

THE STATE OF SOUTH  
CAROLINA

In The Court of  
Appeals

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SC Court of Appeals

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APPEAL FROM RICHLAND  
COUNTY Court of Common  
Please

Frank R. Addy, Circuit Court  
Judge

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Case No. 2019-001794

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The State, .....Respondent,

v.

Dameion E. Thomas, ..... Appellant,

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INITIAL BRIEF OF APPELLANT

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## **STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred by denying the Appellant's motion for continuance pursuant to Rule 7(b), SCRCrimP, where the Appellant's counsel gave an oath that the testimony of the witness was material to the support of the action or defense of the party moving, that the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony, has made use of due diligence to procure the testimony of the witness; and set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such belief, which denied Appellants constitutional right to confront his accuser.

## **STATEMENT OF THE CASE**

The Appellant was arrested on December 16, 2016 for Murder. During the January 2017 term of Edgefield County Grand Jury, the Appellant was indicted for Murder (2017GS1900064). On October 7, 2019, a jury trial was held in front of the Honorable Frank Addy at the Edgefield County Courthouse.

The state proceeded against the Appellant on the indictment for Murder (2017GS1900064). At trial, the Appellant was represented by Everett Chandler, Esquire and Benjamin Moore, Esquire. The state was represented by Assistant Solicitor Sutania Fuller of the Eleventh Circuit Solicitor's Office and Assistant Solicitor Robert McNair, III of the Eleventh Circuit Solicitor's Office.

Prior to the selection of the jury, Appellant's counsel made a motion for a continuance. The trial court denied the motion and the case proceeded to trial.

At the close of State's case, the Appellant chose not to testify or to introduce any evidence on his behalf.

On October 9, the case went to the jury. The jury found Appellant guilty of Murder as indicted.

On October 10, 2019, the Appellant was sentenced to life in prison and given credit for time served.

A timely Notice of Intent to Appeal was filed on Appellant's Behalf. This Brief Follows.

## **ARGUMENT**

The Appellant submits that the trial court erred in denying the Appellant's motion for a continuance where the Appellant's Counsel gave oath that the testimony of the witness is material to the support of the action or defense of the party moving, that motion was not intended for delay, but was made solely because he cannot go safely to trial without such testimony; the he has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay; and set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such belief; which denied Appellants constitutional right to confront his accuser. (ROA. p. 4, 14-24).

### **A. Standard of Review**

It is well established that the denial of a motion for continuance is a matter within the sound discretion of the lower court. *State v. Holland*, 261 S.C. 488,493, 201 S.E.2d 118, 120-1 (1973). On appeal, the lower court's decision will not be reversed absent an abuse of discretion resulting in prejudice to the Appellant. *Id.*

### **B. Trial Record**

#### **HEARING IN OPEN COURT**

At the beginning of the trial, Appellant's counsel submitted a motion for a continuance based on the unavailability of a material witness which was Investigator Jimmy Smith (hereinafter referred to as investigator Smith). (ROA. p. 3, 25, p. 4, 1-9). Appellant's counsel made an oath on the record that the motion was not intended to delay but because the Appellant could not safely go to trial without the testimony of Investigator Smith. (ROA. p. 4, 14-18). Appellants counsel requested an ex parte meeting in efforts not to divulge the defense strategy.

(ROA. p. 4, 18-24). The court asked for an overview of what Investigator Smith anticipated role was in the case. (ROA. p. 5, 2-4).

Assistant solicitor Fulmer (hereinafter referred to as Ms. Fulmer) argued the following to the Court:

- That Investigator Smith was the lead investigator on the case and gathered information,
- That she realized that the state could present their case without investigator Smith's Testimony.
- That Investigator Smith worked alongside Agent Phillip Turner (hereinafter referred to as Agent Turner) who was present for key things and could be cross examined.
- That a lot of the case is witness statements such as SLED, forensics, and all types of information.
- That the defense counsel would be able to get in similar testimony from sources other than investigator Smith. (ROA. p. 5,6- 25, p. 6, 1-14)

The Court asked Ms. Fulmer if the state had provided the Appellant's counsel with investigator Smith's notes to use for purposes of impeachment. (ROA. p. 6, 15-21). Ms. Fulmer responded that the state would not have a problem with providing investigator Smith's notes and would not have a problem with Appellant's counsel impeaching witnesses as long as a proper foundation is laid. (ROA. p. 6, 22- 25, p. 7, 1-5) Appellant's counsel elaborated on the reasons why Investigator Smith was a material witness. As follows:

- That the incident occurred on October 9<sup>th</sup> and that Investigator Smith handled the case himself until sled got involved on October 13<sup>th</sup> of that same year.

