Filed: 9/25/2017 10:36 AM

IN THE
INDIANA SUPREME COURT

No. 46A04-1607-CR-1522

STATE OF INDIANA, *Appellant-Plaintiff*,	Appeal from the LaPorte Circuit Court,
v.	No. 46C01-1212-FA-610,
JOHN B. LARKIN, *Appellee-Defendant*.	The Hon. Patrick B. Blankenship, Special Judge.

APPELLANT'S PETITION FOR TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

I. Whether the Court of Appeals failed to follow this Court's precedent in finding Defendant was entitled to discharge pursuant to Criminal Rule 4(C).

A. Whether the Court of Appeals incorrectly restarted the Rule period before the interlocutory appeal was concluded in conflict with *Pelley v. State*, 901 N.E.2d 494 (Ind. 2009).

B. Whether, in a matter of first impression, the Court of Appeals incorrectly determined that delay caused by a defense motion for a change of judge is charged against the Rule.

II. Whether the Court of Appeals failed to follow this Court's precedent by sustaining dismissal due to misconduct by state actors where the trial court did not identify specific evidence tainted by the misconduct.

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This Court should grant transfer and reinstate the prosecution of Defendant John Larkin for killing his wife. This appeal follows the trial court's order of discharge under Criminal Rule 4(C) and its dismissal after finding the evidence against Defendant tainted by misconduct. Contrary to this Court's precedent, the Court of Appeals determined that the Criminal Rule 4 period restarted before the interlocutory appeal was concluded and counted against the Rule the delay caused by Defendant's motion for a change of judge. Further, although neither the trial court nor the Court of Appeals identified any critical evidence tainted by state misconduct, the Court of Appeals affirmed the trial court's dismissal on the basis of state misconduct. Because all the material evidence was obtained by untainted independent sources, the opinion conflicts with this Court's precedent.

BACKGROUND AND PRIOR TREATMENT OF THE ISSUES

On December 11, 2012, police were dispatched to Defendant's residence for a reported shooting. *Larkin v. State*, 43 N.E.3d 1281, 1283 (Ind. Ct. App. 2015)("*Larkin I*"). Officers found Defendant's wife, Stacy, deceased in a closet. *Id.* She had died from two gunshot wounds. *Id.* Defendant agreed to talk to investigators if he was charged with voluntary manslaughter instead of murder. *Id.* In his interview, Defendant admitted his gun discharged twice, killing Stacey, but denied the shooting was intentional (*Larkin I* App. 345-58).[1] During a break in the

[1] The interlocutory appeal appendix was incorporated (Order 9/9/16).

interview, Defendant conversed with his attorneys while the recording equipment remained running. *Larkin I,* 43 N.E.3d at 1283.

On December 13, 2012, the State charged Defendant with voluntary manslaughter (*Larkin I* App. 37). Following three continuances, the parties filed a stipulation regarding Criminal Rule 4(C) agreeing that the State would have "3 months to bring the case to trial after November 5, 2014" (*Larkin I* App. 172-73). Thereafter, in July of 2014, Defendant filed a motion to dismiss based on the State videotaping his conversation with counsel (*Larkin I* App. 217-19). Defendant also moved to disqualify the LaPorte County Prosecutor's Office (*Larkin I* App. 642-49). Defendant filed a second motion to dismiss in September 2014, alleging the lead investigator conspired to obstruct justice by having another officer change his statement (*Larkin I* App. 620-25).

On October 3, 2014, the trial court denied Defendant's motions to dismiss and to disqualify the prosecutor's office (*Larkin I* App. 811-21). In denying dismissal, the court reasoned that "while the [attorney-client conversation] does contain information about possible charges and defenses, it does not necessarily result in prejudice" (*Larkin I* App. 817). The Court found the "exchange does not disclose confidential information that would give an unfair advantage to the State and law enforcement during the rest of the investigation" (*Larkin I* App. 817). The trial court suppressed the conversation with Defendant's attorneys but not the remainder of the interview (*Larkin I* App. 833). The court also denied dismissal for obstruction of justice because the evidence of obstruction was unclear (*Larkin I* App.

