to the fact that the motion now before the court contains defenses and arguments that the Defendants consolidated pursuant to Rule 12 (g), S.C.R.C.P. Lastly, pursuant to Rule 8, S.C.R.C.P. the Plaintiff was not required to reference the S.C. Tort Claims Act specifically in his complaint to have a theory of recovery thereunder.

**As to Grounds Four and Six of Defendants Motion to Dismiss:
(Venue and Subject Matter Jurisdiction)**

This case arises under the U.S. Constitution and the laws of the United States and presents a federal question within this Court's concurrent jurisdiction under Article III of the Constitution and 28 U.S.C. §§ 1331 and 1343(a)(3). It seeks remedies under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. §§ 1983 and 1988. Additionally, under S.C. Codes §§ 1 as well as S.C. Codes §§ 15-53-10, 15-53-20, 15-53-60, 15-53-80, 15-53-90, and 15-53-110 jurisdiction is established in this Court.

Venue is proper in this Circuit and Country per S.C. Code §15-7-30, as one of the Defendants upon information and belief resides within the County of Spartanburg, State of South Carolina and maintains a place of business herein, additionally many of the facts involved in this matter occurred or originated within this the County of Spartanburg, State of Carolina.

Lastly, the Defendant;s reliance on S.C. Code SECTION 15-77-50. is misplaced see

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code section below:

Jurisdiction and venue of actions affecting State agencies and officials, The circuit courts of this State are hereby vested with jurisdiction to hear and determine all questions, actions and controversies, other than those involving rates of public service companies for which specific procedures for review are provided in Title 58, affecting boards, commissions and agencies of this State, and officials of the State in their official capacities in the circuit where such question, action or controversy shall arise.

As stated in Plaintiff's complaint "many of the facts involved in this matter occurred or originated within this the County of Spartanburg, State of Carolina." As can be seen from the complaint all the matter complained of orbited the Spartanburg Case. The core issue behind the vindictive prosecution claim is the refusal to allow certain evidence to be turned over to the Plaintiff. The sought evidence was sought for the Spartanburg trial, was to be used in the Spartanburg trial, and all the discussion about said evidence revolved around its use in the Spartanburg trial.

Additionally, there remains a criminal charge as listed in the complaint in the County of Spartanburg as as such the Equal Protection portion of the Plaintiff's claims also meet the statute cited by the Defendants in this action. There is more than sufficient allegations to meet the requirements of S.C. Code §15-77-50 for venue to be placed in the County of Spartanburg, State of South Carolina.

**As to Ground Five of Defendants Motion to Dismiss:
(Rule 12(b)(6) Motion)**

In considering a motion to dismiss the Plaintiffs complaint for failure to state a cause of action, the court must base its ruling solely on the allegations set in the complaint. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). The allegations must also be taken in the light

most favorable to the Plaintiff and with every doubt resolved in the Plaintiff's behalf Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007).

If the facts alleged in the complaint and any reasonable inference therefrom constitute that the Plaintiff would be entitled to relief on any theory of the case then a dismissal for failure to state a claim would be improper. Sloan Const. Co. v. Southco Grassing Inc., 377 S.C. 108, 659 S.E.2d 158 (2008). A decision on a motion to dismiss for failure to state a claim can only be based on the allegations set in the face of the complaint. Burns v. Gardner, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997). A claim can not be dismissed merely because the court doubts the plaintiff will prevail in the action Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007).

Plaintiff contends that it's complaint and incorporated documents and exhibits constitute valid causes of action. The facts stated in the complaint support a cause of action on both the equal protection grounds and vindictive prosecution grounds as plead. As such the complaint can not be dismissed pursuant to Rule 12(b)(6), S.C.R.C.P .

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As to Defendant Attorney General's Motion to Strike:

Per Rule 12(f), S.C.R.C.P. a upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter. There is no such matter in the complaint of the Plaintiff to be stricken.

This motion is based upon the premise that the Expungement order requires any reference

to such matter be stricken from the Plaintiff's complaint (specifically paragraphs, 33-38 of the complaint) . Such an order has no such power. See the statute in question below:

SECTION 17-1-40 . Destruction of records where charges dismissed; fee; exception; promulgation of regulations.

(A) A person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the arrest and booking record, files, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal, county, or state law enforcement agency. Provided, however, that local and state detention and correctional facilities may retain booking records, identifying documentation and materials, and other institutional reports and files under seal, on all persons who have been processed, detained, or incarcerated, for a period not to exceed three years from the date of the expungement order to manage their statistical and professional information needs and, where necessary, to defend such facilities during litigation proceedings except when an action, complaint, or inquiry has been initiated. Information retained by a local or state detention or correctional facility as permitted under this section after an expungement order has been issued is not a public document and is exempt from disclosure. Such information only may be disclosed by judicial order, pursuant to subpoena filed in a civil action, or as needed during litigation proceedings. A person who otherwise intentionally retains the arrest and booking record, files, mug shots, fingerprints, or any evidence of the record pertaining to a charge discharged or dismissed pursuant to this section is guilty of contempt of court.

(B) A municipal, county, or state agency may not collect a fee for the destruction of records pursuant to the provisions of this section.

(C) This section does not apply to a person who is charged with a violation of Title 50, Title 56, an enactment pursuant to the authority of counties and municipalities provided in Titles 4 and 5, or any other state criminal offense if the person is not fingerprinted for the violation.

(D) The State Law Enforcement Division is authorized to promulgate regulations that allow for the electronic transmission of information pursuant to this section.

Since the attempt to obtain this evidence is at the core of the vindictive prosecution cause of action it is not immaterial. It is highly relevant to the causes of action in this case, and is not scandalous nor impertinent. The fact of arrest and some detail of the event is still available on the internet and was reported in the news media. Also as can be seen the order only applies to official agencies, this action is brought by a private party not subject to the order.

Additionally, it is the belief of the defense that Patterson was never fingerprinted as a result of this charge and as such his order would be null and void as, he would not be eligible for such order in the first instance under the law, see section C. If this is the case the issue is a nullity even if the court gives credence that the order would require the references in the Plaintiff's private complaint to be stricken.

CONCLUSION

For these and the reasons previously argued in the Plaintiff's other supporting memorandum, the Defendants motions should be denied.

Respectfully Submitted,

Law Office of Brian McDaniel, LLC



Brian McDaniel
Post Office Box 2085
Beaufort, South Carolina 29901
(843) 379-5117 Telephone
(843) 379-5118 Facsimile
Attorney for the Plaintiff

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SPARTANBURG COUNTY
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M. HOPE BLACKBERRY

September 12, 2011

000125

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Anthony C. Odom,
☐ Plaintiff

v.

Alan Wilson, etc. , et al
☐ Defendant.

)
)
)
)
)
)
)
)
)
)
)

IN THE
Court of Common Pleas

CASE NO.
11-CP-42-2032

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Brian D. McDaniel
, Bar No.
Address: Law Office of Brian McDaniel, LLC
P.O. Box 2085
Beaufort, SC 29901

phone: 843-379-5117 fax: 843-379-5118
e-mail: bmcDaniel@attorneymcdaniel.com
other:

Defendant Wilson's and Barnette's Attorney:
J. Emory Smith, Jr.
5262 , Bar No.
Address: Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
phone: 803-734-3680 fax: 803-734-3677
e-mail: agesmith@scag.gov other:

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: To Dismiss

Estimated Time Needed: 20 min Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant Date submitted May 27, 2011

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

000127

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Anthony C. Odom,	)	Case No. 11-CP-42-2032
	)	
Plaintiff,	)	
	)	
v.	)	
	)	MOTION TO DISMISS
Alan Wilson, etc., et al,	)	AND STRIKE
	)	
Defendants.	)	
	)	

Without waiving any jurisdictional or other defenses to this complaint, the Defendants Attorney General and Solicitor Barnette move for the dismissal of the entire Complaint herein pursuant to Rules 12(b)(1), (3) and (6), SCRCP, in that, for reasons set forth below, the Court lacks jurisdiction over the subject matter of this action, venue is improper and the Plaintiff has failed to state facts sufficient to constitute a cause of action:

1. The Court of Common Pleas lacks jurisdiction to enjoin proceedings in the Court of General Sessions.
2. The Court of General Sessions has already scheduled this case for trial.
3. Any damage claims against the Defendants are barred by their absolute prosecutorial immunity.
4. Venue is improper in that under S.C. Code Ann. § 15-77-50 (1976), suits against officials of the State in their official capacities must be brought in the circuit where such question, action or controversy shall arise, and the Complaint does not allege a basis for venue in Spartanburg County.
5. The Plaintiff has failed to state facts sufficient to constitute a cause of action.

6. The Court lacks subject matter jurisdiction of this case.

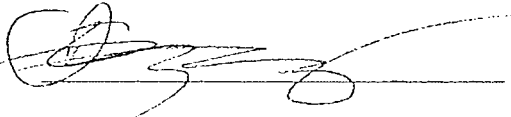
Subject to the Motion to Dismiss, the Attorney General moves to strike those parts of paragraphs 33 – 38 that refer to the arrest of Mr. Patterson because the records were ordered destroyed pursuant to an Order of Destruction, December 8, 2009.¹

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680

BY: 

ATTORNEYS FOR THE ATTORNEY GENERAL
AND SOLICITOR BARNETTE

May 27, 2011

000149

¹ This Order is referenced only for the purposes of the Motion to Strike and not for the purposes of the Motion to Dismiss. It can be provided to the Court if the Court desires to see it.



ALAN WILSON
ATTORNEY GENERAL

September 8, 2011

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg, SC 29304-3483

Re: Odom v. Wilson, et al 2011-CP-42-2032

Dear Ms. Blackley:

Enclosed for filing with your Office are the following items including a certificate of service:

1. The original Motion to Dismiss of Defendant Thurmond together with a motion slip and a check for the filing fee.
2. The Order of the Honorable Lawton McIntosh of August 12, 2011, in *State v. Odom* (2010-GS-37-363A and 364A) which is filed in support of the Motions to Dismiss the Defendants Wilson, Barnette and Adams¹, and in opposition to the Motion for TRO and Preliminary Injunction. The Order is also attached to the Motion to Dismiss Solicitor Thurmond.
3. Portions of the June 27, 2100 transcript (Tr. pp. 1, 16, 17, 24, 25, 32, 38, 39, 96 and 97) in *State v. Odom* which are filed in opposition to the Motion for TRO and Preliminary Injunction. For the purposes of the TRO / Injunction Motion, I reserve the right to offer other parts of that transcript at the hearing in this case scheduled for September 12, 2011, and to rely on documents already filed as to the Motions to Quash and for a Protective Order in this case. These transcript pages are not filed in support of the Motions to Dismiss.

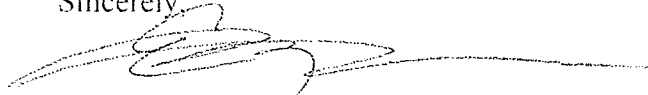
¹ This Court may take judicial notice of the Order of the Honorable Lawton McIntosh setting this case for trial on a date certain of November 7, 2011, copy attached to Motion to Dismiss. *State v. Anthony Odom* (2010-GS-37-363, 364 (Oconee County)). A court may take judicial notice of matters of public record without converting a Motion to Dismiss into a Motion for Summary Judgment. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007); *Jenner v. Dooley*, 1999 SD 20, 590 N.W.2d 463, 470. Such records may include records in prior judicial proceedings (*Jenner*), and this order does not present facts from outside the complaint which was found objectionable in *Charleston County Sch. Dist. v. Harrell*, 713 S.E.2d 604 (S.C. 2011). Therefore, the Court may consider this Order and grant this Motion to dismiss because the Court cannot enjoin a criminal trial that has been scheduled in the Court of General Sessions.

000130

The Honorable M. Hope Blackley
September 8, 2011
Page 2

Please confirm filing by stamping the enclosed copy of this letter and returning it in the enclosed envelope. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to be "J. Emory Smith, Jr.", with a long horizontal flourish extending to the right.

J. Emory Smith, Jr.
Assistant Deputy Attorney General

cc: Brian D. McDaniel, Esquire

000151

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Anthony C. Odom,	)	Case No. 11-CP-42-2032
	)	
Plaintiff,	)	
	)	
v.	)	
	)	MOTION TO DISMISS
Alan Wilson, etc., et al,	)	OF DEFENDANT THURMOND
	)	
Defendants.	)	
	)	

Without waiving any jurisdictional or other defenses to this complaint, the Defendant J. Strom Thurmond, Jr., moves for the dismissal of the entire Complaint herein pursuant to Rules 12(b)(1), (3) and (6), SCRCF, in that, for reasons set forth below, the Court lacks jurisdiction over the subject matter of this action, venue is improper and the Plaintiff has failed to state facts sufficient to constitute a cause of action:

1. The Court of Common Pleas lacks jurisdiction to enjoin proceedings in the Court of General Sessions.
2. The Court of General Sessions has already scheduled the prosecution at issue for trial.¹
3. Any damage claims against the Defendant is barred by his absolute prosecutorial

¹ This Court may take judicial notice of the Order of the Honorable Lawton McIntosh setting this case for trial on a date certain of November 7, 2011, copy attached to Motion to Dismiss. *State v. Anthony Odom* (2010-GS-37-363, 364 (Oconee County)). A court may take judicial notice of matters of public record without converting a Motion to Dismiss into a Motion for Summary Judgment. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007); *Jenner v. Dooley*, 1999 SD 20, 590 N.W.2d 463, 470. Such records may include records in prior judicial proceedings (*Jenner*), and this order does not present facts from outside the complaint which was found objectionable in *Charleston County Sch. Dist. v. Harrell*, 713 S.E.2d 604 (S.C. 2011). Therefore, the Court may consider this Order and grant this Motion to Dismiss because the Court cannot enjoin a criminal trial that has been scheduled in the Court of General Sessions.

immunity.

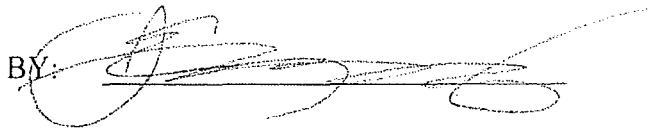
4. Venue is improper in that under S.C. Code Ann. § 15-77-50 (1976), suits against officials of the State in their official capacities must be brought in the circuit where such question, action or controversy shall arise, and the Complaint does not allege a basis for venue in Spartanburg County.
5. The Plaintiff has failed to state facts sufficient to constitute a cause of action.
6. The Court lacks subject matter jurisdiction of this case.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680

BY: 

September 8, 2011

ATTORNEYS FOR SOLICITOR THURMOND

STATE OF SOUTH CAROLINA }
COUNTY OF OCONEE }

IN THE COURT OF GENERAL SESSIONS
TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,
vs.
ANTHONY C. ODOM,
Defendant

ORDER FOR CONTINUANCE AND
DATE CERTAIN

2010-GS-37-363, 364

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FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

THIS MATTER comes before the Court upon the request of Assistant Attorney General Megan B. Wines, on behalf of the State, seeking a continuance in the above-captioned case presently scheduled for trial August 29, 2011.

Attorneys for the State will be on annual leave during the August 29, 2011 Term of Court and, therefore, the State requests the trial be continued. The Defendant has no objection to this request, as his attorney has plans to be away as well.

The State also seeks the trial be re-scheduled for a date certain of November 7, 2011. The State has witnesses from across South Carolina, as well as witnesses from out of state, and believes it necessary to have trial set as a date certain.

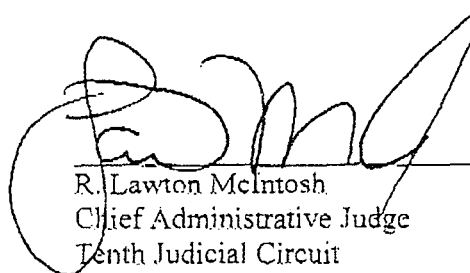
Accordingly, the State respectfully requests the trial of the above-captioned case be continued from August 29, 2011 and scheduled for the **date certain** of November 7, 2011.

IT IS HEREBY ORDERED that the case of Anthony Clark Odom is continued from August 29, 2011 and scheduled for the **date certain** of November 7, 2011.

IT IS SO ORDERED.

cc: Solicitor

August 17, 2011


R. Lawton McIntosh
Chief Administrative Judge
Tenth Judicial Circuit

000137

ENTERED
COMPUTER

2 cont. cases set + Del. Att.

1 STATE OF SOUTH) IN THE COURT OF GENERAL
2 CAROLINA) SESSIONS
3)
4 COUNTY OF OCONEE) INDICTMENTS NO:
5) 2010-GS-37-00363A AND
6) 2010-GS-37-00364A

7)
8)
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10)
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STATE OF SOUTH
CAROLINA
PLAINTIFF,
-VS-
ANTHONY C. ODOM
DEFENDANT.

JUNE 27, 2011
WALHALLA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ALEXANDER S. MACAULAY, JUDGE

A P P E A R A N C E S:

MEGAN BURLESON WINES, ESQ., ASSISTANT ATTORNEY GENERAL
JASON ANDERS, ESQ., ASSISTANT ATTORNEY GENERAL
KYLE SENN, ESQ., ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR THE STATE

JAMES B. HUFF, ESQ.
ANDY JOHNSTON, ESQ.
BRIEN MCDANIEL, ESQ.
ATTORNEYS FOR THE DEFENDANT

ROBIN SUE HILD, FCRR, RPR
CIRCUIT COURT REPORTER
POST OFFICE BOX 9
WALHALLA, SC 29691

000133

1 THE COURT: WELL, I THINK, IF YOU WILL FORGIVE ME,
2 YOUR MOTION TO, I THINK YOU SAY DISMISS, BUT IT'S TO
3 QUASH THE INDICTMENTS BASED ON THE INSUFFICIENCY OR --
4 THAT PROBABLY SHOULD THE FIRST THING WE TAKE UP. BECAUSE
5 IF I GRANT YOUR MOTIONS, THEN WE CAN GO HOME AND THE
6 ATTORNEY GENERAL CAN GO BACK TO THE GRAND JURY. ALL
7 RIGHT.

8 WHAT ELSE DO WE HAVE? I MEAN, IS THAT ACCEPTABLE TO
9 THE DEFENDANT TO GO AHEAD AND TAKE UP THE MOTIONS TO,
10 MOTION TO DISMISS AND THEN TO DECLARE THE STATUTE
11 UNCONSTITUTIONAL?

12 MR. HUFF: YES. I BELIEVE WE'VE ALREADY SUBMITTED
13 EVERYTHING TO THE COURT PREVIOUSLY AS TO THAT ISSUE.

14 THE COURT: ALL RIGHT. WELL, LET'S SEE WHAT WE
15 HAVE. WHICH ONE DO YOU WANT TO TAKE UP FIRST?

16 MR. HUFF: JUDGE, I BELIEVE THERE WAS A MOTION
17 BEFORE THE COURT. IF THE COURT WOULD DESIRE A -- WE HAD
18 MADE A MOTION AS TO DISMISS FOR VIOLATION OF MR. ODOM'S
19 FIRST AMENDMENT RIGHTS, I BELIEVE BRIEFS HAVE BEEN
20 SUBMITTED, MEMORANDUM OF LAW HAVE BEEN SUBMITTED BY BOTH
21 SIDES.

22 THE COURT: ALL RIGHT. DO YOU HAVE ANY ARGUMENT OR
23 DO YOU TRUST MY READING OF THE MEMORANDUMS, OR MEMORANDA?

24 MR. HUFF: WE HAD SUBMITTED THAT I BELIEVE TO YOU,
25 BOTH SIDES HAD.

1 THE COURT: WELL, I'M JUST ASKING YOU, DO YOU HAVE
2 ANY ARGUMENT?

3 MR. HUFF: NO, YOUR HONOR.

4 THE COURT: NO ORAL ARGUMENT?

5 ALL RIGHT. MADAM ATTORNEY GENERAL, DO YOU WANT TO
6 SAY ANYTHING?

7 MS. WINES: I WOULD ALSO STAND ON OUR MEMORANDUM
8 SUBMITTED TO THE COURT.

9 THE COURT: VERY WELL. ALL RIGHT. LET'S SEE.
10 WELL, I THINK THE FIRST THING WOULD BE THE CONSTITUTIONAL
11 QUESTION. THE THRUST OF YOUR CONSTITUTIONAL QUESTION IS
12 EQUAL PROTECTION AND FIRST AMENDMENT; IS THAT CORRECT?

13 MR. HUFF: THAT'S CORRECT, YOUR HONOR.

14 THE COURT: NOW, WHAT IS THE ALTERNATIVE METHOD THAT
15 YOU WOULD PROPOSE TO GOVERN WHAT A THIRTEEN-YEAR-OLD
16 WOULD RECEIVE? NOW, THE *BOOKSELLERS* CASE HAD TO DO WITH
17 THE DISSEMINATION RATHER THAN THE RECEIPT.

18 MR. HUFF: JUDGE, YOU ARE ASKING ME WHAT ALTERNATIVE
19 METHOD --

20 THE COURT: ISN'T THAT ONE OF THE THINGS -- WELL,
21 FIRST OF ALL, I DON'T THINK THERE'S ANY QUESTION, AND YOU
22 NOTE THAT, THAT AS THEY DID IN *BOOKSELLERS*, THEY NOTED
23 THAT THE STATE DOES HAVE A COMPELLING INTEREST NOT TO
24 PERMIT ALL SPEECH, PARTICULARLY THAT WOULD AFFECT MINORS.

25 MR. HUFF: JUDGE, THAT'S CORRECT. BUT THAT WAS ALSO

1 DESIRE TO ENJOY THAT, WATCHING OR OBSERVING OR ---

2 THE COURT: WELL, WOULDN'T THAT BE -- PARTICULARLY
3 IF IT WAS A CHILD, I WOULD HOPE THAT WOULD NOT BE
4 SANCTIONED. I MEAN, IF THERE IS AN ADULT THAT WOULD SEEK
5 GRATIFICATION FROM AN INNOCENT CHILD, AND I THINK THAT'S
6 WHAT THE STATUTE IS AIMED AT, NOT A CARING PARENT HELPING
7 THE CHILD TO MATURE.

8 MR. HUFF: THE STATUTE HAS NOTHING TO DO WITH
9 HELPING THE CHILD TO MATURE.

10 THE COURT: NO. BUT THE POTTY TRAINING DOES.

11 MR. HUFF: THANK YOU, YOUR HONOR.

12 THE COURT: YES, SIR. ALL RIGHT. BUT SO THAT'S IT.

13 ALL RIGHT. BASED ON THE MEMORANDUM AND LIMITED
14 ARGUMENT OF COUNSEL, I FIND THAT UNDER THE DESCRIPTION OF
15 CRIMINAL SOLICITATION BY ONE WHO KNOWINGLY CONTACTS AND
16 COMMUNICATES WITH A PERSON UNDER THE AGE OF EIGHTEEN
17 YEARS OR A PERSON HE REASONABLY BELIEVES IS UNDER THE AGE
18 OF EIGHTEEN YEARS, WITH THE PURPOSES OR INTENT OF
19 PERSUADING, INDUCING, ENTICING OR COERCING THE PERSON TO
20 ENGAGE IN OR PARTICIPATE IN A SEXUAL ACTIVITY IS
21 CONSTITUTIONAL VERSUS THAT NOT BEING PROTECTED SPEECH,
22 NOR IS -- STATE INTEREST BEING SUCH TO PROTECT MINORS
23 FROM SUCH ACTIVITIES. AND NO ALTERNATIVE METHOD OF DOING
24 THAT HAS BEEN, OR LESS RESTRICTIVE METHOD HAS BEEN
25 SUGGESTED, THAT OBVIOUSLY IT IS CONSTITUTIONAL UNDER THE

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1 FIRST AMENDMENT.

2 NOW LET'S GO TO EQUAL PROTECTION. AND YOUR ARGUMENT
3 THERE IS WHAT?

4 MR. HUFF: YOUR HONOR, AS WE MENTIONED BEFORE, AS TO
5 EQUAL PROTECTION, YOU BASICALLY COME UP WITH FOUR CLASSES
6 OR SCENARIOS OF ACTIVITY OR SPEECH. YOU'VE GOT SOMEBODY
7 SPEAKING TO SOMEBODY WHO IS AT LEAST SIXTEEN YEARS OF
8 AGE, THEY TALK ABOUT SEXUAL ACTIVITY. IT'S CONSENSUAL
9 BETWEEN THE TWO. IT IS NOT ILLEGAL. THERE IS AN
10 ABSOLUTE CONSENT DEFENSE IN THAT SCENARIO. EVEN THOUGH
11 THE STATUTE MAKES IT ILLEGAL TO TALK TO SOMEBODY
12 ABOUT ---

13 THE COURT: WELL, IT'S NOT A DEFENSE. IT'S NOT *PER*
14 *SE*. I MEAN, YOU HAVE TO ESTABLISH THAT THERE WAS
15 CONSENT.

16 MR. HUFF: ABSOLUTELY.

17 THE COURT: OKAY.

18 MR. HUFF: I'M ASSUMING THAT THE SIXTEEN-YEAR-OLD
19 SAYS, I AGREE TO TALK INTO THAT CONVERSATION. I AGREE TO
20 IT. EVEN THOUGH THE STATUTE MAKES IT ILLEGAL FOR
21 MR. ODOM TO SPEAK TO SOMEBODY LESS THAN EIGHTEEN, AS LONG
22 AS THEY ARE SIXTEEN AND CONSENTING TO THAT CONVERSATION,
23 IT NOW IS NOT ILLEGAL.

24 THE COURT: ALL RIGHT.

25 MR. HUFF: ADDITIONALLY, JUDGE, IF MR. ODOM IS

1 BECAUSE HE WOULDN'T BE GUILTY.

2 MR. HUFF: AND IT WOULD BE SUBJECT TO A MOTION FOR A
3 DIRECTED VERDICT IF THE STATE ---

4 THE COURT: IF IT DOESN'T, THERE WOULD BE A
5 REASONABLE GROUNDS FOR A FINDING. SO I AGREE WITH YOU,
6 EXCEPT THAT YOU WANT TO SORT OF NOT READ THE WHOLE
7 STATUTE. SO I'M AFRAID I'M GONNA HAVE TO DENY YOU ALSO
8 ON THE EQUAL PROTECTION AND -- WHAT ELSE DO YOU HAVE IN
9 THERE? ANYTHING ELSE?

10 MR. HUFF: JUDGE, I THINK THOSE ARE THE TWO THAT WE
11 HAD SUBMITTED BRIEFS ON.

12 THE COURT: VERY GOOD. ALL RIGHT. SO I FIND THE
13 STATUTE CONSTITUTIONAL UNDER THE FIRST AMENDMENT AS WELL
14 AS THE 14TH.

15 ALL RIGHT. NEXT? NOW WHAT?

16 MR. HUFF: JUDGE, I WAS SPEAKING WITH MR. ODOM. I
17 DID NOT GET YOUR QUESTION.

18 THE COURT: I JUST WANT TO KNOW WHAT'S UP NEXT, OR
19 WE COULD TAKE A SHORT BREAK BEFORE IF YOU WOULD LIKE
20 BEFORE WE GET TO THE NEXT SECTION.

21 MR. HUFF: COULD WE TAKE A FIVE-MINUTE BREAK?

22 THE COURT: FINE. I'M READY. I HAVEN'T DONE THIS
23 MUCH LAW SINCE LAW SCHOOL. NORMALLY I DEPEND ON THE
24 ATTORNEYS TO EDUCATE ME.

25 (DISCUSSION OFF THE RECORD.)

1 THE COURT: ALL RIGHT. VERY GOOD.

2 NEXT?

3 MR. HUFF: YOUR HONOR, WE WOULD HAVE A MOTION THAT
4 MR. BRIEN MCDANIEL WILL TAKE UP AND ARGUE FOR MR. ODOM,
5 IT IS A MOTION ON PROSECUTORIAL VINDICTIVENESS.

6 THE COURT: ALL RIGHT. YOU ARE MR. MCDANIEL?

7 MR. MCDANIEL: BRIEN MCDANIEL, YES, YOUR HONOR.

8 THE COURT: B-R-I-E-N?

9 MR. MCDANIEL: YES, SIR.

10 THE COURT: I'LL ADD YOU TO THE DEFENDANTS.

11 MR. MCDANIEL?

12 MR. MCDANIEL: IF I MAY PASS UP A WRITTEN MOTION ON
13 THIS POINT? (HANDING.)

14 THE COURT: NOW, MR. MCDANIEL, THIS IS DATED JUNE
15 THE 27TH, SO THIS HAS NOT BEEN SERVED OR FILED UNTIL
16 TODAY?

17 MR. MCDANIEL: THAT'S CORRECT.

18 THE COURT: ALL RIGHT. YOU MIGHT WANT TO FILE IT,
19 THOUGH.

20 MR. MCDANIEL: I'LL DO THAT, YOUR HONOR.

21 THE COURT: ALL RIGHT. YOU MAY PROCEED.

22 MR. MCDANIEL: YOUR HONOR, WE WOULD LIKE TO MAKE A
23 MOTION TO HAVE THE INDICTMENTS DISMISSED DUE TO
24 VINDICTIVE PROSECUTION.

25 JUST AS A WAY OF INTRODUCTION TO IT, THE CASES

1 ESTABLISH THAT WHEN THE DEFENDANT EXERCISES A RIGHT, HE
2 CLEARLY HAS THE RIGHT TO DO AND HE'S PUNISHED OR THERE'S
3 A PENALTY FOR DOING THAT, THERE'S AN EXACTING OF A PRICE.
4 AND THAT CAN BE CONSIDERED VINDICTIVE PROSECUTION.
5 ACCORDING TO U.S. V. WILSON AS WELL AS UNITED STATES V.
6 JOHNSON, (READING):

7 AN INDICTMENT MUST BE DISMISSED IF THERE'S A FINDING
8 OF EITHER ACTUAL VINDICTIVENESS OR OF A PRESUMPTION OF
9 VINDICTIVENESS HAS NOT BEEN REBUTTED OR OBJECTIVE
10 EVIDENCE JUSTIFYING THE PROSECUTOR'S ACTION IS NOT
11 ESTABLISHED.

12 WE WOULD LIKE TO FIRST PRESENT OUR EVIDENCE OF
13 VINDICTIVE PROSECUTION AND THEN ARGUE THE LEGAL ASPECTS
14 OF THE MOTION.

15 THE COURT: VERY GOOD.

16 MR. MCDANIEL: I'D LIKE TO PROFFER MR. JIM HUFF AS A
17 WITNESS TO PROFFER HIS TESTIMONY FOR THE COURT AS TO THE
18 EVIDENCE WE HAVE AND HIS TESTIMONY AS TO VINDICTIVE
19 PROSECUTION AT THIS TIME.

20 THE COURT: ALL RIGHT. ANY OBJECTION?

21 MS. WINES: WELL, NO, SIR, GO AHEAD.

22 THE COURT: VERY WELL, MR. HUFF, COME AROUND.

23

24

25

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1 BUT THEY OVERLOOKED OR DIDN'T THINK TO MENTION THAT
2 RULE 3.7, WHICH COMES IN BETWEEN, IS LAWYER AS A WITNESS.
3 (READING): A LAWYER SHALL NOT ACT AS AN ADVOCATE AT A
4 TRIAL IN WHICH A LAWYER IS LIKELY TO BE A NECESSARY
5 WITNESS. AND THAT TO ME ALSO APPLIES TO JUDGES.
6 OBVIOUSLY ANYTHING I KNOW JUDICIALLY TO ME CREATES A
7 PROBLEM, AS I THINK I'VE MENTIONED ON THE MOTIONS ABOUT
8 THE QUESTIONNAIRES. I THINK WHAT A JURY NEEDS TO KNOW IS
9 WHAT THEY HEAR IN A COURTROOM, NOT OUTSIDE OR ANYTHING,
10 AND WHAT THEY ARE INSTRUCTED ABOUT THE LAW IN THE
11 COURTROOM. SO I DON'T WANT TO HAVE ANYTHING THAT WOULD
12 SUGGEST THAT WHATEVER.

13 AND, OF COURSE, THERE'S A PENDING MOTION NOW THAT
14 GOES TO WHETHER THERE WAS ANY ANIMUS OR PRESUMPTION OF
15 VINDICTIVENESS, AND I THINK IT EVEN SAID IN ONE OF THE
16 CASES -- BECAUSE I HAD TO READ PRETTY QUICK SINCE THIS
17 AFTERNOON -- THAT MANY TIMES IT'S NOT DIRECT, IT'S
18 DETERMINED FROM CIRCUMSTANCES, WHICH IS OBVIOUSLY
19 SOMETHING THAT IS NOT DIRECT KNOWLEDGE. BUT HERE THE
20 CIRCUMSTANCES I DID HAVE KNOWLEDGE OF OUTSIDE THE
21 PROCEEDINGS.

22 SO WITH ALL THAT, NO, I'M NOT MAKING A DECISION -- I
23 HAVE NOW -- THE ONLY THING IS, AND THAT WILL BE FOR THE
24 NEXT TRIAL JUDGE TO DETERMINE.

25 MS. WINES: YES, SIR.

1 THE COURT: I'M SATISFIED WITH MY RULINGS ON THE
2 PRETRIAL MATTERS, BUT THAT CAN BE FOR HIM, TOO.

3 MS. WINES: OKAY. THANK YOU, YOUR HONOR, I JUST
4 WANTED CLARIFICATION ON IT. THANK YOU.

5 THE COURT: ALL RIGHT. THAT'S ALL I WANTED TO DO.
6 I WON'T DO A SHORT ORDER FORM, I'LL DO A SHORT ORDER,
7 THOUGH, THAT WILL REFLECT THAT I HAVE RECUSED MYSELF AND
8 THAT THE CONTINUANCE IS GRANTED. AND I'LL LEAVE IT UP
9 TO -- YOU'LL HAVE TO LOOK AT COURT ADMINISTRATION, OR AT
10 LEAST THE CHIEF ADMINISTRATIVE JUDGE, WHICH I AM NOT THIS
11 TIME, FOR MAYBE A SPECIAL ORDER. ALL RIGHT.

12 AGAIN, I'M GOING TO -- MADAM CLERK, I THINK WE CAN,
13 THE MESSAGE WILL BE TO CALL BACK, BUT IF YOU CAN GET TO
14 THE JURY, THE ONES WHO HAVE BEEN SELECTED, THAT WOULD BE
15 GOOD. OTHERWISE, I'LL SEE THEM AT 10:00 AND EXCUSE THEM
16 AT THAT TIME.

17 THE CLERK: OKAY, I WILL.

18 THE COURT: ALL RIGHT, GENTLEMEN AND LADY, I DO
19 APPRECIATE YOUR PATIENCE WITH THE COURT.

20 JMS. WINES: THANK YOU, YOUR HONOR.

21 MR. MCDANIEL: THANK YOU, YOUR HONOR.

22 THE COURT: AND HERE ARE -- NOW, WE DO HAVE A RECORD
23 IN THIS CASE THAT IS A PART OF THE TRIAL RECORD RATHER
24 THAN JUST THE FILINGS. WHAT DO YOU WANT TO DO WITH THE
25 EXHIBITS?

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Anthony C. Odom,	)	Case No. 11-CP-42-2032
	)	
Plaintiff,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
Alan Wilson, etc., et al,	)	
Defendants.	)	
	)	

I hereby certify that I have served a copy of the Motion to Dismiss of Defendant Thurmond, the Order of the Honorable Lawton McIntosh of August 12, 2011, in *State v. Odom* (2010-GS-37-363A and 364A) and portions of the transcript in that case (Tr. pp. 1, 16, 17, 24, 25, 32, 38, 39, 96 and 97) upon counsel for Plaintiff by mailing copies to him at the address below via the United States Mail this September 8, 2011:

Brian D. McDaniel, Esquire
Law Office of Brian McDaniel, LLC
P.O. Box 2085
Beaufort, SC 29901


J. EMORY SMITH, JR.
Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Anthony C. Odom,
☐ Plaintiff

v.

Alan Wilson, etc. , et al
☐ Defendant.

)
)
) IN THE
) Court of Common Pleas
)
)

CASE NO.
11-CP-42-2032

)
) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
)
)

Plaintiff's Attorney: Brian D. McDaniel
, Bar No.
Address: Law Office of Brian McDaniel, LLC
P.O. Box 2085
Beaufort, SC 29901

phone: 843-379-5117 fax: 843-379-5118
e-mail: bmcdaniel@attorneymcdaniel.com
other:

Defendant Adam's Attorney:
J. Emory Smith, Jr.
5262 , Bar No.
Address: Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
phone: 803-734-3680 fax: 803-734-3677
e-mail: agesmith@scag.gov other:

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: To Dismiss Defendant Adams
Estimated Time Needed: 20 min Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant Date submitted August 26, 2011

SECTION III: Motion Fee

☒ **PAID – AMOUNT:** 25.00
☐ **EXEMPT:** ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Anthony C. Odom,	)	Case No. 11-CP-42-2032
	)	
Plaintiff,	)	
	)	
v.	)	
	)	MOTION TO DISMISS
Alan Wilson, etc., et al,	)	OF DEFENDANT ADAMS
	)	
Defendants.	)	
_____	)	

Without waiving any jurisdictional or other defenses to this complaint, the Defendant Christina T. Adams moves for the dismissal of the entire Complaint herein pursuant to Rules 12(b)(1), (3) and (6), SCRCPP, in that, for reasons set forth below, the Court lacks jurisdiction over the subject matter of this action, venue is improper and the Plaintiff has failed to state facts sufficient to constitute a cause of action:

1. The Court of Common Pleas lacks jurisdiction to enjoin proceedings in the Court of General Sessions.
2. The Court of General Sessions has already scheduled this case for trial.
3. Any damage claims against the Defendant is barred by her absolute prosecutorial immunity.
4. Venue is improper in that under S.C. Code Ann. § 15-77-50 (1976), suits against officials of the State in their official capacities must be brought in the circuit where such question, action or controversy shall arise, and the Complaint does not allege a basis for venue in Spartanburg County.
5. The Plaintiff has failed to state facts sufficient to constitute a cause of action.

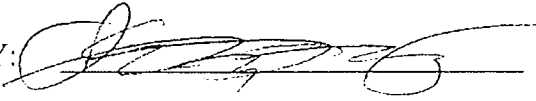
6. The Court lacks subject matter jurisdiction of this case.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680

BY: 

August 26, 2011

ATTORNEYS FOR SOLICITOR ADAMS

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Anthony C. Odom,	)	Case No. 11-CP-42-2032
	)	
Plaintiff,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
Alan Wilson, etc., et al,	)	
Defendants.	)	
	)	

I hereby certify that I have served a copy of the Motion to Dismiss of Defendant Adams upon counsel for Plaintiff by mailing copies to him at the address below via the United States Mail this August 26, 2011:

Brian D. McDaniel, Esquire
Law Office of Brian McDaniel, LLC
P.O. Box 2085
Beaufort, SC 29901



J. EMORY SMITH, JR.
Assistant Deputy Attorney General

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Anthony C. Odom,	)	Case No. 11-CP-42-2032
	)	
Plaintiff,	)	
	)	MEMORANDUM OF ATTORNEY
v.	)	GENERAL AND SOLICITORS
	)	BARNETTE, ADAMS AND THURMOND
Alan Wilson, etc., et al,	)	IN SUPPORT OF MOTIONS
	)	TO DISMISS
Defendants.	)	
_____	)	

The Defendants Attorney General and Solicitors Barnette, Adams and Thurmond submit this Memorandum in Support of their Motions to Dismiss.¹

The instant case is an improper attempt to stop an ongoing criminal prosecution of Plaintiff in the Court of General Sessions. See attached Order of the Honorable R. Lawton McIntosh, August 12, 2011.² Although the Court of General Sessions has held several pretrial hearings, and has scheduled trial for a date certain of November 7, 2011 Plaintiff seeks an injunction in this Common Pleas case in Spartanburg County to block his trial as scheduled by

¹ Subject to his Motion to Dismiss, the Attorney General has also moved to strike paragraphs 33-38 of the Complaint. That motion will be addressed separately in Court if, *arguendo*, reaching it is necessary.

² This Court may take judicial notice of the Order of the Honorable Lawton McIntosh setting this case for trial on a date certain of November 7, 2011, copy attached to Motion to Dismiss. *State v. Anthony Odom* (2010-GS-37-363, 364 (Oconee County)). A court may take judicial notice of matters of public record without converting a Motion to Dismiss into a Motion for Summary Judgment. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007); *Jenner v. Dooley*, 1999 SD 20, 590 N.W.2d 463, 470. Such records may include records in prior judicial proceedings (*Jenner*), and this order does not present facts from outside the complaint which was found objectionable in *Charleston County Sch. Dist. v. Harrell*, 713 S.E.2d 604 (S.C. 2011). Therefore, the Court may consider this Order and grant this Motion to Dismiss because the Court cannot enjoin a criminal trial that has been scheduled in the Court of General Sessions.

Court of General Sessions in Oconee County, and also seeks damages on his malicious prosecution claim.

I

THE COURT OF COMMON PLEAS CANNOT OVERRULE THE ORDER OF THE COURT OF GENERAL SESSIONS OR ENJOIN PROCEEDINGS IN THAT COURT

Plaintiff wants this Court to enjoin the prosecution of him in Oconee County, but this Court lacks the power to do so. The Court of General Sessions has already set a date certain for the trial and the Court of Common Pleas lacks the power to overrule that decision. *Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979); *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986); *Department of Social Services v. Laura D.* 386 S.C. 382, 688 S.E.2d 130 (Ct. App., 2009). Although this authority appears to arise in the context of different circuit judges within the same case, it is consistent with other authority that the Court of Common Pleas lacks the power to enjoin the Court of General Sessions.

Stovall v. Sawyer, 181 S.C. 379, 187 S.E. 821 (1936) makes clear that a collateral attack such as this civil proceeding may not be made.

. . . It will thus be seen that the doctrine recognized in this state is that a court of equity will only restrain a criminal prosecution when (1) there is a suit pending in equity, (2) in which it is sought to try the same right in issue in the criminal proceeding, and (3) such criminal prosecution is instituted by one party to this pending suit against the other, except (1) when the prosecution is instituted under an ordinance or statute which is clearly void, and (2) irreparable injury to property rights may result from its enforcement."

Quoting *Palmetto Golf Club v. Robinson, Sheriff*, 143 S.C. 347, 141 S.E. 610, 616 (1928); see also *Folsoms v. South Carolina Highway Department*, 13 S.E. 2d 130 (S.C. 1941). None of the limited exceptions allowing restraint of a criminal prosecution are present in the instant case

This Court of Common Pleas lacks the authority to overrule Court of General Sessions and, in effect, tell that Court that it cannot hold the trial in his Court of General Sessions when it has scheduled it.

II

THE DEFENDANTS HAVE ABSOLUTE PROSECUTORIAL IMMUNITY FOR ANY DAMAGE CLAIM

The Defendants have absolute prosecutorial immunity from damages under well settled law. *Williams v. Condon*, 347 S.C. 227, 235, 553 S.E.2d 496, 500 (S.C. Ct. App. 2001).³

III

VENUE IS IMPROPER

Venue is improper in that under S.C. Code Ann. § 15-77-50 (1976), suits against officials of the State in their official capacities must be brought in the circuit where such question, action or controversy shall arise, and the Complaint does not allege a basis for venue in Spartanburg County. The prosecution at issue is pending in Oconee County.

³ *Williams* states as follows:

We hold a prosecutor in the employ of this state is immune from personal liability under § 1983 or the South Carolina Tort Claims Act for actions relating to the prosecution of an individual as a criminal defendant-regardless of the prosecutor's motivation-provided the actions complained of were committed while the prosecutor was acting as an "advocate," as defined by *Imbler v. Pachtman* and its progeny.

Additionally, the law is clear that a prosecutor cannot be sued in his official capacity under either § 1983 for money damages or the Tort Claims Act when the acts complained of were "judicial" or "quasi-judicial" in nature. 553 S.E.2d at 509.

CONCLUSION

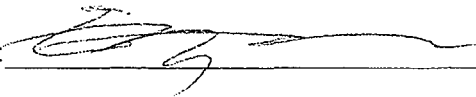
The Motion to Dismiss should be granted because venue is improper, because this Court lacks the authority to enjoin proceedings in the Court of General Sessions, overrule decisions of that Court and because the Defendants are absolutely immune from suit for damages.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

J. EMORY SMITH, JR.
Assistant Deputy Attorney General
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Post Office Box 11549
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Fax: (803) 734-3677

BY: 

September 12, 2011

COUNSEL FOR DEFENDANTS ATTORNEY GENERAL
AND SOLICITOR BARNETTE

0000157

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Anthony C. Odom,	)	Case No. 11-CP-42-2032
	)	
Plaintiff,	)	
	)	MEMORANDUM OF ATTORNEY
v.	)	GENERAL AND SOLICITORS
	)	BARNETTE, ADAMS AND THURMOND
Alan Wilson, etc., et al,	)	IN OPPOSITION TO MOTION FOR TRO
	)	AND PRELIMINARY INJUNCTION
Defendants.	)	
_____	)	

The Defendants Attorney General and Solicitors Barnette, Adams and Thurmond oppose the Motion for a Temporary Restraining Order and Preliminary Injunction for the reasons set forth below.

The instant case is an improper attempt to stop an ongoing criminal prosecution of Plaintiff in the Court of General Sessions. See Exhibit A, attached Oconee County indictments (2010-GS-37-363 and 364; Ex. B, Order of the Honorable Alexander S. Macaulay, May 18, 2011 (*State v. Odom*) and Ex. C Order of the Honorable R. Lawton McIntosh, August 12, 2011; see also, Complaint, paragraphs 10, 19, 29 and 51. Although the Oconee Court of General Sessions has held several pretrial hearings, and has scheduled trial for a date certain of November 7, 2011 following continuances from earlier dates, Plaintiff seeks an injunction in this Common Pleas case in Spartanburg County to block his Oconee trial. Plaintiff fails to meet the guidelines for a temporary injunction and the very strict limitations placed on Courts of Common Pleas issuing injunctions as to General Sessions proceedings.

BACKGROUND

The indictments charge Plaintiff with criminal solicitation of a minor in violation of S.C. Code Ann. § 16-15-342. The basis for the prosecution of Plaintiff is his alleged communication over the internet with Mark Patterson, an undercover agent posing as a 13 year old girl. *Id.* and Ex. D, Tr., *State v. Odom*, 4/12/11, p. 35, ll. 1, 5 -19.

Section 16-15-342 provides as follows.

(A) A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.

(B) Consent is a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.

(C) Consent is not a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is under the age of sixteen.

(D) It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.

(E) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than ten years, or both.

Plaintiff contends that this statute denies him the equal protection of the laws because paragraph B creates a defense to the prosecution if the person with whom the defendant is communicating consents and is at least sixteen years old but disallows this defense if the person is a law enforcement officer. The Court of General Sessions has already ruled that this statute is

constitutional. Ex. E, Tr. 6/27/11 hearing p. 1, 17, ll. 9 – 12; p. 24, l. 2 – p. 25, l. 23; p. 32, ll. 6 – 14).

Despite having had the opportunity before then, Plaintiff waited until the June 27, 2011, Motions hearing to raise his vindictive prosecution claim in the Court of General Sessions. Ex. E, Tr 6/27, p. 38, l. 3 – 22). Before reaching a decision as to the vindictive prosecution issue, Judge Macaulay recused himself and continued the trial. Ex. E, Tr. 6/27, pp. 96 & 97. Now, the case is scheduled for trial on November 7. Ex. C, Order, August 12. When the Court of General Sessions has ruled that the statute is constitutional and has heard argument on the vindictive prosecution claim, the Court of Common Pleas should not allow this collateral attack on the Court of General Sessions to proceed.

This issue was also the subject of Plaintiff's collateral federal action which the Honorable Margaret Seymour dismissed over a year ago. Ex. F, *Odom v. McMaster*, 2:10-cv-00873-MBS (USDC, August 6, 2010) (copy attached). Judge Seymour noted that, in *State v. Fletcher*, 471 S.E.2d 702 (S.C. Ct. App. 1996), a criminal defendant was permitted to present a vindictive prosecution claim within the criminal proceeding against him. *Id.* at 703. She recognized that *Fletcher* demonstrates that South Carolina courts are capable of hearing allegations of vindictive prosecution. Although Plaintiff was not precluded from pursuing the issue before Court of General Sessions, Judge Seymour expressly found that Plaintiff had failed to prove bad faith in the Oconee prosecution in an effort to avoid the application of *Younger* abstention. *Younger v. Harris*, 401U.S. 37, 41 (1971). Order at p. 8.

Despite Judge Seymour's ruling, the rulings of Judge Macaulay and the pendency of Plaintiff's late filed vindictive prosecution claim in the Court of General Sessions, Plaintiff has

chosen to pursue his claims of vindictive prosecution and a denial of equal protection via this improper, collateral civil proceeding.

**PLAINTIFF FAILS TO MEET THE GROUNDS
FOR A TEMPORARY INJUNCTION**

In the case of *Scratch Golf Company v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E. 2d 905, 907 (2004), the South Carolina Supreme Court set out the elements required for the issuance of a temporary injunction.

An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. ... For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.

Plaintiff fails on all three grounds for a temporary injunction all of which are intertwined with the pending prosecution of Plaintiff in the Court of General Sessions.¹

¹ Plaintiff cites a balancing of equities ground for a temporary injunction citing *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 626 S.E. 2d 34, 36 (Ctt. App. 2005), but *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010) rejected or limited this ground as follows:

In our view, the "balancing the equities" requirement is neither necessary nor appropriate in a preliminary injunction case, where the three requirements (irreparable harm, success on merits, and inadequate remedy at law) are well established and clearly delineate the burden of proof and of persuasion. Moreover, the balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test.

A

Plaintiff Has No Likelihood of Success on the Merits

1

**The Court of Common Pleas cannot overrule
the Order of the Court of General Sessions or enjoin proceedings in that Court**

Plaintiff wants this Court to enjoin the prosecution of him in Oconee County, but this Court lacks the power to do so. The Court of General Sessions has already set a date certain for the trial and determined that the statute at issue is constitutional, and the Court of Common Pleas lacks the power to overrule that decision. *Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979); *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986); *Department of Social Services v. Laura D.* 386 S.C. 382, 688 S.E.2d 130 (Ct. App., 2009). Although this authority appears to arise in the context of different circuit judges within the same case, it is consistent with other authority that the Court of Common Pleas lacks the power to enjoin the Court of General Sessions.

Stovall v. Sawyer, 181 S.C. 379, 187 S.E. 821 (1936) makes clear that a collateral attack such as this civil proceeding may not be made.

. . . It will thus be seen that the doctrine recognized in this state is that a court of equity will only restrain a criminal prosecution when (1) there is a suit pending in equity, (2) in which it is sought to try the same right in issue in the criminal proceeding, and (3) such criminal prosecution is instituted by one party to this pending suit against the other, except (1) when the prosecution is instituted under an ordinance or statute which is clearly void, and (2) irreparable injury to property rights may result from its enforcement."

Quoting *Palmetto Golf Club v. Robinson, Sheriff*, 143 S.C. 347, 141 S.E. 610, 616 (1928); see also *Folsoms v. South Carolina Highway Department*, 13 S.E. 2d 130 (S.C. 1941). None of the

limited exceptions allowing restraint of a criminal prosecution are present in the instant case. In particular, the statute at issue is not "clearly void" because Court of General Sessions has already ruled that the statute is constitutional and has set a date certain for trial.

In a recent case, the Supreme Court quickly rejected a Petition for Original Jurisdiction in a civil proceeding that sought to enjoin a criminal proceeding. The Court stated that "if petitioner is entitled to any relief, he should seek it in the court of general sessions where his criminal charges are pending." See Ex. G, Order, Supreme Court, June 6, 2007, *Morgan v. Giese* and Petition, *Morgan v. Giese*, June 5, 2007 (copies attached). Accordingly, Plaintiff should seek any relief available within the proceedings pending before Court of General Sessions where he has already raised all issues that he has raised in the instant civil proceeding. This Court of Common Pleas lacks the authority to overrule Court of General Sessions and, in effect, tell that Court that it cannot hold the trial in his Court of General Sessions when it is scheduled.

2

The Equal Protection claim has already been decided

Plaintiff claims a disparity in treatment between the class of persons consensually communicating with persons 16 and older who are not law enforcement officers under §16-15-342(B) and those who are communicating with law enforcement officers under paragraph (D) of that statute. The Court of General Sessions has already ruled that this statute is constitutional, and the Court of Common Pleas lacks the authority to overturn those rulings or reach a contrary decision as to the statute. Certainly, this statute is presumed to be Constitutional and "will not be declared unconstitutional unless its repugnance to the constitution

is clear and beyond a reasonable doubt.” *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). Plaintiff cannot show a likelihood of overcoming this standard.

3

The Vindictive Prosecution claim is pending before the Court of General Sessions

As noted above, this issue is already pending in the Court of General Sessions and trial has been scheduled. This Court lacks the authority to enjoin the General Session Court from deciding that issue and holding trial. Although Judge Seymour dismissed the Federal action over a year ago, Plaintiff has demonstrated a complete lack of confidence in the claim since then. He has not bothered to raise the claim in the General Sessions case until just before the trial, as then scheduled in June, despite the Court’s having had several pretrial hearings. As noted above, Judge Seymour found no proof of bad faith as to the Oconee prosecution. Certainly, no likelihood of success exists as to the merits of this claim.

4

The Defendants have absolute prosecutorial immunity for any damage claim

The Defendants have absolute prosecutorial immunity from damages under well settled law. *Williams v. Condon*, 347 S.C. 227, 235, 553 S.E.2d 496, 500 (Ct. App. 2001).²

² *Williams*, 553 S.E.2d at 509, states as follows:

We hold a prosecutor in the employ of this state is immune from personal liability under § 1983 or the South Carolina Tort Claims Act for actions relating to the prosecution of an individual as a criminal defendant-regardless of the prosecutor's motivation-provided the actions complained of were committed while the prosecutor was acting as an “advocate,” as defined by *Imbler v. Pachtman* and its progeny. Additionally, the law is clear that a prosecutor cannot be sued in his official capacity under either § 1983 for money damages or the Tort Claims Act when the acts complained of were “judicial” or “quasi-judicial” in nature.

B

Plaintiff Will Not Be Irreparably Harmed If The Injunction Is Not Issued

Plaintiff will not be irreparably harmed if the injunction is not issued because the Court of General Sessions has already decided his Constitutional Claim and the vindictive prosecution claim is pending before that Court. He did not even raise the vindictive prosecution issue until the originally scheduled week of trial in that Court. As noted, the trial was continued due to Judge Macaulay's recusal.

Although Plaintiff claims that he would have broader discovery in the Court of Common Pleas, Plaintiff does not show that he has sought and been denied any information pertinent to his defense by the Court of General Sessions. Further, he apparently was not concerned about irreparable injury from the criminal prosecution when he brought his Federal prosecution. Rather than argue against *Younger* abstention on that basis, he argued that *Younger* should not apply due to bad faith,³ a claim rejected in the United States District Court by Judge Seymour. Order, Judge Seymour, *supra*.

C

Plaintiff Has An Adequate Remedy

The Court of General Sessions has decided the equal protection issue and has before it the vindictive prosecution claim.

³Plaintiff only asserted that irreparable injury could be inferred from the alleged bad faith. Memorandum in Opposition at p. 15 (copy attached as Ex. H).

CONCLUSION

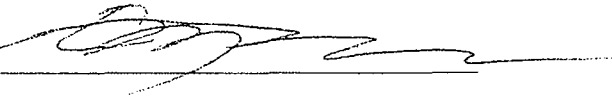
The Request for a Temporary Restraining Order and Preliminary Injunction should be denied because it makes a disruptive and unauthorized request of a Court of Common Pleas to go beyond its authority to enjoin proceedings in the Court of General Sessions contrary to the Order of that Court. Plaintiff shows no likelihood of success on the merits and has made no showing of irreparable harm in this improper challenge to proceedings before Court of General Sessions.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Email: AGESMITH@SCAG.GOV
Post Office Box 11549
Columbia, South Carolina 29211
Phone: (803) 734-3680
Fax: (803) 734-3677

BY: 

September 12, 2011

COUNSEL FOR DEFENDANTS ATTORNEY
GENERAL, BARNETTE, ADAMS AND THURMOND

EXHIBIT A

000157

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF OCONEE)

INDICTMENT

CRIMINAL SOLICITATION OF A MINOR

At a Court of General Sessions, convened on April 12, 2010, the Grand Jurors of Oconee County present upon their oath:

That Anthony C. Odom, on or about May 6, 2008, did willfully and knowingly commit the crime of criminal solicitation of a minor. To wit: Anthony C. Odom, a person eighteen years of age or older, did knowingly contact and communicate with a person located in Oconee County that he reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5), or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person reasonably believed to be under the age of eighteen. This is in direct violation of Section 16-15-0342, of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

OFFICE OF THE ATTORNEY GENERAL


HENRY McMASTER (MBW)
ATTORNEY GENERAL

688153

WITNESSES

Sgt. Gordon Hopkins, WPD

ARREST WARRANT NUMBER

Direct Presentment

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: APR 12 2010

VERDICT

True Bill

Foreperson of Petit Jury

Date:

DOCKET NO. 2010-GS-37-

363

The State of South Carolina

County of Oconee

COURT OF GENERAL SESSIONS

APRIL TERM 2010

THE STATE

VS.

ANTHONY C. ODOM
D.O.B. 6/22/1973

Indictment for

CRIMINAL SOLICITATION
OF A MINOR

SC Code: 16-15-0342

CDR Code: 2999

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2010 APR 12 P 3:17

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF OCONEE)

INDICTMENT

CRIMINAL SOLICITATION OF A MINOR

At a Court of General Sessions, convened on April 12, 2010, the Grand Jurors of Oconee County present upon their oath:

That Anthony C. Odom, on or about May 4, 2006 and/or May 5, 2006, did willfully and knowingly commit the crime of criminal solicitation of a minor. To wit: Anthony C. Odom, a person eighteen years of age or older, did knowingly contact and communicate with a person located in Oconee County that he reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5); or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person reasonably believed to be under the age of eighteen. This is in direct violation of Section 16-15-0342, of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

OFFICE OF THE ATTORNEY GENERAL



HENRY McMASTER (MBW)
ATTORNEY GENERAL

000170

PAGE 01/04

COUNT OF SIGNATURE

000171

WITNESSES

Sgt. Gordon Hopkins, WPD

ARREST WARRANT NUMBER

Direct Presentment

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

APR 12 2010

VERDICT

True Bill

Foreperson of Petit Jury

Date:

DOCKET NO. 2010-GS-37-

364

The State of South Carolina

County of Oconee

COURT OF GENERAL SESSIONS

APRIL TERM 2010

THE STATE

VS.

ANTHONY C. ODOM

D.O.B. 6/22/1973

Indictment for

**CRIMINAL SOLICITATION
OF A MINOR**

SC Code: 16-15-0342

CDR Code: 2999

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED OCONEE SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2010 APR 12 P 3:17

EXHIBIT B

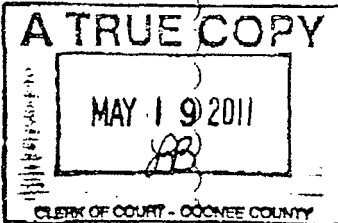
680172

STATE OF SOUTH CAROLINA)

COURT OF GENERAL SESSIONS
TENTH JUDICIAL CIRCUIT

COUNTY OF OCONEE)

State of South Carolina,



2010-GS-37-363, 364

ORDER

v.

ANTHONY C. ODOM

Defendant

THIS MATTER comes before the Court by upon the request of the Defendant seeking certain relief.

The parties agree a date certain is beneficial and necessary for this trial as both parties have witnesses from across the state, out of state witnesses may be required, and the court may issue, pursuant to the request of the defense, a written questionnaire be sent to the jury pool. Further, this case involves matters which were heard pre-trial on April 12, 2011, and further pre-trial matters will be handled at a hearing at the Edgefield County Courthouse on June 2, 2011. Accordingly, the parties respectfully request that the above-captioned case be scheduled for a date certain of June 27, 2011.

IT IS HEREBY ORDERED

1. The above-cited case is scheduled for a date certain of June 27, 2011;
2. A final pre-trial hearing shall be held on June 2, 2011 at the Edgefield County Courthouse at 3 o'clock in the afternoon (3 p.m.).
3. Further relief may be granted as requested.

IT IS SO ORDERED.

ALEXANDER S. MACAULAY, Judge
Tenth Judicial Circuit

Signed this 18th day of May 2011.
Anderson, South Carolina

000173

EXHIBIT C

000174

STATE OF SOUTH CAROLINA }
COUNTY OF OCONEE }

IN THE COURT OF GENERAL SESSIONS
TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,
vs.
ANTHONY C. ODOM,
Defendant

**ORDER FOR CONTINUANCE AND
DATE CERTAIN**

2010-GS-37-363, 364

2011 AUG 17 PM 2:51

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

THIS MATTER comes before the Court upon the request of Assistant Attorney General Megan B. Wines, on behalf of the State, seeking a continuance in the above-captioned case presently scheduled for trial August 29, 2011.

Attorneys for the State will be on annual leave during the August 29, 2011 Term of Court and, therefore, the State requests the trial be continued. The Defendant has no objection to this request, as his attorney has plans to be away as well.

The State also seeks the trial be re-scheduled for a date certain of November 7, 2011. The State has witnesses from across South Carolina, as well as witnesses from out of state, and believes it necessary to have trial set as a date certain.

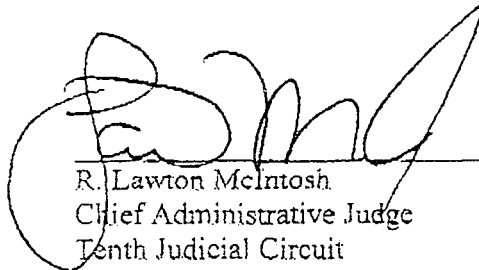
Accordingly, the State respectfully requests the trial of the above-captioned case be continued from August 29, 2011 and scheduled for the **date certain** of November 7, 2011.

IT IS HEREBY ORDERED that the case of Anthony Clark Odom is continued from August 29, 2011 and scheduled for the **date certain** of November 7, 2011.

IT IS SO ORDERED.

cc: Solicitor

August 17, 2011


R. Lawton McIntosh
Chief Administrative Judge
Tenth Judicial Circuit

ENTERED
COMPUTER

000175

2 Cont. cases - 1st & 2nd 11-1-11

EXHIBIT D

000170

1 STATE OF SOUTH
2 CAROLINA
3 COUNTY OF OCONEE

) IN THE COURT OF GENERAL
) SESSIONS
)
) INDICTMENT NO:
) 2010-GS-37-363, 2010-GS-37-264

4
5 STATE OF SOUTH
6 CAROLINA

7 PLAINTIFF,

8 -VS-

9 ANTHONY C. ODOM,

10 DEFENDANT.

)
)
)
) TRANSCRIPT OF RECORD
) MOTIONS HEARING
)
)
)
)

11 APRIL 12, 2011
12 WALHALLA, SOUTH CAROLINA

13 B E F O R E:

14 THE HONORABLE ALEXANDER S. MACAULAY, JUDGE.
15

16
17 A P P E A R A N C E S:

18 MEGAN BURLESON WINES, ASSISTANT ATTORNEY GENERAL
19 R. KYLE SENN, ASSISTANT ATTORNEY GENERAL
20 JASON ANDERS, ASSISTANT ATTORNEY GENERAL
21 ATTORNEYS FOR THE STATE

22 JAMES HUFF, ESQ.
23 ANDREW JOHNSTON
24 ATTORNEYS FOR THE DEFENDANT
25

ROBIN SUE HILD, FCRR, RPR
CIRCUIT COURT REPORTER
POST OFFICE BOX 9
WALHALLA, SC 29691

600177

1 MR. ODOM WOULD HAVE HAD TO HAVE CERTIFIED THAT HE WAS AT
2 LEAST EIGHTEEN YEARS OF AGE AND MR. PATTERSON WOULD HAVE
3 HAD TO HAVE CERTIFIED THAT HE IS AT LEAST EIGHTEEN YEARS
4 OF AGE.

5 AND SO WHAT THE STATE'S THEORY OF THIS CASE IS, IS
6 THAT OFFICER PATTERSON THEN REPRESENTED HIMSELF AS A
7 THIRTEEN-YEAR-OLD FEMALE, AND THAT MR. ODOM VIOLATED THE
8 LAW OF SOUTH CAROLINA, VIOLATED THE CRIMINAL SOLICITATION
9 OF MINORS STATUTES, BY GOING THROUGH THE YAHOO PORTAL AND
10 THEN GOING INTO THESE VIRTUAL CHAT ROOMS AND THEN, IN
11 FACT, GOING INTO A PRIVATE ROOM.

12 SO IT WOULD BE OUR --

13 THE COURT: WELL, IS THE OFFICER EIGHTEEN YEARS OF
14 AGE OR OLDER?

15 MR. JOHNSTON: YES, SIR.

16 THE COURT: THEN WHAT HAS HE DONE?

17 MR. JOHNSTON: WHAT HE'S DONE IS, THE THEORY OF THE
18 PROSECUTION IN THIS CASE IS THAT MR. ODOM HAD TO BELIEVE
19 THAT HE WAS, IN FACT, THIRTEEN YEARS OF AGE.

20 THE COURT: YOU DON'T THINK HE WOULD -- AGAIN, I'M
21 JUST, YOU KNOW -- AN ARRANGEMENT WITH A EIGHTEEN-YEAR-OLD
22 MALE?

23 MR. JOHNSTON: I'M SORRY. I DIDN'T UNDERSTAND YOUR
24 QUESTION, SIR.

25 THE COURT: WELL, IF THE DEFENDANT THOUGHT THAT THE

EXHIBIT E

000173

1 STATE OF SOUTH) IN THE COURT OF GENERAL
2 CAROLINA) SESSIONS
3)
4) INDICTMENTS NO:
5) 2010-GS-37-00363A AND
6) 2010-GS-37-00364A

7)
8)
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10)
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18)
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23)
24)
25)

STATE OF SOUTH
CAROLINA

PLAINTIFF,

-VS-

ANTHONY C. ODOM

DEFENDANT.

TRANSCRIPT OF RECORD
MOTIONS HEARING

JUNE 27, 2011
WALHALLA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ALEXANDER S. MACAULAY, JUDGE

A P P E A R A N C E S:

MEGAN BURLESON WINES, ESQ., ASSISTANT ATTORNEY GENERAL
JASON ANDERS, ESQ., ASSISTANT ATTORNEY GENERAL
KYLE SENN, ESQ., ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR THE STATE

JAMES B. HUFF, ESQ.
ANDY JOHNSTON, ESQ.
BRIEN MCDANIEL, ESQ.
ATTORNEYS FOR THE DEFENDANT

ROBIN SUE HILD, FCRR, RPR
CIRCUIT COURT REPORTER
POST OFFICE BOX 9
WALHALLA, SC 29691

1 THE COURT: WELL, I'M JUST ASKING YOU, DO YOU HAVE
2 ANY ARGUMENT?

3 MR. HUFF: NO, YOUR HONOR.

4 THE COURT: NO ORAL ARGUMENT?

5 ALL RIGHT. MADAM ATTORNEY GENERAL, DO YOU WANT TO
6 SAY ANYTHING?

7 MS. WINES: I WOULD ALSO STAND ON OUR MEMORANDUM
8 SUBMITTED TO THE COURT.

9 THE COURT: VERY WELL. ALL RIGHT. LET'S SEE.
10 WELL, I THINK THE FIRST THING WOULD BE THE CONSTITUTIONAL
11 QUESTION. THE THRUST OF YOUR CONSTITUTIONAL QUESTION IS
12 EQUAL PROTECTION AND FIRST AMENDMENT; IS THAT CORRECT?

13 MR. HUFF: THAT'S CORRECT, YOUR HONOR.

14 THE COURT: NOW, WHAT IS THE ALTERNATIVE METHOD THAT
15 YOU WOULD PROPOSE TO GOVERN WHAT A THIRTEEN-YEAR-OLD
16 WOULD RECEIVE? NOW, THE *BOOKSELLERS* CASE HAD TO DO WITH
17 THE DISSEMINATION RATHER THAN THE RECEIPT.

18 MR. HUFF: JUDGE, YOU ARE ASKING ME WHAT ALTERNATIVE
19 METHOD --

20 THE COURT: ISN'T THAT ONE OF THE THINGS -- WELL,
21 FIRST OF ALL, I DON'T THINK THERE'S ANY QUESTION, AND YOU
22 NOTE THAT, THAT AS THEY DID IN *BOOKSELLERS*, THEY NOTED
23 THAT THE STATE DOES HAVE A COMPELLING INTEREST NOT TO
24 PERMIT ALL SPEECH, PARTICULARLY THAT WOULD AFFECT MINORS.

25 MR. HUFF: JUDGE, THAT'S CORRECT. BUT THAT WAS ALSO

1 DESIRE TO ENJOY THAT, WATCHING OR OBSERVING OR ---

2 THE COURT: WELL, WOULDN'T THAT BE -- PARTICULARLY
3 IF IT WAS A CHILD, I WOULD HOPE THAT WOULD NOT BE
4 SANCTIONED. I MEAN, IF THERE IS AN ADULT THAT WOULD SEEK
5 GRATIFICATION FROM AN INNOCENT CHILD, AND I THINK THAT'S
6 WHAT THE STATUTE IS AIMED AT, NOT A CARING PARENT HELPING
7 THE CHILD TO MATURE.

8 MR. HUFF: THE STATUTE HAS NOTHING TO DO WITH
9 HELPING THE CHILD TO MATURE.

10 THE COURT: NO. BUT THE POTTY TRAINING DOES.

11 MR. HUFF: THANK YOU, YOUR HONOR.

12 THE COURT: YES, SIR. ALL RIGHT. BUT SO THAT'S IT.
13 ALL RIGHT. BASED ON THE MEMORANDUM AND LIMITED
14 ARGUMENT OF COUNSEL, I FIND THAT UNDER THE DESCRIPTION OF
15 CRIMINAL SOLICITATION BY ONE WHO KNOWINGLY CONTACTS AND
16 COMMUNICATES WITH A PERSON UNDER THE AGE OF EIGHTEEN
17 YEARS OR A PERSON HE REASONABLY BELIEVES IS UNDER THE AGE
18 OF EIGHTEEN YEARS, WITH THE PURPOSES OR INTENT OF
19 PERSUADING, INDUCING, ENTICING OR COERCING THE PERSON TO
20 ENGAGE IN OR PARTICIPATE IN A SEXUAL ACTIVITY IS
21 CONSTITUTIONAL VERSUS THAT NOT BEING PROTECTED SPEECH,
22 NOR IS -- STATE INTEREST BEING SUCH TO PROTECT MINORS
23 FROM SUCH ACTIVITIES. AND NO ALTERNATIVE METHOD OF DOING
24 THAT HAS BEEN, OR LESS RESTRICTIVE METHOD HAS BEEN
25 SUGGESTED, THAT OBVIOUSLY IT IS CONSTITUTIONAL UNDER THE

1 FIRST AMENDMENT.

2 NOW LET'S GO TO EQUAL PROTECTION. AND YOUR ARGUMENT
3 THERE IS WHAT?

4 MR. HUFF: YOUR HONOR, AS WE MENTIONED BEFORE, AS TO
5 EQUAL PROTECTION, YOU BASICALLY COME UP WITH FOUR CLASSES
6 OR SCENARIOS OF ACTIVITY OR SPEECH. YOU'VE GOT SOMEBODY
7 SPEAKING TO SOMEBODY WHO IS AT LEAST SIXTEEN YEARS OF
8 AGE, THEY TALK ABOUT SEXUAL ACTIVITY. IT'S CONSENSUAL
9 BETWEEN THE TWO. IT IS NOT ILLEGAL. THERE IS AN
10 ABSOLUTE CONSENT DEFENSE IN THAT SCENARIO. EVEN THOUGH
11 THE STATUTE MAKES IT ILLEGAL TO TALK TO SOMEBODY
12 ABOUT ---

13 THE COURT: WELL, IT'S NOT A DEFENSE. IT'S NOT *PER*
14 *SE*. I MEAN, YOU HAVE TO ESTABLISH THAT THERE WAS
15 CONSENT.

16 MR. HUFF: ABSOLUTELY.

17 THE COURT: OKAY.

18 MR. HUFF: I'M ASSUMING THAT THE SIXTEEN-YEAR-OLD
19 SAYS, I AGREE TO TALK INTO THAT CONVERSATION. I AGREE TO
20 IT. EVEN THOUGH THE STATUTE MAKES IT ILLEGAL FOR
21 MR. ODOM TO SPEAK TO SOMEBODY LESS THAN EIGHTEEN, AS LONG
22 AS THEY ARE SIXTEEN AND CONSENTING TO THAT CONVERSATION,
23 IT NOW IS NOT ILLEGAL.

24 THE COURT: ALL RIGHT.

25 MR. HUFF: ADDITIONALLY, JUDGE, IF MR. ODOM IS

1 BECAUSE HE WOULDN'T BE GUILTY.

2 MR. HUFF: AND IT WOULD BE SUBJECT TO A MOTION FOR A
3 DIRECTED VERDICT IF THE STATE ---

4 THE COURT: IF IT DOESN'T, THERE WOULD BE A
5 REASONABLE GROUNDS FOR A FINDING. SO I AGREE WITH YOU,
6 EXCEPT THAT YOU WANT TO SORT OF NOT READ THE WHOLE
7 STATUTE. SO I'M AFRAID I'M GONNA HAVE TO DENY YOU ALSO
8 ON THE EQUAL PROTECTION AND -- WHAT ELSE DO YOU HAVE IN
9 THERE? ANYTHING ELSE?

10 MR. HUFF: JUDGE, I THINK THOSE ARE THE TWO THAT WE
11 HAD SUBMITTED BRIEFS ON.

12 THE COURT: VERY GOOD. ALL RIGHT. SO I FIND THE
13 STATUTE CONSTITUTIONAL UNDER THE FIRST AMENDMENT AS WELL
14 AS THE 14TH.

15 ALL RIGHT. NEXT? NOW WHAT?

16 MR. HUFF: JUDGE, I WAS SPEAKING WITH MR. ODOM. I
17 DID NOT GET YOUR QUESTION.

18 THE COURT: I JUST WANT TO KNOW WHAT'S UP NEXT, OR
19 WE COULD TAKE A SHORT BREAK BEFORE IF YOU WOULD LIKE
20 BEFORE WE GET TO THE NEXT SECTION.

21 MR. HUFF: COULD WE TAKE A FIVE-MINUTE BREAK?

22 THE COURT: FINE. I'M READY. I HAVEN'T DONE THIS
23 MUCH LAW SINCE LAW SCHOOL. NORMALLY I DEPEND ON THE
24 ATTORNEYS TO EDUCATE ME.

25 (DISCUSSION OFF THE RECORD.)

1 THE COURT: ALL RIGHT.. VERY GOOD.

2 NEXT?

3 MR. HUFF: YOUR HONOR, WE WOULD HAVE A MOTION THAT
4 MR. BRIEN MCDANIEL WILL TAKE UP AND ARGUE FOR MR. ODOM,
5 IT IS A MOTION ON PROSECUTORIAL VINDICTIVENESS.

6 THE COURT: ALL RIGHT. YOU ARE MR. MCDANIEL?

7 MR. MCDANIEL: BRIEN MCDANIEL, YES, YOUR HONOR.

8 THE COURT: B-R-I-E-N?

9 MR. MCDANIEL: YES, SIR.

10 THE COURT: I'LL ADD YOU TO THE DEFENDANTS.

11 MR. MCDANIEL?

12 MR. MCDANIEL: IF I MAY PASS UP A WRITTEN MOTION ON
13 THIS POINT? (HANDING.)

14 THE COURT: NOW, MR. MCDANIEL, THIS IS DATED JUNE
15 THE 27TH, SO THIS HAS NOT BEEN SERVED OR FILED UNTIL
16 TODAY?

17 MR. MCDANIEL: THAT'S CORRECT.

18 THE COURT: ALL RIGHT. YOU MIGHT WANT TO FILE IT,
19 THOUGH.

20 MR. MCDANIEL: I'LL DO THAT, YOUR HONOR.

21 THE COURT: ALL RIGHT. YOU MAY PROCEED.

22 MR. MCDANIEL: YOUR HONOR, WE WOULD LIKE TO MAKE A
23 MOTION TO HAVE THE INDICTMENTS DISMISSED DUE TO
24 VINDICTIVE PROSECUTION.

25 JUST AS A WAY OF INTRODUCTION TO IT, THE CASES

1 BUT THEY OVERLOOKED OR DIDN'T THINK TO MENTION THAT
2 RULE 3.7, WHICH COMES IN BETWEEN, IS LAWYER AS A WITNESS.
3 (READING): A LAWYER SHALL NOT ACT AS AN ADVOCATE AT A
4 TRIAL IN WHICH A LAWYER IS LIKELY TO BE A NECESSARY
5 WITNESS. AND THAT TO ME ALSO APPLIES TO JUDGES.
6 OBVIOUSLY ANYTHING I KNOW JUDICIALLY TO ME CREATES A
7 PROBLEM, AS I THINK I'VE MENTIONED ON THE MOTIONS ABOUT
8 THE QUESTIONNAIRES. I THINK WHAT A JURY NEEDS TO KNOW IS
9 WHAT THEY HEAR IN A COURTROOM, NOT OUTSIDE OR ANYTHING,
10 AND WHAT THEY ARE INSTRUCTED ABOUT THE LAW IN THE
11 COURTROOM. SO I DON'T WANT TO HAVE ANYTHING THAT WOULD
12 SUGGEST THAT WHATEVER.

13 AND, OF COURSE, THERE'S A PENDING MOTION NOW THAT
14 GOES TO WHETHER THERE WAS ANY ANIMUS OR PRESUMPTION OF
15 VINDICTIVENESS, AND I THINK IT EVEN SAID IN ONE OF THE
16 CASES -- BECAUSE I HAD TO READ PRETTY QUICK SINCE THIS
17 AFTERNOON -- THAT MANY TIMES IT'S NOT DIRECT, IT'S
18 DETERMINED FROM CIRCUMSTANCES, WHICH IS OBVIOUSLY
19 SOMETHING THAT IS NOT DIRECT KNOWLEDGE. BUT HERE THE
20 CIRCUMSTANCES I DID HAVE KNOWLEDGE OF OUTSIDE THE
21 PROCEEDINGS.

22 SO WITH ALL THAT, NO, I'M NOT MAKING A DECISION -- I
23 HAVE NOW -- THE ONLY THING IS, AND THAT WILL BE FOR THE
24 NEXT TRIAL JUDGE TO DETERMINE.

25 MS. WINES: YES, SIR.

1 THE COURT: I'M SATISFIED WITH MY RULINGS ON THE
2 PRETRIAL MATTERS, BUT THAT CAN BE FOR HIM, TOO.

3 MS. WINES: OKAY. THANK YOU, YOUR HONOR, I JUST
4 WANTED CLARIFICATION ON IT. THANK YOU.

5 THE COURT: ALL RIGHT. THAT'S ALL I WANTED TO DO.
6 I WON'T DO A SHORT ORDER FORM, I'LL DO A SHORT ORDER,
7 THOUGH, THAT WILL REFLECT THAT I HAVE RECUSED MYSELF AND
8 THAT THE CONTINUANCE IS GRANTED. AND I'LL LEAVE IT UP
9 TO -- YOU'LL HAVE TO LOOK AT COURT ADMINISTRATION, OR AT
10 LEAST THE CHIEF ADMINISTRATIVE JUDGE, WHICH I AM NOT THIS
11 TIME, FOR MAYBE A SPECIAL ORDER. ALL RIGHT.

12 AGAIN, I'M GOING TO -- MADAM CLERK, I THINK WE CAN,
13 THE MESSAGE WILL BE TO CALL BACK, BUT IF YOU CAN GET TO
14 THE JURY, THE ONES WHO HAVE BEEN SELECTED, THAT WOULD BE
15 GOOD. OTHERWISE, I'LL SEE THEM AT 10:00 AND EXCUSE THEM
16 AT THAT TIME.

17 THE CLERK: OKAY, I WILL.

18 THE COURT: ALL RIGHT, GENTLEMEN AND LADY, I DO
19 APPRECIATE YOUR PATIENCE WITH THE COURT.

20 JMS. WINES: THANK YOU, YOUR HONOR.

21 MR. MCDANIEL: THANK YOU, YOUR HONOR.

22 THE COURT: AND HERE ARE -- NOW, WE DO HAVE A RECORD
23 IN THIS CASE THAT IS A PART OF THE TRIAL RECORD RATHER
24 THAN JUST THE FILINGS. WHAT DO YOU WANT TO DO WITH THE
25 EXHIBITS?

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Anthony Odom,

Plaintiff,

vs.

C.A. No. 2:10-cv-00873-MBS

ORDER AND OPINION

Henry D. McMaster, in his official
capacity as the Attorney General of the
State of South Carolina; David Pascoe;
J. Strom Thurmond, Jr.; C. Kelly
Jackson; William B. Rogers, Jr.;
W. Barney Giese; Douglas A. Barfield,
Jr.; Trey Gowdy, III; Jerry W. Peace;
Scarlett Wilson; Christina T. Adams;
Donald V. Myers; Edgar L. Clements, III;
Robert M. Ariail; I. McDuffie Stone, III;
Gregory Hembree; and Kevin S.
Brackett, in their official capacities as
South Carolina Circuit Solicitors,

Defendants.

BACKGROUND

This is an action for declaratory and injunctive relief. Plaintiff filed the within action on April 7, 2010, against Defendants Henry D. McMaster ("McMaster"), in his capacity as Attorney General of the State of South Carolina; and David Pascoe; J. Strom Thurmond, Jr.; C. Kelly Jackson; William B. Rogers, Jr.; W. Barney Giese; Douglas A. Barfield, Jr.; Trey Gowdy, III; Jerry W. Peace; Scarlett Wilson; Christina T. Adams; Donald V. Myers; Edgar L. Clements, III; Robert M. Ariail; I. McDuffie Stone, III; Gregory Hembree; and Kevin S. Brackett; in their official capacities as South Carolina Circuit Solicitors. Plaintiff alleges a claim for vindictive prosecution in violation of his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and 42

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U.S.C. § 1983. Plaintiff seeks declaratory and injunctive relief to prevent or discontinue state criminal proceedings against him for criminal solicitation of a minor in violation of S.C. Code § 16-15-342. Plaintiff filed a motion for a Temporary Restraining Order (TRO) on April 7, 2010. An emergency TRO hearing was held on April 9, 2010. The court denied Plaintiff a TRO because he failed to make the necessary showing on all four prongs of the test set out by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374-76 (2008). The Summons and Complaint were served on McMaster on April 15, 2010.

The case is before the court on McMaster's Motion To Dismiss, which was filed April 30, 2010. Plaintiff filed its response on May 12, 2009. McMaster filed a reply memorandum on May 28, 2010.

FACTS

The facts in the light most favorable to Plaintiff are as follow. Plaintiff was arrested in May 2006, and charged in Spartanburg County, South Carolina, with one count of criminal solicitation of a minor (hereinafter "Spartanburg Indictment"). This count is based on internet communications from March 2006 to May 4, 2006, between Plaintiff and a Spartanburg County law enforcement officer who was acting in an undercover capacity (hereinafter "Spartanburg Communications"). Plaintiff's license to practice law in South Carolina was suspended on May 17, 2006 as a result of these charges.

The trial on the Spartanburg Communications (hereinafter "Spartanburg Trial") was originally set for May 2007 but was continued until July 2007 to allow Plaintiff's counsel an opportunity to review evidence of additional internet communications dated May 4, 5, and 6, 2006 between Plaintiff and a Westminster (Oconee County, South Carolina) law enforcement officer, who

was also acting in an undercover capacity (hereinafter "Oconee County Communications"). The Oconee County Communications were not part of the Spartanburg Indictment. In July 2007, before the swearing of the selected jury in the Spartanburg Trial, the trial court granted Plaintiff's motion to suppress evidence the state deemed crucial to its case. The State appealed. On March 30, 2009 the South Carolina Supreme Court reversed the suppression order, and the case proceeded to trial.

The Spartanburg trial began on February 22, 2010 and ended on March 2, 2010. The Oconee County Communications were not introduced at the Spartanburg Trial. At the end of the Spartanburg Trial, the court declared a mistrial due to a deadlocked jury. Shortly after the mistrial, the State submitted the Oconee County Communications charges to a grand jury. On April 12, 2010, the grand jury returned two indictments for criminal solicitation of a minor: one for internet communications dated May 4 and 5, 2006, and a second for communications on May 6, 2006.

Plaintiff alleges that he was told that the Oconee County Communications would not be prosecuted. Plaintiff contends that the State's decision to submit the Oconee County Communications to the grand jury was a reaction to Plaintiff's attempt to gain information in support of his defense in the Spartanburg Trial. Specifically, Plaintiff sought to discover the details surrounding the Oconee County undercover officer's arrest and subsequent termination from the force. Plaintiff also contends that two separate indictments for three communications in Oconee County over only three days, when compared with the single indictment in the Spartanburg Trial which covered seventeen separate communications over a two-month time period, is evidence of vindictive prosecution. Plaintiff argues that the nearly four years between the charged conduct and the actual charges for the Oconee County Communications is unusually long for this type of crime, also evidencing vindictive prosecution.

Plaintiff seeks: (1) a declaration that the prosecution for the Oconee County Communications is impermissible as a violation of due process; (2) to permanently enjoin Defendants from prosecuting Plaintiff for the Oconee County Communications; and, (3) full discovery on his vindictive prosecution claim.

DISCUSSION

Younger Abstention

Defendant argues that the court should dismiss this case based on the *Younger* abstention doctrine. It is well established that, except under certain narrow circumstances, a federal district court should abstain from hearing a case to enjoin or stay an ongoing state court proceeding. The United States Supreme Court, in *Younger v. Harris*, recognized a “national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.” 401 U.S. 37, 41 (1971). The recognized three-prong test for *Younger* abstention is: “(1) an ongoing state judicial proceeding, instituted prior to any substantial progress [on the merits] in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and, (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit.” *Nivens v. Gilchrist*, 319 F.3d 151 (4th Cir. 2003) (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass’n.*, 457 U.S. 423, 432 (1982)).

The first prong of the *Younger* abstention doctrine requires that there be an ongoing state judicial proceeding. In *Hicks v. Miranda*, 422 U.S. 332 (1975), the Supreme Court found that the ongoing state judicial proceeding prong was met in a case where the federal suit was filed before the state criminal proceedings began. In *Hicks*, Miranda filed suit in federal court seeking to prevent the enforcement of an obscenity statute. 422 U.S. at 337. The district court denied Miranda’s request

for a TRO, but ordered a three-judge panel to review the constitutionality of the statute. *Id.* at 338. Before the panel considered the constitutionality question, Miranda was added to a state criminal proceeding for violation of the obscenity statute. *Id.* at 339. The federal panel subsequently declared the California statute unconstitutional. *Id.* at 341. On certiorari, the United States Supreme Court held that the district court should have abstained “where state criminal proceedings are begun against the federal plaintiff[] [Miranda] after the federal complaint is filed[,] but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force.” *Id.* at 349.

Hicks indicates that in cases where state criminal proceedings are instituted after a plaintiff’s federal complaint was filed and TRO hearing held, there is an ongoing state proceeding for the purposes of the first prong of the *Younger* abstention doctrine. 422 U.S. at 349. Because a TRO hearing is not a proceeding of substance on the merits and no other proceedings have taken place in this case, the first prong of the *Younger* abstention doctrine has been met.

The second prong of the *Younger* abstention doctrine requires that the state proceeding implicate important, substantial, or vital state interests. The Fourth Circuit has recognized the efficient operations of a state’s criminal justice system as an important, substantial, or vital state interest. *Nivens*, 319 F.3d at 154 (citing *Cooper v. Oklahoma*, 517 U.S. 348 (1996)). Moreover, protecting minors from sexual predators is an important state interest. *See State v. Reid*, 679 S.E.2d 194, 201 n.6 (S.C. Ct. App. 2009) (discussing South Carolina’s important public policy of protecting minors from harm in the context of an internet solicitation of a minor case). Thus, the second prong of the *Younger* abstention doctrine has been met.

The third prong of the *Younger* abstention doctrine requires that the state proceeding provide an adequate opportunity for the plaintiff to advance his federal constitutional claim. With regard to this prong, the Supreme Court has placed the burden on the federal plaintiff to show that state procedural law bars the presentation of his claim. *Pennzoil Co. v. Texaco*, 481 U.S. 1, 14 (1987). The Supreme Court stated: "when a litigant has not attempted to present his federal claim in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.* at 15. The Fourth Circuit, in applying *Younger*, explained that: "a federal court *must* abstain from interfering with an ongoing state proceeding where a litigant has an 'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved' and . . . no bad faith, harassment, or other exceptional circumstances dictate to the contrary." *Nivens*, 319 F.3d at 154 (citing *Middlesex*, 457 U.S. at 437) (emphasis added).

Plaintiff argues that his claim of vindictive prosecution cannot be adequately raised in state court because in a South Carolina criminal proceeding there is no right to discovery. The court disagrees. Both of the cases Plaintiff cites in support of his argument were decided prior to the creation of Rule 5 of the South Carolina Rules of Criminal Procedure, governing disclosure in criminal cases. S.C.R. Crim. P. 5. Rule 5 permits discovery in criminal cases:

[u]pon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

S.C.R. Crim. P. 5(a)(1)(C). Rule 5 also gives courts discretion to permit discovery if a party has refused to comply with a discovery request. S.C.R. Crim. P. 5(a)(2). The South Carolina Supreme Court has recognized the right to discovery for state criminal defendants. *State v. Northcutt*, 641 S.E.2d 873, 878 (S.C. 2007) (recognizing that Rule 5 creates a right to reciprocal discovery but does not compel defense experts to create written reports for the opposing side). Plaintiff cites no authority, nor provides examples, to support the proposition that his right of discovery under Rule 5 will be insufficient to adequately develop his vindictive prosecution claim. Plaintiff has failed to meet his burden of proving that state procedural law bars his federal constitutional claim.

In addition, in *State v. Fletcher*, 471 S.E.2d 702 (S.C. Ct. App. 1996) a criminal defendant was permitted to present a vindictive prosecution claim in that proceeding. *Id.* at 703. This case demonstrates that South Carolina courts are capable of hearing allegations of vindictive prosecution in criminal cases and indicates that state procedures are adequate to address Plaintiff's claim. Thus, the third prong of the *Younger* abstention doctrine has been met. Based on the foregoing, the court finds that *Younger* abstention is appropriate in this case unless one of the exceptions applies.

Exceptions to Younger Abstention

Courts have recognized exceptions to the *Younger* abstention doctrine where a state prosecution is: "(1) commenced in bad faith or to harass, (2) based on a flagrantly and patently unconstitutional statute, or (3) related to any other such extraordinary circumstances creating a threat of 'irreparable injury' both great and immediate." *Phelps v. Hamilton*, 59 F.3d 1058, 1063-64 (10th Cir. 1995) (citing *Younger*, 401 U.S. at 53-54). Plaintiff advances the bad faith exception to argue against the application of *Younger*.

The three factors courts use to evaluate the bad faith exception are:

(1) [W]hether it was frivolous or undertaken with no reasonably objective hope of success; (2) whether it was motivated by the defendant's suspect class or in retaliation for the defendant's exercise of constitutional rights; and, (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions.

Phelps, 59 F.3d at 1064-65 (citing *Kugler v. Helfant*, 421 U.S. 117, 126 n.6; *Younger*, 401 U.S. at 48). Mere allegations of bad faith do not suffice; a plaintiff "must *prove* bad faith or harassment before intervention is warranted." *Id.* at 1066 (citing *Perez v. Ledesma*, 401 U.S. 82, 85 (1971); *Juidice v. Vail*, 430 U.S. 327, 338 (1977)).

Plaintiff submits that his prosecution for the Oconee County Communications constitutes retaliation for the exercise of his constitutional rights in defending himself at the Spartanburg Trial. Plaintiff contends that his prosecution for the Oconee County Communications constitutes abuse of prosecutorial discretion due to the oppressive use of multiple prosecutions. Additionally, Plaintiff argues that this case should be allowed to move forward simply because bad faith is an inherent element of his vindictive prosecution claim. McMaster disputes Plaintiff's allegations of prosecutorial misconduct and motivation for bringing charges on the Oconee County Communications, contending that this was a strategic decision. During the pendency of the Spartanburg trial, the position of Chief Prosecutor for the South Carolina Internet Crimes Against Children Task Force changed from David Stumbo to Megan Wines. Because prosecutors have discretion to decide which crimes to prosecute, this personnel change lends support to McMaster's strategy explanation. The court finds that Plaintiff has failed to prove bad faith. Therefore, abstention under the *Younger* abstention doctrine is appropriate.

Rule 12(b)(6) Motion

Plaintiff argues that if this court looks outside the pleadings to decide the motion to dismiss, the Rule 12(b)(6) motion is converted into a motion for summary judgment, entitling Plaintiff to discovery. The Fourth Circuit has recognized that courts can take judicial notice of public information without converting a 12(b)(6) motion into a motion for summary judgment stating: “[i]n reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.” *Sec’y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (citing *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004)). This court has routinely allowed reference to public records in 12(b)(6) motions to dismiss. *See Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 550-51 (D.S.C. 2008) (explaining that a police report may be considered by the court in a 12(b)(6) motion as a matter of public record); *Tobin v. Bodman*, No. 1:06-492-RBH, 2007 WL 1068253, at *2, *4 (D.S.C. Mar. 29, 2007) (allowing proof of plaintiff’s earlier conviction to bar a current claim of illegal arrest); *Larch v. Gintoli*, No. 8:04-1962CMBH, 2006 WL 895019, at *2 (D.S.C. Mar. 31, 2006) (permitting exhibits attached to defendant’s 12(b)(6) motion to be considered by the court because the exhibits were public records from an earlier state court action).

Thus, the court may take judicial notice of the state court indictments without converting McMaster’s 12(b)(6) motion into a motion for summary judgment.

CONCLUSION

McMaster’s motion to dismiss is **granted**. (Entry 11). The court will abstain from exercising jurisdiction in this case under the *Younger* abstention doctrine. Therefore, the entire case is dismissed without prejudice. Defendants Edgar L. Clements; C. Kelly Jackson; Gregory Hembree;

William B. Rogers, Jr.; Christina T. Adams; Trey Gowdy, III; J. Strom Thurmond, Jr.; Robert M. Ariail; Douglas A. Barfield, Jr.; Kevin S. Brackett; David Pascoe; I. McDuffie Stone, III; Scarlett Wilson; W. Barney Giese; Donald V. Myers; and Jerry W. Peace have also filed motions to dismiss this case under the *Younger* abstention doctrine. These motions are now **moot**. (Entries 19, 20, 39, 40, and 41). Edgar L. Clement, III and C. Kelly Jackson's motion to amend or correct their motion to dismiss is also moot. (Entry 42).

IT IS SO ORDERED.

s/ Margaret B. Seymour
The Honorable Margaret B. Seymour
District Court Judge

Columbia, South Carolina
August 6, 2010

EXHIBIT G

The Supreme Court of South Carolina

Michael A. Morgan,

Petitioner,

v.

W. Barney Giese, in his official
capacity as Solicitor of the
Fifth Judicial Circuit; and
Henry Dargan McMaster, in his
official capacity as Attorney
General for the State of South
Carolina,

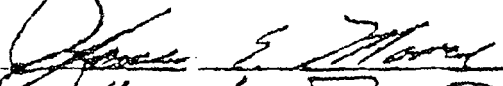
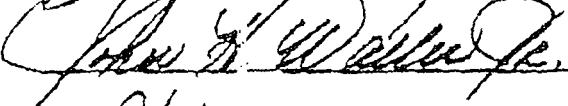
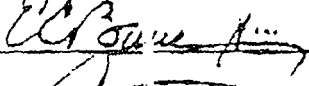
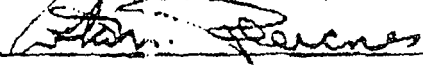
Respondent.

ORDER

Petitioner asks this Court to entertain this matter in its original jurisdiction. He also seeks a temporary restraining order.

We decline to entertain this matter in our original jurisdiction. If petitioner is entitled to any relief, he should seek it in the court of general sessions where his criminal charges are pending. Accordingly, the petition for original jurisdiction and motion for a temporary restraining order are denied.

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 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

June 6, 2007

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

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S.C. SUPREME COURT

IN THE ORIGINAL JURISDICTION

Michael A. Morgan.....Petitioner,

v.

W. Barney Giese, in his official Capacity as Solicitor of the Fifth Judicial Circuit; and
Henry Dargan McMaster, in his official capacity as Attorney General of the State of
South Carolina Respondents.

PETITION FOR THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

Pursuant to Rule 229 of the South Carolina Appellate Court Rules, Michael A. Morgan, by and through his attorneys, petitions the Court for the exercise of its original jurisdiction to hear this matter. Petitioner seeks a declaratory judgment finding S.C. Code Ann. § 1-7-330 violative of both the United States and South Carolina constitutions and an order enjoining the operation of that statute. Petitioner attaches his formal complaint to this petition. Petitioner asserts that this case involves matters of unique public interest and that he will be materially prejudiced if the Court declines to exercise its original jurisdiction.

S.C. Code Ann. § 1-7-330 grants circuit solicitors exclusive control over the preparation of the criminal dockets of the Court of General Sessions and the order in which cases are called for trial. The Judicial Department, as a part of its administrative

duties, publishes a schedule of circuit judge assignments approximately six months in advance. As a result of this public information and the solicitor's exclusive docket control, the solicitor possesses the power both to determine the date of a defendant's trial and the judge before whom he will be tried.

Petitioner contends that S.C. Code Ann. § 1-7-330 violates the South Carolina Constitution's mandated separation of powers (Article I, Section 8) by vesting to the executive branch powers that are inherently judicial. Petitioner also contends that S.C. Code Ann. § 1-7-330 violates his due process rights under Amendment XIV of the United States Constitution and Article I, Section 3 of the South Carolina Constitution. Petitioner knows of no case addressing the constitutionality of S.C. Code Ann. § 1-7-330—this matter is one of first impression.

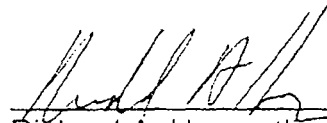
The public importance of the constitutionality of the docket control statute is extreme. The statute controls the procedures by which nearly every criminal trial in the State of South Carolina comes before a jury. The question of the statute's constitutional validity strikes at the foundation of our judicial system and the fundamental fairness that it affords defendants.

Petitioner Morgan currently awaits trial for the offenses of which he has been accused. If the Court declines to accept this case in its original jurisdiction, its abstention will materially prejudice the Petitioner by requiring him to defend his constitutional rights in a criminal justice framework that, in and of itself, may be unconstitutional.

000233

The public importance of this matter is so high, and the risk of prejudice to the Petitioner is so great, that the Court should agree to hear this case in its original jurisdiction.

Respectfully submitted,



Richard A. Harpootlian

Graham L. Newman

RICHARD A. HARPOOTLIAN, P.A.

1410 Laurel Street

Post Office Box 1090

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(803) 252-4848

(803) 252-4810 (facsimile)

ATTORNEYS FOR THE PETITIONER

Columbia, South Carolina
June 5, 2007

000004

EXHIBIT H

000235

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Anthony C. Odom,	)	CIVIL ACTION NO.: 2:10-873-MBS
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS EDGAR L. CLEMENTS' and KELLY C. JACKSON'S MOTION TO DISMISS AND MOTION TO STRIKE
	)	
Henry D. McMaster, in his official	)	
capacity as the Attorney General of	)	
the State of South Carolina, David	)	
Pascoe; J. Strom Thurmond, Jr.,	)	
C. Kelly Jackson; William B. Rogers,	)	
Jr., W. Barney Giese; Douglas A.	)	
Barfield, Jr.; Trey Gowdy, III; Jerry	)	
W. Peace; Scarlett Wilson; Christina	)	
T. Adams; Donald V. Myers; Edgar	)	
L. Clements, III; Robert M. Ariail;	)	
I McDuffie Stone, III; Gregory	)	
Hembree; and Kevin S. Brackett, in	)	
their official capacities as South	)	
Carolina Circuit Solicitors,	)	
	)	
Defendants.	)	

The Plaintiff in this matter submits this memorandum in opposition to Defendant Motion to Dismiss and Motion to Strike. Said response is provided while reserving all Plaintiff's right to a Default judgment against these defendants, as further explained in Plaintiff's Motion to Strike.

Statement of Facts

On May 11, 2006 a search warrant was executed at the residence of Odom in the County of Aiken, State of South Carolina. Odom as a result gave a statement and then subsequently voluntarily waited three hours at the Aiken Department of Public Safety to

mechanisms are not available to Odom in the instituted criminal proceeding and he has no means by which to effectively pursue these claims in the state proceedings.

In a criminal proceeding in South Carolina courts there is no right to discovery. State v. Flood, 257 S.C.141, 184 S.E.2d 549 (1971), State v. Smart, 274 S.C. 303 262 S.E.2d 911 (1980). There is no right of discovery in criminal cases in South Carolina, and the solicitor is not required to turn over his entire file State v. Smart, 274 S.C. 303, 262 S.E.2d 911(1980).

Simply put, Odom would not have access to the tools needed to prove the allegations made in his complaint in the state action. If the Plaintiff's action is not allowed to continue, he would not have the ability to take depositions, send requests to admit, send interrogatories or view the file on the recently filed charges in the County of Oconee, State of South Carolina. These Defendants would not be required to provide any information to assist Odom in the making of a motion for dismissal due to vindictive prosecution. Unlike the US District Court as seen in U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001), a South Carolina Court of General Sessions would not be able to move into a civil nature to allow for such discovery. Therefore, Odom would be at a severe disadvantage and would not be able to assert, much less adequately obtain information to support, the vindictive prosecution claim as a defense in the state action.

Availability of Younger v. Harris Exceptions
Should the Court Apply the Younger Doctrine

In Phelps v. Hamilton, 59 F.3d 1058 (10th Cir. 1995) the court delves into the details of what constitutes a bad faith exception under Younger. Younger authorizes federal courts to enjoin a pending state criminal prosecution provided that it was (1)

commenced in bad faith or to harass, (2) based on a flagrantly and patently unconstitutional statute, or (3) related to any other such extraordinary circumstance creating a threat of "irreparable injury" both great and immediate. 401 U.S. at 53-54, 91 S.Ct. at 754-55; see also Huffman v. Pursue, 420 U.S. 592, 611, 95 S.Ct. 1200, 1211-12, 43 L.Ed.2d 482 (1975). This is allowed even if the Younger doctrine would otherwise apply.

In considering whether a federal plaintiff meets one of the exceptions to Younger abstention, federal courts must balance the necessity of protecting an individual's exercise of his or her constitutional rights with a prosecutor's discretion in selecting certain actions for criminal prosecution. Arkebauer v. Kiley, 985 F.2d 1351, 1358 (7th Cir. 1993).

However, in the present case the action of the State against Odom in Oconee is being brought in bad faith and to harass. Three factors that courts have considered in determining whether a prosecution is commenced in bad faith or to harass are: (1) whether it was frivolous or undertaken with no reasonably objective hope of success, see Kugler v. Helfant, 421 U.S. 117, 126, 95 S.Ct. 1524, 1531 (1975) (explaining that a bad faith prosecution "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction"); (2) whether it was motivated by the defendant's suspect class or in **retaliation for the defendant's exercise of constitutional rights**, see Younger, 401 U.S. at 48, 91 S.Ct. at 752 53 (quoting Dombrowski v. Pfister, 380 U.S. 479, 482, 85 S.Ct. 1116 (1965) (Emphasis added) and (3) whether it was conducted in such a way as to constitute **harassment** and an **abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions**, Younger, 401 U.S. at 49, 91 S.Ct. at 753. (Emphasis added)

These factors are important because, as the Defendant notes, the cost, anxiety, and inconvenience of defending against a single prosecution brought in good faith is not enough to establish the "great and immediate" threat of irreparable injury necessary to justify enjoining pending state proceedings.

The Plaintiff in this matter is requesting relief for vindictive prosecution. Under such a claim bad faith on the part of the State would be required as a part of the claim and has in essence been plead as an inherent element of the claim. Plaintiff has alleged he is being prosecuted newly for availing himself of his constitutional rights afforded to him under Brady v. Maryland, 373 U.S. 83,83 S.Ct. 1194 (1963), specifically, he has alleged that his prosecution arose from his exercise of his constitutional right to obtain information for his defense of the Spartanburg Charges. Because this is not a case of a Constitutional challenge to the underlying statute, but instead is a claim for vindictive prosecution based upon inappropriate actions of the Defendant in retaliating for the Plaintiff's exercise of his constitution rights, a clear exception to Younger abstention is available.

Additionally, the additional charges show a pattern of harassment of the Plaintiff since the new charges are alleged to be vindictive and have resulted in multiple prosecutions as well as multiple charges not sought for a similar alleged offense covering more communications during the same time frame. Odom now faces two charges for alleged conduct covering a period of only May 4-6, 2006 (Oconee County Charge), when the previous charge covers a time period from March 12, 2006 to May 4, 2006, and resulted in a single indictment (Spartanburg County Charge). The nature of vindictive prosecution in and of itself is also an abuse of prosecutorial discretion.

Plaintiff has alleged sufficient allegations in his complaint, which if taken as true, provide him with Younger exceptions, both as to bad faith on the part of the State and by a show of harassment.

In Simopoulos v. Virginia State Bd. of Medicine, 644 F.2d 321 (4th Cir. 1981) the court stated that: In determining whether a particular case comes within the exceptions to the Younger doctrine, courts focus primarily on the adequacy of remedies available at law. Indeed, a finding of adequacy may obviate the need to consider the issue of irreparable harm; if an existing remedy is found to be adequate, that finding itself implies that any harm is repairable.

Moreover, Younger provides that **irreparable harm can be inferred from bad faith and harassment**, and these circumstances can also be viewed as factors in measuring the adequacy of the state forum. The various exceptions to Younger, therefore, can be seen as 'different ways of showing that the state legal apparatus has broken down so thoroughly that federal rights cannot be vindicated through it in a timely fashion'¹.

Dismissal Under Rule 12(b)(6), FRCP Inappropriate
Conversion of Motion into one for Summary Judgment

In reviewing a motion for dismissal under Federal Civil Rule 12 (b)(6), the court must accept the facts alleged in the complaint as true and view "them in the light most favorable to the plaintiff Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 228-29 (4th Cir. 2004), Barbour v. Intl. Union, 594 F.3d 315 (4th Cir. 2010). The facts as alleged in the complaint show direct evidence for vindictive prosecution, as

¹ At the initial hearing in this case, it was stated by both the Plaintiff's counsel and Defendant's counsel that due to the AG's current political aspirations that the state court may not provide a fair and/or impartial forum for actions in which he is involved.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Anthony C. Odom,	)	Case No. 11-CP-42-2032
	)	
Plaintiff,	)	SUPPLEMENTAL
	)	MEMORANDUM OF ATTORNEY
v.	)	GENERAL AND SOLICITORS
	)	BARNETTE, ADAMS AND THURMOND
Alan Wilson, etc., et al,	)	ON EQUAL PROTECTION
	)	
Defendants.	)	
_____	)	

The equal protection issue should not be reached because it has already been decided in the Court of General Sessions, but if, *arguendo*, the Court of Common Pleas chooses to reach the issue, the Defendants Attorney General and Solicitors Barnette, Thurmond and Adams submit the following argument that shows that the equal protection issue is completely lacking in merit.

Plaintiff claims a disparity in treatment between the class of persons consensually communicating with persons 16 and older who are not law enforcement officers under S.C. Code Ann. §16-15-342(B) and those who are communicating with law enforcement officers under paragraph (D) of that statute. Certainly, this statute is presumed to be Constitutional and “will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.” *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). Plaintiff cannot show a likelihood of overcoming this standard.

“A classification does not violate the Equal Protection Clause if (1) ‘similarly situated’ members in a class are treated alike; (2) the classification rests on some reasonable basis; and (3) the classification bears a reasonable relation to a legitimate legislative purpose.” *McKnight v.*

State, 378 S.C. 33, 52, 661 S.E.2d 354, 364 (2008).¹ “[T]he determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is a reasonable hypothesis to support it.” *Id.* “The rational basis standard, not strict scrutiny, is applied in this case because the classification at issue does not affect a fundamental right and does not draw upon inherently suspect distinctions such as race, religion, or alienage.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 428-29, 593 S.E.2d 462, 469 (2004)

Plaintiff cannot bring himself within the class of those persons to which paragraph (B) is intended to be directed. He is alleged to have communicated with a person posing as a 13 year old. Therefore, he is not alleged to have had any expectation of communication with a person 16 or older exempt under paragraph (B). He would not have been entitled to this exemption if the person had in fact been 13. He would only be entitled to this exemption if a non-law enforcement officer 16 or older posed as a 13 year old, a highly unlikely possibility.

Even if, *arguendo*, Plaintiff were within the class of person to which paragraph (B) is directed, the General Assembly acted reasonably in treating conversations with undercover officers 16 and older differently from conversations with non-law enforcement officers 16 and older. *McKnight*. The legislature had a purpose of protecting children from conversations with persons who have “the intent of persuading, inducing, enticing, or coercing the person to engage

¹ *McKnight* cites *Ed Robinson Laundry & Dry Cleaning, Inc. v. S. Carolina Dept. of Revenue*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003) which explains how the test applies if “similarly situated entities” are treated differently: “1) whether the law treats ‘similarly situated’ entities different; 2) if so, whether the Legislature has a rational basis for the disparate treatment; and 3) whether the disparate treatment bears a rational relationship to a legitimate government purpose.”

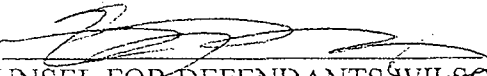
or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime [etc.]”
Allowing a consent defense for communications with persons 16 and older reflects a legislative intent to exempt consensual conversations with older minors. Disallowing that defense for persons who are communicating with law enforcement officers reflects a legislative intent to allow undercover officers to do their work of finding persons preying on minors in violation of § 16-15-342.

Plaintiff erroneously claims that a Louisiana lower court found an allegedly similar Louisiana statute unconstitutional under the Equal Protection clause but was reversed by the Louisiana Supreme Court on procedural grounds. *State v. Hatton*, 985 So. 2d 709 (2008). Instead, the Louisiana Supreme Court found that the lower court decision to invalidate the statute was based upon grounds other than a denial of Equal Protection which were not properly raised. Therefore, according to *Hatton*, neither Louisiana court addressed equal protection, and this case provides no support to Plaintiff’s legal position.

For the foregoing reasons, Plaintiff’s equal protection claim has no merit whatsoever.

Respectfully submitted,

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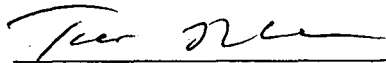
BY: 
COUNSEL FOR DEFENDANTS WILSON
BARNETTE, ADAMS AND THURMOND

September 12, 2011

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 2, 2012



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