- That on October 11<sup>th</sup> Investigator Smith had a call with Appellant in which Appellant was completely cooperative and gave Investigator Smith some key information that led to additional information.
- That the Appellant was consistent with a number of statements. (ROA. p. 7, 13- 25, p. 8 1-7)

The Appellant's Counsel argued that his clients constitutional right to confront his accuser would be violated if he is not allowed to cross examine the lead investigator whom which the Appellant solely had interactions with. (ROA. p. 19, 8-15).

### **EX PARTE HEARING IN CHAMBERS**

Appellant's Counsel, Benjamin Moore (hereinafter referred to as investigator Mr. Moore) and Everett Chandler (hereinafter referred to as Mr. Chandler), in chambers argued the following reason why Investigator Smith was a material witness:

#### **Mr. Chandler**

- That "the criminal nature of it goes directly to our challenging the caliber of the investigation and pursuant to Kyle versus Whitman which is a Supreme Court case, that the conduct of defendant's, the conduct of defense lawyers is to be able to discredit the caliber of the investigation or even the decision to charge the defendant, and we believe that without that opportunity that this case is severely inhibited and it could be cured easily with a few months compared to the three years that the State has already delayed this case." (ROA. p. 32, 11-20).

#### **Mr. Moore**

- That "the State has a strong case and really most of our defense would be going to criticizing the investigation basically saying that they got off on the wrong foot, that they

got tunnel vision and looked at only evidence that was favorable to their case, and that the investigation wasn't done very well.” (ROA. p. 33, 1-6).

- “That the State investigation can't prove their case because they didn't go do a good job.” (ROA. p. 33, 11-14).
- That Investigator Smith stated in his initial report that the Appellant was wearing blue jeans on the video, however, a pair of sweatpants were tested and came back the with GSR. Mr. Smith was the was the only one to say that. (ROA. p. 33, 20-25).
- That “the evidence will show that he went to this convenient store. He's on the convenient store video and obviously the clothing in question is later tested, but initially Investigator Smith says it's blue jeans at the store. Mr. Thomas is later seen on video at some apartment projects. There's a video there. And Investigator Smith says that the defendant has changed clothes on that video and that's in his report. And obviously, and then later says that, in his report, that the clothes that were tested were the ones seen on the video from the projects, video two.” (ROA. p. 34, 4-15).
- That “the ability to bring into question the clothing from which the GSR - obviously earlier in the timeline he has, we can bring that out to the jury to have some doubt that he had different clothing. They're alleging that he's going from the shooting and the first place that they get him on the video camera is the store and he's saying that they tested the clothing that he changed into at the projects, then what's coming positive for GSR is the clothes he changed into, not the clothes he would have had immediately following the alleged murder.pg (ROA. p. 34, 15-25).

- That “this is a big deal and it doesn't come from any other source than Investigator Smith from his report and we think that is obviously a huge deal. (ROA. p. 35, 1-3).
- That Appellant’s Counsel would like to cross exam Mr. Smith on the difference in statements between Mr. Glover and Investigator Smith statements. (ROA. p. 35, 5-10).
- That “We would like to cross examine him about why the GSR results, the things that weren't tested, why he didn't send them to testing when he got the results back and it was only the pants. We actually think GSR only being on the pants is very different from GSR being on all the clothing.” (ROA. p. 35, 10-15).
- That “the Appellant gave a statement that he had been shooting, he's kind of vague, but basically a few days prior and that's where the gunshot residue comes from.” (ROA. p. 35, 15-18).
- That “ originally a big part of our defense was going to be if the GSR was only on the pants, was that he was shooting another day and he wasn't wearing the pants in question, but he wasn't wearing the same shirt, hat, shoes, and it was consistent with his story that he was shooting another day. (ROA. p. 35, 19-24).
- That “we would like task him why an arson expert was not consulted or used to determine if the fire was intentional or accidental.” (ROA. p. 36, 5-7).
- That “Another point of this is he has initial evidence where he has the statement from the Appellant, he has the videos we've talked about, and he has some timeline witnesses that are very favorable to the State that basically puts the defendant in the victim's car on camera soon after like when their cell phones go dead and so forth, and a good timeline

would put him basically going back to the scene and basically the theory is that he shot them in the early afternoon, returned to the scene and burned the house down.”(ROA. p. 36, 9-17).

