

**VOLUME III OF III**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

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**RECEIVED**  
JUL 30 2018  
S.C. SUPREME COURT

JEFFREY MICHAELSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002373

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APPENDIX

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1 present, but the video statements -- the videotaped  
2 statements would reflect that Detective Merrithew was the  
3 one indeed who was asking the questions. That, for  
4 purposes of a trial, then becomes a suppression issue, just  
5 like the search warrant is a suppression issue when we get  
6 to that stage. And all that evidence has a right to be  
7 challenged and I can't do that without Detective  
8 Merrithew's presence.

9 THE COURT: Ms. Kennedy, do you have any, in mind  
10 other than a granting of your motion, way to procure the  
11 testimony of Detective Merrithew?

12 MS. KENNEDY: Your Honor, I -- I -- No, Your  
13 Honor. I mean I've done research. I've looked at the  
14 rules. I've looked at the case law. There's nothing that  
15 would permit that. And, quite frankly, if the suggestion  
16 is that it be done by deposition, which again is contrary  
17 to the case law, I wouldn't consent to it.

18 Juries have a right to judge the credibility of  
19 witnesses. I have a right to examine a witness. I cannot  
20 challenge credibility based on a videotape. Credibility  
21 includes how they sit on the stand, the way they turn, how  
22 nervous they get, the delay in their responses. And I need  
23 a live body to do that.

24 THE COURT: All right. Thank you.

25 Ms. Gay, I'll be happy to hear from you.

1 MS. GAY: Thank you, Your Honor.

2 On behalf of Treze Feaster I just want to say a few  
3 things. I joined in this motion because as an attorney  
4 representing my client charged in this -- in Berkeley  
5 County with these charges I believe it's ---

6 THE COURT: Slow down just a little bit, Ms. Gay.

7 MS. GAY: All right. I believe it's my duty to  
8 join in this motion. I don't see how I can continue  
9 effectively representing my client and not come forth today  
10 with the co-defendant and -- with all these constitutional  
11 issues.

12 Although we -- I did talk to, as Ms. Kennedy did,  
13 Detective Merrithew many times about this case before he  
14 left the Country. And I am very aware that on my client's  
15 behalf he is a material witness to my defense. I know that  
16 because, as Ms. Kennedy described, not only did Mr.  
17 Merrithew -- And I don't want to repeat everything that she  
18 said, because I believe that she -- I want to join in  
19 everything that she said in terms of the procedure,  
20 history, and...

21 But I will tell you that this was a growing monster, a  
22 rock that kept coming down a hill and adding more and more  
23 dirt until it got to a giant bolder in the end. And every  
24 single thing that ultimately led to Ms. Kennedy's client's  
25 arrest built on itself beforehand. And Mr. -- Detective

1 Merrithew was the driving force by every conversation that  
2 was had, by every person charged in this case.

3       There are some videotape witness' statements, but that  
4 is not the important communication that occurred between my  
5 Defendant and Mr. Merrithew. The material important  
6 information that I'm aware of from talking to Detective  
7 Merrithew and my client were communications that they had,  
8 information that was about the case and investigation not  
9 on that videotape.

10       And so, as Ms. Kennedy described, this incident  
11 happened where my client's wife was brought in on -- for  
12 questioning. The next thing you know she's being detained.  
13 The next thing you know she's being charged.

14       Phone calls were made to my client by Detective  
15 Merrithew. Communication was happening between the two of  
16 them. Things were being said. That's why my client came  
17 and turned himself in and came in to talk to Detective  
18 Merrithew.

19       Then it went to the brother. Then it went to Ms.  
20 Kennedy's client. So everything all the way down to the  
21 last arrest starts way back in 2006 and then 2007 with  
22 Detective Merrithew's activities, what he said to people.

23       As Ms. Kennedy said, not only do we have a right to  
24 confront him for purposes of the trial in front of the jury  
25 for his demeanor and character and everything else, but we

1 have a right to do a suppression hearing in this case.  
2 Because this case is all about a confession. It's all  
3 about videotaped statements.

4 And we have -- I have no ability on Mr. Feaster's  
5 behalf to effectively challenge those statements without  
6 Detective Merrithew. I must have him. And if he doesn't  
7 -- If he's not called as a State's witness, I would be  
8 calling him, as Ms. Kennedy said, as a hostile witness  
9 because I have to get this information out in the pre-trial  
10 hearing to see -- to make the effective motions on behalf  
11 of my client.

12 Ms. Kennedy danced around the fact that he left the  
13 Country and did lots of things that he did before he left  
14 the Country. But nobody ever told us. He never -- I don't  
15 know what he told them. But, you know, a week before we  
16 were supposed to go to trial we find -- several days before  
17 we find out he's not around, that he's -- We were never  
18 informed that he wasn't around.

19 And so he knew for I would imagine six months or more  
20 that he was planning to do this move because he had to  
21 resign and he had to get there. And he actually left the  
22 Country before the case was even going to be -- you know,  
23 the week or so before the case was on the docket.

24 THE COURT: Ms. Gay, do you believe that  
25 Detective Merrithew and or the State has an obligation to

1 inform you that he was leaving?

2 MS. GAY: Yes, because it's -- It's a -- What is  
3 the correct word? It's -- My client -- It's exculpatory to  
4 my client that he's not available because he's so important  
5 to the case that I believe as a discovery matter that they  
6 should have informed me that he was no longer in the --  
7 that he was leaving, that we needed to talk about it, that  
8 we may need to do a pre -- you know, so we could make  
9 decisions about making motions that may have been heard  
10 before he left the Country.

11 Because I believe that they are required to let me  
12 know that when something significantly changes in their  
13 case that could be helpful to my client. And I think the  
14 fact that Detective Merrithew, he's not just unavailable,  
15 he's left the Country voluntarily. He's a significant  
16 portion of the State's evidence in this case and he's not  
17 able to be obtained by us.

18 We can't -- As Ms. Kennedy says, we can't just, you  
19 know, ask him to come back, you know, Will you please come  
20 back from Texas? You know, We can't subpoena you because  
21 you're outside of our state, but, you know, on your own,  
22 could you please come back? That's not happening. I mean  
23 it's obvious because this is the third time that we've been  
24 to court that he isn't saying, Oh, I'll be back on May 2<sup>nd</sup>,  
25 let's put this on the docket.

1 He has given up his position at Berkeley County and  
2 moved to a different Country.

3 And so I think that all -- all that said is very  
4 material to my defense. I have a right to be able to  
5 elicit all that testimony that I know he's capable of  
6 having because I've talked to him. And I know that that's  
7 significant in my client's defense.

8 I am unable to procure his testimony in any way,  
9 shape, or form. I'm court-appointed. We don't have the  
10 ability to fly him back here. That's totally impossible.

11 And also, Your Honor, we've used due diligence. I've  
12 been talking with Ms. Kennedy about this ever since  
13 November when this came up.

14 And just for purposes of discussion, Your Honor, she  
15 and I have completely diametrically opposed defenses. My  
16 client says her client shot him. Her client says my client  
17 shot him. We are not on the same team if you want to call  
18 it. We can't be based on our defenses. But based on the  
19 fact that we're both competent defense attorneys and know  
20 how we have to represent our clients, we have to say now  
21 that under the constitution, under, you know, the fairness,  
22 the 14<sup>th</sup> amendment, absolutely impossible to give these  
23 people a fair trial without this witness avail -- being not  
24 even just unavailable, but being a part of this case and  
25 made available to us.

1 THE COURT: All right. And, Ms. Gay, what is it  
2 that you believe that Detective Merrithew would testify to  
3 that is material to the defense of your client?

4 MS. GAY: Well, as Ms. Kennedy said, I would  
5 adopt everything she said because it's the facts related to  
6 both of these cases. This was a process and Detective  
7 Merrithew described it to me as one day I was staring at  
8 the box and decided to take it down and look at it. And in  
9 that box I found. And I believe it was a pawn ticket. And  
10 it just went from there.

11 And he went -- Every single thing he did, he's the  
12 only person who did it. Because it was an old case. It  
13 was many years old. So nobody else was really interested  
14 in it and he did every single thing. He had every single  
15 conversation with my client's wife.

16 He made -- I know from talking to him in the case and  
17 looking at the file there are different types of comments  
18 that were said to her that were about the fact that he  
19 needed to talk to my client, who was her husband.

20 He then -- Detective Merrithew got on the phone,  
21 called my client, had communication, personal one-on-one  
22 communication with him that's not on that videotape. All  
23 of it would be relevant to the defense of this case.

24 Mr. Feaster came in and talked with him, agreed to do  
25 a written statement and a videotaped statement. Camera

1 gets turned on, things are said.

2 Then they immediately went and arrested Ms. Feaster's  
3 brother based on that. The next day was the day that he  
4 turned himself in.

5 And Mr. -- Detective Merrithew got on the phone, made  
6 communication with him person-to-person, had conversations  
7 with him. The boy -- He was a young kid. He agreed to  
8 come in and meet with them, agreed to let them turn on that  
9 videotape and start recording that conversation again.  
10 Things were said in that conversation. After that ---

11 THE COURT: Things were said on the videotape,  
12 Ms. Gay?

13 MS. GAY: No.

14 THE COURT: Or outside?

15 MS. GAY: Outside of the videotape. Everything  
16 that I would like to -- need and require to cross examine  
17 Detective Merrithew about is not on that videotape. It's  
18 not. I mean there's certain things on there, but that's  
19 not what I'm talking about.

20 And then -- After they gave the -- They interviewed  
21 the brother, they then went to the fourth man and they  
22 arrested him. And it went from there.

23 And I mean the evidence that -- He has a completely  
24 different version of facts than all three of the rest of  
25 them.

1 But, the point is, Your Honor, is that Detective  
2 Merrithew was the person having all those conversations.  
3 There's no way that if I -- When I get to that point when I  
4 file my motion to suppress the statements and the  
5 confessions in this case, there's no way I can effectively  
6 handle that motion without his presence.

7 I would -- If they weren't going to bring him, I'd  
8 have to subpoena him. I would need to bring him to court  
9 to testify for that motion. And not only that, assuming  
10 that the judge did agree -- at the time of trial agreed to  
11 admit the statement and then go to the jury with it, there  
12 would be any number of other things that I would need to  
13 bring out in the presence of the jury that would be  
14 material to my client's defense.

15 THE COURT: Anything further?

16 MS. GAY: My client claims things were said that  
17 led him to agreeing to make that statement that were false.  
18 And that is something that the only way I can get that out  
19 is to cross examine Detective Merrithew about it.

20 THE COURT: Ms. Williams?

21 MS. WILLIAMS: Your Honor, the issue of absence  
22 of a witness is covered by Rule 7(b) of the South Carolina  
23 Rules of Criminal Procedure.

24 And, yes, counsel has stated under oath that Detective  
25 Merrithew is material to their case and that they used due

1 diligence to procure his testimony. But the rule then goes  
2 on, after the general statement of rules, and enumerates  
3 two things. And the second thing is very, very specific.  
4 And if Your Honor would look at the case law that we have  
5 provided, the case law has treated it in a very strict  
6 manner and has held counsel to a very strict interpretation  
7 of 7(b)(2), which states, A party applying for such  
8 postponement on account of the absence of a witness shall  
9 set forth under oath in addition to the foregoing matters,  
10 what fact or facts he believes the witness if present would  
11 testify to and the grounds for such belief.

12 That has never been done. Just a general statement  
13 of, we would like to have him on the stand so the jury can  
14 see that he is dishonest or he is not telling the truth  
15 because of his mannerisms, is not in compliance with this  
16 rule.

17 This is not our witness. We are not calling him. And  
18 our ---

19 THE COURT: Ms. Williams, let me interrupt you.  
20 Is the statement that Ms. Kennedy and Ms. Gay made, and  
21 just off the top of my head, the statements prior to the  
22 videotape being -- the tape or the conversation being  
23 videotaped that does not satisfy the rule in your opinion?

24 MS. WILLIAMS: No, Your Honor.

25 THE COURT: What would satisfy the rule in your

1 opinion?

2 MS. WILLIAMS: Well, for one thing, Your Honor,  
3 if that is the case, if they're saying that statements that  
4 Detective Merrithew made, which we don't know what those  
5 statements are, are what makes him so invaluable to their  
6 case, Detective Freeman was in the room the whole time,  
7 before the videotape was turned on. She drove with him to  
8 pick the witnesses up. She was with him the whole time,  
9 even before the videotape went on.

10 So I'm unclear as to -- It's not just fact or facts,  
11 it's what fact or facts he has to provide that make him so  
12 essential to the case that they can't get it from anywhere  
13 else. And that's what I'm failing to understand. That is  
14 what has not been stated for the Court under oath.

15 THE COURT: Well is it part of the reason that  
16 they could not state that is because he's not here for him  
17 to ask?

18 MS. WILLIAMS: But he can get -- Whatever  
19 statements he made he made in the presence of Sgt. Freeman  
20 and Lt. Mason. So I don't understand why they couldn't get  
21 those statements ---

22 THE COURT: Ms. Williams, have you provided, in  
23 light of this request for continuance, have you provided to  
24 the Defendants the person or persons who assisted Detective  
25 Merrithew in every portion of his investigation?

1 MS. WILLIAMS: It's clear from the discovery. In  
2 every single videotape interview of each witness you can  
3 see who is in the presence of Detective Merrithew. And  
4 each of the rights forms is witnessed by the other either  
5 detective or deputy that is present there.

6 We don't know of any fact or facts that -- or  
7 statements that Detective Merrithew made to their clients.  
8 If their clients are telling them that, then they need to  
9 ask the other person who was in the room.

10 So, our contention is that there is no information  
11 that Detective Merrithew can exclusively testify to. And  
12 if the assertion is that they just want to impeach him on  
13 the stand, we don't have an obligation to call any  
14 particular witness. And I don't think we have an  
15 obligation to hunt down any particular witness. We never  
16 planned to call Detective Merrithew.

17 THE COURT: Ms. Williams, is it your position and  
18 your statement here to the Court today that Detective  
19 Merrithew, everything that he would testify to can be  
20 testified to or was witnessed by another witness that is  
21 available to the defense?

22 MS. WILLIAMS: Everything that Detective  
23 Merrithew did that we're aware of in this case. The  
24 missing persons case was not handled by Detective  
25 Merrithew. That was handled by P.J. Lee.

1           Detective Merrithew got involved with the case in  
2 August of 2006. He tracked down a pawn ticket. He did not  
3 do that alone. He then interviewed witnesses in the  
4 company of other deputies. We know of no evidence that he  
5 collected alone. I don't know of anything that Detective  
6 Merrithew can exclusively testify to.

7           THE COURT: Ms. Williams, is there a difference  
8 in your statement of, We don't know of anything, or in  
9 there is nothing?

10           MS. WILLIAMS: Well, Your Honor, I can't testify  
11 to -- I don't know everything that their clients are  
12 telling them. I am telling the Court that I am unaware of  
13 anything in this case, as provided in the discovery, any  
14 action that Detective Merrithew took without another  
15 detective being involved. In fact, several detectives  
16 being involved.

17           THE COURT: And, Ms. Williams, is there any part  
18 of your case that you believe or feel that you will have  
19 trouble introducing evidence of, physical or otherwise,  
20 without Detective Merrithew?

21           MS. WILLIAMS: No.

22           Your Honor, even when Detective Merrithew was here and  
23 we didn't even know that he was leaving for Afghanistan, we  
24 had never planned to call him. We were going to call Sgt.  
25 Freeman for the most part as the case agent. And there's

1 one interview that Lt. Mason did with Detective Merrithew.  
2 He was never going to be our witness.

3 THE COURT: Anything further, Ms. Williams?

4 MS. WILLIAMS: Your Honor, just that I just want  
5 to make the Court aware of the fact that the victim's  
6 mother, Ms. Reeves, is here. And, you know, through no  
7 fault of the process she has waited nine years for just a  
8 day in court. And it's been three years since these  
9 Defendants have been arrested. And to grant an open-ended  
10 continuance until Detective Merrithew comes back, if he  
11 ever comes back, will not only prevent this case probably  
12 from every going forward, but a whole slew of other cases.

13 THE COURT: All right. Ms. Williams, just my  
14 understanding, and please correct me, that he was just gone  
15 for a year; is that correct?

16 MS. WILLIAMS: Your Honor, we just don't know.  
17 We had information ---

18 THE COURT: Is he in the military or is he  
19 privately appointed?

20 MS. WILLIAMS: Private contracting firm to our  
21 knowledge. We had information that he was going to be  
22 returning for pretty much the April 12<sup>th</sup> term of court. And  
23 that was one of the reasons why we were planning to go  
24 forward on that day. We called him. We found out he was  
25 actually just going back to Afghanistan. And at that time

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*APRIL 16, 2010*

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*MOTION HEARING*

1 we learned that because of his employer's policies he may  
2 never have a clear idea of when he's coming back.

3 And, believe us, if we could have him and we could  
4 insure the Court he would be back for a term of court, we  
5 would gladly do that. Nothing would be easier to resolve  
6 this issue.

7 But the truth of the matter is that even if he finds  
8 out that he's going to be back at a particular time,  
9 according to his wife, that can change overnight. And  
10 given the place he is, it's a sad thing to say, but, you  
11 know, there's really no guarantee that Detective Merrithew  
12 will ever come back.

13 I don't know the length of his contract. I think it's  
14 renewable. I don't know if it's a year; I don't know if  
15 it's three years. I think there are some plans now for his  
16 wife to join him in Afghanistan and begin her own contract.  
17 And that, my understanding, what I just learned was that  
18 that might have been one of the reasons why she was being  
19 fingerprinted. And that would be an even longer period of  
20 time.

21 So I wish I could give the Court a clearer idea, but  
22 the truth of the matter is we don't know when he's coming  
23 back.

24 THE COURT: All right.

25 MS. KENNEDY: Your Honor, if I may?

1 THE COURT: No, ma'am.

2 MS. KENNEDY: Oh. Thank you.

3 THE COURT: I am going to -- You'll have my order  
4 by close of business today. Thank you.

5 MS. KENNEDY: Thank you, Your Honor.

6 \*\*\*END OF REQUESTED TRANSCRIPT OF RECORD\*\*\*

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JEFFREY A. MICHAELSON,

APPELLANT

---

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the judge abused her discretion and denied appellant his right to compulsory process, confrontation, and his Due Process right to a fair trial by denying appellant a continuance to secure the presence of Detective Merrithew where that Detective voluntarily left the country for Afghanistan after being available for over thirty terms of court, since the Detective was a material witness as the first trial judge properly ruled, and particularly where the Detective had returned once to Berkeley County after leaving the country?

STATEMENT OF THE CASE

Appellant was indicted by the Berkeley County Grand Jury for the offenses of murder and burglary in the second degree. R. 849. His case was called to trial on June 28, 2010 before the Honorable Kristi Harrington, and a jury. Patricia Kennedy and David Schwake represented appellant. Anne Williams and Bryan Alfaro were the assistant solicitors. R. 111.

On July 1, 2010, the jury found appellant not guilty of burglary in the second degree but guilty of murder. R. 840, l. 21 – 841, l. 4. Judge Harrington sentenced appellant to forty-five years imprisonment. R. 844, ll. 9-12.

This appeal follows.

## ARGUMENT

The judge abused her discretion and denied appellant his right to compulsory process, confrontation, and his Due Process right to a fair trial by denying appellant a continuance to secure the presence of Detective Merrithew where that Detective voluntarily left the country for Afghanistan after being available for over thirty terms of court, since the Detective was a material witness as the first trial judge properly ruled, and particularly where the Detective had returned once to Berkeley County after leaving the country.

### **Relevant Facts**

Detective Merrithew was a critical material witness in this case. At the December 7, 2007 preliminary hearing, appellant appeared along with co-defendant Katherine Feaster. Feaster was the first person arrested in this “cold case” allegedly “solved” by Detective Merrithew, and she was charged with accessory after the fact of murder and receiving stolen goods after allegedly telling Merrithew what occurred in this case. R. 3, l. 4 – 4, l. 1.<sup>1</sup>

Detective Merrithew testified at the preliminary hearing that on February 2, 2001 a police report was filed by the decedent’s mother, Francis Reeves. Reeves was also the owner of the burglarized house home from which the property was stolen. R. 4, l. 7 – 5, l. 1. Merrithew testified that he continued to run names of family members through a “pawn shop list” hoping to find one of them had pawned some of the stolen property. R. 5, ll. 1-8.

During this process, Merrithew learned that the decedent’s step-daughter, co-defendant Katherine Feaster, had sold some jewelry to a pawn shop in Greenville, South Carolina. R. 5, ll. 9-22. Merrithew was able to find Feaster and he arrested her for

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<sup>1</sup> These cites are all from the December 7, 2007 preliminary hearing.

possession of stolen property. He told Feaster that he knew she was involved in the disappearance of her step-father, the decedent. “[S]he named people involved, which would be her husband, her brother, and their friend, which is also in the courtroom, and a Defendant today, Mr. Michaelson. She confessed to pawning the jewelry.” Appellant was the only person charged in the death of the decedent who was not a relative. R. 6, ll. 3-17.

Merrithew also testified that Feaster’s husband confessed he knew about the murder and “he knew where the body was buried.” R. 6, ll. 21-24. Merrithew said that appellant was implicated in the murder and he said that appellant’s “common-law wife” or girlfriend gave the police consent to search a storage facility where they found some more of the decedent’s stolen property. R. 7, ll. 3-10.

Merrithew testified that the decedent’s body was buried in a 55 gallon drum in appellant’s front yard. “Consequently, all were charged.” R. 7, ll. 11-20. Merrithew confirmed that based on Feaster’s statements and her husband’s statements that appellant was charged with murder. R. 8, ll. 15-25.

On cross-examination Merrithew acknowledged that statements given in this case were not consistent. Merrithew admitted that unlike the other suspects appellant was not related to the decedent and Merrithew knew of no personal animosity appellant had towards the decedent. R. 12, l. 18 – 13, l. 18.

Merrithew further said that he was told in one statement by a witness that appellant was upset because his grandmother had died and “he felt like killing somebody and they all say let’s go kill Parish.” Merrithew acknowledged appellant did not even know Parish. R. 17, ll. 2-19. Merrithew opined the only way appellant knew anything about the decedent “is he would have got it from the Feasters.” R. 18, ll. 11-15.

As to the inconsistent statements, Merrithew said he was told in one statement that Feaster wanted to borrow money from the decedent and that he “made some sexual advances towards her.” Feaster apparently claimed she told her husband, her brother, and Michaelson who “all left the residence to go deal with Mr. Reeves.” Merrithew said he was told by one suspect that appellant was going through “some type of mental distress about a family member denying and that he felt like killing someone.” R. 21, ll. 6-23. Appellant and Feaster were bound over for trial at the conclusion Merrithew’s testimony. R. 23, ll. 7-9.

On April 30, 2010, defense counsel filed a motion for a continuance. R. 85. Judge Dennis had ordered a continuance granted on March 22, 2010 because the testimony of “Jerry Merrithew is material to the Defense,” counsel exercised due diligence in attempting to secure his presence and the motion was not made for purposes of delay. R. 34.

In the present motion for a continuance, counsel noted that the Berkeley County Public Defender’s Office was appointed to represent appellant on August 29, 2007. On November 20, 2009, counsel learned through informal sources that Detective Merrithew had resigned his position with the Berkeley County Sheriff’s Office “and **voluntarily** removed himself from the jurisdiction of this court by securing employment with a *private* security firm in Afghanistan.” R. 86. (second emphasis added). Counsel noted that she attempted to serve Merrithew with a subpoena on November 23, 2009, but Captain Rick Ollic of the Detective Unit refused service of this subpoena stating that Detective Merrithew was in Afghanistan.

Later, after an in chambers status conference with Judge Harrington on March 26, 2010, the prosecution announced its intention to place the case on the trial docket for the

April 26, 2010 term. Apparently over the state's objection, Judge Harrington granted a continuance for the April 26 term. The motion noted, however, that Judge Harrington had failed to address the compulsory process and due process issues as well as the right to confront a hostile witness that were raised in the continuance motion. R. 87.

At the April 16, 2010 hearing before Judge Harrington defense counsel argued again that Detective Merrithew was a material witness and that fact had not changed since the earlier grant of a continuance. R. 51, ll. 14 -23.

Defense counsel stated the defense had been trying to secure alternative ways to have Merrithew's testimony placed before a jury when he returned to the jurisdiction. One such way, a videotape deposition, was not possible and counsel noted that Judge Dennis had ruled that there was no case law that would support such a procedure. R. 52, ll. 1-9.

Defense counsel stated that an email he received from the assistant solicitor led her to believe that arrangements were being made to secure Detective Merrithew's presence at trial. R. 52, ll. 16-24. Defense counsel argued under the Sixth Amendment appellant was entitled to compulsory process and the right to a fair trial. R. 53, ll. 9-17. Counsel's argument was threefold in this case: That the denial of a continuance to secure Detective Merrithew's presence would deny appellant his right to compulsory process, to confrontation, and the right to present a complete defense (a fair trial). R. 54, l. 12 - 58, l. 23.<sup>2</sup>

Counsel noted that Merrithew was a material witness because he was the key investigating detective and he "followed pawn tickets. He did a whole bunch of preliminary

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<sup>2</sup> The "Supp.Tr. I" cites refer to this pre-trial hearing.

investigation prior to the time that these folks were taken into custody.” Counsel argued there was good reason to believe Detective Merrithew knew that Travis Feaster had burglarized the decedent’s home on a prior occasion and that was “certainly fodder for cross-examination” and that the quality of the investigation was key issue in this case as it involved appellant. R, p. 54, l. 12 – 58, l. 23.

Defense counsel also told the judge that “there were 32 terms of court that this case could have been called” before “Gerry Merrithew is no longer available.” R. 61, ll. 12-20. Defense counsel told the judge she had used all due diligence to secure Detective Merrithew’s presence and that she had no interest in delay and that Detective Merrithew was a material and critical witness in this case. R. 62, l. 1 – 67, l. 23.

Defense Counsel Gay for co-defendant Feaster joined in appellant’s motion noting that Merrithew’s testimony would be exculpatory and that “he’s so important to the case that the trial could not be held in his absence.” Gay noted that her client said appellant shot the decedent and appellant said that Feaster shot the decedent. Although they were not “on the same team” both defendants agreed Merrithew was a material and critical witness. R. 68, l. 2 – 71, l. 13.

Defense Counsel Gay argued that although relevant matters were on videotape many items that were the subject of cross-examination of Detective Merrithew were *not* on videotape. There was no way, Gay argued, that the motion to suppress statements would be handled “without his presence.” When defense counsel for the appellant asked to add even further to the record at the conclusion of the hearing the judge denied that request. R. 71, l. 15 – 79, l. 1.

On June 28, 2010, defense counsel again moved for a continuance because Detective Merrithew was not present. Defense counsel noted the continuance issues had been argued on prior occasions and that Detective Merrithew continued to be a material witness. R. 114, l. 11 – 117, l. 18. Defense counsel noted that this situation was a case of first impression in South Carolina and that although the prosecution had apparently now been able to structure their case “around the witnesses she [the prosecution] intends to present . . . that Detective Merrithew was still a critical witness for the defense.” R. 117, l. 21 – 121, l. 13.

Defense counsel asked that she be allowed to testify under oath about Detective Merrithew being a material witness and the constitutional violations involved if a continuance was not granted. The judge agreed with the solicitor that defense counsel was an officer of the court, she had provided an affidavit “detailing certain issues in the timeline concerning this case,” and that it was not necessary to place her under oath. R. 122, l. 4 – 124, l. 6.

The judge also told defense counsel that there was no need to rehash the previous motions for a continuance, and she did not need to hear all the particulars of the prior motions. Defense counsel repeated that she did not know of any way -- videotape or otherwise -- to have Detective Merrithew’s testimony placed before the jury without him complying with a subpoena. “I have no method of compulsory process to have Detective -- or secure Detective Merrithew’s presence.” R. 125, l. 22 – 128, l. 6.

Defense counsel reminded the judge that appellant was arrested on August 7, 2007 and that there had been 30 terms of court in 2008 and 2009 during which the state could have called the case where “Detective Merrithew was present and available to me for compulsory process.” R. 128, ll. 7-18.

Defense counsel also argued that Detective Merrithew was given a list of people in the area at the time the decedent disappeared, and Merrithew used that list “to develop leads.” The defense had a right and a need to question Detective Merrithew about his investigation of the people involved and the information that was provided to him. R. 130, l. 4 – 135, l. 16.

Defense counsel referenced the bizarre information that Merrithew was allegedly told appellant wanted to kill the decedent because his grandmother had died. There was conflicting information that “everybody was getting high and smoking dope and that was the explanation [for the murder].” R. 135, l. 17 – 148, l. 14

Detective Merrithew was a critical witness in this case because he was the lead detective “he was the one that did all the investigation.” This was a cold case and defense counsel argued that if Detective Merrithew was in some other state rather than outside the country, she would have been able to secure his presence for appellant’s trial. R. 135, l. 17 – 148, l. 14.

While defense counsel would not go so far as to say the state deliberately kept Detective Merrithew outside of the jurisdiction, counsel did state she found “it suspicious that it [appellant’s trial] was put - - that it was put on what I would call the final trial docket for November 30 almost immediately after he left, because it was first noticed on October 12.” R. 148, ll. 15-24.

Defense counsel argued appellant was entitled to present a defense “and I am representing to the Court that I simply cannot do that and develop my theory of the case absent his [Detective Merrithew’s] presence.” R. 148, l. 25 – 149, l. 8. Defense counsel

also stated Merrithew was the central authority figure and he had influence over who was given leniency for their “cooperation.” R. 149, l. 9 – 151, l. 4.

Defense counsel noted her understanding was with Merrithew’s employment in Afghanistan “he can come back here pretty much anytime he wants to.” R. 151, ll. 5-6. Defense counsel said that at a future term of court that she “can effect compulsory process.” However, I have no ability to serve with a subpoena or secure his presence in the courtroom.” R. 151, l. 18 – 152, l. 15. Defense counsel said she had no duty to show that the state made Detective Merrithew unavailable for her constitutional arguments to prevail. R. 151, l. 21 – 160, l. 19.

Defense counsel also noted that in March: “Detective Merrithew *flew into town early in March . . . I had no notice of that.* I only found out about through folks at the jail. If he had been - - he had been in Berkeley County, he had been at the jail, and I would have had an opportunity at that point in time had I been aware of it to put him under subpoena.” R. 148, l. 8 – 149, l. 8. (emphasis added).

While the solicitor acknowledged the murder happened nine years ago and that arrests were not made for six and a half years, he said “the case is three years old” and he argued that the trial should go forward in Merrithew’s absence. R. 185, l. 10 – 186, l. 8.

Defense counsel argued that she had exercised due diligence in securing Merrithew’s presence but that the constitutional issues of compulsory process, due process, and confrontation could not be discounted. R. 187, l. 14 – 194, l. 25. Defense counsel told the judge if the court would grant a continuance she would subpoena Merrithew just as she would have had she known Detective Merrithew was back in Berkeley County in March. Defense counsel argued “all this could have been avoided had there just been some simple

notice that he was here. We could have had, as Judge Dennis suggested, a conference about when he would be here so we could - - we could go forward with it. None of that was done.” R. 195, ll. 1-25. Defense counsel said if the defense was not granted a continuance appellant would be denied his right to a fair trial. R. 196, ll. 1-6.

The following day, at the beginning of court, the judge denied the motion for a continuance. She stated “the detective is simply unavailable.” She stated that the defense argument “has been fully articulated and preserved for the record.” R. 200, l. 10 – 202, l. 2.

Defense counsel then announced that she wanted to appeal or seek a writ of supersedeas from the appellate court.<sup>3</sup> R. 202, l. 4 – 210, l. 6.

#### **Trial Evidence and Further Motions for a Continuance**

As seen above, there was evidence the decedent made sexual advances which may have been the cause of whatever happened in this case. The judge stated that she would allow evidence that the decedent had been abusive towards the step-mother and the judge stated as with the motion for a continuance that motions in limine regarding abuse were subject to change during the trial. R. 270, l. 2 – 271, l. 14.<sup>4</sup>

The Jackson v. Denno hearing is included in the record because it further reveals Detective Merrithew was a key player in this case. Detective Michael Crumley of the Berkeley County Sheriff’s Department testified he took appellant into custody on August 7,

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<sup>3</sup> Defense counsel told the judge that she had been advised she had the right to appeal this ruling by the Chief Attorney at the Office of Appellate Defense. Undersigned counsel, as an officer of this Court, and the Chief Appellate Defender did *not* give that advice to defense counsel. Defense counsel may also have been confused as to the person who was the Chief Appellate Defender when she consulted this office about the possibility of an appeal and/or a supersedeas.

<sup>4</sup> Appellant remained out on bond during the trial. Tr. 177, l. 20-21

2007 and read him his Miranda warning. R. 214, ll. 9-14. He turned appellant over at the Sheriff's office to Detective Merrithew and Detective Freeman. R. 217, ll. 16-20. On cross-examination, Crumley stated he believed he arrested appellant at the direction of Detective Merrithew. R. 220, ll. 2-4.

Detective Diana Freeman testified that Detective Merrithew had just come into their division in Berkeley County so he took the present case as one of the cold cases. R. 241, ll. 8-18. Merrithew asked Freeman to run pawn shop records for him. R. 243, ll. 7-18.

The decedent's mother, Francis Reeves, testified in the presence of the jury that her daughter-in-law, Brenda, called and told her the decedent was missing. Reeves said she did not and does not know appellant. R. 287, l. 9 – 289, l. 24. Reeves stated that she went to the Detective's office upset and crying and she said that Detective Merrithew promised to get involved in the case and investigate it to solve it. R. 300, l. 4 – 302, l. 7. Reeves was able to later identify stolen jewelry that was shown to her.

Brenda Ahrenholz was the decedent's estranged wife. She last saw him on the night of January 19, 2001. Brenda said that her house was broken into and jewelry stolen from their safe. R. 308, l. 3 – 310, l. 17.

She did not immediately report the decedent missing because the decedent had tax problems and she thought that "he had run from his taxes." R. 317, l. 16 – 318, l. 9. She also thought that the decedent had broken into the safe and she had the locks changed. R. 320, l. 13 – 321, l. 23.

As stated above, the decedent's body was found in 55 gallon drum with a rubber tarp taped to it. This was apparently in appellant's yard and apparently near where the others

lived. R. 376, l. 19 – 378, l. 6. The decedent had been shot but no weapon was submitted for comparison. R. 421, l. 1 – 424, l. 25.

On July 6, 2010, during the trial, defense counsel renewed her motion for a continuance. R. 442, l. 17 – 445, l. 24. She noted that all of the witnesses with the exception of the chain witnesses “have referenced directives from Detective Gerry Merrithew as to their participation in the case.” She noted Detective Crumley and his directive to pick up appellant. There was also Francis Reeves and her discussions with Merrithew. Further, there was his investigation and Brenda Ahrenholz’s testimony that was inconsistent with the testimony Detective Merrithew gave at the preliminary hearing. Defense counsel argued that she had no opportunity in the absence of Detective Merrithew to refute or rebut the testimony. R. 442, l. 23 – 445, l. 19. The judge denied the motion “for a continuance at this time.” R. 445, ll. 21-24.

Detective Diana Freeman acknowledged she assisted Detective Merrithew in the case but that Merrithew was the lead detective. R. 501, l. 15 – 502, l. 8. Freeman also said she took notes while Detective Merrithew interviewed Katherine Feaster on the way from Pelzer to Moncks Corner. R. 511, ll. 17-22.

Freeman also said that Merrithew stated he continued working on this case even after Freeman left the unit, but she could not explain why Detective Merrithew did not have any investigation documented past August 13, 2007. R. 529, ll. 8-25. On redirect examination, Freeman told the jury that Detective Merrithew was in “Iraq, Afghanistan, somewhere overseas.” R. 543, ll. 16-20.

Defense counsel later said that she may be “beating a dead horse” in the continuous motions for a continuance but she stated that “[i]t’s been my position and our position all

along that Detective Merrithew was an essential witness for our defense, and the assistant solicitor made reference to Detective Merrithew not being here . . .” Defense counsel said some of the testimony provided by Detective Freeman contradicted Detective Merrithew’s testimony at the preliminary hearing and this went to the heart of appellant’s defense. R. 673, l. 25 – 674, l. 25.

After the judge denied the directed verdict motions, he asked defense counsel if they had made any other efforts to contact Detective Merrithew. Defense counsel answered “no, Your Honor, because he is beyond the subpoena power of the court.” The judge stated she was again denying the motion for a continuance. R. 761, l. 11 – 762, l. 6.

#### **Discussion**

The Sixth Amendment to the United States Constitution provides an accused the right an impartial jury (fair trial) and the right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.

Here, the court earlier correctly granted a continuance on March 27, 2010 based on the absence of material witness lead Detective Gerry Merrithew. The judge found that Merrithew was a material witness and that the motion for a continuance was not intended for delay and was made solely because the defense could not go to trial safely without Detective Merrithew’s testimony. The judge also found the defense exercised due diligence and that Merrithew’s absence from the jurisdiction and unavailability for trial was voluntary. See Order of Judge Dennis R. 32.

Defense counsel also noted that the state had over 30 terms of court in which they could have called appellant’s case to trial where Merrithew would have been available as a witness. Further, the defense learned that Merrithew was back in Berkeley County at the jail

in March. The defense missed the opportunity to subpoena him then because they were not notified of Merrithew's presence where Judge Dennis apparently earlier urged such cooperation.

There were not any changes in circumstances from Judge Dennis' order granting the continuance because Merrithew was a material witness and the defense exercising due diligence through Judge Harrington's repeated denials of the motions for the continuance as seen above.

In State v. Dodgens, 120 S.C. 239, 113 S.E. 77 (1922) a defense witness had been subpoenaed but left the court without the defendant's knowledge or consent. The Supreme Court held that the refusal to issue a bench warrant to secure the witness's presence or to postpone the trial until the witness was present was a denial of the accused's right to have compulsory process for obtaining witnesses in his favor.

Here, the defense acted with due diligence, and, again, there was no change in circumstances from the time that Judge Dennis properly granted the motion for a continuance for the defense to secure the presence of material witness Detective Merrithew.

Appellant was out on bond during this time, and it is clear that the trial judge did not consider him a flight risk since she allowed him to remain out on bond during the trial also. Acquiescing to the state's wish to try this case because **the state** no longer needed Merrithew was an abuse of discretion which denied appellant his right to compulsory process, to confrontation, and to a fair trial where he could present a complete defense.

Here, unlike State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009), the defense did continuously move for a continuance when it became aware that a material witness's presence could not be secured. Further, the witness in State v. Cooper had

testified under oath during a prior trial and the defendant in Cooper was not denied his right to confrontation because he had had a full right to cross-examine Cooper.

Here, conversely Detective Merrithew's only testimony under oath came at a preliminary hearing, a summary proceeding, where the state need only establish probable cause to bind appellant and Feaster over for trial. This obviously was no substitute for the right to confrontation and full cross-examination.

Here, defense counsel attempted to subpoena Detective Merrithew on November 23, 2009. However, Captain Ollic refused service of that subpoena and defense counsel filed a motion for a continuance the very next day. Defense counsel also filed a supplemental motion for a continuance pursuant to Rule 7(b) of the South Carolina Rules of Criminal Procedure based on the absence of material witness Detective Merrithew.

The trial judge abused her discretion by refusing to grant a further continuance because the equities in this case were clearly on the side of the defense. As seen, Detective Merrithew readily admitted during the preliminary hearing that there were inconsistencies in the statements and stories he was told by suspects with obvious motives to attempt to lessen their own culpability and blame the murder on appellant.

In State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002) the Supreme Court found the judge abused his discretion by refusing grant a continuance to allow defense counsel to obtain a copy of the trial transcript in order for him to properly impeach a witness against him.

Here, appellant was denied any meaningful opportunity to cross-examine Detective Merrithew and Judge Dennis properly found Merrithew to be a material witness for the defense. The trial judge's denial of appellant's **repeated** motions for a continuance in this

case constituted a clear abuse of discretion. See, State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997).<sup>5</sup>

The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002) (*citing* State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); See, also, State v. Lyles, 379 S.C. 328, 341-42, 665 S.E.2d 201, 208-09 (Ct. App. 2008) (*citing*, S.C. Const. art. 1, § 14)

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” Chambers v. Mississippi, 410 U.S. 284, 302, (1973); California v. Trombetta, 467 U.S. 479, 485 (1984). State v. Hutton, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App.2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense); (“Due process requires that a criminal defendant be given a reasonable opportunity to present a complete defense.”) State v. Lyles, 379 S.C. 328, 341-42, 665 S.E.2d 201, 208-09 (Ct. App. 2008).

In Washington v. Texas, 388 U.S. 14, 19, (1967), cited during this trial, the United States Supreme Court elucidated the rights of an accused to present testimony: ‘The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide

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<sup>5</sup> Certiorari dismissed Patterson v. South Carolina, 482 U.S. 902 (1997).

where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” State v. Lyles, 379 S.C. 328, 341-42, 665 S.E.2d 201, 208-09 (Ct. App. 2008).

Finally, the solicitor’s speculation that Merrithew “may never return” was feckless in light of the fact that he had already returned in March to Berkeley County. The judge abused her discretion and denied appellant his right to compulsory process, right to confrontation, and his due process right to a fair trial where he could offer a complete defense by denying appellant a further continuance particularly given the equities in this case where the state had had over 30 terms of court to call appellant’s case where Detective Merrithew would have been available to testify, and where he had returned to the country and county or a prior occasion.

CONCLUSION

By reason of the foregoing arguments appellant's conviction should be reversed and his case remanded to the Berkeley County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender


ATTORNEY FOR APPELLANT

This 24th day of October, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 24<sup>th</sup>, 2012

  
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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Berkeley County  
Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

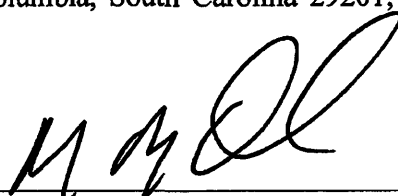
V.

JEFFREY A. MICHAELSON,

APPELLANT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 24th day of October, 2012.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 24th day of October, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal from Berkeley County  
Kristi Lea Harrington, Circuit Court Judge  
Appellate Case No. 2010-166526

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THE STATE OF SOUTH CAROLINA,

Respondent,

V.

JEFFREY MICHAELSON,

Appellant.

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**FINAL BRIEF OF RESPONDENT**

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**APPELLANT'S STATEMENT OF ISSUE ON APPEAL**

Whether the judge abused her discretion and denied appellant his right to compulsory process, confrontation, and his Due Process right to a fair trial by denying appellant a continuance to secure the presence of Detective Merrithew where that Detective voluntarily left the country for Afghanistan after being available for over thirty terms of court, since the Detective was a material witness as the first trial judge properly ruled, and particularly where the detective had returned once to Berkeley County after leaving the country?

## RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Jeffrey A. Michaelson, was indicted by the Court of General Sessions for Berkeley County for the offenses of murder and burglary in the second degree. 2009-GS-08-2295, 2008-GS-08-1668, 2008-GS-08-1669. ROA 849-854. The matter was called to trial on June 28, 2010 before the Honorable Kristi Harrington, Presiding Judge. The Appellant was present and represented by Patricia A. Kennedy and David P. Schwacke. The prosecution was handled by Ninth Circuit Assistant Solicitor Anne Williams and Deputy Solicitor Bryan Alfaro. R. 111, Tr. p. 1. On July 1, 2010, the jury found the Appellant guilty of murder and not guilty of burglary in the second degree. R. 840-41, Tr. 929-933. The defense renewed the motions, including the continuing motion for a continuance based upon the alleged inability to present a defense due to Detective Merrithew's voluntary absence from the jurisdiction. R. 842, Tr. p. 934, ll. 10-21. Judge Harrington denied the motions for a new trial, based upon her prior rulings. R. 842-43, Tr. p. 934, l. 21 - p. 935, l. 1.

After the verdict, the trial court heard pleas in mitigation, including victim impact information and a plea in mitigation from his counsel. R. 843, Tr. 935-39. Judge Harrington then sentenced the Appellant to a term of imprisonment for forty-five (45) years. R. 844, Tr. p. 940, ll. 9-12.

## ARGUMENT

- I. **The trial judge did not abuse her discretion in denying the motion for a continuance due to the absence of former deputy Gerald Merrithew, who was indefinitely residing and working overseas. The defense failed to show that Merrithew was a necessary witness for the defense where other witnesses were available to discuss the course of the investigation based upon their actual participation and present during the interviews of the critical witnesses. The denial of the continuance did not violate the Appellant's constitutional right to compulsory process or right to present a defense.**

This case involves whether a trial must be indefinitely delayed when a former law enforcement officer has not only has left employment, but left the country with no specified date of return. Rather than seeking alternate means to secure the possible testimony from overseas, the

Appellant contends they made a sufficient showing by the mere fact that they attempted to subpoena his former employer after he had left the jurisdiction. Rather than follow-up on the contact information provided to the defense of a telephone number or email, the defense apparently did nothing. The former deputy was briefly involved in the investigation, but the State, after the witness had left the country, consistently made clear to the court and the defense that it did not intend to call Gerald Merrithew as a witness. The State indicated that alternative witnesses were available - as well as the recorded interview by Merrithew and Sgt. Freeman of the Appellant and critical witnesses that the state intended to call in its case. Under the state's theory, each of the available witnesses either participated with Merrithew in the activity or acted independent of the activity that led to the arrests and the preparation of the trial. A review of the record of the trial reveals that the Appellant failed to show prejudice where he was unable to show, because he had not communicated with the witness, the expected content of his testimony or establish that the same information was not available from alternate witnesses. Instead, the Appellant merely sought to rely upon the witness's former designation as "lead detective" and his prior hearsay testimony at a preliminary hearing. Such reliance was insufficient to show prejudice where a review of the record reveals a lack of involvement by Merrithew in the actual evidence development or an additional available witness's presence, particularly during the perpetrator's interviews. The appeal must be dismissed.

#### **STANDARD OF REVIEW**

##### ***Continuance Motion***

The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice. State v. Smith, 387 S.C. 619, 622, 693 S.E.2d 415, 417 (Ct.App.2010). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Geer, 391 S.C.

179, 189, 705 S.E.2d 441, 447 (Ct.App.2010); State v. Meggett, 2012 WL 2402696, 3 (S.C.App. 2012). The Supreme Court has noted that it “has repeatedly upheld denials of motions for continuances where there was no showing that any other evidence on behalf of the defendant could have been introduced, or that other points could have been raised, if more time had been granted to prepare for trial.” State v. McKennedy, 348 S.C. 270 at 280, 559 S.E.2d 850 at 856 (2007) (citing State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996)). Also State v. Colden, 372 S.C. 428, 437-438, 641 S.E.2d 912, 918 (S.C.App. 2007). Motions for continuance on account of absence of witnesses are similarly addressed to discretion of trial court, and Supreme Court will not interfere unless a clear case of legal error is shown. State v. Hewitt, 206 S.C. 409, 34 S.E.2d 764 (1945) (where solicitor agreed to admit a statement from witness who was in armed services as to what he would testify to if present and agreed that testimony of other two absent defense witnesses, given at first trial, should be read to jury and received as evidence, denial of defendants' motion for continuance for absence of witnesses was not an abuse of discretion). Even if there was no evidentiary support, “ [i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.” Geer, 391 S.C. at 190, 705 S.E.2d at 447. “[R]eversals of refusal of continuance are about as rare as the proverbial hens' teeth.” State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

Rule 7(b), SCRCrimP, provides that no continuance shall be granted based on the absence of a witness unless the party, his attorney or agent submits under oath that: 1) the testimony of that witness is material to support the action or defense of the moving party; 2) the motion is not intended for delay, but solely because the party cannot go safely to trial without the testimony; 3) the party has used due diligence to procure the witness' testimony; or 4) such other circumstances that satisfy the court the motion is not intended for delay. Further, when a defendant argues he is prejudiced by the

unavailability of witnesses, the defendant must identify the witnesses he would call, demonstrate with specificity the expected content of the unavailable witnesses' testimony, and establish the information is not available from other sources. State v. Brazell, 325 S.C. 65, 480 S.E.2d 64, 73 (1997); State v. Meggett, 2012 WL 2402696, 3 (S.C.App.,2012); State v. Smith (Marquita), 387 S.C. 619, 624, 693 S.E.2d 415, 417 - 418 (S.C.App. 2010). In State v. Morris (Earle), 376 S.C. 189, 656 S.E.2d 359 (2008), the Supreme Court addressed a denial of a motion for a continuance to allow potential witnesses who had pending trials to become available in the future. In rejection of this assertion by upholding the discretion of the trial court, the Court concluded Morris could not demonstrate that the grant of a continuance would have in any way affected the Fifth Amendment considerations of the potential witnesses. In addition under Rule 7(b), the Court also concluded that at trial, Appellant did not demonstrate any of the hardships under 7(b) in support of his request for a continuance. The Court further concluded, in light of the evidence introduced at trial, any testimony from unavailable witnesses or other unavailable evidence would likely have been cumulative.

#### ***RIGHT TO CONFRONTATION***

The Confrontation Clause does not require the prosecution to call all adverse witnesses at the defendant's trial. See, e.g., U.S. v. Porter, 764 F.2d 1, 9-10 (1st Cir. 1985) (Confrontation Clause not violated when prosecution failed to call informant as witness and defendant chose not to call informant as witness despite informant's availability to testify); U.S. v. Moore, 954 F.2d 379, 381 (6th Cir. 1992) (Confrontation Clause not violated when prosecution did not produce cooperating individual because government agent personally secured evidence upon which defendant convicted); U.S. v. Morgan, 757 F.2d 1074, 1076-77 (10th Cir. 1985) (Confrontation Clause not violated when prosecution did not call informant as witness and judge limited defendant's direct examination of informant because limitations still allowed defendant to present defense that informant coerced

defendant's involvement with crime). But see, e.g., U.S. v. Powers, 500 F.3d 500, 506 (6th Cir. 2007) (Confrontation Clause violated when court admitted testimonial statements made by confidential informant but prosecution failed to call informant as witness).

South Carolina procedure is consistent with this interpretation. As stated in State v. Richardson, 253 S.C. 468, 473-474, 171 S.E.2d 717, 719 - 720 (S.C. 1969), it is now the general rule that the State is not required to place upon the stand every witness who has knowledge of material facts connected with the crime charged or whose name is endorsed upon the indictment. Accord State v. Weaver, 265 S.C. 130, 138, 217 S.E.2d 31, 35 (S.C. 1975).

### ***RIGHT TO COMPULSORY PROCESS***

“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.” Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). “This right is a fundamental element of due process of law.” *Id.* State v. Inman, 395 S.C. 539, 561, 720 S.E.2d 31, 43 (2011). The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right “to have compulsory process for obtaining witnesses in his favor.” A compulsory process claim subject to a proper objection may be reviewed subject to harmless error analysis.<sup>1</sup> See U.S. v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (compulsory process not violated by deportation of illegal aliens who could be defense witnesses because defendant could not show lost testimony would have been material, favorable, and not merely cumulative); U.S. v. DeCologero, 530 F.3d 36, 75 (1st Cir. 2008) (compulsory process not violated by court's refusal to expedite witness's transport in part because

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<sup>1</sup> See Crane v. Kentucky, 476 U.S. 683, 690–91 (1986) (holding that harmless-error analysis applies to the erroneous exclusion of testimony about the circumstances of a confession but not clearly indicating whether the Due Process, Compulsory Process, or Confrontation Clause was violated).

proffered testimony was “tangential and potentially cumulative”); U.S. v. Moussaoui, 365 F.3d 292, 312-14 (4th Cir. 2004) (compulsory process not violated when government refused to produce witnesses shown to be plausibly favorable to defendant because of national security interests and prosecution offered substitutions), amended by 382 F.3d 453 (4th Cir. 2004); U.S. v. Redd, 355 F.3d 866, 878-79 (5th Cir. 2003) (compulsory process not violated by court's refusal to grant writ to produce witness because defendant could only speculate on witness's testimony).

The right to compulsory process however does not guarantee that a witness will be found and attend, but may place some obligation on the government to try to procure the witness's attendance. The right to compulsory process does not amount to a guarantee of the actual attendance of the witnesses, and is not violated merely because the witness leaves the jurisdiction. Commonwealth v. Lahoud, 339 Pa. Super. 59, 488 A.2d 307 (1985).

“This right proscribes ‘the government's making a witness unavailable ....’” See United States v. Colin, 928 F.2d 676, 679 (5th Cir.1991) (quoting United States v. Henao, 652 F.2d 591, 592 (5th Cir. Unit B Aug. 1981)). To make this right fully meaningful it has been extended to proscribe the government's making a witness unavailable and thereby preventing a defendant from interviewing the witness and determining whether he will subpoena and call the witness in his defense. When the Government makes a witness unavailable, the defendant “must at least make some plausible showing of how [the witness's] testimony would have been both material and favorable to his defense .” See United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982); United States v. Villanueva, 408 F.3d 193, 200 (5th Cir.2005), Jacobson v. Henderson, 765 F.2d 12, 16 (2d Cir. 1985) (compulsory process not violated when government failed to produce material defense witness not under control of state government authorities and defendant received full cooperation of government in search for witness); U.S. v. Chaparro-Alcantara, 226 F.3d 616, 625 (7th Cir. 2000) (compulsory process not violated

when government deported witnesses because defense failed to show government acted in bad faith); U.S. v. Medina-Villa, 567 F.3d 507, 518 (9th Cir. 2009) (compulsory process not violated when government deported defense witnesses because deported in good faith and testimony not shown to be material and favorable to defendant); U.S. v. Colin, 928 F.2d 676, 679 (5th Cir. 1991) (compulsory process not violated when police failed to arrest fellow passenger because police in no way hid passenger nor made him unavailable); U.S. ex rel. Searcy v. Greer, 768 F.2d 906, 911-14 (7th Cir. 1985) (compulsory process not violated when court refused to grant defendant continuances to secure additional witnesses whose absences were due to lack of diligent preparation by defense counsel); But see, e.g., Bennett v. Scroggy, 793 F.2d 772, 776-77 (6th Cir. 1986) (compulsory process violated when court refused to grant overnight continuance to allow defendant to secure attendance of favorable reputation witness constituting defendant's "only defense").<sup>2</sup>

#### ANALYSIS

1. **There is no compulsory process violation where the State did not make Merrithew unavailable.**

Here, the State did not make Merrithew unavailable, and therefore the Government's conduct did not rise to the level of a constitutional violation. Merrithew resigned his law enforcement

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<sup>2</sup>The state has no obligation to produce a witness who, through no fault of its own, has become unavailable because of disappearance, illness, or death. People v. Chastain, 733 P.2d 1206, 1212 -1213 (Colo.,1987). See Taylor v. Minnesota, 466 F.2d 1119, 1122 (8th Cir.1972) (witnesses who could not be found), cert. denied, 410 U.S. 956, 93 S.Ct. 1425, 35 L.Ed.2d 689 (1973); United States v. Rhodes, 398 F.2d 655 (7th Cir.1968) (defense witness who died before trial), cert. denied, 394 U.S. 962, 89 S.Ct. 1311, 22 L.Ed.2d 563 (1969); see also Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv.L.Rev. 567, 595 (1978). Even in an instance where the state is responsible for the absence of a witness, the defendant cannot establish a violation of his constitutional right to compulsory process unless he can make a "plausible showing of how [the] testimony would have been both material and favorable to his defense." Valenzuela-Bernal, 458 U.S. at 867, 102 S.Ct. at 3446. The same materiality standard is applied in a due process analysis. *Id.* at 872, 102 S.Ct. at 3449. Cf. United States v. Ballesteros-Acuna, 527 F.2d 928, 930 (9th Cir.1975) (the state "is 'under no obligation to look for' a defendant's 'witnesses, in the absence of a showing that such witnesses were made unavailable through the suggestion, procurement, or negligence' of the Government").

position and moved to a foreign country for employment. See U.S. v. Colin, 928 F.2d 676, at 679. This is no different than if the Government simply permitted a witness whom the government had subpoenaed to return home after it was determined that his testimony would not be required at trial. See U.S. v. Crook, \_\_\_ F.3d \_\_\_, 2012 Westlaw 2345108 (5<sup>th</sup> Cir. June 20, 2012)(unpublished) (government subpoenaed an out of state witness and allowed him to return after it decided not to call him. No compulsory process error where the Government was fully cooperative when defense actually asked for its assistance; witness's contact information was provided promptly when it was first requested. The fact that defense's attempts at service were unsuccessful is not attributable to the Government.). The trial court recognized this fact as telling in rejecting the constitutional violation claim. R. 200-01, 148-49, Tr.p. 127-128, See Tr.p. 39-40.

In Colin, the government released a material witness. The Fifth Circuit held that because the government did not use witness's testimony at trial, in either live or recorded form, confrontation is not at issue here. The Court concluded:

"Due process," we assume, refers in this context to Colin's right to compulsory process. This right proscribes "the government's making a witness unavailable and thereby preventing a defendant from interviewing the witness and determining whether he will subpoena and call the witness in his defense. Thus, the government may not deny the defendant access to a witness by hiding him out." United States v. Henao, 652 F.2d 591, 592 (5th Cir. Unit B Aug. 1981). Surely, the conduct of Officer Gomez, even if it can be ascribed to the United States, did not rise to this level. The officer simply did not arrest Guadalupe; he had no constitutional duty to do so. In no way did Officer Gomez "hide" Guadalupe or otherwise make him "unavailable." We reject Colin's argument.

Colin, supra. The Appellant has failed to show a Confrontation Clause violation.

2. **Where the Appellant failed to show that Merrithew was a material witness with exclusive information about the case, the request for a continuance was properly denied when prejudice was not shown from his absence.**

In his brief before this Court, Appellant makes generalized non-specific assertions as to why

potential witness Gerald Merrithew's absence at trial deprived him of a defense. He merely asserts that in his preliminary hearing testimony Merrithew had admitted that there were inconsistencies in witness statement from the suspects who had individual motives in their statements to law enforcement and that he was denied an opportunity to cross-examine Merrithew. (*Initial Brief of Appellant*, p. 18-19). Further, he complains that the prosecution's rhetorical speculation that Merrithew may never return was "feckless," despite the fact that the defense had not communicated with potential witness Merrithew about his potential testimony or future presence in Berkeley County. As revealed below, the Appellant was unable to articulate prior to the trial the potential testimony he sought to present through Merrithew and its uniqueness or unavailability through other witnesses. In fact, although being provided a telephone number and email address for months, the defense made no contact with Merrithew, by their own admission concerning either the potential testimony or availability. A review of the actual trial testimony reveals that he has failed to show any prejudice by the absence or assert any available deficiencies in the critical testimony. Simply put, the Petitioner has failed to show any deprivation of a right to present a defense or a denial of due process by the failure to have Merrithew present.

#### **How The Continuance Issue Was Presented**

On January 17, 2001, the victim, Parrish Reaves, was reported missing. The Berkeley County Sheriff's Department subsequently received a "missing person's" report on the victim. The Sheriff's Department initially classified the incident as "suspicious activity/Burglary/Larceny." In a Supplemental Report on July 20, 2005, it was modified to "possible missing person."

The case remained cold until August 2007 when some missing jewelry owned by victim's family at the time of the burglary were located as being pawned. The items were tied to the victim's stepdaughter, Katherine Feaster. Ms. Feaster was arrested. Upon arrest, Ms. Feaster admitted

involvement and named the Appellant (Jeffrey Michaelson), her brother (Jeremiah Scharer), and her husband (Treze Feaster). After a series of statements, the police further found stolen items and a search warrant of Michaelson's former residence led to locating a buried 55 gallon drum with the victim's body inside. Michaelson was arrested for murder on August 7, 2007.

In addition to the confession of Michaelson, at the trial, testimony was received from the accomplice Jeremiah Scharer, the victim's stepson who asserted that he met with Katherine and Trey Feaster and Michaelson and that Michaelson made a comment about going to deal with Parrish. R. 553, Tr.p. 590. He knew his stepdad was going to be killed and that Michaelson had shown a small handgun with a silencer on it. R. 556-57, Tr.p. 593-594. Scharer stated that his role was to knock on the door and have the victim come to the door. Feaster dropped them off and Michaelson and Scharer walked to the victim's house. The ruse was to get the victim into the truck claiming a truck was stuck in the mud. R. 558-560, 573, Tr.p. 595-597, 610. After the victim got in the truck, with Michaelson in the passenger seat, Scharer felt the truck sway and later stop. R. 561, 572, Tr.p. 598, 609. At that time he saw Michaelson was now driving and the victim on the passenger side. R. 560-563, Tr.p. 597-600. They drove the truck back to the victim's home. After Scharer called and asked for Feaster to come and take him home. R. 564, Tr.p. 601. Michaelson told Scharer that after what they did that day, "that made me a man." R. 565, Tr.p. 602.<sup>3</sup> Brian Valbert also testified about a jailhouse admission made by Michaelson to someone in a bragging manner. R. 637-643, Tr.p. 686-692. A recorded telephone call made by Michaelson was also admitted involving a conversation with his girlfriend Christine Thomas in which he declared that "I'm sticking with I didn't do it." R. 709-

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<sup>3</sup>On cross-examination, Scharer stated that he did not know if Michaelson knew Reeves, but it was obvious that they knew each other the way they engaged in conversation about the truck. R. 591-92, Tr.p. 628-629.

710, Tr.p. 781-782.

### Preliminary Hearing

The focus of Appellant's continuance request stems from the testimony of then Detective Gerald Merrithew at a preliminary hearing on December 7, 2007. R., Dec. 7, 2007 Tr. p. 1-23. Detective Merrithew initially described the facts that led to establish probable cause to charge Feaster with accessory after the fact of murder. R., Dec. 7, 2007 Tr. 4. Det. Merrithew declared that a police report was filed February 1, 2001 concerning a burglary, suspicious activity and a missing person. He stated after some investigation, the case went cold.

Det. Merrithew stated that he was assigned the case in 2006. He stated that he contacted Frances Reeves, the missing person's mother, who owned the house where the goods were stolen. He received a list of the family members and compared that list with the pawn shop list in 2001. He found the name of her stepdaughter, Katherine Feaster, on the pawn shop list as pawning the same list of items missing from the residence. R., Dec. 7, 2007 Tr. 4-5. Det. Merrithew stated that he reviewed the pawn shop records and located some jewelry which was unique and identified by the victim's mother and others as one of the stolen items. Id.

Detective Merrithew also noted that the missing item list matched the list of pawned items. Id. R., Dec. 7, 2007 Tr. p. 5, ll. 23-25. Det. Merrithew was unable to recover items sold for cash. He had a warrant issued for Ms. Feaster for possession of stolen goods, and ultimately arrested her and had her transported to Berkeley County. Id. p. 6.,

Feaster was advised of her charge and she named the people involved in the disappearance of her stepfather, including her husband, her brother, and their friend. Her brother confessed that he was at the scene of the murder. Her husband confessed that he knew about the murder and where the body was buried. Id., R., p. 6, ll. 22-25.

Det. Merrithew testified that the Appellant was located, Mirandized, and then confessed that he was on the scene when the murder happened and that he also knew where the body was located. *Id.*, R., 6-7. A consent to search a storage facility area by Michaelson's girlfriend (common law wife) resulted in locating more stolen goods from the victim's residence. *Id.* R., p. 7, ll. 3-10.

Det. Merrithew next reported that a search warrant at a former residence was prepared. It resulted in the discovery of the body of the victim buried in a 55 gallon drum in the front yard. *Id.*, R., p. 7, ll. 11-14.

Det. Merrithew reported that Mrs. Feaster was charged with accessory after the fact because she had knowledge of it after it took place when her husband told her about it when he got home. *Id.*, R., p. 7, ll. 15-20.

Det. Merrithew reported that Mr. Jeremiah Scharer stated that Appellant was in the pick-up truck with the victim and he felt the vehicle jerk, heard a pop, and that the victim was dead with a gun shot to the head. Mr. Feaster had stated he met with Jeremiah and Michaelson at end of the road and that the victim had already been shot. Det. Merrithew reported that Michaelson stated that Feaster shot the victim. *Id.*, R., Tr. p. 8, ll. 9-14.

Det. Merrithew reported that Ms. Feaster's husband and brother (later) told her that Michaelson had shot the victim in the head. *Id.*, R., Tr. p. 8, ll. 17-19. Det. Merrithew declared that based upon those statements, Michaelson was charged with murder. *Id.*, R., Tr. 8-9.

*Cross-Examination of Merrithew at the Preliminary Hearing*

Counsel Kennedy cross-examined Det. Merrithew on Appellant's behalf. *Id.*, R., Tr. 9-20. Counsel began by focusing on the sequence the various statements had been given. Det. Merrithew stated that he first met with Mrs. Feaster in Pelzer on August 6 and then brought her to Berkeley County where she gave a statement at 2:30 p.m. *Id.*, R., Tr. p. 9, ll. 9-22. Her brother, Jeremiah

Scharer, gave a statement the next morning - August 7 at 8:27 a.m. and her husband gave a statement at 11:39 a.m. Jeremiah was contacted after Mrs. Feaster's statement and had given his statement approximately 20 hours after Ms. Feaster was in custody. Det. Merrithew indicated that Jeremiah had been in Cottageville and had to find a ride to Berkeley and it took a while to get there. Id., R., Tr. 10.

Det. Merrithew stated that the third person came in after he left work in Pelzer (Greenville area), after family members had located him and "we spoke to him" and he came down and turned himself in. Id., R., Tr. p. 11, l. 13 - p. 12, l. 1. Det. Merrithew stated there was no contact between Mrs. Feaster and Mr. Feaster. Id., R., Tr. p. 11, l. 19.

Det. Merrithew stated that "we" spoke with Mr. Feaster around 11 a.m. and spoke with Michaelson around 4:10 p.m. Id., R., Tr. 12. Det. Merrithew stated that by that time, Mrs. Feaster, Mr. Feaster, and Mr. Scharer were already in custody and each had given statements implicating Michaelson. Id., R., Tr. p. 12, ll. 8-20.

Det. Merrithew acknowledged that there were some inconsistencies in the statements of the others, but denied inconsistencies to how it came about. Id., R., Tr. 12-13. Det. Merrithew stated that he did not have any knowledge (at that time) that Michaelson knew anything about the victim, that Michaelson had any contact with the victim prior to the incident or had any personal animosity toward the victim. Id., R., Tr. 12-13.

Det. Merrithew stated that after he had checked with pawn shops, he discovered that Mrs. Feaster was on the list of family members and that she was the only person who had disposed of the items off the list, although Michaelson also had additional items in his storage area. Id., R., Tr. p. 14, ll. 1-12.

Det. Merrithew stated that when Mrs. Feaster had given her statement that she had been in

custody a couple of hours since 12:00. He stated she had become aware and started discussing the case on the ride down from Pelzer to Berkeley, but was not memorialized in the written statement until 4:00. Id., R., Tr. p. 15, ll. 17-21. He stated because he knew where she was the whole time that there was no chance or opportunity for her to tell either her brother or husband what she stated in her written statement. Id., R., Tr. 15-16. He stated that they made sure this could not happen. Id., R., Tr. p. 16, ll. 4-16.

As to the brother and husband, Det. Merrithew stated that they wrote down what was reflected in the statements and "they all basically say that Parish Reeves is dead due to a gun shot wound from Mr. Michaelson." Id., R., Tr. p. 18, ll. 3-5. Det. Merrithew confirmed that Scharer stated that Michaelson said he was going to deal with Reeves, which Merrithew related to apparently information Michaelson had gotten from either the Feasters or Scharer. Id., R., Tr. p. 18, ll. 11-16. Further, Merrithew confirmed that Feaster made a comment that Michaelson's grandmother had died and that he felt bad about it. Id., R., Tr. 18-19.

Det. Merrithew stated that Michaelson's common law wife (Christine Thomas) had an interest in the storage area because they had stuff in there together. Id., R., Tr. p. 19, ll. 3-15. She had given written consent. Id., R., Tr. 19-20. Det. Merrithew stated that Feaster had rented the bush hog from a company that was defunct and owner had died. However, a family member had located some documentation and that Feaster had stated he had gotten it also. Id., R., Tr. 20.

Counsel for Ms. Feaster also cross-examined Det. Merrithew. In response to an inconsistency question, Det. Merrithew opined that in one of the statements, it had been reported that Mrs. Feaster came in because she went to borrow money from the victim who made sexual advances towards her and that the three individuals left the residence to go deal with the victim, although her brother claimed to not be aware of the reasons. Merrithew stated that Feaster stated they went over to the

victim's to tell him to leave his wife alone or to beat him up. Id., R., Tr. p. 21, ll. 6-19. As to Michaelson, he claimed to be in mental distress after a family member dying and felt like killing someone and Jeremiah had said Michaelson said he was going to kill him or found out later he was going to kill him. Id., R., Tr. p. 21, l. 19 - p. 22, l. 3.

Probable cause was found and each defendant was bound over to the Grand Jury. Id., R., Tr. 23.

### **Initial Continuance Motions by Counsel Kennedy**

The case against the Appellant had been previously set for trial October 12, 2009, November 2, 2009, November 30, 2009, and April 26, 2010. There is no issue that the defendants were notified by letter from the Berkeley County Solicitor's Office that if the case was not reached, it would be called at the subsequent term of court.

#### **1. November 29, 2009 Continuance Motion**

The State notified the defense on October 19, 2009 of its intent to try the case on November 30, 2009. On November 24, 2009, counsel Kennedy filed a second Motion for Continuance based on Rule 7(b), S.C.R.Crim.P., dated November 23, 2009. Counsel asserted in this motion that the basis for the motion was "the absence of the lead detective from this jurisdiction; and defense counsel's inability to serve him with a subpoena because he is in Afghanistan." November 23, 2009 Motion, R. 27. Attached to the Motion was an affidavit from a paralegal who affirmed that she had tried to serve a subpoena on "Det. Sgt. Merrithew", but had been advised that an employee of the Sheriff's Department could not accept the subpoena because Det. Sgt. Merrithew is presently in Afghanistan and that the subpoena cannot be served on their office." Nov. 23, 2009 Motion

(Affidavit of Alicia Slawson). R. 28. [The subpoena was for the “person”, as well as documents].<sup>4</sup>

Based upon a review of the pleadings, on November 25, 2009, a non-recorded status conference was held in Judge Markley Dennis’ chambers. See “Order of Continuance”, March 22, 2010, p. 2, ¶3, 4. “State’s Response to Defendant’s Notice of Motion and Motion for Continuance”, June 24, 2010, p. 2, ¶2. R. 92. It was reported that Gerry Merrithew, who was in Afghanistan for an indeterminable period of time, would not be called as a witness by the State. *Id.*, p. 2, ¶2. ROA 93. At the conclusion of the November 25, 2009 meeting, Judge Dennis orally continued the case for the November 30, 2009 term. ROA 93.

On March 22, 2010, Judge Dennis entered a written Order of Continuance concerning the November 30, 2009 continuance. In conclusion, he found:

After hearing argument from the State, and Defense Counsel, the Court ruled as follows:

- 1) that the testimony of the witness, Jerry Merrithew is material to the Defense;
- 2) that the Defense’s motion is not intended for delay and is made solely because the Defense could not go to trial safely without the testimony; and
- 3) that the Defense has exercised due diligence in attempting to procure the testimony of the witness; and
- 4) that the witness’ absence from the jurisdiction and unavailability for trial was voluntary.

Based on the foregoing, this Court orders that this matter shall be continued past the November 30, 2009 term of General Sessions Court.

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<sup>4</sup> Michaelson’s trial counsel subsequently acknowledged that they had learned around November 20, 2009 that Merrithew had resigned his position with the Sheriff’s Department and had secured new employment in Afghanistan with a private security firm. April 15, 2010 Notice of Motion for Continuance, p. 2. R. 36.

Order of Continuance, filed March 22, 2010, p. 3, R. 34.

### **Subsequent Pre-Trial Events**

In February 2010, a status conference on the pending case was scheduled for March 23, 2010 before the Administrative Judge, the Honorable Kristi Harrington. Subsequent to the notice for the conference, Judge Dennis entered his March 22, 2010 written Order that the matter was continued from the November 30, 2009 term. At the March 6, 2010 status conference before Judge Harrington, the prosecution announced its intent to place the case on the trial docket for the April 26, 2010 term.

### **April 15, 2010 Motion for Continuance**

The Appellant made a motion for continuance on April 15, 2010. R. 35. In the motion, Michaelson asserted that during the March 26, 2010 status conference that the prosecution had announced that they were uncertain when Merrithew would return to the jurisdiction and that it was their intent to proceed without him. April 15, 2010 Motion, p. 3. R. 37. The Appellant's counsel asserted that "the court was advised that the testimony of Det. Merrithew remained material and necessary for the presentation of the Defendant's case." Id, R. 37. He claimed in the motion that it was a violation of his right to compulsory process and a fair trial as guaranteed by the State and Federal Constitution. Id., R. 37.

On April 16, 2010, the State responded in opposition to the continuance request. State's Response to the Notice of Motion and Motion for Continuance, filed April 16, 2010. R. 38-44. The State's initial opposition was the Appellant's continuing failure to comply with Rule 7(b) of the South Carolina Rules of Criminal Procedure. particularly, the State maintained that Appellant never stated under oath what facts he believed the witness, former Berkeley County Sheriff's Office Det. Gerry Merrithew, if present, would testify to and the grounds for that belief. In addition, the State asserted that the other requirement of Rule 7(b) had not been complied. R. 38. The State maintained

that at the earlier conference in November 2009 before Judge Dennis no sworn statement or testimony was presented what material issues Mr. Merrithew would testify or that the motion was not intended for delay or due diligence had been used to procure the witness. *Id.*, p. 2. R. 39. [The State asserted that in November 2009 Judge Dennis suggested other options to procure the testimony such as videotape or video conferencing and the State provided the defense with the contact information they had been provided.] *Id.*, p. 3. R. 40.

The State asserted that a continuance was in the sound discretion of the court. Based upon Rule 7(b) and *State v. Colden*, 372 S.C. 428, 641 S.E.2d 912 (S.C. App. 2007), the State maintained that Rule 7(b) should be strictly applied and that there was support when counsel failed to express why they needed the witness and failed to state that due diligence was employed. The State maintained that the defense's failure to articulate under oath either the facts Merrithew would testify or the due diligence to procure Merrithew's testimony.<sup>5</sup> *Id.*, p. 6 R. 43.

The State urged a denial of the continuance motion. In the pleading, they noted the victim's mother was a fact witness and 77 years old. The State further noted that the crime happened nine (9) years earlier and it had been 3 years since the arrest. The State opposed the request of an open-ended continuance. The State noted that Merrithew "did nothing in the present case without the assistance of other detectives and deputies." The State asserted no interviews were conducted by him alone, nor was any evidence collected by him without the company of another deputy. The State contended any information about interviews, evidence collection or other aspects could be obtained from other employees of the Sheriff's Department. *Id.* p. 6. R. 43. Finally, the State asserted that Merrithew had no firm date to return to the United States, which as noted in April could abruptly

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<sup>5</sup> In the pleading, the prosecution noted that after counsel assumed representation, Merrithew had been available for two years before he left for Afghanistan. *Id.*, p. 6. R. 43.

change. R. 43.

**The April 16, 2010 Motion Hearing**

A motion hearing on the continuance motion was held before Judge Kristi Harrington on April 16, 2010. The motion was joined by counsel for Treze Feaster. R. 48, April 16, 2010 Hearing Tr. p. 4. The State, through Assistant Solicitor Williams, set forth the prior procedural history, including the earlier clarification by Judge Dennis that the November 30, 2009 continuance was only for November 30, not that it would be continued until Merrithew could be available. R. 49-50, April 16, 2010 Tr. 5-6. As the prosecutor urged in opposition to the motion:

We know of no information that Detective Merrithew has independent of anybody else at the Berkeley County Sheriff's Department. He interviewed three witnesses on videotape and he was accompanied by a Berkeley County Sheriff's Department either detective or deputy for each one of the interviews. They are videotaped and they are recorded. He collected no evidence outside the company of another deputy.

We are not aware of anything that he could testify to that someone else couldn't testify to. And that is why we are prepared to go forward without him.

R. 51, April 16, 2010 Tr. p. 7, ll. 1-11.

The defense claimed that Merrithew was a material witness. The Appellant acknowledged that Judge Dennis had previously suggested as an alternative that there could be a videotape deposition, but counsel Kennedy asserted that this was not provided for in the rules. She stated this would not be admissible under Logan v. Gatti, 288 S.C. 546, 347 S.E.2d 506 (S.C. Ct.App. 1986), which she asserted held that depositions and affidavits were not admissible. R. 52, April 16, 2010 Tr. p. 8, ll. 1-15.<sup>6</sup>

[It should be noted that Logan v. Gatti, was a civil case that did not hold that that a deposition

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<sup>6</sup> In the Initial Brief of Appellant, Appellant mistakenly claimed that Judge Dennis had ruled that there was no case law to support such a procedure. Initial Brief of Appellant, p. 8, ¶ 2. The record is void of such a ruling.

was not admissible. To the contrary, it merely concluded that a “discovery” deposition was not admissible because it was done for limited purposes and was not a “de bene esse” deposition to preserve testimony. Respondents note that in State v. Frazier, 357 S.C. 161, 592 S.E.2d 621 (2004), the South Carolina Supreme Court found error in the trial court’s refusal to admit portion of absent college professor’s videotape deposition at trial.]

At the hearing, defense counsel stated that she had erroneously assumed when she learned of the March 20 status conference that arrangements had been made (by the State) to secure Merrithew’s presence. However she confirmed, at that conference, the State asserted that they would not be calling him and that he was on an unpredictable schedule. R. 52-53, April 16, 2010 Tr. 8-9.

Counsel asserted a right to compulsory process was being denied under the precedent of Washington v. Texas, 388 U.S. 14 (1967). Asserting that they could present any defense they wanted, she stated that she intended to call Merrithew as a “hostile witness” based on his involvement in the case. R. 54, April 16, 2010 Tr. p. 10, ll. 19-21. She declared that she had “a right to examine Merrithew on the process of the investigation on whenever he got it in 2006.” R. 55, April 16, 2010 Tr. p. 11, ll. 8-10. She noted that there had been a substantial amount of investigation done by Detective Gene Lee before Merrithew picked up the case in 2006. Counsel noted that Merrithew before the arrest had information that the decedent’s stepdaughter had pawned jewelry and that he had followed up on the pawn tickets and “did a whole bunch of preliminary investigation prior to the time that these folks were taken into custody.” R. 56, April 16, 2010, Tr. p. 12, ll. 8-14.

Counsel stated that police required a female deputy with Merrithew during the transportation of Mrs. Feaster from Pelzer. She stated she wanted to cross-examine Merrithew concerning the series of events in the investigation. She also stated that the defense (in January) had been provided information that Feaster had burglarized the victim’s home previously, which is “fodder for cross-

examination.” She stated that this was something that Merrithew either did something or did not which goes to “the quality of the investigation.” R. 57-58, April 16, 2010 Tr. 13-14.

Counsel Kennedy summarized her basis for why she thought Merrithew was material:

1. He’s the person who did the investigation from 2006 to 2007.
2. At the preliminary hearing, he made representations about other investigative matters being pursued which she claims were not followed up on.

R. 58, April 16, 2010, Tr. p. 14, ll. 15-23.

Concerning her attempts to locate the witness, counsel Kennedy admitted he was out of the jurisdiction and the country. She is unable to serve him in Afghanistan nor any way to force him back. She stated in November she attempted to serve Merrithew at the Sheriff’s office, but he had left employment on October 16 and had gone to Afghanistan on November 7, 2009. R. 59-60, April 16, 2010 Tr. 15-16. The defense opined that there were 32 terms of court between the January and the November term and found it odd that the case was not called til November when was no longer available. R. 61, April 16, 2010 Tr. p. 17, ll. 12-15. Counsel opined that she had used due-diligence to acquire his testimony. She stated that she learned Merrithew had been in town in March briefly, but was not aware if the Solicitor’s Office was aware of it. R. 62-63, April 16, 2010 Tr. 18-19.

Counsel stated that there were search warrant issues concerning Merrithew having shown jewelry to certain witnesses that might not be able to be linked to his client, the video statements reflect Merrithew was asking the questions, although someone else was present. R. 63-64, April 16, 2010 Tr. 19-20.

Counsel asserted she could not find any case law or rule that allowed her to procure the testimony. “[A]nd, quite frankly, if the suggestion is that it be done by deposition, which again is contrary to the case law, I wouldn’t consent to it.” R. 64, April 16, 2010 Tr. p. 20, ll. 15-17. She

stated juries have the right to judge the credibility of a witness, which includes how they sit, turn, how nervous they get and the delay in responses. *Id.*, R. 64, p. 20, ll. 18-23.<sup>7</sup>

In response, Assistant Solicitor Williams noted that Rule 7(b) was not strictly complied with because there has only been a general statement to have him placed on the stand, but included no facts under oath that they believe the witness would present. R. 73, April 16, 2010 Tr. p. 29, ll. 1-16. She asserted that letting the jury see if he is dishonest because of his mannerisms is not in compliance with Rule 7(b). Assistant Solicitor Williams stated that rule compliance would require what statements they claim Merrithew made prior to the videotaping, noting that available (and called) witness Detective Diana Freeman was present the whole time. R. 74, April 16, 2010 Tr. p. 30, ll. 2-9. The Solicitor responded that whatever statements Merrithew made were in the presence of Sgt. Freeman and Lt. Mason. *Id.* R. 74, Tr. p. 30, ll. 18-21.

Assistant Solicitor Williams summarized that the videotapes show each witness present at the statements. She declared that there is no information that Merrithew can exclusively testify. Further, she declared “we never planned to call Detective Merrithew” and the State is not obligated to call any witness just so the defense can attempt impeachment. R. 75.

She stated she was unaware of anything in the case and discovery that Merrithew took without another detective being involved. She confirmed that they were going to call Sgt. Freeman as the case agent and Lt. Mason. Williams clarified that Merrithew was with a private firm and they had thought he was returning during the April 12<sup>th</sup> term but when they called him, they learned he was going back to Afghanistan and his employer policy does not make clear when he would be back. R. 77-78, April 16, 2010 Tr. 33-34.

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<sup>7</sup> Counsel Gay for co-defendant Feaster joined in the motion and argument. R. 65, April 16, 2010 Tr. p. 21, l. 7. Feaster was not tried with Michaelson.

**Order Denying Continuance - April 23, 2010**

On April 23, 2010, Judge Harrington entered an order denying the continuance based upon the unavailability of Merrithew. R. 81-84. In particular, the Court made the following conclusions:

This Court finds that the production of a witness to testify against a Defendant is an essential aspect of a Defendant's rights under the confrontation clause. There is no prejudice against a defendant in not being able to examine an unavailable witness if that unavailable witness will not be testifying against him.

Order, April 23, 2010, p. 2, ¶ 3. R. 82. The hearing judge also concluded: "Nothing in the record presented during this hearing demonstrates to this Court that Merrithew's presence is material to the defense of either of the moving parties." Order, April 23, 2010, p. 3, ¶ 2. R. 83. Further, the Court concluded:

The State maintains that neither Merrithew nor any evidence dependant on him will be presented at trial against the Defendant, therefore a challenge to his credibility is of no value to the Defendant's case. The State asserts that statements collected from the Defendant was done so in the presence of officers other than Merrithew and that those officers will be at trial to testify to the circumstances surrounding their issuance. The Defendant provided no reason how Merrithew's specific testimony or presence would benefit their defense. Since the Defendants failed to show the materiality of Merrithew's testimony, it is this Court's ruling that the Defendants' motion is hereby DENIED.

Order, April 23, 2010, p. 3. R. 83. (emphasis added).

**Pre-trial Motions**

On April 30, 2010, counsel for Appellant made another motion for continuance. April 30, 2010 Motion, p. 1-4. R. 85-88. As with the other motions, Appellant sought to request a continuance until Merrithew could be present for trial. Id., p. 3 R. 87. In addition, he complained that the earlier order did not address other constitutional issues related to due process. Id.

On June 24, 2010, the Solicitor's Office responded to the motion to continue. State's Response to Defendant's Notice of Motion and Motion for Continuance, June 24, 2010. R. 92-96.

The State again opposed the motion asserting there were no constitutional rights being deprived, no witness has been excluded, the State has chosen not to call Merrithew as a witness, but is not preventing the defense from calling Merrithew in its case-in-chief and the court has not limited the defense in any way in regard to this witness or the presentation of evidence. Id.

**June 28, 2010 Pre-Trial Continuance Motion Hearing**

Prior to jury selection, the defense renewed its motion for continuance. She again asserted that Merrithew as a critical witness for the defense. R. 114-121, Tr. p., l. 21 - p. 12, l. 13. Counsel initially sought to be placed under oath to satisfy the mandates of State v. Smith (Marquita), 387 S.C. 619, 693 S.E.2d 415 (Ct.App. 2010). The trial court (and prosecution) did not require counsel Kennedy to be placed under oath because she was an officer of the court. R. 123, Tr. 14.

Counsel Kennedy asserted under Rule 7(a). She initially responded that although the prosecution asserted that Judge Dennis requested she contact Merrithew (and was provided contact information) about a possible deposition, Ms. Kennedy concluded that there was no basis under S.C. procedure that allowed for either videotape deposition or affidavits his testimony. R. 126-27, Tr. p. 17, l. 13 - p. 18, l. 8. She further asserted that the Uniform Act to Serve the Attendance of Witnesses from Without the State in a Criminal Proceeding (S.C. Code § 19-19-10, et. seq.) was unavailable for persons outside of the U.S. R. 128, Tr. p. 19, ll. 9-19. She concluded that there was no compulsory process available to secure Mr. Merrithew's presence. R. 127, Tr. p. 18, ll. 17-20.

Counsel Kennedy acknowledged that she had been made aware earlier that the State did not intend to call Merrithew. R. 128, Tr. 19. Counsel claimed that since her client's arrest on August 7, 2007 until August 2010, in 2008 and 2009 there were 30 terms of court when Det. Merrithew was and the case could have been called to trial and available for compulsory process. Counsel noted that she became aware of Merrithew's absence only after he had left the jurisdiction when the case was

called understanding that he left December 2009. R. 128-29, Tr. 19-20.

She contended that the materiality issue was that Merrithew was the lead investigator in the case. R. 130, Tr. 21. She asserted that in August 2007, co-defendant Katherine Feaster was brought into custody based on Det. Merrithew's investigation for receiving stolen goods. R. 129, Tr. 20. She stated that it was developed at the earlier preliminary hearing that Det. Merrithew received a list of people from Frances Reeves, the victim's mother, about people in custody. R. 130, Tr. p. 21, ll. 4-10.

Kennedy declared that she had a right to cross-examine Merrithew on that issue because she had not been provided a list of those people and it goes to the issue of how Michaelson was developed as a suspect. R. 130, Tr. p. 21, ll. 11-15.

Kennedy stated that Katherine Feaster was picked up after Merrithew and Sgt. Diane Freeman went to Pelzer after the information and matching of pawn shop records about some jewelry that was allegedly stolen from Ms. Reeves. R. 130, Tr. p. 21, ll. 20-25. Counsel Kennedy further questioned the time it took from Pelzer to Berkeley County to get to make a statement by 2:30 p.m. She noted a videotape followup was also done. R. 131, Tr. p. 22, ll. 10-21.

She opined that co-defendant Jeremiah Scharer arrived to the detective office around 1 a.m. and made a videotaped statement until he asked for a cigarette. R. 132, Tr. p. 23, ll. 9-10. She stated she had no idea what additional information was developed. R. 132, Tr. p. 23, ll. 8-10.

The trial court inquired whether the statement of the witnesses would be introduced. In response, the prosecution stated that Scharer was on the witness list, as well as Mark Mason who interviewed Scharer who is available to counsel Kennedy, as well as Sgt. Diane Freeman, who was present at the interview. R. 132, Tr. p. 23, ll. 11-23. Solicitor Williams declared these people were available who also had contact with Scharer. R. 132-33, Tr. 23-24.

Counsel Kennedy continued that the next day Treze Feaster drove down from Pelzer and gave a statement. She stated that Treze was interviewed extensively by Detective Merrithew who stated at the interview that he wanted Treze to write it down, but Treze responded that Merrithew knew better than he did what needed to be put in there. Kennedy asserted that her client was the only one not related to the victim and did not know him before the incident. R. 138, Tr. 29. She stated that at the preliminary hearing, Merrithew had responded "absolutely not" when asked if there was an opportunity for three people (Katherine, Treze, Scharer) to have gotten together and come up with a story. R. 138, Tr. p. 29, ll. 18-22. Kennedy contended that the tapes of the conversations at jail reflect otherwise claiming Katherine stated in a tape that she would not have given (the police) the information about how to get in touch with Treze and her brother had she known they were going to do this to them. R. 135, Tr. p. 26, ll. 1-6.

Kennedy stated that there were details which support her motion to preclude further investigation. She stated Merrithew had been told that Michaelson wanted to shoot Reeves because his grandmother died that day and he just felt like killing somebody. She also noted Scharer had suggested that everyone was getting high. She also said there was another suggestion that Michaelson was upset about his grandmother being dead and that he just felt like shooting someone. R. 135, Tr. p. 26, ll. 1-25.

However, Kennedy stated that her investigation showed that the grandmother had been dead for a while. R. 136, Tr. p. 27, ll. 2-5. Kennedy stated that she had a right to ask why that lead (on the date of the grandmother's death) was not followed up on. R. 136, Tr. p. 27, ll. 4-6. Concerning the death of Feaster's maternal aunt who also died, she asserted the information was not followed up by law enforcement. R. 136, Tr. p. 27, ll. 7-11.

Kennedy's theme was that there were discrepancies among the three witnesses that were not

followed up on by Merrithew (and law enforcement). She stated she had the tapes and statements reviewed by an experienced police officer who advised her that there were "certain investigative issues" that should have been addressed, but were not which goes to the heart of her defense and intent to develop a theory of accessory after the fact which she claimed could not be done without Merrithew. R. 136, Tr. p. 27, ll. 15-27.

Kennedy rejected the prosecution's assertion that the evidence could be presented through others, but ignores her right and obligation to introduce contrary evidence. R. 136-37, Tr. 27-28. This includes the right to call adverse witnesses and use leading questions to present a defense. R. 137, Tr. 28. She noted that this was grounded in an assertion that "mere presence" is not enough. R. 137, Tr. p. 28, ll. 16-19.

Kennedy claimed that in allowing the State to present Detectives Freeman, Crumley and Mason to testify that the statements were taken in conformity with Miranda denies her the ability to challenge them because Merrithew is absent. R. 137-38, Tr. 28-29. At that point, Judge Harrington asked why it would lack the ability to challenge because of the other witness's presence and the taping in addition to Merrithew.

Kennedy responded that was not her issue. She stated that Merrithew was the "lead detective" and she had a right under "hostile examination" to examine him. R. 138, Tr. p. 29, ll. 16-21.

She stated that the three witnesses were cajoled in a warm, folksy manner, yet when Michaelson was arrested, Merrithew's demeanor has changed and attacks and confronts him with a "we know this, you better tell us." Kennedy maintained that with this evolution in the way the witnesses were arrested and questioned, Merrithew, at some point, decided Michaelson was most culpable. Kennedy contended she had a right to explore how that decision was made and explore

the methodology of the investigation. R. 139, Tr. p. 30, ll. 14-15.

Counsel Kennedy claimed that Detective Merrithew was the “lead detective” and that “he was the one that did all the investigation.” R. 140, Tr. p. 31, ll. 9-15. She stated that Frances Reeves declared to the judge on a bond issue for Scharer that no one was doing anything on the case until Merrithew got on the case. R. 140, Tr. p. 31, ll. 9-15. She stated that while there was a year of investigation that culminated in Appellant’s arrest, there was no investigation into the discrepancies provided by the three witnesses. R. 140, Tr. p. 31, ll. 16-22.

Counsel reiterated that she had a further right to examine Merrithew on inadequacy of the investigation and the misinformation that arose from the preliminary hearing. R. 141, Tr. 32. She noted an issue where Merrithew stated at the preliminary hearing that he thought the bush hog used in the burial was rented by Feaster, but no documentation had been provided. She declared this was important because the inference that Michaelson was most culpable because the victim was buried in Appellant’s yard where Feaster also lived on another part of the yard. R. 141, Tr. p. 32, ll. 8-16. She noted at the end of Appellant’s statement, Det. Freeman ask him to include additional material and when Merrithew returned he added the material. She rejected that Freeman and the video addressed this area, claiming that her defense was to attack the investigation. R. 143, Tr. 34.

Counsel Kennedy noted that in July 2008, she was approached by a different solicitor to testify against the co-defendants. R. 143, Tr. 34. She pointed out that although the search warrant was done by Det. Crumley, it was directed by Det. Merrithew. Where the decision was made in 2009 to dredge the canal to look for the gun that Appellant said in 2007 it was thrown there, Kennedy said she had a right to ask Merrithew why it was not done in 2007. R. 144, Tr. 35. The discovery stated it was later done at the directive of Merrithew and Assistant Solicitor Mikell Henderson. R. 145, Tr. p. 36, ll. 1-13.

Counsel Kennedy complained that the prosecution cannot dictate what witnesses the defense calls because they don't intend to use Det. Merrithew. Judge Harrington clarified that in denying the motion for continuance, she did not indicate that the defense could not call Det. Merrithew. R. 145, Tr. p. 36, ll. 20-22. The judge noted that the issue is whether or not his testimony is so material to the defense that justice would not be done if the court went forward. R. 146, Tr. 37.

Counsel Kennedy re-asserted that the case could have been tried before Merrithew left the country. She noted that at an earlier conference with Judge Dennis he suggested videotapes and affidavits and for the parties to get in touch with him and find out when he gets back. R. 147, Tr. p. 38, ll. 8-17. Kennedy declared there was no way that she could get him here.

Counsel Kennedy confirmed that the prosecution had not played any role in precluding Merrithew from testifying. However, she speculated that it was suspicious that the case was called for November after he left. She further stated that he was the "authority figure" who decide how people were charged. She pointed out his manner in examining on video showing Petitioner various pictures and asking him to identify them and the could not identify the victim. R. 149, Tr. p. 40, ll. 15-25.

Counsel Kennedy stated she had spoken with Major Ollic at the Sheriff's Office, but they had no contact with Merrithew and were not aware of any idea when he was coming back. R. 150, Tr. p. 41, ll. 21-25.

Upon questioning from the court, counsel Kennedy admitted she had been provided Merrithew's email, but stated she had not done an email to him, but suggested that Merrithew in that employment could come back anytime he wanted. R. 151, Tr. 42. Aware that other terms would be in July and August, she admitted she had no way to make compulsory process and admitted the State had no power to make him appear. R. 151-52, Tr. 42-43.

The trial court noted that the Petitioner had a right to call Merrithew, but the issue was whether to go forward where the State has indicated that there is nothing Det. Merrithew did alone and/or it was alongside someone else without the testimony of Merrithew. R. 155, Tr. 46.

Counsel Kennedy again asserted that it was her intent to question Merrithew on why he did not check out the claim motive for Appellant's killing that his grandmother died that date he felt like killing, and that there was information that an aunt of the witnesses had died. R. 156, Tr. 47. In addition, she wanted to develop that he had not provided documentation to the defense concerning that Feaster had rented the backhoe, that Merrithew had not directed Det. Crumley to execute a search warrant for the shed and whether the items taken as part of a burglary, and that he had not connected Appellant with the coins that were stolen. R. 157, Tr. 48.

Remarkably, counsel Kennedy stated that she did not know what Det. Merrithew's answer to the questions would be. She stated that her questions were based upon the evidence, but that while Det. Crumley conducted the search and can testify to the contents, he cannot testify to the linkage between the contents in the shed and what was stolen. Kennedy stated that Merrithew can testify as to the linkage based upon his preliminary hearing testimony where he took the jewelry and matched it with the pawn shop tickets which led to the discovery that Katherine Feaster pawned the jewelry. R. 159-160, Tr. 50-51. She asserted that she had a right to ask Merrithew about that discovery and linkage. R. 160, Tr. 51.

Subsequently, counsel Kennedy attempted to clarify that there were separate issues related to compulsory process and confrontation. Although she does not know how Detective Merrithew would answer questions about the investigation through her leading questions, she speculated that if the questions were asked of Det. Crumley or others why they did something, she thought that their answers would be because Det. Merrithew told me to do it. R. 163, Tr. p. 90, ll. 1-25. She stated

that this was the heart of their defense that she was attempting to present. She stated their theory was "accessory after the fact" and that no one else can explain the questions she has about the investigation. R. 164-65, Tr. 91-92.

The trial judge then specifically asked defense counsel again "what is it that Detective Merrithew will testify to that is material to your client's defense?" R. 166, Tr. p. 93, ll. 1-3.

In response, counsel Kennedy stated her intent to request an accessory after the fact charge. She stated that she intended to show that Merrithew, after the statements, decided to charge Appellant as the most culpable. R. 166, Tr. p. 93, ll. 8-10. In doing so, she stated that Merrithew did not pursue other leads, investigate matters in the statements including the conversation with Francis Reeves and the list of people he got from her, his contact with the people at the pawn shop, his representation at the preliminary hearing about the backhoe investigation, the issue of the burglary and the search warrant, the dredging of the Tailrace Canal and who directed it. R. 166, Tr. p. 93, ll. 13-23. She stated she had a right to point out what was not done, but the witnesses the State intended to call know nothing about it. R. 167, Tr. 94.

When the Court asked if she had spoken to Merrithew about the matters she would examine him in, counsel Kennedy stated that she had not discussed these factors with him, asserting that there was no opportunity to do so because of the delay in complete discovery. R. 168, Tr. p. 95, ll. 1-16.

Counsel Kennedy acknowledged that the case had been previously set for October 12 and November 2. When asked by the Court why if he was a material witness at that time did she not subpoena Merrithew then. R. 171, Tr. p. 98, ll. 7-12. She responded that the particular solicitor advised her that he did not think the case would be called then, although it was docketed. R. 171, Tr. 98. She also said that she had still been receiving discovery since November, so the case could not have gone forward then. R. 172, Tr. 99.

Judge Harrington next inquired why she did not use the email address of Merrithew to show due diligence under Rule 7(b). Counsel Kennedy disagreed and discounted that she should have emailed Merrithew because she was not able to secure his presence and it would be insufficient without compulsory process. Judge Harrington stated had counsel listened to the court (Judge Dennis) and asked Merrithew if and when he was coming back, it could have addressed an issue. However, counsel Kennedy complained that this put the burden back on her when she felt the chambers conference suggested it was the State's burden. The Court responded that the State stated it was not calling him and that he was no longer an employee of the State, questioning how it is under their control. R. 174, Tr. 101.

Solicitor Williams responded that at the October 12 term counsel Kennedy had sought an order of protection due to completing another trial that term. The State argued that the Appellant had not satisfied Rule 7(b) because she had failed to articulate what facts she believed the witness, if present, would testify to and the grounds for why. Simply put, she declared that there were no facts that Detective Merrithew would testify.

Solicitor Williams stated that Detective Merrithew had nothing to do with the consent to search the storage unit because that was done by Detective Crumley and Detective Shuler. concerning the dive for the gun, she said that was done by Detective Freeman. R. 177, Tr. p. 104, ll. 24-25. Solicitor Williams declared that while Det. Merrithew may have been the face of the investigation to Francis Reeves and searched for her son, he did not do all the work on the case. She said Detective Freeman would testify that she was the one who researched all the pawnshop tickets. further, while the video showed Det. Merrithew introducing himself to Appellant at the interrogation, Det. Freeman is there the whole interview. R. 178, Tr. p. 105, ll. 15-21.

Solicitor Williams pointed out that even if Det. Merrithew was here, he could not testify what

Treze or Kat Feaster said because it is hearsay. She noted this is a "hand of one" murder case with Scharer and Trey Feaster charged with murder. Although the State's theory is that Appellant is the shooter, the others are not less liable (culpable), according to Williams. R. 179, Tr. 106.

Solicitor Williams speculated that Appellant was interviewed last because he came in last to the Department. R. 179-180, Tr. 106-07. She stated that Detectives Freeman and Merrithew both drove to Pelzer and picked up Kat Feaster. After she was arrested, everyone was working on the case trying to locate the people involved who Feaster gave the names. R. 180, Tr. 107. Solicitor Williams stated counsel Kennedy can cross-examine Kat Feaster about it and Det. Freeman was present on the whole ride. R. 180, Tr. 107.

Solicitor Williams questioned the applicability of a compulsory process argument where the defense's own witness is unavailable. Similarly, she urged that the confrontation clause claim was not applicable because the State is not required to call every witness who has knowledge of material facts, citing State v. Richardson, 253 S.C. 468, 171 S.E.2d 717 (1969). R. 182, Tr. 109. Solicitor Williams declared the State had chosen not to call Merrithew. Solicitor Williams clarified that they had informed the defense at the November 25, 2009 chambers conference that they would not call Merrithew, not the March 2010 conference. She declared they provided the defense with an email address and probably a cell phone number. R. 183, Tr. 110.

In reference to the backhoe rental documents, the prosecutor stated they hounded Merrithew about it but he did not follow-up. Ultimately, Detective Freeman followed up and located the person who owned the out-of-business company that rented the backhoe and went to the storage shed where the receipts might have been kept. R. 184, Tr. 111.

Similarly, Det. Freeman actually was the diver who went to look for the weapon at Solicitor Henderson's request. R. 184, Tr. p. 111, ll. 10-15. It was not done while Merrithew was here nor

at his direction. R. 184, Tr. p. 111, ll. 12-15.

Solicitor Williams stated that she took issue with the Feaster affidavit #5 that no other employee of Berkeley County was involved in the investigation [June 2010 Feaster Affidavit of Melissa Gay, R. 107-109]. R. 185, Tr. p. 112, ll. 13-20. Similarly, the prosecutor took issue with counsel Kennedy's similar affidavit [June 2010 Affidavit Patricia Kennedy, R. 105-06] that there was significant disparity in the questions that Merrithew chose to ask in the interview. R. 185-86, Tr. p. 112, l. 21 - p. 113, l. 5. She noted the tapes were available for all to review. Id.

Counsel Kennedy responded that the prosecution had agreed that Merrithew had dropped the ball on the investigation. R. 186-89, Tr. 113-16. She pointed out that others ended up doing the follow-up work concerning the dredging and backhoe issues. R. 188-89, Tr. 115-116.

Judge Harrington returned to question Kennedy on what facts in this case Detective Merrithew can testify to that is essential to the defense. R. 189, Tr. p. 116, ll. 10-21. Counsel Kennedy pointed out her client had been lured to his girlfriend's where he was arrested, while the others were allowed to voluntarily come in. R. 190-91, Tr. 117-18. As to the pawnshop ticket research, she claimed it was not Det. Freeman, but Det. Merrithew's work based upon the preliminary hearing testimony. Counsel Kennedy again asserted that she needed to be able to interrogate Det. Merrithew about the jewelry that was shown to witnesses Francis Reeves and Ms. Ahrenholz. R. 191, Tr. p. 118, ll. 6-25. She contended this was important to her ability to make a motion for a directed verdict as to the burglary. R. 192, Tr. p. 119, ll. 1-8. [Note: Appellant was found not guilty of the burglary].

Judge Harrington inquired of counsel Kennedy what happens if the continuance is granted. Kennedy stated that she understood that his contract was for year to year. She said if she had known he was here in March, she could have subpoenaed him, then requested a day certain or that he advise

the court when he would return. R. 195, Tr. p. 122, ll. 10-20. She said it could have been avoided if she had notice when Merrithew returned. Kennedy confirmed that she did have an order of protection at an earlier term that had precluded an earlier trial. R. 196, Tr. 123. The State responded that they did not know Merrithew had briefly returned until he after left. Further, the State stated his wife is over there and he understood that they would not be back anytime soon. R. 196, Tr. 123.

On June 29, 2010, Judge Harrington issued her ruling denying the motion for continuance. R. 200-03, Tr. p. 127, l. 10 - p. 130, l. 2. Judge Harrington relied upon the reasons set forth in her April 23, 2010 Order. The trial court noted that neither the State or the Appellant articulated any reason that the State had either prohibited or prevented the Appellant from calling Det. Merrithew. The court concluded that Merrithew was unavailable. The Court concluded that the constitutional grounds raised by Appellant were without merit. Considering the matter as it related to Rule 7(b), Judge Harrington incorporated her April 23, 2010 Order. R. 201, Tr. p. 128, ll. 8-12. She informed the State that this issue could be raised at any point of time in the future. R. 201, Tr. p. 128, ll. 13-23. The defense asserted that they were filing an appeal from the Order. Judge Harrington advised them that the trial would proceed because it would be considered an interlocutory appeal. R. 202-08, Tr. 129-135. After a recess, the defense asserted a request to reconsider its order denying the continuance. R. 209, Tr. p. 136, ll. 7-16. The trial court denied the request. R. 210, Tr. p. 137, ll. 2-6.

The trial proceeded with a Jackson v. Denno hearing and a series of witnesses after opening statement. R. 215-255, Tr. p. 196-236 (Jackson v. Denno)<sup>8</sup>; R. 299-373, p. 282-366 (trial evidence).

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8

**Jackson v. Denno Hearing**

During the Jackson v. Denno hearing, certain issues raised by counsel Kennedy were addressed in the questioning.

Detective Michael Crumley testified that he arrested Appellant on August 7, 2007. R. 215, Tr. 196. He testified that he took Appellant to the Sheriff's Office where he was turned over to Detective

An illness of defense counsel Kennedy disrupted the trial on June 30, 2010. Tr.p. 366-371. On July 1, 2010, court convened and learned the counsel Kennedy was still ill. Tr.p. 371. It recessed for a periods of time to allow second counsel Schwacke to prepare and present the chain of custody witnesses and for Kennedy to regain her health. R. 215-255, Tr.p. 196-236 (Jackson v. Denno); p.

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Sergeant Freeman and Detective Sergeant Merrithew. R. 217, Tr. p. 198, ll. 19-20. On cross-examination, Det. Crumley stated that he became involved under the direction of Sgt. Merrithew, but he was not sure who was the lead investigator. Tr. 201. He confirmed that he was instructed by Sgt. Merrithew to accompany three others to take R. 220, Appellant into custody, but to only Mirandize him and ask no questions and bring him back to the Sheriff's Office. R. 221-22, Tr. 202-03. He stated that he probably alerted Merrithew while on route and brought him to the department and turned him over to Merrithew and Freeman. R. 224-25, Tr. 205-06.

Detective Sergeant Diane Freeman testified that in 2007 she was the sergeant of property crimes and had supervisory authority in the division. R. 228, Tr. 209. She said she became involved with Michaelson when Det. Crumley brought him in and he was carried straight to the interview room by herself and Detective Merrithew. R. 229, Tr. 210. Sgt. Freeman declared that she was supervising Merrithew at that time. R. 229, Tr. p. 210, ll. 22-24. She described being present when Merrithew read the Miranda rights and present during the entire interview of Michaelson. R. 231, 234-35, Tr. p. 212, ll. 3-13, p. 215, l. 8 - p. 216, l. 10. She stated her signature, as well as Det. Merrithew's signature is on the statement. She confirmed she never left Michaelson alone with Merrithew at anytime during the statement. R. 235, Tr. p. 216, ll. 7-10. The Statement was also recorded in its entirety. R. 236, Tr. p. 217, ll. 2-5.

On cross-examination by counsel Kennedy, Det. Freeman stated in 2007 Merrithew was not a sergeant yet and that she was one of his supervisors, in addition to Lt. Mark Mason. R. 241, Tr. 222. Lt. Mason had assigned the case to Merrithew who had just come into the division and was taking cold unsolved cases. Since he was not aware of pawnshop records, she assisted him on those matters. R. 241, Tr. 222. She said that Merrithew had a list (of stolen items) and did not know how to work pawnshop cases and she "ran the list." R. 243, Tr. p. 224, ll. 9-14. in checking the pawnshop records, Sgt. Freeman said she advised him to talk with Gary from "Money Man" to get the pawnshop documents. He was able to verify some jewelry.

