

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

STATE OF SOUTH CAROLINA,)

v.)

LUZENSKI ALLEN COTTRELL,)

Defendant.)

COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

Order for Protection

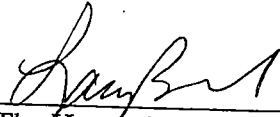
2003-GS-26-0020

FILED
HORRY COUNTY
11 DEC 13 PM 4:34
MELANIE HUGGINS-WARD
CLERK OF COURT

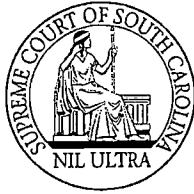
It appearing to the court that Attorneys Stuart Axelrod and Melissa J. Armstrong are actively engaged in the preparation of a capital case set for trial January 23, 2012, and it further appearing that they will need to dedicate themselves exclusively to the preparation of this trial, it is

ORDERED THAT MR. AXELROD AND MS. ARMSTRONG BE PROTECTED FROM ALL COURT APPEARANCES, EXCLUDING THE ABOVE CAPTIONED MATTER FROM JANUARY 1, 2012 UNTIL FEBRUARY 5, 2012.

IT IS SO ORDERED this 13 day of December, 2011.


The Honorable Larry B. Hyman, Jr.
Presiding Judge
State of South Carolina

RECEIVED
JAN 17 2012
S.C. SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 24, 2012

REMITTITUR

The Honorable Melanie Huggins
Clerk of Court, Horry County
Government & Justice Center
P. O. Box 677
Conway, SC 29528-0677

Re: The State v. Cottrell, Luzenski Allen
2003-Gs-26-00020

Dear Ms. Huggins-Ward:

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

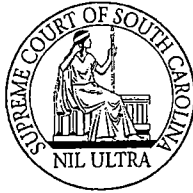
Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Stuart Mark Axelrod, Esquire
Solicitor John Gregory Hembree
Office of the Attorney General



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 5, 2012

Stuart Mark Axelrod, Esquire
Axelrod & Associates
604 16th Ave., North
Myrtle Beach, SC 29577

Re: The State v. Cottrell, Luzenski Allen

Dear Mr. Axelrod:

Enclosed is the order issued in the above entitled matter.

The remittitur will be sent to the lower court as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Daniel E. Shearouse
BS

CLERK

DES/dmh

Enclosure

cc: Solicitor John Gregory Hembree
Office of the Attorney General
Office of Appellate Defense

The Supreme Court of South Carolina

The State, Respondent,
v.
Luzenski Allen Cottrell, Appellant.

The Honorable Larry B. Hyman
Horry County
Trial Court Case No. 2003-GS-26-00020

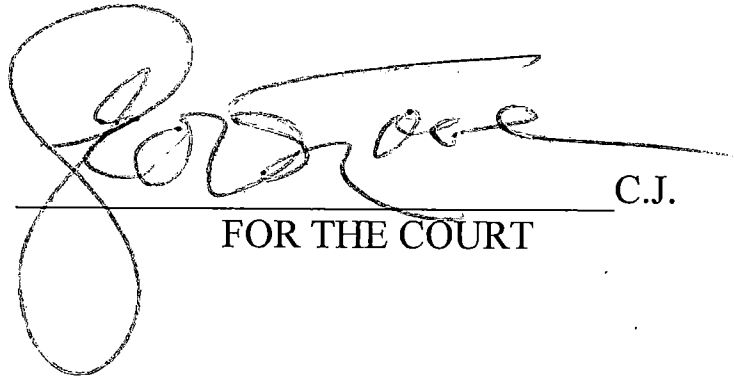
ORDER

The appellant has served and filed a notice of appeal from pretrial rulings in this matter. Since a criminal defendant cannot appeal until sentenced, the notice of appeal is hereby dismissed without prejudice. State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986); Parsons v. State, 289 S.C. 542, 347 S.E.2d 504 (1986); State v. Washington, 285 S.C. 457, 330 S.E.2d

289 (1985). Further, the petition for a writ of supersedeas is denied as moot.

State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994)

IT IS SO ORDERED.



C.J.
FOR THE COURT

Columbia, South Carolina
January 5, 2012

cc: Appellate Defense
Solicitor J. Gregory Hembree
Office of the Attorney General

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
R. Paul Taylor
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III
Christopher D. Helms

604 Sixteenth Avenue North
Myrtle Beach, SC 29577
Phone: (843) 916-9300
Fax: (843) 916-9311

635 East Bay Street
Charleston, SC 29403
Phone: (843) 805-7200
Fax: (843) 577-3911

* Currently on Active Military Leave

FROM THE DESK OF:

Danielle D. Switzer, CP
Direct Phone: (843) 848-6714
Direct Fax: (843) 848-6715
Danielle@GotAxelrod.com

December 29, 2011

Ms. Linda Allen
South Carolina Supreme Court, Clerk's Office
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED

JAN 08 2012

Re: State v. Cottrell
2003-GS-26-0020

S.C. SUPREME COURT

Dear Ms. Allen:


Enclosed please find the appropriate Proof of Service evidencing the Petition for Writ of Supersedeas previously filed in this case was been properly served upon all parties of record on December 26, 2011. Kindly file the original and return a clocked copy to our office in the enclosed self-addressed, stamped envelope.

By copy of this letter, with enclosure, I am providing Gregg Hembree of the 15th Circuit Solicitor's Office with a copy of this document.

With kind regards, I am

Truly yours,

AXELROD & ASSOCIATES, P.A.


Stuart M. Axelrod, Esq.
Attorney for Defendant.

/dds

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
R. Paul Taylor
W. Chris Castro*
Carlton E. Elliott
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December 24, 2011

The Honorable Daniel Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: **State v. Luzenski Allen Cottrell**
Indictment No. 2003-GS-26-0020

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of each of the following:

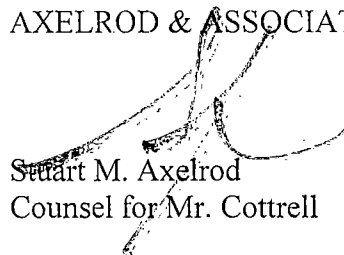
- Defendant's Petition for a Writ of Supersedeas, along with the required accompanying attachments;
- Certified Copies of the necessary Order(s) to be challenged;
- Certified Copies of the Notice of Appeal and Proof of Service on the Respondent.

Kindly file the originals and return a clocked copy of each in the enclosed, self-addressed, stamped envelope.

With kind regards, I am

Truly yours,

AXELROD & ASSOCIATES, P.A.


Stuart M. Axelrod
Counsel for Mr. Cottrell

cc: J. Gregory Hembree
Solicitor, Fifteenth Judicial Circuit
Post Office Box 1276
Conway, South Carolina 29526

RECEIVED

DEC 28 2011

S.C. Supreme Court
pm 12-24-11

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Indictment No. 2003-GS-26-0020

The State,

Respondent,

v.

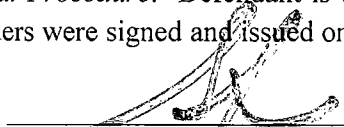
Luzenski Allen Cottrell,

Appellant.

PETITION FOR A WRIT OF SUPERSEDEAS

Luzenski Allen Cottrell, by and through the undersigned counsel, petition the Court to grants Defendant a Writ of Supersedeas regarding the Final Orders of Honorable Judge Larry B. Hyman, Jr., denying Defendant's *Motion for Reconsideration Regarding this Court's Previous Rulings Concerning Rule 13 of the South Carolina Rules of Criminal Procedure* and Defendant's *Motion for Supersedeas to Stay Proceedings Due to this Court's Previous Rulings Concerning Rule 13 of the South Carolina Rules of Criminal Procedure*. Defendant is charged with capital murder and is facing the death penalty. The Orders were signed and issued on December 7, 2011.

December 24, 2011


Stuart M. Axelrod
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300
Counsel for Mr. Cottrell

Other Counsel of Record:
Greg Hembree, Solicitor
Horry County Solicitor's Office
Post Office Box 1276
Conway, South Carolina 29528
(843) 915-5460
Attorney for Respondent

RECEIVED

DEC 28 2011

S.C. Supreme Court

FACTUAL BACKGROUND

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Indictment No. 2003-GS-26-0020

The State,

Respondent,

v.

Luzenski Allen Cottrell,

Appellant.

FACTUAL BACKGROUND REGARDING DEFENDANT'S
PETITION FOR A WRIT OF SUPERSEDEAS

Defendant is charged with murder relating to the 2002 shooting of Myrtle Beach Police Officer Joseph McGarry. The State is seeking the Death Penalty. Because Defendant is arguing he acted in self-defense, counsel for Defendant, pursuant to Rule 13 of the South Carolina Rules of Criminal Procedure, subpoenaed the Myrtle Beach Police Department for documents regarding the deceased Officer McGarry. Defendant's subpoenas were issued by the Horry County Clerk of Court pursuant to Rule 13.

On August 12, 2011, the transcript of which is marked Exhibit A, Defendant was informed by the Honorable Judge Larry B. Hyman, Jr. that no subpoenas for records could be issued outside of a discovery request to the Solicitor. Judge Hyman then stated subpoenas may be issued for trial, but that Defendant could only obtain records for discovery purposes through a discovery motion to the Solicitor's Office.

On October 14, 2011, the Honorable Judge Larry Hyman, Jr. signed an order, hereby marked as Exhibit B, which stated that Defendant was not entitled to request the issuance of subpoenas from the Clerk of Court, and was required to submit all requests for documents to the Solicitor's Office. The order forbade the Clerk from issuing subpoenas upon application of Defendant except in compliance with Rule 13, solely for the purposes of a hearing or trial.

On November 9, 2011, a hearing was held before Judge Hyman in which Defendant requested Judge Hyman reconsider his October 14 order regarding Defendant's Rule 13 subpoena authority. In the transcript marked Exhibit C, Judge Hyman denied Defendant's request for reconsideration. Immediately following Judge Hyman's denial, Defendant, pursuant to his Motion for Supersedeas, asked Judge Hyman to grant a stay in the proceedings so that Defendant could resolve this issue in an appellate court. Also in the transcript marked Exhibit C, the motion was denied by Judge Hyman.

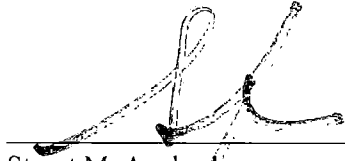
On November 21, 2011, Defendant sent Solicitor of the Fifteenth Judicial Circuit J. Gregory Hembree a Supplemental Discovery Motion hereafter marked as Exhibit D. This requested listed items needed by Defendant to present a complete and material defense, items Defendant would have requested independently via Rule 13, save for Judge Hyman's order requiring Defendant submit all discovery request via a Rule 5 Motion for Discovery.

On December 7, 2011, the orders denying Defendant's Motion for Reconsideration and Motion for Supersedeas were signed by Judge Hyman.

On December 13, 2011, Defendant mailed his Notice of Appeal to the South Carolina Supreme Court, appealing Judge Hyman's signed orders denying Defendant Reconsideration and Supersedeas relief.

On December 19, 2011, the South Carolina Supreme Court clocked Defendant's Notice of Appeal.

From these facts, Defendant's Petition for a Writ of Supersedeas proceeds, and asks the Court to overturn Judge Larry B. Hyman's order enjoining Defendant from requesting documents pursuant to Rule 13 of the South Carolina Rules of Criminal Procedure.

A handwritten signature in black ink, appearing to read 'S. Axelrod', is written over a horizontal line.

Stuart M. Axelrod
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300
Counsel for Mr. Cottrell

EXHIBIT A

1 STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
2 COUNTY OF HORRY) (03-GS-26-0020)
3)
4 STATE)
5 VERSUS) TRANSCRIPT OF RECORD
6)
7 COTTRELL LUZENSKI) August 12, 2011
8) Conway, S. C.
9)

10 B E F O R E :

11 HONORABLE LARRY B. HYMAN, JR., Judge.

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

13 GREGORY HEMBREE, ESQ.
14 SOLICITOR FOR HORRY COUNTY
15 ATTORNEY FOR STATE

16 MELISA ARMSTRONG, ESQ.
17 STUART M. AXELROD, ESQ.
18 ATTORNEYS FOR DEFENDANT

19
20
21
22 DIXIE COX HUBANK
23 CIRCUIT COURT REPORTER
24 FIFTEENTH JUDICIAL CIRCUIT
25

1 THE COURT: Okay.

2 MR. HEMBREE: The next item, Your Honor, is a bit
3 more -- maybe a bit more problematic, I'm not sure. We've had
4 an issue -- I raised to the Court before, we have had an issue
5 with Mr. Axelrod issuing Subpoenas improperly upon the Myrtle
6 Beach Police Department. The Rules do not allow him to do
7 this. We have discussed this. I've made him aware of this,
8 and I've offered an alternative, that if he -- whatever
9 material -- and this is a death penalty case, so we are eager
10 to provide him what he needs, he just needs to go through the
11 right doorway. If he will provide us with a discovery request
12 we will respond to that discovery request. If there's
13 material that we -- that we feel like we should not turn over
14 we'll turn it over to the Court for an incamera hearing and
15 let the Court decide whether that -- whether that material
16 should or should not be turned over. I mean, we don't have an
17 objection to, you know, him asking, but the subpoena -- the
18 Rule, Rule 13, does not allow for the Defense, or the State
19 for that matter, to issue subpoenas for this type of use, and
20 ---

21 THE COURT: How about it, Mr. Axelrod.

22 MR. AXELROD: Well, your Honor, it's my understanding
23 of the rule that I -- the Solicitor's Office got in trouble in
24 the past couple of years for issuing their own subpoena. I
25 know I cannot issue a subpoena in blank, but I went to the

1 Clerk of Horry County Court, and had her, in a criminal
2 defense case, this case, death penalty case, issue subpoenas
3 for me, issued through the Clerk of Court. We served it on
4 the Myrtle Beach Police.

5 THE COURT: Well, she's not going to do it any more,
6 and you simply serve a discovery request. If you have any
7 trouble getting it, or if it hasn't been turned over to me, if
8 it's privileged, we will deal with it.

9 MR. AXELROD: Well, here's the concern I have, Your
10 Honor. This is a death penalty case. What you are asking me
11 to do is to go -- to ask Mr. Hembree to get the discovery that
12 I request, then he's going to look at it, and then decide what
13 I should have or shouldn't have, or possibly give it to the
14 Court. There's no safeguard. I'm not saying he would or
15 wouldn't do it, but I'm looking at the general picture, is
16 that there's no safeguard for the integrity of the discovery.
17 I also -- in all criminal cases I've issued subpoenas before.
18 We are allowed to issue subpoenas in a criminal case,
19 requesting records.

20 THE COURT: Well, I'm not asking you to do anything.
21 I'm tell you, Mr. Axelrod, this is what we are going to do.
22 Serve it on him. Do you think that Myrtle Beach Police
23 Department is going to turn over something to him -- and
24 you've got all these police persons out there that know it's
25 turned over, and then he's not going to turn it over to you.

1 I can't think of a better way to get a reversal. That's not
2 going to happen. If there's an issue I'll decide it. It's
3 the easiest way to do it, period, and that's how we are going
4 to do it. It's easy that way. And I'll monitor anything that
5 he doesn't think he should turn over, and I assure you you are
6 going to get everything that you asked for. It's going to be
7 an extreme situation if there's -- and I can't imagine under
8 what circumstances I would not turn something over to you.
9 But I will, okay, I'll look at it.

10 MR. HEMBREE: Thank you, Your Honor.

The next item on -- on our agenda is, Service of Notice
of Intention to Seek the Death Penalty. Again, Your Honor,
under State v. Young, 459 S.E. 2d 84, Young holds -- stands
for the proposition that it's not necessary. Once the
Defendant has been noticed he's always noticed, until that
Notice is withdrawn, or the trial has been had. It doesn't
require that, but again, out of an abundance of caution, and
to avoid any potential appellate issue in the future we ---

THE COURT: And let me revisit the prior issue. I was
talking about subpoenas for discovery purposes. Of course,
they may have subpoenas issued for trial.

MR. HEMBREE: Absolutely. The Rule provides that, Your
Honor. Of course that's not what we are talking about.

THE COURT: All right.

MR. HEMBREE: Thank you.

1 If -- I would like the record to reflect that we are now
2 serving the Defendant with Notice of Intention to Seek the
3 Death Penalty. Attached to that is a -- and I'll just serve
4 it on Defense Counsel.

5 Attached to that notice is an indictment, in addition,
6 our letter to Court Administration requesting counsel to --
7 requesting the -- that a judge be assigned to the case.

8 The next item, Your Honor, is regarding the ---

9 MR. AXELROD: Your Honor, if I may, before we go any
10 further, just to preserve my record, I would like to take
11 exception to the Court's ruling on me being allowed to issue
12 subpoenas for discovery purposes.

13 THE COURT: And your exception is noted.

14 MR. AXELROD: Thank you, sir.

15 MR. HEMBREE: Your Honor, the next item involves the
16 indictment itself, and since we've served the Indictment on
17 Defense Counsel and Defendant, the indictment is -- when the
18 case was -- the case was reversed it was reversed on the
19 murder charge only.

20 THE COURT: Right.

21 MR. HEMBREE: The Defendant was also convicted of
22 assault with intent to kill, resisting arrest with a deadly
23 weapon and grand larceny.

24 THE COURT: As I understand it it was reversed because
25 Judge Dennis did not give -- or was it Judge Thomas?

EXHIBIT B

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No. 2003-GS-26-0020

HORRY COUNTY
11 OCT 14 AM 11:18
MELANIE JOHNSON-WARD
CLERK OF COURT

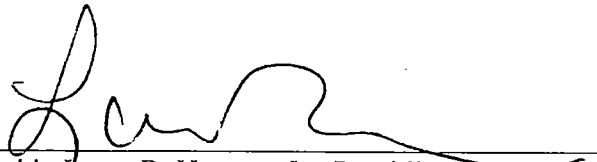
THIS MATTER came before the Court for a hearing on August 12, 2011 pursuant to a status conference and several pre-trial Motions filed by the parties. Present for said hearing were Solicitor Gregg Hembree on behalf of the State and attorneys Stuart M. Axelrod and Melisa Armstrong on behalf of the Defendant.

During said hearing the State raised an objection to the Defense requesting the issuance of subpoenas from the Clerk of Court. The State took the position that the defense has no legal authority under Rule 13, SCRCrimP and/or any other source to issue and/or request the issuance of subpoenas from the Clerk but, rather, must submit all requests for documents to the Solicitor's office in the form of a discovery request. The defense took exception to this position citing that Rule 13, SCRCrimP does, in fact, provide authority for the *Clerk of Court* to issue subpoenas (including subpoenas deuces tecum) upon application of either party. Further, defense argued that the documents sought were not within the care, custody, and/or control of the State and, therefore, appropriate to be sought by way of a subpoena deuces tecum. Lastly defense argued substantial undue prejudice would result from requiring the defendant to rely solely upon the State,

his adversary, to provide documents necessary to effectuate his defense .

After hearing from both sides and taking all matters into consideration, it is the ruling of this Court that the defense is not entitled to request the issuance of subpoenas from the Clerk of Court and must submit all requests for documents to the Solicitor's Office in the form of a Motion for Discovery. In accordance with this ruling the Clerk is specifically forbidden from issuing any subpoena(s) upon application of the defense.

EXCEPT IN COMPLIANCE WITH RULE 13 FOR THE PURPOSE OF HEARINGS OR TRIAL. JM
IT IS SO ORDERED!



Honorable Larry B. Hyman, Jr., Presiding Judge
Fifteenth Judicial Circuit Court of General Sessions

OCT 14
September 14, 2011
Conway, South Carolina

EXHIBIT C

1 THE COURT: All right, it's said.

2 MR. AXELROD: Your Honor, on your previous
3 rulings, for the record, on disqualifying the
4 Solicitor's office and removing the Solicitor's
5 office from the chain, we take exception, for the
6 record, to your ruling.

7 THE COURT: All right. Mr. Hembree will
8 prepare an order and submit it to you or submit it
9 to me in that regard, okay?

10 MR. AXELROD: Your Honor, the next matter we
11 bring up, I talked about it several times, is the
12 motion to reconsider that October 14th order on the
13 issuance of subpoenas.

14 THE COURT: Mr. Axelrod, I have revisited
15 that twice and I have failed to change my ruling.
16 Now, we were back in here again a month ago and we
17 revisited the same, we had the same motions.

18 MR. AXELROD: Just a little latitude, Your
19 Honor.

20 THE COURT: Okay.

21 MR. AXELROD: Your Honor, I understand that.
22 What I'm trying to do, and basically I talked to
23 Appellate Defense and they asked me to do this
24 today because they said that I have not preserved
25 that properly. If the Court could just give me a

1 little latitude and let me put some stuff on the
2 record.

3 THE COURT: All right.

4 MR. AXELROD: Your Honor, we came before Your
5 Honor on the August the 12th hearing and we
6 discussed the defendant's Rule 13 subpoena power
7 pursuant to Rule 13 of the South Carolina Rules of
8 Criminal Procedure. We then filed a timely motion
9 for clarification and reconsideration. October
10 14th Your Honor signed a written order referencing
11 the August 12th, 2011 hearing.

12 Today, Your Honor, we're asking, to preserve
13 the record, we ask that we be heard on the motion
14 for reconsideration. Your Honor, since there has
15 only been one signed order, the defendant asks you
16 to reconsider that one signed order and issue a
17 separate order either granting reconsideration or
18 denying it, at which point the defendant has then
19 properly preserved that issue for appellate review.

20 Your Honor we ask you to reconsider your
21 October 14th order regarding defendant's ability to
22 issue subpoenas based on the following reasons.
23 Your Honor, the October 14th order is inconsistent
24 with the plain meaning of Rule 13 of the South
25 Carolina Rules of Criminal Procedure. It violates

1 the defendant's Fifth and Fourteenth Amendment
2 right to due process. Your Honor, it further
3 violates the Sixth Amendment right to compulsory
4 process. Your Honor, it also violates the Sixth
5 Amendment right to confrontation under the United
6 States Constitution. Your Honor, it violates his
7 right pursuant to Article I, Section 3 and Section
8 14 of the South Carolina Constitution.

9 Your Honor, my client, the defendant in this
10 case, is on trial for his life and feels without
11 the proper reconsideration he will be irreparably
12 harmed based on the order's requirement that the
13 defendant submit all requests for documents in a
14 discovery motion. Your Honor, this would
15 effectively prohibit the defendant from examining
16 documents obtained via subpoena duces tecum and
17 instead leaves the Solicitors as the sole arbiter
18 of what documents the defendant receives at that
19 point.

20 Your Honor, Rule 13 exists requiring the
21 defendant access to documents that exist outside
22 Rule 5. The Solicitor has no obligation to provide
23 any document to the defense outside of Rule 5 and
24 your order, Your Honor, enjoins the defendant from
25 obtaining them via compulsory process. This order

1 also gives the State knowledge of defendant's trial
2 strategies and theories of the incident, things to
3 which they would not normally be privy. It
4 requires either defense counsel hide his strategy
5 for trial by not requesting said documents or
6 giving the State an advantage before trial even
7 starts by laying out the framework of its case.

8 And, Your Honor, what I had done, I have
9 given Mr. Hembree a copy and I'm going to hand up
10 to the Court, I prepared a new motion that he has
11 some objections to but I also wanted to hand you up
12 what is the original one we filed, and
13 clearly --

14 THE COURT: Are you telling me you filed this
15 motion again?

16 MR. AXELROD: Well --

17 THE COURT: Or are you telling me that you're
18 formally, you are wanting me to formally issue an
19 order denying reconsideration?

20 MR. AXELROD: Yes, sir, Your Honor, that is
21 what I'm asking.

22 THE COURT: Which?

23 MR. AXELROD: We're asking you to do an order
24 where you're denying the formal reconsideration at
25 today's hearing.

1 THE COURT: Let me hear from you, Mr.
2 Hembree. I'm going to consider it, I'm going to
3 reconsider it.

4 MR. HEMBREE: Thank you, Your Honor. A
5 couple things. First off, I have got, my real
6 concern with the proposed order that Mr. Axelrod
7 just submitted to the Court is that he repeatedly
8 mischaracterizes what the State's position is and
9 what the Court's ruling is. He characterizes it as
10 we object to the defense requesting subpoenas. We
11 do not. We only require them to follow the rule.

12 The rule says you can get subpoenas for
13 witnesses and documents but only for hearings and
14 trial proceedings. You can't just issue, get
15 subpoenas issued in blank, which is what he has
16 essentially been asking the clerk to do, just sign
17 off on those, and then send them to whoever he
18 wants to send them to to grab these documents
19 whenever he wants to get them. The rule doesn't
20 allow him to do that.

21 So, I have objection, number one, with this
22 proposed order. I think it mischaracterizes it,
23 and the Court never ruled that defense counsel
24 couldn't get a subpoena. The Court said if you get
25 a subpoena you have to follow the rule and if you

1 want that material ahead of time you need to make
2 it through a discovery request. And it is my
3 recollection, Your Honor, that if the State refuses
4 to provide it or has some objection to it, then the
5 Court would be willing and eager to hear defense
6 counsel on that matter.

7 THE COURT: And that was my ruling.

8 MR. HEMBREE: That was your ruling.
9 Therefore, defense counsel's rights have in no way
10 been prejudiced because they have a path, they have
11 a method to obtain whatever documents they want to
12 obtain, whatever evidence they want to try to get
13 hold of. There is a process and a method. They
14 are using, I don't begrudge them asking for
15 materials that they feel is necessary for the
16 preparation of their defense, I encourage that, I
17 would be eager to help them with that, however I
18 have to do it within the rules and there is a
19 process available to do that. That process has
20 been made very clear to defense counsel. For
21 whatever reason defense counsel is fixated on a
22 belief that the rule should be different than what
23 it is. As a policy matter maybe's he's right but
24 as a legal matter he's wrong and, Your Honor, that
25 would be the State's position, that we have a

1 process.

2 His client furthermore is in no way going to
3 be irreparably harmed. He has a motion for
4 supersedeas that is in the background here, that he
5 has submitted to us, I think he may have sent it on
6 to the Court, which in my view is nothing more than
7 a dilatory tactic because there is no irreparable
8 harm because there is a process by which he can go
9 about getting the materials.

10 And I will go one further, Your Honor, and I
11 will sit down. If defense counsel has some
12 evidence that they need to get hold of and they are
13 truly concerned that by asking for it through
14 discovery that they will tip their hand, in some
15 way that it will tip us off, that we'll figure out
16 their trial strategy, all the secret stuff they are
17 trying to do will all now become clear to the
18 State, I have no objection, I have no objection
19 whatsoever to defense counsel coming before this
20 Court requesting an order from this Court to
21 determine whether or not they are entitled to that
22 material, without telling us. I have confidence
23 that the Court, if necessary, would say, it would
24 go this way in my view, "Yes, you're entitled to
25 that, I'm not going to tell the State about that,"

1 or, "I don't know if you're entitled to it or not
2 but either way the State is going to be involved in
3 that," and/or, "You may be entitled to that but
4 there is a third party involved, you're taking
5 somebody else's stuff and they have got a right to
6 be heard on it." It might be a bank, might be a
7 phone company, might be somebody else that says,
8 "Hey, that's my stuff, I don't want you snatching
9 my stuff without due process."

10 So, there are several different, you know,
11 variations that could come up with that request for
12 a court order but I guess I'm saying there are many
13 ways to get where they want to get and follow the
14 rules. I just ask they do that.

15 THE COURT: All right. I have reconsidered
16 my ruling, I looked at my order dated October 14th,
17 I very clearly in that order added a final sentence
18 or addition to a sentence where I said this order,
19 I mean, I was denying the issuance of subpoenas by
20 the defense except in compliance with Rule 13 and
21 for the purposes of hearing or trial. That is the
22 rule of this state as I know it. I know of no
23 authority for the issuance of subpoenas duces tecum
24 by the defense outside of those parameters. I am
25 going to stand by my ruling.

1 Solicitor, will you prepare an order denying
2 the motion to reconsider?

3 MR. HEMBREE: Thank you, Your Honor.

4 MR. AXELROD: Your Honor, at this point, and
5 I respect the Court's ruling, sir, that you denied
6 that motion for reconsideration, we would ask that
7 you grant the defendant supersedeas relief so that
8 this issue can be resolved in an appellate court
9 with the appropriate writ. Your Honor, the
10 defendant requests supersedeas relief be granted so
11 the status quo is preserved and the defendant's
12 grounds for appeal do not become moot. Your Honor,
13 we would base that on the ground supersedeas is
14 based upon his belief, my client's belief that an
15 appellate court would likely rule in his favor and
16 if relief is not immediately granted the defendant
17 would be irreparably harmed.

18 Your Honor, we would argue, we would suggest
19 to the Court that this violates the plain meaning
20 of Rule 13 of the South Carolina Rules of Civil
21 Procedure, Criminal Procedure, and again violates
22 the Fifth and Fourteenth Amendments, the due
23 process clause, violates the Sixth Amendment
24 compulsory process clause and Sixth Amendment
25 confrontation clause, again violating Article I,

1 Sections 3 and 14 of the South Carolina
2 Constitution.

3 Furthermore, Your Honor, my client would
4 likely suffer irreparable harm because of the work
5 product privilege violation and imposition of the
6 harmless error rule in post conviction appeal.

7 Your Honor, this point addresses one of the
8 purposes of supersedeas relief, the prevention of a
9 moot appeal. If this Court does not preserve the
10 status quo the Solicitor could voluntarily produce
11 some requested document outside of Rule 5 but not
12 all of the documents necessary for complete and
13 material defense. Your Honor, in that case an
14 appellate court could likely determine that the
15 appeal was moot, since the Solicitor had
16 voluntarily produced some documents outside of Rule
17 5 and a controversy no longer existed.

18 Your Honor, without a stay to preserve the
19 status quo there is no complete and appropriate
20 remedy that corrects the irreparable harm suffered
21 by the imposition of this order. Your Honor, we
22 ask the Court to grant supersedeas relief and stay
23 the proceedings so the defendant may appeal the
24 order of this Court and obtain the necessary remedy
25 for which he prays from a court of higher

1 jurisdiction, sir.

2 MR. HEMBREE: Your Honor, there is no need
3 for me to go back over our grounds. We oppose the
4 motion for supersedeas.

5 THE COURT: And it is denied.

6 MR. AXELROD: Thank you, Your Honor. We
7 would take exception.

8 THE COURT: All right.

9 MR. HEMBREE: Would you like me to prepare an
10 order on that?

11 THE COURT: Certainly.

12 I look at now on page 104, the next motion of
13 the group of motions filed October the 14th of
14 2011, the motion for production of firearms,
15 bullets, cartridge casings, magazines, ammunition
16 fragments. I think that is the next motion, is it
17 not?

18 MR. RICHARDSON: Your Honor, with regard to
19 three, four, five, six and seven on the October
20 14th motions we have previously met with defense
21 counsel. We have talked about a system whereby
22 they will request whatever they need. It may be
23 more, may be less than is listed in three, four,
24 five, six and seven, but they will request that
25 through Laura Rabin, Laura Rabin will gather that

EXHIBIT D

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)

v.)

SUPPLEMENTAL DISCOVERY
MOTION "B"

LUZENSKI ALLEN COTTRELL,)

Defendant.)

2003-GS-26-0020

FILED
2011 NOV 21 PM 12:54
CLERK OF COURT
MELANIE HUGHES-WARD
HURRY COUNTY

TO: J. GREGORY HEMBREE, SOLICITOR

Now comes the Defendant, LUZENSKI ALLEN COTTRELL, by and through his Attorney, STUART M. AXELROD, who moves this Court pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure and also pursuant to the Order of Judge Larry B. Hyman, Jr. requesting additional discovery of these items and documents.

This information is requested pursuant to *Brady vs. Maryland*, 373 U.S. 383, 10 L. Ed. 2nd 215, 83 S. Ct. 1194 (1963), *U.S. vs. Agurs*, 427 U.S. 97, 49 L. Ed. 2nd 342, 96 S. Ct. 2392 1976, *State v. Mixon*, 274 S.E. 2nd 406 (1981) and Order of Judge Larry B. Hyman, Jr.. Further, this information is essential to insure the Defendant's right to a fair trial, right to compulsory process of service, right to confrontation of witnesses, the right to effective Counsel and due process of law guaranteed by both the South Carolina Constitution, and United States Constitution.

The Defendant was arrested on December 29, 2002. A Brady Motion was filed on or about May 23, 2011. However, only some discovery was received on or about August 27, 2009.

The Defendant hereby requests:

1. A list of all City of Myrtle Beach Police Department's abbreviations used to describe the difference areas of police detail and locations of the City of Myrtle Beach, and an explanation for each, where were in effect during the years 1999-present.

2. A list of all City of Myrtle Beach Police Department's 10-codes, and an explanation for each, which were in effect during the years of 1999-present.
3. A copy of the City of Myrtle Beach Police Department's policy and procedures for the destruction of personnel files which were in effect for the years 1999-present.
4. All arrests and incident reports made by PFC Joseph McGarry while employed by the City of Myrtle Beach Police Department for the years 1999 through 2002.
5. All arrest records and incident reports from the City of Myrtle Beach Police Department which involved the arrest of Lloyd Mangrum.
6. All arrest records and incident reports from the City of Myrtle Beach Police Department which involved the arrest of Bryon Levant Spivey.
7. All personnel files for Investigator George Michael Guthinger while employed by the City of Myrtle Beach Police Department.
8. All personnel files for Officer Robert Todd while employed by the City of Myrtle Beach Police Department.
9. All personnel files for Officer Don Gause while employed by the City of Myrtle Beach Police Department.
10. All personnel files for Officer Robert J. Starr while employed by the City of Myrtle Beach Police Department.
11. All personnel files for PFC Joseph J. McGarry while employed by the City of Myrtle Beach Police Department.
12. All logs, records, calls, tickets, reports, etc. in which PFC Joseph J. McGarry was involved in while employed with the Myrtle Beach Police Department from the dates of October 01, 2001 through December 29, 2002.
13. All Internal Affairs Department files for PFC Joseph McGarry while employed by the City of Myrtle Beach Police Department.
14. All personnel files, including payroll information and time sheets, for the employees of Dunkin Donuts located at 3001 North Kings Highway, Myrtle Beach, SC 29577 who were working at the time of the incident on December 29, 2002.
15. Latent Prints of Donald Gray Morgan, III.
16. Latent Prints of Dianne Lawson.
17. Latent Prints of Amber Counts.

18. Latent Prints of Tabatha "Star" Benson.
19. Latent Prints of Fred Halcomb, Jr.
20. The identity and case file of the confidential informant that provided information to Myrtle Beach Police Narcotics Officers Robert Todd and Robert Starr on December 29, 2002 at 4:00 am.
21. Any and all documents including, but not limited to, case reports, incident reports, witness statements, victim impact notifications, and photographs for Horry County Case Number 02-90397.
22. All files of the Myrtle Beach Police Department Office of Professional Standards (OPS) Unit for PFC Joseph McGarry.

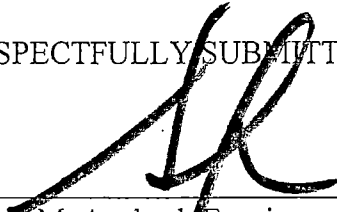
WHEREFORE, Defendant prays:

(a) That the Solicitor be ordered to produce all information described herein and allow the Defendant the right to examine, inspect, copy and photograph, such materials and information at a specific time and place to be fixed by the Court.

(b) That the information be provided no later than 30 days from the date of this request, as reflected by the Clerk of Court's time-stamp appearing on the face of this document.

(c) That the Court enter an Order requiring the Solicitor's Office to make continuing disclosure of all matters requested herein up to and during Trial of the charges against the Defendant.

RESPECTFULLY SUBMITTED,



Stuart M. Axelrod Esquire
Attorney for the Defendant
604 Sixteenth Avenue North
Myrtle Beach, SC 29577
Office: (843) 848-6702
Fax: (843) 848-6703

Dated: November 21, 2011
Myrtle Beach, South Carolina

LEGAL ARGUMENTS IN
SUPPORT OF PETITION

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Indictment No. 2003-GS-26-0020

The State,

Respondent,

v.

Luzenski Allen Cottrell,

Appellant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S
PETITION FOR A WRIT OF SUPERSEDEAS

I. Supersedeas Requirements

South Carolina courts have long held that the function of supersedeas relief is to “stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him.” *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct.App. 1990). It has also long been precedent in South Carolina courts that supersedeas does not reverse, annul, or undo what has already been done, or impair the force of the judgment, order, or decision of the trial court. *Id.* Supersedeas relief suspends the execution or enforcement of the trial judge’s order, but it does not annul that order. *Id.* In determining whether or not supersedeas should be granted, the lower court must determine whether or not the moving party will suffer irreparable harm. *Porter v. Lesesne*, 85 S.C. 399, 67 S.E. 453 (1910). The lower court should grant

supersedeas “when it appears that the party making the application has just reason to apprehend that without a stay he would be deprived of the benefit of the favorable result of the appeal.” *Id.* It can be inferred from this precedent that the two requirements for supersedeas relief are: 1) the probability of a meritorious appeal; and 2) the likelihood that without supersedeas relief being granted, irreparable harm will be suffered. *Id.*

II. Meritorious Appeal

A. Judge Larry B. Hyman’s Order Violates Rule 13 of the South Carolina Rules of Criminal Procedure

In the present case, on October 14, 2011, Horry County Circuit Court Judge Larry B. Hyman issued an order restricting Defendant’s Rule 13 ability to subpoena material and relevant documents pertaining to his pending death penalty case. Rule 13(a) of the South Carolina Rules of Criminal Procedure states:

Upon the request of any party, the clerk of court shall issue subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. *The subpoena shall state the name of the court, the title of the action, and shall command each person to whom it is directed to attend and give testimony, or otherwise produce documentary evidence at time and place therein specified.* The subpoena shall also set forth the name of the party requesting the appearance of such witness and the name of counsel for the party, if any.

Upon a plain reading of the text of Rule 13(a), it is clear that witnesses in General Sessions Court are required to be present at a specific time and place, for the purpose of testifying at a pre-trial hearing, an in-camera hearing or the trial itself. However, if a party to a General Sessions matter requires documents instead of physical presence, the witness, by the clear language of the Rule, has the option to instead produce the necessary documentary evidence. Rule 13(a) does not specify where and when these documents are to be examined.

Instead, the party requesting the subpoena is to specify where and when the documents are to be produced for their review. Similarly, a plain reading of Rule 13(a) does not require the subpoenaed documents be for the purpose of a specific hearing or trial; it merely requires that they be documentary evidence. In fact, the language of Rule 13(a) expressly denies the Clerk of Clerk any latitude in refusing to issue a subpoena if it meets form specifications. Judge Hyman's order stated that Defendant "must submit all requests for documents to the Solicitor's Office in the form of a Motion for Discovery." (Ord. p. 2, Oct. 14, 2011). Judge Hyman's order also forbade the Clerk of Court from issuing subpoenas to Defendant "[e]xcept in compliance with Rule 13 for the purpose of hearings or trial." (Ord. p. 2, Oct. 14, 2011). This unduly narrow reading of Rule 13's breadth runs contrary to the purposes of subpoenas duces tecum, as well as the four-prong test used in determining whether or not a subpoena duces tecum is proper. *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952). The chief historical purpose behind the subpoena power in criminal cases was to expedite the trial by providing a forum for the inspection of documents before the trial began. *United States v. Nixon*, 418 U.S. 683, 698-99, 94 S.Ct. 3090, 3103, 41 L.Ed.2d 1039 (1974). In order to require production of subpoena documents prior to trial, the moving party must demonstrate that the documents: 1) are evidentiary and relevant; 2) are not reasonably procurable prior to trial through due diligence; 3) are necessary for proper preparation prior to trial and would cause unreasonable delay without proper review; and 4) have been requested in good faith. *Id.* at 699-700 [citing *Iozia*, 13 F.R.D. at 338].

Judge Hyman's order reads a goodly portion of Rule 13 out of existence. It draws no distinction between documents which are evidentiary, and documents that will be used at pre-trial hearings and the trial itself. Courts have long held that evidentiary documents do not have

to be documents actually used for a hearing or trial. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 219, 71 S.Ct. 675, 678, 95 L.Ed. 879 (1951). Requiring Defendant to obtain all documents through the Solicitor's Office, by way of a Rule 5 Motion for Discovery, effectively eliminates Defendant's ability to obtain necessary documents and records that are outside the scope of the South Carolina Rules of Criminal Procedure, since there would be no legal or ethical obligation for the Solicitor's Office to provide Defendant with these records. In this regard, Judge Hyman's order amounts to an injunction, preventing Defendant from obtaining documents to which he is legally entitled. Even if the last sentence of Judge Hyman's order is read to modify or expand upon the previous sentence with regards to the subpoena of documents, it would still require that the documents procured be used at a pre-trial hearing, an in-camera hearing or during the trial itself, contrary to the holding in *Bowman Dairy Co.* Because Judge Hyman's order amounts to, at best, a severe restriction and, at worst, a blanket prohibition on the ability of Defendant to subpoena necessary documents, it violates Rule 13 of the South Carolina Criminal Procedure.

B. Judge Larry B. Hyman's Order Violates Defendant's Fifth and Fourteenth Amendment Due Process Rights

Besides violating Rule 13 of the South Carolina Rules of Criminal Procedure, Judge Hyman's order violates Defendant's right to due process of law. It has long been held that a criminal defendant cannot "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fifth Amendment's Due Process Clause historically applied only to the Federal Government, and not to the individual states. *Barron v. City of Baltimore*, 32 U.S. 243, 8 L.Ed. 672 (1833). However, the Fourteenth Amendment's Due Process Clause guaranteed that no State "shall deprive any person of life, liberty, or property, without due

process of law.” U.S. Const. amend. XIV, §1. Justice Felix Frankfurter, in recognizing this distinction, opined:

The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any ‘Bill of Attainder’ or ‘ex post facto Law’, Constitution of the United States, Art. I, s 10. This freedom of action remained with the States until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government. Criminal justice was not withdrawn from the States and made the business of federal lawmaking. The Fourteenth Amendment merely restricted the freedom theretofore possessed by the States in the making and the enforcement of their criminal laws.

Malinski v. New York, 324 U.S. 401, 413, 65 S.Ct. 781, 788, 89 L.Ed. 1029 (1945).

A cornerstone of the Due Process Clause has always been to ensure a criminal defendant’s trial be consistent with the concept of “fundamental fairness.” *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981). Interwoven with fundamental fairness is the concept of substantive due process, which “protects individual liberty ‘against certain government actions regardless of the fairness of procedures used to implement them’.” *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068-69, 117 L.Ed.2d. 261 (1992) [quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)]. When the liberty interest threatened is determined to be a “fundamental right”, courts use heightened scrutiny in measuring whether or not the government’s justification for restricting this right is adequate. *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 1446-47, 123 L.Ed.2d 1 (1993). If the liberty interest is found to be a fundamental right, the State is prohibited from infringing upon that right, unless the government’s interest is compelling and the infringement narrowly tailored. *Id.* at 302.

This concept of protecting fundamental rights through the Due Process Clause of the Fourteenth Amendment can be traced to the Court's belief that implicit in the Clause's protections were the guarantees of the Declaration of Independence. *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90, 17 S.Ct. 427, 431, 41 L.Ed. 832 (1897). In *Allgeyer*, the Court first described the dual concepts of fundamental rights and substantive due process, stating:

But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen." It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word "liberty" as contained in the Fourteenth Amendment.

Id. at 590 [quoting *Butcher's Union Slaughterhouse Co. v. Crescent City Livestock Landing Co.*, 111 U.S. 746, 765, 4 S.Ct. 652, 658, 28 L.Ed. 585 (1884)]. Whether or not the liberty interest being infringed is a fundamental right depends on whether the right being infringed is "deeply rooted in our nation's history and tradition." *City of Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d. 531 (1977). Thus, the nation's history, practices and legal traditions provide the Court with a guide in whether or not the infringed interest is a fundamental right.

In the present case, the fundamental right being infringed is the work-product privilege of Defendant and Defendant's counsel. The concept of a lawyer's work product, if done in anticipation of litigation, stretches back to *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), where the Court ruled requiring production of documents and strategies obtained or prepared by counsel in anticipation of litigation were not subject to the opposing

party's discovery requests. South Carolina has since adopted the framework of *Hickman* and recognized the applicability of work-product privilege. *South Carolina State Highway Dept. v. Booker*, 260 S.C. 245, 195 S.E.2d 615 (1973). Rule 1.6, Comment 5 of the South Carolina Rules of Professional Conduct also recognize the existence of work-product privilege in South Carolina, and imposes upon lawyers a duty not to disclose that confidential information.

Judge Hyman's order, as previously stated, is injunctive in nature, and requires Defendant's counsel to violate Rule 1.6 of the South Carolina Rules of Professional Conduct. The order requires all documents to be obtained via a Rule 5 Motion for Discovery. By doing this, it forces Defendant's counsel to reveal to the documents requested, even those that are outside the scope of Rule 5 and obtainable by Rule 13. Implicit in these requests are counsel's theories and strategies regarding the defense of his client. By forcing Defendant's counsel to disclose to the State theories and strategies to which they would not be privy, save for Judge Hyman's order restricting application of Rule 13, Defendant's counsel is forced to either violate the ethical obligations to his client, or fail to effectively represent by not requesting the necessary documents because of the fear of disclosing trial strategy.

In addition to the conundrum in which Defendant's counsel is placed, this order is not narrowly tailored to serve the State's interest of preventing witnesses and third parties from being unduly harassed. If a subpoena duces tecum exceeds the scope of authority granted to a party in a criminal case, or if the subpoena or subpoena duces tecum is obtained in bad faith, there are other remedies beyond a blanket injunction that solve this abuse. Judicial hearings after subpoenas have been served are available, and can adequately rule on both the admissibility and appropriateness of the requested witnesses and documents. Also, South Carolina's Rules of Professional Conduct govern the actions of Defendant's counsel and impose upon him a duty to

not undertake any action in bad faith, with judicial sanctions to be the punishment if disobeyed. The court's prohibition of Defendant's ability to request documents via Rule 13 is not narrowly tailored, since other viable alternatives exist. For these reasons, this order does not comport with due process, and must be reversed.

C. Judge Larry B. Hyman's Order Violates Defendant's Sixth Amendment Right to Compulsory Process

In addition to violating both Rule 13 and due process, Judge Hyman's order also violates the Compulsory Process Clause, which states that "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The Compulsory Process Clause is applicable to state and local governments through the Fourteenth Amendment's Due Process Clause and the doctrine of incorporation. *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d. 1019 (1967).

The issue of compulsory process first arose in the judiciary in *United States v. Burr*, 25 F.Cas. 30 (No. 14, 692d) (C.C. Va. 1807). In *Burr*, former Vice President Aaron Burr was indicted for treason, accused of conspiring with Spain to purchase for himself lands in Spanish-controlled Texas and Mexico, as well as in the recently purchased Louisiana Territory. Justice Harold S. Burton, "*Justice the Guardian of Liberty*": *John Marshall at the Trial of Aaron Burr*, 37 A.B.A. J. 735, 736-37 (Oct. 1951). Prior to trial, Burr sought a subpoena duces tecum, requesting the documents of President Thomas Jefferson, claiming that they were material to his defense, and were necessary to clear his good name. *Id.* at 786. President Jefferson, opposing the subpoena duces tecum, asserted Executive privilege. *Id.* In his opinion, Chief Justice John Marshall wrote resoundingly that "the [c]ourt has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence." *Burr*, 25 F.Cas. at 35. Justice Marshall, in explaining the effect of denying a defendant authority to issue a

subpoena duces tecum, held that “it would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material.” *Id.*

As applied to the present case, Judge Hyman’s order has given the Solicitor’s Office sole discretion to determine whether or not documents are material, by requiring Defendant to request production via a Rule 5 motion. Because Judge Hyman’s order places all document requests within the scope of Rule 5 and Motions for Discovery, he is thus appointing the Solicitor the sole arbiter in determining what documents beyond Rule 5 Defendant shall receive, even if those documents are necessary for a material defense, and Defendant is legally entitled to possess them. This inherently makes the process upon which Defendant can obtain documents not compulsory, but rather discretionary, and even more egregious, at the arbitrary discretion of the opposing party.

Upon reviewing the Federal Rules of Criminal Procedure and relevant case decisions, it is clear that analogous Rule 17(c) was intended to provide criminal defendants with compulsory process protection, by giving them an opportunity prior to trial to inspect subpoenaed documents. *Nixon*, 418 U.S. at 698-99. When documents are not obtainable through discovery in federal courts, a defendant has the ability to subpoena the document and review them himself. *Bowman Dairy Co.*, 341 U.S. at 219. In *Bowman Dairy Co.*, the Court held that “if such materials or any part of them are not put in evidence by the Government, the [d]efendant may subpoena them under Rule 17(c) and use them himself.” *Id.* They later stated that “[t]here may be documents and materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary.” *Id.*

Analogizing the Federal Rules of Criminal Procedure to the South Carolina Rules of Criminal Procedure, Rule 13 acts as a supplement to Rule 5, and provides criminal defendants with compulsory process, so as not to violate the Sixth Amendment's Compulsory Process Clause. The Clause guarantees a criminal defendant "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 1731, 164 L.Ed.2d. 503 (2006) [quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d. 636 (1986)]. Judge Hyman's order does not allow Defendant a meaningful opportunity to present that complete defense, and thus violates the Sixth Amendment's Compulsory Process Clause.

D. Judge Larry B. Hyman's Order Violates Defendant's Sixth Amendment Right of Confrontation

The Confrontation Clause states that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right, by the holding in *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). One of the essential functions of the Confrontation Clause has been the right of a criminal defendant to cross-examine adverse witnesses. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110 39 L.Ed.2d 347 (1974) [citing *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d. 934 (1965)]. Jurist John Henry Wigmore stated of the Confrontation Clause:

The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 J. Wigmore, Evidence s 1395, p. 123 (3d. ed. 1940). One can infer from Wigmore's analysis the inverse nature of cross-examination and witness credibility. The less ability a criminal defendant has to cross-examine a State's witness, the higher the probability that witness has more credibility with the jury. The greater ability a criminal defendant has to cross-examine a State's witness, the lesser the probability that witness has of maintaining strong credibility.

This is not to say that the right to confrontation is solely one reserved for trial. Justice Harry Blackmun stated that "there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness." *Pennsylvania v. Ritchie*, 480 U.S. 39, 61-62, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987) (Blackmun, concurrence). Similarly, Justice William Brennan held that "the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial." *Id.* at 66 (Brennan, dissent). In justifying this position, Justice Brennan wrote:

A crucial avenue of cross-examination also may be foreclosed by the denial of access to material that would serve as the basis for this examination. Where denial of access is complete, counsel is in no position to formulate a line of inquiry potentially grounded on the material sought. Thus, he or she cannot point to a specific subject of inquiry that has been foreclosed, as can a counsel whose interrogation at trial has been limited by the trial judge. Nonetheless, there occurs as effective a preclusion of a topic of cross-examination as if the judge at trial had ruled an entire area of questioning off limits.

Id. at 67. To conclude that because trial has not begun, Defendant's Sixth Amendment right to confrontation has yet to attach ignores the severe effect wholesale denial of evidence can have on counsel's cross-examinations of crucial State's witnesses.

The United States Supreme Court has held that even absent restrictions on cross-examination questions at trial, effective cross-examination may be infringed. *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). In *Jencks*, the Court held that Defendant was entitled to obtain prior statements of persons to government agents, so long as those persons were to testify against him at trial. *Id.* The Court, in determining that Petitioner was entitled to inspect the government documents to determine whether or not they were to be used at trial, resoundingly stated that “[b]ecause only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government’s witness and thereby furthering the accused’s defense, the defense must initially be entitled to see them to determine what use may be made of them.” *Id.* at 668-69.

As applied to the present case, Judge Hyman’s order turns this reasoning on its head. Defendant, instead of being the sole arbiter in determining the materiality of the documents required, is now subject to the whims and notions of the Solicitor’s Office, who has the sole authority to tell them what documents, beyond those required by Rule 5, he may have. In *Jencks*, the majority held that “only after inspection of the reports by the accused, must the trial judge determine admissibility.” Here, since all requests for documents must be sent to the Solicitor in the form of a Rule 5 Motion for Discovery, there is no ability for Defendant to first inspect anything, since the Solicitor who seeks to execute him is Defendant’s sole gatekeeper for evidence outside of Rule 5’s scope. Compliance with the *Jencks* standard imposes on the Court a duty to allow Defendant first inspection of documents deemed material to his defense, prior to any adjudicatory process. This necessarily dictates that he be allowed to subpoena documents not reachable through the normal discovery process, since this is the only means he has of being the first to inspect. Judge Hyman’s order does not comport with this requirement, and instead

enjoins Defendant from unilaterally obtaining records and determining for themselves the materiality of the documents.

Defendant's concern in this case is echoed by Justice Brennan, who focused on the shortcomings of a due process analysis, and instead argued for a strong interpretation of the Confrontation Clause where issues of documents outside of the discovery process arose. Justice Brennan stated in *Ritchie*:

The ability to obtain material information through reliance on a due process claim will not in all cases nullify the damage of the Court's overly restrictive reading of the Confrontation Clause. As the Court notes, evidence is regarded as material only if there is a reasonable probability that it might affect the outcome of the proceeding. Prior statements on their face may not appear to have such force, since their utility may lie in their more subtle potential for diminishing the credibility of a witness. The prospect that these statements will not be regarded as material is enhanced by the fact that due process analysis requires that information be evaluated by the trial judge, not defense counsel.

Ritchie, 480 U.S. at 71-72.

Here, the Confrontation Clause addresses what the Due Process Clause cannot. Defendant has the sole discretionary authority in determining, in good faith, what is or is not material to his defense. If that discretion is abused, there is an adjudication process available to the State or third parties; they can seek to have Judge Hyman quash the subpoenas. Totally enjoining Defendant from obtaining subpoenas duces tecum prior to trial, and instead requiring documents to be brought the day of trial, provides no ability for Defendant to effectively cross-examine State's witnesses once trial begins. This violates the meaning and the spirit of the Confrontation Clause which is embedded in the Sixth Amendment of the United States Constitution.

III. Irreparable Harm

Besides a meritorious appeal, Defendant in the present case must also prove irreparable harm; he must prove that the only proper remedy for these imposed limitations is a reversal of Judge Larry B. Hyman's October 14 order limiting Defendant's Rule 13 subpoena authority. *Porter*, 85 S.C. at 399. In the present case, whether or not Defendant would receive the proper remedy without a stay of the trial proceedings requires an analysis of: A) the attorney work product doctrine; and B) the relevancy of requested documents necessary to prove either mitigation or an affirmative defense.

A. Judge Larry B. Hyman's Order Prevents Defendant from Maintaining Sufficient Work-Product Privilege

In South Carolina, the work product doctrine protects documents prepared in anticipation of litigation. *Tobacoville USA, Inc. v. McMaster*, 387 S.C. 287, 294 692 S.E.2d 526, 530 (2010). Whether or not a document was obtained or prepared in anticipation of litigation is dependent upon whether it was done so because of the prospect of litigation. *Id.*

Defendant's case presents a novel issue to the Court. Judge Hyman's order requires Defendant to request certain documents outside of Rule 5 from the Solicitor's Office in the form of a discovery motion. Implicit within these requests are Defendant's strategies and theories of the crime that will be used at trial. The Solicitor is not entitled to these theories or strategies, but will nonetheless be privy to them due to Judge Hyman's order. It is Defendant's contention that requiring him to obtain documents outside of Rule 5 necessitates disclosure of trial strategies which are protected by the attorney work product doctrine. Allowing the Solicitor to obtain Defendant's trial strategies places him at an inherent disadvantage once trial begins. Furthermore, without Judge Hyman's order, the State would not be privy to the various theories upon which Defendant is attacking both the State's arguments and theories.

These are documents that are necessary in raising a complete and material defense. The deceased's character and relationship with Defendant are necessary factors for this. However, because Defendant would be required to submit these requests through the Solicitor via a Motion for Discovery, the State would be aware of Defendant's trial strategy and theory of the crime. Therefore, the State, through its agents in law enforcement, would then be able to investigate Defendant's theories regarding his strategy, and would likely be able to present evidence relating to Defendant's theory without Defendant's knowledge. However, it should be noted that Defendant should not be presented with this Catch-22. Thus, without a stay and proper determination of this order's effect on Defendant's work product by the South Carolina Supreme Court, Defendant will be irreparably harmed.

B. Judge Larry B. Hyman's Order Prevents Defendant from Obtaining Documents Disclosing Witnesses Necessary to Present a Full and Complete Defense

Judge Hyman's order, as previously stated, requires Defendant submit all documents requests to the Solicitor via a Rule 5 Motion for Discovery. Rule 5(a)(2) of the South Carolina Rules of Criminal Procedure states:

Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the

production of any statement of any prospective witness prior to the time such witness testifies.

Rule 5(a)(2) clearly prohibits Defendant from obtaining statements, documents or memoranda gathered by the State and its agents in connection with case prosecution or investigation. Where Rule 5 is inapplicable, Rule 13 serves as a vehicle for Defendants to obtain documents from third parties, to which otherwise they would not be entitled in the typical discovery process. In criminal prosecutions, compliance with Defendant's document requests is only guaranteed when issuance is compulsory on third parties, buttressed by legal sanctions for failure to abide. Without this compulsion, Defendant cannot be guaranteed a proper vehicle to obtain necessary documents required to present a full and complete defense.

In the present case, Defendant is charged with the murder of a Myrtle Beach Police Officer and is facing the death penalty. On November 21, 2011, in strict accordance with Judge Hyman's order, Defendant sent Horry County Solicitor Greg Hembree a Supplemental Discovery Request of items that were to have been subpoenaed by Defendant pursuant to Rule 13 of the South Carolina Rules of Criminal Procedure. Those items are as follows:

- 1) A list of all City of Myrtle Beach Police Department's abbreviations used to describe the different areas of police detail and locations of the City of Myrtle Beach, and an explanation for each, where were in effect during the years 1999-present.
- 2) A list of all City of Myrtle Beach Police Department's 10-codes, and an explanation for each, which were in effect during the years of 1999-present.
- 3) A copy of the City of Myrtle Beach Police Department's policy and procedures for the destruction of personnel files which were in effect for the years 1999-present.
- 4) All arrests and incident reports made by PFC Joseph McGarry while employed by the City of Myrtle Beach Police Department for the years 1999 through 2002.

- 5) All arrest records and incident reports from the City of Myrtle Beach Police Department which involved the arrest of Lloyd Mangrum.
- 6) All arrest records and incident reports from the City of Myrtle Beach Police Department which involved the arrest of Bryon Levant Spivey.
- 7) All personnel files for Investigator George Michael Guthinger while employed by the City of Myrtle Beach Police Department.
- 8) All personnel files for Officer Robert Todd while employed by the City of Myrtle Beach Police Department.
- 9) All personnel files for Officer Don Gause while employed by the City of Myrtle Beach Police Department.
- 10) All personnel files for Officer Robert J. Starr while employed by the City of Myrtle Beach Police Department.
- 11) All personnel files for PFC Joseph J. McGarry while employed by the City of Myrtle Beach Police Department.
- 12) All logs, records, calls, tickets, reports, etc. in which PFC Joseph J. McGarry was involved in while employed with the Myrtle Beach Police Department from the dates of October 01, 2001 through December 29, 2002.
- 13) All Internal Affairs Department files for PFC Joseph McGarry while employed by the City of Myrtle Beach Police Department.
- 14) All personnel files, including payroll information and time sheets, for the employees of Dunkin Donuts located at 3001 North Kings Highway, Myrtle Beach, SC 29577 who were working at the time of the incident on December 29, 2002.
- 15) Latent Prints of Donald Gray Morgan, III.
- 16) Latent Prints of Dianne Lawson.
- 17) Latent Prints of Amber Counts.
- 18) Latent Prints of Tabatha "Star" Benson.
- 19) Latent Prints of Fred Halcomb, Jr.

- 20) The identity and case file of the confidential informant that provided information to Myrtle Beach Police Narcotics Officers Robert Todd and Robert Starr on December 29, 2002 at 4:00 am.
- 21) Any and all documents including, but not limited to, case reports, incident reports, witness statements, victim impact notifications, and photographs for Horry County Case Number 02-90397.
- 22) All files of the Myrtle Beach Police Department Office of Professional Standards (OPS) Unit for PFC Joseph McGarry.

The deadline for receipt of these items, pursuant to a typical Rule 5 Motion for Discovery, was December 21, 2011. Defendant has received Items 4, 11 and 13, but has yet to obtain the other relevant items necessary for a material and complete defense. In a conversation with Defendant's counsel, Deputy Solicitor Jimmy Richardson remarked that if Defendant needed the documents, he "should get a search warrant." It appears that the State is able to circumvent Rule 13 by this very process: search warrants. The State's ability to obtain necessary documents through the issuance of search warrants upon suspects and parties related to a criminal investigation negates their need to subpoena relevant documents, because law enforcement then serves as an agent of the Solicitor. Defendant, unlike the Solicitor, has no ability to obtain search warrants since law enforcement does not serve at his behest. It is precisely Rule 13 that allows Defendant to obtain documents that the States is not obligated to provide. Without the power to obtain search warrants and have the police work for him, Rule 13 is Defendant's only compulsory avenue from which he may obtain documents independent of the Solicitor. Judge Hyman's order effectively cuts off that avenue.

It is the contention of Defendant that he acted in self-defense, based upon the Officer's illegal and unconstitutional initiation of force against Defendant, which would constitute an assault and battery. It is also the contention of Defendant that he was shot by the Officer prior to

initiating any force, and that said force used was justified out of a reasonable fear of imminent bodily injury.

The records requested in the Supplemental Discovery Motion demonstrate previous interaction between Officer McGarry, his friends and acquaintances at the Myrtle Beach Police Department and Defendant's known associates. This fact is important because it tends to establish that Officer McGarry's confrontation with Defendant was a personal one, not born out of professional necessity or duty. It establishes Officer McGarry's past relationships with Defendant's acquaintances, many of whom were involved in the selling of drugs and prostitution. These records are needed to adequately present a complete and material defense.

These records, primarily the Dunkin Donuts employee records, also are necessary for locating witnesses who are, as of today, either out of the country or unable to be found. From these records, Defendant will be able to determine the identity of two employees who were working at the Myrtle Beach Dunkin Donuts the night of the alleged incident. These witnesses, who were friendly with Defendant because of his frequent visits as a customer, can give firsthand accounts of the interaction between the Officer and Defendant prior to the physical altercation. This goes to the heart of Defendant's claim of self-defense, because they establish the actions and state of mind of both Defendant and the deceased Officer immediately preceding the incident.

Beyond the probative value these witnesses provide Defendant, it should also be noted that immediately following this incident, the donut shop employees were in the presence of Solicitor J. Gregory Hembree and then-Deputy Solicitor Fran Humphries, as well as numerous law enforcement and investigative agencies, yet no statements were taken. Every other witness present at the scene had their statements taken, save the three Dunkin Donuts employees who

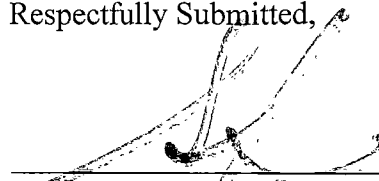
were known friends of Defendant, and would likely give statements that were beneficial to his case. At this point, Defendant has found one Dunkin Donuts employee, living on the outskirts of Warsaw, Poland, but has not located the other two. Because of the conduct of various law enforcement agencies and the Horry County Solicitor's Office, two witness's statements are nonexistent. Because of Judge Hyman's order, Defendant's independent ability to get a statement from them is severely limited, since his only avenue for obtaining their whereabouts is the Dunkin Donuts employee records, which have not been provided.

These two Dunkin Donuts employees not only serve as corroborating witnesses for the employee already found, but they also provide two separate firsthand accounts of the incident that cannot be ignored, and may provide evidence that exculpates Defendant, or at the very least, mitigates his actions. However, Defendant has never had the opportunity to interview these witnesses, and the scope of their knowledge of the events of the morning in question will never be known unless Defendant has the opportunity to examine the Dunkin Donuts employee records, with the express purpose of determining the employees' names and addresses. Without the ability to obtain documents relevant to Officer McGarry's past actions and character, Defendant's ability to present a complete defense is severely limited. Without these relevant records, Defendant will suffer irreparable harm.

IV. Conclusion

For the foregoing reasons, Defendant requests that Judge Hyman's order regarding Defendant's Rule 13 subpoena authority be overturned, so that his meritorious appeal is heard by the South Carolina Supreme Court in order to prevent him from suffering irreparable harm.

Respectfully Submitted,



Stuart M. Axelrod
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300
Counsel for Mr. Cottrell

SHOWING APPLICATION
FOR RELIEF WAS MADE
TO THE LOWER COURT

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
)
Plaintiff,)
)
v.)
)
LUZENSKI ALLEN COTTRELL,)
)
Defendant.)
_____)

Indictment No.: 2003-GS-26-0020

FILED
HORRY COUNTY
2011 OCT 28 PM 4:38
MELANIE HUGGINS-WARD
CLERK OF COURT

MOTION FOR SUPERSEDEAS

COMES NOW, Luzenski Allen Cottrell, Defendant, by counsel, and moves the Court to grant him supersedeas, staying the above-titled action so the Supreme Court may review this Court's previous ruling. In support thereof, the Defendant would show:

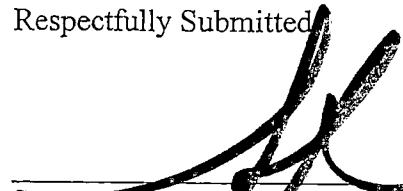
- 1) On August 12, 2011, a hearing took place in which Defendant and Solicitor discussed Defense counsel's subpoena power under the South Carolina Rules of Criminal Procedure.
- 2) During the August 12, 2011 hearing, with regards to the Clerk of Court's issuance of subpoenas to Defense Counsel, Horry County Circuit Court Judge Larry B. Hyman stated that the Clerk of Court is "not going to do it anymore." Judge Hyman also stated to Defense counsel that he "simply serve a discovery request. If you have any trouble getting it, or if it hasn't been turned over to me, it's privileged, we will deal with it."

- 3) On October 14, 2011, Judge Larry B. Hyman signed an order referencing the August 12, 2011 hearing. The order signed modified the August 12, 2011 statements, but still stated that “[i]n accordance with this ruling the Clerk is specifically forbidden from issuing any subpoena(s) upon application of the defense except in compliance with Rule 13 for the purpose of hearings or trial.”
- 4) On November 9, 2011, Defense counsel will be presenting to Judge Hyman a Motion for Reconsideration, due to the October 14, 2011 order’s reference of the August 12, 2011 transcript hearing.
- 5) Upon denial of Defendant’s Motion for Reconsideration, Defense counsel hereby requests supersedeas relief and a stay of the proceedings, so that an immediate appeal can be heard by the South Carolina Supreme Court.
- 6) Defendant believes Judge Hyman’s order violates:
 - a) Rule 13 of the South Carolina Rules of Criminal Procedure
 - b) the Due Process Clause of the Fifth and Fourteenth Amendments
 - c) the Compulsory Process of the Sixth Amendment and
 - d) the Confrontation Clause of the Sixth Amendment.
- 7) Defendant also believes he will be irreparably if the proceedings are not stayed so that a writ can be applied for before the South Carolina Supreme Court.
- 8) Attached is a Memorandum of Law in support of Defendant’s Motion.

WHEREFORE, Defendant prays this Motion be sustained and relief be granted by appropriate Order.

Dated this 28th day of October, 2011.

Respectfully Submitted,



Stuart M. Axelrod, Esquire, Bar #:14678
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300
Counsel for Mr. Cottrell

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No. 2003-GS-26-0020

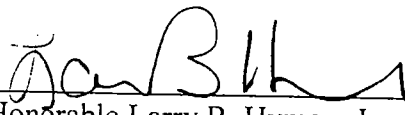
HORRY COUNTY
11 DEC -7 AM 11:46
MELANIE HOGGINS-WARD
CLERK OF COURT

ORDER

Upon consideration of Mr. Cottrell's *Motion for Supersedeas to Stay Proceedings Due to this Court's Previous Rulings Concerning Rule 13 of the South Carolina Rules of Criminal Procedure*, the Court being otherwise sufficiently advised, and good grounds appearing therefore,

The Court Hereby DENIES Mr. Cottrell's Motion for Supersedeas.

SO ORDERED this 7 day of December, 2011.


The Honorable Larry B. Hyman, Jr.
Presiding Judge
State of South Carolina

Attached hereto as exhibit "A" the Court's Order Dated: October 14th, 2011.

Attached hereto as exhibit "B" pp. 98-108 from Transcript of Pre-Trial Hearing Dated: November 9th, 2011.

**CLIENT VERIFICATION
OF PETITION**

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Indictment No. 2003-GS-26-0020

The State,

Respondent,

v.

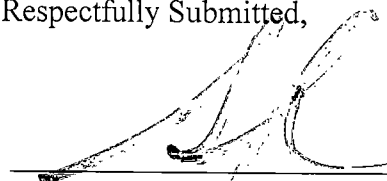
Luzenski Allen Cottrell,

Appellant.

CLIENT VERIFICATION OF COUNSEL'S
PETITION FOR A WRIT OF SUPERSEDEAS

I, Stuart Mark Axelrod, am counsel for Defendant, Luzenski Allen Cottrell, in the above-referenced matter. I hereby certify as an Officer of the Court that Defendant has been informed of this Petition, its reasons and possible outcomes, and agrees to its submission to the Court for redress.

Respectfully Submitted,



Stuart M. Axelrod, Esquire, Bar #:14678
Axelrod & Associates, P.A
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300
Counsel for Mr. Cottrell

**CERTIFIED COPIES OF
LOWER COURT'S ORDERS**

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No. 2003-GS-260020

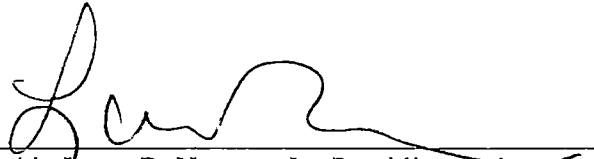
HORRY COUNTY
11 OCT 14 AM 11:18
MELANIE HUBBINS-WARD
CLERK OF COURT

THIS MATTER came before the Court for a hearing on August 12, 2011 pursuant to a status conference and several pre-trial Motions filed by the parties. Present for said hearing were Solicitor Gregg Hembree on behalf of the State and attorneys Stuart M. Axelrod and Melisa Armstrong on behalf of the Defendant.

During said hearing the State raised an objection to the Defense requesting the issuance of subpoenas from the Clerk of Court. The State took the position that the defense has no legal authority under Rule 13, SCRCrimP and/or any other source to issue and/or request the issuance of subpoenas from the Clerk but, rather, must submit all requests for documents to the Solicitor's office in the form of a discovery request. The defense took exception to this position citing that Rule 13, SCRCrimP does, in fact, provide authority for the *Clerk of Court* to issue subpoenas (including subpoenas deuces tecum) upon application of either party. Further, defense argued that the documents sought were not within the care, custody, and/or control of the State and, therefore, appropriate to be sought by way of a subpoena deuces tecum. Lastly defense argued substantial undue prejudice would result from requiring the defendant to rely solely upon the State,

his adversary, to provide documents necessary to effectuate his defense .

After hearing from both sides and taking all matters into consideration, it is the ruling of this Court that the defense is not entitled to request the issuance of subpoenas from the Clerk of Court and must submit all requests for documents to the Solicitor's Office in the form of a Motion for Discovery. In accordance with this ruling the Clerk is specifically forbidden from issuing any subpoena(s) upon application of the defense. EXCEPT TO COMPLY WITH RULE 13 FOR THE PURPOSE OF HEARINGS OR TRIAL. JM
IT IS SO ORDERED!



Honorable Larry B. Hyman, Jr., Presiding Judge
Fifteenth Judicial Circuit Court of General Sessions

OCT 14
September 14, 2011
Conway, South Carolina

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No. 2003-GS-260020

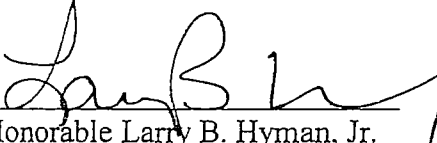
HORRY COUNTY
11 DEC - 7 AM 11:46
MELANIE R. JACOBS-WARD
CLERK OF COURT

ORDER

Upon consideration of Mr. Cottrell's *Motion for Reconsideration regarding this Court's previous rulings concerning Rule 13 of the South Carolina Rules of Criminal Procedure*, the Court being otherwise sufficiently advised, and good grounds appearing therefore,

The Court Hereby DENIES Mr. Cottrell's Motion for Reconsideration Concerning Rule 13 of the South Carolina Rules of Criminal Procedure

SO ORDERED this 7 day of December, 2011.


The Honorable Larry B. Hyman, Jr.
Presiding Judge
State of South Carolina

Attached hereto as exhibit "A" the Court's Order Dated: October 14th, 2011.

Attached hereto as exhibit "B" pp. 98-108 from Transcript of Pre-Trial Hearing Dated: November 9th, 2011.

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
)
)
 Plaintiff,)
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 v.)
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 LUZENSKI ALLEN COTTRELL,)
)
)
 Defendant.)
)

Indictment No. 2003-GS-260020

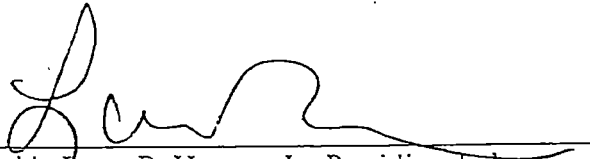
HORRY COUNTY
11 OCT 14 AM 11:18
MELISA ARMSTRONG-WARD
CLERK OF COURT

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During said hearing the State raised an objection to the Defense requesting the issuance of subpoenas from the Clerk of Court. The State took the position that the defense has no legal authority under Rule 13, SCRCrimP and/or any other source to issue and/or request the issuance of subpoenas from the Clerk but, rather, must submit all requests for documents to the Solicitor's office in the form of a discovery request. The defense took exception to this position citing that Rule 13, SCRCrimP does, in fact, provide authority for the *Clerk of Court* to issue subpoenas (including subpoenas deuces tecum) upon application of either party. Further, defense argued that the documents sought were not within the care, custody, and/or control of the State and, therefore, appropriate to be sought by way of a subpoena deuces tecum. Lastly defense argued substantial undue prejudice would result from requiring the defendant to rely solely upon the State,

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IT IS SO ORDERED!



Honorable Larry B. Hyman, Jr., Presiding Judge
Fifteenth Judicial Circuit Court of General Sessions

OCT 14, 2011
September 14, 2011
Conway, South Carolina

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No.: 2003-GS-26-0020

CERTIFICATE OF SERVICE

This is to certify that the following foregoing listed documents were served by Axelrod & Associates, P.A., by and through its agents and employees on October 18th, 2011:

1. Order executed by Judge Hyman on October 14, 2011 in regards to the issuing of Subpoenas by the Defense; and
2. Certificate of Service.

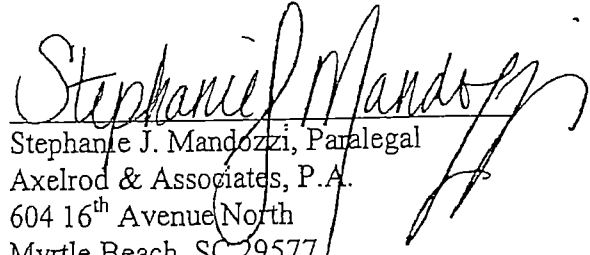
By mailing a copy of the same by United States Mail, first-class mail, postage prepaid, to the following address:

Solicitor J. Gregory Hembree
15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

Melissa Armstrong, Esquire
1400 Laurel Street, Suite 4
Columbia, SC 29201

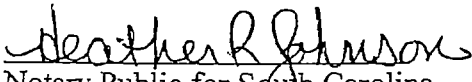
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The Honorable Larry B. Hyman, Jr.
1301 Second Avenue, Suite 3B76
Conway, SC 29526



Stephanie J. Mandozzi, Paralegal
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300

SWORN to before me this
18th day of October, 2011



Notary Public for South Carolina

My commission expires: 01-04-2020

1 THE COURT: All right, it's said.

2 MR. AXELROD: Your Honor, on your previous
3 rulings, for the record, on disqualifying the
4 Solicitor's office and removing the Solicitor's
5 office from the chain, we take exception, for the
6 record, to your ruling.

7 THE COURT: All right. Mr. Hembree will
8 prepare an order and submit it to you or submit it
9 to me in that regard, okay?

10 MR. AXELROD: Your Honor, the next matter we
11 bring up, I talked about it several times, is the
12 motion to reconsider that October 14th order on the
13 issuance of subpoenas.

14 THE COURT: Mr. Axelrod, I have revisited
15 that twice and I have failed to change my ruling.
16 Now, we were back in here again a month ago and we
17 revisited the same, we had the same motions.

18 MR. AXELROD: Just a little latitude, Your
19 Honor.

20 THE COURT: Okay.

21 MR. AXELROD: Your Honor, I understand that.
22 What I'm trying to do, and basically I talked to
23 Appellate Defense and they asked me to do this
24 today because they said that I have not preserved
25 that properly. If the Court could just give me a

1 little latitude and let me put some stuff on the
2 record.

3 THE COURT: All right.

4 MR. AXELROD: Your Honor, we came before Your
5 Honor on the August the 12th hearing and we
6 discussed the defendant's Rule 13 subpoena power
7 pursuant to Rule 13 of the South Carolina Rules of
8 Criminal Procedure. We then filed a timely motion
9 for clarification and reconsideration. October
10 14th Your Honor signed a written order referencing
11 the August 12th, 2011 hearing.

12 Today, Your Honor, we're asking, to preserve
13 the record, we ask that we be heard on the motion
14 for reconsideration. Your Honor, since there has
15 only been one signed order, the defendant asks you
16 to reconsider that one signed order and issue a
17 separate order either granting reconsideration or
18 denying it, at which point the defendant has then
19 properly preserved that issue for appellate review.

20 Your Honor we ask you to reconsider your
21 October 14th order regarding defendant's ability to
22 issue subpoenas based on the following reasons.
23 Your Honor, the October 14th order is inconsistent
24 with the plain meaning of Rule 13 of the South
25 Carolina Rules of Criminal Procedure. It violates

1 the defendant's Fifth and Fourteenth Amendment
2 right to due process. Your Honor, it further
3 violates the Sixth Amendment right to compulsory
4 process. Your Honor, it also violates the Sixth
5 Amendment right to confrontation under the United
6 States Constitution. Your Honor, it violates his
7 right pursuant to Article I, Section 3 and Section
8 14 of the South Carolina Constitution.

9 Your Honor, my client, the defendant in this
10 case, is on trial for his life and feels without
11 the proper reconsideration he will be irreparably
12 harmed based on the order's requirement that the
13 defendant submit all requests for documents in a
14 discovery motion. Your Honor, this would
15 effectively prohibit the defendant from examining
16 documents obtained via subpoena duces tecum and
17 instead leaves the Solicitors as the sole arbiter
18 of what documents the defendant receives at that
19 point.

20 Your Honor, Rule 13 exists requiring the
21 defendant access to documents that exist outside
22 Rule 5. The Solicitor has no obligation to provide
23 any document to the defense outside of Rule 5 and
24 your order, Your Honor, enjoins the defendant from
25 obtaining them via compulsory process. This order

1 also gives the State knowledge of defendant's trial
2 strategies and theories of the incident, things to
3 which they would not normally be privy. It
4 requires either defense counsel hide his strategy
5 for trial by not requesting said documents or
6 giving the State an advantage before trial even
7 starts by laying out the framework of its case.

8 And, Your Honor, what I had done, I have
9 given Mr. Hembree a copy and I'm going to hand up
10 to the Court, I prepared a new motion that he has
11 some objections to but I also wanted to hand you up
12 what is the original one we filed, and
13 clearly --

14 THE COURT: Are you telling me you filed this
15 motion again?

16 MR. AXELROD: Well --

17 THE COURT: Or are you telling me that you're
18 formally, you are wanting me to formally issue an
19 order denying reconsideration?

20 MR. AXELROD: Yes, sir, Your Honor, that is
21 what I'm asking.

22 THE COURT: Which?

23 MR. AXELROD: We're asking you to do an order
24 where you're denying the formal reconsideration at
25 today's hearing.

1 THE COURT: Let me hear from you, Mr.
2 Hembree. I'm going to consider it, I'm going to
3 reconsider it.

4 MR. HEMBREE: Thank you, Your Honor. A
5 couple things. First off, I have got, my real
6 concern with the proposed order that Mr. Axelrod
7 just submitted to the Court is that he repeatedly
8 mischaracterizes what the State's position is and
9 what the Court's ruling is. He characterizes it as
10 we object to the defense requesting subpoenas. We
11 do not. We only require them to follow the rule.

12 The rule says you can get subpoenas for
13 witnesses and documents but only for hearings and
14 trial proceedings. You can't just issue, get
15 subpoenas issued in blank, which is what he has
16 essentially been asking the clerk to do, just sign
17 off on those, and then send them to whoever he
18 wants to send them to to grab these documents
19 whenever he wants to get them. The rule doesn't
20 allow him to do that.

21 So, I have objection, number one, with this
22 proposed order. I think it mischaracterizes it,
23 and the Court never ruled that defense counsel
24 couldn't get a subpoena. The Court said if you get
25 a subpoena you have to follow the rule and if you

1 want that material ahead of time you need to make
2 it through a discovery request. And it is my
3 recollection, Your Honor, that if the State refuses
4 to provide it or has some objection to it, then the
5 Court would be willing and eager to hear defense
6 counsel on that matter.

7 THE COURT: And that was my ruling.

8 MR. HEMBREE: That was your ruling.

9 Therefore, defense counsel's rights have in no way
10 been prejudiced because they have a path, they have
11 a method to obtain whatever documents they want to
12 obtain, whatever evidence they want to try to get
13 hold of. There is a process and a method. They
14 are using, I don't begrudge them asking for
15 materials that they feel is necessary for the
16 preparation of their defense, I encourage that, I
17 would be eager to help them with that, however I
18 have to do it within the rules and there is a
19 process available to do that. That process has
20 been made very clear to defense counsel. For
21 whatever reason defense counsel is fixated on a
22 belief that the rule should be different than what
23 it is. As a policy matter maybe's he's right but
24 as a legal matter he's wrong and, Your Honor, that
25 would be the State's position, that we have a

1 process.

2 His client furthermore is in no way going to
3 be irreparably harmed. He has a motion for
4 supersedeas that is in the background here, that he
5 has submitted to us, I think he may have sent it on
6 to the Court, which in my view is nothing more than
7 a dilatory tactic because there is no irreparable
8 harm because there is a process by which he can go
9 about getting the materials.

10 And I will go one further, Your Honor, and I
11 will sit down. If defense counsel has some
12 evidence that they need to get hold of and they are
13 truly concerned that by asking for it through
14 discovery that they will tip their hand, in some
15 way that it will tip us off, that we'll figure out
16 their trial strategy, all the secret stuff they are
17 trying to do will all now become clear to the
18 State, I have no objection, I have no objection
19 whatsoever to defense counsel coming before this
20 Court requesting an order from this Court to
21 determine whether or not they are entitled to that
22 material, without telling us. I have confidence
23 that the Court, if necessary, would say, it would
24 go this way in my view, "Yes, you're entitled to
25 that, I'm not going to tell the State about that,"

1 or, "I don't know if you're entitled to it or not
2 but either way the State is going to be involved in
3 that," and/or, "You may be entitled to that but
4 there is a third party involved, you're taking
5 somebody else's stuff and they have got a right to
6 be heard on it." It might be a bank, might be a
7 phone company, might be somebody else that says,
8 "Hey, that's my stuff, I don't want you snatching
9 my stuff without due process."

10 So, there are several different, you know,
11 variations that could come up with that request for
12 a court order but I guess I'm saying there are many
13 ways to get where they want to get and follow the
14 rules. I just ask they do that.

15 THE COURT: All right. I have reconsidered
16 my ruling, I looked at my order dated October 14th,
17 I very clearly in that order added a final sentence
18 or addition to a sentence where I said this order,
19 I mean, I was denying the issuance of subpoenas by
20 the defense except in compliance with Rule 13 and
21 for the purposes of hearing or trial. That is the
22 rule of this state as I know it. I know of no
23 authority for the issuance of subpoenas duces tecum
24 by the defense outside of those parameters. I am
25 going to stand by my ruling.

1 Solicitor, will you prepare an order denying
2 the motion to reconsider?

3 MR. HEMBREE: Thank you, Your Honor.

4 MR. AXELROD: Your Honor, at this point, and
5 I respect the Court's ruling, sir, that you denied
6 that motion for reconsideration, we would ask that
7 you grant the defendant supersedeas relief so that
8 this issue can be resolved in an appellate court
9 with the appropriate writ. Your Honor, the
10 defendant requests supersedeas relief be granted so
11 the status quo is preserved and the defendant's
12 grounds for appeal do not become moot. Your Honor,
13 we would base that on the ground supersedeas is
14 based upon his belief, my client's belief that an
15 appellate court would likely rule in his favor and
16 if relief is not immediately granted the defendant
17 would be irreparably harmed.

18 Your Honor, we would argue, we would suggest
19 to the Court that this violates the plain meaning
20 of Rule 13 of the South Carolina Rules of Civil
21 Procedure, Criminal Procedure, and again violates
22 the Fifth and Fourteenth Amendments, the due
23 process clause, violates the Sixth Amendment
24 compulsory process clause and Sixth Amendment
25 confrontation clause, again violating Article I,

1 Sections 3 and 14 of the South Carolina
2 Constitution.

3 Furthermore, Your Honor, my client would
4 likely suffer irreparable harm because of the work
5 product privilege violation and imposition of the
6 harmless error rule in post conviction appeal.

7 Your Honor, this point addresses one of the
8 purposes of supersedeas relief, the prevention of a
9 moot appeal. If this Court does not preserve the
10 status quo the Solicitor could voluntarily produce
11 some requested document outside of Rule 5 but not
12 all of the documents necessary for complete and
13 material defense. Your Honor, in that case an
14 appellate court could likely determine that the
15 appeal was moot, since the Solicitor had
16 voluntarily produced some documents outside of Rule
17 5 and a controversy no longer existed.

18 Your Honor, without a stay to preserve the
19 status quo there is no complete and appropriate
20 remedy that corrects the irreparable harm suffered
21 by the imposition of this order. Your Honor, we
22 ask the Court to grant supersedeas relief and stay
23 the proceedings so the defendant may appeal the
24 order of this Court and obtain the necessary remedy
25 for which he prays from a court of higher

1 jurisdiction, sir.

2 MR. HEMBREE: Your Honor, there is no need
3 for me to go back over our grounds. We oppose the
4 motion for supersedeas.

5 THE COURT: And it is denied.

6 MR. AXELROD: Thank you, Your Honor. We
7 would take exception.

8 THE COURT: All right.

9 MR. HEMBREE: Would you like me to prepare an
10 order on that?

11 THE COURT: Certainly.

12 I look at now on page 104, the next motion of
13 the group of motions filed October the 14th of
14 2011, the motion for production of firearms,
15 bullets, cartridge casings, magazines, ammunition
16 fragments. I think that is the next motion, is it
17 not?

18 MR. RICHARDSON: Your Honor, with regard to
19 three, four, five, six and seven on the October
20 14th motions we have previously met with defense
21 counsel. We have talked about a system whereby
22 they will request whatever they need. It may be
23 more, may be less than is listed in three, four,
24 five, six and seven, but they will request that
25 through Laura Rabin, Laura Rabin will gather that

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No. 2003-GS-26-0020

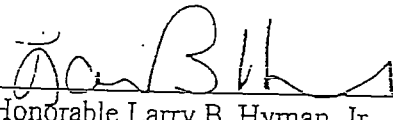
HORRY COUNTY
F1 DEC -7 AM 11:46
MELANIE HUGGINS-WARD
CLERK OF COURT

ORDER

Upon consideration of Mr. Cottrell's *Motion for Supersedeas to Stay Proceedings Due to this Court's Previous Rulings Concerning Rule 13 of the South Carolina Rules of Criminal Procedure*, the Court being otherwise sufficiently advised, and good grounds appearing therefore,

The Court Hereby DENIES Mr. Cottrell's Motion for Supersedeas.

SO ORDERED this 7 day of December, 2011.


The Honorable Larry B. Hyman, Jr.
Presiding Judge
State of South Carolina

Attached hereto as exhibit "A" the Court's Order Dated: October 14th, 2011.

Attached hereto as exhibit "B" pp. 98-108 from Transcript of Pre-Trial Hearing Dated: November 9th, 2011.

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF Horry

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No. 2003-GS-260026

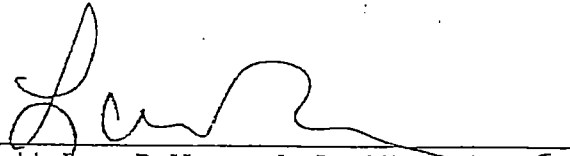
Horry County
11 OCT 14 AM 11:18
MELISSA JOHNSON-WARD
CLERK OF COURT

THIS MATTER came before the Court for a hearing on August 12, 2011 pursuant to a status conference and several pre-trial Motions filed by the parties. Present for said hearing were Solicitor Gregg Hembree on behalf of the State and attorneys Stuart M. Axelrod and Melisa Armstrong on behalf of the Defendant.

During said hearing the State raised an objection to the Defense requesting the issuance of subpoenas from the Clerk of Court. The State took the position that the defense has no legal authority under Rule 13, SCRCrimP and/or any other source to issue and/or request the issuance of subpoenas from the Clerk but, rather, must submit all requests for documents to the Solicitor's office in the form of a discovery request. The defense took exception to this position citing that Rule 13, SCRCrimP does, in fact, provide authority for the *Clerk of Court* to issue subpoenas (including subpoenas deuces tecum) upon application of either party. Further, defense argued that the documents sought were not within the care, custody, and/or control of the State and, therefore, appropriate to be sought by way of a subpoena deuces tecum. Lastly defense argued substantial undue prejudice would result from requiring the defendant to rely solely upon the State,

his adversary, to provide documents necessary to effectuate his defense.

After hearing from both sides and taking all matters into consideration, it is the ruling of this Court that the defense is not entitled to request the issuance of subpoenas from the Clerk of Court and must submit all requests for documents to the Solicitor's Office in the form of a Motion for Discovery. In accordance with this ruling the Clerk is specifically forbidden from issuing any subpoena(s) upon application of the defense. EXCEPT IN COMPLIANCE WITH RULE 13 FOR THE PURPOSE OF HEARINGS OR TRIAL. JM
IT IS SO ORDERED!



Honorable Larry B. Hyman, Jr., Presiding Judge
Fifteenth Judicial Circuit Court of General Sessions

OCT 14
September 14, 2011
Conway, South Carolina

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No.: 2003-GS-26-0020

CERTIFICATE OF SERVICE

This is to certify that the following foregoing listed documents were served by Axelrod & Associates, P.A., by and through its agents and employees on October 18th, 2011:

1. Order executed by Judge Hyman on October 14, 2011 in regards to the issuing of Subpoenas by the Defense; and
2. Certificate of Service.

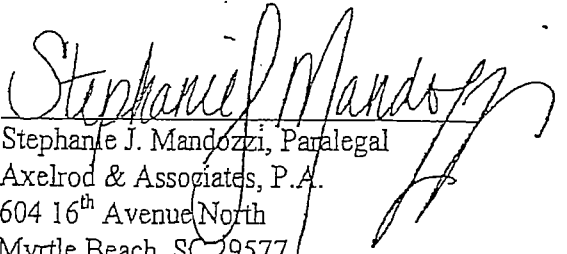
By mailing a copy of the same by United States Mail, first-class mail, postage prepaid, to the following address:

Solicitor J. Gregory Hembree
15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

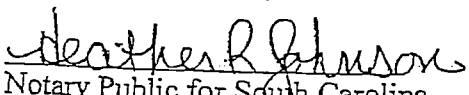
Melissa Armstrong, Esquire
1400 Laurel Street, Suite 4
Columbia, SC 29201

THIS AREA INTENTIONALLY LEFT BLANK

The Honorable Larry B. Hyman, Jr.
1301 Second Avenue, Suite 3B76
Conway, SC 29526


Stephanie J. Mandozzi, Paralegal
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300

SWORN to before me this
18th day of October, 2011


Notary Public for South Carolina
My commission expires: 01-04-2020

1 THE COURT: All right, it's said.

2 MR. AXELROD: Your Honor, on your previous
3 rulings, for the record, on disqualifying the
4 Solicitor's office and removing the Solicitor's
5 office from the chain, we take exception, for the
6 record, to your ruling.

7 THE COURT: All right. Mr. Hembree will
8 prepare an order and submit it to you or submit it
9 to me in that regard, okay?

10 MR. AXELROD: Your Honor, the next matter we
11 bring up, I talked about it several times, is the
12 motion to reconsider that October 14th order on the
13 issuance of subpoenas.

14 THE COURT: Mr. Axelrod, I have revisited
15 that twice and I have failed to change my ruling.
16 Now, we were back in here again a month ago and we
17 revisited the same, we had the same motions.

18 MR. AXELROD: Just a little latitude, Your
19 Honor.

20 THE COURT: Okay.

21 MR. AXELROD: Your Honor, I understand that.
22 What I'm trying to do, and basically I talked to
23 Appellate Defense and they asked me to do this
24 today because they said that I have not preserved
25 that properly. If the Court could just give me a

1 little latitude and let me put some stuff on the
2 record.

3 THE COURT: All right.

4 MR. AXELROD: Your Honor, we came before Your
5 Honor on the August the 12th hearing and we
6 discussed the defendant's Rule 13 subpoena power
7 pursuant to Rule 13 of the South Carolina Rules of
8 Criminal Procedure. We then filed a timely motion
9 for clarification and reconsideration. October
10 14th Your Honor signed a written order referencing
11 the August 12th, 2011 hearing.

12 Today, Your Honor, we're asking, to preserve
13 the record, we ask that we be heard on the motion
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16 to reconsider that one signed order and issue a
17 separate order either granting reconsideration or
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19 properly preserved that issue for appellate review.

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21 October 14th order regarding defendant's ability to
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25 Carolina Rules of Criminal Procedure. It violates

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7 right pursuant to Article I, Section 3 and Section
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9 Your Honor, my client, the defendant in this
10 case, is on trial for his life and feels without
11 the proper reconsideration he will be irreparably
12 harmed based on the order's requirement that the
13 defendant submit all requests for documents in a
14 discovery motion. Your Honor, this would
15 effectively prohibit the defendant from examining
16 documents obtained via subpoena duces tecum and
17 instead leaves the Solicitors as the sole arbiter
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21 defendant access to documents that exist outside
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11 some objections to but I also wanted to hand you up
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14 THE COURT: Are you telling me you filed this
15 motion again?

16 MR. AXELROD: Well --

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18 formally, you are wanting me to formally issue an
19 order denying reconsideration?

20 MR. AXELROD: Yes, sir, Your Honor, that is
21 what I'm asking.

22 THE COURT: Which?

23 MR. AXELROD: We're asking you to do an order
24 where you're denying the formal reconsideration at
25 today's hearing.

1 THE COURT: Let me hear from you, Mr.
2 Hembree. I'm going to consider it, I'm going to
3 reconsider it.

4 MR. HEMBREE: Thank you, Your Honor. A
5 couple things. First off, I have got, my real
6 concern with the proposed order that Mr. Axelrod
7 just submitted to the Court is that he repeatedly
8 mischaracterizes what the State's position is and
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2 it through a discovery request. And it is my
3 recollection, Your Honor, that if the State refuses
4 to provide it or has some objection to it, then the
5 Court would be willing and eager to hear defense
6 counsel on that matter.

7 THE COURT: And that was my ruling.

8 MR. HEMBREE: That was your ruling.

9 Therefore, defense counsel's rights have in no way
10 been prejudiced because they have a path, they have
11 a method to obtain whatever documents they want to
12 obtain, whatever evidence they want to try to get
13 hold of. There is a process and a method. They
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2 His client furthermore is in no way going to
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15 THE COURT: All right. I have reconsidered
16 my ruling, I looked at my order dated October 14th,
17 I very clearly in that order added a final sentence
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22 rule of this state as I know it. I know of no
23 authority for the issuance of subpoenas duces tecum
24 by the defense outside of those parameters. I am
25 going to stand by my ruling.

1 Solicitor, will you prepare an order denying
2 the motion to reconsider?

3 MR. HEMBREE: Thank you, Your Honor.

4 MR. AXELROD: Your Honor, at this point, and
5 I respect the Court's ruling, sir, that you denied
6 that motion for reconsideration, we would ask that
7 you grant the defendant supersedeas relief so that
8 this issue can be resolved in an appellate court
9 with the appropriate writ. Your Honor, the
10 defendant requests supersedeas relief be granted so
11 the status quo is preserved and the defendant's
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13 we would base that on the ground supersedeas is
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18 Your Honor, without a stay to preserve the
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1 jurisdiction, sir.

2 MR. HEMBREE: Your Honor, there is no need
3 for me to go back over our grounds. We oppose the
4 motion for supersedeas.

5 THE COURT: And it is denied.

6 MR. AXELROD: Thank you, Your Honor. We
7 would take exception.

8 THE COURT: All right.

9 MR. HEMBREE: Would you like me to prepare an
10 order on that?

11 THE COURT: Certainly.

12 I look at now on page 104, the next motion of
13 the group of motions filed October the 14th of
14 2011, the motion for production of firearms,
15 bullets, cartridge casings, magazines, ammunition
16 fragments. I think that is the next motion, is it
17 not?

18 MR. RICHARDSON: Your Honor, with regard to
19 three, four, five, six and seven on the October
20 14th motions we have previously met with defense
21 counsel. We have talked about a system whereby
22 they will request whatever they need. It may be
23 more, may be less than is listed in three, four,
24 five, six and seven, but they will request that
25 through Laura Rabin, Laura Rabin will gather that

**CERTIFIED COPY OF
NOTICE OF APPEAL
AND PROOF OF SERVICE**

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
R. Paul Taylor
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III
Christopher D. Helms

604 Sixteenth Avenue North
Myrtle Beach, SC 29577
Phone: (843) 916-9300
Fax: (843) 916-9311

635 East Bay Street
Charleston, SC 29403
Phone: (843) 805-7200
Fax: (843) 577-3911

* Currently on Active Military Leave

December 13, 2011

The Honorable Daniel Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED

DEC 19 2011

Re: State v. Luzenski Allen Cottrell
Indictment No. 2003-GS-26-0020

S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed for filing please find the original and one copy of each of the following:

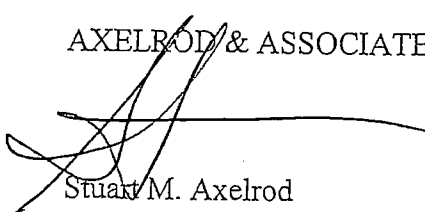
- Notice of Appeal;
- Copy of the Order(s) to be challenged on Appeal;
- Proof of Service on the Respondent.

Kindly file the originals and return a clocked copy of each in the enclosed, self-addressed, stamped envelope.

With kind regards, I am

Truly yours,

AXELROD & ASSOCIATES, P.A.


Stuart M. Axelrod
Counsel for Mr. Cottrell

cc: J. Gregory Hembree
Solicitor, Fifteenth Judicial Circuit
Post Office Box 1276
Conway, South Carolina 29526

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

RECEIVED

DEC 19 2011

S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Indictment No. 2003-GS-26-0020

The State,

Respondent,

v.

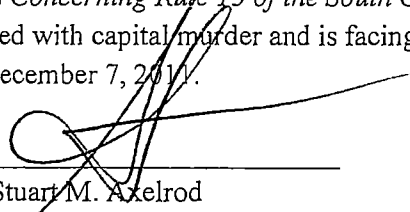
Luzenski Allen Cottrell,

Appellant.

NOTICE OF APPEAL

Luzenski Allen Cottrell, by and through the undersigned counsel, appeals the Final Orders of Honorable Judge Larry B. Hyman, Jr., denying Defendant's *Motion for Reconsideration Regarding this Court's Previous Rulings Concerning Rule 13 of the South Carolina Rules of Criminal Procedure* and Defendant's *Motion for Supersedeas to Stay Proceedings Due to this Court's Previous Rulings Concerning Rule 13 of the South Carolina Rules of Criminal Procedure*. Defendant is charged with capital murder and is facing the death penalty. The Orders were signed and issued on December 7, 2011.

December 13, 2011


Stuart M. Axelrod
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300
Counsel for Mr. Cottrell

Other Counsel of Record:
Greg Hembree, Solicitor
Horry County Solicitor's Office
Post Office Box 1276
Conway, South Carolina 29528
(843) 915-5460
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Larry B. Hyman, Circuit Court Judge

Indictment No. 2003-GS-26-0020

The State,

Respondent,

v.

Luzenski Allen Cottrell,

Appellant

PROOF OF SERVICE

I, Jarrett Calder, paralegal to Stuart Mark Axelrod, attorney of record for the Appellant, hereby certify that I have this day properly served the foregoing NOTICE OF APPEAL upon the Respondent by mailing a copy of same to the Respondent's attorney of record via U.S. Mail, sufficient postage pre-paid, and addressed as follows:

J. Gregory Hembree
Solicitor of the Fifteenth Judicial Circuit
P.O. Box 1276
Conway, South Carolina 29526

December 13, 2011.


Jarrett S. Calder, Paralegal
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Larry B. Hyman, Circuit Court Judge

Indictment No. 2003-GS-26-0020

The State,

Respondent,

v.

Luzenski Allen Cottrell,

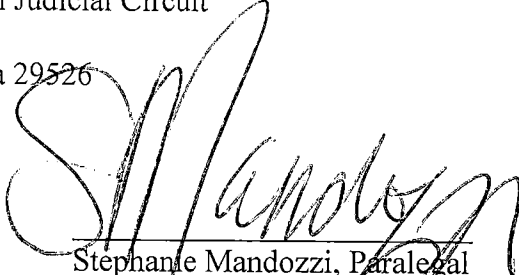
Appellant

PROOF OF SERVICE

I, Stephanie Mandozzi, paralegal to Stuart Mark Axelrod, attorney of record for the Appellant, hereby certify that I, on Monday, the 26th of December, 2011, properly served Appellant's PETITION FOR A WRIT OF SUPERSEDEAS upon the Respondent by mailing a copy of same to the Respondent's attorney of record via U.S. Mail, sufficient postage pre-paid, and addressed as follows:

J. Gregory Hembree
Solicitor of the Fifteenth Judicial Circuit
P.O. Box 1276
Conway, South Carolina 29526

December 29, 2011.



Stephanie Mandozzi, Paralegal
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300

Sworn to and Subscribed before me this 29
day of December 2011.



Notary Public of the State of South Carolina
My Commission Expires: 8/15/11

RECEIVED

JAN 09 2012

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

RECEIVED

DEC 16 2011

APPEAL FROM HORRY COUNTY
Court of General Sessions

S.C. SUPREME COURT

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Indictment No: 2003-GS-26-0020

The State,

Respondent,

v.

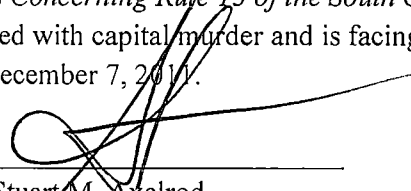
Luzenski Allen Cottrell,

Appellant.

NOTICE OF APPEAL

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December 13, 2011


Stuart M. Axelrod
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300
Counsel for Mr. Cottrell

Other Counsel of Record:
Greg Hembree, Solicitor
Horry County Solicitor's Office
Post Office Box 1276
Conway, South Carolina 29528
(843) 915-5460
Attorney for Respondent

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

_____)
STATE OF SOUTH CAROLINA,)
)
Plaintiff,)
)
v.)
)
LUZENSKI ALLEN COTTRELL,)
)
Defendant.)
_____)

Indictment No. 2003-GS-250020

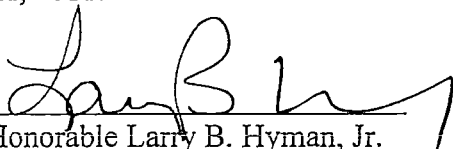
HORRY COUNTY
 11 DEC -7 AM 11:46
 MELANIE J. JUBINS-WARD
 CLERK OF COURT

ORDER

Upon consideration of Mr. Cottrell's *Motion for Reconsideration regarding this Court's previous rulings concerning Rule 13 of the South Carolina Rules of Criminal Procedure*, the Court being otherwise sufficiently advised, and good grounds appearing therefore,

The Court Hereby DENIES Mr. Cottrell's Motion for Reconsideration Concerning Rule 13 of the South Carolina Rules of Criminal Procedure

SO ORDERED this 7 day of December, 2011.



 The Honorable Larry B. Hyman, Jr.
 Presiding Judge
 State of South Carolina

Attached hereto as exhibit "A" the Court's Order Dated: October 14th, 2011.

Attached hereto as exhibit "B" pp. 98-108 from Transcript of Pre-Trial Hearing Dated: November 9th, 2011.

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No. 2003-GS-26-0020

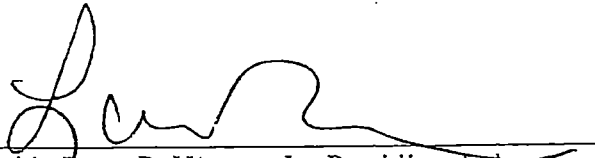
HORRY COUNTY
11 OCT 14 AM 11:18
FILED IN JUDGE'S WARD
CLERK OF COURT

THIS MATTER came before the Court for a hearing on August 12, 2011 pursuant to a status conference and several pre-trial Motions filed by the parties. Present for said hearing were Solicitor Gregg Hembree on behalf of the State and attorneys Stuart M. Axelrod and Melisa Armstrong on behalf of the Defendant.

During said hearing the State raised an objection to the Defense requesting the issuance of subpoenas from the Clerk of Court. The State took the position that the defense has no legal authority under Rule 13, SCRCrimP and/or any other source to issue and/or request the issuance of subpoenas from the Clerk but, rather, must submit all requests for documents to the Solicitor's office in the form of a discovery request. The defense took exception to this position citing that Rule 13, SCRCrimP does, in fact, provide authority for the *Clerk of Court* to issue subpoenas (including subpoenas deuces tecum) upon application of either party. Further, defense argued that the documents sought were not within the care, custody, and/or control of the State and, therefore, appropriate to be sought by way of a subpoena deuces tecum. Lastly defense argued substantial undue prejudice would result from requiring the defendant to rely solely upon the State,

his adversary, to provide documents necessary to effectuate his defense .

After hearing from both sides and taking all matters into consideration, it is the ruling of this Court that the defense is not entitled to request the issuance of subpoenas from the Clerk of Court and must submit all requests for documents to the Solicitor's Office in the form of a Motion for Discovery. In accordance with this ruling the Clerk is specifically forbidden from issuing any subpoena(s) upon application of the defense. EXCEPT IN COMPLIANCE WITH RULE 13 FOR THE PURPOSE OF HEARINGS OR TRIAL. JM
IT IS SO ORDERED!



Honorable Larry B. Hyman, Jr., Presiding Judge
Fifteenth Judicial Circuit Court of General Sessions

OCT 14
September 14, 2011
Conway, South Carolina

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LUZENSKI ALLEN COTTRELL,

Defendant.

Indictment No.: 2003-GS-26-0020

CERTIFICATE OF SERVICE

This is to certify that the following foregoing listed documents were served by Axelrod & Associates, P.A., by and through its agents and employees on October 18th, 2011:

1. Order executed by Judge Hyman on October 14, 2011 in regards to the issuing of Subpoenas by the Defense; and
2. Certificate of Service.

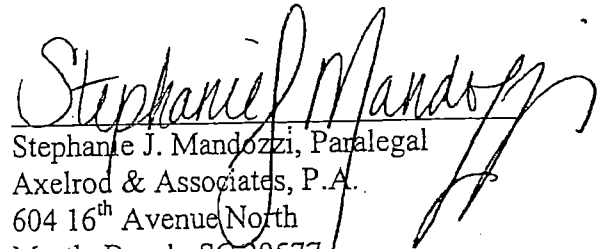
By mailing a copy of the same by United States Mail, first-class mail, postage prepaid, to the following address:

Solicitor J. Gregory Hembree
15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

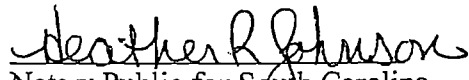
Melissa Armstrong, Esquire
1400 Laurel Street, Suite 4
Columbia, SC 29201

THIS AREA INTENTIONALLY LEFT BLANK

The Honorable Larry B. Hyman, Jr.
1301 Second Avenue, Suite 3B76
Conway, SC 29526


Stephanie J. Mandozzi, Paralegal
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300

SWORN to before me this
18th day of October, 2011


Notary Public for South Carolina
My commission expires: 01-04-2020

1 THE COURT: All right, it's said.

2 MR. AXELROD: Your Honor, on your previous
3 rulings, for the record, on disqualifying the
4 Solicitor's office and removing the Solicitor's
5 office from the chain, we take exception, for the
6 record, to your ruling.

7 THE COURT: All right. Mr. Hembree will
8 prepare an order and submit it to you or submit it
9 to me in that regard, okay?

10 MR. AXELROD: Your Honor, the next matter we
11 bring up, I talked about it several times, is the
12 motion to reconsider that October 14th order on the
13 issuance of subpoenas.

14 THE COURT: Mr. Axelrod, I have revisited
15 that twice and I have failed to change my ruling.
16 Now, we were back in here again a month ago and we
17 revisited the same, we had the same motions.

18 MR. AXELROD: Just a little latitude, Your
19 Honor.

20 THE COURT: Okay.

21 MR. AXELROD: Your Honor, I understand that.
22 What I'm trying to do, and basically I talked to
23 Appellate Defense and they asked me to do this
24 today because they said that I have not preserved
25 that properly. If the Court could just give me a

1 little latitude and let me put some stuff on the
2 record.

3 THE COURT: All right.

4 MR. AXELROD: Your Honor, we came before Your
5 Honor on the August the 12th hearing and we
6 discussed the defendant's Rule 13 subpoena power
7 pursuant to Rule 13 of the South Carolina Rules of
8 Criminal Procedure. We then filed a timely motion
9 for clarification and reconsideration. October
10 14th Your Honor signed a written order referencing
11 the August 12th, 2011 hearing.

12 Today, Your Honor, we're asking, to preserve
13 the record, we ask that we be heard on the motion
14 for reconsideration. Your Honor, since there has
15 only been one signed order, the defendant asks you
16 to reconsider that one signed order and issue a
17 separate order either granting reconsideration or
18 denying it, at which point the defendant has then
19 properly preserved that issue for appellate review.

20 Your Honor we ask you to reconsider your
21 October 14th order regarding defendant's ability to
22 issue subpoenas based on the following reasons.
23 Your Honor, the October 14th order is inconsistent
24 with the plain meaning of Rule 13 of the South
25 Carolina Rules of Criminal Procedure. It violates

1 the defendant's Fifth and Fourteenth Amendment
2 right to due process. Your Honor, it further
3 violates the Sixth Amendment right to compulsory
4 process. Your Honor, it also violates the Sixth
5 Amendment right to confrontation under the United
6 States Constitution. Your Honor, it violates his
7 right pursuant to Article I, Section 3 and Section
8 14 of the South Carolina Constitution.

9 Your Honor, my client, the defendant in this
10 case, is on trial for his life and feels without
11 the proper reconsideration he will be irreparably
12 harmed based on the order's requirement that the
13 defendant submit all requests for documents in a
14 discovery motion. Your Honor, this would
15 effectively prohibit the defendant from examining
16 documents obtained via subpoena duces tecum and
17 instead leaves the Solicitors as the sole arbiter
18 of what documents the defendant receives at that
19 point.

20 Your Honor, Rule 13 exists requiring the
21 defendant access to documents that exist outside
22 Rule 5. The Solicitor has no obligation to provide
23 any document to the defense outside of Rule 5 and
24 your order, Your Honor, enjoins the defendant from
25 obtaining them via compulsory process. This order

1 also gives the State knowledge of defendant's trial
2 strategies and theories of the incident, things to
3 which they would not normally be privy. It
4 requires either defense counsel hide his strategy
5 for trial by not requesting said documents or
6 giving the State an advantage before trial even
7 starts by laying out the framework of its case.

8 And, Your Honor, what I had done, I have
9 given Mr. Hembree a copy and I'm going to hand up
10 to the Court, I prepared a new motion that he has
11 some objections to but I also wanted to hand you up
12 what is the original one we filed, and
13 clearly --

14 THE COURT: Are you telling me you filed this
15 motion again?

16 MR. AXELROD: Well --

17 THE COURT: Or are you telling me that you're
18 formally, you are wanting me to formally issue an
19 order denying reconsideration?

20 MR. AXELROD: Yes, sir, Your Honor, that is
21 what I'm asking.

22 THE COURT: Which?

23 MR. AXELROD: We're asking you to do an order
24 where you're denying the formal reconsideration at
25 today's hearing.

1 THE COURT: Let me hear from you, Mr.
2 Hembree. I'm going to consider it, I'm going to
3 reconsider it.

4 MR. HEMBREE: Thank you, Your Honor. A
5 couple things. First off, I have got, my real
6 concern with the proposed order that Mr. Axelrod
7 just submitted to the Court is that he repeatedly
8 mischaracterizes what the State's position is and
9 what the Court's ruling is. He characterizes it as
10 we object to the defense requesting subpoenas. We
11 do not. We only require them to follow the rule.

12 The rule says you can get subpoenas for
13 witnesses and documents but only for hearings and
14 trial proceedings. You can't just issue, get
15 subpoenas issued in blank, which is what he has
16 essentially been asking the clerk to do, just sign
17 off on those, and then send them to whoever he
18 wants to send them to to grab these documents
19 whenever he wants to get them. The rule doesn't
20 allow him to do that.

21 So, I have objection, number one, with this
22 proposed order. I think it mischaracterizes it,
23 and the Court never ruled that defense counsel
24 couldn't get a subpoena. The Court said if you get
25 a subpoena you have to follow the rule and if you

1 want that material ahead of time you need to make
2 it through a discovery request. And it is my
3 recollection, Your Honor, that if the State refuses
4 to provide it or has some objection to it, then the
5 Court would be willing and eager to hear defense
6 counsel on that matter.

7 THE COURT: And that was my ruling.

8 MR. HEMBREE: That was your ruling.

9 Therefore, defense counsel's rights have in no way
10 been prejudiced because they have a path, they have
11 a method to obtain whatever documents they want to
12 obtain, whatever evidence they want to try to get
13 hold of. There is a process and a method. They
14 are using, I don't begrudge them asking for
15 materials that they feel is necessary for the
16 preparation of their defense, I encourage that, I
17 would be eager to help them with that, however I
18 have to do it within the rules and there is a
19 process available to do that. That process has
20 been made very clear to defense counsel. For
21 whatever reason defense counsel is fixated on a
22 belief that the rule should be different than what
23 it is. As a policy matter maybe's he's right but
24 as a legal matter he's wrong and, Your Honor, that
25 would be the State's position, that we have a

1 process.

2 His client furthermore is in no way going to
3 be irreparably harmed. He has a motion for
4 supersedeas that is in the background here, that he
5 has submitted to us, I think he may have sent it on
6 to the Court, which in my view is nothing more than
7 a dilatory tactic because there is no irreparable
8 harm because there is a process by which he can go
9 about getting the materials.

10 And I will go one further, Your Honor, and I
11 will sit down. If defense counsel has some
12 evidence that they need to get hold of and they are
13 truly concerned that by asking for it through
14 discovery that they will tip their hand, in some
15 way that it will tip us off, that we'll figure out
16 their trial strategy, all the secret stuff they are
17 trying to do will all now become clear to the
18 State, I have no objection, I have no objection
19 whatsoever to defense counsel coming before this
20 Court requesting an order from this Court to
21 determine whether or not they are entitled to that
22 material, without telling us. I have confidence
23 that the Court, if necessary, would say, it would
24 go this way in my view, "Yes, you're entitled to
25 that, I'm not going to tell the State about that,"

1 or, "I don't know if you're entitled to it or not
2 but either way the State is going to be involved in
3 that," and/or, "You may be entitled to that but
4 there is a third party involved, you're taking
5 somebody else's stuff and they have got a right to
6 be heard on it." It might be a bank, might be a
7 phone company, might be somebody else that says,
8 "Hey, that's my stuff, I don't want you snatching
9 my stuff without due process."

10 So, there are several different, you know,
11 variations that could come up with that request for
12 a court order but I guess I'm saying there are many
13 ways to get where they want to get and follow the
14 rules. I just ask they do that.

15 THE COURT: All right. I have reconsidered
16 my ruling, I looked at my order dated October 14th,
17 I very clearly in that order added a final sentence
18 or addition to a sentence where I said this order,
19 I mean, I was denying the issuance of subpoenas by
20 the defense except in compliance with Rule 13 and
21 for the purposes of hearing or trial. That is the
22 rule of this state as I know it. I know of no
23 authority for the issuance of subpoenas duces tecum
24 by the defense outside of those parameters. I am
25 going to stand by my ruling.

1 Solicitor, will you prepare an order denying
2 the motion to reconsider?

3 MR. HEMBREE: Thank you, Your Honor.

4 MR. AXELROD: Your Honor, at this point, and
5 I respect the Court's ruling, sir, that you denied
6 that motion for reconsideration, we would ask that
7 you grant the defendant supersedeas relief so that
8 this issue can be resolved in an appellate court
9 with the appropriate writ. Your Honor, the
10 defendant requests supersedeas relief be granted so
11 the status quo is preserved and the defendant's
12 grounds for appeal do not become moot. Your Honor,
13 we would base that on the ground supersedeas is
14 based upon his belief, my client's belief that an
15 appellate court would likely rule in his favor and
16 if relief is not immediately granted the defendant
17 would be irreparably harmed.

18 Your Honor, we would argue, we would suggest
19 to the Court that this violates the plain meaning
20 of Rule 13 of the South Carolina Rules of Civil
21 Procedure, Criminal Procedure, and again violates
22 the Fifth and Fourteenth Amendments, the due
23 process clause, violates the Sixth Amendment
24 compulsory process clause and Sixth Amendment
25 confrontation clause, again violating Article I,

1 Sections 3 and 14 of the South Carolina
2 Constitution.

3 Furthermore, Your Honor, my client would
4 likely suffer irreparable harm because of the work
5 product privilege violation and imposition of the
6 harmless error rule in post conviction appeal.

7 Your Honor, this point addresses one of the
8 purposes of supersedeas relief, the prevention of a
9 moot appeal. If this Court does not preserve the
10 status quo the Solicitor could voluntarily produce
11 some requested document outside of Rule 5 but not
12 all of the documents necessary for complete and
13 material defense. Your Honor, in that case an
14 appellate court could likely determine that the
15 appeal was moot, since the Solicitor had
16 voluntarily produced some documents outside of Rule
17 5 and a controversy no longer existed.

18 Your Honor, without a stay to preserve the
19 status quo there is no complete and appropriate
20 remedy that corrects the irreparable harm suffered
21 by the imposition of this order. Your Honor, we
22 ask the Court to grant supersedeas relief and stay
23 the proceedings so the defendant may appeal the
24 order of this Court and obtain the necessary remedy
25 for which he prays from a court of higher

1 jurisdiction, sir.

2 MR. HEMBREE: Your Honor, there is no need
3 for me to go back over our grounds. We oppose the
4 motion for supersedeas.

5 THE COURT: And it is denied.

6 MR. AXELROD: Thank you, Your Honor. We
7 would take exception.

8 THE COURT: All right.

9 MR. HEMBREE: Would you like me to prepare an
10 order on that?

11 THE COURT: Certainly.

12 I look at now on page 104, the next motion of
13 the group of motions filed October the 14th of
14 2011, the motion for production of firearms,
15 bullets, cartridge casings, magazines, ammunition
16 fragments. I think that is the next motion, is it
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DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

_____)
STATE OF SOUTH CAROLINA,)
)
Plaintiff,)
)
v.)
)
LUZENSKI ALLEN COTTRELL,)
)
Defendant.)
_____)

Indictment No. 2003-GS-26-0020

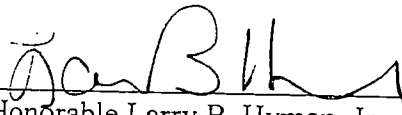
HORRY COUNTY
 IN DEC - 7 AM 11:46
 MELANIE HUGGINS-WARD
 CLERK OF COURT

ORDER

Upon consideration of Mr. Cottrell's *Motion for Supersedeas to Stay Proceedings Due to this Court's Previous Rulings Concerning Rule 13 of the South Carolina Rules of Criminal Procedure*, the Court being otherwise sufficiently advised, and good grounds appearing therefore,

The Court Hereby DENIES Mr. Cottrell's Motion for Supersedeas.

SO ORDERED this 7 day of December, 2011.



 The Honorable Larry B. Hyman, Jr.
 Presiding Judge
 State of South Carolina

Attached hereto as exhibit "A" the Court's Order Dated: October 14th, 2011.

Attached hereto as exhibit "B" pp. 98-108 from Transcript of Pre-Trial Hearing Dated: November 9th, 2011.

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
)
)
 Plaintiff,)
)
 v.)
)
 LUZENSKI ALLEN COTTRELL,)
)
)
 Defendant.)

Indictment No. 2003-GS-260020

HORRY COUNTY
11 OCT 14 AM 11:18
FILED
CLERK OF COURT

THIS MATTER came before the Court for a hearing on August 12, 2011 pursuant to a status conference and several pre-trial Motions filed by the parties. Present for said hearing were Solicitor Gregg Hembree on behalf of the State and attorneys Stuart M. Axelrod and Melisa Armstrong on behalf of the Defendant.