- That “they had all of that, but Investigator Smith did not believe he had probable cause at that point to make an arrest. He waited. He was concerned, from his report it shows that he was concerned about flight and the defendant fleeing, but he doesn't - he waits for
- “the GSR to make the arrest and quite frankly part of our defense is if he had hesitation to act on the probable cause at that point, then the jury should look less favorably or take that into account when they look at the timeline evidence, the video evidence, and the defendant's statement which we actually think is the strongest part of their case. We think the GSR is a nice bonus obviously, but we actually believe that his, our defendant's statement and that timeline and being in the victim's vehicle is really what kills us”.

(ROA. p. 36, 18- 25, p. 37, 1-7)

- “And then there's jailhouse snitches like Mr. Glover and other people that we feel like we could do some damage with and if we could weaken the case as far as even the investigator had problems with the initial evidence which we think is the strongest, if he's hesitating to act on probable cause, we think that the jury should hesitate to act on reasonable doubt.” (ROA. p. 37, 8-14).

The court asked Mr. Moore how long did it take for the GSR to come back on the pants?

(ROA. p. 37, 15-17).

- Mr. Moore stated that the pants were collected on October 13<sup>th</sup> and came back in mid-December of the same year. (ROA. p. 37, 18-23).

- Mr. Moore also argued that a witness by the name of Kayleigh Lewis was mentioned in the notes of Investigator Smith and that she mentioned planning to meet the alleged victims at 2:30 but never showed; and that cross examining Investigator Smith on not getting a statement was key . (ROA. p. 38, 9-19).

The court asked Mr. Moore if Lewis was on the Investigator's witness list and what does she testify to? (ROA. p. 39, 2-3).

- Mr. Moore explained that Investigator Smith had poor handwriting, so he typed his notes, but have not gotten them yet. (ROA. p. 39, 4-8).
- Mr. Moore explained that Kayleigh Lewis are mentioned in the notes but he is not aware of any statement given, however, he believes that she is a big witness because She is right in the middle of the timeline around the time the Investigator's believe the Appellant committed the Murder. (ROA. p. 39, 9-17).

The court asked "was that the December interview that was recorded that we're talking about, the tape recording? (ROA. p. 40, 7-8).

- Mr. Moore explained that the interview happened on October 13<sup>th</sup>, which was recorded, and that Investigator Smith had a lot of things wrong in his report and could be discredited by the report (ROA. p. 40, 9-25).
- Mr. Moore also explained that Investigator Moore told him that the car keys to the alleged victim's car was never found, however, when he searched the evidence locker

the keys were in there, so he would like to cross examine him on that and a lot of other things. (ROA. p. 41, 1-7).

- Mr. Moore explained that Investigator Smith's notes mentioned pictures of the Appellant's body which never suffered. Attorney more expressed a desire to cross-examine Investigator Smith on the whereabouts of the pictures. (ROA. p. 41, 7-14).
- Attorney more explained that the pics were in the Sled Agent's notes and not Investigator Smith's report. (ROA. p. 41, 21-23).

The court asked Mr. Moore was there anything else big that he can relay? (ROA. p. 42, 2).

- Mr. Moore argued that the timeline was a huge deal int this case and that there are issues in the notes of Investigator Smith that need to be addressed on cross-examination regarding the timeline. (ROA. p. 42, 4-18).
- Mr. Moore argued that Investigator Smith can establish that the Appellant was cooperative, forth coming and consistent from the beginning. (ROA. p. 42, 20- 25, p. 43, 1-7)

### **Benjamin Moore, Everette Chandler and Court**

#### **Everette Chandler**

- Argued that stipulations would not be effective under the circumstances. (ROA. p. 43, - 10).

#### **Court**

- Argued that cross examination would not be effective because Investigator Smith is a veteran with pretty good experience and would be able to explain the discrepancies. (ROA. p. 43, 11-16).

- Argued that giving a great deal of latitude in questioning SLED would be appropriate as opposed to a continuance. (ROA. p. 43, 17-25, p. 44, 1-2)

**Everette Chandler**

- Argued that Investigator Smith is not a veteran and would have foul up on cross-examination; and that the only remedy would be to try the case in a couple of months. (ROA. p. 44, 5-13).

**Court**

- Argued that it would serve the defense's interest to proceed without Investigator smith because they can put the investigation on trial without Investigator Smith refuting it. (ROA. p. 44, 14-20).

**Everette Chandler**

- Argued that Investigator Smith is not going to effectively refute the cross-examination, will fumble, his presence is necessary to execute their legal strategy and the simple remedy is to give a continuance. (ROA. p. 44, 21- 25, p. 45, 1-11)

**Court**

- Argued that the defense can cross-examine firsthand witnesses and still put Investigator Smith on trial for shoddy work. (ROA. p. 45, 12-19).

**Benjamin Moore**

- Argued that Edgefield is a small town, people know that Investigator Smith is in the hospital and will be sympathetic when they put him on trial. (ROA. p. 45, 24-24).

**Everette Chandler**

- Argued that Investigator Smith is needed for cross-examination because he does not do well, he is the reason why they did well at the Preliminary hearing and that “ the premium has to be on my client's rights to the best defense.” (ROA. p. 46, 1-7).

#### **Court**

- Argued that he will take a break to consider the continuance and that he understands that when there is a strong case against you the best thing to do is put somebody else or something else on trial which is the investigation. (ROA. p. 46, 8-21).

#### **Everette Chandler**

- Argued that the only one that would be prejudiced by the continuance is his client and that the state allowed Three years to pass and “the state really putting focus on this case in the last month to speed this up at this time and in light of Jimmy Smith's absence.” (ROA. p. 47, 10-19).
- Argued that the GSR on the wrong clothes is huge. (ROA. p. 48, 1-2).
- Argued that the rules required him to swear under oath and that he was swearing under oath. (ROA. p. 48, 11-15).
- Argued that the continuance is not a delay tactic. (ROA. p. 48, 20-21).
- Argued that Investigator Smith was a material witness, he was their case and him not testifying goes directly to the confrontation clause. (ROA. p. 48, 23- 25, p. 49, 1)

#### **Court**

Argued that he did not see any difference between the two Glover statements. (ROA. p. 49, 1-2).

**Benjamin Moore**

- Argued that Glover's first stated that he heard others say that the Appellant doing the murder, however, now he is saying that he heard the Appellant say it directly. (ROA. p. 49, 4-12).

**Court**

- Argued that usually the context is that the witness is necessary because they are an Alibi witness and being essential to definitively prove something affirmative. (ROA. p. 51, 1-8).

**Everette Chandler**

- Argued that Investigator Smith talks about it. (ROA. p. 51, 9).

**Court**

- Argued that the defense was trying to prove that Investigator Smith is a lousy cop. (ROA. p. 51, 10-11).

**Everette Chandler**

- Argued that he is using the caliber of investigation defense which is a common defense tactic. (ROA. p. 51, 12-15).
- Argued tat there is caselaw on the caliber of investigation defense and proofread the highlighted case law. (ROA. p. 51, 17-19).

**Court**

- Argued that usually the witness would be a fact witness or some expert witness or someone who has become unavailable as opposed to just a cop who did a lousy job. (ROA. p. 51, 21- 25, p. 52, 1-2)

**Everette Chandler**

- Argued that Investigator Smith is a witness who is the only person who can testify to whether the Appellant was wearing jeans and to whether the pants that were tested had the GSR on them or not. (ROA. p. 52, 3-7).

**Court**

- Argued that he will allow him to do this with other witnesses. (ROA. p. 52, 8-9).

**Everette Chandler**

- Argued that the only remedy is to grant the continuance, allow for Investigator Smith to be made available so he can offer the best defense for his client and that his client would be the only prejudiced by the failure to grant the continuance. (ROA. p. 52, 14-25).

**COURTS RULING ON THE RECORD**

**Court**

Ruled that after having an ex parte discussion in chamber and reviewing Rule 7 of the Rules of Criminal Procedures, the court found:

- The defense raised roughly eleven items of varying degrees of probative value as grounds for continuance. (ROA. p. 53, 18-22).
- Rule 7 applies primarily to fact witnesses which is someone key to a party's case that their attendance is just absolutely necessary in order for a trial to be fair and after

reviewing the trial strategy that the defense wishes to put forward, the court believes that a continuance is not necessary. (ROA. p. 53, 24- 25, p. 54, 1-8)

- The testimony of Investigator Smith would not be so material to any issue involved in this case because first party witnesses are available. (ROA. p. 54, 9-14).
- Much of investigator Smith's testimony will be able to be elicited from other witnesses and the court is willing to give the defense a great deal of latitude in doing so. (ROA. p. 54, 15-20).

### **C. Argument**

#### **Sixth amendment right to confront witnesses**

The Confrontation Clause guarantees an accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility. *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987).

The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. *See State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002); (holding the Sixth Amendment applicable to the states through the Fourteenth Amendment). Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001); The Sixth Amendment essentially "constitutionalizes" the right to present a defense in an adversary criminal trial. *Schmidt*, 288 S.C. at 303, 342 S.E.2d at 402.

The Sixth Amendment is applicable to the states through the Fourteenth Amendment *See State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002) Here, the Appellants constitutional right to confront his accuser and to cross exam Investigator Smith was stripped from him. The *state v. Copper* court held, "the Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility". *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987).For the jury to observe the witness's demeanor and assess his credibility, Investigator Smith would have been required to take the stand which is what the Defense counsel requested.

The Confrontation Clause guarantees an accused the right "to be confronted with the witnesses against him." *U.S. Const. amend. VI*. The appellant was denied this right when the motion for continuance was denied. Investigator Smith was on the case from the inception and compiled the evidence to have the Appellant indicted. For these reasons, the Appellant had a constitutional right to confront this witness in open court and before a jury of his peers. *The State v. Mizzell* court held, The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002) Here, Investigator smith was a favorable witness as well as an adverse witness that the defense desired to cross-examine, however, the Appellant was denied his constitutional right to confront the lead investigator who was responsible for the Appellant being indicted and who brought the charges against the Appellant.

The *State v. Cheeseboro* Court held, specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001). Here, the Appellant was

denied his constitutional right to cross examine Investigator Smith who was considered an adverse witness to the Appellant and who brought the charges against the Appellant.

Lastly, The *State v. Schmidt* court held, the Sixth Amendment essentially "constitutionalizes" the right to present a defense in an adversary criminal trial. *Schmidt*, 288 S.C. at 303, 342 S.E.2d at 402. Here, the Appellant was denied his right to present his "caliber of investigation" defense due to not being able to confront Investigator Smith, which violated his constitutional rights.

### **Plain Meaning/ Language**

"The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). As such, a court must abide by the plain meaning of the words of a statute. *Id.* When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010).

Here, the Court erroneously interpreted Rule 7(b) to only apply to fact witness or some expert witness. This interpretation substantially limited the operation of Rule 7(b) which is repugnant to *Grazia v. S.C. State Plastering, LLC*. The plain language of Rule 7(b) unambiguously states that the motion will be granted if the testimony of the witness is material to the support of the action or defense of the party moving. Rule 7(b) does not limit a material witness to a fact witness or expert witness as the court erroneously did here. The Defense gave sufficient reasons why they believed that Investigator Smith was a material to their defense. The court abused its discretion by misinterpreting Rule 7 (b) and limiting the operation of rule 7(b).

The courts abuse of discretion prejudiced the Defense by impairing their ability to mount their “caliber of investigation defense and to impeach investigator smit’s credibility as a whole.

**Rule 7 (b) of the South Carolina rules of criminal procedures**

This rule provide: No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

(1) When a subpoena has been issued, the original shall be produced with proof of service or the reason why not served endorsed thereon or attached thereto; or if lost the same proof shall be offered with additional proof of the loss of the original subpoena.

(2) A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such belief.

Here, The Defense met every requirement under Rule 7(b). The Defense gave an oath to the court that the motion was not intended for delay, was made solely because he cannot go safely to trial without such testimony and has made use of due diligence to procure the testimony of the witness. Furthermore, under Rule 7(b) (2), the Defense set forth numerous facts they believed the witness if present would testify to and the grounds for such belief. Based on the Plan language of the Rule 7(b), the Court abused its discretion when it denied the Appellant’s motion for continuance, after complying with all the requirements for the motion to be granted. The

appellant was prejudiced by the abuse of discretion, and not allowed to properly mount a defense.

### **Prejudicial denial of continuance**

In *State v. Lytchfield*, the Supreme court held, the trial court's decision to deny a motion for continuance is a matter within the trial court's discretion. *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Therefore, this court will not reverse the trial court unless there was an abuse of discretion that resulted in prejudice. *Id.* In *State v. Lytchfield*, the court found that the defense counsel did not comply with Rule 7(b) because she did not state under oath that the testimony of the witnesses was material to the support of her defense, the motion was not intended for delay, or due diligence had been exercised to secure the testimony of the witnesses. Thus, the trial court did not commit reversible error in denying the motion for continuance.

Here, unlike *State v. Lytchfield*, the Defense fully complied with Rule 7(b) by stating under oath that the testimony of the witnesses was material to the support of their defense, the motion was not intended for delay, and due diligence had been exercised to secure the testimony of the witnesses. The Defense also set forth numerous facts they believed the witness if present would testify to and the grounds for such belief. The Defense was prejudiced by not being able to cross-examine Investigator Smith on his shoddy investigation and his inconsistent reporting as the lead investigator who was involved from the inception of the Investigation. Investigator Smith was indeed a material witness because the Defense could not go safely into trial without his presence. Investigator Smith's absence crippled the Defense's ability to cast doubt on the credibility of Investigator Smith's investigation as well as the credibility of his written statements. No other witness or witnesses would allow the Defense the ability to mount its "caliber of investigation" defense. The Defense gave a host of reasons as to why Investigator

Smith's presence was material to their case which has been discussed ad nauseam in the **Trial Record** section of this brief. For the above stated reasons, the trial court's decision should be found as a harmful abuse of discretion which severely prejudiced the Appellant.

In *State v. Williams*, the Supreme court held, where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of the motion for continuance is not an abuse of discretion. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996) (


Here, unlike in *State v. Williams*, the Defense showed the court that if time was granted for Investigator Smith to be present at trial, they would have been able to produce additional evidence. Granting the continuance would have assured the presence of a material witness and allowed the Defense to present evidence to the jury that they would otherwise not be able to present without investigator Smith's presence. This evidence has also been discussed ad nauseam in the **Trial Record** section of this brief. Based on *State v. Williams*, the court abused its discretion by denying the Appellant's motion, after the Defense showed that other evidence could have been produced if given additional time to procure the presence of investigator Smith. For the above stated reasons, the trial court's decision should be found as a harmful abuse of discretion which severely prejudiced the Appellant.

## CONCLUSION

There is not much case law regarding motion for continuance pursuant to Rule 7(b). The cases that have been considered were affirmed because the Appellant did not either give an oath that the motion was not for delay, did not set forth numerous facts they believed the witness if present would testify to and the grounds for such belief or did not show that any other evidence on behalf of the appellant could have been produced if continuance were granted. This case is distinguishable from all other cases on the books because the Appellant did all the above. The only guidance that the court used to arrive at its conclusion was the language of Rule 7(b). The court erroneously interpreted the meaning of material witness to mean a fact witness or an expert witness which is not supported by case law or otherwise. The court limited the operation of Rule 7 (b), which limited the ability of the Appellant to impeach the lead investigator who was on the case from the inception, who made inconsistent written statements, and whose work on the case could have given a jury a reason to doubt the states findings. The denial of the motion irreparably harmed the Appellants ability to mount a caliber of investigation defense and to impeach investigator Smith. This amounted to a prejudicial abuse of discretion. The denial of the motion for continuance also violated the Appellants constitutional right to confront his accuser under the Sixth Amendment of the United states Constitution. For the foregoing reasons, the Applicant respectfully requests that this Court reverse the above-mentioned findings of the lower court and order a new trial.

Respectfully Submitted,

This 11<sup>th</sup> day of March 2020

  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Frank R. Addy, Circuit Court Judge

Case No. 2019-001794

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The State, ..... Respondent,  
v.  
Dameion E. Thomas, ..... Appellant,

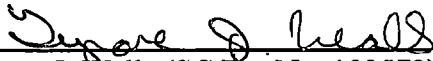
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the initial brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody Brown, of the SC Attorney General Office, by depositing a copy of it in the United States Mail, postage prepaid, on March 11, 2020, addressed to the S C Attorney General Office at P.O. Box, Columbia, South Carolina 2921.

The undersigned hereby certifies that a true copy of the initial brief of Appellant and Designation of Matter in the above referenced case has been served upon the South Carolina Office of Court Administration by depositing a copy of it in the United States Mail, postage prepaid, on January 31, 2020, addressed to the South Carolina Office of Court Administration 1220 Senate St Columbia, South Carolina 29201

March 11, 2020  
Columbia, SC

Respectfully Submitted,

  
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