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SC Court of Appeals

THE STATE OF SOUTH
CAROLINA

In The Court of
Appeals

APPEAL FROM RICHLAND
COUNTY Court of Common
Please

Frank R. Addy, Circuit Court
Judge

Case No. 2019-001794

The State, ... Respondent,

v.

Dameion E. Thomas, ... Appellant,

RECORD ON APPEAL

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1 State of South Carolina) In the Court
2 County of Edgefield) Of General Sessions
3 State of South Carolina,) Indictment No.: 2017-GS-19-00062,
4 Plaintiff,) 00063, 00064, 00065
5 vs.) Excerpt Transcript of Record
6 Dameion Edwin Thomas,)
7 Defendant.)
_____)

8

9

October 7, 2019

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Edgefield, South Carolina

11

12 BEFORE:

13

The Honorable Frank Addy, Judge

14

15 APPEARANCES:

16

17

Sutania Fuller, Assistant State Solicitor
Robert McNair, Assistant State Solicitor
Attorneys for the State/Plaintiff

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19

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Everett Chandler, Esquire
Benjamin Moore, Esquire
Attorneys for the Defendant

21 ALSO PRESENT:

22

Dameion Edwin Thomas

23

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1 Thereupon, the following proceedings were had,

2 * * * * *

3 THE COURT: Housekeeping wise, I know that my clerk
4 did receive an e-mail on Friday from the defense. The
5 Court was informed by the Clerk of Court here in
6 Edgefield that the lead investigator apparently had a
7 rather serious medical episode and has been hospitalized
8 and I think is going to undergo surgery on Wednesday.
9 The State indicated they were still capable of moving
10 forward despite his absence. What's the name of the
11 gentleman?

12 MS. FULLER: Your Honor, it's Investigator Jimmy
13 Smith, and just to make sure you have all the right
14 information, we were initially told that surgery was
15 scheduled, but apparently due to other health
16 complications there will be more complications if they go
17 forward with surgery but I know he's been transported to
18 a different hospital so he's still in the hospital but
19 the surgery is not scheduled for this week.

20 THE COURT: All right. Mr. Chandler, you had
21 indicated that you felt that Mr. Smith's presence or
22 testimony might be needed during the course of your
23 presentation or what's the -- I want to go ahead and
24 address the issue of continuance at this point in time.

25 MR. CHANDLER: May it please the Court. I think we

1 have handed up our motion, our formal motion for a
2 continuance. We are making this motion based on Rule
3 7(b) which is the continuance because of the absence of
4 witness. Beyond that we are pursuant to Rule 7(c) of the
5 South Carolina Rules of Criminal Procedure we are also
6 offering other good cause for which there should be a
7 continuance. We do believe that our client --
8 Investigator Jimmy Smith is a material witness and we'll
9 give you an opportunity to read the entire motion.

10 THE COURT: All right. Let me hear from you on that
11 question then because I know absolutely nothing about
12 what Mr. Smith may know or testify to as it relates to
13 this case.

14 MR. CHANDLER: Your Honor, as you're aware, we are
15 required to swear as we have in the motion that this
16 motion is not intended for a delay but made solely
17 because we cannot go safely to trial without the
18 testimony of Jimmy Smith. As I indicated in the e-mail,
19 we do not want to divulge the defense strategy so as to
20 specifics of why his presence would be material and why
21 he would be a material witness under the rule, Your
22 Honor, we would ask for a meeting with Your Honor in
23 chambers, ex parte meeting with Your Honor in chambers on
24 the record.

25 THE COURT: All right. Typically that's how I've

1 handled this in the past, any problem with that sort of
2 situation so I can be apprised. Can you -- Well, before
3 I do that, can you give me, somebody give me an overview
4 of what you anticipate Mr. Smith's role in this case
5 having been?

6 MS. FULLER: Yes, Your Honor. So Investigator
7 Smith, of course, was the case officer in this case. He
8 was lead investigator in this. When we were apprised of
9 that situation even in trial prep, of course, he's
10 gathering information from witnesses and so, of course,
11 cumulative testimony we would be putting up because he
12 can't testify to what they said so calling witnesses to
13 just relay what they know about the case is truly our
14 intention and even once we went through everything we
15 realized we can present the case without his testimony.

16 There are several things that he did along with SLED
17 Agent Phillip Turner who was present for probably those
18 key things that probably need to be cross examined from
19 witnesses, used for cross examination purposes. So
20 Phillip Turner would be testifying and also would be
21 available to get that information in if it's necessary.
22 But a lot of this case is witness statements, SLED,
23 forensics, and all of that type of information, Your
24 Honor.

25 So in looking at going under 7(b) and arguing that

1 the witness is unavailable, it says like under oath he
2 needs to state what testimony he would be presenting and
3 the grounds for that belief and I'm not sure much of what
4 he would be relevant for would probably be if someone
5 testified incorrectly from what he documented in his
6 notes per se, but that's gonna be once the trial gets
7 started and you see if the witnesses testifying are
8 lying, you know, or consistent with what they shared with
9 law enforcement three years ago or even up to recently in
10 prepping the case. So in terms of independent testimony
11 I'm not sure what defense counsel is arguing that he
12 would be presenting in court that we can't present
13 through other means because other people and other
14 officers were present.

15 THE COURT: Okay. Well, before I meet with Mr.
16 Chandler, I assume that the State's provided Investigator
17 Smith's notes to the defense and that if a witness were
18 to testify contrary to how the investigator documented
19 that testimony, the State would have no issue with
20 permitting impeachment even though Mr. Smith is not
21 available?

22 MS. FULLER: If I can just caveat that with if the
23 foundation is laid properly and is proper impeachment
24 then, of course, but if it's - it would just have to
25 depend on that. But, Your Honor, I would definitely be

1 working around that because we definitely want this case
2 to go forward.

3 THE COURT: Sure.

4 MS. FULLER: As long as it's proper impeachment I
5 don't think counsel and I have any problem with that.

6 THE COURT: Okay. Mr. Chandler also raised a few
7 other matters concerning GSR being provided 30 days from,
8 within 30 days from today, additional new evidence of
9 forensic pathologist, key witness statement from a
10 witness by the name of Lewis, and an alleged confession
11 from Glover. Can you speak to that?

12 MS. FULLER: Yes, Your Honor.

13 MR. CHANDLER: Your Honor, if I may, I would like to
14 expound on those. I didn't go into detail, but I would
15 like to expound before we move from 7(b). I would
16 indicate that this case, the incident occurred on October
17 the 9th. The lead investigator, Investigator Smith was,
18 only had assistance from the SLED agent who was only
19 providing assistance starting on December the 13th.
20 October the 13th. Excuse me. October the 13th. And for
21 that period of time Mr. Smith was investigating this by
22 himself. More specifically, Your Honor, on October 11th
23 Jimmy Smith actually had a call with my client where my
24 client was completely cooperative and had given him some
25 key information where he was able to get some additional

1 information that would show a number of things about how
2 cooperative my client was, how consistent he was with a
3 number of his statements. That's just a small portion.
4 We'll get into a lot more detail, Your Honor, without
5 revealing, with respect to that issue without revealing
6 defense strategy and, of course, we try my best to
7 protect all of my client's constitutional rights.

8 THE COURT: Sure. Okay. The other items though
9 that you mentioned.

10 MR. CHANDLER: Sure. Your Honor, the reality of it
11 is for three - I've been representing Mr. Thomas for
12 three years and it was only since we had our status
13 conference in Saluda, we moved from a data dump that
14 started about 9/9/19 which you know, Your Honor, included
15 information that both State, defense, and Your Honor were
16 also included in that and was trying to handle the
17 McNaughton issues and criminal responsibility issues,
18 that entire issue. Part of this evidence is some new
19 stuff. We didn't include this in the motion, Your Honor,
20 but I confirmed it with the State, that included in the
21 data dump that occurred on September the 9th was a CD
22 that was half of a investigative discussion that my
23 client had that you had that was half of that CD. We
24 didn't get half of it until September 9th.

25 Your Honor, the State's had, you know, frankly it

1 wasn't -- Yeah. We didn't get it until September the
2 9th. The reality of it is, Your Honor, the State has had
3 three years to prepare for this case. Within the last 30
4 days, less than 30 days we've been given mountains of
5 information. That alone, Your Honor, I understand. I
6 have been a prosecutor. I know how you have to go and
7 reinvestigate a case. I know you have to work it up, but
8 even in discussions, Your Honor, the State has talked
9 about since our meetings with you that their case has
10 gotten substantially stronger.

11 Your Honor, they even acknowledged that the
12 information that they dumped on us on September the 9th
13 has been material enough for them to take away stances,
14 pretrial stances that we, or pretrial potential
15 resolutions of the case that we had talked about before.
16 Our position is, as important as this case is, the State
17 should not be in a posture or should not be able to be in
18 a posture where they're moving forward from a trial delay
19 for a few terms versus a potential life sentence. We are
20 asking a premium on justice and my client's
21 constitutional rights, Your Honor. A few months delay
22 only prejudices my client, and the unavailability of the
23 State's leading investigator is not the fault of my
24 client and it's our position that Mr. Thomas is in fact
25 entitled to every constitutional safeguard.

1 If we move forward, Your Honor, it basically
2 threatens to undermine the basic constitutional precepts.
3 He has a right and as a result we are, we believe that
4 moving forward would deny my client effective assistance
5 of counsel and as a result of all of that, Your Honor,
6 that we believe that that data dump does not give us
7 opportunity, under the circumstances of all of the mental
8 health things that we had to take care of, does not give
9 us the opportunity to thoroughly counter some of this
10 information that was presented. And, Your Honor, that is
11 in addition to the more important issue of not having the
12 lead investigator and the cumulative information that we
13 want to share with you in chambers on the record.

14 THE COURT: Ms. Fuller.

15 MS. FULLER: Thank you, Your Honor. Your Honor,
16 just so you have full background in this case, as you
17 know I primarily practice in Lexington so I'm just on to
18 assist in this case, but when I did come on back on April
19 2nd is when we gave defense counsel trial notice for
20 October 7th. If you remember, roughly around that time
21 is when we received the six month calendar so we had an
22 idea of when the next term in Edgefield would be. So
23 from that date April 2nd is when he had, he was put on
24 notice as well as reciprocal Rule 5 of this case.

25 On May 9th in an effort to make sure defense counsel

1 had all discovery in this case since the case has had
2 several hands, I know you know we had former prosecutors
3 leave out here and they initially had this case, on May
4 9th my paralegal and I put together everything that we
5 had since everything was kind of all over the place and
6 we turned over 315 pages and 12 disks at that time and
7 the message to defense counsel through his paralegal was
8 let me know if there's anything in there that you notice
9 that you're missing. I have done my due diligence, so
10 has Mr. McNair to go through and make sure we have
11 everything law enforcement has, but if there's anything
12 that you're requesting in advance of trial, please let us
13 know. We didn't get any responses.

14 On July 16th we turned over additional four pages of
15 discovery. So I don't want you to think that this was a
16 data dump 30 days before trial. That's not my practice.
17 On July 16th we turned over an additional four pages. On
18 July 24th of 2019 we turned over an additional 58 pages,
19 of course, discovering things that are out there. On
20 August 28th we turned over an additional seven pages of
21 discovery as well as autopsy photos that we didn't have.
22 It took us a while to get them since Dr. Ross retired and
23 went to Charleston and it was an older case, as well as a
24 disk from SLED.

25 On September 5th we turned over five pages along

1 with the rest of that interview and that was dated
2 September 5th of 2019, Your Honor, so a little over a
3 month ago. Particularly with the interview we always had
4 a portion of it and from our review of the case back in
5 April and May I made several requests to law enforcement,
6 hey, is this the entire reporting? Because I don't - it
7 starts kind of in the middle of it. I think when you
8 received it, you would have had two audio files on there.
9 It wasn't until preparing the case for trial and
10 typically for murder cases we set out four weeks prior to
11 to sit down and really hammer it down and focus in on it.
12 We're not preparing it for three solid years. We
13 wouldn't try anything if that's what we did. So that's
14 when our Investigator Quattlebaum was over there and
15 noticed that there was an interview disk on their server
16 labeled interview one and, of course, that gave us
17 concern because we've been asking for all of it.

18 My paralegal sat down with the file. Former
19 paralegals sat down. We've gone through it. This was
20 just an oversight. As soon as we obtained that second
21 part of that first portion of the interview, we turned
22 that over. What defense counsel had for nearly three
23 years though were the notes from that interview which has
24 been in the officer's report. It gives you a summary of
25 what he said in the car. It gives you a summary of what

1 he said in the interview, just didn't have the actual
2 audio recording. So I will tell the Court on September
3 5th once we discovered it that was provided to defense
4 counsel and that's a month prior to trial which I believe
5 is plenty of time to listen to a 45 minute audio.

6 On September 9th we turned over another 11 pages
7 including a video that we just discovered from meeting
8 with a witness that she recorded the fire. Her grandson
9 did. He was curious and he recorded it driving down the
10 road. Law enforcement didn't know about it. It's not
11 something the grandson said. It's something we didn't
12 know. As soon as we got it we turned it over. On
13 September 10th we turned over an additional three pages
14 of discovery. On September 20th we turned over an
15 additional 77 pages of discovery. I believe this may be
16 the updated SLED chain of custody, and those are roughly
17 50, 60 pages long.

18 Once we - once preparing for trial, meeting with
19 Lieutenant Nates, she mentioned that for some reason back
20 then the particle lifts that were swabbed of the other
21 clothing items that they had in their possession back
22 then, it wasn't tested and so at that point I said, well,
23 we have enough time before trial. Can you get this done?
24 And she said if I get the items that day, I'll go ahead
25 and test them. What they did three years ago once they

1 had the pants tested and that came back positive for
2 gunshot residue, Your Honor, so for three years which was
3 the basis of the arrest in December of '16 they had
4 knowledge that gunshot residue was in play. It's not any
5 new information per se because if they wanted a gunshot
6 residue expert, they could have had one because that was
7 gonna be evidence introduced. They were on notice of
8 that from December of '16 when the warrants were served.

9 On September 23rd an additional -- I misspoke on the
10 77 pages, Your Honor. That was not the SLED. The 77
11 pages on the 23rd was the SLED chain of custody. I
12 apologize. And then most recently the last set which was
13 110 pages, defense counsel requested all of the rap
14 sheets of the witnesses on our witness list and so
15 combine that with I think one additional summary made up
16 those 110. So those are essentially rap sheets of
17 witnesses on our witness list which we typically don't
18 have to turn over until they testify if we should call
19 them, but we turned everyone on our witness list, we
20 provided them with our witness list in advance which, of
21 course, is not required by the rules, we have done
22 everything we can by Mr. McNair calling him, giving him a
23 heads up of what's coming so it's not anything alarming.

24 If there was something extremely alarming, Your
25 Honor, the State would be standing before you saying,

1 hey, we just, I don't know, located a new fingerprint or
2 something which is not the case, but if it was something
3 that was truly alarming, we would be standing before you
4 probably in agreement with his request for continuance,
5 but nothing listed out is new per se. He listed out
6 potential new evidence of the forensic pathologist. He's
7 had the autopsy report since back then. He was free to
8 call the doctor preparing for trial last week. Dr. Ross
9 isn't - for all of the cases that I have had with her,
10 she's not someone that I prep throughout the three years.
11 She's someone I can call literally a week before trial
12 and review her report, just her phrasing on how she
13 explained her write up which, it's written in English but
14 for us it's plainer English when she actually talks to
15 you and I believe, I wasn't part of that conversation but
16 I'm assuming Mr. McNair just relayed specifically what
17 was written in her report how she would say it, explain
18 it which is something defense counsel has had for, I
19 mean, two and a half years, three years. He could have
20 called her himself and she would have said the same
21 thing. That's not new.

22 Key witness statement from Kayleigh Lewis that he
23 indicated he received on the 9th, the only thing that was
24 in there in the investigator's handwritten note that he's
25 had since initially on the case, I re-turned over in May

1 of this year just so we had everything, those all in his
2 handwritten notes, her name has always been in there.
3 Since she's a State witness in this case, we turned over
4 a summary of what she would testify in advance which we
5 technically could have waited to right before she took
6 the stand, Your Honor, because the rules allow us to do
7 that. We didn't. We turned it over a month in advance.
8 I don't see how we could be penalized for doing that when
9 we don't even have to when there was nothing necessarily
10 identifying the statement of the defendant, it's nothing
11 of that nature.

12 The alleged confession that was obtained by Steven
13 Glover, Steven Glover's name has been in discovery. His
14 statement was taken back in August, I want to say August
15 of 2017. That's been in the discovery. He's always had
16 knowledge of that. The additional specifics of who,
17 what, where, when, where you were sitting, all of that
18 information, he's an anticipated witness. We turned over
19 a witness statement in advance that the rules do not
20 require us to do a month before trial but we did. And I
21 don't see how we can be penalized for that either.

22 So, Your Honor, in terms of 7(c) I would completely
23 object and reject that any of those - any of that that
24 was turned over should be a reason for a continuance. I
25 mean, I believe counsel had plenty of time to prepare and

1 we gave - we normally don't have that much notice to give
2 of trial but we gave notice from April so all of these
3 names have been in there and he could have made request
4 of us but I think we went above and beyond so we don't
5 force a continuance. We want this case gone. It's been
6 almost three years. The family deserves closure.
7 Frankly the schedule out here, you know we only have
8 terms of court four times a year. I mean, a continuance
9 would push us back into January and, Your Honor, you and
10 I already have another trial in January in Lexington so
11 it's just gonna be problematic because I won't be
12 available for the next term of Court out here. We just
13 got that court calendar so then you're looking at April
14 maybe. I'm not sure when it is, but we're ready to go
15 forward. We'll be as accommodating as possible.

16 We understand Investigator Jimmy Smith isn't
17 available and should the defense had wished to call him
18 in their case in chief because there's nothing that says
19 we have to, I haven't - I'm sure he's gonna relay to you
20 what other material information, but anything we would
21 argue would probably be cumulative testimony and so I'm
22 not, I can't really say for sure what he's anticipating
23 him testifying to as his witness potentially because we
24 have expressed to the Court we can go forward without
25 him. We reviewed the necessary Rules of Evidence. We're

1 ready to go forward without him and we just really want
2 this case resolved.

3 I apologize for being long winded but this is
4 important and I'm really, really requesting, Your Honor,
5 that we go forward with trial. I think we can to
6 everything we can to protect the defendant's rights in
7 this and I think defense counsel has had sufficient time
8 to prepare for it.

9 MR. CHANDLER: Your Honor, if I may. Just, the
10 State starts, mentions that they will be penalized.
11 First of all, Your Honor, the State is not being
12 penalized for my client's constitutional rights being
13 protected. In fact, the only person who is actually
14 suffering any prejudice is my client for having to be
15 incarcerated for a few more months possibly.

16 With respect to Steven Glover, Your Honor, there's a
17 difference between knowing somebody is being interviewed
18 and Steven Glover now is relaying a direct admission of
19 guilt. I am not gonna say that the State is being
20 disingenuous in their description of Steven Glover's
21 testimony, but just to say that they know that they spoke
22 with him as opposed to the new evidence of him hearing my
23 client admit some level of guilt is an entirely different
24 thing and that's the same thing with the GSR.

25 Your Honor, the GSR is actually, the new GSR is on a

1 different article of clothing. To say that we know that
2 GSR is in play, that's disingenuous, Your Honor, because
3 if you don't have it tested and you test it less than 30
4 days out and dump it on the defense, we're not saying
5 that they're at fault. They're working their case up.
6 They're doing their job. I said it before, this is not
7 saying anything bad about the State because the State
8 doesn't need to defend themselves. Who needs defense is
9 my client whose constitutional rights are at risk and one
10 of the constitutional rights just happens to be his right
11 to confront his accuser and that happens to be a lead
12 investigator where there are times where the only
13 interaction is between him and Mr. -- And I only mention
14 that because she mentioned it -- is my client and the
15 lead investigator Jimmy Smith.

16 With respect to the data dump, we're not trying to
17 blame the State for getting information late and for
18 working up their case when there were some gaps in their
19 case, but all we're saying is that is a lot. You've
20 heard her run through a lot of information. We're not
21 talking about fault. We're talking about the fact that
22 all of that came through after a status conference where
23 everything seemed to be settled. They sit down and look
24 at their case and then they see that there's a lot of
25 holes in it and they fill it up. It's not the duty of my

1 client to test GSR when we know that the State has to
2 test it. But if the State tests it at the last minute or
3 gets some different opinion evidence from an expert like
4 Dr. Ross, obviously we need time to investigate it.

5 Again, the main thrust of our motion is the more
6 critical motion regarding the critical witness, the lead
7 investigator. But we believe that there are Rule 7(c)
8 violations alone to warrant a continuance in this case.
9 And if the State really thought it was so important and
10 the delay was so important, why would they wait? I have
11 represented him for three years. They wait 30 days out
12 to start getting all of this information. If the concern
13 for the victims were - the State could have - we've sat
14 down and gone over evidence and that date of notice and
15 we came to this date. We agreed to this date. This
16 wasn't the State saying this date. We talked and we
17 agreed to this date because I was looking at the evidence
18 that they have and lo and behold I did not know that the
19 State was going to reinvestigate the case and dump so
20 much information and key information of key witnesses and
21 reintroducing and having testing of key items.

22 Your Honor, after we got the GSR report, we
23 literally went to the evidence locker with my client to
24 look at his clothes with the State witnesses and asked is
25 there anything else. Because my gosh, we don't know.

1 What else have y'all sent up? Because if this is the way
2 they're operating, all I'm saying is, they can
3 investigate their case, but they can't investigate their
4 case at the last minute. Three years have passed.
5 They've investigated their case within a month before
6 trial and then dump this information and then talk about
7 how important this trial is. If it's that important, do
8 this a year ago. If it's that important, do it two years
9 ago. If it's that important, do it two and a half years
10 ago. My client deserves better. It's his life that's on
11 the line. Nobody else's. He's the only one that's
12 prejudiced by a delay and he's asking for it.

13 THE COURT: Okay. Let's talk specifics. The new
14 article of clothing that the GSR was found on, what
15 article of clothing are you talking about?

16 MS. FULLER: Yes, Your Honor. So Back in 2017 they
17 tested the pants he was wearing at the time that we
18 believe he was wearing during the murder. That was
19 tested back then and it came back positive for gunshot
20 residue. So I wasn't being disingenuous when I say
21 gunshot residue has always been in play because they
22 found it on his clothes. What was collected but the,
23 uhm, particle lifts from his shoes came back positive for
24 gunshot residue and then particle lifts from his shirt he
25 was wearing came back positive for gunshot residue.

1 MR. CHANDLER: Your Honor, the new the item was his
2 shirt.

3 MS. FULLER: The new item --

4 MR. CHANDLER: The new item was his shirt.

5 MS. FULLER: -- are the pants - are the shoes, the
6 shirt and the head band were the new items in the report
7 that all came back positive for gunshot residue.

8 THE COURT: All right. Is there a reason that those
9 items weren't tested sooner?

10 MS. FULLER: Your Honor, I can't speak for a former
11 prosecutor who had the case back then. I can only speak
12 for myself when I reviewed it getting ready for trial
13 realizing that it was since particles were done and for
14 some reason it wasn't tested. I can't speak for that.

15 THE COURT: Okay. Can you speak to or just so that
16 I have an idea about how relevant potentially this new
17 evidence is, what's the State alleging in terms of a
18 murder weapon that was used?

19 MS. FULLER: The murder weapon we allege that we
20 believe was used was a .22 rifle, long rifle. The
21 clothes in terms of our timeline when we believe they
22 last had communication with anyone and which would be an
23 hour or so prior to the defendant showing up at a gas
24 station on camera wearing these clothes. I believe when
25 the clothes were seized, there was some confusion in

1 terms of which one -- I'm not sure what the breakdown was
2 but all of them were sent to SLED. When I pulled up the
3 video, I took a snip, I sent it to SLED and I said this
4 is the long shirt. She opened all of them. She said
5 this is the only one that matches the video and that's
6 what she tested. I think there was some confusion back
7 then and in an effort to get what she could get tested
8 they only tested the pants. I don't know who made the
9 decision not to test everything. They had it. They did
10 the particle lifts in 2016. Some particles were
11 collected except for on the shirts. The particles were
12 collected on the shoes back then and they were sealed and
13 particles were collected on the do rag that he was
14 wearing at the time of the video and those were sealed.
15 It wasn't until now they weren't.

16 The report, the initial GSR report defense counsel
17 has had since December and so on there it says literally
18 the items that were seized, particles done, no testing
19 done, no analysis performed. So it's just when I really
20 dived in to look at it that there's no analysis
21 performed. What happened. And I asked her is this
22 something that we need to delay the case for. Is this
23 something gun, trace evidence can that be tested in a
24 certain amount of time period. She said yes. You can
25 get it done within ten days and so that's when she did

1 it.

2 THE COURT: How many shots do y'all think were
3 fired?

4 MS. FULLER: We know for sure that six shots were
5 fired.

6 THE COURT: How many?

7 MS. FULLER: Six.

8 THE COURT: Six?

9 MS. FULLER: Yes. The male victim is deceased. He
10 had four gunshot wounds and the female had two.

11 THE COURT: Okay. So obviously this isn't like the
12 kind of .22 that you give a kid that just has a breach
13 load and you put in a single shot? It would be something
14 where you chamber rounds?

15 MS. FULLER: We believe. Yes.

16 THE COURT: Okay. All right. And as it relates to
17 the alleged confession from Steven Glover --

18 MS. FULLER: Yes, Your Honor. I'm gonna hand you
19 the investigator's report because I don't like being
20 accused of being disingenuous so I'm just gonna have you
21 read -- May I approach?

22 THE COURT: Sure.

23 MS. FULLER: -- what was -- I apologize. This is,
24 it just has highlights, but no notes on it -- what was
25 summarized by the investigator back on August 16th, 2017.

1 What defense is referring to is receiving a summary by
2 our investigator in trial prep which just elaborates more
3 on what was recorded there. (Proffering.)

4 THE COURT: So is the document that you have handed
5 me, this was previously provided to the defense?

6 MS. FULLER: It was provided back when the case was
7 originally made and then my practice is to turn it over
8 all again and so that's why the top page stamped where it
9 says, I believe May 9th maybe, would have been when it
10 was all re-provided, reorganized so we can all - some
11 things he has didn't have page numbers on it so we can
12 talk about the same thing at the same time if he needs
13 to. So he had that back then and then he got it again in
14 May this year.

15 MR. CHANDLER: Your Honor, I would like to see that.
16 I don't know what you're reading and I just --

17 THE COURT: Sorry.

18 MR. CHANDLER: That's all right.

19 THE COURT: (Proffering.) So what was provided on
20 September the 9th per Mr. Chandler's motion was a more
21 detailed statement from Mr. Glover?

22 MS. FULLER: Yes, Your Honor, and I do have that
23 summary if you want to look at that.

24 THE COURT: Okay.

25 MR. CHANDLER: Then I would like to look at it,

1 too.

2 THE COURT: Go ahead and let Mr. Chandler take a
3 look at it, Solicitor.

4 MS. FULLER: This is what he would have received
5 from our -- We met with Steven Glover on September 5th
6 preparing for trial and this is something that was
7 provided to him on September 9th of 2019 page 2 of 11 of
8 discovery.

9 THE COURT: Okay. So the documents that you're
10 handing to him now, you said that those were created
11 September the 5th or they were --

12 MR. CHANDLER: September the 9th.

13 MS. FULLER: They were prepared - they were notes
14 typed up by our investigator after our interview on the
15 5th.

16 THE COURT: Okay.

17 MS. FULLER: Yes. But it was provided, a full
18 summary of a bunch of different people we spoke to we
19 turned over at one time on the 9th.

20 THE COURT: So this isn't a document that's existed
21 for three years what Mr. Chandler is currently looking
22 at?

23 MS. FULLER: No. This just was -- Again, we're not
24 necessarily required to, but in advance of trial to
25 streamline things so there isn't an argument that we just

1 turned over the morning of, I know some prosecutors do,
2 as soon as they call the witness, they'll hand you a
3 summary of our trial prep interview, we turned it over a
4 month in advance, Your Honor.

5 MR. CHANDLER: Your Honor, the second to the last
6 statement is significantly different and you will see the
7 difference. The second to the last bullet point is
8 significantly different from what you read earlier.

9 MS. FULLER: Your Honor, I don't think I need to
10 made an argument about witness statements and what they
11 found following, follow up, while we're following up on
12 questions. (Proffering.)

13 THE COURT: The second to the last on the first
14 page, Mr. Chandler?

15 MR. CHANDLER: On the second -- the second to last
16 bullet point. Significantly different, Your Honor, and
17 frankly material. You go from a hearsay statement to I
18 heard directly and I think that's significant. Glover is
19 talking about other people's statements that we first
20 received and all we knew up until less than a month
21 before trial was Glover's relaying hearsay statements and
22 now he is offering a first hand account less than a month
23 before trial.

24 MS. FULLER: I would disagree with that
25 interpretation of the summary and so did Steven Glover.

1 We asked him. He told us, he was like, yeah, I told the
2 investigators all this, but the details we got into
3 because we need to know, you know, who, what, where,
4 when, why. So I would disagree with that interpretation
5 of the officer's notes.

6 THE COURT: I would tend to agree with you,
7 Solicitor. I'm looking at the narrative by Investigator
8 Smith and it seems to relate to a first person account
9 from Mr. Glover and then Mr. Glover relates again the
10 first person account in the next to last bullet point on
11 the interview of September the 5th of 2019. So let's do
12 this. We'll go ahead and take a break. I'll ask my
13 court reporter to set up in chambers and I'll have a
14 private conversation with Mr. Chandler and we will see
15 where this is going.

16 As it relates to the other items that Mr. Chandler
17 takes issue with, the other discovery that was provided,
18 Mr. Chandler, I respect your position, but I don't think
19 that those are so surprising as to warrant necessarily
20 continuing this down the road. The Solicitor has pointed
21 out providing a detailed witness statement prior to the
22 witness testifying. I know in some parts of this state
23 they don't even prepare, they don't even write it down.
24 The attorney takes personal notes and that's it when they
25 interview these witnesses. So the fact that maybe you

1 got some of these statements that are more detailed from
2 them when they actually interviewed the witnesses early
3 last month I don't necessarily see that as a reason to
4 continue the case.

5 And again, the additional GSR, if we're talking
6 about nine shots being fired from a .22, I'm sorry, six
7 shots being fired, at least six from a .22, the fact that
8 GSR is discovered on the pants and the head band and the
9 shirt and the shoes, I mean, it was on the pants so I
10 think that any additional GSR testing, that simply
11 indicates cumulative evidence as opposed to something
12 that's brand new. If you had gotten perhaps a GSR sample
13 from the pants that was negative for GSR and then all of
14 a sudden they test the shirt and the do-rag or the shoes
15 and it comes back as positive, that might be a different
16 matter entirely because that changes the posture of the
17 case, but in this case you already have a positive result
18 for GSR. It shouldn't be a surprise especially if six
19 shots are fired from admittedly a low caliber weapon. If
20 six shots are fired, you're gonna get more GSR than if
21 you only fired perhaps one shot from a small caliber
22 weapon so I don't know that those issues are so new or
23 surprising to the defense as to warrant a continuance,
24 but we'll go off the record out here. You have one other
25 thing, Ms. Fuller?

1 MS. FULLER: Yes, Your Honor. I know you're going
2 off the record ex parte. Should I argue my argument in
3 terms of 7(b) now or after you have spoken to him?

4 THE COURT: Let me, so I can get a feel for what he
5 is --

6 MS. FULLER: Okay.

7 THE COURT: -- saying and what his position is, why
8 Mr. Smith is so absolutely necessary. The biggest
9 problem I always have in this kind of a situation is
10 obviously after meeting with counsel I have questions
11 about, okay, well, this, that, and the other but I'm
12 somewhat between a rock and a hard place in that I'm not
13 able to be as candid or as inquisitive out here as I am
14 back there but we'll take it as it comes. Let me talk to
15 him first.

16 MS. FULLER: Okay. Thank you, Your Honor. Your
17 Honor, do you need me to make copies of that and make it
18 a part of the record?

19 THE COURT: Yeah. What we're gonna do, if you
20 could, go ahead and make copies of the May 9th document
21 and the September 9th documents. Those will be Court's
22 2, and then we'll introduce the report from doctor
23 whoever at DMH as Court's 1.

24 MS. FULLER: Thank you, Your Honor.

25 (Whereupon, Court's Exhibits #1 and #2 marked for

1 identification.)

2 THE COURT: We'll let the court reporter go ahead
3 and do that and break down and set up back in the
4 chambers. We'll be at ease.

5 (Whereupon, the following proceedings were conducted
6 in chambers ex parte between the Court and defense
7 counsel.)

8 THE COURT: Okay. We'll go on the record. We're
9 going on the record and the record will reflect that this
10 conversation is taking place ex parte in chambers in the
11 Edgefield Courthouse. Mr. Chandler is here and it's Ben
12 -- What's your name again, sir?

13 MR. MOORE: Moore.

14 THE COURT: Moore.

15 MR. MOORE: Like Benjamin Moore Paint.

16 THE COURT: Okay.

17 MR. MOORE: You'll remember it forever now.

18 THE COURT: I will. Mr. Moore is here and, of
19 course, the purpose of this hearing is to let Mr.
20 Chandler tell me about Mr. Smith and the reasons that the
21 defense feels that his presence here is key so I'll turn
22 it over to you.

23 MR. CHANDLER: Your Honor, I have Benjamin Moore
24 here. We split up duties. We knew this was a very
25 important part of what we had to do today to talk about

1 the importance of Jimmy Smith. I appreciate the
2 opportunity to do this in chambers because we do believe
3 this is key. I will tell you, Your Honor, that Jimmy
4 makes a great defense witness so much that when the
5 initial charges, financial transaction card fraud was
6 presented at the preliminary hearing, we had the case
7 dismissed because of his, some of the issues that we're
8 gonna talk about as to some of the factual issues that he
9 would get mixed up. Some of it is gonna be very key and
10 the cumulative nature of it goes directly, Your Honor,
11 it's our position, the criminal nature of it goes
12 directly to our challenging the caliber of the
13 investigation and pursuant to Kyle versus Whitman which
14 is a Supreme Court case, that the conduct of defendant's,
15 the conduct of defense lawyers is to be able to discredit
16 the caliber of the investigation or even the decision to
17 charge the defendant, and we believe that without that
18 opportunity that this case is severely inhibited and it
19 could be cured easily with a few months compared to the
20 three years that the State has already delayed this case
21 and I would turn it over to Benjamin Moore with the
22 history.

23 THE COURT: Sure. Go ahead and give me the
24 specifics, if you could.

25 MR. MOORE: Okay, Your Honor. As we have discussed,

1 as you probably know at this point the State has a strong
2 case and really most of our defense would be going to
3 criticizing the investigation basically saying that they
4 got off on the wrong foot, that they got tunnel vision
5 and looked at only evidence that was favorable to their
6 case, and that the investigation wasn't done very well.
7 And I know Your Honor has seen this many times, but it is
8 one of these situations where to be quite frank here in
9 chambers, you know, there's not an alibi, there's not any
10 real realistic thing that anybody else did it or anything
11 like this. This is one of them that the State
12 investigation can't prove their case because they didn't
13 go do a good job and I know we've all been there but to
14 be quite honest --

15 THE COURT: I've defended those cases as well so I
16 know exactly what you're talking about.

17 MR. MOORE: Yes. Right. Right. So I'll get to
18 really the biggest thing. You heard that the clothing is
19 very important. In Investigator Smith's report he
20 initially says that our client was wearing blue jeans on
21 the video. As you heard it's sweat pants that were
22 tested and came back with the GSR, but he actually puts
23 in his report that the defendant was wearing blue jeans
24 not sweat pants and he's the only one to say that. We
25 don't know - he's the only source of that. We do have

1 some notes from Turner. He did kind of a chronology, not
2 really necessarily a report but a SLED chronology of his
3 involvement, but Smith is the only source of that.

4 To go further, Mr. Thomas, the defendant, the
5 evidence will show that he went to this convenient store.
6 He's on the convenient store video and obviously the
7 clothing in question is later tested, but initially
8 Investigator Smith says it's blue jeans at the store.
9 Mr. Thomas is later seen on video at some apartment
10 projects. There's a video there. And Investigator Smith
11 says that the defendant has changed clothes on that video
12 and that's in his report. And obviously, and then later
13 says that, in his report, that the clothes that were
14 tested were the ones seen on the video from the projects,
15 video two.

16 So the ability to bring into question the clothing
17 from which the GSR - obviously earlier in the timeline he
18 has, we can bring that out to the jury to have some doubt
19 that he had different clothing. They're alleging that
20 he's going from the shooting and the first place that
21 they get him on the video camera is the store and he's
22 saying that they tested the clothing that he changed into
23 at the projects, then what's coming positive for GSR is
24 the clothes he changed into, not the clothes he would
25 have had immediately following the alleged murder. So

1 this is a big deal and it doesn't come from any other
2 source than Investigator Smith from his report and we
3 think that is obviously a huge deal.

4 Beyond that there's all kinds of stuff that we would
5 like to cross examine him on. You heard the Solicitor
6 talk about the differences in the statement. Mr. Glover
7 originally said he did tell Investigator Smith that.
8 Well, obviously we would like to question, cross examine
9 him about that scenario. That's just something that was
10 just brought up. We would like to cross examine him
11 about why the GSR results, the things that weren't
12 tested, why he didn't send them to testing when he got
13 the results back and it was only the pants. We actually
14 think GSR only being on the pants is very different from
15 GSR being on all the clothing. And the defendant gave a
16 statement that he had been shooting, he's kind of vague,
17 but basically a few days prior and that's where the
18 gunshot residue comes from.

19 Well, originally a big part of our defense was going
20 to be if the GSR was only on the pants, was that he was
21 shooting another day and he wasn't wearing the pants in
22 question, but he wasn't wearing the same shirt, hat,
23 shoes, and it was consistent with his story that he was
24 shooting another day. So I know, I get Your Honor's
25 point about it not being a huge surprise but it did - we

1 did have - we were thinking we had something there. We
2 really did. Plus with this other stuff. And we weren't
3 really looking to challenge or get any expert involved
4 because we like the GSR results we had originally. We
5 thought it was actually advantageous. We would like to
6 ask him why an arson expert was not consulted or used to
7 determine if the fire was intentional or accidental.

8 Another point of this is he has initial evidence
9 where he has the statement from the defendant, he has the
10 videos we've talked about, and he has some timeline
11 witnesses that are very favorable to the State that
12 basically puts the defendant in the victim's car on
13 camera soon after like when their cell phones go dead and
14 so forth, and a good timeline would put him basically
15 going back to the scene and basically the theory is that
16 he shot them in the early afternoon, returned to the
17 scene and burned the house down.

18 But anyway, they had all of that but Investigator
19 Smith did not believe he had probable cause at that point
20 to make an arrest. He waited. He was concerned, from
21 his report it shows that he was concerned about flight
22 and the defendant fleeing, but he doesn't - he waits for
23 the GSR to make the arrest and quite frankly part of our
24 defense is if he had hesitation to act on the probable
25 cause at that point, then the jury should look less

1 favorably or take that into account when they look at the
2 timeline evidence, the video evidence, and the
3 defendant's statement which we actually think is the
4 strongest part of their case. We think the GSR is a nice
5 bonus obviously, but we actually believe that his, our
6 defendant's statement and that timeline and being in the
7 victim's vehicle is really what kills us.

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

15 THE COURT: Well, let me ask you about that. How
16 long did it take for the GSR to come back on the pants?
17 What was the time frame?

18 MR. MOORE: The time frame was, this happened
19 October 9th, they collected the pants on October 13th,
20 and it came back, I believe --

21 THE COURT: In December?

22 MR. MOORE: It was in December. Mid December and
23 that's when they made the arrest. They arrested him on
24 the financial transaction card fraud because they wanted
25 to get him locked up. They were concerned about him

1 fleeing, but they hesitated on the other charges until
2 they got the GSR results. Now, we think, as I pointed
3 out earlier, only getting it on the pants, arguably does
4 that help with probable cause or not? Because you
5 certainly could think that he wasn't wearing the other
6 pants. It seems like you would want the other stuff to
7 test to confirm.

8 THE COURT: Sure.

9 MR. MOORE: But that's more kind of, it's the kind
10 of stuff we would like to talk about. As the Solicitor
11 mentioned, the Kayleigh Lewis witness who is a very
12 strong witness on their timeline says that the victims
13 were supposed to meet her at 2:30 to watch a ball game
14 and never showed up. She was in his notes as the
15 Solicitor mentioned. We would certainly like to cross
16 examine him about why he didn't get a statement from her
17 and certainly we're gonna be saying that she's coming
18 late in the game with almost this too good to be true
19 statement. And actually the statement that led to the
20 evaluation, I haven't personally seen, and I think that's
21 from someone named Randy Deas, about the defendant
22 hearing voices, but he was also in his list and it begs
23 the question why wasn't the person interviewed.
24 Obviously we would say they're on the victims' side.
25 They're making things up at the last minute and that type

1 of thing.

2 THE COURT: So was Lewis on the investigator's list,
3 witness list, and what does she testify to again?

4 MR. MOORE: She was in the investigator's notes and
5 we have his written notes. He has very poor handwriting
6 and Investigator Smith did tell me he did type them up to
7 the Solicitor that I and Mr. Chandler requested. We
8 haven't gotten them yet. I'm sure that's something that
9 can be cured. But Kayleigh Lewis is mentioned in his
10 notes, but we're not aware of any kind of statement until
11 the September 5th interview that we received the contents
12 of September 9th so... But she is a big witness because
13 she's right in the middle of that timeline about the time
14 they believe he committed the murder, maybe half an hour
15 before they were supposed to be at her house to watch the
16 South Carolina/Georgia game that was played on Sunday
17 because of the hurricane. I first thought what in the
18 world is this woman saying, but I looked it up and I
19 actually went to that game and I was like, yeah. She's
20 talking about a Carolina game on a Sunday, I was like,
21 woo.

22 THE COURT: I think I was there, too.

23 MR. MOORE: Yeah. Anyway, we have issues about the
24 defendant's interviews. They interview him during an
25 interrogation without Miranda. Probably you heard it but

1 he does leave afterwards but they arrest him the next day
2 and but certainly at least where the jury, you know,
3 you're working your way around his Miranda, you know, and
4 you have probable cause to arrest him but you made sure
5 you didn't because you didn't want to Mirandize him
6 but...

7 THE COURT: Was that the December interview that was
8 recorded that we're talking about, the tape recording?

9 MR. MOORE: This interview happened October 13th and
10 that's the one that - he interviewed the defendant
11 October 11th, a preliminary phone interview before SLED
12 Agent Turner was on the case. SLED Agent Turner comes on
13 the case on the 13th, they interview the defendant and
14 that's the recorded interview that we're talking about
15 where we recently got the first half of which is really
16 the meat of it where he says the really damaging things
17 and as she stated, the Solicitor stated that the things
18 were in the notes, but part of our looking at it very
19 differently getting it on audio our client saying it is
20 Investigator Smith had a lot of things wrong in his
21 report and we felt like it was only in his report we
22 could do a lot to discredit him so that's why there was a
23 big difference getting our guy saying it as opposed to it
24 just being in Investigator Smith's report because he does
25 have some things that are factually wrong.

1 When we went to go through the evidence locker and
2 looked at the evidence, I asked him if the car keys were
3 ever found. Our theory is our client said, hey, I went
4 back and gave them the car keys. He says they weren't.
5 We go through the evidence. I actually pulled them out
6 and there were cars keys in evidence. Just a lot, a lot
7 that we would like to cross examine him on. There is a
8 reference to taking a picture of the defendant's body to
9 see if he had any burns from basically setting the house
10 on fire and there were none. Those pictures have never
11 evidently haven't been found, haven't gotten an answer on
12 that, but we certainly would like to cross examine him
13 and if those pictures are gone, we would love to cross
14 examine him about what happened to them.

15 THE COURT: When was that photo supposedly taken?

16 MR. MOORE: It was in October.

17 THE COURT: After the SLED agent got involved?

18 MR. MOORE: The SLED agent was involved.

19 THE COURT: Okay.

20 MR. MOORE: The SLED agent was involved. Actually
21 that would be another thing to cross Smith on. It's in
22 the SLED agent's notes, but not in Investigator Smith's
23 report.

24 THE COURT: The photo was in the SLED agent's notes
25 but not in Smith's?

1 MR. MOORE: Yes. And the photo as far as we know is
2 lost. They may have it.

3 THE COURT: Anything else big that you can relay?

4 MR. MOORE: One thing that's in his notes, the
5 timeline is just huge to this case. It's really the
6 strength of their case in my opinion. In his notes
7 there's a witness, a neighbor who saw the defendant, says
8 that she saw the defendant's car drive by. I mean the
9 victim's car driving by, but obviously they believe that
10 the defendant was in it and in his notes he has the time
11 at 16:15 which would be about 4:15 in the afternoon which
12 would be a lot better for us but in his report he has it
13 as 18:15 or 6:15 p.m.

14 THE COURT: Well, 6:15, I mean, that could have just
15 been a --

16 MR. MOORE: It could have been, but we would like to
17 cross examine him.

18 THE COURT: 16:15 an opposed to 6:15, I mean, that's
19 --

20 MR. MOORE: Right. Well, there's a lot of things we
21 would like to cross examine him about. And he could also
22 - he's the one who can establish our client was
23 cooperative in the beginning. He's the one who told him
24 that he was on the 10/11 statement about being in the,
25 using the victims' credit card, using the victims' car,

1 that he was - that he did go buy cigarettes and that
2 statement was - he's the only one who can confirm that
3 the victim - the defendant gave that statement and we
4 think it's important to show that the defendant has been
5 consistent in what he's saying from the beginning from
6 the initial interview on the 11th and on the subsequent
7 interview on the 13th and really to us but...

8 MR. CHANDLER: Your Honor, those are statements that
9 stipulations just don't really, are not as effective for
10 the purposes of us effectively representing Mr. Thomas.

11 THE COURT: Yeah. I hear you. The flip side of
12 that is though that to the extent that Mr. Smith or
13 Investigator Smith would be questioned about this, he
14 would probably have pretty good experience. This guy
15 sounds like he's somewhat of a veteran so he's gonna have
16 an explanation for the discrepancies and so what I'm
17 thinking about potentially doing is just giving y'all a
18 great deal more latitude in terms of questioning the SLED
19 agent, allowing some of the potentially hearsay type
20 stuff from the incident report, allow that to come in
21 through other witnesses and I would simply have to go out
22 there and explain to the State that, you know, look,
23 there may be times where they're gonna be seeking to
24 introduce something which, you know, is in the gray area
25 of the law as opposed to something, you know, black and

1 white. I'm gonna let them go into the gray a little bit
2 more here than I otherwise would.

3 MR. CHANDLER: Your Honor, if I may.

4 THE COURT: Sure.

5 MR. CHANDLER: He's not that veteran. That's why we
6 got it dismissed at the prelims and this guy is gonna
7 foul this up and this is important for our client and the
8 only remedy is to try it a couple of months later, Your
9 Honor, and this is, you know, Your Honor, there's a lot
10 weighing on us. We've done everything. We've contorted
11 ourselves, especially with the DMH stuff to speed
12 everything up and I just think that this whole process
13 has lost focus on my client's rights.

14 THE COURT: Well, that's my point though is that if
15 you're trying - if you're putting the investigation on
16 trial, having the person that you're on trial, letting
17 that be a TIA, you're putting the investigation on trial
18 in many respects works to your benefit because they're
19 not in a position to refute a lot of what you're gonna be
20 bringing out and so, you know --

21 MR. CHANDLER: Jimmy Smith is not gonna effectively
22 refute it. This guy is the guy that we got the prelim
23 won on because he can't. He will fumble it up and he
24 will jumble it up and that's why we need him. We need
25 him there. I don't want to put some guy on trial who's

1 -- Look, if I'm the prosecutor who's fighting for his
2 life. You know what I'm saying? Yeah. And the defense
3 can't put him on a man who's fighting for his life on
4 trial. And again, Your Honor, the simple remedy is to
5 give us these months in light of all of this other stuff
6 going on. We've been bending over backwards. My poor
7 client is here involved in all this stuff we're doing.
8 We're introducing this new stuff. We're hearing about
9 new stuff and I get it, but there is a simple remedy
10 here, Your Honor, and there's a whole lot -- You know
11 there's a whole lot riding on it.

12 THE COURT: I understand. The flip side of it is
13 though if they're gonna be producing first person
14 witnesses, then you will have the benefit of crossing
15 those witnesses and again to take this conversation full
16 circle to the extent that you can put Smith on trial for
17 shoddy a investigation, it's better for your client if
18 that's a TIA as opposed to Smith being here. I really
19 don't --

20 MR. CHANDLER: Your Honor, I'm not - Your Honor, I'm
21 really --

22 MR. MOORE: Your Honor, this is Edgefield, a small
23 town. People know he's in the hospital. They're gonna
24 be sympathetic when we put him on trial.

25 MR. CHANDLER: Your Honor, it is not better. We

1 need him. He is the guy that we need. Jimmy is a friend
2 of mine, but Jimmy does not do well and when I knew he
3 was on the case, this is not my first rodeo with him, I
4 knew we were gonna do well in that prelim. I know what
5 -- This is who we need on the stand for the purposes of
6 protecting our client. Your Honor, the premium has to be
7 on my client's rights to the best defense.

8 THE COURT: And I don't disagree with that and I'm
9 gonna think about this and have a cigarette before I go
10 out there and give you a ruling, but I'm just telling you
11 the way that I'm kind of leaning here so that we can just
12 have this conversation back here and not have it out
13 there and let y'all respond so, you know, I'm not
14 definitively saying no to the continuance because I am
15 gonna reflect on it just a tad, and I hear what you're
16 saying about Smith and I hear that sometimes when you've
17 got a strong case against you, I hear you a hundred
18 percent. Sometimes when you've got a strong case, the
19 best thing that you can do is put something else on
20 trial, put somebody else on trial and that's the
21 investigation in this case.

22 MR. CHANDLER: So it really is all we have, Your
23 Honor. And, you know, in a case like this, Your Honor,
24 where all I'm asking is for a chance for my client to be
25 able to have the best defense. I think this really makes

1 me ineffective. It really doesn't allow me to do my best
2 for my client.

3 THE COURT: It sounds like you're doing everything
4 that you are being asked. Whether or not I continue it
5 is entirely, you know, that's my call.

6 MR. CHANDLER: Without any question. And I'm not
7 even talking about, you know, certainly, and I hope it
8 didn't come across as a threat, Your Honor.

9 THE COURT: Oh, no.

10 MR. CHANDLER: Your Honor, I know your interest in
11 the whole process you have to be fair but, Your Honor,
12 the flip side, my client is the only one prejudiced by
13 this delay. He's the only one prejudiced by this delay
14 and the premium of saying we've got to do this now as
15 opposed to three or four months kind of flies - it's
16 almost laughable when you talk about three years passing
17 and the State really putting focus on this case in the
18 last month to speed this up at this time and in light of
19 Jimmy Smith's absence.

20 THE COURT: Yeah. I'm just taking down these items
21 here and I'm doing it back here because I can't do it out
22 there.

23 MR. CHANDLER: Yes.

24 THE COURT: You know, the blue jeans thing.

25 MR. CHANDLER: That's huge. Yeah. That's huge

1 because you said it. The GSR on the wrong clothes,
2 that's huge, Your Honor.

3 THE COURT: Well, these videos, and I haven't seen
4 them, but they're often grainy. You can't really tell
5 whether it's blue jeans. You can't really tell whether
6 it's sweat pants.

