No. A_____

IN THE SUPREME COURT OF THE UNITED STATES

BRODERICK WILLIAM SEAY, JR. ……..……..Respondent,

v.

SHERIFF AL CANNON……..……..…Petitioner.

APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT PENDING FILING OF A PETITION FOR WRIT OF CERTIORARI

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To: The Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit

Pursuant to Rules 22 and 23 of the Rules of the Supreme Court, as well as 28 U.S.C. §§ 1651(a) and 2101(f), Petitioner Sheriff Al Cannon[1] respectfully petitions this Court for an order staying the issuance of the mandate of the United States Court of Appeals for the Fourth Circuit in *Seay v. Cannon*, No. 18-7242, reported at 927 F.3d 776 (4th Cir. June 21, 2019). (Attachment 1). The State moved to stay the mandate pursuant to Rule 41(d), Federal Rules of Appellate Procedure on July 23, 2019, pending the anticipated filing of a petition for writ of certiorari in this Court. On August 2, 2019, two judges voted to deny the motion, and one voted to grant the motion. (Attachment 2). The mandate which will return the matter to the District Court to grant federal habeas relief is **scheduled to be issued on Friday, August 9, 2019.** Petitioner seeks a stay of the mandate pending certiorari review. The petition is due to be filed on or before October 17, 2019. In support of the request, the State, would respectfully show:

PROCEDURAL HISTORY

This action was initially filed pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of South Carolina. Respondent Seay sought to bar the State of South Carolina from trying him for murder. He argued the Double Jeopardy Clause prevented retrial. A state court judge granted a mistrial in previous

[1] Respondent Seay is a pretrial detainee in the Sheriff's custody awaiting trial on the charge of murder. He is being prosecuted by the State of South Carolina. Thus, the State is referenced hereafter as the Petitioner in this application.

proceedings finding the prosecution was surprised by the failure of a duly subpoenaed, critical witness to appear when called. A second, separate, state court judge subsequent found the witness in contempt for failure to appear on the day called. A third and also separate state court judge heard the jeopardy plea and denied Seay's motion to dismiss, but granted Seay's motion to stay the retrial. A federal Magistrate recommended relief be denied. The District Court subsequently denied relief. On June 21, 2019, in a split panel decision, the Fourth Circuit reversed and directed the writ be issued. On July 5, 2019, the State filed a timely petition for rehearing and rehearing *en banc* which was denied on July 19, 2019.

REASONS SUPPORTING THE REQUESTED STAY

"Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Calderon v. Thompson,* 523 U.S. 538, 555–556 (1998) (internal quotation marks omitted). This Court has granted numerous petitions in order to instruct the lower federal courts on the deference due under 28 U.S.C. § 2254. This case shows error under 28 U.S.C. § 2241. Modern guidance as to deference to the state courts is limited.[2] It has never been swept aside so fully as it was by the majority:

> In the larger picture, the majority's holding today unnecessarily challenges the traditional principles of comity and federalism that the Supreme Court has long required for our habeas review of state court proceedings. As the Supreme Court stated in *Williams v. Taylor*, "federal habeas corpus principles must inform and shape the historic

[2] *See, for example, Felker v. Turpin,* 518 U.S. 651, 663 (1996) (in considering AEDPA changes in context of original writ process, "Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions.")

> and still vital relation of mutual respect and common purpose existing between States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." 529 U.S. 420, 436 (2000)….

(Opinion, Dissent at 37-38).

Further, the Fourth Circuit misapplied this Court's dictates in *Arizona v. Washington,* 434 U.S. 497, 508 (1978), shaping "strict scrutiny" review to a standard unsurmountable by any measure.

To be sure, there are factual errors as pointed out consistently by the dissent. However, the respect for state trial court fact-finding would have ameliorated or eliminated that error. Thus, the State will seek review on the below or similar question presented:

> In review under 28 U.S.C. § 2241, when determining whether double jeopardy protection bars retrial when a mistrial is granted over a defendant's objection based upon the absence of a critical prosecution witness, does the required strict scrutiny applied to the legal determination of manifest necessity constrain in equal or greater measure the deference universally afforded a trial court's fact-finding?

The State seeks to stay the effect of the majority's opinion as it is not simply new proceedings but a complete bar to retrial on the charge of murder – a crime, as the dissent points out, of a particularly brutal execution style, the retaliatory murder of a purported "snitch." (Opinion, Dissent at 17). Both the majority and dissent in the Fourth Circuit opinion agree as to infliction of harm in this grant of relief, though they disagree as to the cause. The majority noted the "clear loser in this scenario is the public, which had a strong interest in having Seay tried under the murder

indictment," and the dissent noted the relief is a "shock to public justice…." (Opinion, at 15- 18). The State, balancing its duty to its citizens and fairness in the criminal law, will not delay in seeking this Court's review and intends to file on or before October 17, 2019.[3]

Relevant Law

Whether to issue a stay is governed by the traditional factors: 1) the likelihood of irreparable injury resulting from a denial of the stay; 2) whether there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari; 3) whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and 4) in a close case, whether a stay is required by a "balance [of] equities" between petitioner, respondent and the public at large. *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J.); *Baltimore City Dept. of Social Services v. Bouknight,* 488 U.S. 1301, 1303-1304 (1988) (Rehnquist, C.J.). Application of the factors to the facts of this case supports granting a stay.