Sgt. Freeman stated that she went with him to Anderson to pick up Katherine Feaster and interviewed her on the drive back to Berkeley County, sat in on all interviews, except one, dove for the gun herself with the underwater recovery team, and was present at the dig (for the victim's body). R. 245, Tr. p. 226, ll. 12-16.

Contrary to the claims of counsel Kennedy earlier, Sgt. Freeman stated that she personally pulled the pawnshop files. R. 245, Tr. p. 226, ll. 17-25. She stated that she helped Merrithew match them up with the list that he had. R. 246, Tr. p. 227, ll. 1-2. It started with the list that Merrithew had of the stolen items. R. 246, Tr. 227.

Sgt. Freeman confirmed that when Michaelson was brought to the station, she was with Merrithew and they both escorted him to the interview room. R. 250-51, Tr. 231-32. While she was present at the interview, she asked a few questions for clarification. R. 250-53, Tr. 231-34.

Sgt. Freeman stated that she had involvement in the investigation in answering questions and looking up addresses and people in the DMV. R. 255, Tr. p. 236, ll. 19-21. She stated that prior to the arrest, it was Merrithew's investigation. R. 255, Tr. p. 236, ll. 22-25.

371-470.<sup>9</sup>

9

Chain of Custody Witnesses

Corporal Bobby Drennon of the Berkeley County Sheriff's Office testified that in 2007 he was part of the detective division and assisted in the recovery and dig for the victim's remains at Starbright Lane on August 8, 2007. Tr. 394-95. He stated he manually shoveled and recovered a 55 gallon drum with a lid and yellow tarp taped to it. Tr. 395. He stated a backhoe was used to do the majority of the dig. Tr. 397. Photographs depicted the progress of the dig. Tr. 397-98. The drum was then taken to MUSC for an autopsy. Tr. 399. He stated the non-tampered barrel was turned over to Dr. Presnell, the medical examiner. Tr. 399. Cpl. Drennon remained with the barrel until it was opened and observed the autopsy. Tr. p. 399-401. He stated that inside the barrel was a decomposed body wrapped in a comforter. He stated that they recovered a projectile, a dog collar, a stuffed animal, currency from the pockets, and clothing. Tr. 401-03.

On cross-examination, it was developed that at the scene of the dig, Dean Kokinda, Det. Ollic and Sgt. Freeman were present with SLED investigators. Treze Feaster was also brought by Cpl. Drennon to identify the location of the barrel. Tr. p. 404, ll. 15-25.

Cpl. Drennon testified that at Dr. Presnell's autopsy, hair from the deceased, a projectile, a green short-sleeved shirt, dark jeans, shoes, a stuffed animal, and dog collar were delivered to him. Tr. 405-06.

Tabitha Haring, a Berkeley County Patrol Deputy, stated in August 2008 she took buccal swabs from Frances Reeves. Tr. 409-411.

Crystal Spence with the Sheriff's Department stated that she transported 3 teeth from the victim, Parrish Reeves, to SLED on August 14, 2007. According to her records, Dean Kokinda had turned them in on August 10, 2007. Tr. 414. She had retrieved them from their locked evidence facility and personally took them to SLED and turned them into SLED forensic technician Amy Stephens. Tr. 415. Harding testified that she had also logged in a projectile from Cpl. Drennon and it was transferred to SLED Agent Vicki Hallman on August 8, 2007 at 1800. Tr. 417-18. She further testified that on the same date, on August 8, 2007, head hairs from the victim and buccal swabs from Ms. Reeves were also turned over to Agent Hallman. Tr. 419.

Amy Stephens of SLED, a forensic technician, testified she handled evidence concerning a specific SLED number. In particular, she came into contact with the teeth of the victim on August 14, 2007 at 11:24 a.m. based on the label from Crystal Spence in a heat sealed package. Tr. 425. It was in her possession for four minutes. Tr. 426.

Selma Kinard, another SLED forensic technician testified that a fired bullet projectile was transferred on July 18, 2008 to her from Suzanne Cromer which she placed in the evidence room. Tr. 428. She also handled head hair of the victim on August 14, 2007. On August 15, 2007, she removed the victim's teeth from the evidence room and transferred them to SLED forensic tech Sharee Brown of the DNA Department. Tr. 429. She did not perform any analysis on the items. Tr. 430.

SLED DNA forensic technician Sharee Brown testified that she received the buccal swabs of Frances Reeves from Agent Vicki Hallman on August 9, 2007 until August 20, 2007. Tr. 432-33. She stated she placed the untampered item in the DNA freezer in her secure area. Tr. 433. She stated she received the victim's teeth from forensic tech Selena Kinard on August 15, 2007 which she transferred to the freezer until August 20, 2007. She did not perform any analysis. Tr. 435.

SLED firearms and tool mark examiner expert Suzanne Cromer testified she received Exhibit 95, a fired bullet, on August 9, 2007. She examined it and concluded it was most consistent with a .25 automatic bullet and that it was not suitable for identification with a specific firearm. Tr. 440. She testified that this inability was due to the fact the markings were gone because it had corroded and degraded. Tr. 441. On cross-examination, Agent Cromer testified that she did not believe it was consistent that it could have been fired by any other type of gun. Tr. 442-43.

On July 6, 2010, court re-convened with counsel Kennedy and Schwacke present. Tr. 472. At the outset, counsel Kennedy renewed her motion for a continuance. Tr. 472-73. She asserted that all witnesses had testified, other than the chain witnesses about directives from Det. Merrithew as to their participation. R. 442-43, Tr. 474-75. She summarized that Det. Crumley testified that he was directed to pick up Appellant and how he was directed to the storage shed. R. 443, Tr. p. 475, ll. 6-9. She stated Frances Reeves spoke about her contact with Merrithew, how he agreed to volunteer to take the case, and how Merrithew provided information to her. R. 443, Tr. p. 475, ll. 10-15. Counsel Kennedy summarized that Brenda Ahrenholz testified inconsistent with Merrithew at the preliminary hearing concerning the contact that took place between Katherine Feaster, Ahrenholz and Jeremiah Scharer, although Merrithew asserted there was no contact. R. 443, Tr. p. 475, ll. 16-24. She also claimed Det. Drennon testified he did a number of things under Merrithew's direction and guidance. R. 444, Tr. 476.

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Eowyn Corcraun, a MUSC pathology assistant, testified that she assisted Dr. Presnell in the autopsy and collected evidence and removed the victim's jaws and packaged them. Tr. 448-49. She stated that this was done to assist in the identification. R. 428, Tr. 449. She stated she later removed teeth from the jaws and packaged and labeled them. R. 429-431, Tr. 450-52. She removed the molars a few days after the autopsy which she turned over to Investigator Kokinda of Berkeley County. R. 431, Tr. 452.

SLED forensic DNA scientist expert Catherine Lisey testified that she received the buccal swabs of Frances Reeves and the teeth of the victim (Exhibit 96 & 97). She stated that she developed a DNA profile from one of the teeth and the buccal swabs by testing 15 different DNA locations. She described how she extracted DNA from the teeth from cells within the center of the pulp after the tooth is pulverized. R. 436-37, Tr. 457-58. Although hair of the victim was submitted, no testing was done because the teeth provided a better choice than decomposing hair. R. 437-38, Tr. 458-59. She determined the DNA profile developed from the victim's teeth was consistent with being a biological offspring of Frances Reeves. R. 438, Tr. p. 459, ll. 6-8.

On cross-examination, she stated that it was possible for Ms. Reeves to be the parent of the victim. R. 440, Tr. 461. She did not make any comparison to any database from the profile of the teeth. R. 440, Tr. 461. She stated that was not common practice unless it be specifically requested for it to be entered into missing persons. She confirmed that she was dealing with Detective Merrithew who made the request. R. 440, Tr. p. 461, ll. 12-15.

At the conclusion of the testimony, the court contacted counsel Kennedy by telephone concerning her status. Tr. 465-68. The parties were advised that court would be recessed until Tuesday after the holiday weekend. Tr. 467-470.

Counsel Kennedy contended that due to Merrithew absence she cannot rebut or refute the testimony. R. 444, Tr. p. 476, ll. 5-9.

The prosecution, through Assistant Solicitor Williams, deferred to the earlier ruling under Rule 7(b) and that Merrithew is not a material witness and that all the witnesses called did matters in Merrithew's presence. R. 444-45, Tr. 476-77.

Counsel Kennedy again responded that she is not concerned about what was done in presence. Instead, she claimed she wanted to know matters concerning the directives he was giving to them and to explore the investigative process. R. 445, Tr. 477.

Judge Harrington denied the motion for continuance, based upon her earlier order. R. 445, Tr. p. 477, ll. 20-24.

#### **The Later Continuance Motions at Trial.**

Subsequently, the defense raised a continuance motion at various times. R. 674, 754-55, 761-62, 842-43, Tr. p. 723-724, 826-827, 833-834, 934-936. The defense renewed its motion for continuance after Brian Valbert's testimony concerning overhearing a jailhouse admission by Appellant. R. 673, Tr. p. 722. Counsel claimed that Merrithew was a material witness and that the state had made reference to Merrithew not being there. She stated the continuance motion was based upon all the testimony that had been heard and information from Detective Freeman that she contended contradicted what was said by Merrithew at the preliminary hearing. He also claimed that Freeman had testified about a number of things that she did after the arrest and the defense wanted to explore matters that led to the arrest, but were not able to do so. R. 674, Tr. p. 723.

Subsequently, after the pathologist's testimony, counsel renewed the continuance motion. R. 754, Tr. p. 826. The defense did not add any matter to the motion, other than noting "Merrithew's voluntary absence from the jurisdiction" and "based upon the evidence that was presented." R. 754,

Tr.p. 826, ll. 6-12. After the denial of the various motions for directed verdict, the trial judge inquired of the defense whether there had been any attempt to contact Detective Merrithew. R. 761, Tr.p. 833, ll. 12-17. Defense counsel responded no, because he was beyond the subpoena power of the court and its jurisdiction. While confirming to the court that they had been provided an email address, counsel merely responded, that "an email address is insufficient to compel someone to attend a court proceeding." R. 761-62, Tr.p. 833-834. Judge Harrington denied the continuance motion, based upon the April 23 order and reasons articulated throughout the trial. R. 762, Tr.p. 834, l. 7-11.

After the guilty verdict on murder, counsel made a motion for acquittal and renewed the continuance motion based upon the absence, contending the proceedings had been inherently prejudicial to the Appellant. R. 842, Tr. p. 934, ll. 11-21. Judge Harrington denied the motion. R. 842, Tr. p. 934, ll. 22-25.

**Prejudice Not Proven Where Available Witnesses Addressed The Issues and Appellant Failed to Show Material Testimony Was Unavailable .**

In his brief, Michaelson makes generalized comments about why he was deprived of a new trial. What he fails to do is articulate any prejudice caused by the denial of the continuance. However, as at trial, he is unable to proffer what testimony the Appellant is seeking to present through Merrithew. What this reveals is that his original trial and pretrial speculation dissipated as the trial occurred. Removing the potential prejudice that he may have feared, it left a motion without any support. At points in his arguments in the trial court, unlike on appeal, he attempted to articulate some areas of concern. Respondents submits that those claims about the necessity of Merrithew to address them were removed by the testimony presented and the witnesses who actually did the work.

In particular, Appellant stated that she wanted Merrithew to testify about certain factors in

the investigation including the pawnshop ticket research, the 2009 decision to dive in search of the weapon based upon the 2007 information from Michaelson that he threw the weapon into the river, his reaction to his grandmother's death as a reason for the killing, whether there was an ability for the Feaster and Scharer to concoct a consistent story, the investigation concerning who rented the bush hog (backhoe) to bury the victim where Michaelson lived, and the awareness that Feaster was a suspect in an earlier burglary of the victim. Yet the particular uniqueness of the testimony sought from Merrithew was not shown. This evidence was available through the witnesses at trial.

Particularly probative concerning the lack of prejudice were the cross-examinations by defense counsel Kennedy of the eventual case agent, Detective Diane Freeman and Deputy Crumley.<sup>10</sup> On cross-examination, Sgt. Freeman discussed the fact she was a supervisor over property crimes and Det. Merrithew recently came in and was in people crimes. She was assigned to work the Reeves case in August 2006 by Capt. Ollic to work with Merrithew to get the case resolved. R. 499, Tr. 533. Also R. 448-450, Tr. p. 480-482. Merrithew was new to the Sheriff's Department and she had supervisory duty over him since there was a burglary and larceny. R. 489, R. 489, Tr. 523. She initially assisted in reviewing pawnshop records, helped him locate the Feasters

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<sup>10</sup> An initial area of concern was the Appellant's concern that Merrithew had done the pawnshop research. However, as noted by the testimony of Detective Freeman at both the *Jackson v. Denno* hearing and before the jury, she was the person that actually did the research and pulled the pawnshop files because Merrithew was new to the unit and not aware how to do it. R. 241-45, Tr.p. 222-226. She stated she helped Merrithew match the list that he had of the stolen items. R. 245-46, Tr.p. 226-27. Sgt. Freeman stated that she first became involved in the case in August 2006. R. 449, Tr. 481. At that time, she looked at pawnshop records to attempt to locate stolen items. R.450, Tr. 482. She stated she was successful in locating items connected to Parrish Reeves, particularly a necklace which was a yellow chain with a charm on the end and .08 carat round diamonds, among other potential items. She said the necklace was identified by the victim's wife and mother. R. 451, Tr. 483. She stated they went back through the records of the Money Man pawnshop with the owner Gary Bowman and found that the piece had been sold and they were able to get it back. R. 451-52, Tr. 483-84. She learned the item was originally pawned by Katherine Feaster. She described obtaining a warrant for possession of stolen property for her because they were sure she had the necklace in her possession. R. 452, Tr. 484. She learned that Kat Feaster was the stepdaughter of the victim and spoke to her about the disappearance. Tr. 484. She provided information that help guide the investigation. R. 453, Tr. 485.

through DMV records after they located other witnesses from a list that they had received from Ms. Reeves and Ms. Ahrenholz in 2006 and 2007. R. 490-91, Tr. 524-25. Also R. 450-52, Tr.p. 482-484.

Sgt. Freeman stated that she understood between 2002 and 2006, Lt. Lee had looked for people, taken statements, looked for the vehicle, looked for Parrish Reeves through NCIC and sent a law enforcement agency to attempt to locate him. R. 492, Tr. 526. Sgt. Freeman stated that she read the entries by Lt. Lee around when Det. Merrithew left employment in October or November 2009. R. 493, Tr. 527.

Sgt. Freeman confirmed that Reeves was reported missing in 2001, in 2004 or 2005, Lt. Lee did an investigation which disclosed that Treze Feaster was a suspect and had previously burglarized Reeves home as reported May 15, 2000. R. 494-95, Tr. 528-29. Also R. 449, Tr.p. 481.

Sgt. Freeman stated Lt. Lee made it a possible missing person report in a supplemental report on February 1, 2001 in addition to burglary and larceny. R. 495-97, Tr. 529-31. Also R. 449, Tr.p. 481. Sgt. Freeman stated she reviewed the material prior to 2009, but did not do the leads. She noted that Det. Merrithew was working the case and that she was pulling information for him and he would review matters with her. R. 498-99, Tr. 532-33.

Sgt. Freeman described that she actually pulled information out of the pawnshop records after they had been discussing the case with Merrithew. R. 499, Tr. 533. Also R. 450, Tr.p. 482. She said Merrithew had come to her when he first started working the case and what they might want to look for. He described wanting to talk with Ms. Ahrenholz and Ms. Reeves and try to get more leads from them. R. 499, Tr. p. 533, ll. 20-25. While Sgt. Freeman was not present when the list were made, Det. Merrithew gave Freeman the names of Katherine Feaster and Jerry Scharer, the step-daughter

and stepson-in-law. R. 500, Tr. 534.<sup>11</sup>

Sgt. Freeman stated "lead investigator" means the person who a case is definitely assigned and take it to the prosecutor. R. 500-01, Tr. 534-35. She stated that Merrithew was the lead agent but that she was the supervisor assisting him during the time period. She stated when he knew he was going away, they started working the case together and pulling information that might be needed. R. 501-02, Tr. 535-36. Sgt. Freeman stated that Merrithew had been planning several times to leave.

Sgt. Freeman stated around February 2009, Assistant Solicitor Mikell Henderson and Merrithew came to her and said there was a good chance that Merrithew would be leaving and they needed to review his cases, although a trial date had not been set for this case. R. 502-03, Tr. 536-37. Sgt. Freeman stated that she was on leave between Oct. 15 through November due to a family illness and that Merrithew was gone when she returned. R. 504, Tr. 538.

Sgt. Freeman again confirmed she helped with the pawnshop ticket and learned the items had been pawned by Katherine Feaster. R. 505, Tr. p. 539, ll. 5-10. Some of the items were recovered by Det. Merrithew which she was not involved in. R. 505, Tr. p. 539, ll. 11-16. Freeman was pulling DMV records throughout. When asked how leads from Kat to Trey to Jeremiah was developed, Sgt. Freeman stated they had the pawn ticket from her, obtained a warrant for the property, had the

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<sup>11</sup>The victim's mother, Frances Reeves, testified about the disappearance of her son Parrish. She testified on cross-examination by counsel Kennedy that there were five detectives that she had who worked on the case. Concerning Det. Merrithew, Ms. Reeves stated that she was talking with Captain Rick Ollic and was very upset and Merrithew came up and told Ollic that he could look into the case. R. 299-301, Tr. 282-84. Ms. Reeves stated she went to "Unsolved Mysteries" and other places and told Merrithew what she had done looking for her son. She stated that she gave Merrithew a list of names that she thought might be involved, but the list did not include Katherine Feaster, Trey Feaster, and Jeremiah Scharer. She said she did not know about their involvement until the jewelry was recovered. R. 301, Tr. 284.

Ms. Reeves stated that Merrithew brought her some jewelry and she looked at it with her former daughter-in-law Brenda and they identified one piece that belonged to Brenda which was a necklace with a stone that specially made by her son. R. 302-03, Tr. 285-86. She became aware then that Katherine Feaster had pawned it because Merrithew had the pawn ticket. R. 304, Tr. p. 287, ll. 1-11.

warrant countersigned in Anderson, took her into custody, she was Mirandized, and the statement she made "took us down to each person." R. 506, Tr. p. 540, ll. 3-12. Sgt. Freeman confirmed that she went with Merrithew to Pelzer after she found out through DMV records where she was living. R. 507, Tr. 541. She agreed with Merrithew to get a warrant. R. 508, Tr. 542. She felt they had a "guarantee with Katherine Feaster." R. 508, Tr. 542, ll. 24-25. Sgt. Freeman said she did not rely on Lt. Lee's contact sheets to develop Trey as a suspect and spoke to Katherine about the events which developed Treze Feaster and Jeremiah. She declared that while there was information about Trey in the file, he was not developed until Kat Feaster was arrested. R. 509-510, Tr. 543-44.

Sgt. Freeman acknowledged that part of the reason she went to Anderson with Merrithew to arrest Katherine was because of policy because the arrested was a female. R. 510, Tr. 544. She stated it took several hours to go to Pelzer or Anderson and back to Moncks Corner. R. 510, Tr. 544. She said after the arrest during the drive, Det. Merrithew was talking to her and Sgt. Freeman was taking notes on the statements she made. At 2:30 on August 6, Kat Feaster made the written statement. She said Feaster was Mirandized when they first got into the vehicle and Feaster was in the front seat. R. 513, Tr. 547. Sgt. Freeman stated she wrote out the statement of Feaster stating that she executed the written Miranda warnings at 2:30. She said in route there was a verbal interrogation then a written statement prepared and then there was a video statement later after 9 or 10 p.m. R. 517, Tr. 551. In the statements, Feaster had implicated her brother and husband. R. 517-18, Tr. 551-52.

Sgt. Freeman stated at some point she called her husband (Treze Feaster) on Det. Merrithew's phone and told him that she was in custody. R. 518, Tr. p. 552, ll. 4-19. She said that she was trying to get Treze to come in. Sgt. Freeman also stated that Katherine Feaster called her mother and asked her to get her brother and bring him. R. 519, Tr. 553.

Sgt. Freeman asserted that Ahrenholz was not aware what they were being arrested for and was only told to bring her son in. R. 519, Tr. 553.<sup>12</sup> She said Merrithew asked Kat to call to see if she could get them to come in and “doing the right thing.” R. 520, Tr. 554.

Sgt. Freeman confirmed that all but Michaelson were related and that they had been told did not have a good relationship with Reeves. R. 521, Tr. 555. Freeman stated that they had learned in their investigation that each of the family members had their own reasons to dislike Reeves and never

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<sup>12</sup>Ahrenholz testified that she was shown a necklace that was stolen from a safe. R. 312-13, Tr. 295-96. (State Exh. 91). She also identified a painted Liberty coin that was stolen. R. 315, Tr. 298. On cross-examination from counsel Kennedy, the witness was unable to describe his first encounter with Det. Merrithew, but knew they had more contact with him after the victim's truck was found. R. 327, Tr. 310. She stated that he told her and said he was taking over the case. She said he called a couple of times in 2003 or 2004 and asked her to draw a picture of the necklace. R. 327-28, Tr. 310-11. She said Merrithew came to her home when Frances Reeves was there and showed them the necklace. Merrithew did not tell them who, but said he had traced it through a pawn ticket and found it at Money Man Pawn Shop. R. 328-29, Tr. 311-12. At that time, she said he did not tell her that her daughter, Katherine Feaster, was involved. R. 329, Tr. 312. Ahrenholz said she learned that for the first time when she received a telephone call from Trey that Katherine had been arrested on August 6. R. 329-331, Tr. p. 312, l. 10 - p. 314, l. 2. At that point, she stated she contacted Det. Merrithew. R. 331, Tr. p. 314, ll. 1-17. Out of the jury's presence, she said Merrithew told her that Katherine was picked up on a receiving stolen goods charge. R. 333-34, Tr. 316-17. She said that Merrithew asked to pick up her son, Jeremiah, and bring him to the police station because they wanted to speak with him, but not the reason why. R. 334-35, Tr. 317-18.

Counsel Kennedy stated that she was seeking to elicit information about Merrithew due to his non-presence. R. 335-36, Tr. 318-19. Solicitor Williams noted that it would be hearsay even if he was present and testifying. R. 336, Tr. p. 319, ll. 4-10. Counsel Kennedy asserted that this inquiry was in response to preliminary hearing testimony that there was no opportunity for the individuals (Trey Feaster, Katherine Feaster, and Jeremiah Scharer) to communicate with each other about their statements. R. 337, Tr. 320.

In response, she stated she had the one conversation with Det. Merrithew about bringing Jeremiah down there. After she picked him up and dropped him at the department, Merrithew asked her to stay out front in the lobby. Later, Merrithew brought her back and had her children (Kat and Jeremiah) tell her that Parrish was dead (but not what happened). R. 338-39, Tr. 321-22.

Back in front of the jury, Ahrenholz described that after the disappearance she spent time with her children who never shared what happened. R. 342-44, Tr. 325-27. At some point, she gave Det. Merrithew a list of items that were missing, including the necklace, gold watch, tennis bracelet, half-carat earrings and his coin collection. Ahrenholz testified that the only things Det. Merrithew showed her was the necklace (before the arrest) and subsequently a coin. R. 344-45, Tr. 327-28. She stated a few months after the arrests she was asked to try to identify items from the storage shed from another detective other than the necklace. R. 346, Tr. 329.

On re-direct, Ahrenholz confirmed that he has identified the coin a long time before. R. 346, Tr. 329. She stated that her son Jeremiah was 16 when he moved from the home. R. 347, Tr. 330.

had a good relationship with him. R. 521, Tr. 555 [An objection was sustained under hearsay to evidence that Ms. Feaster made allegations of abuse about Reeves. R. 522-23, Tr. p. 556-557].<sup>13</sup>

Concerning the rental of the backhoe, Freeman described learning that it was rented from "Doc's" after the arrest and in 2009 they were able to locate the owner who had moved out of state. Freeman stated that she was the person who located the owner, not Merrithew, and contacted him by telephone in 2009. R. 524, Tr. 558. Also R. 479-480, Tr.p. 511-512. The owner tried to establish the transaction record through software, but that company was also out of business and they were unable to develop the tapes to get the information. R. 524, Tr. 558.

Sgt. Freeman agreed that information about the backhoe rental was important and that they developed the information from two people that said they rented it, but they were not able to confirm the information through documents. R. 525, Tr. 559. Sgt. Freeman rejected the implication that this should have led to re-interviews because she did not think there was additional information to develop. R. 526, Tr. 560.

She confirmed that she had tried to call Ryan Almers concerning the trailer that disappeared. R. 526, Tr. p. 560. She said she had not documented it because she was not able to speak with him. She confirmed that she found him in the DMV records and made several telephone calls, including one to his uncle., but the messages were not returned. She said that she did not put her attempts in a supplemental report because she was never able to speak with him. R. 526-28, Tr.p. 560-562. She stated at the time she was in charge of the investigation and Merrithew had already left. R. 528, Tr.p. 562.

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<sup>13</sup> Jeremiah Scharer testified that he did not have a good relationship with his stepfather, but denied it was based upon any knowledge that he had beaten his mother. Instead, he stated that he was a bad kid and got beatings and spankings. R. 618-19, Tr .p. 655-656. He stated he moved out because he was 16 and wanted to live with other better than his family. Id.

Sgt. Freeman stated that she could not explain why there was nothing documented in the file by Det. Merrithew past August 13, 2007 when she was not in the unit, though Merrithew had told her that he had continued working on the case. R. 529, Tr.p. 563. She stated she had several conferences with Merrithew prior to his leaving as information exchange with the case file and Assistant Solicitor Mikell Henderson. R. 530, Tr.p. 564.

Sgt. Freeman responded that further investigation was not done, to her knowledge from the arrest (August 6, 2007) until she picked up the file in October 2009, other than "clean up things" and "question marks." R. 531, Tr.p. 565. She confirmed she did an underwater search after a request from Solicitor Henderson in 2009. She noted that a dive team had not been formed previously, but admitted the information about the weapon was available in 2007. R. 532, Tr.p. 566.<sup>14</sup>

Sgt. Freeman indicated that she learned from the Feasters that they had moved into the Starlight property at a later time after the body was already buried there. R. 534-36, Tr.p. 568-570. Also R. 475-76, 477-79, Tr.p. 507-508, 509-511. She stated that they were told by Ahrenholz and Ms. Reeves that the Feasters were not living there at that time. There were also the pawnshop records and their own statements indicating that they were living in Bonneau. "In fact, Michaelson's own statement said they were living in Bonneau." R. 536-37, Tr.p. 570-571. She said according to the Feasters they moved into the Starlight property a year or so later. She stated the information was not part of the files. R. 537, Tr.p. 571.

Sgt. Freeman stated that the sequence of who spoke with them was Feaster, then Scharer voluntarily and then three unmarked cars were sent to pick up Michaelson when a warrant was

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<sup>14</sup>She stated no murder weapon was recovered during the dig. R. 480, Tr. 512. They were also unable to locate where the firearm was obtained from, although Appellant indicated in his statement that he recovered it from Ms. Reeves. R. 480, Tr. 512. He had admitted throwing it out of the vehicle in the Tailrace Canal. R. 481, Tr. 513. She said in 2009, attempts were made to recover the gun. She stated her underwater recovery team conducted an unsuccessful search in the water and on land. R. 481, Tr. 513.

issued. R. 538, Tr. 572. Also R. 452-54, Tr.p. 484-486. Freeman did not know who sent them, but policy would be for the supervisor and the Sgt. Alteri was present. R. 539, Tr. 573.

Sgt. Freeman stated the truck had been recovered and was in Sgt. Lee's notes. R. 540, Tr.p. 574. She stated file notes reflected Sgt. O'Neal had spoken to the Morrises who owned the property where the truck was found. She stated the Morrises had a written statement saying that Reeves and Trey had brought it over and it was left there. R. 540-41, Tr.p. 574-575. She stated they also investigated it through the DMV, trying to find a chain of titles and found that Morris had claimed it as abandoned property with a magistrate and transferred it. R. 541, Tr.p. 575. She said the Morrises stated the truck was there because they were hiding it from Ahrenholz due to the separation. R. 541, Tr. 575. She said that they verified it and spoke with Ahrenholz to see if it was true. However, they did not do anything about Trey taking the truck over. R. 542, Tr.p. 576. Sgt. Freeman confirmed that in Det. Lee's notes that it indicated that she spoke with Trey Feaster who disclosed he was aware of it in 2005, so he was aware in 2007 that he was being looked at in some fashion. R. 543, Tr. 577.

On re-direct Freeman stated that Det. Merrithew is in Iraq or Afghanistan overseas. R. 543, Tr.p. 577. She said that this was not the only case she assisted Merrithew prior to any arrest. She said that she participated in the interviews by asking questions and clarifications. R. 544, Tr.p. 578. She said that Kat had implicated Trey, Jeremiah, and Michaelson. R. 545, Tr.p. 579.<sup>15</sup>

Concerning the backhoe, she indicated she followed up on the documentation as to who rented it. R. 545, Tr. 579. She confirmed that Michaelson had stated he rented the backhoe in his interview. R. 546, Tr. 580. Michaelson had also indicated then that he was living at Starbright at his mother's when the victim was buried, but that he was now living in Bonneau. Similarly, she said that

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<sup>15</sup>Sgt. Freeman further stated that they attempted to follow-up on Appellant's statement that he drove Treze Feaster downtown to cash in the victim's coins. R. 481-82, Tr. 513-14. However, while able to locate the coin shops, they no longer had records from that 2001 time period. R. 482, Tr. 514.

Michaelson had indicated that he carried the truck to the trailer in the woods. He also indicated that he went to Bonneau at the time of the shooting to meet with Trey, Katherine and Jeremiah. R. 547, Tr. 581.

On cross-examination, Det. Michael Crumley of the Berkeley County Sheriffs Department stated that he was sent by he believes Det. Merrithew to Wilmor Acres because there was an arrest warrant for Appellant. R. 363, Tr. 346. Crumley was involved in the arrest of Michaelson, reading him his rights after arrest, and the subsequent consent search of the storage shed. R. 349-363, Tr.p. 332-346.<sup>16</sup> He stated he was not aware why Appellant was directed to Wilmor Acres. Appellant was Mirandized outside of the patrol car after he was in handcuffs. R. 364-65, Tr. 347-48. Det. Crumley stated that he told Appellant there was an active arrest warrant for him which would be explained when he got to the Sheriff's Office. R. 365, Tr. 348. Crumley stated he had no idea what the warrant was for. Crumley stated he was not aware who the lead agent was, but went there under Merrithew's instructions. R. 366, Tr. 349. He opined the arrest occurred at 3 p.m. and that

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<sup>16</sup> Detective Crumley testified that in 2007, he was a detective in the criminal investigation unit assisting in the investigation concerning the disappearance and death of Parrish Reeves. His first involvement was the arrest of Jeffrey Michaelson on August 7, 2007. R. 349, Tr. 332. He stated that he read Appellant the Miranda rights from a card. R. 350, Tr. 333. Detective Crumley opined that Appellant understood his rights, but did not ask him any questions at the time. He placed Appellant in handcuffs and drove him 20 minutes to the Sheriff's Office. R. 351, Tr. 334. He made no threats nor promise him anything. At the Sheriff's Office, he transferred custody to Sgt. Freeman and Det. Merrithew. R. 352, Tr. 335.

Det. Crumley stated later that evening, he went with Sgt. Alteri, Sgt. Shuler, and Det. Murphy to Ladson Self Storage and met Christine Thomas, the Appellant's girlfriend at her storage unit. They obtained consent from her to search the unit that she claimed she shared with Appellant. R. 353-57, Tr. p. 336, ll. 1-13, p. 340, ll. 7-9. In the unit, they located items addressed to Appellant, as well as Ms. Thomas. Id. Photographs were introduced and identified concerning the storage unit and its contents. R. 355-56, Tr. 338-39. Within the unit was a certificate of authenticity and a 1999 Delaware painted quarter, as well as other coins. R. 356-57, Tr. 339-40.

Det. Crumley described obtaining the written consent to search (Exhibit 93) from Ms. Thomas prior to the actual search and seizure of items. R. 357-360, Tr. 340-43. Det. Crumley confirmed that item 5 of the recovered items, a 2000 U.S. Silver Dollar (painted) was the item shown as Exhibit 92. R. 362, Tr. 345. He noted that mail was not seized on that search and therefore was not listed in the return. R. 362-63, Tr. 345-46.

Appellant was in Merrithew's custody at 3:30. R. 367, Tr. 350.

He stated when he went to the storage facility, it could have been by Merrithew. He was told to meet Thomas who was Appellant's girlfriend who would be there to allow entry into the unit and to look for any items that might be pertinent. R. 367-68, Tr. 350-51. At the time, Crumley stated he did not know if the items or safe were involved in the 2001 burglary. R. 368, Tr. 351. Crumley stated that he completed a report for Sgt. Freeman, his supervisor, on August 7. R. 369-370, Tr. 352-53. Crumley stated that the approving officer on his August 7 supplemental report was Sgt. Freeman. R. 372, Tr. 355.

Finally, what is also troubling is that the defense never actually contacted Merrithew once the absence was known and they were provided his email and telephone number. The trial court's inquiries notwithstanding, defense counsel refused to take the next step by communicating when or if their witness would be available or take the minimal step to determine what his testimony would be in any critical area. These reasonable steps - required under Rule 7 to show with specificity the expected content of such testimony - were ignored by the defense at trial against the state's protestations. The indeterminate delay sought by the Appellant, under these circumstances was not an abuse of discretion. The continuance denial did not deprive Appellant of due process. Relief must be denied.

**CONCLUSION**

For all the foregoing reasons, the judgment of conviction must be affirmed.

Respectfully submitted,

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By: \_\_\_\_\_

  
DONALD J. ZELENKA  
ATTORNEYS FOR RESPONDENT

October 25, 2012

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Berkeley County  
Kristi Lea Harrington, Circuit Court Judge

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THE STATE OF SOUTH CAROLINA,

Respondent,

v.

JEFFREY MICHAELSON,

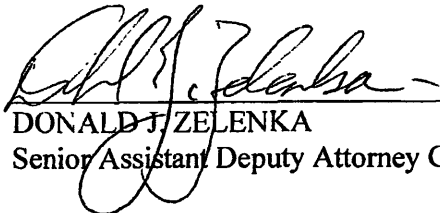
Appellant.

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled “Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”

  
DONALD J. ZELENKA  
Senior Assistant Deputy Attorney General

October 25, 2012

**CERTIFICATE OF SERVICE**

I, **Donald J. Zelenka**, counsel for the Respondent, certify that I have served the within *Final Brief of Respondent* in the foregoing action on the Appellant by depositing two (2) copies of the same in the InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 25<sup>th</sup> day of October, 2012.



**DONALD J. ZELENKA**  
Senior Assistant Deputy Attorney General

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Jeffrey Michaelson, Appellant.

Appellate Case No. 2010-166526

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Appeal From Berkeley County  
Kristi Lea Harrington, Circuit Court Judge

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Unpublished Opinion No. 2013-UP-188  
Submitted April 1, 2013 – Filed May 8, 2013

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**AFFIRMED**

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Chief Appellate Defender Robert Michael Dudek, of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General John W. McIntosh, and Senior  
Assistant Deputy Attorney General Donald J. Zelenka, all  
of Columbia; and Solicitor Scarlett Anne Wilson, of  
Charleston, for Respondent.

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**PER CURIAM:** Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) ("The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice."); *State v. McKennedy*, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002) ("[The supreme court] has repeatedly upheld denials of motions for continuances where there is no showing that any other evidence on behalf of the defendant could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial."); *State v. Colden*, 372 S.C. 428, 438, 641 S.E.2d 912, 918 (Ct. App. 2007) ("All components of Rule 7(b), SCRCrimP, including that of the attestation under oath, are strictly required, and a party asking for a continuance must show due diligence in trying to procure the testimony of the witness, as well as what the party believes the absent witness would testify to and the basis for that belief."); *id.* at 439, 641 S.E.2d at 918-19 ("It is paramount that the party asking for the continuance show 'due diligence' was used in trying to procure the absent witness."); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (noting "the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses"); *State v. Richardson*, 253 S.C. 468, 473-74, 171 S.E.2d 717, 719 (1969) (noting "the State is not required to place upon the stand every witness who has knowledge of material facts connected with the crime charged or whose name is endorsed upon the indictment"); *State v. Charping*, 333 S.C. 124, 129, 508 S.E.2d 851, 854 (1998) ("[A]n adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted where the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses."); *State v. Morris*, 376 S.C. 189, 209, 656 S.E.2d 359, 370 (2008) (stating when testimony from unavailable witnesses would be cumulative, the defendant cannot make a successful argument for a continuance).

**AFFIRMED.**<sup>1</sup>

**HUFF, WILLIAMS, and KONDUROS, JJ., concur.**

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<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

JEFFREY A. MICHAELSON,

APPELLANT

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Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

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Opinion No. 2013-UP-188

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Appellate Case No. 2010-166526

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PETITION FOR REHEARING

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Petitioner requests rehearing pursuant to Rule 221(a), SCACR, because this Court may have overlooked the fact that Judge Dennis in a pretrial ruling found Detective Merrithew was a material witness when he granted the motion for a continuance, and there was no change in circumstance from the time of that ruling. Judge Dennis also found the defense had exercised *due diligence* to obtain his presence at trial. R. 34.

Further, the equities weighed in favor of appellant in this case particularly since he had returned to the country *after being available for thirty terms of court before that*, and the solicitor failed to notify appellant even though at the time they were uniquely in possession of this

information. Further, the state's argument that the solicitor was able to find other witnesses to fill in the gaps of the state's case ignores the *defense need for the witness*. The same is true of the statement in the one page unpublished opinion that the "state is not required to place upon the stand every witness who has knowledge of material facts connected with the crime charge or whose name is endorsed on the indictment."

A scaled back version of the facts in this case follows to show that rehearing should be granted given the documented unfairness to the defense in this case by arbitrarily forcing this case to trial to appellant's palpable prejudice. Moreover, the state's brief on appeal contending other witnesses sufficiently "filled in the gaps" for Detective Merrithew is not only incorrect, but totally fails to focus on **appellant's right to present witnesses in his favor.**

Moreover, appellant did everything possible to show prior to trial, during trial, and on appeal how Detective Merrithew's testimony was necessary for the defense.

Detective Merrithew testified at the preliminary hearing that on February 2, 2001 a police report was filed by the decedent's mother, Francis Reeves. Reeves was also the owner of the burglarized house home from which the property was stolen. R. 4, l. 7 – 5, l. 1. Merrithew testified that he continued to run names of family members through a "pawn shop list" hoping to find one of them had pawned some of the stolen property. R. 5, ll. 1-8.

During this process, Merrithew learned that the decedent's step-daughter, co-defendant Katherine Feaster, had sold some jewelry to a pawn shop in Greenville, South Carolina. R. 5, ll. 9-22. She confessed to pawning the jewelry. Appellant was the only person charged in the death of the decedent who was not a relative. R. 6, ll. 3-17.

Merrithew also testified that Feaster's husband confessed he knew about the murder and "he knew where the body was buried." R. 6, ll. 21-24. Merrithew said that appellant was implicated in

the murder and he said that appellant's "common-law wife" or girlfriend gave the police consent to search a storage facility where they found some more of the decedent's stolen property. R. 7, ll. 3-10.

Merrithew testified that the decedent's body was buried in a 55 gallon drum in appellant's front yard. "Consequently, all were charged." R. 7, ll. 11-20. Merrithew confirmed that based on Feaster's statements and her husband's statements that appellant was charged with murder. R. 8, ll. 15-25.

On cross-examination Merrithew acknowledged that statements given in this case *were not consistent*. Merrithew admitted that unlike the other suspects *appellant was not related to the decedent* and Merrithew knew of *no personal animosity appellant had towards the decedent*. R. 12, l. 18 – 13, l. 18.

Merrithew further said that he was told in one statement by a witness that appellant was upset because his grandmother had died and "he felt like killing somebody and they all say let's go kill Parish." Merrithew acknowledged appellant did not even know Parish. R. 17, ll. 2-19. Merrithew opined the only way appellant knew anything about the decedent "is he would have got it from the Feasters." R. 18, ll. 11-15.

As to the inconsistent statements, Merrithew said he was told in one statement that Feaster wanted to borrow money from the decedent and that he "made some sexual advances towards her." Feaster apparently claimed she told her husband, her brother, and Michaelson who "all left the residence to go deal with Mr. Reeves." Merrithew said he was told by one suspect that appellant was going through "some type of mental distress about a family member denying and that he felt like killing someone." R. 21, ll. 6-23. Appellant and Feaster were bound over for trial at the conclusion of Merrithew's testimony. R. 23, ll. 7-9. Judge Dennis had ordered a continuance

granted on March 22, 2010 because the testimony of “**Jerry Merrithew is material to the Defense,**” **counsel exercised due diligence** in attempting to secure his presence and the motion was not made for purposes of delay. R. 34. (emphasis added).

In subsequent motion for a continuance, counsel noted that the Berkeley County Public Defender’s Office was appointed to represent appellant on August 29, 2007. On November 20, 2009, counsel learned through informal sources that Detective Merrithew had resigned his position with the Berkeley County Sheriff’s Office “and **voluntarily** removed himself from the jurisdiction of this court by securing employment with a *private* security firm in Afghanistan.” R. 86. (second emphasis added). Counsel noted that she attempted to serve Merrithew with a subpoena on November 23, 2009, but Captain Rick Ollic of the Detective Unit refused service of this subpoena stating that Detective Merrithew was in Afghanistan.

At the April 16, 2010 hearing, now before Judge Harrington, defense counsel argued again that Detective Merrithew was a material witness and that fact had not changed since the earlier grant of a continuance. R. 51, ll. 14 -23. Defense counsel stated the defense had been trying to secure alternative ways to have Merrithew’s testimony placed before a jury when he returned to the jurisdiction. One such way, a videotape deposition, was not possible and counsel noted that Judge Dennis had ruled that there was no case law that would support such a procedure. R. 52, ll. 1-9.

Defense counsel stated that an email he received from the assistant solicitor led her to believe that arrangements were being made to secure Detective Merrithew’s presence at trial. R. 52, ll. 16-24. Defense counsel argued under the Sixth Amendment appellant was entitled to compulsory process and the right to a fair trial. R. 53, ll. 9-17. Counsel’s argument was threefold in this case: That the denial of a continuance to secure Detective Merrithew’s presence would deny

appellant his right to compulsory process, to confrontation, and the right to present a complete defense (a fair trial). R. 54, l. 12 – 58, l. 23.

Counsel noted that Merrithew was a material witness because he was the key investigating detective and he “followed pawn tickets. He did a whole bunch of preliminary investigation prior to the time that these folks were taken into custody.” Counsel argued there was good reason to believe Detective Merrithew knew that Travis Feaster had burglarized the decedent’s home on a prior occasion which was “certainly fodder for cross-examination.” The quality of the investigation was a key issue in this case insofar as it involved appellant. R, p. 54, l. 12 – 58, l. 23. The state highlighted in its final brief that appellant was found not guilty of burglary. However, that fails to account for the theory of the case linking appellant to the burglary and murder. Further, inconsistent verdicts are meaningless in this state.

Defense counsel also told the judge that **“there were 32 terms of court that this case could have been called” before “Gerry Merrithew is no longer available.”** R. 61, ll. 12-20. Defense counsel told the judge she had used all due diligence (again as found earlier by Judge Dennis) to secure Detective Merrithew’s presence and that she had no interest in delay and that Detective Merrithew was a material and critical witness in this case. R. 62, l. 1 – 67, l. 23.

Defense Counsel Gay, for co-defendant Feaster, joined in appellant’s motion. Gay noted that Merrithew’s testimony would be exculpatory and that “he’s so important to the case that the trial could not be held in his absence.” Gay noted that her client said appellant shot the decedent and appellant said that Feaster shot the decedent. Although they were not “on the same team” both defendants agreed Merrithew was a material and critical witness. R. 68, l. 2 – 71, l. 13.

Defense Counsel Gay argued that, although relevant matters were on videotape, many items that were the subject of cross-examination of Detective Merrithew were *not* on videotape. There

was no way, Gay argued, that the motion to suppress statements would be handled “without his presence.” When defense counsel for the appellant asked to add even further to the record at the conclusion of the hearing the judge denied that request. R. 71, l. 15 – 79, l. 1.

On June 28, 2010, defense counsel again moved for a continuance because Detective Merrithew was not present. Defense counsel noted the continuance issues had been argued on prior occasions and that Detective Merrithew continued to be a material witness. R. 114, l. 11 – 117, l. 18. Defense counsel noted that this situation was a case of first impression in South Carolina and that although the prosecution had apparently now been able to structure their case “around the witnesses she [the prosecution] intends to present . . . that Detective Merrithew was still a critical witness for the defense.” R. 117, l. 21 – 121, l. 13.

Defense counsel asked that she be allowed to testify under oath about Detective Merrithew being a material witness and the constitutional violations involved if a continuance was not granted. The judge agreed with the solicitor that defense counsel was an officer of the court, she had provided an affidavit “detailing certain issues in the timeline concerning this case,” **and that it was not necessary to place her under oath.** R. 122, l. 4 – 124, l. 6.

Defense counsel further argued that Detective Merrithew was given a list of people in the area at the time the decedent disappeared, and Merrithew used that list “to develop leads.” The defense had a right and a need to question Detective Merrithew about his investigation of the people involved and the information that was provided to him. R. 130, l. 4 – 135, l. 16.

Defense counsel referenced the bizarre information that Merrithew was allegedly told appellant wanted to kill the decedent because his grandmother had died. There was conflicting information that “everybody was getting high and smoking dope and that was the explanation [for the murder].” R. 135, l. 17 – 148, l. 14

Detective Merrithew was a critical witness in this case because he was the lead detective “he was the one that did all the investigation.” This was a cold case and defense counsel argued that if Detective Merrithew was in some other state rather than outside the country, she would have been able to secure his presence for appellant’s trial. R. 135, l. 17 – 148, l. 14.

While defense counsel would not go so far as to say the state deliberately kept Detective Merrithew outside of the jurisdiction, counsel did state she found “it suspicious that it [appellant’s trial] was put - - that it was put on what I would call the final trial docket for November 30 almost immediately after he left, because it was first noticed on October 12.” R. 148, ll. 15-24.

Defense counsel argued appellant was entitled to present a defense “and I am representing to the Court that I simply cannot do that and develop my theory of the case absent his [Detective Merrithew’s] presence.” R. 148, l. 25 – 149, l. 8. Defense counsel also stated Merrithew was the central authority figure and **he had influence over who was given leniency for their “cooperation.”** R. 149, l. 9 – 151, l. 4.

Defense counsel noted her understanding was with Merrithew’s employment in Afghanistan “**he can come back here pretty much anytime he wants to.**” R. 151, ll. 5-6. Further, the state highlighted in its brief that Merrithew took a **civil and not military job.** Defense counsel said that at a future term of court that she “can effect compulsory process.” However, “I have no ability to serve with a subpoena or secure his presence in the courtroom.” R. 151, l. 18 – 152, l. 15. Defense counsel said she had no duty to show that the state made Detective Merrithew unavailable for her constitutional arguments to prevail. R. 151, l. 21 – 160, l. 19.

Defense counsel also noted that in March: “Detective Merrithew *flew into town early in March . . . I had no notice of that.* I only found out about through folks at the jail. If he had been - - he had been in Berkeley County, he had been at the jail, and I would have had an opportunity at that

point in time had I been aware of it to put him under subpoena.” R. 148, l. 8 – 149, l. 8. (emphasis added).

While the solicitor acknowledged the murder happened nine years ago and that arrests were not made for six and a half years, he said “the case is three years old” and he argued that the trial should go forward in Merrithew’s absence. R. 185, l. 10 – 186, l. 8.

Defense counsel argued that she had exercised due diligence in securing Merrithew’s presence – as seen and **ruled by Judge Dennis** -- but that the constitutional issues of compulsory process, due process, and confrontation could not be discounted. R. 187, l. 14 – 194, l. 25. Defense counsel told the judge if the court would grant a continuance she would subpoena Merrithew just as she would have had she known Detective Merrithew was back in Berkeley County in March. Defense counsel argued “all this could have been avoided had there just been some simple notice that he was here. We could have had, as Judge Dennis suggested, a conference about when he would be here so we could - - we could go forward with it. None of that was done.” R. 195, ll. 1-25. Defense counsel said if the defense was not granted a continuance appellant would be denied his right to a fair trial. R. 196, ll. 1-6.

The following day, at the beginning of court, the judge denied the motion for a continuance. She stated “the detective is simply unavailable.” She stated that the defense argument “has been fully articulated and preserved for the record.” R. 200, l. 10 – 202, l. 2.

On July 6, 2010, during the trial, defense counsel renewed her motion for a continuance. R. 442, l. 17 – 445, l. 24. She noted that all of the witnesses with the exception of the chain witnesses “**have referenced directives from Detective Gerry Merrithew as to their participation in the case.**” She noted Detective Crumley and his directive to pick up appellant. There was also Francis Reeves and her discussions with Merrithew. Further, there was his investigation and Brenda

Ahrenholz's testimony that was inconsistent with the testimony Detective Merrithew gave at the preliminary hearing. Defense counsel argued that she had no opportunity in the absence of Detective Merrithew to refute or rebut the testimony. R. 442, l. 23 – 445, l. 19. The judge denied the motion "for a continuance at this time." R. 445, ll. 21-24.

The state in its brief also makes much of the testimony of Detective Diana Freeman at the trial. However, Freeman acknowledged she assisted Detective Merrithew in the case but that Merrithew was the lead detective. R. 501, l. 15 – 502, l. 8. Freeman also said she took notes while Detective Merrithew interviewed Katherine Feaster on the way from Pelzer to Moncks Corner. R. 511, ll. 17-22.

Freeman also said that Merrithew stated he continued working on this case even after Freeman left the unit, but she could not explain why Detective Merrithew did not have any investigation documented past August 13, 2007. R. 529, ll. 8-25.

Defense counsel later said that some of the testimony provided by Detective Freeman contradicted Detective Merrithew's testimony at the preliminary hearing and this went to the heart of appellant's defense. R. 673, l. 25 – 674, l. 25.

After the judge denied the directed verdict motions, he asked defense counsel if they had made any other efforts to contact Detective Merrithew. Defense counsel answered "no, Your Honor, because he is beyond the subpoena power of the court." The judge stated she was again denying the motion for a continuance. R. 761, l. 11 – 762, l. 6.

This Court's summary one page opinion respectfully does not respond to the lengthy briefs and arguments on an important constitutional issue in this case. This is hardly a garden variety continuance case. The Sixth Amendment to the United States Constitution provides an accused the right an impartial jury (fair trial) and the right to be confronted with the witnesses against him and to

have compulsory process for obtaining witnesses in his favor. Judge Dennis properly ruled the missing witness was material, and that appellant had exercised due diligence to obtain his testimony. See Order of Judge Dennis R. 32.

As appellant argued in his brief, in State v. Dodgens, 120 S.C. 239, 113 S.E. 77 (1922) a defense witness had been subpoenaed but left the court without the defendant's knowledge or consent. The Supreme Court held that the refusal to issue a bench warrant to secure the witness's presence or to postpone the trial until the witness was present was a denial of the accused's right to have compulsory process for obtaining witnesses in his favor.

As noted above, appellant was out on bond during this time, and it is clear that the trial judge did not consider him a flight risk since she allowed him to remain out on bond during the trial also. Acquiescing to the state's wish to try this case because **the state** no longer needed Merrithew was an abuse of discretion which denied appellant his right to compulsory process, to confrontation, and to a fair trial where he could present a complete defense.

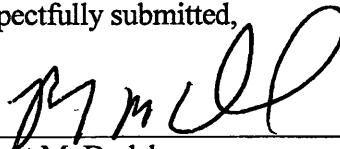
"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, (1973); California v. Trombetta, 467 U.S. 479, 485 (1984). State v. Hutton, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App.2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense); ("Due process requires that a criminal defendant be given a reasonable opportunity to present a complete defense.")" State v. Lyles, 379 S.C. 328, 341-42, 665 S.E.2d 201, 208-09 (Ct. App. 2008).

In Washington v. Texas, 388 U.S. 14, 19, (1967), cited during this trial, the United States Supreme Court elucidated the rights of an accused to present testimony:

‘The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.’” State v. Lyles, 379 S.C. 328, 341-42, 665 S.E.2d 201, 208-09 (Ct. App. 2008).

This Court should respectfully grant rehearing in this serious denial of the right to present witnesses in his favor case. The summary one page opinion does not do justice to the issues involved.

Respectfully submitted,



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Robert M. Dudek  
Chief Appellate Defender

This 22nd day of May, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFREY A. MICHAELSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of May, 2013.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 22nd day  
of May, 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

# The South Carolina Court of Appeals

The State, Respondent

v.

Jeffrey Michaelson, Appellant.

Appellate Case No. 2010-166526

RECEIVED

JUN 20 2013

RECEIVED  
PROBATION DEPT

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ORDER  
\_\_\_\_\_

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

H B Wo J.

OKO J.

Columbia, South Carolina

cc:  
Donald J. Zelenka  
Robert Michael Dudek

FILED  
20 June 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Berkeley County  
Kristi Lea Harrington, Circuit Court Judge

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Opinion No. 2013-UP-188 (S.C. Ct. App. filed 5/8/2013)  
09-GS-08-2295

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THE STATE,

RESPONDENT,

V.

JEFFREY A. MICHAELSON,

PETITIONER

APPELLATE CASE NO. 2013-001570

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 6/20/2013.

QUESTION PRESENTED

Whether the Court of Appeals erred by holding the judge did not abuse her discretion and deny petitioner his right to compulsory process, confrontation, and his Due Process right to a fair trial by denying petitioner a continuance to secure the presence of Detective Merrithew where that Detective voluntarily left the country to work private security in Afghanistan after being available for over thirty terms of court, since the Detective was a material witness as the first trial judge properly ruled, and particularly where the Detective had returned once to Berkeley County after leaving the country?

STATEMENT OF FACTS

**Procedural history**

Petitioner was indicted by the Berkeley County Grand Jury for the offenses of murder and burglary in the second degree. R. 849. His case was called to trial on June 28, 2010 before the Honorable Kristi Harrington, and a jury. Patricia Kennedy and David Schwake represented petitioner. Anne Williams and Bryan Alfaro were the assistant solicitors. R. 111.

On July 1, 2010, the jury found petitioner not guilty of burglary in the second degree but guilty of murder. R. 840, l. 21 – 841, l. 4. Judge Harrington sentenced petitioner to forty-five years imprisonment. R. 844, ll. 9-12.

The Court of Appeals affirmed petitioner's convictions in State v. Jeffrey Michaelson, Unpublished Opinion No. 2013-UP-188, filed May 8, 2013. App. 1-2. Petitioner sought rehearing. App. 3-14. Rehearing was denied. App. 15.

This petition for a writ of certiorari to the Court of Appeals follows

ARGUMENT

The Court of Appeals erred by holding the judge did not abuse her discretion and deny petitioner his right to compulsory process, confrontation, and his Due Process right to a fair trial by denying petitioner a continuance to secure the presence of Detective Merrithew where that Detective voluntarily left the country for Afghanistan after being available for over thirty terms of court, since the Detective was a material witness as the first trial judge properly ruled, and particularly where the Detective had returned once to Berkeley County after leaving the country.

**Relevant Facts**

As Judge Harrington had previously ruled, Detective Merrithew was a critical material witness in this case. At the December 7, 2007 preliminary hearing, petitioner appeared along with co-defendant Katherine Feaster. Feaster was the first person arrested in this “cold case” allegedly “solved” by Detective Merrithew, and she was charged with accessory after the fact of murder and receiving stolen goods after allegedly telling Merrithew what occurred in this case. R. 3, l. 4 – 4, l. 1.<sup>1</sup>

Detective Merrithew testified at the preliminary hearing that on February 2, 2001 a police report was filed by the decedent’s mother, Francis Reeves. Reeves was also the owner of the burglarized house home from which the property was stolen. R. 4, l. 7 – 5, l. 1. Merrithew testified that he continued to run names of family members through a “pawn shop list” hoping to find one of them had pawned some of the stolen property. R. 5, ll. 1-8.

During this process, Merrithew learned that the decedent’s step-daughter, co-defendant Katherine Feaster, had sold some jewelry to a pawn shop in Greenville, South Carolina. R. 5, ll. 9-

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<sup>1</sup> These citations are all from the December 7, 2007 preliminary hearing.

22. Merrithew was able to find Feaster and he arrested her for possession of stolen property. He told Feaster that he knew she was involved in the disappearance of her step-father, the decedent. “[S]he named people involved, which would be her husband, her brother, and their friend, which is also in the courtroom, and a Defendant today, Mr. Michaelson. She confessed to pawning the jewelry.” Petitioner was the only person charged in the death of the decedent who was not a relative of the decedent. R. 6, ll. 3-17.

Merrithew also testified that Feaster’s husband confessed he knew about the murder and “he knew where the body was buried.” R. 6, ll. 21-24. Merrithew said that petitioner was implicated in the murder and he said that petitioner’s “common-law wife” or girlfriend gave the police consent to search a storage facility where they found some more of the decedent’s stolen property. R. 7, ll. 3-10.

Merrithew testified that the decedent’s body was buried in a 55 gallon drum in petitioner’s front yard. “Consequently, all were charged.” R. 7, ll. 11-20. Merrithew confirmed that based on Feaster’s statements and her husband’s statements that petitioner was charged with murder. R. 8, ll. 15-25.

On cross-examination Merrithew acknowledged that statements given in this case were not consistent. Merrithew admitted that unlike the other suspects, petitioner was not related to the decedent and Merrithew knew of no personal animosity petitioner had towards the decedent. R. 12, l. 18 – 13, l. 18.

Merrithew further said that he was told in one statement by a witness that petitioner was upset because his grandmother had died and “he felt like killing somebody and they all say let’s go kill Parish.” Merrithew acknowledged petitioner did not even know Parish. R. 17, ll. 2-19.

Merrithew opined the only way petitioner knew anything about the decedent “is he would have got it from the Feasters.” R. 18, ll. 11-15.

As to the inconsistent statements, Merrithew said he was told in one statement that Feaster wanted to borrow money from the decedent and that he “made some sexual advances towards her.” Feaster apparently claimed she told her husband, her brother, and Michaelson who “all left the residence to go deal with Mr. Reeves.” Merrithew said he was told by one suspect that petitioner was going through “some type of mental distress about a family member denying and that he felt like killing someone.” R. 21, ll. 6-23. Petitioner and Feaster were bound over for trial at the conclusion Merrithew’s testimony. R. 23, ll. 7-9.

On April 30, 2010, defense counsel filed a motion for a continuance. R. 85. Judge Dennis had ordered a continuance granted on March 22, 2010 because the testimony of “Jerry Merrithew is material to the Defense,” counsel exercised due diligence in attempting to secure his presence, and the motion was not made for purposes of delay. R. 34.

In the present motion for a continuance, counsel noted that the Berkeley County Public Defender’s Office was appointed to represent petitioner on August 29, 2007. On November 20, 2009, counsel learned through informal sources that Detective Merrithew had resigned his position with the Berkeley County Sheriff’s Office “and **voluntarily** removed himself from the jurisdiction of this court by securing employment with a *private* security firm in Afghanistan.” R. 86. (second emphasis added). Counsel noted that she attempted to serve Merrithew with a subpoena on November 23, 2009, but Captain Rick Ollic of the Detective Unit refused service of this subpoena stating that Detective Merrithew was in Afghanistan.

Later, after an in chambers status conference with Judge Harrington on March 26, 2010, the prosecution announced its intention to place the case on the trial docket for the April 26, 2010 term.

Apparently over the **state's** objection, Judge Harrington granted a continuance for the April 26 term. The motion noted, however, that Judge Harrington had failed to address the compulsory process and due process issues as well as the right to confront a hostile witness that were raised in the continuance motion. R. 87.

At the April 16, 2010 hearing before Judge Harrington defense counsel argued again that Detective Merrithew was a material witness and that fact had not changed since the earlier grant of a continuance. R. 51, ll. 14 -23.

Defense counsel stated the defense had been trying to secure alternative ways to have Merrithew's testimony placed before a jury when he returned to the jurisdiction. One such way, a videotape deposition, was not possible. Counsel noted that Judge Dennis had ruled that there was no case law that would support such a procedure. R. 52, ll. 1-9.

Defense counsel stated that an email he received from the assistant solicitor led her to believe that arrangements were being made to secure Detective Merrithew's presence at trial. R. 52, ll. 16-24. Defense counsel argued under the Sixth Amendment petitioner was entitled to compulsory process and the right to a fair trial. R. 53, ll. 9-17. Counsel's argument was threefold in this case: That the denial of a continuance to secure Detective Merrithew's presence would deny petitioner his right to compulsory process, to confrontation, and the right to present a complete defense (a fair trial). R. 54, l. 12 – 58, l. 23.

Counsel noted that Merrithew was a material witness because he was the key investigating detective and he "followed pawn tickets. He did a whole bunch of preliminary investigation prior to the time that these folks were taken into custody." Counsel argued there was good reason to believe Detective Merrithew knew that Travis Feaster had burglarized the decedent's home on a prior

occasion and that was “certainly fodder for cross-examination” and that the quality of the investigation was key issue in this case as it involved petitioner. R, p. 54, l. 12 – 58, l. 23.

Defense counsel also told the judge that “there were 32 terms of court that this case could have been called “before “Gerry Merrithew is no longer available.” R. 61, ll. 12-20. Defense counsel told the judge she had used all due diligence to secure Detective Merrithew’s presence and that she had no interest in delay and that Detective Merrithew was a material and critical witness in this case. R. 62, l. 1 – 67, l. 23.

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The judge also told defense counsel that there was no need to rehash the previous motions for a continuance, and she did not need to hear all the particulars of the prior motions. Defense counsel repeated that she did not know of any way -- videotape or otherwise -- to have Detective Merrithew’s testimony placed before the jury without him complying with a subpoena. “I have no method of compulsory process to have Detective - - or secure Detective Merrithew’s presence.” R. 125, l. 22 – 128, l. 6.

Defense counsel reminded the judge that petitioner was arrested on August 7, 2007 and that there had been 30 terms of court in 2008 and 2009 during which the state could have called the case where “Detective Merrithew was present and available to me for compulsory process.” R. 128, ll. 7-18.

Defense counsel also argued that Detective Merrithew was given a list of people in the area at the time the decedent disappeared, and Merrithew used that list “to develop leads.” The defense had a right and a need to question Detective Merrithew about his investigation of the people involved and the information that was provided to him. R. 130, l. 4 – 135, l. 16.

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Counsel found “it suspicious that it [petitioner’s trial] was put - - that it was put on what I would call the final trial docket for November 30 almost immediately after he [Merrithew] left, because it was first noticed on October 12.” R. 148, ll. 15-24.

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The following day, at the beginning of court, the judge denied the motion for a continuance. She stated “the detective is simply unavailable.” She stated that the defense argument “has been fully articulated and preserved for the record.” R. 200, l. 10 – 202, l. 2.

Defense counsel then announced that she wanted to appeal or seek a writ of supersedeas from the appellate court.<sup>2</sup> R. 202, l. 4 – 210, l. 6.

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<sup>2</sup> Defense counsel told the judge that she had been advised she had the right to appeal this ruling by the Chief Attorney at the Office of Appellate Defense. Undersigned counsel, as an officer of this Court, and the Chief Appellate Defender, did *not* give that advice to defense counsel. Defense counsel may also have been confused as to the person who was the Chief Appellate Defender when she consulted this office about the possibility of an appeal and/or a supersedeas.

### **Trial Evidence and Further Motions for a Continuance**

As seen above, there was evidence the decedent made sexual advances which may have been the cause of whatever happened in this case. The judge stated that she would allow evidence that the decedent had been abusive towards the step-mother and the judge stated as with the motion for a continuance that motions in limine regarding abuse were subject to change during the trial. R. 270, l. 2 – 271, l. 14.<sup>3</sup>

The Jackson v. Denno hearing is included in the record because it further reveals Detective Merrithew was a key player in this case. Detective Michael Crumley of the Berkeley County Sheriff's Department testified he took petitioner into custody on August 7, 2007 and read him his Miranda warning. R. 214, ll. 9-14. He turned petitioner over at the Sheriff's office to Detective Merrithew and Detective Freeman. R. 217, ll. 16-20. On cross-examination, Crumley stated he believed he arrested petitioner at the direction of Detective Merrithew. R. 220, ll. 2-4.

Detective Diana Freeman testified that Detective Merrithew had just come into their division in Berkeley County so he took the present case as one of the cold cases. R. 241, ll. 8-18. Merrithew asked Freeman to run pawn shop records for him. R. 243, ll. 7-18.

The decedent's mother, Francis Reeves, testified in the presence of the jury that her daughter-in-law, Brenda, called and told her the decedent was missing. Reeves said she did not and does not know petitioner. R. 287, l. 9 – 289, l. 24. Reeves stated that she went to the Detective's office upset and crying and she said that Detective Merrithew promised to get involved in the case and investigate it to solve it. R. 300, l. 4 – 302, l. 7. Reeves was able to later identify stolen jewelry that was shown to her.

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<sup>3</sup> Petitioner remained out on bond during the trial. R. 177, l. 20-21

Brenda Ahrenholz was the decedent's estranged wife. She last saw him on the night of January 19, 2001. Brenda said that her house was broken into and jewelry stolen from their safe. R. 308, l. 3 – 310, l. 17.

She did not immediately report the decedent missing because the decedent had tax problems and she thought that "he had run from his taxes." R. 317, l. 16 – 318, l. 9. She also thought that the decedent had broken into the safe and she had the locks changed. R. 320, l. 13 – 321, l. 23.

As stated above, the decedent's body was found in 55 gallon drum with a rubber tarp taped to it. This was apparently in petitioner's yard and apparently near where the others lived. R. 376, l. 19 – 378, l. 6. The decedent had been shot, but no weapon was submitted for comparison. R. 421, l. 1 – 424, l. 25.

On July 6, 2010, during the trial, defense counsel renewed her motion for a continuance. R. 442, l. 17 – 445, l. 24. She noted that all of the witnesses with the exception of the chain witnesses "have referenced directives from Detective Gerry Merrithew as to their participation in the case." She noted Detective Crumley and his directive to pick up petitioner. There was also Francis Reeves and her discussions with Merrithew. Further, there was his investigation and Brenda Ahrenholz's testimony that was inconsistent with the testimony Detective Merrithew gave at the preliminary hearing. Defense counsel argued that she had no opportunity in the absence of Detective Merrithew to refute or rebut the testimony. R. 442, l. 23 – 445, l. 19. The judge denied the motion "for a continuance at this time." R. 445, ll. 21-24.

Detective Diana Freeman acknowledged she assisted Detective Merrithew in the case but that Merrithew was the lead detective. R. 501, l. 15 – 502, l. 8. Freeman also said she took notes while Detective Merrithew interviewed Katherine Feaster on the way from Pelzer to Moncks Corner. R. 511, ll. 17-22.

Freeman also testified that Merrithew stated he continued working on this case even after Freeman left the unit, but she could not explain why Detective Merrithew had no investigation documented past August 13, 2007. R. 529, ll. 8-25. On redirect examination, Freeman told the jury that Detective Merrithew was in "Iraq, Afghanistan, somewhere overseas." R. 543, ll. 16-20.

Defense counsel countered that "[i]t's been my position and our position all along that Detective Merrithew was an essential witness for our defense, and the assistant solicitor made reference to Detective Merrithew not being here . . ." Defense counsel said some of the testimony provided by Detective Freeman contradicted Detective Merrithew's testimony at the preliminary hearing and this went to the heart of petitioner's defense. R. 673, l. 25 – 674, l. 25.

After the judge denied the directed verdict motions, he asked defense counsel if they had made any other efforts to contact Detective Merrithew. Defense counsel answered "no, Your Honor, because he is beyond the subpoena power of the court." The judge stated she was again denying the motion for a continuance. R. 761, l. 11 – 762, l. 6.

### **The Court of Appeals**

The Court of Appeals in a one page parenthetical cited cases for the general propositions that continuance denials are rarely reversed on appeal, that a party requesting a continuance must use due diligence to obtain the presence of the missing witness, and that the state is not required to call every witness with material knowledge of the facts surrounding the crime. App. 2.

### **Discussion**

As seen, Judge Dennis had ordered a continuance granted on March 22, 2010 because the testimony of "**Jerry Merrithew is material to the Defense,**" counsel exercised due diligence in attempting to secure his presence and the motion was not made for purposes of delay. R. 34.

(emphasis added). Later, defense counsel added that “**there were 32 terms of court that this case could have been called**” before “**Gerry Merrithew is no longer available.**” R. 61, ll. 12-20. Defense counsel told the judge she had used all due diligence (again as found earlier by Judge Dennis) to secure Detective Merrithew’s presence and that she had no interest in delay and that Detective Merrithew was a material and critical witness in this case. R. 62, l. 1 – 67, l. 23.

The Sixth Amendment to the United States Constitution provides an accused the right an impartial jury (fair trial) and the right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.

Here, the trial court earlier correctly granted a continuance on March 27, 2010 based on the absence of material witness lead Detective Gerry Merrithew. The judge found that Merrithew was a material witness and that the motion for a continuance was not intended for delay and was made solely because the defense could not go to trial safely without Detective Merrithew’s testimony. The judge also found the defense exercised due diligence and that Merrithew’s absence from the jurisdiction and unavailability for trial was voluntary. See Order of Judge Dennis R. 32.

As also seen above, defense counsel also noted that the state had over 30 terms of court in which they could have called petitioner’s case to trial where Merrithew would have been available as a witness. Further, the defense learned that Merrithew was back in Berkeley County at the jail in March. The defense missed the opportunity to subpoena him then because they were not notified of Merrithew’s presence where Judge Dennis apparently earlier urged such cooperation.

In State v. Dodgens, 120 S.C. 239, 113 S.E. 77 (1922) a defense witness had been subpoenaed but left the court without the defendant’s knowledge or consent. The Supreme Court held that the refusal to issue a bench warrant to secure the witness’s presence or to postpone the trial

until the witness was present was a denial of the accused's right to have compulsory process for obtaining witnesses in his favor.

Here, the defense acted with due diligence, and, again, there was no change in circumstances from the time that Judge Dennis properly granted the motion for a continuance for the defense to secure the presence of material witness Detective Merrithew.

Petitioner was out on bond during this time, and it is clear that the trial judge did not consider him a flight risk since she allowed him to remain out on bond during the trial also. Acquiescing to the state's wish to try this case because **the state** no longer needed Merrithew was an abuse of discretion which denied petitioner his right to compulsory process, to confrontation, and to a fair trial where he could present a complete defense.

Here, unlike State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009), the defense did continuously move for a continuance when it became aware that a material witness's presence could not be secured. Further, the witness in State v. Cooper had testified under oath during a prior trial and the defendant in Cooper was not denied his right to confrontation because he had had a full right to cross-examine Cooper.

Here, conversely Detective Merrithew's only testimony under oath came at a preliminary hearing, a summary proceeding, where the state need only establish probable cause to bind petitioner and Feaster over for trial. This obviously was no substitute for the right to confrontation and full cross-examination.

Here, defense counsel attempted to subpoena Detective Merrithew on November 23, 2009. However, Captain Ollic refused service of that subpoena and defense counsel filed a motion for a continuance the very next day. Defense counsel also filed a supplemental motion for a continuance

pursuant to Rule 7(b) of the South Carolina Rules of Criminal Procedure based on the absence of material witness Detective Merrithew.

The trial judge abused her discretion by refusing to grant a further continuance because the equities in this case were clearly on the side of the defense. As seen, Detective Merrithew readily admitted during the preliminary hearing that there were inconsistencies in the statements and stories he was told by suspects with obvious motives to attempt to lessen their own culpability and blame the murder on petitioner.

In State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002) the Supreme Court found the judge abused his discretion by refusing grant a continuance to allow defense counsel to obtain a copy of the trial transcript in order for him to properly impeach a witness against him.

Here, petitioner was denied any meaningful opportunity to cross-examine Detective Merrithew and Judge Dennis properly found Merrithew to be a material witness for the defense. The trial judge's denial of petitioner's **repeated** motions for a continuance in this case constituted a clear abuse of discretion. See, State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997).<sup>4</sup>

The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002) (*citing* State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)); See, also, State v. Lyles, 379 S.C. 328, 341-42, 665 S.E.2d 201, 208-09 (Ct. App. 2008) (*citing*, S.C. Const. art. 1, § 14)

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, (1973); California v. Trombetta, 467

U.S. 479, 485 (1984). State v. Hutton, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App.2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense); (“Due process requires that a criminal defendant be given a reasonable opportunity to present a complete defense.”) State v. Lyles, 379 S.C. 328, 341-42, 665 S.E.2d 201, 208-09 (Ct. App. 2008).

In Washington v. Texas, 388 U.S. 14, 19, (1967), cited during this trial, the United States Supreme Court elucidated the rights of an accused to present testimony:

“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” State v. Lyles, 379 S.C. 328, 341-42, 665 S.E.2d 201, 208-09 (Ct. App. 2008).

Finally, the solicitor's speculation that Merrithew “may never return” was feckless in light of the fact that he had already returned in March to Berkeley County. The judge abused her discretion, and the Court of Appeals erred by affirming her ruling. It denied petitioner his right to compulsory process, right to confrontation, and his due process right to a fair trial where he could offer a complete defense by denying petitioner a further continuance particularly given the equities in this case where the state had had over 30 terms of court to call petitioner's case where Detective Merrithew would have been available to testify, and where he had returned to the country and

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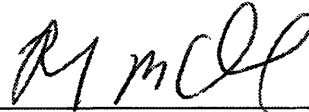
<sup>4</sup> Certiorari dismissed Patterson v. South Carolina, 482 U.S. 902 (1997).

county on a prior occasion. The summary opinion of the Court of Appeals affirming the denial of a continuance under the highly unusual facts of this case respectfully should be reversed.

CONCLUSION

By reason of the foregoing arguments a writ of certiorari should be issued to allow full briefing of this issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R M Dudek", written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of September, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Certiorari to Berkeley County  
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2013-UP-188 (S.C. Ct. App. filed 5/8/2013)  
09-GS-08-2295

THE STATE,

RESPONDENT,

V.

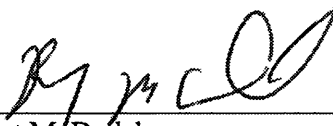
JEFFREY A. MICHAELSON,

PETITIONER

APPELLATE CASE NO. 2013-001570


CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 18th day of September, 2013.

  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of September, 2013.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 21, 2023

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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Appeal from Berkeley County  
Kristi Lea Harrington, Circuit Court Judge  
90-GS-08-2295  
Op. No. 2013-UP-188 (S.C. Ct. App. Filed May 8, 2013)  
Appellate Case No. 2013-001570

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THE STATE OF SOUTH CAROLINA,

Respondent,

v.

JEFFREY MICHAELSON,

Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**PETITIONER'S QUESTION PRESENTED ON CERTIORARI**

Whether the Court of Appeals erred by holding the judge did not abuse her discretion and deny petitioner his right to compulsory process, confrontation, and his Due Process right to a fair trial by denying petitioner a continuance to secure the presence of Detective Merrithew where that Detective voluntarily left the country for Afghanistan after being available for over thirty terms of court, since the Detective was a material witness as the first trial judge properly ruled, and particularly where the detective had returned once to Berkeley County after leaving the country?

**RESPONDENT'S STATEMENT OF THE CASE**

Respondent incorporates by reference its State of the Case set forth in the Final Brief of Respondent, p.1 and the statement of the crime and arrest set forth in the Final Brief of Respondent, pages 9-11.

**ARGUMENT**

- I. **The trial judge did not abuse her discretion in denying the motion for a continuance due to the absence of former deputy Gerald Merrithew, who was indefinitely residing and working overseas. The defense failed to show that Merrithew was a necessary witness for the defense where other witnesses were available to discuss the course of the investigation based upon their actual participation and presence during the interviews of the critical witnesses. The denial of the continuance did not violate the Petitioner's constitutional right to compulsory process or right to present a defense.**

This case involves whether a trial must be indefinitely delayed when a former law enforcement officer has not only left employment, but left the country with no specified date of return. Rather than seeking alternate means to secure the possible testimony from overseas, the Petitioner contends they made a sufficient showing by the mere fact that they attempted to subpoena his former employer after the witness had left the United States [and employment with the Berkeley County Sheriff's Department] to pursue private employment in Afghanistan. Rather than follow-up on the contact information provided by the prosecution to the defense of a telephone number and/or email, the defense apparently did nothing. The former sheriff deputy was briefly involved in the investigation, but the State, after the witness had left the U.S. [and sheriff's employment], consistently made clear to the trial court and the defense that it

did not intend to call Gerald Merrithew as a witness. The State advised the defense and the trial court that alternative witnesses were available, as well as the recorded interview by Merrithew and Sgt. Freeman of the Petitioner. The prosecution further stated the critical witnesses that the state intended to call in its case. Under the state's theory, each of the available witnesses either participated with Merrithew in the activity or acted independent of the activity that led to the arrests and the preparation of the trial.

A review of the record before this Court reveals that the Petitioner failed to show prejudice because he had not communicated with the witness and was unable to show the expected content of the unavailable testimony or to establish that the same potential information from Merrithew was not available from alternate witnesses. Instead, the Petitioner merely sought to rely upon the witness's former designation as "lead detective" and his prior hearsay testimony at a preliminary hearing. Such reliance was insufficient to show prejudice where a review of the record reveals a lack of involvement by Merrithew in the actual evidence development or an additional available witness's presence, particularly during the perpetrator's interviews. Certiorari should be denied.

#### STANDARD OF REVIEW

##### *Continuance Motion*

The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice State v. Meggett, 398 S.C. 516, 728 S.E.2d 492, 496 (S.C.App. 2012). Motions for continuance on account of absence of witnesses are similarly addressed to discretion of trial court, and Supreme Court will not interfere unless a clear case of legal error is shown. State v. Hewitt, 206 S.C. 409, 34 S.E.2d 764 (1945). Rule 7(b), SCRCrimP, provides that no continuance shall be granted based on the absence of a witness unless the party, his attorney or agent submits under oath that: 1) the testimony of that witness is material to support the action or defense of the moving party; 2) the motion is not intended for delay, but solely because the party cannot go safely to trial without the testimony; 3) the party has used due diligence to procure the witness' testimony; or 4) such other circumstances that satisfy the court the motion is not intended for

delay. Further, when a defendant argues he is prejudiced by the unavailability of witnesses, the defendant must identify the witnesses he would call, demonstrate with specificity the expected content of the unavailable witnesses' testimony, and establish the information is not available from other sources. State v. Brazell, 325 S.C. 65, 480 S.E.2d 64, 73 (1997); State v. Morris (Earle), 376 S.C. 189, 656 S.E.2d 359 (2008).

#### ***RIGHT TO CONFRONTATION***

The Confrontation Clause does not require the prosecution to call all adverse witnesses at the defendant's trial. See, e.g., U.S. v. Porter, 764 F.2d 1, 9-10 (1st Cir. 1985) (Confrontation Clause not violated when prosecution failed to call informant as witness and defendant chose not to call informant as witness despite informant's availability to testify).<sup>1</sup> South Carolina procedure is consistent with this interpretation. As stated in State v. Richardson, 253 S.C. 468, 473-474, 171 S.E.2d 717, 719 - 720 (S.C. 1969), it is now the general rule that the State is not required to place upon the stand every witness who has knowledge of material facts connected with the crime charged or whose name is endorsed upon the indictment. Accord State v. Weaver, 265 S.C. 130, 138, 217 S.E.2d 31, 35 (S.C. 1975).

#### ***RIGHT TO COMPULSORY PROCESS***

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). A compulsory process claim subject to a proper objection may be reviewed subject to harmless error analysis. See U.S. v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (compulsory process not violated by deportation of illegal aliens who could be defense witnesses

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<sup>1</sup> U.S. v. Moore, 954 F.2d 379, 381 (6th Cir. 1992) (Confrontation Clause not violated when prosecution did not produce cooperating individual because government agent personally secured evidence upon which defendant convicted); U.S. v. Morgan, 757 F.2d 1074, 1076-77 (10th Cir. 1985) (Confrontation Clause not violated when prosecution did not call informant as witness and judge limited defendant's direct examination of informant because limitations still allowed defendant to present defense that informant coerced defendant's involvement with crime). But see, e.g., U.S. v. Powers, 500 F.3d 500, 506 (6th Cir. 2007) (Confrontation Clause violated when court admitted testimonial statements made by confidential informant but prosecution failed to call informant as witness).

because defendant could not show lost testimony would have been material, favorable, and not merely cumulative).

The right to compulsory process however does not guarantee that a witness will be found and attend, but may place some obligation on the government to try to procure the witness's attendance. The right to compulsory process does not amount to a guarantee of the actual attendance of the witnesses, and is not violated merely because the witness leaves the jurisdiction. Commonwealth v. Lahoud, 339 Pa. Super. 59, 488 A.2d 307 (1985).

This right proscribes 'the government's making a witness unavailable. See United States v. Colin, 928 F.2d 676, 679 (5th Cir.1991). To make this right fully meaningful it has been extended to proscribe the government's making a witness unavailable and thereby preventing a defendant from interviewing the witness and determining whether he will subpoena and call the witness in his defense. When the Government makes a witness unavailable, the defendant "must at least make some plausible showing of how [the witness's] testimony would have been both material and favorable to his defense ." See United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). The state has no obligation to produce a witness who, through no fault of its own, has become unavailable because of disappearance, illness, or death. People v. Chastain, 733 P.2d 1206, 1212 -1213 (Colo.,1987).

#### ANALYSIS

1. **There is no compulsory process violation where the State did not make Merrithew unavailable.**

The State did not make Merrithew unavailable, and therefore the Government's conduct did not rise to the level of a constitutional violation. Merrithew had resigned his law enforcement position and had moved to a foreign country for employment. See U.S. v. Colin, 928 F.2d 676, at 679. This is no different than if the Government simply permitted a witness whom the government had subpoenaed to return to his home country after it was determined that his testimony would not be required at trial. The trial court recognized this fact as persuasive in rejecting the constitutional violation claim. R. 200-01, 148-49, Tr.p. 127-128, See Tr.p. 39-40. The Petitioner has failed to show a Confrontation Clause

violation.

2. **Where the Petitioner failed to show that Merrithew was a material witness with exclusive information about the case, the request for a continuance was properly denied when prejudice was not shown from his absence and his rights to confrontation and Due Process were not denied.**

In his petition before this Court, Petitioner only makes generalized non-specific assertions as to why potential witness Gerald Merrithew's absence at trial deprived him of a defense. Petitioner asserts that in his preliminary hearing testimony Merrithew had admitted that there were inconsistencies in witness statements from the suspects who had individual motives in their statements to law enforcement and that Michaelson was now denied an opportunity to cross-examine Merrithew due to his absence. Petition, p. 18-19. Further, he complains that the prosecution's rhetorical speculation that Merrithew may never return was "feckless," despite the fact that the defense had not actually communicated with potential witness Merrithew about either his potential testimony or future presence in Berkeley County. Id.

As revealed below, the Petitioner was unable to articulate prior to the trial the potential testimony he sought to present through Merrithew and its uniqueness or unavailability through other witnesses. In fact, although being provided a telephone number and email address for months, the defense made no contact with Merrithew, by their own admission, concerning either the potential testimony or his availability. A review of the actual trial testimony reveals that Petitioner has failed to show any prejudice by the absence of Merrithew or assert any available deficiencies in the critical testimony. Simply put, the Petitioner has failed to show any deprivation of a right to present a defense or a denial of due process by the failure to have Merrithew present.

#### **How the Continuance Issue Was Presented**

These events are set forth in detail in the Final Brief of Respondent, p. 9-39. Respondent incorporates those matters by reference. Respondents will attempt to highlight the critical portions in response to the Petition. The focus of Petitioner's continuance request stems from the testimony of then

Detective Gerald Merrithew at a preliminary hearing on December 7, 2007. R., Dec. 7, 2007 Tr. p. 1-23.<sup>2</sup>

<sup>2</sup> In the preliminary hearing testimony, Detective Merrithew initially described the facts that led to establish probable cause to charge Feaster with accessory after the fact of murder. R., Dec. 7, 2007 Tr. 4. Det. Merrithew declared that a police report was filed February 1, 2001 concerning a burglary, suspicious activity and a missing person. He stated after some investigation, the case went cold.

Det. Merrithew stated that he was assigned the case in 2006. He stated that he contacted Frances Reeves, the missing person's mother, who owned the house where the goods were stolen. He received a list of the family members and compared that list with the pawn shop list in 2001. He found the name of her stepdaughter, Katherine Feaster, on the pawn shop list as pawning the same list of items missing from the residence. R., Dec. 7, 2007 Tr. 4-5. Det. Merrithew stated that he reviewed the pawn shop records and located some jewelry which was unique and identified by the victim's mother and others as one of the stolen items. Id.

Detective Merrithew also noted that the missing item list matched the list of pawned items. Id. R., Dec. 7, 2007 Tr. p. 5, ll. 23-25. Det. Merrithew was unable to recover items sold for cash. He had a warrant issued for Ms. Feaster for possession of stolen goods, and ultimately arrested her and had her transported to Berkeley County. Id. p. 6.,

Feaster was advised of her charge and she named the people involved in the disappearance of her stepfather, including her husband, her brother, and their friend. Her brother confessed that he was at the scene of the murder. Her husband confessed that he knew about the murder and where the body was buried. Id., R., p. 6, ll. 22-25.

Det. Merrithew testified that the Petitioner was located, Mirandized, and then confessed that he was on the scene when the murder happened and that he also knew where the body was located. Id., R., 6-7. A consent to search a storage facility area by Michaelson's girlfriend (common law wife) resulted in locating more stolen goods from the victim's residence. Id. R., p. 7, ll. 3-10.

Det. Merrithew next reported that a search warrant at a former residence was prepared. It resulted in the discovery of the body of the victim buried in a 55 gallon drum in the front yard. Id., R., p. 7, ll. 11-14. Det. Merrithew reported that Mrs. Feaster was charged with accessory after the fact because she had knowledge of it after it took place when her husband told her about it when he got home. Id., R., p. 7, ll. 15-20.

Det. Merrithew reported that Mr. Jeremiah Scharer stated that Petitioner was in the pick-up truck with the victim and he felt the vehicle jerk, heard a pop, and that the victim was dead with a gun shot to the head. Mr. Feaster had stated he met with Jeremiah and Michaelson at end of the road and that the victim had already been shot. Det. Merrithew reported that Michaelson stated that Feaster shot the victim. Id., R., Tr. p. 8, ll. 9-14.

Det. Merrithew reported that Ms. Feaster's husband and brother (later) told her that Michaelson had shot the victim in the head. Id., R., Tr. p. 8, ll. 17-19. Det. Merrithew declared that based upon those statements, Michaelson was charged with murder. Id., R., Tr. 8-9.

*Cross-Examination of Merrithew at the Preliminary Hearing*

Counsel Kennedy cross-examined Det. Merrithew on Petitioner's behalf. Id., R., Tr. 9-20. Counsel began by focusing on the sequence the various statements had been given. Det. Merrithew stated that he first met with Mrs. Feaster in Pelzer on August 6 and then brought her to Berkeley County where she gave a statement at 2:30 p.m. Id., R., Tr. p. 9, ll. 9-22. Her brother, Jeremiah Scharer, gave a statement the next morning - August 7 at 8:27 a.m. and her husband gave a statement at 11:39 a.m. Jeremiah was contacted after Mrs. Feaster's statement and had given his statement approximately 20 hours after Ms. Feaster was in custody. Det. Merrithew indicated that Jeremiah had been in Cottageville and had to find a ride to Berkeley and it took a while to get there. Id., R., Tr. 10. Det. Merrithew stated that the third person came in after he left work in Pelzer (Greenville area), after family members had located him and "we spoke to him" and he came down and turned himself in. Id., R., Tr. p. 11, l. 13 - p. 12, l. 1. Det. Merrithew stated there was no contact between Mrs. Feaster and Mr. Feaster. Id., R., Tr. p. 11, l. 19.

Det. Merrithew stated that "we" spoke with Mr. Feaster around 11 a.m. and spoke with Michaelson around 4:10 p.m. Id., R., Tr. 12. Det. Merrithew stated that by that time, Mrs. Feaster, Mr. Feaster, and Mr. Scharer were already in custody and each had given statements implicating Michaelson. Id., R., Tr. p. 12, ll. 8-20. Det. Merrithew acknowledged that there were some inconsistencies in the statements of the others, but denied inconsistencies to how it came about. Id., R., Tr. 12-13. Det. Merrithew stated that he did not have any knowledge (at that time) that Michaelson knew anything about the victim, that Michaelson had any contact with the victim prior

Gerald Merrithew had left employment with the Sheriff's Department on October 16, 2009 and moved to Afghanistan in private employment on November 7, 2009. ROA 59-60. April 16, 2010 Tr. 15-16. Defense counsel confirmed that they had learned this around November 20, 2009.

**April 15, 2010 Motion for Continuance and April 16, 2010 Hearing**

The Petitioner made a motion for continuance on April 15, 2010. R. 35.<sup>3</sup> A motion hearing on

to the incident or had any personal animosity toward the victim. Id., R., Tr. 12-13.

Det. Merrithew stated that after he had checked with pawn shops, he discovered that Mrs. Feaster was on the list of family members and that she was the only person who had disposed of the items off the list, although Michaelson also had additional items in his storage area. Id., R., Tr. p. 14, ll. 1-12.

Det. Merrithew stated that when Mrs. Feaster had given her statement that she had been in custody a couple of hours since 12:00. He stated she had become aware and started discussing the case on the ride down from Pelzer to Berkeley, but was not memorialized in the written statement until 4:00. Id., R., Tr. p. 15, ll. 17-21. He stated because he knew where she was the whole time that there was no chance or opportunity for her to tell either her brother or husband what she stated in her written statement. Id., R., Tr. 15-16. He stated that they made sure this could not happen. Id., R., Tr. p. 16, ll. 4-16.

As to the brother and husband, Det. Merrithew stated that they wrote down what was reflected in the statements and "they all basically say that Parish Reeves is dead due to a gun shot wound from Mr. Michaelson." Id., R., Tr. p. 18, ll. 3-5. Det. Merrithew confirmed that Scharer stated that Michaelson said he was going to deal with Reeves, which Merrithew related to information Michaelson had gotten from either the Feasters or Scharer. Id., R., Tr. p. 18, ll. 11-16. Further, Merrithew confirmed that Feaster made a comment that Michaelson's grandmother had died and that he felt bad about it. Id., R., Tr. 18-19.

Det. Merrithew stated that Michaelson's common law wife (Christine Thomas) had an interest in the storage area because they had stuff in there together. Id., R., Tr. p. 19, ll. 3-15. She had given written consent. Id., R., Tr. 19-20. Det. Merrithew stated that Feaster had rented the bush hog from a company that was defunct and owner had died. However, a family member had located some documentation and that Feaster had stated he had gotten it also. Id., R., Tr. 20.

Counsel for Ms. Feaster also cross-examined Det. Merrithew. In response to an inconsistency question, Det. Merrithew opined that in one of the statements, it had been reported that Mrs. Feaster came in because she went to borrow money from the victim who made sexual advances towards her and that the three individuals left the residence to go deal with the victim, although her brother claimed to not be aware of the reasons. Merrithew stated that Feaster stated they went over to the victim's to tell him to leave his wife alone or to beat him up. Id., R., Tr. p. 21, ll. 6-19. As to Michaelson, he claimed to be in mental distress after a family member dying and felt like killing someone and Jeremiah had said Michaelson said he was going to kill him or found out later he was going to kill him. Id., R., Tr. p. 21, l. 19 - p. 22, l. 3.

Probable cause was found and each defendant was bound over to the Grand Jury. Id., R., Tr. 23.

3 On April 16, 2010, the State responded in opposition to the continuance request. State's Response to the Notice of Motion and Motion for Continuance, filed April 16, 2010. R. 38-44. The State's initial opposition was the Petitioner's continuing failure to comply with Rule 7(b) of the South Carolina Rules of Criminal Procedure. The State maintained that Petitioner never stated under oath *what facts* he believed the witness, former Berkeley County Sheriff's Office Det. Gerry Merrithew, if present, would testify to and the grounds for that belief. In addition, the State asserted that the other requirement of Rule 7(b) had not been complied with. R. 38.3 The State asserted that a continuance was in the sound discretion of the court. Based upon Rule 7(b) and State v. Colden, 372 S.C. 428, 641 S.E.2d 912 (S.C. App. 2007), the State maintained that Rule 7(b) should be strictly applied and that there was support when counsel failed to express why they needed the witness and failed to state that due diligence was employed. The State maintained that the defense's failure to articulate under oath either the facts Merrithew would testify or the due diligence to procure Merrithew's testimony.<sup>3</sup> Id., p. 6 R. 43.

The State urged a denial of the continuance motion. In the pleading, they noted the victim's mother was a

the continuance motion was held before Judge Kristi Harrington on April 16, 2010.<sup>4</sup> On April 23, 2010,

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fact witness and 77 years old. The State further noted that the crime happened nine (9) years earlier and it had been 3 years since the arrest. The State opposed the request of an open-ended continuance. The State noted that Merrithew "did nothing in the present case without the assistance of other detectives and deputies." The State asserted no interviews were conducted by him alone, nor was any evidence collected by him without the company of another deputy. The State contended any information about interviews, evidence collection or other aspects could be obtained from other employees of the Sheriff's Department. *Id.* p. 6. R. 43. Finally, the State asserted that Merrithew had no firm date to return to the United States, which as noted in April could abruptly change. R. 43.

4 As the prosecutor urged in opposition to the motion:

We know of no information that Detective Merrithew has independent of anybody else at the Berkeley County Sheriff's Department. He interviewed three witnesses on videotape and he was accompanied by a Berkeley County Sheriff's Department either detective or deputy for each one of the interviews. They are videotaped and they are recorded. He collected no evidence outside the company of another deputy.

We are not aware of anything that he could testify to that someone else couldn't testify to. And that is why we are prepared to go forward without him.

R. 51, April 16, 2010 Tr. p. 7, ll. 1-11.

The defense claimed that Merrithew was a material witness. The Petitioner acknowledged that Judge Dennis had previously suggested as an alternative that there could be a videotape deposition, but Counsel Kennedy asserted that this was not provided for in the rules. She stated this would not be admissible under Logan v. Gatti, 288 S.C. 546, 347 S.E.2d 506 (S.C. Ct.App. 1986), which she mistakenly asserted held that depositions and affidavits were not admissible. R. 52, April 16, 2010 Tr. p. 8, ll. 1-15. Defense counsel stated that she had erroneously assumed when she learned of the March 20 status conference that arrangements had been made (by the State) to secure Merrithew's presence. However she confirmed, at that conference, the State asserted that they would not be calling him and that he was on an unpredictable schedule. R. 52-53, April 16, 2010 Tr. 8-9. Counsel Kennedy summarized her basis for why she thought Merrithew was material:

1. He's the person who did the investigation from 2006 to 2007.
2. At the preliminary hearing, he made representations about other investigative matters being pursued which she claims were not followed up on.

R. 58, April 16, 2010, Tr. p. 14, ll. 15-23.

Concerning her attempts to locate the witness, counsel Kennedy admitted he was out of the jurisdiction and the country. She is unable to serve him in Afghanistan nor any way to force him back. She stated in November she attempted to serve Merrithew at the Sheriff's office, but he had already left employment on October 16 and had gone to Afghanistan on November 7, 2009. R. 59-60, April 16, 2010 Tr. 15-16. The defense opined that there were 32 terms of court between the January and the November term and found it odd that the case was not called until November when was no longer available. R. 61, April 16, 2010 Tr. p. 17, ll. 12-15. Counsel opined that she had used due diligence to acquire his testimony. She stated that she learned Merrithew was in town in March briefly, but was not aware if the Solicitor's Office was aware of it. R. 62-63, April 16, 2010 Tr. 18-19. Counsel stated that there were search warrant issues concerning Merrithew having shown jewelry to certain witnesses that might not be able to be linked to his client, the video statements reflect Merrithew was asking the questions, although someone else was present. R. 63-64, April 16, 2010 Tr. 19-20. Counsel asserted she could not find any case law or rule that allowed her to procure the testimony. "[A]nd, quite frankly, if the suggestion is that it be done by deposition, which again is contrary to the case law, I wouldn't consent to it." R. 64, April 16, 2010 Tr. p. 20, ll. 15-17. She stated juries have the right to judge the credibility of a witness, which includes how they sit, turn, how nervous they get and the delay in responses. *Id.*, R. 64, p. 20, ll. 18-23.

In response, Assistant Solicitor Williams noted that Rule 7(b) was not strictly complied with because there has only been a general statement to have him placed on the stand, but included no facts under oath that they believe the witness would present. R. 73, April 16, 2010 Tr. p. 29, ll. 1-16. She asserted that letting the jury see if he is dishonest because of his mannerisms is not in compliance with Rule 7(b). Assistant Solicitor Williams stated that rule compliance would require what statements they claim Merrithew made prior to the videotaping; noting that

Judge Harrington entered an order denying the continuance based upon the unavailability of Merrithew.

R. 81-84. In particular, the Court made the following conclusions:

This Court finds that the production of a witness to testify against a Defendant is an essential aspect of a Defendant's rights under the confrontation clause. There is no prejudice against a defendant in not being able to examine an unavailable witness if that unavailable witness will not be testifying against him.

Order, April 23, 2010, p. 2, ¶ 3. R. 82. The hearing judge also concluded: "Nothing in the record presented during this hearing demonstrates to this Court that Merrithew's presence is material to the defense of either of the moving parties." Order, April 23, 2010, p. 3, ¶ 2. R. 83. Further, the Court concluded:

The State maintains that neither Merrithew nor any evidence dependent on him will be presented at trial against the Defendant, therefore a challenge to his credibility is of no value to the Defendant's case. The State asserts that statements collected from the Defendant was done so in the presence of officers other than Merrithew and that those officers will be at trial to testify to the circumstances surrounding their issuance. The Defendant provided no reason how Merrithew's specific testimony or presence would benefit their defense. Since the Defendants failed to show the materiality of Merrithew's testimony, it is this Court's ruling that the Defendants' motion is hereby DENIED.

Order, April 23, 2010, p. 3. R. 83. (emphasis added).

On April 30, 2010, counsel for Petitioner made another motion for continuance. April 30, 2010 Motion, p. 1-4. R. 85-88. As with the other motions, Petitioner sought to request a continuance until Merrithew could be present for trial. *Id.*, p. 3 R. 87. On June 24, 2010, the Solicitor's Office opposed the motion to continue by written motion. R. 92-96.

#### **June 28, 2010 Pre-Trial Continuance Motion Hearing**

In his Petition before this Court, the Petitioner focuses on this June 28, 2010 hearing prior to jury

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available (and called) witness Detective Diana Freeman was present the whole time. R. 74, April 16, 2010 Tr. p. 30, ll. 2-9. The Solicitor responded that whatever statements Merrithew made were in the presence of Sgt. Freeman and Lt. Mason. *Id.* R. 74, Tr. p. 30, ll. 18-21. Assistant Solicitor Williams summarized that the videotapes show each witness present at the statements. She declared that there is no information that Merrithew can exclusively testify about. Further, she declared "we never planned to call Detective Merrithew" and the State is not obligated to call any witness just so the defense can attempt impeachment. R. 75. She stated she was unaware of anything in the case and discovery that Merrithew took without another detective being involved. She confirmed that they were going to call Sgt. Freeman as the case agent and Lt. Mason. Williams clarified that Merrithew was with a private firm and they had thought he was returning during the April 12<sup>th</sup> term but when they called him, they learned he was going back to Afghanistan and his employer policy does not make clear when he would be back. R. 77-78, April 16, 2010 Tr. 33-34.

selection where the defense renewed its motion for continuance. Petition, p. 9-12. Respondent incorporates by reference its summary of this hearing in our Final Brief of Respondent, p. 24-35. Simply put, the arguments did not change. Counsel Kennedy again argued that Merrithew as a critical witness for the defense. R. 114-121, Tr. p., l. 21 - p. 12, l. 13. Counsel Kennedy asserted that the motion had been filed under Rule 7(a). R. 124. She initially responded that although the prosecution asserted that Judge Dennis requested she contact Merrithew (and was provided contact information) about a possible deposition, Ms. Kennedy concluded that there was no basis under S.C. procedure that allowed for either videotape deposition or affidavits of his testimony. R. 126-27, Tr. p. 17, l. 13 - p. 18, l. 8. She further asserted that the Uniform Act to Serve the Attendance of Witnesses from Without the State in a Criminal Proceeding (S.C. Code § 19-19-10, et. seq.) was unavailable for persons outside of the U.S. R. 128, Tr. p. 19, ll. 9-19. She concluded that there was no compulsory process available to secure Mr. Merrithew's presence. R. 127, Tr. p. 18, ll. 17-20. Counsel Kennedy acknowledged that she had been made aware earlier that the State did not intend to call Merrithew. R. 128, Tr. 19. She claimed that since her client's arrest on August 7, 2007 until August 2010, in 2008 and 2009 there were 30 terms of court when Det. Merrithew was and the case could have been called to trial and available for compulsory process. Counsel noted that she became aware of Merrithew's absence only after he had left the jurisdiction when the case was called understanding that he left December 2009. R. 128-29, Tr. 19-20.

She contended that the materiality issue was that Merrithew was the lead investigator in the case. R. 130, Tr. 21. She asserted that in August 2007, co-defendant Katherine Feaster was brought into custody based on Det. Merrithew's investigation for receiving stolen goods. R. 129, Tr. 20. She stated that it was developed at the earlier preliminary hearing that Det. Merrithew received a list of people from Frances Reeves, the victim's mother, about people in custody. R. 130, Tr. p. 21, ll. 4-10. Kennedy declared that she had a right to cross-examine Merrithew on that issue because she had not been provided a list of those people and it goes to the issue of how Michaelson was developed as a suspect. R. 130, Tr.

p. 21, ll. 11-15.<sup>5</sup>

The trial court inquired whether the statement of the witnesses would be introduced. In response, the prosecution stated that Scharer was on the witness list, as well as Mark Mason who interviewed Scharer who is available to counsel Kennedy, as well as Sgt. Diane Freeman, who was present at the interview. R. 132, Tr. p. 23, ll. 11-23. Solicitor Williams declared these people were available who also had contact with Scharer. R. 132-33, Tr. 23-24.<sup>6</sup> Kennedy rejected the prosecution's assertion that the evidence could be presented through others, but ignores her right and obligation to introduce contrary evidence. R. 136-37, Tr. 27-28. This includes the right to call adverse witnesses and use leading questions to present a defense. R. 137, Tr. 28. She noted that this was grounded in an assertion that "mere presence" is not enough. R. 137, Tr. p. 28, ll. 16-19. Kennedy claimed that in allowing the State to present Detectives Freeman, Crumley and Mason to testify that the statements were taken in conformity with Miranda denies her the ability to challenge them because Merrithew is absent. R. 137-38, Tr. 28-29.<sup>7</sup>

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5 Kennedy stated that Katherine Feaster was picked up after Merrithew and Sgt. Diane Freeman went to Pelzer after the information and matching of pawn shop records about some jewelry that was allegedly stolen from Ms. Reeves. R. 130, Tr. p. 21, ll. 20-25. Counsel Kennedy further questioned the time it took from Pelzer to Berkeley County to get to make a statement by 2:30 p.m. She noted a videotape follow-up was also done. R. 131, Tr. p. 22, ll. 10-21. She opined that co-defendant Jeremiah Scharer arrived to the detective office around 1 a.m. and made a videotaped statement until he asked for a cigarette. R. 132, Tr. p. 23, ll. 9-10. She stated she had no idea what additional information was developed. R. 132, Tr. p. 23, ll. 8-10.

6 Counsel Kennedy continued that the next day Treze Feaster drove down from Pelzer and gave a statement. She stated that Treze was interviewed extensively by Detective Merrithew who stated at the interview that he wanted Treze to write it down, but Treze responded that Merrithew knew better than he did what needed to be put in there. She stated that her client was the only one not related to the victim and did not know him before the incident. R. 138, Tr. 29. She stated that at the preliminary hearing, Merrithew had responded "absolutely not" when asked if there was an opportunity for three people (Katherine, Treze, Scharer) to have gotten together and come up with a story. R. 138, Tr. p. 29, ll. 18-22. Kennedy contended that the tapes of the conversations at jail reflect otherwise claiming Katherine stated in a tape that she would not have given (the police) the information about how to get in touch with Treze and her brother had she known they were going to do this to them. R. 135, Tr. p. 26, ll. 1-6.

7 Kennedy stated that there were details which support her motion to preclude further investigation. She stated Merrithew had been told that Michaelson wanted to shoot Reeves because his grandmother died that day and he just felt like killing somebody. She also noted Scharer had suggested that everyone was getting high. She also said there was another suggestion that Michaelson was upset about his grandmother being dead and that he just felt like shooting someone. R. 135, Tr. p. 26, ll. 1-25.

However, Kennedy stated that her investigation showed that the grandmother had been dead for a while. R. 136, Tr. p. 27, ll. 2-5. Kennedy stated that she had a right to ask why that lead (on the date of the grandmother's

At that point, Judge Harrington asked why it would lack the ability to challenge because of the other witness's presence and the taping in addition to Merrithew. Kennedy responded that was not her issue. She stated that Merrithew was the "lead detective" and she had a right under "hostile examination" to examine him. R. 138, Tr. p. 29, ll. 16-21. She stated that the three witnesses were cajoled in a warm, folksy manner, yet when Michaelson was arrested, Merrithew's demeanor has changed and attacks and confronts him with a "we know this, you better tell us." Kennedy maintained that with this evolution in the way the witnesses were arrested and questioned, Merrithew, at some point, decided Michaelson was most culpable. Kennedy contended she had a right to explore how that decision was made and explore the methodology of the investigation. R. 139, Tr. p. 30, ll. 14-15.

Counsel Kennedy claimed that Detective Merrithew was the "lead detective" and that "he was the one that did all the investigation." R. 140, Tr. p. 31, ll. 9-15. She stated that Frances Reeves declared to the judge on a bond issue for Scharer that no one was doing anything on the case until Merrithew got on the case. R. 140, Tr. p. 31, ll. 9-15. She stated that while there was a year of investigation that culminated in Petitioner's arrest, there was no investigation into the discrepancies provided by the three witnesses. R. 140, Tr. p. 31, ll. 16-22.<sup>8</sup> She pointed out that although the search warrant was done by Det. Crumley, it was directed by Det. Merrithew. Where the decision was made in 2009 to dredge the canal to look for the gun that Petitioner said in 2007 it was thrown there, Kennedy said she had a right to

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death) was not followed up on. R. 136, Tr. p. 27, ll. 4-6. Concerning the death of Feaster's maternal aunt who also died, she asserted the information was not followed up by law enforcement. R. 136, Tr. p. 27, ll. 7-11. Kennedy's theme was that there were discrepancies among the three witnesses that were not followed up on by Merrithew (and law enforcement). She stated she had the tapes and statements reviewed by an experienced police officer who advised her that there were "certain investigative issues" that should have been addressed, but were not which goes to the heart of her defense and intent to develop a theory of accessory after the fact which she claimed could not be done without Merrithew. R. 136, Tr. p. 27, ll. 15-27.

<sup>8</sup> Counsel reiterated that she had a further right to examine Merrithew on inadequacy of the investigation and the misinformation that arose from the preliminary hearing. R. 141, Tr. 32. She noted an issue where Merrithew stated at the preliminary hearing that he thought the bush hog used in the burial was rented by Feaster, but no documentation had been provided. She declared this was important because the inference that Michaelson was most culpable because the victim was buried in Petitioner's yard where Feaster also lived on another part of the yard. R. 141, Tr. p. 32, ll. 8-16. She noted at the end of Petitioner's statement. Det. Freeman ask him to include additional material and when Merrithew returned he added the material. She rejected that Freeman and the video addressed this area, claiming that her defense was to attack the investigation. R. 143, Tr. 34.

ask Merrithew why it was not done in 2007. R. 144, Tr. 35. The discovery stated it was later done at the directive of Merrithew and Assistant Solicitor Mikell Henderson. R. 145, Tr. p. 36, ll. 1-13.

Judge Harrington clarified that in denying the motion for continuance, she did not indicate that the defense could not call Det. Merrithew. R. 145, Tr. p. 36, ll. 20-22. The judge noted that the issue is whether or not his testimony is so material to the defense that justice would not be done if the court went forward. R. 146, Tr. 37.

Counsel Kennedy confirmed that the prosecution had not played any role in precluding Merrithew from testifying. However, she speculated that it was suspicious that the case was called for November after he left. She further stated that he was the "authority figure" who decide how people were charged. She pointed out his manner in examining on video showing Petitioner various pictures and asking him to identify them and the could not identify the victim. R. 149, Tr. p. 40, ll. 15-25. Counsel Kennedy stated she had spoken with Major Ollic at the Sheriff's Office, but they had no contact with Merrithew and were not aware of any idea when he was coming back. R. 150, Tr. p. 41, ll. 21-25.

Upon questioning from the court, counsel Kennedy admitted she had been provided Merrithew's email, but stated she had not done an email to him, but suggested that Merrithew in that employment could come back anytime he wanted. R. 151, Tr. 42. Aware that other terms would be in July and August, she admitted she had no way to make compulsory process and admitted the State had no power to make him appear. R. 151-52, Tr. 42-43.

The trial court noted that the Petitioner had a right to call Merrithew, but the issue was whether to go forward where the State has indicated that there is nothing Det. Merrithew did alone and/or it was alongside someone else without the testimony of Merrithew. R. 155, Tr. 46.

Counsel Kennedy again asserted that it was her intent to question Merrithew on why he did not check out the claim motive for Petitioner's killing that his grandmother died that date he felt like killing, and that there was information that an aunt of the witnesses had died. R. 156, Tr. 47. In addition, she wanted to develop that he had not provided documentation to the defense concerning that Feaster had

rented the backhoe, that Merrithew had not directed Det. Crumley to execute a search warrant for the shed and whether the items taken as part of a burglary, and that he had not connected Petitioner with the coins that were stolen. R. 157, Tr. 48.

Remarkably, counsel Kennedy stated that she did not know what Det. Merrithew's answer to the questions would be. She stated that her questions were based upon the evidence, but that while Det. Crumley conducted the search and can testify to the contents, he cannot testify to the linkage between the contents in the shed and what was stolen. Kennedy stated that Merrithew can testify as to the linkage based upon his preliminary hearing testimony where he took the jewelry and matched it with the pawn shop tickets which led to the discovery that Katherine Feaster pawned the jewelry. R. 159-160, Tr. 50-51. She asserted that she had a right to ask Merrithew about that discovery and linkage. R. 160, Tr. 51.

Subsequently, counsel Kennedy attempted to clarify that there were separate issues related to compulsory process and confrontation. Although she does not know how Detective Merrithew would answer questions about the investigation through her leading questions, she speculated that if the questions were asked of Det. Crumley or others why they did something, she thought that their answers would be because Det. Merrithew told me to do it. R. 163, Tr. p. 90, ll. 1-25. She stated that this was the heart of their defense that she was attempting to present. She stated their theory was "accessory after the fact" and that no one else can explain the questions she has about the investigation. R. 164-65, Tr. 91-92.

The trial judge then specifically asked defense counsel again "what is it that Detective Merrithew will testify to that is material to your client's defense?" R. 166, Tr. p. 93, ll. 1-3.

In response, counsel Kennedy stated her intent to request an accessory after the fact charge. She stated that she intended to show that Merrithew, after the statements, decided to charge Petitioner as the most culpable. R. 166, Tr. p. 93, ll. 8-10. In doing so, she stated that Merrithew did not pursue other leads, investigate matters in the statements including the conversation with Francis Reeves and the list of people he got from her, his contact with the people at the pawn shop, his representation at the preliminary hearing about the backhoe investigation, the issue of the burglary and the search warrant, the dredging of

the Tailrace Canal and who directed it. R. 166, Tr. p. 93, ll. 13-23. She stated she had a right to point out what was not done, but the witnesses the State intended to call know nothing about it. R. 167, Tr. 94.

When the Court asked if she had spoken to Merrithew about the matters she would examine him in, counsel Kennedy stated that she had not discussed these factors with him, asserting that there was no opportunity to do so because of the delay in complete discovery. R. 168, Tr. p. 95, ll. 1-16. Counsel Kennedy acknowledged that the case had been previously set for October 12 and November 2. When asked by the Court why if he was a material witness at that time did she not subpoena Merrithew then. R. 171, Tr. p. 98, ll. 7-12. She responded that the particular solicitor advised her that he did not think the case would be called then, although it was docketed. R. 171, Tr. 98. She also said that she had still been receiving discovery since November, so the case could not have gone forward then. R. 172, Tr. 99<sup>9</sup>

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<sup>9</sup> Solicitor Williams responded that at the October 12 term counsel Kennedy had sought an order of protection due to completing another trial that term. The State argued that the Petitioner had not satisfied Rule 7(b) because she had failed to articulate what facts she believed the witness, if present, would testify to and the grounds for why. Simply put, she declared that there were no facts that Detective Merrithew would testify. Solicitor Williams stated that Detective Merrithew had nothing to do with the consent to search the storage unit because that was done by Detective Crumley and Detective Shuler. concerning the dive for the gun, she said that was done by Detective Freeman. R. 177, Tr. p. 104, ll. 24-25. Solicitor Williams declared that while Det. Merrithew may have been the face of the investigation to Francis Reeves and searched for her son, he did not do all the work on the case. She said Detective Freeman would testify that she was the one who researched all the pawnshop tickets. further, while the video showed Det. Merrithew introducing himself to Petitioner at the interrogation, Det. Freeman is there the whole interview. R. 178, Tr. p. 105, ll. 15-21.

Solicitor Williams pointed out that even if Det. Merrithew was here, he could not testify what Treze or Kat Feaster said because it is hearsay. She noted this is a "hand of one" murder case with Scharer and Trey Feaster charged with murder. Although the State's theory is that Petitioner is the shooter, the others are not less liable (culpable), according to Williams. R. 179, Tr. 106.

Solicitor Williams speculated that Petitioner was interviewed last because he came in last to the Department. R. 179-180, Tr. 106-07. She stated that Detectives Freeman and Merrithew both drove to Pelzer and picked up Kat Feaster. After she was arrested, everyone was working on the case trying to locate the people involved who Feaster gave the names. R. 180, Tr. 107. Solicitor Williams stated counsel Kennedy can cross-examine Kat Feaster about it and Det. Freeman was present on the whole ride. R. 180, Tr. 107.

Solicitor Williams questioned the applicability of a compulsory process argument where the defense's own witness is unavailable. Similarly, she urged that the confrontation clause claim was not applicable because the State is not required to call every witness who has knowledge of material facts, citing State v. Richardson, 253 S.C. 468, 171 S.E.2d 717 (1969). R. 182, Tr. 109. Solicitor Williams declared the State had chosen not to call Merrithew. Solicitor Williams clarified that they had informed the defense at the November 25, 2009 chambers conference that they would not call Merrithew, not the March 2010 conference. She declared they provided the defense with an email address and probably a cell phone number. R. 183, Tr. 110. In reference to the backhoe rental documents, the prosecutor stated they hounded Merrithew about it but he did not follow-up. Ultimately, Detective Freeman followed up and located the person who owned the out-of-business

Judge Harrington next inquired why she did not use the email address of Merrithew to show due diligence under Rule 7(b). Counsel Kennedy disagreed and discounted that she should have emailed Merrithew because she was not able to secure his presence and it would be insufficient without compulsory process. Judge Harrington stated had counsel listened to the court (Judge Dennis) and asked Merrithew if and when he was coming back, it could have addressed an issue. However, counsel Kennedy complained that this put the burden back on her when she felt the chambers conference suggested it was the State's burden. The Court responded that the State stated it was not calling him and that he was no longer an employee of the State, questioning how it is under their control. R. 174, Tr. 101.

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company that rented the backhoe and went to the storage shed where the receipts might have been kept. R. 184, Tr. 111.

Similarly, Det. Freeman actually was the diver who went to look for the weapon at Solicitor Henderson's request. R. 184, Tr. p. 111, ll. 10-15. It was not done while Merrithew was here nor at his direction. R. 184, Tr. p. 111, ll. 12-15.

Solicitor Williams stated that she took issue with the Feaster affidavit #5 that no other employee of Berkeley County was involved in the investigation [June 2010 Feaster Affidavit of Melissa Gay, R. 107-109]. R. 185, Tr. p. 112, ll. 13-20. Similarly, the prosecutor took issue with counsel Kennedy's similar affidavit [June 2010 Affidavit Patricia Kennedy, R. 105-06] that there was significant disparity in the questions that Merrithew chose to ask in the interview. R. 185-86, Tr. p. 112, l. 21 - p. 113, l. 5. She noted the tapes were available for all to review. Id.

10 Solicitor Williams responded that at the October 12 term counsel Kennedy had sought an order of protection due to completing another trial that term. The State argued that the Petitioner had not satisfied Rule 7(b) because she had failed to articulate what facts she believed the witness, if present, would testify to and the grounds for why. Simply put, she declared that there were no facts that Detective Merrithew would testify. Solicitor Williams stated that Detective Merrithew had nothing to do with the consent to search the storage unit because that was done by Detective Crumley and Detective Shuler. concerning the dive for the gun, she said that was done by Detective Freeman. R. 177, Tr. p. 104, ll. 24-25. Solicitor Williams declared that while Det. Merrithew may have been the face of the investigation to Francis Reeves and searched for her son, he did not do all the work on the case. She said Detective Freeman would testify that she was the one who researched all the pawnshop tickets. further, while the video showed Det. Merrithew introducing himself to Petitioner at the interrogation, Det. Freeman is there the whole interview. R. 178, Tr. p. 105, ll. 15-21.

Solicitor Williams pointed out that even if Det. Merrithew was here, he could not testify what Treze or Kat Feaster said because it is hearsay. She noted this is a "hand of one" murder case with Scharer and Trey Feaster charged with murder. Although the State's theory is that Petitioner is the shooter, the others are not less liable (culpable), according to Williams. R. 179, Tr. 106.

Solicitor Williams speculated that Petitioner was interviewed last because he came in last to the Department. R. 179-180, Tr. 106-07. She stated that Detectives Freeman and Merrithew both drove to Pelzer and picked up Kat Feaster. After she was arrested, everyone was working on the case trying to locate the people involved who Feaster gave the names. R. 180, Tr. 107. Solicitor Williams stated counsel Kennedy can cross-examine Kat Feaster about it and Det. Freeman was present on the whole ride. R. 180, Tr. 107.

Solicitor Williams questioned the applicability of a compulsory process argument where the defense's own witness is unavailable. Similarly, she urged that the confrontation clause claim was not applicable because the State is not

Judge Harrington returned to question Kennedy on what facts in this case Detective Merrithew can testify to that is essential to the defense. R. 189, Tr. p. 116, ll. 10-21. Counsel Kennedy pointed out her client had been lured to his girlfriend's where he was arrested, while the others were allowed to voluntarily come in. R. 190-91, Tr. 117-18. As to the pawnshop ticket research, she claimed it was not Det. Freeman, but Det. Merrithew's work based upon the preliminary hearing testimony. Counsel Kennedy again asserted that she needed to be able to interrogate Det. Merrithew about the jewelry that was shown to witnesses Francis Reeves and Ms. Ahrenholz. R. 191, Tr. p. 118, ll. 6-25. She contended this was important to her ability to make a motion for a directed verdict as to the burglary. R. 192, Tr. p. 119, ll. 1-8. [Note: Petitioner was found not guilty of the burglary].

Judge Harrington inquired of counsel Kennedy what happens if the continuance is granted. Kennedy stated that she understood that his contract was for year to year. She said if she had known he was here in March, she could have subpoenaed him, then requested a day certain or that he advise the court when he would return. R. 195, Tr. p. 122, ll. 10-20. She said it could have been avoided if she had notice when Merrithew returned. Kennedy confirmed that she did have an order of protection at an earlier term that had precluded an earlier trial. R. 196, Tr. 123. The State responded that they did not know Merrithew had briefly returned until he after left. Further, the State stated his wife is over there and he

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required to call every witness who has knowledge of material facts, citing State v. Richardson, 253 S.C. 468, 171 S.E.2d 717 (1969). R. 182, Tr. 109. Solicitor Williams declared the State had chosen not to call Merrithew.

Solicitor Williams clarified that they had informed the defense at the November 25, 2009 chambers conference that they would not call Merrithew, not the March 2010 conference. She declared they provided the defense with an email address and probably a cell phone number. R. 183, Tr. 110.

In reference to the backhoe rental documents, the prosecutor stated they hounded Merrithew about it but he did not follow-up. Ultimately, Detective Freeman followed up and located the person who owned the out-of-business company that rented the backhoe and went to the storage shed where the receipts might have been kept. R. 184, Tr. 111.

Similarly, Det. Freeman actually was the diver who went to look for the weapon at Solicitor Henderson's request. R. 184, Tr. p. 111, ll. 10-15. It was not done while Merrithew was here nor at his direction. R. 184, Tr. p. 111, ll. 12-15.

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understood that they would not be back anytime soon. R. 196, Tr. 123.

On June 29, 2010, Judge Harrington issued her ruling denying the motion for continuance. R. 200-03, Tr. p. 127, l. 10 - p. 130, l. 2. Judge Harrington relied upon the reasons set forth in her April 23, 2010 Order. The trial court noted that neither the State or the Petitioner articulated any reason that the State had either prohibited or prevented the Petitioner from calling Det. Merrithew. The court concluded that Merrithew was unavailable. The Court concluded that the constitutional grounds raised by Petitioner were without merit. Considering the matter as it related to Rule 7(b), Judge Harrington incorporated her April 23, 2010 Order. R. 201, Tr. p. 128, ll. 8-12. She informed the State that this issue could be raised at any point of time in the future. R. 201, Tr. p. 128, ll. 13-23.

The trial proceeded with a Jackson v. Denno hearing and a series of witnesses after opening statement. R. 215-255, Tr. p. 196-236 (Jackson v. Denno); R. 299-373, p. 282-366 (trial evidence). An illness of defense counsel Kennedy disrupted the trial on June 30, 2010. Tr.p. 366-371. On July 1, 2010, court convened and learned the counsel Kennedy was still ill. Tr.p. 371. It recessed for a periods of time to allow second counsel Schwacke to prepare and present the chain of custody witnesses and for Kennedy to regain her health. R. 215-255, Tr.p. 196-236 (Jackson v. Denno); p. 371-470.

On July 6, 2010, court re-convened with counsel Kennedy and Schwacke present. Tr. 472. At the outset, counsel Kennedy renewed her motion for a continuance. Tr. 472-73.<sup>11</sup> Judge Harrington

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<sup>11</sup> She asserted that all witnesses had testified, other than the chain witnesses about directives from Det. Merrithew as to their participation. R. 442-43, Tr. 474-75. She summarized that Det. Crumley testified that he was directed to pick up Petitioner and how he was directed to the storage shed. R. 443, Tr. p. 475, ll. 6-9. She stated Frances Reeves spoke about her contact with Merrithew, how he agreed to volunteer to take the case, and how Merrithew provided information to her. R. 443, Tr. p. 475, ll. 10-15. Counsel Kennedy summarized that Brenda Ahrenholz testified inconsistent with Merrithew at the preliminary hearing concerning the contact that took place between Katherine Feaster, Ahrenholz and Jeremiah Scharer, although Merrithew asserted there was no contact. R. 443, Tr. p. 475, ll. 16-24. She also claimed Det. Drennon testified he did a number of things under Merrithew's direction and guidance. R. 444, Tr. 476.

Counsel Kennedy contended that due to Merrithew absence she cannot rebut or refute the testimony. R. 444, Tr. p. 476, ll. 5-9. The prosecution, through Assistant Solicitor Williams, deferred to the earlier ruling under Rule 7(b) and that Merrithew is not a material witness and that all the witnesses called did matters in Merrithew's presence. R. 444-45, Tr. 476-77.

Counsel Kennedy again responded that she is not concerned about what was done in presence. Instead, she claimed she wanted to know matters concerning the directives he was giving to them and to explore the investigative

denied the motion for continuance, based upon her earlier order. R. 445, Tr. p. 477, ll. 20-24.<sup>12</sup>

**3. Prejudice Not Proven Where Available Witnesses Addressed The Issues and Petitioner Failed to Show Material Testimony Was Unavailable.**

In his brief, Michaelson makes generalized comments about why he was deprived of a new trial. What he fails to do is articulate any prejudice caused by the denial of the continuance. However, as at trial, he is unable to proffer what testimony the Petitioner is seeking to present through Merrithew. What this reveals is that his original trial and pretrial speculation dissipated as the trial occurred. Removing the potential prejudice that he may have feared, it left a motion without any support. At points in his arguments in the trial court, unlike on appeal, he attempted to articulate some areas of concern. Respondents submits that those claims about the necessity of Merrithew to address them were removed by the testimony presented and the witnesses who actually did the work.

In particular, Petitioner stated that she wanted Merrithew to testify about certain factors in the investigation including the pawnshop ticket research, the 2009 decision to dive in search of the weapon based upon the 2007 information from Michaelson that he threw the weapon into the river, his reaction to

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process. R. 445, Tr. 477.

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**The Later Continuance Motions at Trial.**

Subsequently, the defense raised a continuance motion at various times. R. 674, 754-55, 761-62, 842-43, Tr. p. 723-724, 826-827, 833-834, 934-936. The defense renewed its motion for continuance after Brian Valbert's testimony concerning overhearing a jailhouse admission by Petitioner. R. 673, Tr.p. 722. Counsel claimed that Merrithew was a material witness and that the state had made reference to Merrithew not being there. She stated the continuance motion was based upon all the testimony that had been heard and information from Detective Freeman that she contended contradicted what was said by Merrithew at the preliminary hearing. He also claimed that Freeman had testified about a number of things that she did after the arrest and the defense wanted to explore matters that led to the arrest, but were not able to do so. R. 674, Tr. p. 723.

After the pathologist's testimony, counsel renewed the continuance motion. R. 754, Tr. p. 826. The defense did not add any matter to the motion, other than noting "Merrithew's voluntary absence from the jurisdiction" and "based upon the evidence that was presented." R. 754, Tr.p. 826, ll. 6-12. After the denial of the various motions for directed verdict, the trial judge inquired of the defense whether there had been any attempt to contact Detective Merrithew. R. 761, Tr.p. 833, ll. 12-17. Defense counsel responded no, because he was beyond the subpoena power of the court and its jurisdiction. While confirming to the court that they had been provided an email address, counsel merely responded, that "an email address is insufficient to compel someone to attend a court proceeding." R. 761-62, Tr.p. 835-834. Judge Harrington denied the continuance motion, based upon the April 23 order and reasons articulated throughout the trial. R. 762, Tr.p. 834, l. 7-11.

After the guilty verdict on murder, counsel made a motion for acquittal and renewed the continuance motion based upon the absence, contending the proceedings had been inherently prejudicial to the Petitioner. R. 842, Tr. p. 934, ll. 11-21. Judge Harrington denied the motion. R. 842, Tr. p. 934, ll. 22-25.

his grandmother's death as a reason for the killing, whether there was an ability for the Feaster and Scharer to concoct a consistent story, the investigation concerning who rented the bush hog (backhoe) to bury the victim where Michaelson lived, and the awareness that Feaster was a suspect in an earlier burglary of the victim. Yet the particular uniqueness of the testimony sought from Merrithew was not shown. This evidence was available through the witnesses at trial.

Particularly probative concerning the lack of prejudice were the cross-examinations by defense counsel Kennedy of the eventual case agent, Detective Diane Freeman and Deputy Crumley.<sup>13</sup> On cross-examination, Sgt. Freeman discussed the fact she was a supervisor over property crimes and Det. Merrithew recently came in and was in people crimes. She was assigned to work the Reeves case in August 2006 by Capt. Ollic to work with Merrithew to get the case resolved. R. 499, Tr. 533. Also R. 448-450, Tr. p. 480-482. Merrithew was new to the Sheriff's Department and she had supervisory duty over him since there was a burglary and larceny. R. 489, R. 489, Tr. 523. She initially assisted in reviewing pawnshop records, helped him locate the Feasters through DMV records after they located other witnesses from a list that they had received from Ms. Reeves and Ms. Ahrenholz in 2006 and 2007. R. 490-91, Tr. 524-25. Also R. 450-52, Tr.p. 482-484.

Sgt. Freeman stated that she understood between 2002 and 2006, Lt. Lee had looked for people, taken statements, looked for the vehicle, looked for Parrish Reeves through NCIC and sent a law

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<sup>13</sup> An initial area of concern was the Petitioner's concern that Merrithew had done the pawnshop research. However, as noted by the testimony of Detective Freeman at both the *Jackson v. Denno* hearing and before the jury, she was the person that actually did the research and pulled the pawnshop files because Merrithew was new to the unit and not aware how to do it. R. 241-45, Tr.p. 222-226. She stated she helped Merrithew match the list that he had of the stolen items. R. 245-46, Tr.p. 226-27. Sgt. Freeman stated that she first became involved in the case in August 2006. R. 449, Tr. 481. At that time, she looked at pawnshop records to attempt to locate stolen items. R.450, Tr. 482. She stated she was successful in locating items connected to Parrish Reeves, particularly a necklace which was a yellow chain with a charm on the end and .08 carat round diamonds, among other potential items. She said the necklace was identified by the victim's wife and mother. R. 451, Tr. 483. She stated they went back through the records of the Money Man pawnshop with the owner Gary Bowman and found that the piece had been sold and they were able to get it back. R. 451-52, Tr. 483-84. She learned the item was originally pawned by Katherine Feaster. She described obtaining a warrant for possession of stolen property for her because they were sure she had the necklace in her possession. R. 452, Tr. 484. She learned that Kat Feaster was the stepdaughter of the victim and spoke to her about the disappearance. Tr. 484. She provided information that help guide the investigation. R. 453, Tr. 485.

enforcement agency to attempt to locate him. R. 492, Tr. 526. Sgt. Freeman stated that she read the entries by Lt. Lee around when Det. Merrithew left employment in October or November 2009. R. 493, Tr. 527.

Sgt. Freeman confirmed that Reeves was reported missing in 2001, in 2004 or 2005, Lt. Lee did an investigation which disclosed that Treze Feaster was a suspect and had previously burglarized Reeves home as reported May 15, 2000. R. 494-95, Tr. 528-29. Also R. 449, Tr.p. 481.

Sgt. Freeman stated Lt. Lee made it a possible missing person report in a supplemental report on February 1, 2001 in addition to burglary and larceny. R. 495-97, Tr. 529-31. Also R. 449, Tr.p. 481. Sgt. Freeman stated she reviewed the material prior to 2009, but did not do the leads. She noted that Det. Merrithew was working the case and that she was pulling information for him and he would review matters with her. R. 498-99, Tr. 532-33.

Sgt. Freeman described that she actually pulled information out of the pawnshop records after they had been discussing the case with Merrithew. R. 499, Tr. 533. Also R. 450, Tr.p. 482. She said Merrithew had come to her when he first started working the case and what they might want to look for. He described wanting to talk with Ms. Ahrenholz and Ms. Reeves and try to get more leads from them. R. 499, Tr. p. 533, ll. 20-25. While Sgt. Freeman was not present when the list were made, Det. Merrithew gave Freeman the names of Katherine Feaster and Jerry Scharer, the step-daughter and stepson-in-law. R. 500, Tr. 534.<sup>14</sup>

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<sup>14</sup> The victim's mother, Frances Reeves, testified about the disappearance of her son Parrish. She testified on cross-examination by counsel Kennedy that there were five detectives that she had who worked on the case. Concerning Det. Merrithew, Ms. Reeves stated that she was talking with Captain Rick Ollic and was very upset and Merrithew came up and told Ollic that he could look into the case. R. 299-301, Tr. 282-84. Ms. Reeves stated she went to "Unsolved Mysteries" and other places and told Merrithew what she had done looking for her son. She stated that she gave Merrithew a list of names that she thought might be involved, but the list did not include Katherine Feaster, Trey Feaster, and Jeremiah Scharer. She said she did not know about their involvement until the jewelry was recovered. R. 301, Tr. 284.

Ms. Reeves stated that Merrithew brought her some jewelry and she looked at it with her former daughter-in-law Brenda and they identified one piece that belonged to Brenda which was a necklace with a stone that specially made by her son. R. 302-03, Tr. 285-86. She became aware then that Katherine Feaster had pawned it because Merrithew had the pawn ticket. R. 304, Tr. p. 287, ll. 1-11.

Sgt. Freeman stated "lead investigator" means the person who a case is definitely assigned and take it to the prosecutor. R. 500-01, Tr. 534-35. She stated that Merrithew was the lead agent but that she was the supervisor assisting him during the time period. She stated when he knew he was going away, they started working the case together and pulling information that might be needed. R. 501-02, Tr. 535-36. Sgt. Freeman stated that Merrithew had been planning several times to leave.

Sgt. Freeman stated around February 2009, Assistant Solicitor Mikell Henderson and Merrithew came to her and said there was a good chance that Merrithew would be leaving and they needed to review his cases, although a trial date had not been set for this case. R. 502-03, Tr. 536-37. Sgt. Freeman stated that she was on leave between Oct. 15 through November due to a family illness and that Merrithew was gone when she returned. R. 504, Tr. 538.

Sgt. Freeman again confirmed she helped with the pawnshop ticket and learned the items had been pawned by Katherine Feaster. R. 505, Tr. p. 539, ll. 5-10. Some of the items were recovered by Det. Merrithew which she was not involved in. R. 505, Tr. p. 539, ll. 11-16. Freeman was pulling DMV records throughout. When asked how leads from Kat to Trey to Jeremiah was developed, Sgt. Freeman stated they had the pawn ticket from her, obtained a warrant for the property, had the warrant countersigned in Anderson, took her into custody, she was Mirandized, and the statement she made "took us down to each person." R. 506, Tr. p. 540, ll. 3-12. Sgt. Freeman confirmed that she went with Merrithew to Pelzer after she found out through DMV records where she was living. R. 507, Tr. 541. She agreed with Merrithew to get a warrant. R. 508, Tr. 542. She felt they had a "guarantee with Katherine Feaster." R. 508, Tr. 542, ll. 24-25. Sgt. Freeman said she did not rely on Lt. Lee's contact sheets to develop Trey as a suspect and spoke to Katherine about the events which developed Treze Feaster and Jeremiah. She declared that while there was information about Trey in the file, he was not developed until Kat Feaster was arrested. R. 509-510, Tr. 543-44.

Sgt. Freeman acknowledged that part of the reason she went to Anderson with Merrithew to arrest Katherine was because of policy because the arrested was a female. R. 510, Tr. 544. She stated it took

several hours to go to Pelzer or Anderson and back to Moncks Corner. R. 510, Tr. 544. She said after the arrest during the drive, Det. Merrithew was talking to her and Sgt. Freeman was taking notes on the statements she made. At 2:30 on August 6, Kat Feaster made the written statement. She said Feaster was Mirandized when they first got into the vehicle and Feaster was in the front seat. R. 513, Tr. 547. Sgt. Freeman stated she wrote out the statement of Feaster stating that she executed the written Miranda warnings at 2:30. She said in route there was a verbal interrogation then a written statement prepared and then there was a video statement later after 9 or 10 p.m. R. 517, Tr. 551. In the statements, Feaster had implicated her brother and husband. R. 517-18, Tr. 551-52.

Sgt. Freeman stated at some point she called her husband (Treze Feaster) on Det. Merrithew's phone and told him that she was in custody. R. 518, Tr. p. 552, ll. 4-19. She said that she was trying to get Treze to come in. Sgt. Freeman also stated that Katherine Feaster called her mother and asked her to get her brother and bring him. R. 519, Tr. 553.

Sgt. Freeman asserted that Ahrenholz was not aware what they were being arrested for and was only told to bring her son in. R. 519, Tr. 553.<sup>15</sup> She said Merrithew asked Kat to call to see if she could

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<sup>15</sup>Ahrenholz testified that she was shown a necklace that was stolen from a safe. R. 312-13, Tr. 295-96. (State Exh. 91). She also identified a painted Liberty coin that was stolen. R. 315, Tr. 298. On cross-examination from counsel Kennedy, the witness was unable to describe his first encounter with Det. Merrithew, but knew they had more contact with him after the victim's truck was found. R. 327, Tr. 310. She stated that he told her and said he was taking over the case. She said he called a couple of times in 2003 or 2004 and asked her to draw a picture of the necklace. R. 327-28, Tr. 310-11. She said Merrithew came to her home when Frances Reeves was there and showed them the necklace. Merrithew did not tell them who, but said he had traced it through a pawn ticket and found it at Money Man Pawn Shop. R. 328-29, Tr. 311-12. At that time, she said he did not tell her that her daughter, Katherine Feaster, was involved. R. 329, Tr. 312. Ahrenholz said she learned that for the first time when she received a telephone call from Trey that Katherine had been arrested on August 6. R. 329-331, Tr. p. 312, l. 10 - p. 314, l. 2. At that point, she stated she contacted Det. Merrithew. R. 331, Tr. p. 314, ll. 1-17. Out of the jury's presence, she said Merrithew told her that Katherine was picked up on a receiving stolen goods charge. R. 333-34, Tr. 316-17. She said that Merrithew asked to pick up her son, Jeremiah, and bring him to the police station because they wanted to speak with him, but not the reason why. R. 334-35, Tr. 317-18.

Counsel Kennedy stated that she was seeking to elicit information about Merrithew due to his non-presence. R. 335-36, Tr. 318-19. Solicitor Williams noted that it would be hearsay even if he was present and testifying. R. 336, Tr. p. 319, ll. 4-10. Counsel Kennedy asserted that this inquiry was in response to preliminary hearing testimony that there was no opportunity for the individuals (Trey Feaster, Katherine Feaster, and Jeremiah Scharer) to communicate with each other about their statements. R. 337, Tr. 320.

In response, she stated she had the one conversation with Det. Merrithew about bringing Jeremiah down there. After she picked him up and dropped him at the department, Merrithew asked her to stay out front in the lobby. Later, Merrithew brought her back and had her children (Kat and Jeremiah) tell her that Parrish was dead (but not what happened). R. 338-39, Tr. 321-22.

get them to come in and “doing the right thing.” R. 520, Tr. 554.

Sgt. Freeman confirmed that all but Michaelson were related and that they had been told did not have a good relationship with Reeves. R. 521, Tr. 555. Freeman stated that they had learned in their investigation that each of the family members had their own reasons to dislike Reeves and never had a good relationship with him. R. 521, Tr. 555 [An objection was sustained under hearsay to evidence that Ms. Feaster made allegations of abuse about Reeves. R. 522-23, Tr. p. 556-557].<sup>16</sup>

Concerning the rental of the backhoe, Freeman described learning that it was rented from “Doc’s” after the arrest and in 2009 they were able to locate the owner who had moved out of state. Freeman stated that she was the person who located the owner, not Merrithew, and contacted him by telephone in 2009. R. 524, Tr. 558. Also R. 479-480, Tr.p. 511-512. The owner tried to establish the transaction record through software, but that company was also out of business and they were unable to develop the tapes to get the information. R. 524, Tr. 558.

Sgt. Freeman agreed that information about the backhoe rental was important and that they developed the information from two people that said they rented it, but they were not able to confirm the information through documents. R. 525, Tr. 559. Sgt. Freeman rejected the implication that this should have led to re-interviews because she did not think there was additional information to develop. R. 526, Tr. 560.

She confirmed that she had tried to call Ryan Almers concerning the trailer that disappeared. R.

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Back in front of the jury, Ahrenholz described that after the disappearance she spent time with her children who never shared what happened. R. 342-44, Tr. 325-27. At some point, she gave Det. Merrithew a list of items that were missing, including the necklace, gold watch, tennis bracelet, half-carat earrings and his coin collection. Ahrenholz testified that the only things Det. Merrithew showed her was the necklace (before the arrest) and subsequently a coin. R. 344-45, Tr. 327-28. She stated a few months after the arrests she was asked to try to identify items from the storage shed from another detective other than the necklace. R. 346, Tr. 329.

On re-direct, Ahrenholz confirmed that he has identified the coin a long time before. R. 346, Tr. 329. She stated that her on Jeremiah was 16 when he moved from the home. R. 347, Tr. 330.

<sup>16</sup> Jeremiah Scharer testified that he did not have a good relationship with his stepfather, but denied it was based upon any knowledge that he had beaten his mother. Instead, he stated that he was a bad kid and got beatings and spankings. R. 618-19, Tr .p. 655-656. He stated he moved out because he was 16 and wanted to live with other better than his family. Id.

526, Tr. p. 560. She said she had not documented it because she was not able to speak with him. She confirmed that she found him in the DMV records and made several telephone calls, including one to his uncle., but the messages were not returned. She said that she did not put her attempts in a supplemental report because she was never able to speak with him. R. 526-28, Tr.p. 560-562. She stated at the time she was in charge of the investigation and Merrithew had already left. R. 528, Tr.p. 562.

Sgt. Freeman stated that she could not explain why there was nothing documented in the file by Det. Merrithew past August 13, 2007 when she was not in the unit, though Merrithew had told her that he had continued working on the case. R. 529, Tr.p. 563. She stated she had several conferences with Merrithew prior to his leaving as information exchange with the case file and Assistant Solicitor Mikell Henderson. R. 530, Tr.p. 564.

Sgt. Freeman responded that further investigation was not done, to her knowledge from the arrest (August 6, 2007) until she picked up the file in October 2009, other than "clean up things" and "question marks." R. 531, Tr.p. 565. She confirmed she did an underwater search after a request from Solicitor Henderson in 2009. She noted that a dive team had not been formed previously, but admitted the information about the weapon was available in 2007. R. 532, Tr.p. 566.<sup>17</sup>

Sgt. Freeman indicated that she learned from the Feasters that they had moved into the Starlight property at a later time after the body was already buried there. R. 534-36, Tr.p. 568-570. Also R. 475-76, 477-79, Tr.p. 507-508, 509-511. She stated that they were told by Ahrenholz and Ms. Reeves that the Feasters were not living there at that time. There were also the pawnshop records and there own statements indicating that they were living in Bonneau. "In fact, Michaelson's own statement said they were living in Bonneau." R. 536-37, Tr.p. 570-571. She said according to the Feasters they moved into the Starlight property a year or so later. She stated the information was not part of the files. R. 537, Tr.p.

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<sup>17</sup>She stated no murder weapon was recovered during the dig. R. 480, Tr. 512. They were also unable to locate where the firearm was obtained from, although Petitioner indicated in his statement that he recovered it from Ms. Reeves. R. 480, Tr. 512. He had admitted throwing it out of the vehicle in the Tailrace Canal. R. 481, Tr. 513. She said in 2009, attempts were made to recover the gun. She stated her underwater recovery team conducted an unsuccessful search in the water and on land. R. 481, Tr. 513.

571.

Sgt. Freeman stated that the sequence of who spoke with them was Feaster, then Scharer voluntarily and then three unmarked cars were sent to pick up Michaelson when a warrant was issued. R. 538, Tr. 572. Also R. 452-54, Tr.p. 484-486. Freeman did not know who sent them, but policy would be for the supervisor and the Sgt. Alteri was present. R. 539, Tr. 573.

Sgt. Freeman stated the truck had been recovered and was in Sgt. Lee's notes. R. 540, Tr.p. 574. She stated file notes reflected Sgt. O'Neal had spoken to the Morrises who owned the property where the truck was found. She stated the Morrises had a written statement saying that Reeves and Trey had brought it over and it was left there. R. 540-41, Tr.p. 574-575. She stated they also investigated it through the DMV, trying to find a chain of titles and found that Morris had claimed it as abandoned property with a magistrate and transferred it. R. 541, Tr.p. 575. She said the Morrises stated the truck was there because they were hiding it from Ahrenholz due to the separation. R. 541, Tr. 575. She said that they verified it and spoke with Ahrenholz to see if it was true. However, they did not do anything about Trey taking the truck over. R. 542, Tr.p. 576. Sgt. Freeman confirmed that in Det. Lee's notes that it indicated that she spoke with Trey Feaster who disclosed he was aware of it in 2005, so he was aware in 2007 that he was being looked at in some fashion. R. 543, Tr. 577.

On re-direct Freeman stated that Det. Merrithew is in Iraq or Afghanistan overseas. R. 543, Tr.p. 577. She said that this was not the only case she assisted Merrithew prior to any arrest. She said that she participated in the interviews by asking questions and clarifications. R. 544, Tr.p. 578. She said that Kat had implicated Trey, Jeremiah, and Michaelson. R. 545, Tr.p. 579.<sup>18</sup>

Concerning the backhoe, she indicated she followed up on the documentation as to who rented it. R. 545, Tr. 579. She confirmed that Michaelson had stated he rented the backhoe in his interview. R. 546, Tr. 580. Michaelson had also indicated then that he was living at Starbright at his mother's when the

---

<sup>18</sup> Sgt. Freeman further stated that they attempted to follow-up on Petitioner's statement that he drove Treze Feaster downtown to cash in the victim's coins. R. 481-82, Tr. 513-14. However, while able to locate the coin shops, they no longer had records from that 2001 time period. R. 482, Tr. 514.

victim was buried, but that he was now living in Bonneau. Similarly, she said that Michaelson had indicated that he carried the truck to the trailer in the woods. He also indicated that he went to Bonneau at the time of the shooting to meet with Trey, Katherine and Jeremiah. R. 547, Tr. 581.

On cross-examination, Det. Michael Crumley of the Berkeley County Sheriffs Department stated that he was sent by he believes Det. Merrithew to Wilmor Acres because there was an arrest warrant for Petitioner. R. 363, Tr. 346. Crumley was involved in the arrest of Michaelson, reading him his rights after arrest, and the subsequent consent search of the storage shed. R. 349-363, Tr.p. 332-346.<sup>19</sup> He stated he was not aware why Petitioner was directed to Wilmor Acres. Petitioner was Mirandized outside of the patrol car after he was in handcuffs. R. 364-65, Tr. 347-48. Det. Crumley stated that he told Petitioner there was an active arrest warrant for him which would be explained when he got to the Sheriff's Office. R. 365, Tr. 348. Crumley stated he had no idea what the warrant was for. Crumley stated he was not aware who the lead agent was, but went there under Merrithew's instructions. R. 366, Tr. 349. He opined the arrest occurred at 3 p.m. and that Petitioner was in Merrithew's custody at 3:30. R. 367, Tr. 350.

He stated when he went to the storage facility, it could have been by Merrithew. He was told to meet Thomas who was Petitioner's girlfriend who would be there to allow entry into the unit and to look

---

<sup>19</sup> Detective Crumley testified that in 2007, he was a detective in the criminal investigation unit assisting in the investigation concerning the disappearance and death of Parrish Reeves. His first involvement was the arrest of Jeffrey Michaelson on August 7, 2007. R. 349, Tr. 332. He stated that he read Petitioner the Miranda rights from a card. R. 350, Tr. 333. Detective Crumley opined that Petitioner understood his rights, but did not ask him any questions at the time. He placed Petitioner in handcuffs and drove him 20 minutes to the Sheriff's Office. R. 351, Tr. 334. He made no threats nor promise him anything. At the Sheriff's Office, he transferred custody to Sgt. Freeman and Det. Merrithew. R. 352, Tr. 335.

Det. Crumley stated later that evening, he went with Sgt. Alteri, Sgt. Shuler, and Det. Murphy to Ladson Self Storage and met Christine Thomas, the Petitioner's girlfriend at her storage unit. They obtained consent from her to search the unit that she claimed she shared with Petitioner. R. 353-57, Tr. p. 336, ll. 1-13, p. 340, ll. 7-9. In the unit, they located items addressed to Petitioner, as well as Ms. Thomas. Id. Photographs were introduced and identified concerning the storage unit and its contents. R. 355-56, Tr. 338-39. Within the unit was a certificate of authenticity and a 1999 Delaware painted quarter, as well as other coins. R. 356-57, Tr. 339-40.

Det. Crumley described obtaining the written consent to search (Exhibit 93) from Ms. Thomas prior to the actual search and seizure of items. R. 357-360, Tr. 340-43. Det. Crumley confirmed that item 5 of the recovered items, a 2000 U.S. Silver Dollar (painted) was the item shown as Exhibit 92. R. 362, Tr. 345. He noted that mail was not seized on that search and therefore was not listed in the return. R. 362-63, Tr. 345-46.

for any items that might be pertinent. R. 367-68, Tr. 350-51. At the time, Crumley stated he did not know if the items or safe were involved in the 2001 burglary. R. 368, Tr. 351. Crumley stated that he completed a report for Sgt. Freeman, his supervisor, on August 7. R. 369-370, Tr. 352-53. Crumley stated that the approving officer on his August 7 supplemental report was Sgt. Freeman. R. 372, Tr. 355.

Finally, what is also troubling is that the defense never actually contacted Merrithew once the absence was known and they were provided his email and telephone number. The trial court's inquiries notwithstanding, defense counsel refused to take the next step by communicating when or if their witness would be available or take the minimal step to determine what his testimony would be in any critical area. These reasonable steps - required under Rule 7 to show with specificity the expected content of such testimony - were ignored by the defense at trial against the state's protestations. The indeterminate delay sought by the Petitioner, under these circumstances was not an abuse of discretion. The continuance denial did not deprive Petitioner of due process. Relief must be denied.

#### CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied and the judgment of conviction must be affirmed.

Respectfully submitted,

DONALD J. ZELENKA  
S. C. Bar Number 5758  
Senior Assistant Deputy Attorney General  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

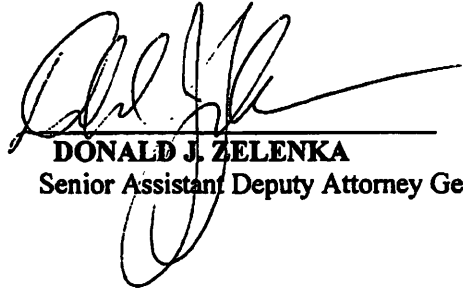
By: 

DONALD J. ZELENKA  
ATTORNEYS FOR RESPONDENT

February 18, 2014

**CERTIFICATE OF SERVICE**

I, **Donald J. Zelenka**, counsel for the Respondent, certify that I have served the within Return to the Petition for a Writ of Certiorari in the foregoing action on the Petitioner by depositing two (2) copies of the same in the InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 17<sup>th</sup> day of January, 2014.



**DONALD J. ZELENKA**  
Senior Assistant Deputy Attorney General

# The Supreme Court of South Carolina

The State, Respondent

v.

Jeffrey Michaelson, Petitioner.

Appellate Case No. 2013-001570

Lower Court Case No. 2009-GS-08-00295

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ORDER

---

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Michaelson*, Op. No. 2013-UP-188 (S.C. Ct. App. filed May 8, 2013). The petition is denied.

  
C.J.  
FOR THE COURT

Columbia, South Carolina

November 7, 2014

cc:

The Honorable Jenny Abbot Kitchings  
The Honorable Mary P. Brown  
Robert Michael Dudek, Esquire  
Donald J. Zelenka, Esquire



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1220 SENATE STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
www.sccourts.org

April 29, 2015

The Honorable Mary P. Brown  
PO Box 219  
Moncks Corner SC 29461-0219

### REMITTITUR

Re: The State v. Michaelson, Jeffrey  
Lower Court Case No. 2009GS0800295  
Appellate Case No. 2010-166526

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

The following exhibits filed in this case are being returned to you:

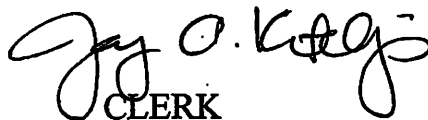
State's Exhibit 2, Re-marked State's Exhibit 100 - Videotape  
Court's Exhibit 1, Re-marked State's Exhibit 99 - Redacted Videotape

Please sign and return the enclosed copy of this letter acknowledging receipt of these items.

### Receipt Acknowledgment

Name: \_\_\_\_\_ Date: \_\_\_\_\_

Very truly yours,

  
CLERK

Enclosure

cc: Donald J. Zelenka, Esquire  
Robert Michael Dudek, Esquire  
Alan McCrory Wilson, Esquire  
Scarlett Anne Wilson, Esquire  
John W. McIntosh, Esquire

FORM 5

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF Berkely )  
 )  
Jeffrey Michaelson 341675 )  
 Full name and prison number (if any) of Applicant. )  
 )  
 v. )  
 )  
 State of South Carolina )  
 )

IN THE COURT OF COMMON PLEAS

2015 CP-00-2524

APPLICATION FOR

POST-CONVICTION RELIEF

FILED  
 NOV-4 AM 8:30  
 MARY P. DROWNS  
 CLERK OF COURT  
 BERKELEY COUNTY

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in legibly (possibly handwritten or typewritten), signed by the applicant and veified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay threes and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber correction Institution
2. Name and location of Court which imposed sentence Berkely county 9<sup>th</sup> Cir. gen
3. Name(s) of co-defendant(s) (if any) Kathrien Feuster, Treck Feuster, Jeremial Schewe
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2008-GS-1669
  - (b) 2009-GS-2295
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) July 8, 2010 30 years + 15 years 85%
  - (b) \_\_\_\_\_

M

- (c) \_\_\_\_\_
- 6. Check whether a finding of guilty was made:
  - (a) after a plea of guilty \_\_\_\_\_
  - (b) after a plea of not guilty \_\_\_\_\_ ✓
  - (c) after a plea of nolo contendere \_\_\_\_\_

7. Did you appeal from the judgment of conviction or the imposition of sentence?  
YES

8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
    - i. South Carolina court of appeals
    - ii. South Carolina Supreme Court
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. appeal dismissed
    - ii. appeal dismissed
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. submitted April 1, 2013 - Filed May 9, 2013
    - ii. November 7, 2014
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. ~~2013-UP-1466~~ 2013-UP-1466
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_

9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) \_\_\_\_\_
  - (b) \_\_\_\_\_ ✓
  - (c) \_\_\_\_\_ ✓

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) ineffective assistance of counsel
- (b) prosecution misconduct
- (c) \_\_\_\_\_

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See Attached
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? appeal
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? None
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? None
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
  - i. Direct appeal
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. S.C. Court of Appeals
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (c) the disposition thereof:
  - i. appeal was dismissed
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- iv. \_\_\_\_\_
- (d) the date of each such disposition:
  - i. May 9, 2013
  - ii. November 7, 2014
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. 2013-UP-189
  - ii. 2013-UP-188
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?  
NO

15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
    - i. N/A
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the proceedings in which each ground was raised:
    - i. N/A
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) ~~N/A~~ See above
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NO
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? \_\_\_\_\_

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
  - i. Patricia Kennedy Esquire <sup>101 meeting st 6th floor charleston</sup> SC 29401
  - ii. Robert M Dudek <sup>Po Box 11589</sup> Columbia SC 29211
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. Trial + sentencing counsel: Patricia Kennedy
  - ii. Robert Dudek Direct appeal, Writ of Certiorari
  - iii. Direct appeal counsel: Robert Dudek

19. State clearly the relief you seek in filing this application:

Sentence vacated

20. Are you now under sentence from any other court that you have not challenged?

NO

**APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF**

I, \_\_\_\_\_, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- ✓ (1) I am the applicant in this action and I believe I am entitled to redress.
- ✓ (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

*[Signature]*  
Applicant

SWORN or affirmed to and subscribed before me this  
29<sup>th</sup> day of October, 2015.

*[Signature]*  
Notary Public

My Commission Expires: May 26, 2020

15 M FILED  
 15 NOV -4 AM 9:33  
 HARRY P. BROWN  
 CLERK OF COURT  
 BERKELEY COUNTY, S.C.

STATE OF SOUTH CAROLINA )

County of Berkeley )

VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

[Signature]

SWORN to and subscribed before me this 28<sup>th</sup>  
day of October, 2015.

[Signature] (L.S.)  
Notary Public

My Commission Expires: May 26, 2015

MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, S.C.

FILED  
15 NOV -4 AM 9:33

## Attachment

11a Defense counsel was ineffective for not contacting the witness she based her defense around. Evidence supporting trial transcript p110 line 8-17,

11b Defense council was ineffective for allowing prosecutorial misconduct. Supporting evidence trial transcript p 589-613 Solicitor Anne Williams was deliberately leading the witness through purged testimony.

PCR Application to be Amended.  
within guide lines of SC rules.

Please forward a copy to Attorney General and Patti Kennedy.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BERKELEY )  
 )  
 )  
Jeffrey Michaelson, #341675 )  
 Plaintiff, )  
 vs. )  
 )  
State of South Carolina )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT  
 CASE NO.: 2015\_-CP-08-2521

**MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET**

Plaintiff's Attorney: Lance S. Boozer, Esquire, Bar No. _____ Address: 807 Gervais St, Suite 203; Columbia, SC 29201 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: J. Rutledge Johnson, Bar No. 78871 Address: PO Box 11549 Columbia, SC 29211-1549 Phone: 803-734-3737 Fax 803-734-4113 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: \_\_\_\_\_  
 Estimated Time Needed: \_\_\_\_\_ 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 June 9, 2016  
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: \_\_\_\_\_

<p align="center"><b>JUDGE'S SECTION</b></p> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
---	---------------------------------

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_  
 MOTION FEE COLLECTED: \$ \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
 COUNTY OF BERKELEY )

IN THE COURT OF COMMON PLEAS )  
 NINTH JUDICIAL CIRCUIT )

Jeffrey Michaelson, #341675, )

2015-CP-08-2521 )

Applicant, )

v. )

**RETURN** )

State of South Carolina, )

Respondent. )

Respondent, making its Return to the application for post conviction relief (PCR) filed November 4, 2015, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted by the August 2008 term of the Berkeley County Grand Jury for one (1) count of Burglary, Second Degree (2009-GS-08-1669). The Applicant was indicted by the November 2009 term of the Berkeley County Grand Jury for one (1) count of Murder (2009-GS-08-2295). Patricia Kennedy, Esquire represented the Applicant. On July 8, 2010, the Applicant proceeded to a jury trial to which he was found guilty as indicted for one (1) count of Murder and not guilty for one (1) count of Burglary, Second Degree. The Honorable Kristi Lea Harrington sentenced the Applicant to incarceration for forty-five (45) years.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Michaelson, Op. No. 2015-UP-188 (filed on May 8, 2013). The Remittitur was issued on April 29, 2015. The Applicant sought a writ of

certiorari to review the South Carolina Court of Appeals' opinion. The petition was denied on November 7, 2014.

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, and the South Carolina Department of Corrections' records, the record on appeal, the Court of Appeals opinion, and the Supreme Court's order denying certiorari. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

In his original Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective (sic) Assistance of Counsel"
  - a. "Deffense (sic) counsel was ineffective for not contacting the witness she based her defense around. Evidence supporting the trial transcript p. 100 line 9-17 (sic)"
  - b. "Defense council was ineffective for allowing Prosecutorial misconduct. Supporting evidence trial transcript p. 589-613.
2. "Prosicution (sic) misconduct"
  - a. Solicitor Anne Williams was deliberately leading the wittness (sic) through purgerd (sic) testimony (sic)."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

## III.

For purposes of this Return, Respondent interprets Applicant's first allegation to be an allegation of ineffective assistance of counsel. In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged

errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### IV.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicants burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

#### VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

#### VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

JOHANNA C. VALENZUELA  
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON  
Assistant Deputy Attorney General

By:   
~~ATTORNEYS FOR RESPONDENT~~

Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

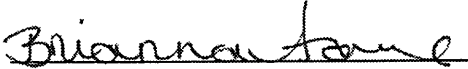
June 9, 2016.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
	)	
	)	2015-CP-08-2521
	)	
JEFFREY MICHAELSON, #341675	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Lance S. Boozer, Esquire  
The Boozer Law Firm, LLC  
807 Gervais Street, Suite 203  
Columbia, South Carolina 29201

DATED this 9<sup>th</sup> day of June, 2016.

  
Brianna Arnone, Legal Assistant  
For Respondent

## THE BOOZER LAW FIRM, LLC

---

**Lance S. Boozer, Esq.\***  
\*Also admitted in Florida

1400 Laurel Street, Suite 4A  
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Telephone: 803-608-5543  
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Email: [lsb@boozerlawfirm.com](mailto:lsb@boozerlawfirm.com)  
Website: [www.boozerlawfirm.com](http://www.boozerlawfirm.com)

July 13, 2017

Honorable Clerk of Court  
Common Pleas Court of Berkeley County  
P.O. Box 219  
Moncks Corner, SC 29461-0219

**RE: Jeffery Michaelson, #341675 v. State**  
**2015-CP-08-2521**

Dear Madam Clerk:

Enclosed for filing, please find an original and one (1) copy of the following documents:

- **Petitioner's Amended PCR Application**

Please file the original and return the extra file-stamped copy to my office in the enclosed self-addressed envelope. Thank you for your time and please do not hesitate to contact me should you have any questions.

Yours very truly,



Lance S. Boozer

cc: Judah VanSyckel, AAG  
Jeffrey Michaelson, #341675

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	C/A NO: 2015-CP-08-2521
	)	
Jeffrey Michaelson, #341675,	)	
	)	
Applicant,	)	
	)	<b>FIRST AMENDMENT TO PRIOR</b>
v.	)	<b>APPLICATION FOR PCR</b>
	)	
State of South Carolina,	)	
	)	
<u>Respondent.</u>	)	

The Applicant, at his request and through appointed counsel below, makes the following additional claim and amendment to his prior application for post-conviction relief:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
  - (i) Applicant asserts counsel was ineffective for not attempting to contact lead detective.
  - (ii) Applicant asserts counsel was ineffective for failing to use witness letters which would have established a conspiracy against Applicant.
  - (iii) Applicant believes counsel should have requested that the trial judge be recused.
  - (iv) Applicant believes counsel should have requested a change of venue.
  - (v) Applicant believes counsel should have requested a mistrial due to misconduct between victim's mother and a juror during trial. (See attached affidavit for George David Palms)
  - (vi) Counsel was ineffective for failing to argue the State opened the door for allowing hearsay testimony of Katherine Feaster. (See trial tr. pg. 521 and 545).

THE BOOZER LAW FIRM, LLC

  
Lance S. Boozer

Attorney for Applicant  
1400 Laurel Street, Suite 4A  
Columbia, SC 29201  
Phone: (803) 608-5543  
Fax: (803) 926-3463

Columbia, South Carolina  
July 13, 2017

I, the undersigned of the Boozer Law Firm, LLC, Attorney for Applicant, do hereby certify that I served the foregoing First Amendment to Prior Application for PCR and Motion for Funding and Production of Documents upon the persons below-listed by placing a copy, postage prepaid, in the United States Mail, addressed as follows:

Judah VanSyckel  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211

THE BOOZER LAW FIRM, LLC

  
Lance S. Boozer

Attorney for Applicant  
1400 Laurel Street, Suite 4A  
Columbia, SC 29201  
Phone: (803) 608-5543  
Fax: (803) 926-3463

Columbia, South Carolina  
July 13, 2017

To: The officer of the court  
 From: George David Palms  
 Date: October 6, 2015  
 Reference: Juror number Forty (Deborah Davis)

On the morning of July 08, 2010, Jeffrey Michaelson and myself (George David Palms) were sitting outside the courtroom at 308 (B) California Avenue, Moncks Corner, South Carolina, 29461. While sitting there, in my vehicle, smoking before court began I (George David Palms) saw one juror (Deborah Davis, Juror number 40) walk up to Frances Reeves and spoke to her for three to five minutes then gave Ms. Reeves a hug and walked into the courthouse.

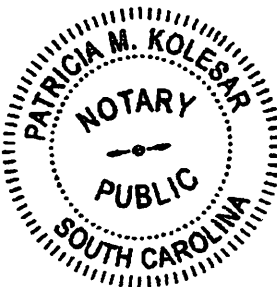
George D & Palms

George David Palms

10-6-15

Date

Sworn and Subscribed before me )  
 this 6 day of October, 2015 )  
Patricia M. Kolesar )  
 Notary Public for South Carolina )  
 My commission expires 03/09/2017 )



STATE OF SOUTH CAROLINA      COURT OF COMMON PLEAS  
COUNTY OF BERKELEY            2015-CP-08-2521

JEFFREY A. MICHAELSON,      )  
                                  ) TRANSCRIPT OF RECORD  
                                  ) Applicant,                    )  
                                  ) July 31, 2017  
                                  ) -vs-                            )  
                                  ) STATE OF SOUTH CAROLINA, ) Moncks Corner, South Carolina  
                                  ) Respondent.                    )

B E F O R E:

The Honorable Michael Nettles, Judge.

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

Lance S. Boozer, Esquire  
Attorney for the Applicant

Lindsey McCallister, Esquire  
Attorney for the Respondent

Amanda K. Haffenden, RPR, CRR  
Circuit Court Reporter

## E X A M I N A T I O N S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Jeffrey Michaelson	9	26	--	--
Patricia Kennedy	36	--	--	--

## E X H I B I T S

APPLICANT'S	DESCRIPTION	MARKED	ADMITTED
1	Letter	19	19
2	Letter	19	19
3	Letter	19	19
4	George Palms's Obituary	24	24
5	Article from the Post & Courier	58	58
6	Statement of Katherine Feaster	64	64

1 (July 31, 2017.)

2 THE COURT: Yes, ma'am.

3 MS. McCALLISTER: May it please the Court:  
4 This is Jeffrey Michaelson versus State of South  
5 Carolina, 2015-CP-08-2521. We're here today on Mr.  
6 Michaelson's application for post-conviction relief. He  
7 is currently confined to the South Carolina Department of  
8 Corrections pursuant to orders of commitment of the  
9 Berkeley County Clerk of Court. He was indicted in  
10 August of 2008 for one count of burglary second degree  
11 and then again in November 2009 for one count of murder.  
12 He was represented on those charges by Patricia Kennedy.

13 On July 8, 2010 he proceeded to a jury trial  
14 before Judge Harrington where, he was convicted on the  
15 count of murder and not guilty on the count of burglary.  
16 Judge Harrington sentenced him to a term of incarceration  
17 of 45 years. Timely notice of appeal was filed on his  
18 behalf and perfected.

19 The Court of Appeals denied -- I'm sorry,  
20 affirmed his conviction and sentenced him on May 8, 2013.  
21 The remitter was ultimately issued on April 29, 2015. He  
22 timely filed this application on November 4th, 2015.  
23 Mr. Michaelson is present in court today, and he is  
24 represented by Lance Boozer.

25 THE COURT: All right. Mr. Boozer, you're

1 recognized.

2 MR. BOOZER: Thank you, Your Honor. If it  
3 pleases the Court: Your Honor, in addition to the  
4 initial application, we did file an amendment on behalf  
5 of Mr. Michaelson, which should be in Your Honor's  
6 packet. If it's not --

7 THE COURT: Let's set forth in summary  
8 fashion the grounds for ineffective assistance of counsel  
9 and what respect in general.

10 MR. BOOZER: Certainly, Your Honor. The  
11 first, which was filed by way of his original  
12 application, was that his lawyer was ineffective for not  
13 contacting a witness that he alleges she based her entire  
14 defense around. The second allegation in his original  
15 application was one --

16 THE COURT: Are we still going forward on  
17 that one?

18 MR. BOOZER: We are, Your Honor, and it's  
19 alleged in a little more detail. The second allegation  
20 that he has is that his lawyer was ineffective for what  
21 he describes as prosectorial misconduct in that he  
22 believes the solicitor was deliberately leading one of  
23 the State's witnesses through perjured testimony.

24 THE COURT: All right.

25 MR. BOOZER: And, Your Honor, by way of

1 amendment, as I indicated before, he asserts that his  
2 lawyer was ineffective for not attempting to contact the  
3 lead detective, which goes back to his original  
4 allegation that he was not contacting the witnesses the  
5 defense was based around.

6 THE COURT: Okay.

7 MR. BOOZER: There's a second amended  
8 allegation which is that his lawyer was ineffective for  
9 failing to use witness letters which would have  
10 established, he alleges, a conspiracy against him.

11 THE COURT: Witness letters?

12 MR. BOOZER: Yes, Your Honor, and I do  
13 believe the State is going to most likely oppose these  
14 letters. At the appropriate time, I would ask to be able  
15 to examine my client as well as his former counsel about  
16 three letters.

17 These letters, as I will get into with both  
18 of those folks, are alleged to be from Mr. Michaelson's  
19 codefendants, and they would be in the form, I guess, of  
20 jailhouse letters, or what they call kites, I guess, and,  
21 basically, the gist of it, sort of the outline to provide  
22 Your Honor with the background in this case, the  
23 allegations in this case involve, really, three family  
24 members -- well, actually, four family members:  
25 Stepfather, a sister, and two brothers, and

1 husband-in-law, or husband, and then Mr. Michaelson is  
2 the sole outsider of this family. The allegations are  
3 that the stepfather was murdered. Mr. Michaelson ended  
4 up going to trial and was convicted, and, of course, as  
5 the State presented, was sentenced for that murder  
6 conviction.

7           Basically his entire defense was, in my  
8 opinion from reading the trial transcript, should have  
9 been or was that the family was doing everything they  
10 could to stick together while all pinning this on the  
11 non-family member, which was Mr. Michaelson. The letters  
12 that we would seek to introduce and which I would like to  
13 examine counsel on are letters that are alleged to be  
14 from his codefendant, Mr. Feaster, where, depending on  
15 the interpretation of the letters and what we allege, he  
16 was basically trying to coordinate the testimony of one  
17 of the witnesses who actually testified against  
18 Mr. Michaelson at his trial to: Basically stick to the  
19 script. If you go off the script, you get us all in  
20 trouble. We need to stay together, basically.

21           I have an article that I would like to hand  
22 up at the appropriate time from the Post & Courier in  
23 which the solicitor's office was actually, in preparing  
24 for trial against one of his codefendants, was wanting  
25 handwriting samples, which I can only guess were about

1 those letters. So these are the letters in particular as  
2 regards that allegation.

3 THE COURT: Okay.

4 MR. BOOZER: He believes that his lawyer  
5 should have requested the trial judge be recused. He'll  
6 be able to provide that testimony. He also believes that  
7 there should have been a request for change of venue,  
8 which will again be supported by his testimony.

9 Your Honor, he has another allegation which  
10 he believes his lawyer should have requested a mistrial  
11 due to what he describes as misconduct between the  
12 victim's mother in the case and a juror during the trial.  
13 Attached to the amended application is an affidavit from  
14 a fellow named George Palms.

15 Your Honor, it's my understanding the State  
16 most likely will oppose or move to have that stricken  
17 from the record. Just by way of what the affidavit would  
18 say is that George Palms was related to Mr. Michaelson.  
19 Unfortunately, Mr. Palms is deceased. I do have the  
20 obituary notice from the Post & Courier.

21 In that affidavit, which Mr. Palms -- which  
22 Mr. Michaelson has indicated to me that Mr. Palms has  
23 executed is signed and notarized, that he and Mr.  
24 Michaelson observed what they believed to be juror  
25 misconduct, which was a juror hugging the mother there

1 during the trial. We'll certainly get into that, of what  
2 Ms. Kennedy's knowledge of that was. So he can testify  
3 to that, A, of his own knowledge because I think he  
4 indicates he saw that, but also the affidavit indicates  
5 that Mr. Palms saw it.

6           The other allegation, Your Honor, that I'll  
7 be focussing quite a bit on with his former counsel is  
8 that his lawyer was ineffective for failing to argue that  
9 the State opened the door for allowing hearsay testimony  
10 of a codefendant, Katherine Feaster, and I, of course,  
11 will point out those pages in the transcript, unless Your  
12 Honor prefers that I do it now, and I'm happy to do so.

13           THE COURT: We'll get to that momentarily.

14           MR. BOOZER: Okay. Your Honor, those are the  
15 allegations as outlined. We'll certainly fill in the  
16 blanks with the testimony.

17           THE COURT: All right. You may call your  
18 first witness.

19           MR. BOOZER: Thank you, Your Honor. We'll go  
20 ahead and call Mr. Michaelson to the stand.

21           JEFFREY MICHAELSON,  
22           having been first duly sworn,  
23           was examined and testified as follows:

24           THE COURT: Mr. Michaelson, I'm going to ask  
25 if you could pull up the microphone. Speak loudly,

## JEFFREY MICHAELSON - DIRECT EXAMINATION

1 clearly, and slowly. I want to hear everything you have  
2 to say. Start with your full name.

3 THE WITNESS: Jeffrey Michaelson.

4 THE COURT: All right.

5 DIRECT EXAMINATION

6 BY MR. BOOZER:

7 Q. Thank you. Mr. Michaelson, how are you?

8 A. I'm well.

9 Q. I noticed because of your condition of shackles  
10 there is a small step you just took a little bit of a  
11 stumble over. Are you okay?

12 A. Yeah, I'm all right.

13 Q. Do you need a minute to compose yourself? It  
14 didn't look too serious. I just wanted to --

15 A. No. Let's go.

16 Q. Do you know what you're here for today in court?

17 A. Yes, to find out if -- or to try to get a release  
18 due to ineffectiveness of my initial counsel.

19 Q. And you understand to get to court today you filed  
20 what's called an application for post-conviction relief?

21 A. Yes, sir.

22 Q. Okay. And what is it that you're currently  
23 incarcerated for?

24 A. Murder one.

25 Q. All right. Now, did you go to trial on that

1 charge?

2 A. Yes, I did.

3 Q. And what type of sentence did you receive?

4 A. Forty-five years, day for day.

5 Q. All right. And as part of what a PCR action is,  
6 you and I have certainly had a discussion. His Honor  
7 certainly can't reduce your sentence or change your time  
8 or make you parole eligible. The only thing the Court  
9 can do for you is grant you a new trial.

10 Do you understand that?

11 A. Yeah, I understand that.

12 Q. Is that something that you want?

13 A. Yeah.

14 Q. Now, who was your trial attorney?

15 A. Patricia Kennedy.

16 Q. Before we get into your actual allegations, I want  
17 you to give us a little bit of background. When were you  
18 first arrested for these charges?

19 A. August 7 of 2007.

20 Q. August of 2007?

21 A. Yes.

22 Q. When was it the State alleged this crime occurred?

23 A. Sometime in 2001.

24 Q. So some time elapsed before you were arrested?

25 A. Yes.

1 Q. When did you first -- let me ask you this: How  
2 did Ms. Kennedy come about representing you?

3 A. I had filed for a State-appointed attorney.

4 Q. Do you know how soon after your arrest that she  
5 was appointed to represent you?

6 A. Within 30 days she came in and was -- what's the  
7 word? I guess -- she was taking to everybody that was  
8 needing an appointed attorney, but she wasn't appointed  
9 to me yet.

10 Q. She was coming by --

11 A. Yeah.

12 Q. -- the detention center?

13 A. Yeah. She came by the detention center to do, I  
14 guess, interviews with everybody that was trying to get  
15 appointed attorneys.

16 Q. Okay. When did you actually go to trial in your  
17 case?

18 A. June of 2010.

19 Q. June of 2010?

20 A. Yeah.

21 Q. So about 30 days or thereabouts after you first  
22 have contact with Ms. Kennedy. Do you know about how  
23 many times you may have met with her over the course of  
24 that time?

25 A. I think three or four, the only time I was in the

1 county.

2 Q. Did you ever bond out or anything?

3 A. Yes. I bonded out in November of '08.

4 Q. All right. After you made bond, how would you  
5 maintain contact with her if you did?

6 A. She would call me when I was needed.

7 Q. Okay. Would you go see her at her office or  
8 mainly by phone?

9 A. By phone.

10 Q. All right. Prior to you having a trial in the  
11 case, was there ever a plea offer that you're aware of?

12 A. She visited me at the jail once and said that  
13 there was a plea that she had turned down for me for 20  
14 years.

15 Q. Okay. Did you ask her any details about it or why  
16 she turned it down?

17 A. No.

18 Q. Okay. Did you want to take the plea or is this --

19 A. At that point, honestly, I didn't see any of the  
20 motions for discovery, so I couldn't make a decision like  
21 that. Being incarcerated for that length of time,  
22 already 15 months, you know, I feel like I really could  
23 have used some insight before I would have made a  
24 decision yes or no.

25 Q. Okay. So you sort of know your risk in going to

1 trial and whatnot?

2 A. Yes.

3 Q. Okay. Obviously, you went to trial in the case.

4 What did y'all do to prepare for trial?

5 A. I think she got an investigator, came and seen me  
6 once. He asked me a couple questions.

7 Q. All right. Let's start going through your  
8 allegations, because that's what we need to focus on, and  
9 that will sort of fill in some of the blanks about what  
10 y'all were doing.

11 You've got an allegation that you feel like your  
12 lawyer was ineffective for not contacting a witness she  
13 based her defense around, and that dovetails with the  
14 amended application that we have filed in that your  
15 lawyer was ineffective for not attempting to contact the  
16 lead detective.

17 Are those kind of two and the same?

18 A. Yes.

19 Q. All right. Who was the lead detective in the  
20 case?

21 A. Detective Merrithew.

22 Q. All right. And Detective Merrithew -- prior to  
23 your trial, did y'all have some continuances?

24 A. Yes. We had a few continuances.

25 Q. Do you recall what the reasons were for those

1 continuances?

2 A. For him not being available for a trial.

3 Q. For Detective Merrithew not being available?

4 A. Yes.

5 Q. Now, to your knowledge, what was your discussion  
6 with your lawyer about Detective Merrithew?

7 A. His testimony was supposed to fill in blanks and  
8 lay down groundwork of how things come together, how I  
9 was supposedly involved.

10 Q. And was it your understanding that Detective  
11 Merrithew, along, I guess, with another investigator, do  
12 you know, does the name Freeman ring a bell?

13 A. Yes.

14 Q. Okay. That they -- did they initially have  
15 contact with a woman named Katherine Feaster?

16 A. Yes.

17 Q. Okay. And did she actually live somewhere else in  
18 the state at that time?

19 A. Pelzer, South Carolina.

20 Q. She was up in the upstate?

21 A. Yes.

22 Q. And to your knowledge, Detective Merrithew and  
23 Investigator Freeman, did they travel to Pelzer and bring  
24 her back down here?

25 A. From what I am to understand, since I've been

1 incarcerated, yes.

2 Q. And they actually took statements from  
3 Ms. Feaster?

4 A. Yes, and from the way the times are on the  
5 statements, I mean, it's awfully hard to see how you  
6 interrogated someone for three and a half hours and then  
7 the times don't match up for the video versus the written  
8 statement.

9 Q. Okay. Your lawyer, did she tell you why she  
10 wanted Detective Merrithew at your trial?

11 A. I don't recall.

12 Q. Okay. Do you know what she was doing to try to  
13 get in touch with Detective Merrithew?

14 A. I mean, other than she was -- from what I'm to  
15 understand, it's in the transcript. She was given an  
16 e-mail address to contact.

17 Q. Okay. And eventually when your trial rolled  
18 around, he still wasn't there, was he?

19 A. Correct.

20 Q. And what did your lawyer try and do then?

21 A. Tried to file for a continuance.

22 Q. And was that denied?

23 A. Correct.

24 Q. Okay. And what was the reason at that point that  
25 Detective Merrithew was not at your trial?

1 A. He was in Afghanistan.

2 Q. Okay. Was that one of your appellate issues about  
3 the trial?

4 A. I don't recall.

5 Q. All right. Let's move on to another allegation  
6 that you've got in your original application.

7 You allege your lawyer was ineffective in allowing  
8 prosecutorial misconduct. Prosecutor was deliberately  
9 leading witness through perjured testimony?

10 A. Yes, Jeremiah Scharer.

11 MR. BOOZER: And, Your Honor, I believe the  
12 keynotes in the transcript of 589 would be Jeremiah  
13 Scharer's testimony. That may actually be the beginning  
14 page for Ms. Kennedy's cross-examination, so it obviously  
15 begins earlier than that.

16 BY MR. BOOZER:

17 Q. Jeremiah Scharer, who was he? He testified at  
18 your trial?

19 A. He was a stepson to the victim.

20 Q. Now, who else were your codefendants? Who were  
21 the others?

22 A. His sister Katherine and her husband, Treze  
23 Feaster.

24 Q. Why do you believe your lawyer was ineffective for  
25 allowing what you called perjured testimony? Do you not

1 agree with what Jeremiah was testifying to?

2 A. No, not at all.

3 Q. What do you believe your lawyer should have done  
4 with regard to his testimony?

5 A. I believe she should have objected.

6 Q. Okay. And did you feel like she should have  
7 brought some sort of attention other than cross-examining  
8 him, brought something to the Court's attention about  
9 your beliefs that everything he was saying was not true?

10 A. I do.

11 Q. And did she do that?

12 A. No.

13 Q. All right. Let's get into some of your  
14 amendments. You've got an allegation -- we've already  
15 discussed one, which was about Detective Merrithew, but  
16 let's talk about your lawyer was ineffective for failing  
17 to use witness letters, which you describe would have  
18 basically shown there was a conspiracy against you.

19 I'm sorry. Go ahead.

20 A. I wasn't even aware these letters existed until  
21 after maybe a year, year-and-a-half after I was  
22 incarcerated, when I actually received a copy of the Rule  
23 5.

24 Q. I'm going to ask you this: You indicated you got  
25 a copy of your Rule 5. Where did you get that?

1           A. I had my sister-in-law go pick it up from the  
2 lawyer's office.

3           Q. And when you say lawyer's office, are you talking  
4 about Ms. Kennedy?

5           A. Yes.

6           Q. All right. What was provided to you in Rule 5?

7           A. Some statements, police reports, medical  
8 examination records, and copies of those jailhouse dates,  
9 as you put it.

10          Q. Okay.

11                   MR. BOOZER: Your Honor, may I approach the  
12 witness?

13                   THE COURT: Yeah.

14 BY MR. BOOZER:

15          Q. Mr. Michaelson, I'm going to hand you three  
16 separate documents. If you would, just take a moment,  
17 look at them, review them to yourself, and then we'll  
18 chat briefly about them.

19          A. Okay.

20          Q. Now, you indicated you received some material  
21 through, I think, one of your relatives from your former  
22 attorney, Ms. Kennedy, and you got your Rule 5 materials  
23 a year, year-and-a-half after you had been convicted; is  
24 that right?

25          A. Correct.

JEFFREY MICHAELSON - DIRECT EXAMINATION

1 Q. Okay. The letters that you're holding in your  
2 hand, those three documents, are those items that were in  
3 the Rule 5 materials that were delivered to you from  
4 Ms. Kennedy's office?

5 A. Yes.

6 Q. Did you ever see those letters prior to your  
7 trial?

8 A. No.

9 Q. Were those letters ever introduced at your trial?

10 A. No.

11 Q. Is that a fair and accurate copy of the letters as  
12 you saw them from your Rule 5 materials?

13 A. Yes.

14 MR. BOOZER: Your Honor, at this time I would  
15 move to have these entered into evidence as Applicant's  
16 Exhibits 1, 2, and 3.

17 THE COURT: Any objection from the State?

18 MS. McCALLISTER: No, Your Honor.

19 THE COURT: All right. They're in evidence.

20 (Applicant's Exhibits 1, 2, and 3 were marked  
21 for identification and admitted into evidence.)

22 BY MR. BOOZER:

23 Q. Mr. Michaelson, you've had a moment to review the  
24 letters that have been marked as Petitioner's Exhibits 1,  
25 2, and 3?

1 A. Yes, sir.

2 Q. And we'll get into these letters with your  
3 attorney, but to your knowledge and based upon your  
4 experience at the trial and your review of the  
5 transcript, she never used these letters to confront any  
6 of the testifying witnesses at your trial?

7 A. No.

8 Q. Do you wish she would have?

9 A. Yes.

10 Q. Okay. You also have an allegation that you feel  
11 like the lawyer should have requested that the trial  
12 judge be recused. If you would, explain that allegation  
13 to the Court.

14 A. All right. When I was arrested and charged, I was  
15 given Porter -- I can't remember Ms. Porter's first name.  
16 Jennifer Porter was my initial solicitor, and she was  
17 either fired or let go for something, and after that  
18 time, I've had three or four different solicitors in  
19 the -- and their names are on the paperwork that I  
20 received in the Rule 5, but Ms. Harrington was a  
21 supervisor solicitor during that time.

22 Q. Okay. Who was your trial judge?

23 A. My trial judge was Kristi Harrington.

24 Q. I'm sorry. Keep going.

25 A. With her being a supervising solicitor, I'm going

1 to assume a solicitor's office is like any other  
2 business. If somebody gets fired, then the supervisor  
3 passes out the jobs to the people that would best -- to  
4 best perform that, so I would, in my mind -- I mean,  
5 maybe I'm wrong, but I would honestly think that if you  
6 had prior knowledge of something, then you couldn't give  
7 a fair decision. You couldn't give fair judgment.

8 Q. While your case was pending, it's your  
9 understanding that now Judge Harrington was at the  
10 solicitor's office?

11 A. When my case was pending, she was at the  
12 solicitor's office. I think she got her judgeship in  
13 February of '08 or somewhere in there.

14 Q. Did you have any discussion with Ms. Kennedy about  
15 that?

16 A. No, I did not.

17 Q. Okay. When did you become aware of that  
18 knowledge?

19 A. Since I was incarcerated.

20 Q. Had you known what you say you know now, would you  
21 have had any discussion with your lawyer at that time?

22 A. Yes, I would have.

23 Q. Would you have asked her to make a request for  
24 Judge Harrington to recuse herself?

25 A. I would have.

JEFFREY MICHAELSON - DIRECT EXAMINATION

1 Q. Now, you've also got an allegation that you  
2 believe your lawyer should have requested a change in  
3 venue. Explain that, please, if you would.

4 A. The victim's mother was prominent in Coastal  
5 Carolina Flea Market in the area and was -- when we went  
6 through the voir dire or whatever for the choosing our  
7 jurors, 20, 30 percent of the jurors in the room was  
8 familiar with the case.

9 Q. Okay. Well, let me ask you this: Were there  
10 articles in the paper --

11 A. Yes.

12 Q. -- about your case -- let me finish so Madame  
13 court reporter -- she can't write down things that we're  
14 saying at the same time. Were there newspaper articles  
15 about your case before your trial?

16 A. Absolutely.

17 Q. Were there stories that were in the media about  
18 your case?

19 A. Absolutely.

20 Q. All right. Did you have any discussion with  
21 Ms. Kennedy about trying to change the venue of the case?

22 A. I did ask.

23 Q. What was her response?

24 A. That it wouldn't -- that there wasn't a reason to  
25 do it because it probably wouldn't go through.

1 Q. Okay. Now, at any point during the trial, did you  
2 ever have an opportunity to observe any interaction  
3 between any of the jurors and anyone from the victim's  
4 family?

5 A. Yes. The last day of the trial, before the jury  
6 went in to deliberate, early in the morning, me and my  
7 brother-in-law were sitting in the parking lot, and he  
8 brought it to my attention --

9 Q. Who is your brother-in-law?

10 A. George David Palms.

11 Q. Okay.

12 A. He brought it to my attention that the victim's  
13 mother was hugging one of the jurors.

14 Q. And it was before your trial had ended or was it  
15 after?

16 A. No, this was before. This is before trial began  
17 on the last day.

18 Q. Did you personally see it?

19 A. I seen it as well, but it was brought to my  
20 attention by him.

21 Q. Did you notify your lawyer of that?

22 A. I did say something to her and asked her, and she  
23 told me if I didn't have a picture of it, then there  
24 wasn't no reason to bring it up.

25 Q. Did you want her to bring it up?

JEFFREY MICHAELSON - DIRECT EXAMINATION

1       A. I felt like it should have been brought up,  
2 considering all the parties were there.

3       Q. Okay. Now, you said it's your brother-in-law,  
4 Mr. Palms?

5       A. Uh-huh.

6       Q. And say yes or no, please.

7       A. Yes.

8       Q. Has he since passed away?

9       A. Yes, he did, last July, or July before last.

10      Q. And was his name George David Palms?

11      A. Correct.

12      Q. And who was his wife?

13      A. Susan Palms.

14               MR. BOOZER: Your Honor, Your Honor, I would  
15 just ask the Court to take judicial notice. This is a  
16 printout of the Post & Courier obituaries archives. It  
17 has George David Palms, 46, of North Charleston, husband  
18 of Susan Palms, died Sunday. I would just ask it be made  
19 a part of the record marked Applicant's Exhibit 4.

20               THE COURT: Any objection from the State?

21               MS. McCALLISTER: No, Your Honor.

22               THE COURT: All right. We'll make that part  
23 of the record.

24               (Applicant's Exhibit 4 was marked for  
25 identification and admitted into evidence.)

1 BY MR. BOOZER:

2 Q. All right. In your amended application, you have  
3 an allegation that your lawyer was ineffective for  
4 failing to argue that the State opened the door for  
5 allowing hearsay testimony from Katherine Feaster. Is  
6 that one of your allegations?

7 A. Yes, it is.

8 Q. And is this something you and I have discussed?

9 A. Yes.

10 Q. And do you understand that that is really a legal  
11 argument or a legal claim I'll be addressing with your  
12 lawyer?

13 A. Yes.

14 Q. And, just for the record, Katherine Feaster was  
15 related how to the victim?

16 A. Stepdaughter.

17 Q. And Katherine Feaster was related how to Jeremiah  
18 Scharer?

19 A. Sister and brother.

20 Q. And the third codefendant --

21 A. She was married to Treze Feaster.

22 Q. Who goes by Treze, or Treze Feaster?

23 A. Yes.

24 Q. All right. Now, I want to make sure that we have  
25 covered and outlined for the Court all of your

## JEFFREY MICHAELSON - CROSS-EXAMINATION

1 PCR claims, knowing that we will be getting into those in  
2 more detail with your lawyer. Is there anything that we  
3 have not covered or that you want to make the Court aware  
4 of about your PCR application?

5 A. No, not at this time.

6 MR. BOOZER: Mr. Michaelson, please answer  
7 any questions the State may have.

8 THE COURT: Yes, ma'am.

9 MS. McCALLISTER: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MS. McCALLISTER:

12 Q. I believe you said your first contact with  
13 Ms. Kennedy was when she came when you were in the  
14 detention center and she was interviewing you and others  
15 about needing an attorney; is that correct?

16 A. Correct.

17 Q. And after that point, did she interview you that  
18 day?

19 A. I mean, she interviewed everybody for about ten  
20 minutes.

21 Q. Okay. And then after that, you found out that the  
22 attorney that would be assigned was actually Ms. Kennedy;  
23 is that correct?

24 A. Yes.

25 Q. And I believe you said you met at the jail three

1 or four times?

2 A. Yes.

3 Q. And you were released on bond?

4 A. Yes.

5 Q. And your only contact with her after you were  
6 released on bond was via telephone?

7 A. Yes. She called me a couple times for roll call,  
8 and then she called me the morning my trial started.

9 Q. And so you had some continuance motions and things  
10 like that that happened before your trial officially  
11 began; is that correct?

12 A. Yes, and I wasn't privy to those.

13 Q. You were not privy to those?

14 A. No.

15 Q. You didn't come to court for this?

16 A. No.

17 Q. In your phone calls that you had and your  
18 meetings, I suppose, with Ms. Kennedy, did she talk to  
19 you about what the evidence was against you?

20 A. No. The first time we sat down to speak on that  
21 was, I think, the day after -- or the same day that we  
22 picked 12 for the jury.

23 Q. Okay.

24 A. Went to her office afterwards.

25 Q. So she didn't review any kind of discovery or talk

1 about who was going to testify or what was going to be  
2 said?

3 A. No.

4 Q. I believe you did say, though, that she talked to  
5 you or you were aware of the issue with Detective  
6 Merrithew being out of the country?

7 A. I mean, I found that out during the trial, yes.

8 Q. And she didn't talk to you then about what your  
9 defense would be at trial and why she needed him?

10 A. We talked about my defense after voir dire, after  
11 we picked the 12 that day.

12 Q. And is it your understanding that there was  
13 some -- maybe you weren't privy to them, that there was  
14 some argument about the issue of him not being available,  
15 and she asked the Court to continue the case?

16 A. Yes. I mean, there was a steady continuance  
17 during the trial.

18 Q. And when you say steady continuance, what do you  
19 mean?

20 A. She repeated it a few times to put it on record.

21 Q. So she kept renewing that objection as trial went  
22 on?

23 A. Yes.

24 Q. And is it your understanding that she also raised  
25 that issue in some motions before your trial occurred?

1           A. Yes. It was always my understanding during trial  
2 that she was given a way to contact them, and she didn't,  
3 and that's in the transcripts as well.

4           Q. And I think I heard you tell that to Mr. Boozer,  
5 that it's your understanding that she was given an e-mail  
6 address?

7           A. Yes.

8           Q. And it's your understanding that the detective,  
9 the person at issue, had left the country and was in  
10 Afghanistan; is that correct?

11          A. Yes.

12          Q. In terms of your allegation about perjured  
13 testimony, I just want to be clear. Other than -- I  
14 think you said your counsel did cross-examined the  
15 witness that you have this allegation about, Mr. Scharer;  
16 is that correct?

17          A. Yes.

18          Q. She cross-examined him after the State had put him  
19 up on the stand, correct?

20          A. Correct.

21          Q. And she did ask him about why his statement had  
22 changed and why his statements were inconsistent; is that  
23 correct?

24          A. Yes.

25          Q. And she did point out the differences in his

1 statements between what he said to one officer, to a  
2 different officer, to what he was saying in trial?

3 A. Yes, I assume so.

4 Q. And I think you told Mr. Boozer that you wish she  
5 had done something else or something more. What is that  
6 that you wanted her to do?

7 MR. BOOZER: Your Honor, if I may object,  
8 he's answered this question. She can play back what he  
9 said in response to it. I think he just said what he  
10 wanted her to do.

11 THE COURT: Well, I'll allow her to ask.

12 MS. McCALLISTER: I think he just said she  
13 should have done more. I'm not sure he answered the  
14 question of what exactly that means.

15 BY MS. McCALLISTER:

16 Q. What does more mean that you wanted her to do?

17 A. I don't know.

18 Q. Okay. And I think you said on the issue of Judge  
19 Harrington also having been in the solicitor's office,  
20 it's your understanding that she became a judge in  
21 February 2008; is that correct?

22 A. Yes.

23 Q. And what date were you arrested?

24 A. I was arrested August 7th of '07, and I had three  
25 or four different solicitors in that time.

1 Q. In the time between August 7th and February of  
2 2008?

3 A. Yes.

4 Q. And your trial was in June of 2010; is that  
5 correct?

6 A. Correct.

7 Q. So by the time of your trial, she had been gone  
8 from the solicitor's office for over two years; is that  
9 correct?

10 A. Okay.

11 Q. You agree with me?

12 A. I do.

13 Q. Okay. And you didn't bring that up to her because  
14 you weren't aware of it until after the trial, correct?

15 A. That's correct.

16 THE COURT: Mr. Michaelson, do you have any  
17 evidence she knew anything about your case?

18 THE WITNESS: Not directly.

19 THE COURT: Worked on your case?

20 THE WITNESS: No, sir.

21 BY MS. McCALLISTER:

22 Q. Your issue with the change of venue -- I'm sorry.  
23 Could you tell me -- you said you did discuss that with  
24 Ms. Kennedy?

25 A. Yes.

1 Q. You asked her about that? I'm sorry.

2 A. I did ask Patricia Kennedy about having a change  
3 of venue.

4 Q. And she told you that in her opinion that that  
5 would not be granted?

6 A. Exactly. She said it wouldn't be granted because  
7 the changes of venues aren't generally granted.

8 Q. Okay.

9 MS. McCALLISTER: Beg the Court's indulgence,  
10 Your Honor.

11 THE COURT: While she's looking at that,  
12 Mr. Boozer, I think trial counsel might be right on that.  
13 Those are very rarely granted, changes of venue. Just  
14 about all of the cases that address that say it's within  
15 the sound discretion of the trial judge, and any motion  
16 to change venue is really premature until such time as  
17 it's impossible to get an impartial jury, and you can't  
18 find that out until you have voir dire of the jury, and I  
19 speak from a little bit of experience.

20 I was probably about your age when I tried a  
21 case, and I hired a team of sociologists to do a survey  
22 of Florence County citizens. They all came back, and it  
23 was astronomical how many people knew about this case,  
24 and not only that, they specifically thought the  
25 defendant was guilty.

1           And, of course, they convened a jury, and  
2 after asking the appropriate questions, they made the  
3 determination that the witnesses, after voir dire, could  
4 be fair and impartial, and the Supreme Court said it was  
5 proper to deny the motion for change of venue.

6           What do you have in this case that would seem  
7 to indicate the jury denial was present?

8           MR. BOOZER: And, Your Honor, I do understand  
9 that they are rarely granted, those motions, and I've  
10 certainly had this issue in a PCR setting before.

11           As I stand right now, I don't have anything.  
12 I certainly will be handing you up probably some copies  
13 of some articles from the Post & Courier, but I would  
14 like to have Ms. Kennedy testify, who I'll be calling  
15 momentarily. As she was chief public defender over here,  
16 I can really get a feel from her sort of what the climate  
17 was like, what sort of news coverage there was about this  
18 case.

19           THE COURT: Regardless of what her perception  
20 of what the climate was, isn't the ultimate test as to  
21 whether or not the judge can get -- after asking the jury  
22 pool the appropriate questions, whether or not they say  
23 they can be fair and impartial? Isn't that kind of the  
24 measure that you got to get over?

25           MR. BOOZER: It is, Your Honor, but in this

1 case, there was no motion that was ever made, so I'd like  
2 to get into why she didn't explore that, and she may have  
3 a very valid reason for it, but as it stands right now, I  
4 certainly, as an officer of the Court, could not answer  
5 that question.

6 THE COURT: The valid reason probably is such  
7 that they were able to get a jury that said they could be  
8 fair and impartial.

9 MR. BOOZER: Sure.

10 THE COURT: And probably the question was  
11 asked -- and I haven't read the transcript to this extent  
12 probably was asked: Has anybody read anything about the  
13 case? I imagine they probably did. What did the  
14 transcript say as to whether or not they did?

15 MR. BOOZER: I have to reflect back and look  
16 at it in detail, Judge.

17 THE COURT: Okay.

18 MR. BOOZER: I couldn't quote it right now.

19 THE COURT: All right. Yes, ma'am?

20 MS. McCALLISTER: Thank you, Your Honor.

21 THE COURT: As we digress, you were looking  
22 for something?

23 MS. McCALLISTER: I was, yes. Thank you,  
24 Your Honor.

25 BY MS. McCALLISTER:

1 Q. Okay. I'm going to move on to your allegation  
2 about the juror that you allegedly saw hugging the  
3 victim's mother. You said that occurred on the last day  
4 of your trial?

5 A. Yes.

6 Q. Okay. And you said that you saw that personally  
7 occur.

8 A. Yes.

9 Q. How far away were you from them when you saw that  
10 happen?

11 A. From here to the back wall.

12 Q. Okay. So -- I don't know, how far is that, 20  
13 yards? Okay. Did you hear any conversation?

14 A. No. I was in a vehicle, but they were conversing.  
15 I could see their mouths moving.

16 Q. But you couldn't hear what was being said?

17 A. No.

18 Q. And you said you did report that to Ms. Kennedy?

19 A. Yes.

20 Q. You reported what you had seen. When did you  
21 report that to her?

22 A. Before trial was to begin that morning.

23 Q. And her response to you was: If you don't have  
24 pictures, then there is no reason to bring that up.

25 A. Yes.

## JEFFREY MICHAELSON - REDIRECT EXAMINATION

1 MS. McCALLISTER: I think that's all the  
2 questions I have for Mr. Michaelson.

3 THE COURT: Any redirect?

4 MR. BOOZER: Just briefly, Your Honor.

5 REDIRECT EXAMINATION.

6 BY MR. BOOZER:

7 Q. The distance from where you're sitting to this  
8 back wall, 20 yards, is that a best guess?

9 A. I mean, yes. It's close.

10 Q. Okay.

11 MR. BOOZER: Nothing further, Your Honor.

12 THE COURT: All right. You may step down.

13 Thank you, sir.

14 You may call your next witness.

15 MR. BOOZER: Thank you, Your Honor. We call

16 Ms. Kennedy to the stand.

17 PATRICIA KENNEDY

18 having been first duly sworn,

19 was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. BOOZER:

22 Q. Ms. Kennedy, how are you?

23 A. I'm well, thank you.

24 Q. Ms. Kennedy, where do you currently work?

25 A. Charleston County public defender's office.

1 Q. All right. And how long have you been over in  
2 Charleston County?

3 A. Since May of 2013.

4 Q. Okay. Prior to May of 2013, where did you work  
5 then?

6 A. Berkeley County public defender's office.

7 Q. What was your position over here?

8 A. Chief public defender.

9 Q. How long were you in that role?

10 A. Ten years.

11 Q. During that time, did you represent Mr. Michaelson  
12 as chief public defender?

13 A. I represented him as his public defender.

14 Q. Were you then the chief public defender in that  
15 office?

16 A. Yes, I was.

17 Q. And, obviously, you were appointed on the case.

18 A. Yes.

19 Q. Do you know how many times you may have met with  
20 Mr. Michaelson?

21 A. No. I mean, I would have met with him -- what I  
22 try to do is, I can't say it every time all my clients  
23 that are in jail, I try to meet with them at least every  
24 30 to 45 days, and that time frame may change depending  
25 on -- vary when I get discovery or something that needs

1 to be shared, then it would be much more frequently than  
2 that.

3 Q. That's sort of your policy and general rule?

4 A. Has been for a long time.

5 Q. So there may be fluctuations up or down depending  
6 on the client?

7 A. A little, yes.

8 Q. But specifically for Mr. Michaelson, you don't  
9 have any specific recollection of the number of times?

10 A. That was seven years ago.

11 Q. Sure.

12 A. Or eight, I guess. Eight or nine.

13 Q. Let me touch on this for a minute: Prior to the  
14 trial, do you ever remember there being a plea offer?

15 A. No.

16 Q. Okay. If there was a plea offer, would you have  
17 discussed that with Mr. Michaelson?

18 A. Absolutely. I have an ethical obligation to do  
19 so.

20 Q. From your recollection, was he pretty set on going  
21 to trial?

22 A. My recollection, yeah, because he maintained his  
23 innocence and I believed him.

24 Q. Let's talk about this sort of -- what were sort of  
25 the -- maybe not the specific allegations against

1 Mr. Michaelson directly, but sort of the background of  
2 the case. What were the facts or the allegations in the  
3 case?

4 A. Starting when?

5 Q. Well, you start where you want to start, and I'll  
6 back you up if you want to.

7 A. In February of 2001, a man named Parrish Reeves  
8 went missing, from 2001 till, I don't know, 2007 when  
9 Mr. Michaelson and his codefendants were arrested,  
10 Mr. Reeves's mother, whose first name escapes me, has  
11 been on a continuous quest because she never believed  
12 that her son would up and leave, that she felt very  
13 strongly that something had happened to him, that  
14 somebody had hurt him.

15 She went to America's Most Wanted. She contacted  
16 a number of television programs in that ilk to try to get  
17 some assistance. She then, the whole time, would also  
18 make regular trips to the Berkeley County sheriff's  
19 office asking for updates on the case, and, of course,  
20 there were none.

21 Then she, I think, sometime in early August, I  
22 guess it was, or maybe July, she was over at the  
23 sheriff's office, ran in to Detective Merrithew.  
24 Detective Merrithew was consoling her, as I understand  
25 it, asking if he could help.

PATRICIA KENNEDY - DIRECT EXAMINATION

1           She explained to him what her situation was, and,  
2 obviously, at that point in time, it was a cold case.  
3 Detective Merrithew was then in contact with the major of  
4 the detective squad, Rick Olick, and he was given the  
5 go-ahead to pursue the cold case.

6           THE COURT: Okay. And, if you could, kind of  
7 keep leaping forward and walking through this.

8           THE WITNESS: Okay. So Detective Merrithew  
9 then went -- he reviewed the file. There was also a  
10 burglary associated with it. He started looking at pawn  
11 shop receipts, found some pawn shop receipts which then  
12 led him to Money Man Pawn shop, which then led him to  
13 Katherine Feaster, who was Parrish Reeves's  
14 step-daughter.

15         Q. So that was sort of the beginning of the case  
16 getting warmer. It's not longer that cold anymore.

17         A. Right, exactly.

18         Q. So then where does Mr. Michaelson come into this?

19         A. Okay. Detective Merrithew and I think sergeant at  
20 the time, Sergeant Freeman, they found out that Katherine  
21 Feaster was living in Pelzer, in Anderson County. They  
22 drove to Anderson with an arrest warrant for her for  
23 receiving stolen goods.

24                 They brought her back to Charleston, I'm not sure.  
25 Somewhere en route -- not Charleston, Berkeley.

PATRICIA KENNEDY - DIRECT EXAMINATION

1 Somewhere en route, they may have contacted her husband,  
2 Treze Feaster. He was aware that she had been arrested,  
3 and then at the -- at or about the same time, they  
4 contacted -- Detective Merrithew contacted Jeremiah,  
5 Scharer who is Katherine Feaster's younger brother.

6 So they interviewed Mrs. Feaster. They  
7 interviewed Mr. Feaster. Then they interviewed  
8 Mr. Sheerer.

9 Q. All right. And what --

10 A. In domino fashion.

11 Q. In domino fashion?

12 A. Yes.

13 Q. And wasn't there some little kind of point in time  
14 I believe on the ride back from Pelzer to down here that  
15 Katherine got to speak to her husband?

16 A. That's what I said, somewhere en route. He was  
17 aware that she had been arrested.

18 Q. So still, as Mr. Michaelson --

19 A. Totally out of the loop.

20 Q. Okay. So if you could continue to walk the Court  
21 through.

22 A. They -- all right. Detective Merrithew  
23 interviewed. Detective Lee drove the car. Detective Lee  
24 is a female. Detective Lee went with Merrithew because  
25 she would be a female prisoner.

1           Detective Merrithew interviewed her, took a  
2 statement from her --

3           Q.   Sergeant Freeman actually wrote the statement?

4           A.   Right, but he was doing the interrogation, and  
5 then he -- when he got back to the sheriff's office or  
6 the detective unit, they did a video, I think, I believe.

7           Q.   Of Katherine?

8           A.   Right, and then after that, they got Mr. Feaster  
9 to come in. He was interviewed, gave a statement, and,  
10 again, Jeremiah was, I believe, in Walterboro, and they  
11 asked him to come in and he gave a statement.

12          Q.   Where does Mr. Michaelson come in?

13          A.   He wasn't in at all until they implicated him.

14          Q.   And when you say they implicated, who is that?

15          A.   It started with -- I believe it started with Treze  
16 and the statement he gave.

17          Q.   Okay. So Treze is the husband of Katherine who is  
18 the stepdaughter of the victim.

19          A.   Right.

20          Q.   And then Jeremiah is the brother of Katherine?

21          A.   Yes.

22          Q.   Okay.

23          A.   The younger brother.

24          Q.   So they all implicate Mr. Michaelson?

25          A.   Yes.

PATRICIA KENNEDY - DIRECT EXAMINATION

1 Q. And what happens then?

2 A. Then they -- two to three people, they went to  
3 pick up Mr. Michaelson. They sort of had him boxed in,  
4 as I understand it. He came in toward his house, and  
5 they boxed him in and took him into custody.

6 Q. All right. And Mr. Michaelson, he denied having  
7 any active role in the killing of the victim?

8 A. Yes. I don't mean to back up, but those three  
9 people were interviewed, I believe, on August 6th and he  
10 gave a statement on August 7th when he was arrested.

11 Q. And depicted in the transcript where was the body  
12 eventually found?

13 A. It was found basically in Mr. Michaelson's front  
14 yard.

15 Q. All right.

16 A. Or to the right when you walk out of his trailer.

17 Q. All right. So it's safe to say Mr. Michaelson is  
18 the only non-family member in this whole crime?

19 A. Exactly. Exactly.

20 Q. Okay.

21 A. Didn't know him at all.

22 Q. Okay. Were Jeremiah and Treze or who goes by -- I  
23 think I've seen the name Treze, and -- Katherine,  
24 Jeremiah and Treze, or Treze, were they all facing  
25 charges as a result of all of this?

PATRICIA KENNEDY - DIRECT EXAMINATION

1 A. Yes.

2 Q. All right. So were they actually his codefendants  
3 at some point?

4 A. Yes.

5 Q. Now, what was your -- I guess, sort of -- what was  
6 your trial strategy for this case?

7 A. My trial strategy was he didn't do it. He was not  
8 related to the victim in any way. He had no -- had had  
9 no prior contact with him, had no beef with him. The  
10 other -- there are allegations and information contained  
11 in Katherine Feaster's statement that he had -- that Mr.  
12 Reeves had been sexually abusing her, touching her  
13 inappropriately, that he -- during the time that he was  
14 married to their mother, Jeremiah was beaten frequently  
15 by Mr. Reeves and, of course, Mr. Feaster was very upset  
16 that his wife was being touched inappropriately by her  
17 stepfather-in-law.

18 Q. And you -- what sort of -- what was the State's  
19 theory or what motive was there for Mr. Michaelson to  
20 want to kill these folks' relative, stepfather?

21 A. Only thing that was ever said about Mr.  
22 Michaelson's motivation was in -- I don't remember his  
23 statement, but it was like they relied, one of them --  
24 one of his codefendants relayed in a statement that he,  
25 Mr. Michaelson, had been very upset recently. His

PATRICIA KENNEDY - DIRECT EXAMINATION

1 grandmother had died and he wanted to kill somebody, so  
2 then from that, we got to the decision oh, let's go kill  
3 Parrish Reeves.

4 Q. Does that seem pretty incredible to you?

5 A. Absolutely incredible. Made no sense to me.

6 Q. Okay. Now, we'll come back to all that here in a  
7 moment, but during the trial, you made what appears to be  
8 a pretty big issue about of not having Detective  
9 Merrithew there; in fact, so much that you made three  
10 multiple continuance requests.

11 A. Yes.

12 Q. Okay. What was your strategy and why did you want  
13 Detective Merrithew there?

14 A. Well, because Detective Merrithew was the one who  
15 picked it up as a cold case. Detective Merrithew was --  
16 had been the engine driving the train. I mean, Major  
17 Rick Olick, his superior, had put him in charge of that,  
18 that case.

19 Detective Merrithew -- I'd had a lot of  
20 experience, prior experience, with Detective Merrithew  
21 and his work for the Berkeley County sheriff's office. I  
22 knew that he was -- knew him to be a person who was not  
23 very thorough; a person who, in my belief, would not just  
24 jump to conclusions, but could leap to conclusions, and,  
25 in my view, of the discovery and what came through the

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1 discovery, he had not been -- he had not done a competent  
2 job of investigation.

3 Q. Okay. And what would you have done at trial had  
4 he testified?

5 A. I would have challenged him on just about  
6 everything he did, had done.

7 Q. What efforts did you make to try and get in touch  
8 with him?

9 A. Well, let me back I procedurally. He left -- all  
10 right. He was under subpoena once when we were supposed  
11 to go to trial. Sometime, maybe the spring or summer of  
12 200 -- let me think, 2009, and somewhere in there he had  
13 been under subpoena somewhere during -- between that time  
14 and November of that year when we were put on, actually  
15 put on, the trial docket.

16 Detective Merrithew had gone to work for a private  
17 security firm doing security work in Afghanistan. We had  
18 a motion for continuance in front of Judge Dennis in  
19 November 2009 at which time Judge Dennis ruled that he  
20 was an essential witness, that the State had control over  
21 him, and that they should make every effort to bring him  
22 back.

23 The order in that case was not filed, I think,  
24 until March of 2010, at or around the time that I was  
25 before Judge Harrington on another motion for a

1 continuance, based on the same set of facts, that he's --  
2 he wasn't there. He they asserted that -- the assistant  
3 solicitor asserted that they had given me an e-mail  
4 address. What they had given me was an e-mail address to  
5 a supervisor or the person who was responsible for  
6 signing all these people -- because the number of people  
7 from the Berkeley County sheriff's department did that.  
8 Apparently, you can go over there and make \$50,000  
9 tax-free and come back and still have your job, so it was  
10 the supervisor who was in charge of all of that in  
11 Afghanistan.

12 Q. Okay. What were you doing to try to locate him  
13 before he went to Afghanistan?

14 A. Right. Based on the conference and the order  
15 issued from Judge Dennis, it wasn't filed until that  
16 following March.

17 Q. All right. And did you try to get in touch with  
18 him by e-mail prior to that point?

19 A. Not -- the e-mail address I had was for the  
20 company that he was working for.

21 Q. Okay. There's also an allegation that  
22 Mr. Michaelson alleged in his original application that  
23 you were ineffective for allowing what he described as  
24 prosecutorial misconduct and specifically in regard to  
25 what he believed was, basically, the State presenting

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1 perjured testimony through Jeremiah Scharer?

2 A. Yes.

3 Q. Did Jeremiah testify at trial?

4 A. Yes, he did.

5 Q. Was he the only one of those codefendants that  
6 testified at trial?

7 A. Yes, he was.

8 Q. And you actually had an opportunity to  
9 cross-examine Jeremiah?

10 A. Yes.

11 Q. And you indicated earlier that you believed  
12 Mr. Michaelson?

13 A. Absolutely, still do.

14 Q. Still do. Did you have any opportunity to form  
15 any sort of personal opinion as to the veracity of Mr.  
16 Shearer's testimony?

17 A. Let me get the -- he had given a statement, a  
18 written statement. There weren't any written statements  
19 that followed that I received. In my conversations with  
20 the solicitor, his testimony kept evolving in the sense  
21 that there was greater detail, and I challenged him  
22 during the cross-examination because I asked him how many  
23 times had he met with the solicitor, and he said he  
24 couldn't say.

25 And then we went through, Was it one time? Was it

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1 two times? Was it more than four times? We got to the  
2 point where he just didn't answer. So my concern about  
3 that testimony is, as I said, as it went along, it became  
4 more detailed.

5 Q. Let me ask you this: Have you had in the past  
6 witnesses who are represented by the State that you just  
7 do not believe?

8 A. Oh, sure.

9 Q. Okay. To your knowledge, is there anything  
10 further that you can do after cross-examining that  
11 witness?

12 A. No, just vigorous cross-examination and hope that  
13 something -- a question that I ask or an answer that is  
14 given might, you know, penetrate a juror's conscience.

15 Q. Okay. Now, did you receive and make requests  
16 pursuant to Rule 5 in Brady in this case?

17 A. Yes.

18 Q. All right. Did you receive what you believed to  
19 be a complete copy of everything?

20 A. Yes, but let me explain to you. As Mr. Michaelson  
21 has indicated, he started out with Jennifer Porter as his  
22 prosecutor. Ms. Porter left. Then a gentleman named  
23 Michael Henderson was the assistant solicitor who was  
24 assigned to the case. Mr. Henderson was transferred to  
25 Charleston County at some point, so I received discovery

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1 materials from M. Porter. I received discovery materials  
2 from Mr. Henderson. I received discovery materials  
3 from -- and Assistant Solicitor Wilson, and, I believe,  
4 Williams and Deputy Solicitor Alfaro, and the closer that  
5 we got to trial -- I think it's noted in the transcript.  
6 I got discovery in March; I got discovery in April; I got  
7 discovery in June. It just kept coming in in drips and  
8 drabs, but that's the usual process.

9 Q. All right. After the trial -- and you may not be  
10 involved in this, and you can certainly tell us whether  
11 you were or not. Did you receive any request form Mr.  
12 Michaelson or Mr. Michaelson's family for a copy of the  
13 Rule 5 materials?

14 A. Yes, we did.

15 Q. Okay. Were those then subsequently provided to  
16 Mr. Michaelson?

17 A. Yeah, but as I recall -- because I was still in  
18 Berkeley at the time, as I recall, it took them forever  
19 to come pick it up.

20 Q. But it was done after the trial is when they --

21 A. Oh, yes, absolutely.

22 MR. BOOZER: May I approach Ms. Kennedy?

23 THE COURT: Yes.

24 Counsel, approach the bench for a moment.

25 (Brief sidebar.)

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1                   We're going to stand at ease for five  
2 minutes.

3                   (Recess taken.)

4                   THE COURT: Counsel usual recognized.

5                   MR. BOOZER: Thank you, Your Honor.

6 BY MR. BOOZER:

7           Q. Ms. Kennedy, I was about to approach you.

8                   MR. BOOZER: May I approach the witness, Your  
9 Honor?

10                   THE COURT: Yes.

11 BY MR. BOOZER:

12           Q. I'm going to hand you three documents, which are  
13 marked Petitioner's Exhibit 1, 2, and 3. If you would,  
14 take a moment and review to yourself and let me know when  
15 you're done. All right?

16           A. I'm done.

17           Q. Thank you. If you will, I'll just have you keep  
18 these up here for a moment. Do you know what those  
19 documents are?

20           A. They appear to be letters that were written to  
21 Jeremiah Scharer, as best as I can put it together.

22           Q. Were those documents in your discovery, do you  
23 recall?

24           A. No. I don't recall, but after you brought them to  
25 my attention, I went back through my file and discovered

1 that I did, in fact, have them. I don't know where they  
2 came from. I assume they came through discovery.

3 Q. So you initially did not think these were in your  
4 discovery, but you've since gone back and looked through  
5 the original file you would have received?

6 A. Yes.

7 Q. And they are, in fact, in that file?

8 A. They are in the file, yes.

9 Q. Okay. And you had indicated to you it appeared to  
10 be letters to one of -- a witness who testified at Mr.  
11 Michaelson's trial, Jeremiah?

12 A. Yes.

13 Q. All right. And if they were in your discovery  
14 file, then presumably they would have been given to  
15 Mr. Michaelson at the post-trial request, I guess?

16 A. Certainly, yes.

17 Q. Have you had a moment to review the substance of  
18 those writings?

19 A. I've looked at them several times.

20 Q. I want to point your attention to Exhibit 1, and,  
21 if you would, Ms. Kennedy, if we look at these exhibits,  
22 Exhibits 1, 2, and 3 together, the only one that actually  
23 has it addressed to someone, at least where you can read  
24 it, is Exhibit 2 which begins: Jere.

25 A. Right.

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1 Q. Is that your understanding of Jeremiah Scharer?

2 MS. McCALLISTER: I'm sorry. I thought you  
3 marked them all together, so could you tell me which one  
4 is 1, 2, and 3?

5 All right. I've got it now. Thank you.

6 BY MR. BOOZER:

7 Q. And let's go back to Exhibit 1, and if you look at  
8 the top -- and I'll just read it.

9 It says: My lawyer Sunday and I've already  
10 had my clothes brushed up here. She told me everything  
11 is a go for Monday, and you can't tell me don't worry.  
12 There's a whole lot to worry about. You need to be  
13 prepared and hold up under pressure.

14 You have to be very careful what you say and  
15 how you say it. I hope you're right that that  
16 conversation was not recorded. You definitely can't say  
17 anything like that because that makes it premeditated,  
18 and not only are you burying me, but you put yourself in  
19 the same position, and you don't need to do that, but you  
20 really might not matter because they need your statement.  
21 That's what they're going on, is you and your story, so  
22 I'm sure your plea still stands. When is the last time  
23 you talked to your lawyer?

24 And it goes on: And you should be used to  
25 the whole, We know this and that, routine. They don't

1 know anything unless you tell them. That's why we're  
2 here now. They still don't have nothing except what we  
3 say. That's why they're doing all the threats to y'all,  
4 waiting for y'all to crack. We're at the critical point  
5 now where it's getting dangerous. I'm not trying to give  
6 these people the rest of my life.

7           Skip down a couple sentences: But just  
8 remember they're trying me and him as a whole. That is  
9 what you have to be careful with what you say and how you  
10 say it. Let me know what's up and what all your lawyer  
11 said when you got that info. I might not even come back.  
12 Kat says she loves you.

13           Based on that initial letter, what is sort of  
14 your understanding of what that letter is?

15       A. It appears to be a letter from Treze Feaster to  
16 Jeremiah advising him that he should stick to whatever  
17 story they developed.

18       Q. And the line about them being tried as a whole, is  
19 that talking about Mr. Michaelson and Mr. Feaster?

20       A. Additionally, they were going to be tried together  
21 and the decision was made that for some reason  
22 Mr. Feaster would be offered voluntary manslaughter, so,  
23 you know, that left Mr. Michaelson on his own.

24       Q. All right. If we skip over to Exhibit 2, which is  
25 the one we have the identifier Jere --

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1 THE COURT: I'm going to ask her to reiterate  
2 that. What happened to the codefendants?

3 THE WITNESS: Well, Your Honor, Treze Feaster  
4 pled guilty to voluntary manslaughter and burglary, and I  
5 believe he got an 18-year sentence on the voluntary  
6 manslaughter and a 15-year sentence on the burglary.  
7 Jeremiah Scharer pled to --

8 THE COURT: To run concurrent?

9 THE WITNESS: Yes, sir. Jeremiah pled to  
10 accessory after the fact, I believe, and then Ms. Feaster  
11 was receiving stolen --

12 THE COURT: What happened to Jeremiah?

13 THE WITNESS: He got prison term. I don't  
14 recall how much.

15 THE COURT: And the last one?

16 THE WITNESS: Ms. Feaster, she got receiving  
17 stolen goods, but she got prison time, which, by the time  
18 they gave her -- I don't remember the exact number of  
19 years, but by the time she got to trial, with the credit  
20 that she had been given, she only had to serve a very  
21 short term in the Department of Corrections.

22 MR. BOOZER: Thank you, Your Honor.

23 BY MR. BOOZER:

24 Q. Looking at Exhibit No. 2, which begins with Jere  
25 at the top, it begins: Jere. Hey, man. You should have

1 stuck to the script and never fold.

2           Skipping down a couple lines: My lawyer is  
3 telling me to testify for myself against him and to make  
4 it as we're getting drunk and high, that Jeff wanted to  
5 go see Parrish to get some more pot. I said I'd drive,  
6 but I wouldn't go to the house because we don't get  
7 along, and nobody knew what he was going to do, and  
8 that's what I'm going with. They only wanted to offer me  
9 25 for voluntary to testify for them.

10           I got to testify for myself and still go to  
11 trial, but if you're saying we knew where it was planned,  
12 I'm fried, so what's up? You got to stick to your guns.  
13 If you didn't think you could have passed the test, you  
14 shouldn't have took it. It's not even admissible. We  
15 already went over all that. My lawyer was telling me  
16 that even if I get convicted, I shouldn't get any more  
17 than 15, but I don't know now, and when she saw me  
18 Sunday -- he has Sunday abbreviated -- she said Anna  
19 Williams told her they weren't going to use Kat's  
20 statement and she would be getting out after the trial.

21           Who's Anna Williams?

22           A. Anne Williams is the assistant solicitor who was  
23 co-counsel with the Deputy Solicitor Alfaro, on the  
24 case.

25           Q. Okay. And Kat's statement, is that talking about

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1 Katherine Feaster?

2 A. I believe so.

3 Q. And we'll get to that in a moment.

4 So what's your lawyer saying now? What's up  
5 and what story are you testifying to? Because that's  
6 going to make all the difference between possibly going  
7 home or the 15 or getting the max. Holla back.

8 Then looking over at the third exhibit,  
9 which, again appears to be a letter, if you're looking at  
10 the last line where it says: It's all in how everything  
11 is worded, and really the statement is not important. My  
12 lawyer says it boils down to what's said on the stand and  
13 what you stick with. You can't let his lawyer or the  
14 solicitor pick you apart. What's up?

15 Now, you indicated that you may not have seen  
16 these when you initially were going through representing  
17 Mr. Michaelson.

18 A. Yes.

19 Q. Would you agree that these could have been  
20 beneficial to you at trial?

21 A. Yes. If they could be authenticated, absolutely.

22 Q. And what would you have done with them at trial?

23 A. I would have used them to impeach Mr. Scharer.

24 Q. And certainly if they were able to be  
25 authenticated or admissible, then those certainly paint

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1 the picture that there is some effort to get Jeremiah to  
2 testify in a particular manner?

3 A. Exactly, a conspiracy against Mr. Michaelson.

4 Q. And that could certainly discredit Jeremiah, could  
5 it not?

6 A. Yes.

7 MR. BOOZER: Your Honor, may I approach the  
8 witness?

9 THE COURT: Yes.

10 MR. BOOZER: May I approach the witness, Your  
11 Honor? I'm going to hand you a document, if you would  
12 take a moment and review it for yourself.

13 THE WITNESS: Okay.

14 MR. BOOZER: Your Honor, I would ask the  
15 Court -- and I will certainly hand up a copy to take  
16 judicial notice of an article that I printed from the  
17 Post & Courier website dated July 28th, 2010 about this  
18 case specifically, and, if so, we'll go ahead and mark  
19 this Applicant's Exhibit No. 5.

20 THE COURT: Yes. Any objection from the  
21 State?

22 MS. McCALLISTER: No, Your Honor.

23 (Applicant's Exhibit 5 was marked for  
24 identification and admitted into evidence.)

25 BY MR. BOOZER:

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1 Q. Ms. Kennedy, looking at Exhibit No. 5, which is an  
2 article from the Post & Courier about this case in  
3 particular, looking at the bottom of page one onto the  
4 top of page two, it indicates:

5 In a tearful courtroom exchange, Parrish  
6 Reeves's former stepdaughter Katherine Feaster accepted a  
7 plea bargain in the case. Treze Feaster, her husband,  
8 turned down a plea bargain. A few hours later, he was  
9 ordered to turn over a handwriting sample that  
10 prosecutors said will tie him to incriminating letters.

11 Do you see that?

12 A. Yes.

13 Q. Now, certainly, without any further information in  
14 this article, do you know if those are related to  
15 Exhibits 1, 2, and 3 or if it's something else?

16 A. I don't know.

17 Q. Mr. Michaelson should have requested that Judge  
18 Harrington recuse herself from the trial. Do you recall  
19 having any event about that with Mr. Michaelson?

20 A. No.

21 Q. Have you been in court for the testimony with  
22 Mr. Michaelson?

23 A. Yes.

24 Q. Did you hear what his understanding of sort of the  
25 timeline Judge Harrington worked for the Berkeley County

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1 solicitor's office to when she became a judge?

2 A. Well, first of all, she wasn't a supervisor.

3 Q. Okay.

4 A. Okay. She was elected to the bench -- he was  
5 arrested in August 2007. She was elected to the bench in  
6 2008. During her time at the solicitor's office, she had  
7 primary responsibility for prosecuting criminal domestic  
8 violence cases, sex abuse cases, child abuse cases, and  
9 criminal sexual contact cases. When judges get first  
10 elected to the bench, they can't hold court for a year in  
11 their own circuit.

12 Q. Do you have any knowledge about any involvement or  
13 noninvolvement in the case?

14 A. No. As I said, we had Jennifer Porter and Michael  
15 Henderson, and then the two solicitors ended up trying  
16 the case.

17 Q. And I think you said you did not have any  
18 discussion with Mr. Michaelson about that?

19 A. No.

20 Q. Okay. Now, Mr. Michaelson has also alleged you  
21 should have requested a change of venue. Did you make  
22 that request?

23 A. No, I didn't.

24 Q. Did this case -- you had indicated earlier that  
25 sort of -- I think you the word you used on behalf of the

1 mother, what's the television show?

2 A. America's -- one of those reality things.

3 Q. Is this a case that has a lot of news attached to  
4 it?

5 A. Not in my experience, and I say that based on the  
6 fact that it happens, it happened, in Berkeley County.  
7 It had news coverage because of the unfortunate  
8 circumstances attached to it, the burden on the fact that  
9 Mr. Reeves was missing for as long as he had been missing  
10 and then the body was found.

11 But if I may, by way of explanation, I was one of  
12 three attorneys who were appointed to assist or represent  
13 a person known as the Lowcountry serial rapist who was  
14 accused -- or implicated in 26 different rapes. We ended  
15 up trying one case in Gaffney County and another one in  
16 Anderson County. The hoops that we had to go through and  
17 literally thousands, thousands of newspaper articles and  
18 the number of times that a case was referenced on  
19 television, and even with all that, that was a very -- it  
20 wasn't a slam dunk.

21 So in regard to this case, as I recall, there were  
22 articles when all of them were arrested, and there were  
23 articles during the trial, and there were articles after  
24 the trial.

25 Q. Do you know if during the prior jury selection the

1 jurors were questioned about any of their knowledge about  
2 the case?

3 A. The voir dire of the jury?

4 Q. Correct.

5 A. Oh, yes. It was done.

6 Q. Did you have any discussion with Mr. Michaelson  
7 about making any sort of request to change any --

8 A. Not that I recall, but if I did, that my response  
9 would have been what he indicated, based on my  
10 experience.

11 Q. Have you successfully had cases where you were  
12 able to argue that it should be changed and it happens?

13 A. Just once.

14 Q. Just once? All right. And that's the one you  
15 were referring to a moment ago?

16 A. Yes.

17 Q. Now, during the trial, were you ever notified of  
18 any contact between the victim's mother and a juror?

19 A. Not that I recall.

20 Q. And understanding it's been a while, is that  
21 something you may just not recall or it could have  
22 happened but you just don't remember it?

23 A. I think I would have remembered it. It's the kind  
24 of thing that's so improper that had it been brought to  
25 my attention, I would have been ethically obligated to

1 bring it to the attention of the judge.

2 Q. Do you believe, though, that that interaction  
3 would be improper?

4 A. Yes.

5 Q. And would require it being brought to the judge's  
6 attention?

7 A. Yes.

8 Q. Okay. But you don't specifically recall any  
9 discussion with your client about it?

10 A. Not that I recall, no.

11 Q. All right.

12 There is an allegation that you were ineffective  
13 for failing to argue the State allowing hearsay testimony  
14 of Katherine Feaster. Have you reviewed the trial  
15 transcript recently?

16 A. Yes.

17 Q. Okay. I'm going to be bouncing back between two  
18 pages, the first of which is page 521 and the second of  
19 which is page 545.

20 A. Okay.

21 Q. Were you provided with a statement, and you  
22 testified about it earlier, by Katherine Feaster?

23 A. Yes.

24 MR. BOOZER: Your Honor, may I approach the  
25 witness?

1 THE COURT: Yes.

2 BY MR. BOOZER:

3 Q. If you would take a moment and look over the  
4 document I just handed to you, please.

5 A. Okay.

6 Q. Have you had a moment to review that document?

7 A. Yes.

8 Q. Can you identify it, please.

9 A. It is a statement given by Katherine Feaster at  
10 the Berkeley County sheriff's office. This is August  
11 6th, 2007.

12 Q. Okay. Is that a true and accurate copy of the  
13 statement that you were given as part of the Rule 5  
14 discovery materials?

15 A. Yes, it is.

16 MR. BOOZER: At this time, I would move to  
17 have this marked as Applicant's Exhibit 6.

18 THE COURT: Any objection from the State?

19 MS. McCALLISTER: No, Your Honor.

20 THE COURT: It's admitted.

21 (Applicant's Exhibit 6 was marked for  
22 identification and admitted into evidence.)

23 MR. BOOZER: May I have one moment to speak  
24 with my client?

25 THE COURT: Yes.

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1 BY MR. BOOZER:

2 Q. Ms. Kennedy, now, you had indicated earlier, what  
3 was the State's -- or what was it that others were saying  
4 was the motivation for Mr. Michaelson committing this  
5 crime?

6 A. That his grandmother had died, I guess, a couple  
7 days before this happened, and the remark that he wanted  
8 to kill somebody.

9 Q. And I think you indicated that was pretty  
10 incredible to you?

11 A. Yes.

12 Q. Meaning not believable, right?

13 A. Yes.

14 Q. Now, as I indicated earlier -- let's look at 521  
15 of the trial transcript, and this is your  
16 cross-examination of Sergeant Freeman.

17 A. Right.

18 Q. And if you look at Exhibit 6 -- I'm sorry. If you  
19 look at Exhibit No. 6, who was it that actually wrote the  
20 statement for Ms. Feaster?

21 A. Corporal Merrithew.

22 Q. If you would, look at the body of the -- I think  
23 the first line, and that may refresh who actually read  
24 it.

25 A. What line?

1 Q. Yes, ma'am, and I'm actually looking at the  
2 statement.

3 A. Okay. Yes.

4 Q. And it says: This statement is being written for  
5 me by Detective Sergeant Freeman at my request, although  
6 it says at the top: Taken before Detective Merrithew.

7 A. Right.

8 Q. So back to 521 of the trial transcript, you're  
9 examining Sergeant Freeman, and beginning at line 13, you  
10 asked:

11 All right. We've already gone through the  
12 familial relationships of the other three, all right, and  
13 there is also information from this investigation that  
14 you were provided that each of these folks had reason to  
15 not like Mr. Reeves, correct?

16 MS. McCALLISTER: Your Honor, I'm sorry. My  
17 transcript on page 521 does not have that.

18 MR. BOOZER: I'm citing the record on appeal,  
19 Judge, so that would be 555. I'm sorry. It creates some  
20 confusion.

21 BY MR. BOOZER:

22 Q. So on 555, beginning at line 13, your question to  
23 Sergeant Freeman during cross:

24 All right. We've already gone through the  
25 familial relationships of the other three. All right.

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1 There is also information from this investigation that  
2 you're provided that each of those folks have reason to  
3 not like Mr. Reeves, correct?

4 Answer: Yes, ma'am.

5 Question: They each had their own reason?

6 Yes, ma'am.

7 Never had a good relationship with him?

8 That's what we were told.

9 That's what you were told?

10 Uh-huh.

11 By Katherine?

12 Flipping over to 556, answer: By Katherine.

13 You asked: By Treze?

14 Mr. Alfaro -- who is Mr. Alfaro?

15 A. He is the deputy solicitor.

16 Q. All right enters an objection:

17 Objection, Your Honor.

18 The Court: State your --

19 Mr. Alfaro: The whole line of questioning  
20 calls for hearsay on the part of the witness.

21 The Court: Is there an exception,  
22 Ms. Kennedy?

23 Your answer: Yes, Your Honor, I believe  
24 there is.

25 All right. Let's approach.

1                   There is an off-the-record bench conference,  
2 and then ultimately that objection is sustained. So you  
3 then can't get into any of these witnesses's statements  
4 with Sergeant Freeman, right?

5           A. Right.

6           Q. All right. So let's flip over to 545 -- and that  
7 appeared to be what you were trying to do, is it not?

8           A. Yes.

9           Q. So this will be my 546, but let me correct it with  
10 the trial transcript number, which would be 579.

11          A. Okay.

12          Q. Okay. Beginning at line 12 -- and I guess Mr.  
13 Alfaro was conducting redirect of Sergeant Freeman. H:

14                   And on cross-examination, you were asked if  
15 Katherine had implicated Treze Feaster and Jeremiah  
16 Scharer?

17                   Yes.

18                   What was your response to that?

19                   She did.

20                   And did she also implicate the defendant?

21                   Yes.

22                   So now is the State not trying to get into  
23 testimony that you tried to get into, yet they objected  
24 to it?

25          A. It would appear to be that's what happened.

PATRICIA KENNEDY - DIRECT EXAMINATION

1       Q. At this point, did you attempt to make any sort of  
2 argument or attempt to argue that the State would open  
3 the door there by allowing you to get more into Katherine  
4 Feaster's statement?

5       A. No, the record does not reflect that.

6       Q. And looking at Katherine Feaster's statement,  
7 which is Exhibit No. 6, it indicates:

8               In 1991, when I was 11 years old, my mom met  
9 Parrish Reeves. Shortly after she moved in with him,  
10 bringing me and my two brothers, Dennis and Jeremiah  
11 Scharer. Right after we moved in, Parrish made me keep  
12 my door open. He would touch me around my breast and act  
13 like it was an accident. He would lock us outside. He  
14 would beat us for the wrong reasons. This was in his  
15 house in North Charleston. I think it was Morningside.  
16 The neighbors tried to help keep us out of trouble to  
17 keep him from beating us.

18               Then when I was around 12 years old, we moved  
19 to Cordesville. As time went by, he got meaner and more  
20 possessive of me. When he got mad at me for cutting my  
21 hair, he made me pull down my pants, and he beat me with  
22 a switch until I bled. He made my brother drink scummy  
23 dog water because he forgot to change the water. When I  
24 was 16 years old, I left home and stayed gone for about  
25 three days. I tried to tell mom what he was doing. She

1 said he was just being affectionate.

2 In 1997, I met my husband, Treze Feaster. We  
3 got married, and Parrish hated Treze. I didn't have to  
4 tell him what Parrish was doing. He could see it. He  
5 tried to be nice to Parrish.

6 On January 17, 2001, I was pregnant and had a  
7 two-year-old son. My husband was out of work, I think,  
8 and I couldn't pay the bills. It was around dusk, and  
9 mom was at work. I went to ask Parrish to borrow money.  
10 He started laughing and gave me a long speech about how  
11 my husband was supposed to support me. Then he asked,  
12 What are you going to do for me?

13 He put his arm around me, brushing my breast.  
14 Again, he said, Oh, I didn't mean to touch you there. I  
15 told him, Screw you and left. I went home and told  
16 Treze. My brother was there too. They stormed out,  
17 really pissed off. My brother went with him. They were  
18 gone for about an hour. When they came back, they were  
19 with Jeff Michaelson in his truck. It was an S-10.

20 I asked Treze what happened. He said I  
21 didn't need to know. It was an accident. He then told  
22 me Jeff had a gun. He pulled the trigger. Treze went  
23 over there to beat Parrish's ass, not to kill him. I  
24 asked where he was or what they did with him. He told me  
25 don't worry about it.

PATRICIA KENNEDY - DIRECT EXAMINATION

1                   So looking at that, does that ever come out  
2 at trial?

3           A.   No.

4           Q.   Okay.  Would that have been a more believable  
5 motivation than the one that they indicated Jeffrey  
6 Michaelson had?

7           A.   Absolutely.

8           Q.   Do you agree with me that after you had attempted  
9 to get -- were you trying to get into Ms. Feaster's  
10 statement, you think?

11          A.   Yes.

12          Q.   And that was shut down by the solicitor's  
13 objection?

14          A.   Yes, and the conference with the trial judge.

15                   THE COURT:  Do you remember any details about  
16 the trial statement?

17                   THE WITNESS:  No, but I made a mistake by not  
18 requiring it be on the record.

19 BY MR. BOOZER:

20          Q.   And then leaping forward to the redirect by the  
21 State, do you agree with me that they are getting into  
22 the same area that you tried to get into with Katherine's  
23 statement at 579?

24          A.   It would appear so, yes.

25          Q.   And is there any indication that you tried to do

1 any sort of recross examination?

2 A. No.

3 Q. Okay. Do you think that there was an argument to  
4 be made that you should be allowed to recross because the  
5 door has been opened by the State?

6 A. Probably, yes.

7 Q. Do you agree with me that that's an action you  
8 should have taken?

9 A. If the opportunity presented itself, yes.

10 Q. Okay. And would there have been an opportunity  
11 after the State's redirect of Mr. Freeman?

12 A. Yes.

13 Q. Okay. And as you indicated, the jury never heard  
14 this argument that Ms. Feaster indicated in her  
15 statement, did they not?

16 A. No, they did not.

17 Q. Do you think hearing the statement itself or the  
18 details of the statement or generalities of the statement  
19 would have assisted Mr. Michaelson at trial?

20 A. Oh, sure, yes.

21 Q. Do you think that could have changed the outcome  
22 of the trial?

23 A. I can't say that. I've been doing this too long  
24 to predict what a jury is going to do. It would have  
25 been of enormous benefit. I can concede that.

1           Q. It certainly wouldn't have been a detriment, would  
2 it?

3           A. No.

4                   MR. BOOZER: Your Honor, beg the Court's  
5 indulgence.

6                   Thank you, Ms. Kennedy. That's all the  
7 questions I have.

8                   THE COURT: Ms. McCallister?

9                   MS. McCALLISTER: Thank you, Your Honor.

10                  THE COURT: Let me ask one question of the  
11 applicant. Was there -- do you have any description or  
12 the name of the juror who supposedly was contacted by the  
13 victim's family?

14                  MR. BOOZER: Beg the Court's indulgence, Your  
15 Honor.

16                   In the affidavit that was submitted by Mr.  
17 Palms, which is attached to the amendment, they indicated  
18 it was juror number 40 and gave the name of the juror.

19                  THE COURT: All right. Very good.

20                                   CROSS-EXAMINATION

21 BY MS. McCALLISTER:

22           Q. Let just take these in order.

23                   I think Mr. Michaelson's first allegation is this  
24 issue of you not contacting Detective Merrithew, and I  
25 believe you testified to Mr. Boozer that you had an

1 e-mail address that was given to you by one of the  
2 solicitors; is that correct?

3 A. Yes.

4 Q. And it was not a direct e-mail address to the  
5 detective?

6 A. Yes.

7 Q. As far as you knew?

8 A. I knew it wasn't. It was a contact person for  
9 them to contact him.

10 Q. It was someone else in his company for you to  
11 contact?

12 A. Yes.

13 Q. Okay. And you did not use that -- you didn't use  
14 that e-mail address to try to contact anyone, or did you?

15 A. I attempted to contact the -- the contractor, I  
16 attempted to do that and got no response.

17 Q. So you did e-mail -- you sent an e-mail to the  
18 address that you were given?

19 A. Yes.

20 Q. And you received no response?

21 A. Right.

22 Q. Okay. Even if you had gotten a response to your  
23 e-mail, is there anything you would have been able to do  
24 legally to get Mr. Merrithew to come to trial?

25 A. No. He's not subject to a compulsory process

1 where he is, so --

2 Q. Because he had left the country?

3 A. Yes.

4 Q. Okay. And you did make several motions for a  
5 continuance based on his absence, correct?

6 A. Yes.

7 Q. And several of those motions were granted?

8 A. Judge Dennis granted one, but Judge Harrington  
9 denied.

10 Q. Okay. And this case was continued a couple of  
11 times for other reasons then; is that right? Or was  
12 it -- I'm sorry.

13 A. It was put on a docket. The way it's done here in  
14 the Ninth Circuit, they'll notice, like, five cases for  
15 trial, and you may be fifth on the trial docket, and then  
16 if you're not reached, then you don't know when it's  
17 going to come up.

18 So the date that -- where it probably became --  
19 started moving was when assistant solicitor Michael  
20 Henderson had the case, and I received a notice that  
21 Mr. Michaelson's case was going to be put on the  
22 October -- I think it was October 9th, 2009 and, that  
23 would have been the first time, but it doesn't  
24 necessarily mean it would have gone, and it didn't go.  
25 So we were in November -- in November, we were going

PATRICIA KENNEDY - CROSS-EXAMINATION

1 through it again.

2 Q. Okay. So it didn't go in October, and then it got  
3 put on for November of 2009?

4 A. Right.

5 Q. And November of 2009 is when you were first  
6 informed or learned that Detective Merrithew had left the  
7 country?

8 A. I may have been aware of that beforehand, but that  
9 was the basis for the motion for continuance then because  
10 I've been unable to contact them.

11 Q. I guess what I'm getting at is, was he here in  
12 October?

13 A. No.

14 Q. So he had left sometime by the fall of 2009?

15 A. Yes.

16 Q. And you didn't find out that he left until after  
17 he left?

18 A. Yes. I think he left sometime in June or July.

19 Q. So by the time you even found out about this, he  
20 was beyond the reach of any subpoena you could issue.

21 A. That's true.

22 Q. And you were aware of his absence from at least  
23 November of 2009 until the time of trial in June of 2010;  
24 is that correct?

25 A. Yes.

1 Q. So you were aware you were probably going to have  
2 to try your case without him?

3 A. Yes.

4 Q. And you did, in fact, prepare a case without  
5 Detective Merrithew?

6 A. Yes, but I still argued the motion for continuance  
7 at the beginning of the trial in June.

8 Q. Right. And you made a continuing objection  
9 throughout the course of the trial?

10 A. Yes.

11 Q. And was that an issue that was raised on appeal,  
12 do you know?

13 A. I don't remember.

14 Q. Okay.

15 A. I think -- yeah, it is because there was a -- yes,  
16 it was. It was raised on appeal.

17 Q. Okay.

18 THE COURT: Let me ask you a question, if I  
19 could: The lead investigator -- and quite often they  
20 come sit over there with the solicitor's office and never  
21 testify because quite often what they have to say is  
22 hearsay. They're investigating after the fact, and the  
23 principal witnesses are somebody other than the lead  
24 investigator.

25 Did you want the lead investigator there to

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1 discuss what in particular?

2 THE WITNESS: The process of the  
3 investigation, Your Honor, because he started it, and he  
4 was the one who did the initial statement. So I wanted  
5 to -- because what happened over the course, they had  
6 Detective Merrithew, and then they gave the case to  
7 Detective Freeman. Detective Freeman, all she did -- she  
8 didn't do any investigation. She basically picked up the  
9 file, and what I would regard as the primary  
10 investigative work was done by him.

11 THE COURT: Is there any particular  
12 exculpatory information that you wanted from him other  
13 than just the feel of his investigation?

14 THE WITNESS: No, sir.

15 MS. McCALLISTER: Okay.

16 THE COURT: And I'm going to give you this  
17 opportunity to kind of explain why he was critical of the  
18 case.

19 THE WITNESS: Because Detective Merrithew --  
20 because at that time, I had been in Berkeley County  
21 probably eight years. I had been the lead investigator  
22 in at least four of my trials. I've been able to  
23 successfully attack his methods and the way he did things  
24 in terms of creating reasonable doubt, and I had had  
25 victories in two of those cases.

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1 THE COURT: All right. If the State elected  
2 not to call the investigator, which quite often they do  
3 not, were you planning on calling him as a witness?

4 THE WITNESS: Yes.

5 THE COURT: Okay.

6 BY MS. McCALLISTER:

7 Q. In all of these issues, the issue of why you  
8 wanted him for trial and what you would do if the State  
9 didn't call him, you argued these issues as part of your  
10 motions; is that correct?

11 A. Yes.

12 Q. So all of those issues were put on the record?

13 A. Yes.

14 Q. Okay. And, in fact, the State asserted that they  
15 were not going to call Detective Merrithew; is that  
16 correct?

17 A. Yes.

18 Q. And that had never been their plan to call him,  
19 correct?

20 A. As far I knew till that moment, yes.

21 Q. Okay. So all of that was hashed out in front of a  
22 judge?

23 A. Yes.

24 Q. The second allegation is the issue of Jeremiah  
25 Shearer's testimony, and I think the issue with his

PATRICIA KENNEDY - CROSS-EXAMINATION

1 statement, the concern was it kept getting more and more  
2 detailed as you went along?

3 A. Yes.

4 Q. And you did cross-examine him on the differences  
5 in his statements; is that correct?

6 A. Yes, and I argued those differences in my closing.

7 Q. Okay. I think you told Mr. Boozer other than  
8 that, you didn't think you could do anything with that?

9 A. Right.

10 Q. And is that unusual, to have a witness whose  
11 statement changes?

12 A. No.

13 Q. Okay. That's normal in your cases?

14 A. Yes.

15 Q. Okay. I believe you said that there had been  
16 three prosecutors on the case; is that correct?

17 A. Yes.

18 Q. Porter, Henderson, and then Anne Williams; is that  
19 right?

20 A. Yes.

21 Q. And as far as you know, nothing in the file -- or  
22 you had no reason to believe that Judge Harrington had  
23 any involvement in anything to do with this case file  
24 while she was at the solicitor's office?

25 A. None. Murders are not her -- as I said, she did

1 sex crimes, child abuse, so --

2 Q. And I think you said at one point that Michael  
3 Henderson took the case to Charleston?

4 A. Yes.

5 Q. So at one point, the person handling the case was  
6 not even in the Berkeley office?

7 A. Right, and he had the file with him in Charleston  
8 because he sent me a letter saying I could come down and  
9 review his file.

10 Q. Okay.

11 A. Make sure I had everything.

12 Q. Okay. And to your knowledge -- now, Judge  
13 Harrington, she worked in Berkeley, correct, not in  
14 Charleston?

15 A. Not in Charleston.

16 Q. The three witness letters, do you still have a  
17 copy or do you need me to hand you --

18 A. Which one?

19 Q. There's a lot of things going on here. And I  
20 believe you testified that these were in your file.

21 A. I found them, yes.

22 Q. And you would agree with me that these letters are  
23 not signed by anyone?

24 A. No, they're not.

25 Q. And they're not dated?

PATRICIA KENNEDY - CROSS-EXAMINATION

1 A. No, they're not.

2 Q. And only one of them is there any indication as to  
3 who it's addressed to.

4 A. That's correct.

5 Q. Okay. Would you agree with me that they don't  
6 mention Mr. Michaelson except for maybe once or twice?

7 A. That's correct.

8 Q. I think you would characterize them as someone,  
9 presumably Treze, trying to pressure Jeremiah into  
10 telling a certain story?

11 A. That's correct.

12 Q. Is there any indication that Jeremiah took any  
13 action based on these letters?

14 A. Not to my knowledge, no.

15 Q. Do you have any knowledge that Jeremiah ever even  
16 received these letters?

17 A. No.

18 Q. Okay. There's nothing in here as Jeremiah writing  
19 back to Treze saying: Yeah, man. I'm going to change my  
20 story.

21 A. No.

22 Q. Okay. And then you were also asked about  
23 Ms. Feaster's statements. Did you make a motion or was  
24 there some kind of pretrial conference or ruling on an  
25 issue of whether you could get into the sexual abuse

1 allegation? Do you recall that at all?

2 A. No. I think there was some reference made to it  
3 during the course of the trial. I can't say in what  
4 context it may have been a motion, but I don't -- can't  
5 say exactly.

6 Q. You don't remember a motion in limine at the  
7 beginning of the trial addressing this issue?

8 A. No. From the solicitor?

9 Q. Yes.

10 A. Yeah, I do now. Yes.

11 Q. Yes, ma'am. You do remember that?

12 A. I do, vaguely. Yes, vaguely.

13 Q. Do you remember the ruling on that issue?

14 A. It probably went against me because we had several  
15 pretrial motions, and that was one of them, so --

16 Q. Do you recall in your questioning of Jeremiah  
17 Scharer that you asked him about his relationship with  
18 the victim?

19 A. Yes.

20 Q. Do you remember asking him specifically about  
21 whether the victim ever beat him?

22 A. Yes.

23 Q. And what was his answer, do you recall?

24 A. I think he acknowledged that he did. I'm quite  
25 sure he did.

1 Q. And did you use that in your closing, do you  
2 recall?

3 A. I don't -- I don't remember that. My closing  
4 was -- all these people, all relatives, all had an ax to  
5 grind, all had a reason, and Mr. Michaelson had none, so  
6 I probably did. I just don't recall verbatim.

7 Q. In general, in your theory of the case, was it  
8 your contention that Jeremiah's reason was the fact that  
9 the victim had hit him and was not very nice to him?

10 A. Right, and the sexual abuse of Kat, which we  
11 couldn't get into it.

12 Q. Do you recall actually mentioning the sexual abuse  
13 in your closing argument? I'm looking at page 89 and 90,  
14 I believe.

15 A. Okay.

16 Q. Okay. You stated Detective Freeman or -- this is  
17 your closing argument; is that correct?

18 A. Yes.

19 Q. Okay. And you -- in your closing argument, you  
20 said: Detective Freeman had information that shows  
21 there's reason to believe that Mr. Reeves, who is the  
22 victim, made improper sexual advances toward Kat Feaster,  
23 which, of course, is only going to enflame her husband,  
24 Treze Feaster.

25 A. Yes.

1 Q. And you said to the jury: I ask you to consider  
2 that. Is it credible, believable that one person who  
3 didn't know Mr. Reeves is going to go over there and say,  
4 Let's kill him? Is that right?

5 A. Yes.

6 Q. Is that a fair representation of your argument?

7 A. Yes.

8 Q. So you did -- you actually did put in front of the  
9 jury without objection from the State the issue of the  
10 sexual misconduct by the victim and Kat Feaster.

11 A. Yes.

12 Q. Okay. And you set that up as part of your general  
13 theory that they were the ones who had the ax to grind,  
14 correct?

15 A. Yes.

16 Q. And I believe you testified on direct examination  
17 that you do not recall Mr. Michaelson informing you about  
18 any kind of juror misconduct.

19 A. I don't.

20 Q. And that's something that you think you would  
21 remember?

22 A. I think so, because it's quite serious.

23 Q. And is that an unusual occurrence?

24 A. To have your client tell you there is jury  
25 misconduct? It doesn't happen that often, or it has

1 happened, but not that often, and when I've discussed it  
2 with him, there's usually some misunderstanding of what  
3 was going on.

4 Q. So if Mr. Michaelson had made that allegation to  
5 you, would you have discussed it with him?

6 A. Yes.

7 Q. Okay. And if you felt that it was not a  
8 misunderstanding --

9 A. I would have brought it to the attention of Judge  
10 Harrington.

11 Q. Okay.

12 MS. McCALLISTER: Beg the Court's indulgence,  
13 Your Honor.

14 BY MS. McCALLISTER:

15 Q. One last thing about the issue of the letters.  
16 They're not signed, correct?

17 A. Correct.

18 Q. So the identity of the writer is at least somewhat  
19 in doubt; is that correct?

20 A. Yes.

21 Q. And assuming for the sake of argument that it was  
22 Treze Feaster, would you have been able to get Treze or  
23 force Treze to come into court to testify about the  
24 contents of these letters?

25 A. No.

~~PATRICIA KENNEDY - CROSS-EXAMINATION~~

1 Q. Would you have been able to introduce them as an  
2 exhibit through Treze?

3 A. No, not without him being a witness.

4 Q. And the reason why you couldn't make him come in  
5 and testify is because he was a codefendant and he had  
6 the right not to testify; is that correct?

7 A. Right.

8 Q. Okay.

9 MS. McCALLISTER: Thank you, Your Honor.  
10 That's all I have.

11 THE COURT: Anything further from anybody?

12 MR. BOOZER: Nothing further, Your Honor.

13 THE COURT: All right. I'm going to ask --  
14 let's start with the first allegation, ineffective  
15 assistance of counsel, and, Mr. Boozer, I'm going to  
16 start with the failure to contact a key witness.

17 You may step down, by the way.

18 THE WITNESS: Thank you.

19 THE COURT: I want to hear your arguments  
20 with regard to that, and then I'm going to hear from the  
21 State. We're going to go through them one at a time.

22 MR. BOOZER: Certainly, Your Honor. If it  
23 pleases the Court: With regard to failing to contact a  
24 witness, I mean, it's obvious from the transcript that  
25 that was really a key issue for Ms. Kennedy and she made

1 multiple continuance requests, was making some effort, I  
2 believe to get --

3 THE COURT: And we're talking about the  
4 witness and the investigator were actually the same  
5 person, right?

6 MR. BOOZER: I am, Your Honor, correct. And  
7 I believe, based on Ms. Kennedy's testimony, there should  
8 have been some further steps taken. She believed that  
9 she's been so successful at discrediting his  
10 investigations, what he's done in the past, that she  
11 presumably could have done that again at this trial.

12 I think she indicated she was given a general  
13 e-mail address. My client believes, based on the  
14 transcript, she was actually given his actual e-mail  
15 address, but be that as it may --

16 THE COURT: As I understand the testimony,  
17 there was only one continuance granted pursuant to that  
18 particular issue.

19 MR. BOOZER: Correct.

20 THE COURT: There's an issue about Judge  
21 Dennis; is that correct?

22 MR. BOOZER: That's correct, Your Honor.

23 THE COURT: What does the State have to say  
24 about that?

25 MS. McCALLISTER: Thank you. I think that

1 Ms. Kennedy explained the issue there was that even if it  
2 was his personal e-mail address, he didn't have to answer  
3 her; B: If he did have, she couldn't force him to come  
4 and testify at that point.

5 She testified that he left the country  
6 sometime in June, July, November of 2009, and this case  
7 didn't go to trial until June of 2010, and by the time  
8 she found out he was gone, he was already gone.

9 And, Your Honor, this issue -- she preserved  
10 this issue. She raised it multiple times throughout the  
11 trial in a pretrial --

12 THE COURT: Was that issue addressed in the  
13 appeal?

14 MS. McCALLISTER: That's where I was going.  
15 This issue was addressed on the appeal on the merits.  
16 The issue she raised -- she raised it as a confrontation  
17 clause issue, and that issue was addressed on appeal.

18 THE COURT: Mr. Boozer, what could she have  
19 done other than that? That's about as hogtied as you can  
20 get. Some portion of it -- I mean, there's not much else  
21 she could have done.

22 MR. BOOZER: I agree. I don't know what else  
23 she could have done at that point.

24 THE COURT: And the ultimate question is, is  
25 that inherently unfair, and the Supreme Court seems to

1 indicate not.

2 MR. BOOZER: That's correct, Judge, that's  
3 what they did indicate.

4 THE COURT: All right.

5 All right, Mr. Boozer. Let me hear about  
6 these letters that are not dated. They are not signed.  
7 They have not been authenticated. We don't know whether  
8 they were delivered.

9 With all those problems, what do you have to  
10 say about that?

11 MR. BOOZER: Those are certainly issues that  
12 I have to contend with here today, Judge.

13 THE COURT: Certainly it can't be introduced  
14 into evidence unless somebody was able to authenticate  
15 it.

16 MR. BOOZER: Judge, the only -- looking back  
17 at it, obviously, the bad part is that Mr. Michaelson  
18 never saw those until after the trial, and Ms. Kennedy  
19 indicated they were just apparently overlooked in  
20 discovery, so she did not see them.

21 Now, going back, could she have maybe taken  
22 some affirmative steps to then try and authenticate them?  
23 Apparently, by the news article that was handed up, I  
24 think we can draw some conclusion that the State may have  
25 been attempting to use those in the prosecution of Treze

1 Feaster by obtaining handwriting samples, but maybe she  
2 could have used them in her examination of Jeremiah, if  
3 he admitted that he had received letters from Treze  
4 Feaster, trying to influence his testimony, then maybe  
5 she could have then confronted him either just with the  
6 contents of the letter or with the letters themselves.

7           Again, that's something that's hard to go  
8 back and speculate what the trial judge would have  
9 allowed; but it's certainly something that she maybe  
10 could have at least asked at that point, so that is what  
11 we would argue with the letters.

12           And certainly, Judge, just looking at the  
13 letters themselves, I mean, they're in the discovery, so  
14 they were obviously written before Mr. Michaelson's  
15 trial, so it's not something that he went out and  
16 conjured up and wrote himself after or something like  
17 that, and just looking at the contents of the letters, it  
18 all makes sense that it's Treze Feaster speaking directly  
19 to Jeremiah, or Jere, as he's addressed, about the case  
20 itself.

21           Those are probably the only people in the  
22 world that would have that understanding of the case, and  
23 that's what was being discussed, so that would be my  
24 argument to that, Your Honor.

25           THE COURT: All right. What does the State

1 have to say about that?

2 MS. McCALLISTER: Your Honor, I think you've  
3 addressed some of the issues, and I think there is a  
4 major authentication issue as to how she would have  
5 gotten them in and what she would have been able to do  
6 had she gone down that road.

7 I also think -- Your Honor, I would argue  
8 this is being framed as evidence of a conspiracy to  
9 implicate Mr. Michaelson, or frame him somehow, and I  
10 would argue, Your Honor --

11 THE COURT: Treze Feaster was not being tried  
12 at the same time, was he?

13 MS. McCALLISTER: No, Your Honor. My  
14 understanding from the record is that was the plan at  
15 first. They were going to be tried together, and then at  
16 some point in time, that decision changed, and I think  
17 Ms. Kennedy testified --

18 THE COURT: There was sort of a blanket  
19 statement, that Treze Feaster could not have been a  
20 witness in this, but do Bruton issues really apply in  
21 this case? He wasn't being tried. That's one of the  
22 reasons why you try them separately, as far as that very  
23 purpose.

24 MS. McCALLISTER: That's true, Your Honor,  
25 but I think that these statements -- and that was kind of

1 where I was trying to go. These statements implicate  
2 Treze, I think, or whoever is the letter writer, but I  
3 don't know that they go to a conspiracy against the  
4 defendant or that they bring up things that were not put  
5 in evidence in other ways or came out at trial in other  
6 ways. I think it came out at trial that the statements  
7 --

8 THE COURT: Let me ask you again: I'm  
9 asking -- I might be overlooking something. Just explain  
10 to me why trial counsel could not have subpoenaed Treze  
11 Feaster, confronted him with the letters, asked him if he  
12 wrote them, and get into the content?

13 MS. McCALLISTER: Because I think these  
14 letters go to his criminal liability, and I don't think  
15 at that point he hadn't --

16 THE COURT: It's not like it's a Miranda  
17 issue. He voluntarily wrote it.

18 MS. McCALLISTER: He did, Your Honor. That  
19 is true. That would be my argument, Your Honor, is that  
20 if she got him here, if she got him at trial and she  
21 tried to introduce them that my understanding is that  
22 most likely he would invoke his Fifth Amendment right not  
23 to testify about those letters and not to talk about  
24 them.

25 THE COURT: Was he represented at the time?

1 MS. McCALLISTER: He was, as far as I'm  
2 aware. That's my understanding. And so I think the  
3 State would just argue, like I said, these don't go to  
4 show a conspiracy. There is no indication that Jeremiah  
5 did actually change his statements.

6 THE COURT: I don't think they would plan on  
7 offering it for conspiracy but to say Treze Feaster was  
8 guilty of it and that this defendant was not.

9 MS. McCALLISTER: Well, Your Honor, I think  
10 the issue here as it was raised today, there was a  
11 conspiracy for other --

12 THE COURT: Conspiracy to offer evidence?

13 MS. McCALLISTER: Yes, and that's what she  
14 could have used these for, to show there was a conspiracy  
15 to kind of frame Mr. Michaelson rather than the truth.

16 THE COURT: Yeah, that's correct, but you say  
17 it doesn't offer a conspiracy, but take that a step  
18 further then. They say you need to stand firm. You  
19 don't need to be -- you need to stand firm or stick with  
20 the story, the script, and why is that not a conspiracy?

21 MS. McCALLISTER: Well, I think the  
22 conspiracy requires another person. I think that's  
23 evidence that Treze was trying to influence whoever the  
24 recipient is, but that doesn't mean that the recipient  
25 did anything about that or gave into that pressure or

1 agreed to change his story, or anything like that.  
2 There's no proof of that. These letters don't offer any  
3 proof of that, and she did cross-examine Jeremiah.

4 THE COURT: You think that if -- the  
5 allegation by the applicant is that these letters were  
6 written by Treze Feaster to Jeremiah?

7 MR. BOOZER: That's correct, Your Honor.  
8 That would certainly, I think, kind of -- the State is  
9 really nailing down and making specific -- trying to get  
10 really specific on the allegations. I mean, I think Your  
11 Honor sees it as I have framed it, which is the  
12 conspiracy, a conspiracy to have a codefendant testify  
13 against him, or to testify the way he wants them to  
14 testify to hurt Jeff.

15 I mean, it's verbatim: My lawyer is telling  
16 me to testify for myself against him and to make it as  
17 we're getting drunk, high, that Jeff wanted to go see  
18 Parrish to get some more pot. I said I'd drive but I  
19 wouldn't go to the house because we don't get along, and  
20 nobody knew what he was going to do, and that's what I'm  
21 going with. They only wanted to offer me 25, but if  
22 you're saying we knew it was planned, I'm fried, so  
23 what's up? You got to stick to your guns.

24 THE COURT: Why is that not -- I mean, the  
25 question is whether or not trial counsel was deficient in

1 not subpoenaing Treze Feaster there and getting from him  
2 who he sent it to, and maybe even getting Jeremiah there  
3 as well.

4 MS. McCALLISTER: Yes. And, Your Honor,  
5 Jeremiah was there, and she did cross-examine him about  
6 the changes in his statement. Obviously, she didn't use  
7 the letters. That's why we're here today. So she did  
8 have the opportunity to cross-examine him about why --

9 THE COURT: But Treze Feaster was not there,  
10 and that's the delict that we're talking about here.

11 MS. McCALLISTER: Yes, Your Honor. I  
12 understand. I understand Your Honor's point.

13 THE COURT: Is it a good point?

14 MS. McCALLISTER: Your Honor, I think that  
15 Ms. Kennedy explained why she felt like even if she had  
16 noticed these or remembered they were in the file she  
17 would have had issues, that she could have gotten Treze  
18 there and he could say: No, I didn't write these.  
19 They're not mine, and there's issues with getting him to  
20 authenticate them and admit that he wrote them and for  
21 what purpose and all that.

22 THE COURT: Yeah, it's kind of hard to say in  
23 a vacuum as to what effect the letters could have had  
24 because we don't know. There could have been  
25 authentication through handwriting exemplars or him

1 answering the questions necessary to authenticate them.

2 MS. McCALLISTER: That's correct. I think  
3 it's purely speculation as to what would happen if they  
4 had used these, and it's speculation as to whether they  
5 would have been admissible at all in the first place.

6 THE COURT: With regard to the issue of the  
7 recusal of the judge, I am going to rule on that without  
8 the necessity of the argument that Judge Harrington --  
9 there's been no evidence put forward that Judge  
10 Harrington knew anything about the case, had any  
11 involvement in the case, and the evidence is to the  
12 contrary, that she didn't even deal with murder cases,  
13 she dealt with child abuse and sex crimes.

14 And I don't think there's any -- and I've  
15 heard the testimony of trial court that issue was never  
16 really raised or brought up, and there's been -- you  
17 know, the burden is on the applicant to prove that  
18 something went wrong, and they have fallen short in that  
19 regard.

20 As far as the change of venue, I'm denying  
21 the request for relief pursuant to the failure to request  
22 a change of venue. It doesn't appear that there was an  
23 unusual amount of publicity, and just by virtue of the  
24 fact they were able to empanel a jury would seem to  
25 indicate that there was no tainting of the jury pool, and

1 I think it was proper not to file the change of venue  
2 motion. And even if it were to be filed, it's usually  
3 done pretrial, and quite often it's determined to be  
4 premature until such time as you can see whether you can  
5 empanel a jury, and, clearly, Judge Harrington would ask  
6 the questions that every judge asks in every case whether  
7 or not they could be fair and impartial, whether or not  
8 they had seen or heard anything about the case, and there  
9 has been no record that would seem to indicate that was  
10 not.

11 As far as the juror misconduct, I'm going to  
12 go ahead and rule on that. There's been an affidavit  
13 submitted by someone who is now deceased; is that  
14 correct?

15 MR. BOOZER: That's correct, Your Honor, and  
16 his own personal knowledge.

17 THE COURT: That's right, and I think it's  
18 incumbent upon the applicant to show that something went  
19 wrong. There's two reasons why I'm going to deny the  
20 application with regard to the jury misconduct: Number  
21 one is trial counsel has testified that in her many years  
22 of experience, if there is ever an allegation of improper  
23 contact with a juror, lawyers are ethically obligated to  
24 report it to the Court. And I'm certain if this were  
25 reported to her, she's got an obligation to do that, and

1 I think what trial counsel has indicated today is usually  
2 something quite innocuous or something that did not  
3 happen at all.

4 I don't believe that that was ever reported  
5 to trial counsel. I've heard her testimony here today.  
6 I don't believe that took place, but I do also think it's  
7 incumbent upon the applicant. You have the name of the  
8 person. You have their juror number, and I think that if  
9 you are planning to get a new trial based on that, I  
10 think it would be incumbent upon you to subpoena that  
11 person. You got her name and juror number. You could  
12 have brought her here and asked her what was said, if  
13 anything.

14 There was another allegation with regard to  
15 hearsay testimony. What do you have to say with regard  
16 to that, Mr. Boozer?

17 MR. BOOZER: With regard to Katherine  
18 Feaster?

19 THE COURT: Yes.

20 MR. BOOZER: Yes, Your Honor. If it pleases  
21 the Court: I believe this is one of the strongest parts  
22 of Mr. Michaelson's case. This trial, as Ms. Kennedy  
23 indicated was all about Jeffrey, or Mr. Michaelson, being  
24 sort of the outsider in this and that she indicated that  
25 basically the motive that was set forth by his

1 codefendants and the State was that the motive for  
2 killing this man was Mr. Michaelson had a relative that  
3 passed away, and he just wanted to go out and kill  
4 somebody, which Ms. Kennedy, in her own words, said was  
5 incredible.

6           What the jury did not get to hear is that  
7 Katherine Feaster, in her statement, writes down an  
8 absolute motive that makes a lot more sense than  
9 someone's relative dying who's not related to this family  
10 wanting to go out and kill a random person. When she  
11 talks about sort of this issue with her going to him for  
12 money, he says, basically: You need to get a husband  
13 that can provide for you, touches her breast. She tells  
14 him to screw you and then goes home and tells her  
15 husband, and her brother was there too, and then the  
16 husband immediately gets, what she says, really pissed  
17 off.

18           Brother goes with him, and in an hour they  
19 come back with Jeffrey Michaelson and that she thought  
20 that her husband went over there to beat, quote, his ass,  
21 not kill him. That makes a lot more sense than the  
22 motive that was put forth by these other witnesses and by  
23 the State at trial, but it's never -- although there's  
24 some allusion to sexual abuse and to prior beatings by  
25 Jeremiah, it is never drilled down to what is stated in

1 Katherine Feaster's statement, and I think that there's a  
2 perfect opportunity for that statement, or, if not the  
3 statement itself, details of the statement through  
4 Sergeant Freeman, who actually wrote this statement for  
5 Katherine Feaster.

6 She tried to get into it, but it was shut  
7 down through an objection, and there was a bench  
8 conference which wasn't put on the record, and then,  
9 ultimately, the State goes in and re-plows over this.  
10 And, Judge, I would argue that they opened the door for  
11 the specifics of the statement to come in when they go  
12 back over that ground and start questioning the witness  
13 about it, and, as Ms. Kennedy said, that would have been  
14 a big benefit to Mr. Michaelson, had it come in, because  
15 it sort of would have tied everything together.

16 Now, the State has questioned Ms. Kennedy  
17 about that in her closing, she did mention the past  
18 sexual abuse. Well, certainly the jury is charged that  
19 that's not evidence, what she says, and she's only able  
20 to allude to it. She could have really tied this all  
21 together by the State opening the door and telling what  
22 this motive was and that this one man, who's not related  
23 to any of this, why would he go out and do this? It  
24 doesn't make any sense. She wasn't able to do that  
25 because she didn't take the opportunity to make that

1 argument, or at least attempt to make argument to the  
2 judge to get into that.

3 THE COURT: What does the State have to say  
4 about that?

5 MS. McCALLISTER: Your Honor, I believe the  
6 issue was addressed in a pretrial motion, that there was  
7 a motion made about getting into the issue of the sexual  
8 abuse in the statement and the allegations of physical  
9 abuse, and the allegation was -- sexual allegations were  
10 off limits, but they could go into the issue of physical  
11 beatings and abuse, and she did do that with Jeremiah.

12 That came out in his testimony, that he --  
13 the victim hit him and his mother, I believe, and, as Mr.  
14 Boozer has said, she did bring that up in her closing  
15 arguments. On page 890 she talks about that. Even  
16 though, technically, I guess, that had been ruled  
17 inadmissible, the State didn't object to that. It did  
18 come in in front of the jury, and the State, in their  
19 closing argument, also acknowledged the fact that the  
20 victim was not a nice man, and I think she said there's  
21 allegations that he beats his wife, or he's a wife  
22 beater, so that information did come in.

23 I would argue that the transcript cite  
24 Mr. Boozer has given on page 579, she asked on  
25 cross-examination about the steps that were taken in the

1 investigation and who was interviewed and what did you do  
2 after you interviewed person number one, you went and  
3 interviewed person number two, you went and interviewed  
4 person number three, and the fact that these statements  
5 kind of came, as she said, kind of in a domino fashion,  
6 one implicating the other implicating the other  
7 implicating the other, and that's kind of how they went  
8 down the line, so I would argue that that's what that  
9 cross-examination or redirect was about and because  
10 Ms. Kennedy had been told she could not go into that part  
11 of the statement, so I don't think that's what she was  
12 trying to get into, necessarily, on the cross,  
13 specifically about the sexual abuse.

14 She said she was trying to get into their  
15 statements, I believe, but the statements is a lot more  
16 than the issue of the sexual misconduct between Katherine  
17 and the victim. There's a lot of other things in there  
18 too. That implicates not just Mr. Michaelson, but the  
19 other codefendants as well.

20 MR. BOOZER: And may I reply at the  
21 appropriate time, Your Honor?

22 THE COURT: Yes.

23 MS. McCALLISTER: Are you waiting to hear  
24 from me on the hearsay issue?

25 THE COURT: I thought you were talking to

1 co-counsel about this particular issue.

2 MS. McCALLISTER: I'm sorry. We were talking  
3 about one of the other issues. Sorry, Your Honor. I  
4 think I'm ready for his reply, Your Honor. Sorry about  
5 that.

6 MR. BOOZER: Thank you, Your Honor.

7 Going to whatever pretrial issues with the  
8 sexual abuse, that's not what I'm talking about. Looking  
9 at Katherine's statement, that's something completely  
10 different. That's in the statement she's talking about  
11 when she was 11 years old. Then she skips forward to  
12 when -- I think it's '97, or before '97, so those are  
13 things about an 11-year-old that supposedly had some  
14 sexual advances made to her. I'm not talking about that.

15 I'm talking about when it says on January 17,  
16 2001 -- when she says she was 11 in 1991, that would make  
17 her 21 in January -- presumably, in January 2001, she  
18 would be 21, when she's an adult. I'm not talking about  
19 the sexual stuff. I'm talking about in the statement,  
20 there is clearly a motive when she tells her husband:  
21 Hey, step-dad touched me, brushing against my breast,  
22 touched me, then he storms off, really pissed off, and  
23 that's when they come back and the guy is dead same day.  
24 That doesn't have anything to do with prior bad acts of  
25 the victim allegedly sexually abusing Ms. Feaster.

1 That's not what I was referring to.

2 MS. McCALLISTER: And, Your Honor, my  
3 response to that is, maybe I'm I phrasing my argument  
4 improperly when I'm saying sexual abuse. I mean to  
5 encompass all of the sexual misconduct that was alleged  
6 in that statement, and I believe that was addressed in  
7 the -- in a preliminary hearing, that there was a motion  
8 made by the State to exclude that, and there was a  
9 specific ruling that none of that come could in,  
10 including the part to go over there to ask for money and  
11 him touching her, that that was not to be discussed or  
12 brought up, but the physical issues with him hitting  
13 their mother or hitting them --

14 THE COURT: Is that correct?

15 MR. BOOZER: Your Honor, in all candidness,  
16 even if it is correct, I feel like it's irrelevant,  
17 because the door then becomes opened by the solicitor  
18 when he starts questioning about Katherine Feaster's  
19 statement. I think then that ruling, if that's what the  
20 ruling says, is out the window. Even if that's what it  
21 says, I think then the door's been opened, and she can  
22 get into it. Whether she wants to get into all the past  
23 back when she was 11 years old or the current thing that  
24 happened on the date of the murder, which was this  
25 apparent argument between step-dad and daughter and her

1 telling her husband and then husband storming off, pissed  
2 off, as it said, and then all of a sudden he's dead.

3 THE COURT: What do you have to say about  
4 that?

5 MS. McCALLISTER: Your Honor, my response to  
6 that is the cite that Mr. Boozer's giving for this and  
7 the question that we're talking about on page 579 of the  
8 transcript, it's redirect examination, and he  
9 specifically asks about what she, Detective Freeman, was  
10 asked about on cross-examination. So if anybody, it  
11 wasn't the State opening the door. It was a question --  
12 he's asking about a question that came out on cross, so  
13 it wasn't the State who first brought up the issue of  
14 what did Katherine's statement say.

15 It was the defendant, and the State objected  
16 and she had to move on, and so I don't think that the  
17 door was opened by anybody on that ruling because the  
18 State did object, and I think all this is is just trying  
19 to clarify or kind of hammer home the answer from the  
20 cross-examination.

21 MR. BOOZER: Judge, I hate to belabor the  
22 point. If I may --

23 THE COURT: Yes.

24 MR. BOOZER: On 579, the question is answered  
25 further beyond the scope of cross-examination, and did

1 she also implicate the defendant? Yes.

2 So I think starting with 12 through 17, the  
3 door is open, but I think that that even fully more so  
4 opens the door to go beyond what was asked on  
5 cross-examination, and with that I will leave it at that,  
6 Your Honor.

7 THE COURT: With regard to the issue of the  
8 absence of the investigator, I'm going to deny relief  
9 with regard to that because Judge Dennis did continue the  
10 case on one occasion. There was absolutely nothing that  
11 trial counsel could have done, Ms. Kennedy could have  
12 done, to compel his presence. He was not subject to  
13 subpoena. He was out of the country. Furthermore, this  
14 issue, as I understand, it was addressed on appeal and  
15 denied.

16 As far as the writings, I find they were not  
17 authenticated and that the existence of these letters and  
18 the failure to introduce them does not present a  
19 reasonable probability that but for the counselor's  
20 failure to explore these writings that the results would  
21 be different.

22 As far as the issue concerning Katherine's  
23 statement, I think that falls short in that the issue  
24 with regard to sexual misconduct was previously ruled  
25 upon, and the State did not open the door as to the

1 statement of Katherine and to the extent that there was  
2 some mention of that by the State. The previous ruling  
3 with regard to the exclusion of sexual misconduct would  
4 prevail in my estimation, and, moreover, sexual  
5 misconduct was incorporated into the defense and  
6 presented to the jury in closing arguments.

7 I'm going to ask the State to prepare an  
8 order in that regard, and did I address all of the  
9 issues?

10 MR. BOOZER: Your Honor, if I may seek  
11 clarification on the last one Your Honor was ruling on?

12 THE COURT: Yes.

13 MR. BOOZER: The nature of the allegation is  
14 not so specific as just the prior sexual acts. It has to  
15 do with the entirety of the statement, or, at the very  
16 least, that she tells Treze, her husband, about that  
17 particular incident right then and there, and then she  
18 tells him this and he leaves, and then he comes back and  
19 says, It was an accident. Jeff had the gun. He pulled  
20 the trigger. Treze went over there to beat his ass, not  
21 to kill him, that's really the part -- I'm not as  
22 concerned about the prior stuff. I'm concerned about  
23 that. There is a motivation for the killing, and I just  
24 want to make sure that's the ruling so that it's  
25 preserved.

1 THE COURT: Right. And you're protected on  
2 the right, but I find upon reviewing the transcript,  
3 there was not an adequate opening of the door by the  
4 State.

5 MR. BOOZER: Thank you, Your Honor.

6 MS. McCALLISTER: Your Honor, I'm sorry. I  
7 don't think you addressed issue of perjured testimony  
8 that was allegedly elicited.

9 THE COURT: I don't think that argument has  
10 merit. As I understand it, the witness was adequately  
11 cross-examined with regard to that issue, and the  
12 testimony speaks to itself in that regard.

13 Would you like to be heard any further on  
14 that?

15 MR. BOOZER: No, Your Honor.

16 THE COURT: Okay. All right. We will stand  
17 at ease until 9:30 in Charleston tomorrow.

18 - - -

19 (Whereupon, the proceedings were concluded.)

20 - - -

21

22

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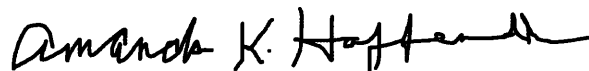
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I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Berkeley County, South Carolina, on the 31st of July 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 25, 2018



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Circuit Court Reporter

my lawyer Sunday and Eve already had my clothes brought up here. She told me that every thing is a go for Monday. And you cant tell me don't worry there is a whole lot to worry about. You need to be prepared and hold up under pressure you have to be very careful with what you say and how you say it. I hope your right that that conversation was not recorded, ~~cause that~~ You definitely can't say anything like that cause that makes it premeditated and not on are you bugging me but you put yourself in the same position. And you don't need to do that trick it really might not matter cause the need your statement that's what there going on is you and your story so I'm sure your plea still stands when is the last time you talked to your lawyer and what all is she saying about every thing. And you should be used to the whole we know this and that routine they don't know anything unless you tell them that's why were here now. They still don't have nothing they keep what we say. That's why there doing all the threats to yall waiting for you to crack. were at the critical point now and its getting dangerous I'm now trying to give these people the rest of my life. You need to think things through before you speak. I believe your still in a good position as far as the same plea cause they need you to testify. But just remember they are trying me and trying a whole that is why you have to be careful with what you say and how you say it. Let me know what's up and what all your lawyer said, when you get that info. I might not even come back. Kat says she loves you.

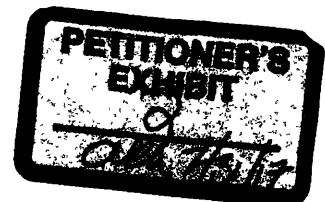
How how is your boy charging the things.  
and tell them boys to send us something

55  
Paparazie  
who ever



Jeff,

Hey man you should have stuck to the script and never said  
 So did you tell them that I know before hand if thats the case  
 they could burn us all especially me cause there trying me and  
 Jeff together so basicly the only chance I'll have is if  
 he dosen't show up. My lawyers telling me to testify for my-  
 self against him and to make it as we were getting drunk an  
 high the Jeff wanted to go see parish to get some more  
 pot I said I'd drive but I wouldn't go to the house cause  
 we don't get along and nobody knew what he was going  
 to do. and thats what I'm going with the only wanted to offer  
 me 25 for voluntary to testify for them. Basicly I gotta test  
 anyway for my self and still go to trial. but if your saying  
 we knew or it was planned I'm fried so what's up. You gotta  
 stick to your guns if you didn't think you could a past the test  
 you shouldn't of took it. its not even admissable we already  
 went over all that. My lawyer was telling me that even if  
 I get convicted that I shouldn't get any more than 15 but I  
 don't know now and when she saw me Sun she said  
 ann williams told her they weren't gonna use that's statement  
 and she would be getting out after the trial. and then  
 they belined you and were going with your statement and  
 that you would be getting out to. So whats your lawyer  
 saying now what's up. And what's story are you testify  
 ing to cause that is going to make all the difference  
 between possibly going home or the 15 or getting the  
 max Hell a Back.



I know what we said in our statement I was stating  
 the frame of mind Jeff was in and when I have to get up  
 there I'm clarifying and filling in the blanks of my statement.  
 So I'm still saying the same thing, just giving more details. You've  
 got to be careful first of all you were talking to the most credible  
 person that's gonna be in that courtroom the Solicitor. And depending on  
 what you told him you could of given him prearrangement and that  
 changes every thing that goes from Voluntary to murder its a big  
 difference. So I need to know word for word what you told him. at least  
 give me a heads up on what I'm walking into. And I need to know  
 exactly what you gonna say on the stand. I would of sent the letter sooner  
 but the CO's act scary and dont wanna do anything any more. And what are  
 the gonna do with you now is it still A.A.F.F. or are you being tried or  
 what. I need all the details times running out. Its all in how everything  
 is worded and really the statement is not important my lawyers says it boils  
 down to what's said on the stand and what you stick with you can't let  
 his lawyer or the Solicitor pick you apart. what's up.



1306

[http://www.postandcourier.com/obituaries-archive/deaths-summary/article\\_8211dd37-5d39-594f-97ee-879b97b03761.html](http://www.postandcourier.com/obituaries-archive/deaths-summary/article_8211dd37-5d39-594f-97ee-879b97b03761.html)

## Deaths summary

**The Post and Courier** Jul 5, 2016

AKRA, Brigitte Hildgard, 75, of Mount Pleasant, a retired flight attendant, died June 29.

Arrangements by James A. McAlister Funerals and Cremation

ALMEIDA-CANCIO, Quintin, 78, of Charleston, husband of Amada Almeida, died Sunday.

Arrangements by Palmetto Cremation Society

BOWEN, Phillip G., 93, of North Charleston, a Merchant Marine veteran, died. Arrangements by

Carolina Memorial Funeral Home

CARLEY, Charles L., 78, of North Charleston, a Navy veteran, retired machinist with the Charleston

Naval Shipyard and husband of Margie Carley, died June 22. Arrangements by Palmetto Cremation

Society of Charleston.

DILLIGARD, Gerald, 27, of Charleston died Saturday. Arrangements by Murray's Mortuary of North

Charleston.

GIBBS, Helen V., of Johns Island, wife of Samuel L. Gibbs, died Monday. Arrangements by Walker's

Mortuary.

GOOGER, Wesley Freeman, 70, of Mount Pleasant, a Navy veteran, died Monday. Arrangements by

Stuhr's Mount Pleasant Chapel.

HILL, Haydee Bottia, 74, of Mount Pleasant, a retired weaver, died Sunday. Arrangements by

Simplicity Lowcountry Cremation and Burial Services of North Charleston.

HOLLAND, Mary, 96, of Seabrook Island, a retired Army nurse, died Monday. Arrangements by

McAlister-Smith's James Island Chapel.

MAXON, Katherine Marie Buntyn, 58, of Hollywood, a certified CT technician with Roger St. Francis

and wife of James F. Maxon, died Tuesday. Arrangements by Stuhr's West Ashley Chapel of

Charleston.

PALMS, George David, 46, of North Charleston, husband of Susan Michaelson Palms, died Sunday

Arrangements by Dial-Murray Funeral Home of Moncks Corner.

RECTOR, Pamela Joy, 68, of Mount Pleasant, a licensed practical nurse, co-owner and manager of

Geehee Seafood and wife of Warren L. Rector, died Tuesday. Arrangements by Stuhr's Mount

Pleasant Chapel.

RICHBURG, Chuck, 56, of Mount Pleasant, husband of Eleanor Richburg, died Sunday. Arrangements

by Stuhr's Mount Pleasant Chapel.

ROBINSON, Zelda V., 50, of Mount Pleasant died Friday. Arrangements by The Palmetto Mortuary of

Charleston.

[http://www.postandcourier.com/obituaries-archive/deaths-summary/article\\_8211dd37-5d39-594f-97ee-879b97b03761.html](http://www.postandcourier.com/obituaries-archive/deaths-summary/article_8211dd37-5d39-594f-97ee-879b97b03761.html)



STREET, Agnes Louise Mengedoht, 88, of Charleston, wife of Timothy S. Street, died Tuesday.

Arrangements by Stuhr's Downtown Chapel.

YOST, Prudence Browning, 88, of Kiawah Island died Friday. Arrangements by Simplicity Lowcountry Cremation and Burial Services of North Charleston.

MEDORS, James P., 48, of Goose Creek, a paralegal, died Saturday. Arrangements by Simplicity Lowcountry Cremation and Burial Services of North Charleston.

VARNER, Louise Saulisbury, 89, of Pinopolis, widow of John Varner, died Monday. Arrangements by Russell Funeral Chapel of Moncks Corner.

WEINSTEIN, Judith M., 74, of Summerville, a retired secretary and wife of Paul Weinstein, died Friday. Arrangements by Simplicity Lowcountry Cremation and Burial Services of North Charleston.

WHITT, Thomas Lloyd, 55, of Goose Creek, a Navy retiree and husband of Diana Whitt, died Sunday. Arrangements by Simplicity Lowcountry Cremation and Burial Services of North Charleston.

KEITH, Lennoye Ray, of Walterboro, an Air Force veteran, died Saturday. Arrangements by Parker-Rhoden Funeral Home.

KEMPSON, Nancy Lee Stevenson, 78, of Ladson, widow of Alvin A. Kempson Jr., died Sunday. Arrangements by James A. Dyal Funeral Home of Summerville.

SIGMON, Kimberly Michele, 30, of Summerville, a school teacher, died Sunday. Arrangements by Parks Funeral Home.

BROUGHTON, June Seckinger, 88, of Savannah, Ga., widow of Frank Broughton, died Saturday. Arrangements by Anderson Funeral Home of Beaufort, S.C.

EVANS, Rosalie Camlin, 93, of Saters, widow of William B. Evans, died Monday. Arrangements by Williamsburg Funeral Home of Kingstree.

SWIATOCHA, Robert, 34, of Hilton Head Island died Thursday. Arrangements by Anderson Funeral Home of Beaufort.

1308



Join Us for our August events and see retirement living at its best!

CROSSING



[http://www.postandcourier.com/news/mothers-instincts-persistence-finally-pay-off/article\\_3f95b124-a78a-5197-ab1f-2f027f0003f1.html](http://www.postandcourier.com/news/mothers-instincts-persistence-finally-pay-off/article_3f95b124-a78a-5197-ab1f-2f027f0003f1.html)

### Mother's instincts, persistence finally pay off

Bo Petersen Jul 28, 2010



Frances Reeves was overcome with emotion after leaving Cherokee County courtroom Wednesday. A woman had accepted a plea bargain in the 2001 slaying of Reeves' son.

MONCK'S CORNER -- Frances Reeves couldn't sleep. She laid awake at night and prayed for one tiny, little clue.

A police officer had told her that Parrish, her son, hadn't been killed, but was just off somewhere. His case was treated as a missing person, then just a cold case.

She knew better because he left Kippy behind, and he never left without the mixed breed dog. He slept with the dog. He took the dog to work. Also, blood was smeared on a wall in his house. And his attic had been ransacked.

She prayed for a clue, and she got one. Then another. Bit by bit she began to string together what happened.

"I wouldn't let it die," she said. For nearly a decade she hounded police and pushed to keep her son's disappearance in the public eye.

In 2007, authorities found his body. On Wednesday, Reeves watched justice edge a bit closer.

In a tearful courtroom exchange, Parrish Reeves' former stepdaughter, Katherine Feaster, accepted a plea bargain in the case.



Treze Feaster, her husband, turned down a plea bargain. A few hours later, he was ordered to turn over a handwriting sample that prosecutors said will tie him to incriminating letters.

The judge set his trial date set for late September.

The cases were heard less than a month after Jeffrey Michaelson was convicted of murder in the case and sentenced to 45 years.

"Hang in there a little longer," 9th Circuit Assistant Solicitor Anne Williams told Frances Reeves, patting her shoulder gently. Looking up at observers, Williams said "She's the reason why this thing is going to trial."

Reeves, now 78, sat forward on a bench in the front of the Berkeley County courtroom, her hands restlessly rubbing at each other. When Treze Feaster was brought into the courtroom, she stared him down.

He didn't return the look, but occasionally glanced sidelong to see if she was still looking.

Katherine Feaster pleaded guilty to burglary and misprision of a felony and received an eight-year sentence, Williams said.

"She was crying and she was upset. She told the family she was sorry," Reeves said. "She didn't even look like herself. Her mother didn't even recognize her."

Of the four people charged in the case, Michaelson and Katherine Feaster have pleaded guilty. Co-defendant Jeremiah Paul Scharer will testify against Treze Feaster, Williams said.

Treze Feaster turned down a plea bargain of 30 years, Reeves said. After the hearing, he turned with his hands cuffed in front of him and walked casually out of the courtroom, shrugging a bailiff's hand off his shoulder.

"Oh yeah," Reeves said, she wants vindication.

Parrish Reeves was 36 years old when he vanished from his Corcesville home in January 2001. Six years later his body was found in a barrel buried four feet deep in the yard in front of Michaelson's former home.

Reeves was as surprised as anyone that her prayer for a clue was answered. She runs a maintenance company and loves the flea market. She is not, she says firmly, a psychic.

But something told her to look in certain places, ask certain questions. She hung fliers asking for information. She kept business cards for contacts, kept a notebook of things she learned. She contacted the FBI and the TV show "America's Most Wanted."

Then, one night in a dream, she saw two people carry Parrish's white comforter out of his front door, down the steps past the wrecked car that sat there. "It was weird," she said.

She worked her way through three detectives until she convinced one. A few of Parrish's belongings were found in a shop where authorities said Katherine Feaster had pawned them. One of the suspects broke and told deputies what happened.

Parrish's remains were found wrapped in that comforter.

## 1310

"To put him in a 55-gallon drum, put him in the front yard, walk over him every day -- to me it couldn't be much crueler," said Mickael Fitzpatrick, Frances Reeves' son.

"They were looking me straight in my eyes and knowing where my son was," Reeves said. "It's hard. You never know how a parent feels when a child's been murdered or kidnapped until it happens to you."

Hang in there, Williams told Reeves, and she brushed back a tear and nodded firmly. "I don't like it. But I'm all right. I'll make it."

Reach **Bo Petersen** at 937-5744 or [bpetersen@postandcourier.com](mailto:bpetersen@postandcourier.com).

Affidavit Statement  
BERKELEY COUNTY SHERIFF'S DEPARTMENT  
Moncks Corner, S. C. 29461

1311

This statement of KATHERINE S FEASTER is taken before Det Col J MERRITT

Date AUGUST 6, 2007 Time 14:30 DOB [REDACTED] SSN [REDACTED]

I KATHERINE FEASTER, whose address is [REDACTED]

am 37 years of age and have completed the 5th with GED grade in school. Det. Col J Merritt

[REDACTED] who has advised me that he is a member of the Berkeley County Sheriff's Department, has advised me --

KE

1. That I have the absolute right to remain silent and do not have to answer any questions or give a statement and this cannot be used against me.

KE

2. That if I do answer questions or give a statement, anything I say, can and will be used against me in a court of law.

KE

3. That I have the right to consult with a lawyer of my choice before I answer questions or give a statement and also to have him present while I am being questioned.

KE

4. That if I wish to talk to a lawyer or have him present, but am unable to afford to hire a lawyer, one will be appointed to represent me free of charge.

KE

5. That if I decide to answer questions or give a statement without a lawyer present representing me, I have the absolute right during this interview to stop answering questions and to remain silent.

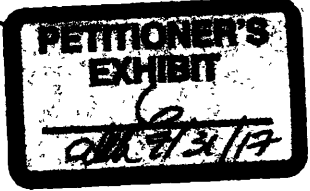
**Rule 5**

I fully understand each of these rights which have been explained to me, and having these in mind, I do hereby waive these rights and answer questions concerning the charge of PERJURY which I have been accused of committing. No threats force or promise of any kind have been made to me by anyone to induce me to waive these rights and answer questions.

[Signature]

WITNESSES.

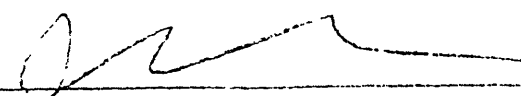
[Signature]



This statement is being written for me by Det. Sgt. D. Freeman at my request and in my words. In 1991, when I was 11 years old, my mother and British Reever. Shortly after she moved in with him, bring me and my two brothers, Dennis and Jeremiah Eborer. Right after he moved in, Parrish made me keep my door ~~closed~~ open. He would touch me around my breast and act like it was an accident. He would lock us outside ~~the house~~. He would beat us for the wrong reasons. This was in his house in North Charleston

I think it was Morningside. The neighbors tried to help keep us out of trouble to keep him from beating us. Then when I was around twelve years old we moved to Cordesville. As time went by he got meaner and more possessive of me. When he got mad at me for cutting my hair, he made me pull down my pants and he beat me with a switch until I bled. He made my brother drink skummy dog water because he had forgot to change the water. When I was 16 years old I left home and stayed gone about three days. I tried to tell mom what he was doing, she said he was just being affectionate. She wouldn't listen when I told her it was inappropriate. In 1997 I met my husband Trey ~~Fear~~ <sup>Rife</sup>. We got married and Parrish hated Trey. I didn't have to tell him what Parrish was doing, he could see it. He tried to be nice to Parrish. On January 17, 2001, I was pregnant and had a two year old son. My husband was out of work, I think and I couldn't pay the bills. It was around dusk and mom was at work. I went to ask Parrish to borrow money. He started laughing then gave me a long speech about how my husband was suppose to support me. Then he asked "What are you going to do for me?" He went to

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT

NAME: 

WESS: \_\_\_\_\_

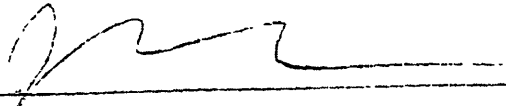
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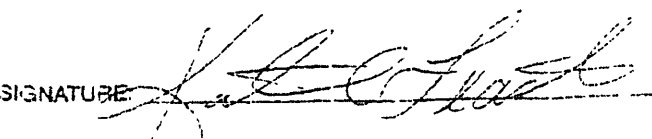
put his arm around me, brushing my breast. Again he said "Oh I didn't mean to touch you there." I told him "Seriously" and left. I went home and told Trey. My brother was there too. Trey stomped out really pissed off. My brother went with him. They were gone about an hour. When they came back, they were with Jeff Michaelson in his truck. It was a 5-10. I asked Trey what happened. He said I didn't need to know, it was an accident. He then told me Jeff had a gun. He pulled the trigger. Trey went over there to beat Pamish's ass, not to kill him. I asked where he was or what they did with him. He told me don't worry about it. Several months later, after we moved from

**Rule 5**

Starbright Drive, Trey told me they had buried him in Jeff's front yard. Jeff lived in the trailer in front of us. It was right inside the fence, to the left when you first pull in the drive. We moved to Iowa and lived with my dad for a while. Then we moved back to Pelzer, SC. I forgot to add several days after Pamish was killed, we went to the house to feed the dogs. It was Jeff, Trey and I. While I fed the dogs, they broke into the safe in mom's house. They took jewelry and coins. They got me to take the coins to the bank across from

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT

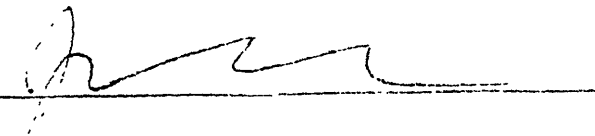
NAME: 

WITNESS: \_\_\_\_\_ SIGNATURE: 

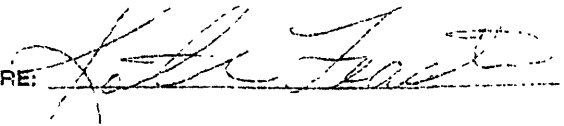
Western Sizzin in Moncks Corner. The jewelry was taken  
 to Money Man in moncks Corner. We just needed money  
 to feed our baby. Since then I havent talked to my  
 brother or Jeff about this. My brother was only about  
 16 years old when this happened.

**Rule 5**

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF  
 MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY  
 STATEMENT

NAME: 

WESS: \_\_\_\_\_

SIGNATURE: 

STATE OF SOUTH CAROLINA )  
 COUNTY OF BERKELEY )  
 )  
 Jeffrey Michaelson, #341675, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT

C. A. No. 2015-CP-08-2521

**ORDER OF DISMISSAL**

MARY P. BROWN  
 CLERK OF COURT  
 BERKELEY COUNTY S.C.

2017 NOV -6 PM 2:44

**FILED**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed by Jeffrey Michaelson (Applicant) on November 4, 2015, and amended on July 14, 2017. Respondent made its Return on June 9, 2016. An evidentiary hearing into the matter was convened on <sup>July 31,</sup> ~~August 1,~~ 2017, at the Berkeley County Courthouse. Lance Boozer, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. Patricia Kennedy, Esquire, also testified. This Court had before it a copy of the records of the Berkeley County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application and amendment, the State's Return, the trial transcript, and Applicant's appellate records.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted at the August 2008 term of the Berkeley County Grand Jury for one count of burglary, second degree (2009-GS-08-1669), and at the November 2009 term of the Berkeley County Grand Jury for one count of murder (2009-GS-08-2295). Patricia Kennedy, Esquire, represented Applicant. On July

8, 2010, Applicant proceeded to a jury trial before the Honorable Kristi Lea Harrington and a jury. Applicant was found guilty as indicted on the count of murder and not guilty for of burglary, second degree. Judge Harrington sentenced Applicant to incarceration for forty-five years.

A notice of appeal was filed on Applicant's behalf and an appeal perfected on his behalf by Robert Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Michaelson, Op. No. 2015-UP-188 (filed on May 8, 2013). Applicant then sought a writ of certiorari to review the South Carolina Court of Appeals' opinion. The petition was denied on November 7, 2014, and the Remittitur was issued on April 29, 2015.

#### **SUMMARY OF FACTS ADDUCED AT TRIAL**

The victim in this case, Parrish Reeves, was last seen on January 19, 2001. Tr. p. 291. After searching for him on her own for several weeks, his wife reported him missing on February 1, 2001. Tr. pp. 299-300. At the same time, she also reported a burglary in their home. Tr. pp. 299-300.

The case remained cold until August 2007 when some jewelry, owned by victim's family at the time of the burglary, was located after being pawned. Tr. pp. 481-83. The items were tied to the victim's stepdaughter, Katherine Feaster, through the pawnshop records. Tr. pp. 483-84. Ms. Feaster was arrested and gave a statement to police. Tr. pp. 484-85. She named Applicant; her brother, Jeremiah Scharer; and her husband, Treze Feaster, as being involved in the theft of the jewelry. Tr. pp. 485. Applicant was arrested and gave a statement detailing his involvement in the crime, admitting he provided the gun and helped bury the victim, and naming the location where he disposed of the gun. Tr. pp. 486, 508-13. A search warrant was executed at

Applicant's former residence, and investigators recovered a buried fifty-five gallon drum with the victim's body inside from the front yard. Tr. pp. 395-96, 400, 509-11. Applicant was arrested for murder on August 7, 2007. Tr. pp. 332-33.

In addition to Applicant's confession, testimony was also received from Jeremiah Scharer, the victim's stepson and Applicant's codefendant. Tr. pp. 587, 592. Jeremiah testified he was at Katherine and Trey Feaster's house, along with Applicant, when Applicant made a comment about going to deal with the victim. Tr. pp. 589-90. Scharer testified he knew his stepdad was going to be killed because Applicant had shown him a small handgun with a silencer on it. Tr. pp. 593-594. Scharer further testified his role was to knock on the door and get the victim to come outside. Tr. pp. 593. Treze Feaster dropped off Applicant and Scharer, and they walked to the victim's house. Tr. p. 593. Scharer testified the ruse was to get the victim into his vehicle by claiming Treze Feaster's truck was stuck in the mud, and they needed help to pull it out. Tr. pp. 596-597, 610. After the victim got in his vehicle, with Applicant in the passenger seat, the group took off down the road. Tr. pp. 596-97. Scharer, riding in the bed, testified he felt the truck sway and then stop. Tr. pp. 596, 598, 609. Scharer testified when the driver's side door opened, Applicant was now driving, and the victim was slumped on the passenger side. Tr. pp. 597-599. Applicant drove the truck back to the victim's home, and Scharer called and asked for Feaster to come and take him home. Tr. pp. 600-01. Applicant told Scharer after what they did that day, "that made me a man." Tr. pp. 602.

Brian Valbert, who at the time was civilly committed pursuant to the Sexually Violent Predator Act, testified about a jailhouse admission Applicant made to another inmate in a bragging manner. Tr. pp. 684-687. A recorded telephone call Applicant made to his girlfriend,

Christine Thomas, was also admitted, in which Applicant declared he was “sticking with I didn’t do it.” Tr. pp. 781-782.

### ALLEGATIONS

In his original application and the subsequent amendment thereto, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. Counsel failed to contact lead detective;
  - b. Counsel allowed prosecutorial misconduct;
  - c. Counsel failed to use witness letters which would have established a conspiracy against Applicant;
  - d. Counsel should have requested trial judge be recused;
  - e. Counsel should have requested a change of venue;
  - f. Counsel should have requested a mistrial due to misconduct between victim’s mother and a juror during trial;
  - g. Counsel failed to argue the State opened the door to Katherine Feaster’s hearsay testimony regarding her relationship with the victim.
2. Prosecutorial misconduct
  - a. Solicitor deliberately elicited perjured testimony.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

#### Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland, 466 at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant testified he was arrested and tried for murder, and Patricia Kennedy (Counsel) was appointed to represent him. Applicant testified he was arrested in August 2007 and tried in June 2010, and he met with Counsel three or four times in jail before he posted bond in November 2008. Applicant testified, after that, Counsel would call him by phone if she needed to get in touch with him. Applicant also testified he met with an investigator in preparation for trial.

Counsel testified she has worked at the Charleston County Public Defender’s Office since 2013, and before that, she was the Chief Public Defender for Berkeley County for ten years. Counsel testified her general rule is to meet with clients who are in jail every 30-45 days,

although she could not recall a specific number of meetings with Applicant. Counsel testified she did not recall receiving any plea offers, but she would have discussed that with Applicant. Further, Counsel testified Applicant maintained his innocence and was set on going to trial.

Counsel testified this case began in February 2001 when the victim was first reported missing, and it remained a cold case, despite considerable media attention, until August 2007, when Detective Merrithew got involved and tracked down Katherine Feaster based on pawnshop records. Counsel testified Applicant was the only non-family-member involved in the case, and he was the last person to be arrested and interviewed; Applicant was implicated by Treze Feaster. Counsel further testified Applicant always denied direct involvement in the murder, but the victim's body was recovered from his front yard. Counsel testified the State's theory at trial was Applicant was upset over his grandmother's death and "just wanted to kill someone." Counsel testified the defense theory was that Applicant was innocent, and she emphasized he was not related, had little to no contact with the victim, and had no motive to kill him, whereas the codefendants did.

Issue #1 – Counsel failed to contact lead detective, who was a key witness, for trial.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In order to prevail on a claim of ineffectiveness

based on counsel's failure to call a favorable witness, the South Carolina Supreme Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis added). Applicant's speculation the witness' testimony would have been favorable cannot, by itself, satisfy his burden of showing prejudice. Glover v. State, 318 S.C. 396, 498-99, 458 S.E.2d 538, 540 (1995).

Applicant testified he believed Counsel should have attempted to contact the lead detective in the case, Detective Merrithew. Applicant testified Merrithew had left the country for Afghanistan by the time of trial, and Counsel did request and was granted several continuances to try to locate him. However, Applicant testified Counsel was given an email address she should have used to contact him. Applicant testified the detective was necessary because he transported Katherine Feaster from Anderson to Berkeley County after her arrest, and the times on the statement taken from her "do not match." Applicant further testified Merrithew was not present for trial, and Counsel requested another continuance, which was denied.

Counsel testified at length about her attempts to contact Merrithew, or, in the alternative, have the trial delayed until he returned to the United States. Counsel testified Merrithew was the main driver of the investigation, and she wanted to be able to question him about his investigative steps. Counsel testified she has personal experience with Merrithew, and in her opinion, he jumps to conclusions and isn't always thorough in his investigation, and she felt he had not done a competent job in this case. Counsel testified Merrithew was under subpoena for trial during the spring and summer of 2009, but the case was not called. Counsel testified when the case was put back on the docket for November 2009, Merrithew was already gone. Counsel

testified she requested a continuance based on his absence, and Judge Dennis ruled he was an essential witness and continued the case. Counsel testified she was given an email address by the solicitor, but it was not Merrithew's personal account, just a supervisor or someone within the company he was working for, and she got no reply when she attempted to contact him that way. Counsel testified Merrithew was beyond the reach of any subpoena, and there was nothing legally she could do to bring him back. Counsel also testified she was aware the case would be tried without him after Judge Harrington denied multiple continuance requests, and she prepared her case accordingly.

This Court finds Applicant has failed to prove Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms in regards to her attempts to secure the presence of Detective Merrithew at trial. This Court finds Counsel made reasonable efforts to locate Merrithew after she became aware he had left the country, and there was nothing further she could have done. The Court further finds Counsel had no legal recourse to compel Merrithew's attendance at trial from Afghanistan, even if she had been able to contact him. Additionally, Applicant did not call Merrithew, the witness he alleges should have been called at trial, to testify at the evidentiary hearing. Applicant's assertion alone this witness would have provided favorable testimony is not enough to meet his burden as to this allegation. See Glover, 318 S.C. at 499, 458 S.E.2d at 540 ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Furthermore, this issue was properly preserved by Counsel and raised on appeal as a Confrontation Clause issue, and Applicant's appeal on that ground was denied. This allegation is therefore denied and dismissed.

Issues #2 – Counsel allowed “prosecutorial misconduct” by failing to object to perjured testimony.

Nondisclosure of evidence of perjured testimony about which the prosecution knew or should have known is a Brady violation. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324-25 (1999) (citing U.S. v. Agurs, 427 U.S. 97 (1976)). “A Brady claim is based on the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Id. at 524, 514 S.E.2d at 324.

Applicant testified Jeremiah Scharer, a witness called by the prosecution, lied during his testimony, and Applicant believes Counsel should have objected or done more to prevent him from testifying. On cross-examination, however, Applicant could not explain what he wanted Counsel to have done.

Counsel testified her concern with Scharer’s testimony was that it kept getting more and more detailed as time went on. Counsel testified he only gave one written statement, but later gave additional oral statements. Counsel further testified, because of this, she specifically asked about his meetings with the solicitor and how many times they discussed his statements. Counsel testified although she personally did not believe Scharer’s testimony, there was nothing she could do other than cross-examine him about his various statements and argue his questionable veracity to the jury during closing.

This Court finds Applicant has failed to prove Counsel was ineffective for failing to object to Scharer’s testimony. Applicant has not established that any perjured testimony was presented or that Counsel had any reason to believe perjured testimony was deliberately presented. Further, this Court notes Counsel reviewed Jeremiah Scharer’s statements and cross-

examined him on inconsistencies in his trial testimony. Lastly, Applicant has failed to show there was an objection or motion Counsel could have made that would have resulted in a different outcome, particularly where he has set forth no absolutely evidence to substantiate this claim. Accordingly, this allegation is denied and dismissed.

Issue #3 – Counsel failed to introduce or otherwise use at trial witness letters which would have shown the existence of a conspiracy to frame Applicant.

“There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)). In order to prove Counsel was ineffective, Applicant must show Counsel’s performance was deficient, and there is a reasonable probability that, but for Counsel’s errors, the result of the trial would have been different. Strickland, 466 U.S. at 688. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Id. When evaluating the reasonableness of Counsel’s conduct, this Court must “keep in mind that [C]ounsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Id. at 690. “Furthermore, when a defendant’s conviction is challenged, ‘the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.’” Catoe, 372 S.C. at 331, 642 S.E.2d at 596 (quoting Strickland, 466 U.S. at 695).

Applicant introduced copies of three letters he believes were sent between his codefendants Treze Feaster and Jeremiah Scharer. Applicant testified he was not aware of the existence of the letters until a year after trial, when he requested a copy of his file and discovery

from Counsel. Applicant testified the letters were not introduced at trial nor used to confront witnesses, and he believes Counsel could have and should have used them to his benefit.

Counsel testified she believed she had been given a full copy of the State's file pursuant to Brady and Rule 5. She testified she received discovery in multiple batches from several different solicitors, and she prepared a copy of this and gave it to Applicant via his family. Counsel reviewed the letters Applicant introduced and asserted she had received them from the State. Counsel testified the letters appear to have been written by Treze Feaster, addressed to Jeremiah Scharer, and if the letters could be authenticated, she would have liked to use them to discredit Scharer and show the existence of a possible conspiracy to blame Applicant. However, Counsel testified Treze Feaster had a right not to testify, and he did not testify, so she felt she had no way to authenticate them. Additionally, Counsel testified there was no indication Scharer ever received the letters or changed his story based on the letters.

This Court finds Applicant has failed to prove Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms in regards to the use of the witness letters at trial. Counsel testified she believed the letters were written by Treze Feaster, who did not testify at trial and could not be compelled to testify. This Court agrees with Counsel's assessment that she would likely have been unable to authenticate the letters in order to use them for impeachment purposes as they are undated and unsigned. Further, Applicant presented no evidence Scharer even received the letters, much less took any action based on them. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by any deficiencies in Counsel's performance. This Court finds use of the letters would not have changed the result at trial, especially given the fact Applicant himself

admitted to significant involvement in the crime. This allegation is therefore denied and dismissed.

Issue #4 – Counsel should have requested the trial judge be recused.

“Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned. It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge.” State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (S.C. Ct. App. 2003).

Applicant testified he believed Counsel should have asked Judge Harrington to recuse herself from hearing his case because before she took the bench in 2008, she was a supervisor in the Berkeley County Solicitor’s Office, and he believed she had prior knowledge of the case. Applicant testified he was unaware of Judge Harrington’s work as a solicitor until after the trial, so he never discussed the issue with Counsel, but he would have asked Counsel to make a motion if he had known.

Counsel testified she did not discuss Judge Harrington’s previous employment as a solicitor with Applicant. Counsel testified Applicant was arrested in August 2007, and Judge Harrington was elected to the bench in February 2008, so there was only a short overlap. Additionally, Counsel testified Judge Harrington prosecuted criminal domestic violence, criminal sexual conduct, and child abuse matters, not murder cases, and she was not a supervisor in the office. Counsel further testified Applicant’s case was handled mostly by the Charleston

Solicitor's Office, particularly as trial approached, and she had no reason to believe Judge Harrington was ever involved.

This Court finds Counsel rendered reasonably effective assistance under prevailing professional norms, and Applicant has failed to prove Counsel's performance was deficient. Applicant presented no evidence whatsoever of any direct involvement by Judge while she was still at the Solicitor's office, nor of any bias because of her former position. Additionally, Counsel testified she was aware of Judge Harrington's previous employment and had no reason to believe she was involved in the case. Therefore, Counsel had no basis to request recusal. This allegation is denied and dismissed.

Issue #5- Counsel should have requested a change of venue.

Applicant testified he wanted Counsel to file a motion for a change of venue because the victim's mother was prominent at some flea markets in the area and 20-30% of the jury pool indicated they knew who she was. Applicant also testified the case had been reported in newspapers and other media sources in the area. Applicant testified he asked Counsel to make the motion, but Counsel refused and told him it would not be successful.

Counsel testified she did not request a venue change due to her belief, based on past experience, it would not be granted. Counsel further testified the only successful venue change she ever had granted was in a serial rape case that received thousands of newspaper articles and television stories, and even then she had to "jump through hoops" for it to happen. Counsel testified there were a few newspaper articles about this case, and jurors were questioned about their knowledge of it, but the media coverage was nothing abnormal.

The Court finds Applicant has failed to prove Counsel's performance was deficient in her handling of this issue or that Applicant suffered any prejudice as a result. Applicant did not

present any evidence of difficulties impaneling a jury as a result of pre-trial publicity. Further, it does not appear to this Court that Applicant's case received an unusual amount of publicity. Counsel testified potential jurors were asked about their knowledge of the case, and this Court finds there is no evidence the trial court failed to ask appropriate questions. The Court notes the fact that a jury was successfully drawn is evidence a change of venue was unnecessary, and such a motion would be premature until there were problems impaneling a jury. This allegation is therefore denied and dismissed.

**Issue #6 – Counsel should have requested a mistrial based on contact between a juror and the victim's mother during trial.**

Applicant introduced the affidavit of George David Palms, Applicant's now-deceased brother-in-law. Applicant testified he was sitting in a vehicle with Palms in the parking lot outside the courthouse on the last day of trial, when he and Palms observed a juror approach the victim's mother, speak to her and give her a hug, then enter the courthouse. Applicant testified he was about 20 yards away at the time and could not hear the conversation, but he saw mouths moving. Applicant further testified he informed Counsel of the encounter before trial resumed that morning, but Counsel told him it was not worth bringing up unless he had pictures as proof.

Counsel testified Applicant never reported this allegation to her, and, because it is an unusual occurrence, she believed she would remember if she had been told about it. Counsel further testified she would have been obligated to inform the judge if she had known about it because it is so improper, and she would have done so.

This Court finds Counsel's testimony on this issue to be credible and finds Applicant's testimony was not credible. This Court finds Applicant never reported this incident to Counsel, if it ever took place. Therefore, this Court finds Counsel's performance was not deficient. Further, this Court finds Applicant failed to prove prejudice as he did not call the juror in

question to testify, despite knowing her name and juror number. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .”). This allegation is therefore denied and dismissed.

Issue #7 – Counsel failed to argue the State opened the door to Katherine Feaster’s hearsay testimony regarding her relationship with the victim.

Applicant alleges Counsel should have argued the State opened the door to allowing hearsay testimony regarding Katherine Feaster’s relationship with the victim, who was her stepfather. Specifically, Applicant alleges the State opened the door after successfully objecting to Counsel’s questions to Sergeant Freeman regarding the family relationships, “bad blood” between the victim and Applicant’s codefendants, and the statements given by the codefendant’s before police arrested Applicant. See Tr., pp. 555-56. Applicant contends Counsel was deficient for then failing to object to the State’s question on re-direct as to whether Katherine Feaster had implicated Treze Feaster, Jeremiah Scharer, and Applicant in her statement to police. See Tr., p. 579. Applicant alleges this “opened the door” for Counsel to go into the statement, but Counsel failed to make that argument.

Counsel testified she received Katherine Feaster’s statement to police in discovery and felt it would have been beneficial if she could have used it at trial because it supported her argument that the codefendants had much stronger motives for killing the victim. Counsel agreed she should have made an argument the State opened the door to bring in the contents of the statement, but, although there was a bench conference, she never did so on the record. On cross-examination, Counsel testified the State made a motion in limine to keep out any mention of the victim’s alleged sexual abuse or assault of Katherine Feaster. Counsel acknowledged she

questioned Scharer about being beaten by the victim and Scharer's dislike of the victim. Counsel also testified her closing focused on the argument that everyone else had a reason to be involved except Applicant, and she did argue to the jury the victim had a history of physical abuse and had sexually assaulted Katherine Feaster.

This Court finds Applicant has failed to prove Counsel's performance was deficient, and Counsel rendered reasonably effective assistance under prevailing professional norms. The trial court has wide discretion as to what evidence and testimony is admissible. See, e.g., State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) ("The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.") (citing State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). This Court finds the issue of the victim's alleged sexual misconduct was ruled upon during pre-trial motions, and this ruling controlled during trial. Further, the Court finds the State's question did not open the door or give Counsel a basis to challenge the previous ruling, despite Counsel's assessment of her own performance. See Harris v. Dugger, 874 F.2d 756, 761 n. 4 (11th Cir. 1989) ("Because ineffectiveness is a question which [the court] must decide, admission of deficient performance by attorneys are not decisive."). Additionally, Counsel was able to cross-examine Scharer regarding physical abuse by the victim, and she argued the issue of sexual assault during closing. Therefore, this Court finds Applicant has not met his burden of proving he was prejudiced by the lack of testimony on these issues or that he would have been likely to prevail on this issue on appeal even if it had been preserved. This allegation is therefore denied and dismissed.

**CONCLUSION**

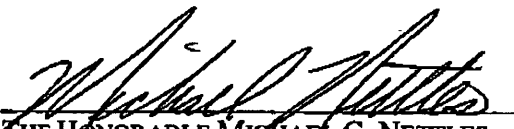
Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by any alleged deficiencies in Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1 day of November, 2017.

  
 THE HONORABLE MICHAEL G. NETTLES  
 Presiding Judge  
 Ninth Judicial Circuit

Florence, South Carolina.

STATE OF SOUTH CAROLINA

1332  
COUNTY OF Berkeley  
STATE VS.

Jeffrey A Michaelson

AKA:

Race: W Sex: M Age: 30

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

\*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was TO: Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 09GS082295

A/W#: 09GS082295

Date of Offense: 8/8/2007

S.C. Code § : 16-03-0010, 0020

CDR Code #: 0116

SENTENCE SHEET

CONVICTED OF or  PLEADS

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116  
 NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  Mandatory GPS(CSC w/minor 1st or Lewd Act)  §17-25-45

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. (defendant's initials)  
The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST: Bryan A. Alfaro SC Bar# 70502 Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center,  
for a determinate term of 45 days/months/years or  under the Youthful Offender Act not to exceed     years  
and/or to pay a fine of \$    ; provided that upon the service of     days/months/years and/or payment  
of \$    ; plus costs and assessments as applicable\*; the balance is suspended with probation for    

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on:  
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.  
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence ) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION:  Deferred  Def. Waives Hearing  Ordered  
Total: \$     plus 20% fee: \$      
Payment Terms:      
 Set by SCDPPPS    

PTUP      
    days/hours Public Service Employment  
Obtain GED   
Attend Voc. Rehab. or Job Corp.      
May serve W/E beginning      
Substance Abuse Counseling   
Random Drug/Alcohol testing   
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$     beginning      
\$     paid to Public Defender Fund  
Other:    

Recipient:      
\*Fine: \$      
§ 14-1-206 (Assessments 107.5 %) \$      
§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00  
§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$      
§ 56-5-2995 (DUI Assessment) \$12 \$      
§ 56-1-286 (DUI Breath Test) \$25 \$      
§ 47.12 (Public Def/Prob) \$500 \$      
§ 14-1-212 (Law Enforce. Funding) \$25 \$      
§ 14-1-213 (Drug Court Surcharge) \$150 \$ 25.00  
§ 50-21-114(BUI Breath Test Fee) \$50 \$      
§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$      
§ 90.7 (SCCJA Surcharge) \$5 \$ 5.00  
3% to County (if paid in installments) \$ 3.90  
TOTAL \$ 133.90

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Linda J. Hill  
Court Reporter: Brenda Cooley  
SCCA 217 (11/2009)

Presiding Judge Kristi King  
Judge Code: 2151  
Sentence Date: 7/8/10

ALF 2007-08-02888

WITNESSES

Gerald Merrithew  
Berkeley County Sheriff's Office

AGENCY CASE NUMBER

01020003640

ARREST WARRANT NUMBER

DIRECT INDICTMENT

DATE OF ARREST

August 8, 2007

ACTION OF GRAND JURY

True Bill

*Gandra Morales*

Foreperson of Grand Jury

Date: 11-18-09

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2009-GS-08-2295

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

NOVEMBER Term 2009

THE STATE

vs.

Jeffrey A Michaelson

DOB: [REDACTED]

W/M

Indictment for

MURDER

2009 NOV 18 AM 11:02  
CLERK OF COURT  
BERKELEY COUNTY, S.C.  
K.A.

FILED

45



MMH2007-08-02888

DOCKET NO. 2008-GS-08-1669

WITNESSES

Gerald Merrithew *GM*  
Berkeley County Sheriff

*Rene Ramsey*

The State of South Carolina

County of Berkeley

AGENCY CASE NUMBER

01020003640

COURT OF GENERAL SESSIONS

August Term 2008

ARREST WARRANT NUMBER

DIRECT PRESENTMENT

DATE OF ARREST

August 8, 2007

THE STATE

vs.

ACTION OF GRAND JURY

Jeffrey A Michaelson

DOB: [REDACTED]  
W/M

**True Bill**

*Brian Hunt*

Foreperson of Grand Jury

Date: 8-20-08

Indictment for

Burglary-2nd Degree

VERDICT

Foreperson of Petit Jury

Date:

INDICT

CLERK OF COURT

✓ |

STATE OF SOUTH CAROLINA )  
  )  
COUNTY OF BERKELEY        )

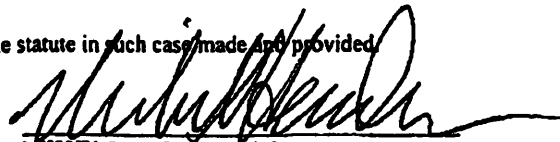
## INDICTMENT

At a Court of General Sessions, convened on August 20, 2008 the Grand Jurors of Berkeley County present upon their oath:

**Burglary-2nd Degree**

That Jeffrey A. Michaelson did in Berkeley County, on or between January 17, 2001, and February 1, 2001, unlawfully enter the dwelling of Parish Reeves and/or Brenda Ahrenhoiz located at [REDACTED] Cordesville, South Carolina, without consent and with the intent to commit a crime therein, to wit: larceny. This being in violation of §16-11-312 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.

  
MIKELL HENDERSON  
ASSISTANT SOLICITOR