7 MR. CHANDLER: Not this video.

8 THE COURT: This is a clear one?

9 MR. CHANDLER: It's clear. It's clear. It's just -
10 and all we have is change of clothes. Your Honor, this
11 is huge. I mean, it really is. And one other thing,
12 Your Honor, and then I'm gonna pause. The rules, I read
13 the rules and they require that I swear under oath and I
14 just don't want to miss it so I just want to make it
15 clear that we swear under oath.

16 THE COURT: No problem.

17 MR. CHANDLER: Okay.

18 THE COURT: I'm taking y'all's representations as
19 being under oath so that's not a problem.

20 MR. CHANDLER: In that same way my position is that
21 this is not a delay tactic.

22 THE COURT: I agree.

23 MR. CHANDLER: This is clearly something that this
24 guy is material. This is our case. He is our case and I
25 think it really goes directly to the confrontation

1 clause. This is our case.

2 THE COURT: Okay. The Glover statement, I didn't
3 see any difference between those two statements.

4 MR. MOORE: Well, he originally says that he heard
5 other people saying that Thomas talked about doing the
6 murder. Now he's saying he heard it directly. Now, he
7 did say that he heard him say he got fed up, but he
8 didn't hear the - he originally said he heard the other
9 two people talking about that Thomas said that he killed
10 two people and burned the house down. Now he's saying,
11 he said that he heard it directly and he's saying that he
12 told Investigator Smith that in the first place.

13 THE COURT: Well, that's how it reads from Smith's
14 narrative that was introduced as Court's 2.

15 MR. MOORE: Well, there's also a statement, I
16 believe, that I could get for you. I don't believe I
17 brought it back with me. But there's a very short
18 written statement and I guess that would be another Jimmy
19 Smith special. A lot of what Jimmy puts in his report
20 isn't consistent with reality and I don't think it's -- I
21 think Jimmy's an honest guy but Jimmy writes weird things
22 in his reports. I don't know how he thinks the guy was
23 wearing blue jeans, but I really -- I don't know. If you
24 watch this video, you'll be like no, no. It's clear.

25 MR. CHANDLER: The TIA is just a non starter. It

1 and - usually the context is that the witness is
2 absolutely necessary because maybe they're an alibi
3 witness. The rule, if you really look at it,
4 contemplates the witness being essential to definitively
5 prove something affirmative like Thomas was not present
6 at the scene of the crime, or I saw somebody else not
7 Thomas go into that house with a .22 rile, or something
8 like that as opposed to a witness who --

9 MR. CHANDLER: Talks about it?

10 THE COURT: -- is a lousy cop is what you're
11 saying.

12 MR. CHANDLER: Oh, no. The caliber of the
13 investigation. That's why we call it the caliber of the
14 investigation is a common defense tactic. It is used.
15 It's allowed and that's what we are operating under.

16 THE COURT: Let me see that. Do you have that case?

17 MR. CHANDLER: Yes (proffering.)

18 THE COURT: I would like to take a look at it.

19 MR. CHANDLER: And I highlighted the relevant
20 portion on page 11. And this is a Brady issue.

21 THE COURT: I get you. I understand. What I'm
22 still struggling with is that, and I know you're telling
23 me it's a strong case against your guy, that he did it
24 and usually the witness would be a fact witness or some
25 expert or somebody who has become unavailable as opposed

1 to just a cop who did a lousy job and if it's - that's
2 what I'm having a hard time with.

3 MR. CHANDLER: There's a fact guy there that he was
4 wearing jeans. There's a fact guy there that the pants
5 test were tested may not be the pants with the GSR.
6 That's a fact that's out there that only he - that we can
7 bring out with him.

8 THE COURT: I will let you do it with other
9 witnesses I'm telling you.

10 MR. CHANDLER: Your Honor, you're tying my hands
11 behind my back.

12 THE COURT: I'm actually I'm trying to untie your
13 hands as much as possible.

14 MR. CHANDLER: No, sir. You can untie my hands,
15 give us the continuance. Give us the continuance to
16 allow him to be made available so that we can then cross
17 examine him and offer the best defense for my client. He
18 is the only one that's prejudiced. He's the only one
19 that gets to sit behind these bars during that time.
20 He's willing to do that for this opportunity. If I was
21 him, I would want it. If I was him, I would want -- Your
22 Honor, you have given me a lot of latitude. I know. I
23 know I have interrupted you a lot, but if I was him, I
24 would want me doing this. If he was representing me, I
25 would want me here as much as saying please, please,

1 please give me this chance. Give me this chance.

2 THE COURT: All right. Let me think about it.

3 MR. CHANDLER: Yes, sir.

4 THE COURT: Let me just think about it. Give me 10
5 or 15 minutes. All right. Going off the record.

6 (Whereupon, the ex parte in chambers conference was
7 concluded.)

8 (Short break.)

9 BAILIFF: All rise.

10 THE COURT: Have a seat please. Thank you. Okay.
11 We're gonna go back on the record in the State versus Mr.
12 Thomas and, of course, the record will reflect that I did
13 have an ex parte discussion with Mr. Chandler and Mr.
14 Moore in chambers about the grounds for their request for
15 a continuance, and the Court has also had an opportunity
16 to review again Rule 7 of the Rules of Criminal
17 Procedure.

18 The discussion in chambers centered on a variety of
19 items basically by my count roughly 11 items of varying
20 degrees of probative value that the defense has raised as
21 grounds for wanting a continuance for Mr. Smith, and just
22 so that the record is clear, I do understand the general
23 trial strategy that the defense was hoping to employ.

24 When I look at Rule 7, it applies primarily to a
25 fact witness, someone who is so key to a party's case

1 that their attendance is just absolutely necessary in
2 order for a trial to be fair and it is regrettable that
3 Mr. Smith is not present with us, but having reviewed the
4 trial strategy the defense wishes to put forward candidly
5 speaking the Court is not able to say that this case
6 should not go forward. Putting it another way, I feel
7 like a continuance is not necessary in this case for the
8 reasons that I expressed to defense counsel in chambers.

9 I have reviewed Rule 7. Again, I don't see where
10 the material, or whether the testimony of the officer
11 would be so material to any issue involved in this case
12 because again I'm hearing that we will be hearing from
13 the first party witnesses, the individuals who
14 Investigator Smith actually did affirmatively interview.
15 I do understand the defense's strategy but this is not a
16 situation where much of his testimony would simply not be
17 able to be elicited. Quite the contrary, I'm going to be
18 inclined to allow the defense a great deal of latitude to
19 elicit testimony about the points that they made in
20 chambers with me pursuant to their trial strategy. So to
21 the extent that the defense may ask questions that
22 venture a little bit more into the gray than I otherwise
23 would permit, in an effort to be as fair as possible to
24 all sides, I'm gonna let them go into that gray a little
25 bit more than I normally would so that they can pursue

1 the strategy that they are hoping to pursue in defense of
2 this case.

3 But again, I do not see that Investigator Smith is
4 such an absolutely necessary witness as to warrant a
5 continuance so in the Court's discretion the Court will
6 be denying the defendant's motion for a continuance for
7 those reasons, okay? Are there any other pretrial
8 matters that we need to address?

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CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

Respectfully Submitted,

s/Tyrone J. Walls

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ATTORNEY FOR APPELLANT

This 4th day of January 2021

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SC Court of Appeals

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

The State, ... Respondent,

v.

Dameion E. Thomas, ... Appellant,

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Record on Appeal in the above-referenced case has been served upon W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is, DDAlessio@scag.gov, this 4th day of January, 2021.

Respectfully Submitted,

S/ Tyrone J. walls

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