Fourth Circuit Disagreement Among the Panel

Two judges in the Fourth Circuit found that double jeopardy bars the State of South Carolina from trying Seay for murder. Judge Niemeyer explained in detail the error in the majority's analysis. In particular, Judge Niemeyer noted the failure to afford deference to trial court fact-finding, even on matters of state law. (See Opinion,

[3] The State of South Carolina will file within a shortened period of time as the Court may direct if the Court would prefer a more limited stay. *See Baltimore City Dept. of Social Services v. Bouknight,* 488 U.S. at 1305 (granting a stay which continued incarceration noting an offer to file within shortened period of time). The State did not object to Seay's request to expedite the appeal in the Fourth Circuit.

Dissent at 20-28 and 32-36). The very fact that there is spirited disagreement between the majority and dissent regarding the deference due the state court's factual findings supports there is a "substantial question" for the State's petition. Further still, Judge Niemeyer voted to grant the motion to stay the mandate which again shows confidence in a "substantial question" ripe for this Court's consideration. See generally Rule 41(d)(1), Federal Rules of Appellate Procedure (to obtain a stay of the mandate, "[t]he motion … must show that the petition would present a substantial question and that there is good cause for a stay"). Absent a stay, issuance of the mandate will require the District Court to unconditionally grant the writ of habeas corpus and allow for complete release from the charge of murder.[4]

Likelihood of Harm to Respondent Minimal

There is no present danger of retrial to endanger the protections of the Double Jeopardy Clause. Seay moved for a stay of retrial proceedings which was granted. It remains in effect. (See JA 546). Thus, the grant of the stay would "maintain the status quo" in a matter "which the Court is likely to hear on the merits." *Holtzman v. Schlesinger,* 414 U.S. 1304, 1310 (1973). *See also Bouknight, supra.* In contrast, the damaged principle of comity will continue to suffer if the District Court actually grants release before the State has had an opportunity to seek redress. Again, even the majority agrees the public is the "clear loser" here when retrial is not possible.

[4] Seay is currently held not only on the murder charge, but also on an unrelated gun charge. Seay was arrested for unlawful carrying of a pistol on November 7, 2016, a charge he acquired while on bond for the murder and subject to house arrest. If the murder charge is dismissed, he would still need to make bond on the weapon charge, currently set at $20,000.00. The commands of the writ would not conclude his involvement in the legal system. However, if the murder charge is dismissed, bond proceedings will no doubt be affected but wrongly so should this Court reverse the Fourth Circuit.

(Opinion, p. 15). The equity in the situation favors a short stay of the complete release ordered, especially where the legal issue is substantial.

A Substantial Question to Present

A critical key to understanding the discord in the rulings in this matter is to determine what constitutes "strict scrutiny" in the double jeopardy context. The majority's structure allowed for a grant of relief on the federal appellate level by review of a cold record. Applying strict scrutiny to a legal conclusion does not render a deathblow to fact-finding deference:

> …the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject….

United States v. Perez, 22 U.S. 579, 580 (1824). [5]

Strict scrutiny applies when a mistrial is granted due to the "unavailability of critical prosecution evidence…." *Arizona v. Washington,* 434 U.S. 497, 508 (1978). However, the critical finding is still manifest necessity. Certainly, "reviewing courts have an obligation to satisfy themselves… the trial judge exercised 'sound discretion' in declaring a mistrial," *Washington,* 434 U.S. at 514; however, that can be, and should be, done without the wholesale rejection of deference as to fact-finding. Strict scrutiny properly applied calls for less deference, not absence of deference. *See*

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[5] *See Clemons v. Mississippi,* 494 U.S. 738, 766 (1990) ("… 'even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.'") (Blackmun, J., concurring in part and dissenting in part) (quoting *Gavin v. State,* 473 So.2d 952, 955 (Miss. 1985)).

McCorkle v. State, 619 A.2d 186, 200 (Md.Ct.Spec.App.1993) ("strictest scrutiny" equates with "*limited* discretion to grant mistrial") (emphasis in original). This is in complement to the definition of manifest necessity, which does not equate with absolute necessity. *Washington,* 434 U.S. at 506.

To be sure, there are fact-involved problems with the majority opinion, but nothing that undermines the State's position when the record is read correctly and considered under proper precedent. For instance, in substitution its own fact-finding in the situation, the majority faulted the mistrial judge (Judge Cooper) for failing to consider alternatives – yet that was the entire reason for the trial continuance and the search for the witness. Judge Cooper not only *considered* alternatives, he *pursued* them. This is summarized precisely by the federal magistrate in the report and recommendation:

> The trial judge did NOT order a mistrial immediately after the State advised him that Ms. Grant was not cooperating. Instead, Judge Cooper issued a bench warrant for Ms. Grant's arrest, and he sent the jury home for the rest of the day with instructions to return the following morning. (Dkt. No. 29-2 at 233-36 of 258.) The following day, when Ms. Grant still had not been located–even with the assistance of the United States Marshals Service–Judge Cooper granted a mistrial. …

(JA at 539-40).