822-25). At Defendant's request, the trial court certified the denial of disqualification of the prosecutor's office for interlocutory appeal and stayed the proceedings (*Larkin I* App. 897-98).

On September 30, 2015, the Court of Appeals issued its opinion in *Larkin I*, holding the motion to disqualify was moot because a new prosecutor had been elected. *Larkin I,* 43 N.E.3d at 1286. The *Larkin I* opinion was certified on November 20, 2015 (Docket). On October 6, 2015—after *Larkin I* was issued but before certification—the new prosecutor moved for appointment of a special prosecutor (App. Vol. II 24). The trial court granted the State's motion on November 12, 2015, appointing Stanley Levco as special prosecutor (App. Vol. II 44).

On November 23, 2015, Defendant moved to disqualify Judge Alevizos (App. Vol. II 45, 47, 59). A hearing was held on December 10, 2015, where the State argued no recusal was required (12/10/15 Tr. 9). On December 31, 2015, Judge Alevizos recused himself "to save this matter any further delays" despite finding no actual bias and that a reasonable person would not doubt his impartiality (App. Vol. II 89). On February 29, 2016, Judge Patrick Blankenship, Pulaski Superior Court, accepted appointment as special judge (App. Vol. II 110).

On March 11, 2016, the State moved to set an expeditious hearing (App. Vol. II 27). At a March 28, 2016 hearing, Defendant filed his first motion for discharge under Rule 4(C) (App. Vol. III 22). On April 7, 2016, the trial court held a hearing where Defendant waived any right to a trial setting in May of 2016 (App. Vol. II 27).

The court memorialized Defendant's position as waiving "the trial being set in May with the understanding the record has been made that the Defense believes the time to be brought to trial has already elapsed" (App. Vol. III 63). The court scheduled a trial date of June 20 to 24, 2016 (App. Vol. III 64). On May 11, 2016, Defendant filed a second motion for discharge (App. Vol. III 87-97). On May 20, 2016, Defendant again moved to dismiss based on misconduct related to attorney-client communication and officers' initial failure to honor his request for counsel (App. Vol. IV 7-15). On June 7, 2016, Defendant supplemented his motion to dismiss to again allege obstruction of justice (App. Vol. IV 45-49).

On June 9, 2016, the trial court held a hearing where the State appeared by telephone, but requested an opportunity to be present and present evidence on Defendant's motion to dismiss (App. Vol. IV 84; 6/9/16 Tr. 11). The trial court denied that request (6/9/16 Tr. 11). The court then issued findings and conclusions granting discharge and dismissal (App. Vol. IV 84-89).

The State appealed. The Indiana Court of Appeals found that Defendant should have been discharged pursuant to his March 28, 2016 motion because the Criminal Rule 4(C) period expired two days earlier. *State v. Larkin*, 77 N.E.3d 237, 256, slip op. at 34-35 (Ind. Ct. App. 2017) (*Larkin II*). The court found the stipulated three months (calculated as 90 days) remaining in the Rule 4 period did not commence on November 5, 2014, due to Defendant's interlocutory appeal "because *Pelley* [*v. State*, 901 N.E.2d 494 (Ind. 2009)] is controlling[.]" *Id*. at 22. But, the court found the Rule 4 period did start running on October 6, 2015—seven

days after the opinion in *Larkin I* and 45 days before certification of *Larkin I* — when the State requested appointment of a special prosecutor. *Id.* at 22-27. The Court rejected the State's argument that tolling extended until certification of the opinion. *Id.* The Court of Appeals also found delay caused by Defendant's motion for a change of judge was charged against the rule based on the unique circumstances. *Id.* at 27-35. Finally, the court determined dismissal was proper here due to state misconduct and that the trial court was not required to limit its remedy to the exclusion of tainted evidence. *Id.* at 35-40.

Judge Barnes dissented. *Id.* at 42-50 (Barnes, J., dissenting). Judge Barnes disagreed with the majority's ruling that the Rule 4 period ran prior to certification of *Larkin I* and during the delay caused by Defendant's request for a change of judge. *Id.* at 42-48. Judge Barnes found that because the Rule 4 period extended to the end of May 2016, Defendant waived his Rule 4 claim when he requested and agreed to a June 2016 trial date instead, so the trial court's ruling had improperly given Defendant a "technical means to avoid trial." *Id.* at 47-48. Judge Barnes further found that dismissal was not warranted because the remedy for misconduct should address the specific prejudice suffered by Defendant. *Id.* at 48-50.

The State sought rehearing, which the Court of Appeals denied, and now seeks transfer.

ARGUMENT

I.
The Court of Appeals failed to follow this Court's precedent interpreting Criminal Rule 4(C).

A. *Pelley* establishes the Rule 4(C) period did not run during Larkin's interlocutory appeal.

The Court of Appeals' decision conflicts with this Court's precedent from *Pelley*—or at least creates an exception as a matter of first impression—by holding that part of the period while Defendant's prosecution was stayed for an interlocutory appeal is charged against Rule 4 because of the State's efforts to advance the case. *See Pelley v. State*, 901 N.E.2d 494, 499-500 (Ind. 2009). In *Pelley*, this Court determined that when an interlocutory appeal is taken and trial proceedings are stayed, the time during which proceedings are stayed is excluded from the Rule 4 period. *Id*. "When trial court proceedings have been stayed pending resolution of the State's interlocutory appeal, the trial court loses jurisdiction to try the defendant and has no ability to speed the appellate process." *Id.* at 499.

This rule should be retained and control here as the trial court could not have conducted Larkin's trial while the interlocutory appeal was still pending and a stay was in place (*Larkin I* App. 898). While there was no formal order lifting the stay, the State believes, as it argued below, that the remaining three-month Rule 4 period began to run when *Larkin I* was certified (App. Vol. IV 21-24). "[T]he Clerk's certification of appellate decisions signals the parties that such a decision is 'final.'"

Rogers Group, Inc. v. Diamond Builders, LLC, 833 N.E.2d 475, 477 (Ind. Ct. App. 2005).

The Court of Appeals acknowledged that "*Pelley* is controlling," but nonetheless found that the Rule 4 clock restarted 45 days before *Larkin I* was certified when the State moved for a special prosecutor. *Larkin II,* slip op. at 22-27. But *Pelley* holds "that Rule 4(C)'s one-year limitation does not include the time during which trial proceedings have been stayed pending interlocutory appeal." 901 N.E.2d at 499-500. And Indiana Appellate Rule 65(E) provides that the trial court and the parties shall not take any action in reliance upon an appellate decision until it is certified. As *Larkin I* was not certified until November 20, 2015, *Pelley* and the appellate rules indicate that the Rule 4 period did not begin running until that date.

While the State did move for appointment of a special prosecutor before certification of the *Larkin I* opinion, the State had no reason to suspect that this action would restart the Rule 4 period. The trial court could have denied the motion or Defendant could have asked the appellate courts for rehearing or transfer regardless of the trial court's inclination to act or not. And while a trial court retains jurisdiction during an interlocutory appeal, the case could not be set for trial and a trial court "is not permitted to intermeddle with the subject-matter of the appeal." *Bradley v. State*, 649 N.E.2d 100, 106 (Ind. 1995). As Judge Barnes observed, the trial court's grant of a special prosecutor while an appeal on that subject was still pending may have been voidable. *See Larkin II*, slip op. at 44

(Barnes, J. dissenting). The State's action of moving for a special prosecutor should merely be viewed as an effort in anticipation that *Larkin I* would be certified, and the time necessary to complete Defendant's interlocutory appeal—and the associated stay of proceedings—should not be charged against the Rule 4 period. Rather than have a date certain that the parties can rely upon to restart the clock, the Rule announced by the Court of Appeals injects uncertainty and allows for game-playing by defendants.

B. This Court's precedent establishes that delay from Larkin's request for a change of judge is not charged against the Rule 4(C) period.

The Court of Appeals also failed to follow this Court's precedent by charging three periods of delay resulting from Defendant's motion for a change of judge against the Rule 4 period. This Court has already "held that a delay occasioned by a defendant's filing of a motion for a change of judge is chargeable to him and that the time begins to run anew when the new judge qualifies and assumes jurisdiction." *State ex rel. Brown v. Hancock Cty. Superior Court*, 267 Ind. 546, 547-48, 372 N.E.2d 169, 170 (1978); *see also Johnson v. State*, 708 N.E.2d 912, 915 (Ind. Ct. App. 1999), *trans. denied*.

Thus, there should be no question that the delay from Defendant's motion for a change of judge on November 23, 2015 until Judge Blankenship accepted the appointment on February 28, 2016 is not charged against the Rule 4 period. Yet, the Court of Appeals divided the period into three periods and found all three ran against the Rule. In doing so, the Court of Appeals appears to recognize that

precedent does not support its ruling, but nonetheless found—as a matter of first impression—a different result should be reached here because "particularized circumstances warranted special treatment" *Larkin II*, slip op. at 34. This Court should grant transfer and vacate this deviation from precedent.

First, the Court of Appeals found "[t]he parties do not dispute" whether the 20 days from the filing of the motion for a change of judge until the hearing should be included in the Rule 4 period. *Id.* at 27. But this Court's precedent already establishes that period is not charged against the Rule. *State ex rel. Brown*, 372 N.E.2d at 170. And, as the dissent correctly observes, the State has consistently argued that the Rule 4 period should have tolled from the date Defendant requested a change of judge. *Id.* at 45, n.8.[2] The State argued in the Brief of the Appellant "[t]he rule period was extended by the time between Larkin's November 23, 2016 motion for a change of judge and the February 29, 2016 acceptance of jurisdiction by Judge Blankenship" (Appellant's Br. 25). In the Reply Brief, the State argued that "defendant's motion for a change of judge and the appointment of a new judge is delay caused by the defendant's act" and offered proposed calculations of the Rule 4 period based on tolling from November 23, 2016 (Reply Br. 10, n.2). The Court of

[2] The majority acknowledges the State's contrary arguments in a footnote but finds the State needed to raise a separate appellate claim regarding attribution of the 20-day period to preserve this issue. *Larkin II, slip op.* at 27, n.4.

Appeals' circumvention of this Court's precedent by characterizing this time period as undisputed is simply unsupported by the record.[3]

Second, the Court of Appeals attributes the 21 days from the change of judge hearing on December 10, 2015, until Judge Alevizos' recusal on December 31, 2015 to the Rule period, by creating a new exception to this Court's precedent. *Larkin II*, slip op. at 27-31. The court "recognizes an exception for judicial conflicts" that causes the Rule 4 period to remain running. *Id.* at 31. The majority's new rule appears to be that if the facts strongly support judicial recusal, then the time spent litigating recusal counts toward the Rule 4 period because the judge should have *sua sponte* recused himself and the defendant "should not be placed in a position of choosing between a fair or timely trial." *Id*. at 28, 30.

This Court should reject the Court of Appeals' new exception to its precedent. Such a rule would encourage defendants to file recusal motions in hopes of simultaneously preventing their case from being set for trial while also allowing the Rule 4 period to march forward. Instead, the present rule draws a proper balance

[3] By characterizing this 20-day period as undisputed the Court of Appeals avoids addressing the State's argument that Defendant waived any objection to a May or June 2016 trial setting. *Larkin II*, slip op. 27 ("[W]e need not address whether Larkin waived his claim at the April 7 Hearing because the Rule 4(C) time period had already run by that date."). Specifically, the court's attribution to the Rule period this 20 days and the 45 days prior to certification of *Larkin I* causes the March 28, 2016 motion for discharge to be meritorious. *Id.* at 27. The Court of Appeals similarly uses the 20-day period to characterize the rest of its analysis for the change of judge period as dicta. *Id*. at 27, 31. If this Court finds error, this Court should then address the merits of the State's waiver argument (Appellant's Br. 26-28).

between honoring a defendant's right to an impartial jurist and the impossibility of conducting a trial while a defendant is raising a claim of judicial conflict.

Moreover, nothing in the present record shows a compelling need to protect Defendant from unfair delay while he is raising a meritorious claim of judicial conflict. The alleged conflict described by the Court of Appeals relates only to Judge Alevizos' decisions in a related guardianship matter. *Id*. at 28-30. But this Court has already found that a judge's knowledge of a defendant from judicial sources does not create a conflict. *Garland v. State*, 788 N.E.2d 425 (Ind. 2003). That is true even if Judge Alevizos' rulings in the guardianship case were incorrect or adverse to Defendant's interests. *Id.* Indeed, Judge Alevizos observed when recusing that there was no actual bias or circumstances that would cause a reasonable person to doubt his impartiality (App. Vol. II 89). This Court should reject the Court of Appeals' effort to create a needless exception to this Court's Rule 4(C) jurisprudence.

Third, the Court of Appeals attributed the 59-day period from Judge Alevizos' recusal on December 31, 2015 until to the appointment of a special judge on February 28, 2016 against the rule. *Larkin II*, slip op. at 32-34. The court found that period should be charged against the Rule based on its new exception for clear judicial conflicts and because difficulty in finding a replacement judge does not amount to court congestion. *Id.* That holding is again in conflict with this Court's precedent from *Brown* that the Rule 4 period tolls until "the new judge qualifies and assumes jurisdiction." *State ex rel. Brown*, 372 N.E.2d at 170. Additionally, the

holding conflicts with the Courts of Appeals' own precedent on court congestion. *State v. Goble*, 717 N.E.2d 1268, 1272 (Ind. Ct. App. 1999); *see also Wood v. State*, 999 N.E.2d 1054, 1063 (Ind. Ct. App. 2013), *trans. denied* (holding Rule 4 period tolled for a special judge to be assigned by the Supreme Court as no judge had jurisdiction to try the defendant in the interim).

In sum, the Court of Appeals rejected this Court's bright-line rules for interpreting Criminal Rule 4(C) in favor of an amorphous balancing-of-interests test that neither serves the purpose of the Rule nor the interests of justice.

II.
Exclusion is the proper remedy for improperly discovered evidence, not dismissal especially when the case is supported by untainted evidence.

Although there was misconduct by state actors here, exclusion of evidence is the proper remedy not dismissal of all criminal charges. In affirming the trial court's dismissal, the Court of Appeals failed to follow this Court's and federal precedent. The United States Supreme Court has held that where, after the institution of adversary proceedings but before trial, a Sixth Amendment violation is committed by the government, "the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence" gained from the violation. *United States v. Morrison*, 449 U.S. 361, 365 (1981). "The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression." *Id.* at 366. A defendant who learns of police or prosecutor misconduct is only entitled to be put in the same position as if the misconduct had not occurred. *See id.*

This Court reached the same conclusion in *State v. Taylor*, 49 N.E.3d 1019 (Ind. 2016). The Court noted that "[t]he United States Supreme Court has rejected the view that all right-to-counsel intrusions give rise to a per se—that is, irrebuttable—presumption of prejudice." *Id.* at 1025 (citing *Weatherford v. Bursey*, 429 U.S. 545, 550-51 (1977)). Although a presumption of prejudice arises from state misconduct, that presumption is rebuttable. *Id.* at 1025-26. The presumption is rebutted if each piece of admitted evidence has a source independent of the misconduct and the subject matter of each witness's testimony is such that it will not be tainted by the misconduct. *See Id.* at 1021, 1025-26. This is because situations have arisen where despite misconduct "the State did not gain any significant advantage" from the violation. *Malinski v. State*, 794 N.E.2d 1071, 1082 (Ind. 2003).

Here, it has never been disputed that misconduct occurred. The only issue is what remedy Defendant deserves—outright dismissal or the suppression of evidence that the State is unable to show is untainted. *Taylor* instructs that a suppression hearing should be held to determine what evidence is tainted. *Taylor*, 49 N.E.3d at 1029. But the trial court refused the State's request for a *Taylor* hearing, refused to consider whether individual pieces of evidence were tainted, based its dismissal in significant part on the supplemental motion to dismiss filed a mere day earlier, and failed to consider that Defendant received a new prosecutor not involved in any of the misconduct (App. Vol. IV 87-89). Instead the trial court made a blanket finding that *all* of the testimony from *all* the State's witnesses was

tainted (App. IV 87). This does not comport with *Morrison* and *Taylor*. The State has shown in its Brief of Appellant that each major piece of evidence the State intends to offer at trial has a source untainted by any misconduct (Appellant's Br. 36-37). *See Murray v. United States*, 487 U.S. 533, 537-38 (1988) (explaining the independent source doctrine). The trial court's decision to dismiss instead of examining specific evidence to determine if it should be excluded due to taint is not supported by the controlling precedent.[4]

By affirming dismissal, the Court of Appeals is putting Defendant in a *more* advantageous position than he would have enjoyed absent the misconduct. The facts of the domestic shooting—including Defendant's 911 call to the scene of his dead wife and his voluntary recorded statement admitting that his gun killed her—show that even if the State had behaved perfectly, it still would have charged Defendant and would have sufficient evidence to try him. And at least with regard to the overheard communications, it appears the State was never aided by that improper information as then-presiding Judge Lang reviewed the tape and concluded in October of 2014 that there was nothing therein which "would give an unfair advantage to the State and law enforcement during the rest of investigation" or "would lead law enforcement to discover further evidence" (*Larkin I* App. 817).

[4] The Court of Appeals cites a line of appellate cases indicating that dismissal can be a proper sanction for flagrant discovery violations. *Larkin*, slip op. at 36-37, 40. But those cases are not controlling precedent and recognize that the extent of prejudice must be considered. *See State v. Schmitt*, 915 N.E.2d 520, 523 (Ind. Ct. App. 2009), *trans. denied.*

Transfer should be granted to order that any remedy for the misconduct must comport with *Morrison* and *Taylor*.

Finally, as argued on Rehearing, the Court of Appeals' decision unfairly implies that Special Prosecutor Levco violated a duty of candor during a Court of Appeals' oral argument. *Larkin II*, slip op. at 39-40. The opinion suggests Levco was dishonest or not forthright when stating "in the same breath" that he had not reviewed privileged communications and that he did not believe those communications included information "not already known from other sources." *Larkin II*, slip op. at 39.[5] The Court of Appeals deduced "Levco, one way or another, learned of the information [in the privileged communications] because there is no other way he could confidently make these statements." *Id*.

It is a serious allegation to challenge the integrity of an attorney or jurist, and the present record does not support such a challenge. Levco's statement did not require knowledge of the confidential communications, but only knowledge of Judge Lang's 2014 finding that the privileged communications did not aid the State (*Larkin I* App. 811-18). Vacating the opinion will ensure Levco's distinguished career in service to the legal profession as an elected prosecutor and judge will not be unfairly tarnished.

[5] The oral argument was not recorded or otherwise preserved.

CONCLUSION

The State respectfully requests that this Court grant transfer and reverse the trial court's discharge and dismissal.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this petition for transfer contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

I certify that on September 25, 2017, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I also certify that on September 25, 2017, the foregoing document was electronically served upon the following person(s) via IEFS:

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