During said hearing the State raised an objection to the Defense requesting the issuance of subpoenas from the Clerk of Court. The State took the position that the defense has no legal authority under Rule 13, SCRCrimP and/or any other source to issue and/or request the issuance of subpoenas from the Clerk but, rather, must submit all requests for documents to the Solicitor's office in the form of a discovery request. The defense took exception to this position citing that Rule 13, SCRCrimP does, in fact, provide authority for the *Clerk of Court* to issue subpoenas (including subpoenas deuces tecum) upon application of either party. Further, defense argued that the documents sought were not within the care, custody, and/or control of the State and, therefore, appropriate to be sought by way of a subpoena deuces tecum. Lastly defense argued substantial undue prejudice would result from requiring the defendant to rely solely upon the State,

his adversary, to provide documents necessary to effectuate his defense .

After hearing from both sides and taking all matters into consideration, it is the ruling of this Court that the defense is not entitled to request the issuance of subpoenas from the Clerk of Court and must submit all requests for documents to the Solicitor's Office in the form of a Motion for Discovery. In accordance with this ruling the Clerk is specifically forbidden from issuing any subpoena(s) upon application of the defense. EXCEPT IN COMPLIANCE WITH RULE 13 FOR THE PURPOSE OF HEARINGS OR TRIAL. JM
IT IS SO ORDERED!



Honorable Larry B. Hyman, Jr., Presiding Judge
Fifteenth Judicial Circuit Court of General Sessions

OCT. JM
September 14, 2011
Conway, South Carolina

DEATH PENALTY CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)	
Plaintiff,)	
v.)	Indictment No.: 2003-GS-26-0020
LUZENSKI ALLEN COTTRELL,)	
Defendant.)	

CERTIFICATE OF SERVICE

This is to certify that the following foregoing listed documents were served by Axelrod & Associates, P.A., by and through its agents and employees on October 18th, 2011:

1. Order executed by Judge Hyman on October 14, 2011 in regards to the issuing of Subpoenas by the Defense; and
2. Certificate of Service.

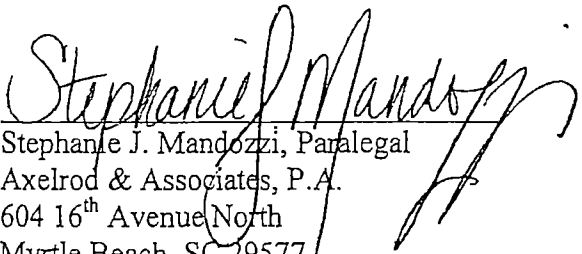
By mailing a copy of the same by United States Mail, first-class mail, postage prepaid, to the following address:

Solicitor J. Gregory Hembree
15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

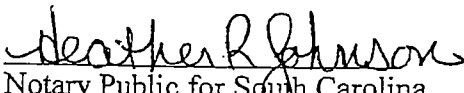
Melissa Armstrong, Esquire
1400 Laurel Street, Suite 4
Columbia, SC 29201

THIS AREA INTENTIONALLY LEFT BLANK

The Honorable Larry B. Hyman, Jr.
1301 Second Avenue, Suite 3B76
Conway, SC 29526


Stephanie J. Mandozzi, Paralegal
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300

SWORN to before me this
18th day of October, 2011


Notary Public for South Carolina
My commission expires: 01-04-2020

1 THE COURT: All right, it's said.

2 MR. AXELROD: Your Honor, on your previous
3 rulings, for the record, on disqualifying the
4 Solicitor's office and removing the Solicitor's
5 office from the chain, we take exception, for the
6 record, to your ruling.

7 THE COURT: All right. Mr. Hembree will
8 prepare an order and submit it to you or submit it
9 to me in that regard, okay?

10 MR. AXELROD: Your Honor, the next matter we
11 bring up, I talked about it several times, is the
12 motion to reconsider that October 14th order on the
13 issuance of subpoenas.

14 THE COURT: Mr. Axelrod, I have revisited
15 that twice and I have failed to change my ruling.
16 Now, we were back in here again a month ago and we
17 revisited the same, we had the same motions.

18 MR. AXELROD: Just a little latitude, Your
19 Honor.

20 THE COURT: Okay.

21 MR. AXELROD: Your Honor, I understand that.
22 What I'm trying to do, and basically I talked to
23 Appellate Defense and they asked me to do this
24 today because they said that I have not preserved
25 that properly. If the Court could just give me a

1 little latitude and let me put some stuff on the
2 record.

3 THE COURT: All right.

4 MR. AXELROD: Your Honor, we came before Your
5 Honor on the August the 12th hearing and we
6 discussed the defendant's Rule 13 subpoena power
7 pursuant to Rule 13 of the South Carolina Rules of
8 Criminal Procedure. We then filed a timely motion
9 for clarification and reconsideration. October
10 14th Your Honor signed a written order referencing
11 the August 12th, 2011 hearing.

12 Today, Your Honor, we're asking, to preserve
13 the record, we ask that we be heard on the motion
14 for reconsideration. Your Honor, since there has
15 only been one signed order, the defendant asks you
16 to reconsider that one signed order and issue a
17 separate order either granting reconsideration or
18 denying it, at which point the defendant has then
19 properly preserved that issue for appellate review.

20 Your Honor we ask you to reconsider your
21 October 14th order regarding defendant's ability to
22 issue subpoenas based on the following reasons.
23 Your Honor, the October 14th order is inconsistent
24 with the plain meaning of Rule 13 of the South
25 Carolina Rules of Criminal Procedure. It violates

1 the defendant's Fifth and Fourteenth Amendment
2 right to due process. Your Honor, it further
3 violates the Sixth Amendment right to compulsory
4 process. Your Honor, it also violates the Sixth
5 Amendment right to confrontation under the United
6 States Constitution. Your Honor, it violates his
7 right pursuant to Article I, Section 3 and Section
8 14 of the South Carolina Constitution.

9 Your Honor, my client, the defendant in this
10 case, is on trial for his life and feels without
11 the proper reconsideration he will be irreparably
12 harmed based on the order's requirement that the
13 defendant submit all requests for documents in a
14 discovery motion. Your Honor, this would
15 effectively prohibit the defendant from examining
16 documents obtained via subpoena duces tecum and
17 instead leaves the Solicitors as the sole arbiter
18 of what documents the defendant receives at that
19 point.

20 Your Honor, Rule 13 exists requiring the
21 defendant access to documents that exist outside
22 Rule 5. The Solicitor has no obligation to provide
23 any document to the defense outside of Rule 5 and
24 your order, Your Honor, enjoins the defendant from
25 obtaining them via compulsory process. This order

1 also gives the State knowledge of defendant's trial
2 strategies and theories of the incident, things to
3 which they would not normally be privy. It
4 requires either defense counsel hide his strategy
5 for trial by not requesting said documents or
6 giving the State an advantage before trial even
7 starts by laying out the framework of its case.

8 And, Your Honor, what I had done, I have
9 given Mr. Hembree a copy and I'm going to hand up
10 to the Court, I prepared a new motion that he has
11 some objections to but I also wanted to hand you up
12 what is the original one we filed, and
13 clearly --

14 THE COURT: Are you telling me you filed this
15 motion again?

16 MR. AXELROD: Well --

17 THE COURT: Or are you telling me that you're
18 formally, you are wanting me to formally issue an
19 order denying reconsideration?

20 MR. AXELROD: Yes, sir, Your Honor, that is
21 what I'm asking.

22 THE COURT: Which?

23 MR. AXELROD: We're asking you to do an order
24 where you're denying the formal reconsideration at
25 today's hearing.

1 THE COURT: Let me hear from you, Mr.
2 Hembree. I'm going to consider it, I'm going to
3 reconsider it.

4 MR. HEMBREE: Thank you, Your Honor. A
5 couple things. First off, I have got, my real
6 concern with the proposed order that Mr. Axelrod
7 just submitted to the Court is that he repeatedly
8 mischaracterizes what the State's position is and
9 what the Court's ruling is. He characterizes it as
10 we object to the defense requesting subpoenas. We
11 do not. We only require them to follow the rule.

12 The rule says you can get subpoenas for
13 witnesses and documents but only for hearings and
14 trial proceedings. You can't just issue, get
15 subpoenas issued in blank, which is what he has
16 essentially been asking the clerk to do, just sign
17 off on those, and then send them to whoever he
18 wants to send them to to grab these documents
19 whenever he wants to get them. The rule doesn't
20 allow him to do that.

21 So, I have objection, number one, with this
22 proposed order. I think it mischaracterizes it,
23 and the Court never ruled that defense counsel
24 couldn't get a subpoena. The Court said if you get
25 a subpoena you have to follow the rule and if you

1 want that material ahead of time you need to make
2 it through a discovery request. And it is my
3 recollection, Your Honor, that if the State refuses
4 to provide it or has some objection to it, then the
5 Court would be willing and eager to hear defense
6 counsel on that matter.

7 THE COURT: And that was my ruling.

8 MR. HEMBREE: That was your ruling.

9 Therefore, defense counsel's rights have in no way
10 been prejudiced because they have a path, they have
11 a method to obtain whatever documents they want to
12 obtain, whatever evidence they want to try to get
13 hold of. There is a process and a method. They
14 are using, I don't begrudge them asking for
15 materials that they feel is necessary for the
16 preparation of their defense, I encourage that, I
17 would be eager to help them with that, however I
18 have to do it within the rules and there is a
19 process available to do that. That process has
20 been made very clear to defense counsel. For
21 whatever reason defense counsel is fixated on a
22 belief that the rule should be different than what
23 it is. As a policy matter maybe's he's right but
24 as a legal matter he's wrong and, Your Honor, that
25 would be the State's position, that we have a

1 process.

2 His client furthermore is in no way going to
3 be irreparably harmed. He has a motion for
4 supersedeas that is in the background here, that he
5 has submitted to us, I think he may have sent it on
6 to the Court, which in my view is nothing more than
7 a dilatory tactic because there is no irreparable
8 harm because there is a process by which he can go
9 about getting the materials.

10 And I will go one further, Your Honor, and I
11 will sit down. If defense counsel has some
12 evidence that they need to get hold of and they are
13 truly concerned that by asking for it through
14 discovery that they will tip their hand, in some
15 way that it will tip us off, that we'll figure out
16 their trial strategy, all the secret stuff they are
17 trying to do will all now become clear to the
18 State, I have no objection, I have no objection
19 whatsoever to defense counsel coming before this
20 Court requesting an order from this Court to
21 determine whether or not they are entitled to that
22 material, without telling us. I have confidence
23 that the Court, if necessary, would say, it would
24 go this way in my view, "Yes, you're entitled to
25 that, I'm not going to tell the State about that,"

1 or, "I don't know if you're entitled to it or not
2 but either way the State is going to be involved in
3 that," and/or, "You may be entitled to that but
4 there is a third party involved, you're taking
5 somebody else's stuff and they have got a right to
6 be heard on it." It might be a bank, might be a
7 phone company, might be somebody else that says,
8 "Hey, that's my stuff, I don't want you snatching
9 my stuff without due process."

10 So, there are several different, you know,
11 variations that could come up with that request for
12 a court order but I guess I'm saying there are many
13 ways to get where they want to get and follow the
14 rules. I just ask they do that.

15 THE COURT: All right. I have reconsidered
16 my ruling, I looked at my order dated October 14th,
17 I very clearly in that order added a final sentence
18 or addition to a sentence where I said this order,
19 I mean, I was denying the issuance of subpoenas by
20 the defense except in compliance with Rule 13 and
21 for the purposes of hearing or trial. That is the
22 rule of this state as I know it. I know of no
23 authority for the issuance of subpoenas duces tecum
24 by the defense outside of those parameters. I am
25 going to stand by my ruling.

1 Solicitor, will you prepare an order denying
2 the motion to reconsider?

3 MR. HEMBREE: Thank you, Your Honor.

4 MR. AXELROD: Your Honor, at this point, and
5 I respect the Court's ruling, sir, that you denied
6 that motion for reconsideration, we would ask that
7 you grant the defendant supersedeas relief so that
8 this issue can be resolved in an appellate court
9 with the appropriate writ. Your Honor, the
10 defendant requests supersedeas relief be granted so
11 the status quo is preserved and the defendant's
12 grounds for appeal do not become moot. Your Honor,
13 we would base that on the ground supersedeas is
14 based upon his belief, my client's belief that an
15 appellate court would likely rule in his favor and
16 if relief is not immediately granted the defendant
17 would be irreparably harmed.

18 Your Honor, we would argue, we would suggest
19 to the Court that this violates the plain meaning
20 of Rule 13 of the South Carolina Rules of Civil
21 Procedure, Criminal Procedure, and again violates
22 the Fifth and Fourteenth Amendments, the due
23 process clause, violates the Sixth Amendment
24 compulsory process clause and Sixth Amendment
25 confrontation clause, again violating Article I,

1 Sections 3 and 14 of the South Carolina
2 Constitution.

3 Furthermore, Your Honor, my client would
4 likely suffer irreparable harm because of the work
5 product privilege violation and imposition of the
6 harmless error rule in post conviction appeal.

7 Your Honor, this point addresses one of the
8 purposes of supersedeas relief, the prevention of a
9 moot appeal. If this Court does not preserve the
10 status quo the Solicitor could voluntarily produce
11 some requested document outside of Rule 5 but not
12 all of the documents necessary for complete and
13 material defense. Your Honor, in that case an
14 appellate court could likely determine that the
15 appeal was moot, since the Solicitor had
16 voluntarily produced some documents outside of Rule
17 5 and a controversy no longer existed.

18 Your Honor, without a stay to preserve the
19 status quo there is no complete and appropriate
20 remedy that corrects the irreparable harm suffered
21 by the imposition of this order. Your Honor, we
22 ask the Court to grant supersedeas relief and stay
23 the proceedings so the defendant may appeal the
24 order of this Court and obtain the necessary remedy
25 for which he prays from a court of higher

1 jurisdiction, sir.

2 MR. HEMBREE: Your Honor, there is no need
3 for me to go back over our grounds. We oppose the
4 motion for supersedeas.

5 THE COURT: And it is denied.

6 MR. AXELROD: Thank you, Your Honor. We
7 would take exception.

8 THE COURT: All right.

9 MR. HEMBREE: Would you like me to prepare an
10 order on that?

11 THE COURT: Certainly.

12 I look at now on page 104, the next motion of
13 the group of motions filed October the 14th of
14 2011, the motion for production of firearms,
15 bullets, cartridge casings, magazines, ammunition
16 fragments. I think that is the next motion, is it
17 not?

18 MR. RICHARDSON: Your Honor, with regard to
19 three, four, five, six and seven on the October
20 14th motions we have previously met with defense
21 counsel. We have talked about a system whereby
22 they will request whatever they need. It may be
23 more, may be less than is listed in three, four,
24 five, six and seven, but they will request that
25 through Laura Rabin, Laura Rabin will gather that

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Larry B. Hyman, Circuit Court Judge

Indictment No. 2003-GS-26-0020

The State,

Respondent,

v.

Luzenski Allen Cottrell,

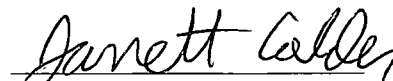
Appellant

PROOF OF SERVICE

I, Jarrett Calder, paralegal to Stuart Mark Axelrod, attorney of record for the Appellant, hereby certify that I have this day properly served the foregoing NOTICE OF APPEAL upon the Respondent by mailing a copy of same to the Respondent's attorney of record via U.S. Mail, sufficient postage pre-paid, and addressed as follows:

J. Gregory Hembree
Solicitor of the Fifteenth Judicial Circuit
P.O. Box 1276
Conway, South Carolina 29526

December 13, 2011.


Jarrett S. Calder, Paralegal
Axelrod & Associates, P.A.
604 16th Avenue North
Myrtle Beach, SC 29577
(843) 916-9300

AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

Stuart Mark Axelrod
R. Paul Taylor
W. Chris Castro*
Carlton E. Elliott
J. William Parker, III
Christopher D. Helms

* Currently on Active Military Leave

604 Sixteenth Avenue North
Myrtle Beach, SC 29577
Phone: (843) 916-9300
Fax: (843) 916-9311

635 East Bay Street
Charleston, SC 29403
Phone: (843) 805-7200
Fax: (843) 577-3911

December 13, 2011

The Honorable Daniel Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED

DEC 16 2011

S.C. SUPREME COURT

Re: State v. Luzenski Allen Cottrell
Indictment No. 2003-GS-26-0020

Dear Mr. Shearouse:

Enclosed for filing please find the original and one copy of each of the following:

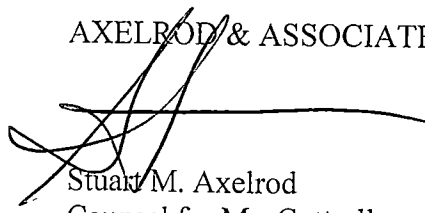
- Notice of Appeal;
- Copy of the Order(s) to be challenged on Appeal;
- Proof of Service on the Respondent.

Kindly file the originals and return a clocked copy of each in the enclosed, self-addressed, stamped envelope.

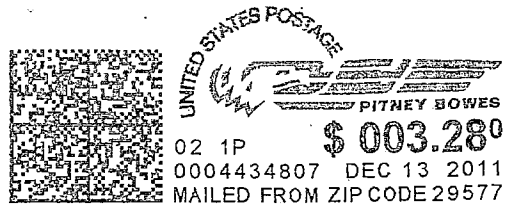
With kind regards, I am

Truly yours,

AXELROD & ASSOCIATES, P.A.


Stuart M. Axelrod
Counsel for Mr. Cottrell

cc: J. Gregory Hembree
Solicitor, Fifteenth Judicial Circuit
Post Office Box 1276
Conway, South Carolina 29526



AXELROD & ASSOCIATES, P.A.
ATTORNEYS AND COUNSELORS AT LAW

604 Sixteenth Avenue North
Myrtle Beach, South Carolina 29577
(P) 843-916-9300 (F) 843-916-9311



):

Honorable Daniel Shearouse
Clerk, Supreme Court of SC
P.O Box 11330
Columbia, SC 29211