Further, the trial was nearly complete when the surprise occurred. As the Report and Recommendation reflects:

> To the extent Petitioner argues the State should have simply called any one of its remaining witnesses, Petitioner's counsel at trial appeared to recognize only a few witnesses remained. (*See* Dkt. No. 16-2 at 22 of 30.) And while Petitioner contends the State should have gone ahead and presented testimony of two witnesses who "were to testify as to Seay's location during the alleged murder via his mobile phone's 'pings' on

> transmission towers," Petitioner suggests this testimony should have been introduced without Ms. Grant's testimony that she "sees Mr. Seay with Mr. Howard and Ty after their coming off of" Wadmalaw Island, where the victim's body was found; without Ms. Grant's testimony that she "goes to her apartment, sees them taking the tote bag with the weapon or which she believes the weapon still inside the bag, tried to take that into her apartment and puts a halt to that"; without Ms. Grant's testimony that they "travel to Montague Avenue, try to get a hotel room," and then they "leave [Petitioner] behind at the Waffle House." (Dkt. No. 29-2 at 231 of 258.) As Respondent notes, Petitioner's "mobile phone pings" are not all that probative without Ms. Grant's testimony.

(JA at 539).

With only a few witnesses left, and their testimony dependent on the missing witness, alternatives other than those already explored and pursued were limited by the circumstances. (See also JA at 556, the District Court deferred to the state trial court's decision in light of the fact "a continuance had already been granted and substantial efforts were already made to locate the absent witness without success").

Another error is the majority's emphasis on the swearing of the jury. The swearing of the jury is the mark when jeopardy *attaches*, not when surprise in trial is *measured*. *See Martinez v. Illinois,* 572 U.S. 833, 839 (2014) (the point at which jury is sworn is the "bright line at which jeopardy attaches"). That emphasis clouds the very issue that should be in forefront which is the state court's decision on manifest necessity. In this very case, had the witness been in court on a prior day, it would not have prevented the surprise that occurred later.[6] The Fourth Circuit grants relief on an exercise in futility that fails to address the surprise here – essentially, the

[6] Further, in this case, there was even a contempt hearing wherein it was determined it was indeed the witness's decision *after* cooperation with the State, and *after* receipt of her subpoena, to fail to come to court when called. (Opinion, Dissent at 25-26).

majority's spotlight is on the wrong juncture. As a result, the majority opinion stands in contrast to factually similar cases. *See, for example, Downum v. United States,* 372 U.S. 734 (1963) ("prosecution allowed the jury to be selected and sworn even though one of its key witnesses was absent and had not been found"); *Walck v. Edmondson,* 472 F.3d 1227, 1239 (10th Cir. 2007) (prosecution aware "prior to the jury being sworn" that witness "was on her way to the hospital to deliver her child"); *Montgomery v. State,* 253 So. 3d 305, 314 (Miss. 2018) (no bar where "unexpected family emergency" prevent attendance); *McCorkle v. State*, 619 A.2d at 201 (no double jeopardy bar where "absence was not caused by-or was not in any way referable to-any acts or omissions on behalf of the State; the key witness's absence was not known to or reasonably expected by the State prior to jeopardy attaching; the trial judge considered alternatives to declaring mistrial"); *Wilson v. Gusman,* No. CIV.A. 12-0386, 2012 WL 893471, at *7 (E.D. La. Mar. 15, 2012) (denying petition under 28 U.S.C. § 2241 reasoning though "Wilson makes much of the fact that J.T. was not present in court on June 2, 2011, when the jury was sworn. This fact is minimized, however, when one considers (1) the trial court's grant of a recess immediately after spending the 7–8 hours selecting the jury; (2) the record establishes that J.T. wanted to and endeavored to attend trial in New Orleans; and (3) the great lengths the State went to in attempting to secure J.T.'s presence."). Further, the fact that the *Seay* decision is a published opinion brings more force to the position that the error of law should be addressed quickly. It is out of step with

federal law and general habeas principles. Though incorrect, it is available to other federal courts sitting in habeas pursuant to Section 2241 to follow.

The trial judge critically assessed the facts before him and specifically found *no* fact supported that the critical witness's disappearance was anything other than surprise. (JA at 421-26). It is the fact-finding supporting that surprise which distinguishes this case from the cases where the prosecution "took a chance" in going to trial aware they had not secured a witness. Any measure of deference surely would make a different. The State was deprived of that moderating governor – one otherwise universally afforded the trial judge on the scene.

CONCLUSION

For the foregoing reasons, the motion to stay the mandate pending review on certiorari should be granted.

Respectfully submitted,

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August 6, 2019
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TABLE OF AUTHORITIES

Cases:

Statutes:

Rules: