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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7242

[Filed June 21, 2019]

BRODERICK WILLIAM SEAY, JR.,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
SHERIFF AL CANNON,	)
	)
Respondent - Appellee.	)
	)

Appeal from the United States District Court for the District of South Carolina, at Charleston. Timothy M. Cain, District Judge. (2:17-cv-02814-TMC)

Argued: January 29, 2019 Decided: June 21, 2019

Before NIEMEYER, KEENAN, and QUATTLEBAUM, Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Keenan wrote the opinion, in which Judge Quattlebaum joined. Judge Niemeyer wrote a dissenting opinion.

ARGUED: Jason Scott Luck, GARRETT LAW OFFICES, LLC, Charleston, South Carolina; Sara Alexandra Turner, LAW OFFICE OF SARA A. TURNER, LLC, Charleston, South Carolina, for Appellant. Melody Jane Brown, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee. **ON BRIEF:** Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee.

BARBARA MILANO KEENAN, Circuit Judge:

Broderick William Seay, Jr. appeals from the district court's denial of his petition for habeas corpus relief under 28 U.S.C. § 2241. Seay argues that his rights under the Double Jeopardy Clause of the Fifth Amendment will be violated if the State of South Carolina (the government) retries him on murder charges in state court. The state trial court granted a mistrial in the original proceedings based on the failure of the government's critical witness to appear at Seay's trial. In Seay's view, the government failed to meet its burden of showing manifest necessity for a mistrial after the jury was empaneled and jeopardy had attached. The district court denied habeas relief, holding that under the facts presented it was

appropriate to defer to the state trial court's finding of manifest necessity.

Employing "strictest scrutiny" review, we conclude that the government failed to satisfy its high burden of showing manifest necessity for a mistrial. The record shows that the government allowed the jury to be empaneled knowing that the crucial witness might not appear to testify. Additionally, the state trial court failed to consider possible alternatives to granting the government's mistrial motion. We therefore vacate the district court's judgment, and remand with instructions that the district court award Seay habeas corpus relief.

I.

In 2015, a South Carolina grand jury indicted Seay on a charge of murder, in violation of South Carolina Code § 16-3-10. The government alleged that two of Seay's co-conspirators, Kevin Howard and Tyrone Drayton, kidnapped the victim, Adrian Lyles, from his home in 2012. According to the government, Seay later joined the group and, together with Howard and Drayton, drove to a remote South Carolina island where the three men shot Lyles a total of ten times in retaliation for Lyles' work as an informant for law enforcement authorities.

Howard was the first co-conspirator tried for murder. At that trial, Howard's former girlfriend, Startasia Grant, testified as a cooperating witness for

the government.[1] Most relevant here, Grant testified that she joined Howard, Seay, and Drayton shortly after the time that Lyles was killed. When Grant first encountered the group, she noticed that Howard's hand was bleeding and that the three men acted "agitated" and "jumpy." Grant also testified about her interactions with the men in the hours following the murder, including her suspicion that Howard was carrying a bag with a shotgun inside. Her testimony placed Seay with the co-conspirators around the time of the murder.

After hearing additional evidence in the case, the jury found Howard guilty on the charge of murder. The state court sentenced Howard to serve a term of life imprisonment. At the time Grant testified at Howard's trial, she had been charged with obstruction of justice for her role in attempting to "cover up" the crime. However, the government dismissed that charge after Grant testified at Howard's trial.

More than two years after Howard's trial, in June 2016, the government issued a subpoena requiring Grant to testify at Seay's trial. Pursuant to the subpoena, Grant was directed to appear in the state trial court at 9:00 a.m. on "each day" of the term of court beginning on Monday, July 25, 2016. The subpoena also explained that the prosecutor's office "may be able to give [the witness] a more specific date and time to appear in Court" under certain circumstances, but nothing in the record indicates that

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[1] The record contains inconsistent spellings of Grant's first name. We use the spelling included on the government's witness list and subpoena for Seay's trial.

the government advised Grant not to appear as directed on Monday.

The trial was scheduled to begin on the first day of that term, Monday, July 25, 2016. Although the prosecutor and the government's investigator spoke with Grant the weekend before the scheduled trial, Grant did not appear as required that Monday. For reasons unrelated to Grant's failure to appear, the court continued the trial to the next day.

When the court convened the following day, Tuesday, July 26, 2016, Grant again failed to appear as required by her subpoena. Despite the absence of this crucial witness, the government did not seek to delay the trial, and the jury was empaneled. The government presented testimony from eight witnesses on the first day of trial. Meanwhile, the government's investigator attempted to contact Grant and left multiple messages directing her to appear in court the following morning.

On Wednesday, July 27, 2016, Grant once again failed to appear in court as ordered. After the government presented the testimony of one additional witness, the government for the first time raised to the state trial court the issue of Grant's nonappearance. The government informed the court that, since speaking with Grant on Saturday, Grant had "not been cooperative with [the prosecutor's] office at all."[2] The

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[2] The government represented to the state trial court that Grant had informed the government's investigator in a text message sometime on Tuesday, July 26, 2016, or on Wednesday, July 27, 2016, that she did not intend to testify because she was frightened. The government, however, failed to preserve the text message or

state trial court issued a bench warrant for Grant's arrest, and adjourned court until the next day to permit law enforcement authorities to attempt to locate her. When the court reconvened the following day, Thursday, July 28, 2016, the authorities had not located Grant, and she again failed to appear pursuant to the subpoena.

The government immediately moved for a mistrial, claiming surprise that Grant had failed to appear as a witness. The government further stated: "We are asking for a mistrial because at this point we do not know if [] Grant is alive. We do not know if she has been injured. We do not know if she is just scared. We do not know if she has been threatened." Seay opposed the mistrial motion, arguing that there was no evidence that he had attempted to dissuade Grant from testifying, and that the government had failed to meet the manifest necessity standard required for ordering a mistrial. After hearing further argument from counsel, the state trial court, as part of its basis for granting the motion, stated: "I do feel that the State has been caught by surprise. . . . [T]he case is ongoing as of this moment. I think the public is entitled to a fair trial as is" the defendant. The court then granted a mistrial without any consideration on the record of other measures that could have been taken.

Seay later filed a motion to dismiss the indictment in state court, asserting that the constitutional protection against double jeopardy barred him from

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the investigator's electronic device. Instead, the record contains only an unverified statement of the purported text message.

being retried on the state murder charge. After the state trial court denied Seay's motion, Seay filed a petition in the federal district court seeking habeas corpus relief under 28 U.S.C. § 2241 on the ground that a second trial would violate his rights under the Double Jeopardy Clause.[3] On the recommendation of the magistrate judge, the district court denied Seay's petition. However, the district court granted a certificate of appealability, and Seay now appeals to this Court.

II.

A.

We review de novo the district court's denial of habeas corpus relief under 28 U.S.C. § 2241. *Fontanez v. O'Brien*, 807 F.3d 84, 86 (4th Cir. 2015). Because Seay challenges his pretrial detention on double jeopardy grounds under Section 2241, the special deference we ordinarily accord to state court judgments under 28 U.S.C. § 2254 is inapplicable here. *See Phillips v. Court of Common Pleas*, 668 F.3d 804, 810 (6th Cir. 2012) (collecting cases from First, Fifth, Ninth, and Tenth Circuits); *see also Walck v. Edmondson*, 472 F.3d 1227, 1235 (10th Cir. 2007). Section 2241 entitles a prisoner to habeas corpus relief if "[h]e is in custody in violation of the Constitution or

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[3] At Seay's request, the state court agreed to continue the trial until final adjudication of Seay's Section 2241 petition.

laws or treaties of the United States."[4] 28 U.S.C. § 2241(c)(3).

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, prohibits states from subjecting a person to trial twice for the same crime. *See Crist v. Bretz*, 437 U.S. 28, 32-36 (1978). "In a jury trial, jeopardy attaches when the jury is empaneled," after which "the defendant has a constitutional right, subject to limited exceptions, to have his case decided by that particular jury." *United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993) (footnote omitted). Those exceptions apply only when the defendant's right is outweighed by "the public's interest in fair trials designed to end in just judgments." *Id.* (citation omitted). Accordingly, when a defendant objects to a mistrial, he may be retried only if the mistrial was "required by 'manifest necessity.'" *Id.* (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)); *see also Gilliam v. Foster*, 75 F.3d 881, 893 (4th Cir. 1996) (en banc).

The government's burden of establishing manifest necessity is "a heavy one," and is subject to especially searching review when the government seeks a mistrial

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[4] Under South Carolina law, Seay may not raise his double jeopardy arguments in an interlocutory appeal. *See State v. Rearick*, 790 S.E.2d 192, 195, 199 (S.C. 2016). Thus, because South Carolina's procedures do not afford Seay adequate protection against a double jeopardy violation, we do not abstain from intervention in the ongoing state criminal proceedings pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). *See Robinson v. Thomas*, 855 F.3d 278, 285-89 (4th Cir. 2017).

"in order to buttress weaknesses in [its] evidence." *Arizona*, 434 U.S. at 505, 507. Thus when, as here, "the basis for the mistrial is the unavailability of critical prosecution evidence,"[5] we apply "the strictest scrutiny" to the question of manifest necessity. *Id.* at 508. With these principles in mind, we proceed to consider Seay's arguments.

B.

Seay argues that the district court erred in concluding that the state trial court's finding of "manifest necessity" is supported by the present record. In Seay's view, the decision granting a mistrial fails under strictest scrutiny review because (1) the government was aware at the time the jury was empaneled that Grant might not appear to testify, and (2) the state trial court failed to consider other available alternatives.

In response, the government relies on the state trial court's finding that the government was "caught by surprise" when Grant failed to appear in response to the subpoena. According to the government, this factual finding and the lack of any fault on the government's part support the state trial court's determination that a mistrial was warranted for reasons of manifest necessity. We disagree with the government's position.

The Supreme Court, in *Downum v. United States*, 372 U.S. 734, 737-38 (1963), explained that the double

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[5] The state trial court found that Grant was a critical prosecution witness. The parties do not dispute this characterization.

jeopardy inquiry focuses on the state's knowledge at the time the jury is empaneled. The Court emphasized that when a prosecutor empanels a jury "without first ascertaining" that his witnesses are present and available to testify, the prosecutor "t[akes] a chance."[6] *Id.* at 737 (quoting *Cornero v. United States*, 48 F.2d 69, 71 (9th Cir. 1931)). According to the Court, under these circumstances, the prosecutor has "entered upon the trial of the case without sufficient evidence to convict," thereby assuming the risk of jeopardy attaching in the face of weak government evidence. *Id.* (citation omitted). Thus, the essence of the Court's holding in *Downum* is that when a prosecutor agrees to the empaneling of a jury, gambling that his missing witness will appear in time to testify, the prosecutor subjects his case to a defendant's later plea of double jeopardy. *See id.* at 737-38. As the Court explicitly stated, "[w]e resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." *Id.* at 738 (internal quotation marks and citation omitted).

In the present case, the record shows that the government allowed jeopardy to attach with the awareness that Grant, a critical government witness, might not appear to testify. The timeline in the record is dispositive. Grant was compelled by subpoena to

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[6] In *Downum*, although the prosecutor had not served a summons on the witness requiring his appearance before the trial court, the Supreme Court did not assign particular weight to that fact in determining that the government failed to show manifest necessity for a mistrial. *See* 372 U.S. at 737.

appear in court for the full term of court beginning on Monday, July 25, 2016, but she did not comply with that directive. Nor did Grant appear the following morning on Tuesday, July 26, 2016, before the jury was empaneled. On Wednesday, July 27, 2016, the government informed the court that Grant "ha[d] not been cooperative with [the prosecutor's] office at all" after state officials had spoken with her the Saturday before trial. The prosecutor and state investigator had attempted to locate Grant several times between Monday and Wednesday morning during the week of trial, including visiting Grant's apartment and place of employment, contacting Grant's sisters, and sending Grant multiple text messages.

Reading this record in its totality, two facts are apparent. First, the government knew that its crucial witness had failed to appear as required by subpoena for two consecutive days before the jury was empaneled. The government nevertheless allowed jeopardy to attach, risking the foreseeable possibility that Grant would not appear in time to testify.

Second, given the serious nature of the case, the government plainly was concerned throughout the week of trial that Grant might not appear. The government knew that its star witness was being asked to testify against a defendant charged with murdering a "snitch." The government also knew that it had relinquished its leverage over Grant by dismissing the obstruction charges that had induced Grant to testify in the earlier trial. Indeed, one of the government's justifications for seeking a mistrial was the speculation that Grant had been harmed to prevent her from

testifying. Consistent with this background knowledge, as noted above, the prosecutor and investigator took several steps to locate Grant on Monday and Tuesday during the week of trial.

In view of these facts, we disagree with the dissent's assertion that the government employed a "standard procedure for calling subpoenaed witnesses to testify in multiday trials," and instructed Grant not to appear until the Wednesday of trial. Dissent at 20. Although Grant's subpoena indicated that the prosecutor's office "may be able to" provide a more specific date for Grant's testimony, nothing in the record suggests that the prosecutor in fact followed such a practice with Grant. The mere fact that the prosecutor *could have* done so says nothing about what the prosecutor actually told Grant. And, notably, the government never told the state trial court that Grant was not required to appear on the Monday and Tuesday of trial as commanded by her subpoena.[7] Under our "strictest scrutiny" standard of review, we cannot construe such absence of factual support in the record in favor of the state.

Applying our heightened standard of review, we conclude that the record does not support the

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[7] While we agree that the record "conclusively shows" that the government directed Grant to appear in court on the Wednesday of trial, we emphasize that this fact does not "conclusively show" that the government had directed Grant *not* to appear *until* Wednesday. Dissent at 33. Moreover, the dissent's characterization of this timeline is undermined by the government's numerous attempts to locate Grant between Monday and Wednesday morning.

conclusion that the government was surprised when Grant failed to appear to testify. We emphasize that it was the government's heavy burden to establish manifest necessity and to develop the record to support such a finding, even in the dynamic context of a murder trial. For example, the government: (1) could have stated clearly whether it had relieved Grant of her obligation under the subpoena to appear on Monday and Tuesday; (2) could have clarified the timeline and contents of state officials' communications with Grant both before and during the trial; and (3) could have preserved on the record the text message allegedly received by the government investigator indicating that Grant was afraid to testify. *See supra* note 2. The dissent attempts to supplement these gaps in the record with its own speculation about what "must" or "should" have happened, and construes all aspects of the existing record in favor of the government. However, bound by strictest scrutiny review, we decline to remedy the government's failure to satisfy its burden by inserting hypothetical "facts" into the record.

The heart of the constitutional protection against double jeopardy prohibits the government from obtaining a "second bite at the apple" when the government has been unable to marshal sufficient evidence to convict in the first trial. *See Shafer*, 987 F.2d at 1059; *Sanders v. Easley*, 230 F.3d 679, 686 (4th Cir. 2000) (at the "extreme" end of the spectrum when double jeopardy applies "are situations in which the prosecution seeks a mistrial in order to have additional time to marshal evidence to strengthen the case against the defendant"). Here, given the government's failure to produce its own witness in a timely fashion,

a mistrial was not manifestly necessary because of surprise to the government. Instead, the mistrial afforded the government "a more favorable opportunity to convict" the defendant at a new trial with the testimony of the missing witness. *Downum*, 372 U.S. at 736. Accordingly, we conclude that the government's allegation of surprise fails to support the state trial court's finding of manifest necessity.

Notwithstanding this absence of surprise, the government nevertheless maintains that the record supports the state trial court's decision to grant a mistrial. In particular, the government contends that the state trial court exercised a "cautious approach" before granting a mistrial, by continuing the trial overnight while law enforcement authorities sought to locate the missing witness. Accordingly, the government argues that because Grant "was such a critical witness, and the remaining witnesses to be called in the case in chief depended on her testimony, it is difficult to see an actual, viable, sufficient alternative available" to the state trial court. We disagree with the government's position.

In determining whether the government has satisfied its burden to show manifest necessity, "the critical inquiry is whether less drastic alternatives were available." *Shafer*, 987 F.2d at 1057; *see also United States v. Jorn*, 400 U.S. 470, 487 (1971) (plurality opinion) (manifest necessity did not exist when trial judge gave "no consideration . . . to the possibility of a trial continuance" instead of a mistrial). When such alternatives are available, "society's interest in fair trials designed to end in just judgments

[is] not in conflict with the defendant's right to have the case submitted to the jury." *Shafer*, 987 F.2d at 1057 (internal citation and quotation marks omitted).

And when, as here, the strictest scrutiny standard of review applies, the trial court's consideration of reasonable alternatives is a central factor in our heightened review of manifest necessity. All alternative options must be evaluated, and all reasonable choices exhausted, before the government may reap the benefit of a second opportunity to prove a defendant's guilt. We thus agree with our sister circuits' conclusion that, applying strictest scrutiny review, the government must demonstrate that the trial court gave "careful consideration" to the availability of reasonable alternatives to a mistrial, and that the court concluded that none were appropriate. *United States v. Fisher*, 624 F.3d 713, 722 (5th Cir. 2010); *see also Walck,* 472 F.3d at 1240; *United States v. Rivera*, 384 F.3d 49, 56 (3d Cir. 2004). If the trial court's assessment of reasonable alternatives does not appear on the record, a finding of manifest necessity will not be upheld under the lens of strictest scrutiny.[8] *See Fisher*, 624 F.3d at 723.

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[8] We recognize that the Supreme Court in *Arizona* did not require trial courts to articulate on the record reasons for finding manifest necessity. 434 U.S. at 517. However, that portion of the analysis in *Arizona* does not govern the very different circumstances present here. The Court in *Arizona* accorded "great deference" to the trial court's evaluation of whether potential juror bias warranted a mistrial. *Id.* at 510, 514. In contrast, here, we apply the much more rigorous "strictest scrutiny" review, applicable to "extreme" cases in which the government seeks a mistrial "in order to buttress weaknesses in [its] evidence." *Id.* at 507-08.

In the present case, as discussed above, Grant failed to comply with the terms of her subpoena, which required her to appear for court on Monday, July 25, 2016, Tuesday, July 26, 2016, and Wednesday, July 27, 2016. After Grant did not appear on those days, despite the government's multiple attempts to contact her, the state trial court issued a bench warrant for her arrest on Wednesday, July 27, 2016, and adjourned the trial until the following morning. The government requested a mistrial shortly after the court reconvened on Thursday, July 28, 2016, on the basis that law enforcement authorities had been unable to locate Grant. After oral argument, the court granted the mistrial.[9]

While the state trial court explained its rationale for granting the motion, the record before us does not show that the court considered any available alternatives before granting the government's mistrial motion. For example, the court did not discuss why it did not continue the trial one additional day, or over the weekend until the following Monday, August 1, 2016, to give law enforcement authorities additional time to locate Grant. Likewise, the court failed to discuss why it did not require the government, which had 18 remaining witnesses listed for the case, to present testimony from some of those witnesses while the

[9] The following day, Friday, July 29, 2016, law enforcement authorities successfully executed the bench warrant and arrested Grant. She was detained and, one month later, was found in contempt of court for her failure to comply with the subpoena.

efforts to locate Grant continued.[10] Thus, the record contains no analysis of potential alternatives to a mistrial as required by our precedent. Without considering the viability of possible alternatives, the "drastic" step of declaring a mistrial is not supported by the record. *See Shafer*, 987 F.2d at 1057; *Rivera*, 384 F.3d at 56 (holding that a trial court "must exercise prudence and care, giving due consideration to reasonably available alternatives to the drastic measure of a mistrial").

We therefore conclude that the state trial court erred in finding manifest necessity for a mistrial, and that the district court erroneously accorded deference to that decision. In doing so, we "resolve any doubt in favor of the liberty of the citizen," who was defending against the charged offense when the state trial court abruptly ended the trial and dismissed the jury. *Downum*, 372 U.S. at 738 (internal quotation marks omitted).

Finally, we emphasize that this case sharply illustrates the consequences of the government's too ready reliance on the short-term solution of a mistrial

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[10] The government maintains that, although its witness list included 18 additional witnesses, the government only planned to call "two or three" of these witnesses. According to the government, these two or three witnesses would provide cell phone location evidence, and their testimony would lose its "corroborative value" without Grant's testimony detailing Seay's movements following the murder. However, these issues, including the possibility of altering the planned order of proof, should have been fully discussed and evaluated by the state trial court before a mistrial was granted.

to solve a common trial predicament. The clear loser in this scenario is the public, which had a strong interest in having Seay tried under the murder indictment. However, as a result of the government's ill-advised request for a mistrial, approved by the state trial court without consideration of existing alternatives, Seay is entitled to the habeas corpus relief that will afford him his constitutional rights under the Double Jeopardy Clause.

III.

For these reasons, we vacate the district court's judgment, and remand the case to the district court with instructions to grant Seay's petition for habeas corpus relief under 28 U.S.C. § 2241.

VACATED AND REMANDED WITH INSTRUCTIONS

NIEMEYER, Circuit Judge, dissenting:

Broderick Seay, Jr., was charged in a South Carolina state court in 2015 with the first-degree murder of Adrian Lyles on March 28, 2012. The prosecution alleges that Lyles was taken to a remote area and shot ten times, "execution-style," with three different types of ammunition by three men, one of whom was Seay, because they believed that Lyles was a "snitch." In April 2016, after one of the three men was tried and convicted of the murder, the court scheduled Seay's case for trial, beginning the week of July 25, 2016.

On the second day of trial, the State's key witness, who had testified in the earlier case and was cooperating with the State in its prosecution of Seay, failed to appear for trial as directed by subpoena and the prosecutor. The prosecutor claimed surprise and, after law enforcement officers were unable to locate the witness during a 24-hour continuance, requested a mistrial. Finding that the prosecutor was indeed surprised and acting in good faith, the judge declared a mistrial.

When the State sought to retry Seay, he raised a double jeopardy defense, which that state court denied. He thereafter sought federal habeas relief, which the district court also rejected. But the majority now finds — for the first time on appeal and contrary to the record and the findings of three state judges and two federal judges — that the state prosecutor *knew* before the jury's empanelment that the witness was missing and might not appear for trial but nonetheless proceeded with the empanelment of the jury, thus

gambling on whether the witness would appear. Relying on *Downum v. United States*, 372 U.S. 734, 737 (1963) (holding that such gambling precludes the demonstration of manifest necessity necessary for a mistrial), the majority thus concludes that the State did not demonstrate manifest necessity for the mistrial based on the prosecutor's contention that she had been caught by surprise. And it further concludes that the state trial court erred in failing to consider reasonable alternatives to a mistrial. Based on these two conclusions, it holds that Seay cannot be retried.

Not only is this ruling a profound shock to public justice, but the facts on which it is based are unsupported by the record.

As I demonstrate in detail hereafter, a month before trial, the State subpoenaed its star witness, Startaesia Grant, to testify at Seay's trial. She had testified in the earlier trial of Seay's alleged coconspirator and was cooperating with the State in its prosecution of Seay. The subpoena commanded Grant to appear at trial during the July 25, 2016 term, "each day this term of court or until disposition of case." But, consistent with common practice, the subpoena also explicitly stated that if Grant provided the prosecutor's office with her contact information, she might not have "to attend court on each day of the entire term," but could instead appear at "a more specific date and time," as specified by the prosecutor. And in this case, the prosecutor directed Grant to appear to testify on Wednesday, July 27, 2016, the second day of trial.

When Grant did not appear for trial on July 27, the prosecutor explained to the court that Grant had been

cooperative as recently as Sunday, July 24, but then had failed to return phone calls and text messages, only to suddenly declare on Tuesday night, July 26 — the night before her expected testimony — that she was too frightened to appear the next day, as directed. The prosecutor requested that the court issue a bench warrant for Grant's appearance and postpone the trial to the next day to accommodate efforts to bring her in. The court granted both requests. The next morning, when law enforcement officers stated that they had been unable to find Grant, the State filed a motion for a mistrial. The court reviewed the facts and law and received arguments from counsel, after which it found "that the State ha[d] been caught by surprise" and had demonstrated "manifest necessity" for a mistrial, quoting *Arizona v. Washington*, 434 U.S. 497, 506 (1978). It concluded that it would be in the public interest to grant the mistrial in the "unique circumstances" of the case.

When the State scheduled a retrial, Seay filed a motion in state court to dismiss the case on double jeopardy grounds, and after the state court denied his motion, he filed this habeas petition in the district court under 28 U.S.C. § 2241, again contending that to start the trial again would violate his rights under the Double Jeopardy Clause of the U.S. Constitution. The district court denied Seay's petition.

The majority now reverses both the state court and the district court, holding that Seay cannot be tried for murder because the state trial judge erred in finding that the state prosecutor was surprised by Grant's failure to appear for trial on July 27 and in ordering a

mistrial. In doing so, the majority effectively overrules the factfinding of the state trial judge and engages in factfinding on its own, finding first that the state prosecutor expected Grant to be in court both on Monday, July 25, and Tuesday, July 26, pursuant to the terms of the subpoena, and from there reasoning that because the prosecutor knew that Grant had not appeared on those days, she chose to gamble by proceeding with the jury's empanelment on July 26. *See ante* at 9–10. But the majority's underlying finding that Grant had been required by her subpoena to appear in court on July 25 and July 26 is flawed, as it rests on an incomplete reading of the subpoena and disregards all the record evidence indicating that the prosecutor did not expect Grant to appear until July 27. Similarly, the majority emphasizes that at *sometime "between* Monday and Wednesday morning during the week of trial" the State "took several steps to locate Grant." *Ante* at 10. But the fact that efforts were made to locate Grant at some point after she temporarily stopped returning phone calls and text messages hardly justifies the majority's factual finding that the government was aware *on the morning of Tuesday, July 26* that Grant would not appear to testify. *See ante* at 9. Finally, the majority's conclusion that the state trial court acted too rashly in declaring a mistrial without considering the availability of reasonable alternatives fails to give due regard to the unique circumstances with which the state trial court was confronted and the considered actions it actually took.

At bottom, the majority's factfinding is unsupported by the record, and its analysis is accordingly flawed. And on this basis, it denies South Carolina the right to

a full and fair trial of Seay for a gruesome murder, a ruling that, in my judgment, is totally unnecessary.

I

At the outset, it is remarkable that the majority does not acknowledge the standard procedure for calling subpoenaed witnesses to testify in multiday trials. Subpoenas routinely require witnesses to appear on every day of a trial, which gives the lawyer calling the witness the authority and flexibility to decide when to have the witness actually appear. It is thus perfectly ordinary for lawyers not to require their subpoenaed witnesses to appear on a trial's first day, even if the subpoena covers the trial's entire expected duration. Rather, the witnesses are required to respond to the lawyer's directions on when to appear, as the subpoena gives the lawyer that authority. This practice was acknowledged by the state judge who denied Seay's double jeopardy motion when he observed that he had practiced law for 21 years and "didn't make [subpoenaed witnesses] come sit in the courtroom until I called them."

Moreover, the subpoena in this case, which was served on Grant a month before trial, incorporated this standard practice, clearly indicating that Grant would not be required to appear on the first day of trial if she were in contact with the prosecutor. More specifically, while the subpoena did direct Grant to appear at the courthouse at 9:00 a.m. on "each day" of the term of court beginning on Monday, July 25, 2016, it also directed Grant to provide the prosecutor's office with contact information for "where you can be reached during this term of Court" and stated that "if you

promptly furnish this office with your contact information, it may not be necessary for you to attend court on each day of the entire term set forth in this subpoena." Instead, "we may be able to give you a more specific date and time to appear in Court for the disposition of this case." By contrast, the subpoena warned Grant that if she did *not* provide the prosecutor's office with her contact information, then she "*must appear in Court at the time and place set forth in this subpoena*." (Emphasis in original.) Moreover, consistent with this language in the subpoena, the record reflects that before jury selection began on the trial's first day, the prosecutor asked the judge a scheduling question because she was "trying to figure out when [she] need[ed] to get [a particular] witness" to the courthouse whom she expected to call that afternoon — a further indication that the prosecutors in this case were not requiring their subpoenaed witnesses to appear before trial began each day.

Grant, who had already testified in the successful prosecution of Seay's alleged coconspirator, was a critical witness for the State's prosecution of Seay. And in preparation for Seay's trial, as the prosecution team represented, "[s]he frequently met with the State and participated in interviews each time [the prosecutors] requested. As recently as the Saturday before the trial, Ms. Grant was engaged with [the prosecutors] in trial preparation," and she "showed no reticence in cooperating."

The trial was scheduled to begin on Monday, July 25, but was postponed for a day due to a discovery

issue. On Tuesday, July 26, the jury was empaneled at around 11:30 a.m., and the State proceeded to present testimony from eight witnesses before court adjourned for the day.

Meanwhile, an investigator with the prosecutor's office attempted to get in touch with Grant to check in with her and to tell her that she was required to appear on Wednesday, July 27. But Grant did not answer her phone or immediately return any messages, and the investigator at some point took steps to locate her, visiting her apartment and workplace and contacting her sisters, but without success. After finishing with the trial's first day, the prosecutor also sent Grant a text message, telling her "that she needed to be in court at 9:00 [a.m.]" the next morning. The investigator likewise texted Grant again and repeated "that she needed to be present at 9:00 over at the courthouse." Grant responded to the investigator with a text message that night, stating for the first time that she was "scared as hell" and no longer willing to testify. She explained, "I can't afford for any of my loved ones to be harmed, I am all that my son has[,] he has no daddy[,] so I decided not to take the stand and I'm willing to accept all consequences. Jail time is better than leaving my son in this world without a mother."

As she had indicated, Grant did not appear in court as instructed on the morning of Wednesday, July 27. The prosecutor explained the situation to the trial judge and requested that the court issue a bench warrant for Grant's appearance and postpone the trial until the next morning. Counsel for Seay — who noted that he had spoken to Grant by phone on Sunday, July

24 — did not object, and the court then issued the bench warrant at 10:06 a.m. on July 27. The text of the bench warrant noted that Grant had been "advised by telephone communications to be present in the General Sessions Court of Charleston County on Wednesday, July 27, 2016, at 9:00 a.m., pursuant to the issued subpoena." The court also granted the prosecutor's motion for a postponement and adjourned trial until the next morning to allow law enforcement officers time to bring Grant in.

On Thursday morning, July 28, after law enforcement reported that they had been unable to find Grant, the prosecutor so advised the court and then moved for a mistrial, explaining to the court that Grant "did not show up to court yesterday after being advised by me as to when to come and by my investigator . . . as to when to come." The prosecutor explained that Grant had "sent a text to my investigator indicating that she was scared and that she would not be coming." The prosecutor then stated:

> I would like to state for the record that this is not a situation where the State failed to have a witness subpoenaed before trial started. This is not a situation where the State is requesting a mistrial for any reason to better our case recognizing it was weak or in any way inflict any type of injustice toward the Defendant.
>
> We are asking for a mistrial because at this point we do not know if Startaesia Grant is alive. We do not know if she has been injured. We do not know if she is just scared. We do not know if she has been threatened. . . . I have

> practiced law since 1986. My investigator has been an investigator for 26 years. And neither he nor I have ever had this situation arise. So it is not something that is frequently an issue in trial.

After arguing the applicable caselaw, the prosecutor stated to the court that "obviously the State needs one fair and full opportunity to present the evidence [to] the jury." She added:

> This is no manipulation on the part of the State. We have been prepared. We had her served. We met with her. We want a just end result not only for the public's interest, but for the interest of the victim as well.

The prosecutor further emphasized the seriousness of the murder charge and the public interest at stake, stating, "[A]ll those involved in the killing in this case need justice."

In response to the State's motion, counsel for Seay emphasized that jeopardy attached in the case on Tuesday, July 26, when the jury was sworn. He then argued:

> [W]hen I looked at the caselaw here well obviously, Judge, if there had been any sort of decision that had been made by the jury itself, then it is absolutely certain that a mistrial would not be appropriate at all. So we are kind of in a gray area that's in between opening statements, jeopardy attaching, and a decision that's been made by the jury.

Counsel for Seay also explained that his client had been waiting for trial for almost two months, that the crime had occurred almost four years ago, and that Seay had been charged two years ago. He concluded by arguing that the State had failed to show "manifest necessity or . . . the best interest of the public."

After listening to counsel, State Judge G. Thomas Cooper granted the motion for a mistrial, explaining:

> Having read basically the same caselaw that both of you have read and put on this record, I wanted to make a complete record of this proceeding. *I do feel that the State has been caught by surprise. I have no reason to believe that the State has concocted this factual situation to aid in the trial of your client.* I think it has created a fact that this witness is a critical witness to the prosecution of the Defendant and the almost simultaneous absence of the witness once the case is called and once the witness is called based on the fact as you have both pointed out the witness was available as of perhaps Friday or as late as Sunday before the trial started on Monday and then to have her disappear when her name is called is in my opinion *not the fault of either one of you*. There is obviously a reason this Court is not aware of as to why she's not available.
>
> I think it does fall within the rubric of *Arizona v. Washington* that this creates and I will use the word manifest necessity to grant a mistrial.

* * *

> I think the public is entitled to a fair trial as is your client. And these unique circumstances I think compel this Court to grant a mistrial and I so do at this time. I grant a mistrial to the State and this case for this time has ended.

(Emphasis added). In dismissing the jury, Judge Cooper explained that it had "been a struggle . . . to try to determine how to proceed in this matter" but that he had concluded that he had "no choice" but to declare a mistrial.

Grant was subsequently arrested and found in contempt of court. As State Judge Kristi L. Harrington ruled, following a hearing, "the Defendant was served with a lawful subpoena and failed to appear in court *on July 27, 2016*. . . . Following the presentation of evidence by the State, and with the Defendant offering no justifiable defense *for failing to appear in court on July 27, 2016*, the Court finds [Grant] is in willful violation of a lawful subpoena constituting an indirect civil contempt of court violation." (Emphasis added).

When the State rescheduled Seay's trial, Seay filed a motion in state court to dismiss the case on double jeopardy grounds. After a full hearing, State Judge R. Markley Dennis, Jr., issued an order finding the operative facts and denying the motion. The court found:

> Prior to trial, Ms. Grant was cooperative with the State and prepared to testify during the Defendant's trial. Ms. Grant was served a subpoena and showed no reticence in cooperating. She frequently met with the State

and participated in interviews each time it was requested. As recently as the Saturday before the trial, Ms. Grant was engaged with the State in trial preparation. The State learned prior to jury selection, that defense counsel spoke with Ms. Grant the Sunday evening before trial.

On July 26, [2016], a jury was selected and sworn, the witnesses were sequestered, and several witnesses testified. The evening before Ms. Grant was scheduled to testify, she did not answer phone calls from the State's Investigator, Keith Hair. He left her voice and text messages instructing her to appear in court the following morning at 9:00 am. She did not show up at the appointed time. The State brought this matter to the attention of the Court and requested a bench warrant be issued to secure her presence. The Court granted a twenty-four-hour recess to allow the United States Marshalls time to locate Ms. Grant. . . .

The United States Marshalls were unable to locate Ms. Grant during the twenty-four-hour recess. As a result, the State moved for a mistrial. The Honorable Thomas Cooper heard the matter in full. After hearing arguments from the State and Defense, Judge Cooper declared a mistrial.

In granting the mistrial, Judge Cooper found "I do feel that the State has been caught by surprise. I have no reason to believe that the State has concocted this factual situation to aid in the trial of your client." Further, Judge

> Cooper ruled, "I think it falls within the rubric of *Arizona v. Washington* that this creates and I will use the word manifest necessity to grant a mistrial. And there certainly is a public interest in the fair trial of the Defendant." Judge Cooper also held, "I think the public is entitled to a fair trial as is your client. And these unique circumstances I think compel this Court to grant a mistrial and I so do at this time."

(Citations omitted). After reviewing the law, the court then concluded that Judge Cooper "did not abuse his discretion by granting a mistrial based on manifest necessity." "[T]he public's interest in a fair adjudication was implicated by the surprise absence of the State's witness."

Seay then filed this habeas petition in federal court under 28 U.S.C. § 2241. Magistrate Judge Mary Gordon Baker, in a careful analysis of the facts and the law, recommended that the petition be denied. Agreeing with the State that "there was manifest necessity for the mistrial," she explained that unlike the Supreme Court's case in *Downum*, the State in this case "did not take a chance." She stated further:

> [T]he State — and [Seay's] counsel — had been in contact with Ms. Grant the weekend before trial began, and nothing suggested she would not be present for trial; she had, in fact, testified during the trial of one of [Seay's] codefendants. After the jury was sworn, Ms. Grant stopped cooperating with the State and failed to appear, despite her subpoena. In response to the State's attempts to get in touch with her, she (or

> someone using her cellular telephone) sent a text message to the State's investigator advising that she was not coming to testify.

In response to Seay's contention that the trial judge should have granted a continuance instead of a mistral, Magistrate Judge Baker disagreed:

> 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. 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.
>
> When she was subsequently arrested — albeit a day later — she was found to be in contempt. And while she was arrested the following day, the information Judge Cooper had was that she was uncooperative and had decided she was not going to testify, no matter the consequences. There appears to have been no fault on behalf of the State (or the Petitioner) — Ms. Grant simply decided, at the eleventh hour, not to testify.

The judge accordingly recommended that the district court deny Seay's petition for a writ of habeas corpus.

After considering the case *de novo*, the district court agreed with Magistrate Judge Baker's recommendation. The court addressed more fully Seay's claim that the state judge failed to discuss and

consider available alternatives prior to granting a mistrial, concluding that the state court did not abuse its discretion:

> While the trial judge did not seem to consider another continuance immediately before he granted the mistrial, in light of the circumstances, *i.e.* Grant's declaration that she did not want to testify, the State's effort's to locate her, including involving the U.S. Marshals' Office, and the fact that a continuance had already been granted, the court finds that no other alternatives were available at that time.

From the district court's order, dated September 11, 2018, Seay filed this appeal.

II

The applicable double jeopardy principles are not in controversy. The Fifth Amendment provides that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This Double Jeopardy Clause — which is applicable to the States through the Fourteenth Amendment, *see Benton v. Maryland*, 395 U.S. 784, 794 (1969) — thus "unequivocally prohibits a second trial following an acquittal." *Arizona v. Washington*, 434 U.S. 497, 503 (1978). But, as jeopardy attaches on the empanelment of the jury, the Clause also protects "the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Id.* (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)); *see also id.* at 503–04 (recognizing that, "whenever a trial is aborted before it

is completed," there is a "danger of . . . unfairness to the defendant" because "[i]t increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted" (footnote call numbers omitted)). The Supreme Court has thus recognized that, "as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Id.* at 505.

At the same time, however, the Court has recognized that a defendant's right to have a particular tribunal decide his case is not absolute and instead must "sometimes [be] subordinate to the public interest in affording the prosecutor one *full and fair* opportunity to present his evidence to an impartial jury." *Washington*, 434 U.S. at 505 (emphasis added). Nonetheless, "in view of the importance of the right," the prosecutor bears the "heavy" burden of justifying any mistrial to which a defendant objects, and she does so by demonstrating that the mistrial is warranted by "'manifest necessity.'" *Id.* (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (recognizing that "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")); *cf. United States v. Jorn*, 400 U.S. 470, 481 (1971) (plurality opinion) (describing "manifest necessity" as a "standard of appellate review for testing the trial judge's exercise of his discretion in

declaring a mistrial without the defendant's consent"). But while this "classic formulation of the test" requires that there be "a 'high degree'" of necessity justifying a mistrial, the Court has nonetheless emphasized that *the standard must not* "*be applied mechanically*" but rather with "attention to the particular problem confronting the trial judge." *Washington*, 434 U.S. at 506 (emphasis added).

More specifically, as relevant here, the Court has instructed that "when the basis for the mistrial is the unavailability of critical prosecution evidence," "the strictest scrutiny is appropriate." *Washington*, 434 U.S. at 508. Such extra care must be taken because "the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn [the] 'abhorrent' practice" of prosecutors seeking mistrials "in order to buttress weaknesses in [their] evidence," *id.* at 507–08, or otherwise attempting to use "the superior resources of the State to harass or to achieve a tactical advantage over the accused," *id.* at 508. As such, the Court has recognized that *if* "*a prosecutor proceeds to trial aware that [a] key witness[] [is] not available to give testimony* and a mistrial is later granted for that reason, a second prosecution is barred." *Id.* at 508 n.24 (emphasis added) (citing *Downum*, 372 U.S. 734). That being said, however, the Court has nonetheless repeatedly "refuse[d] to say that the absence of [a] witness[] 'can never justify discontinuance of a trial'" and has instead emphasized that "[e]ach case must turn on its facts." *Downum*, 372 U.S. at 737; *see also Wade*, 336 U.S. at 691 (same).

When a defendant contends that he may not be retried consistent with the Double Jeopardy Clause because the trial court's declaration of a mistrial was improper, "reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial," so as to ensure that the defendant's right "to have his trial concluded before the first jury impaneled" is adequately protected. *Washington*, 434 U.S. at 514, 516. In considering whether a trial judge's exercise of discretion in granting a mistrial was sound, "a reviewing court may find relevant [1] whether the trial judge acted precipitately [in declaring a mistrial] or [instead] expressed concern regarding the possible double jeopardy consequences of an erroneous declaration of a mistrial, [2] heard extensive argument on the appropriateness of such a measure, and [3] gave appropriate consideration to alternatives less drastic than granting a mistrial." *Gilliam v. Foster*, 75 F.3d 881, 895 (4th Cir. 1996) (en banc); *see also Washington*, 434 U.S. at 515 (emphasizing, in concluding that a trial judge had exercised sound discretion in declaring a mistrial, that "[t]he trial judge did not act precipitately in response to the prosecutor's request for a mistrial" but instead had "evinc[ed] a concern for the possible double jeopardy consequences of an erroneous ruling" by giving "both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial"); *United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993) (noting that in determining whether a mistrial was required by manifest necessity, the question of "whether less drastic alternatives were available" is "critical" (citing *Harris v. Young*, 607 F.2d 1081, 1085 n.4 (4th Cir. 1979) ("If obvious and

adequate alternatives to aborting the trial were disregarded, [it] suggests the trial judge acted unjustifiably")).

In this case, the record before the state trial judge at the time of his mistrial ruling fully supported his factual finding that "the State ha[d] been caught by surprise" by Grant's failure to appear on Wednesday, July 27. Indeed, because there was no evidence to the contrary, even the strictest scrutiny cannot justify upsetting the trial court's decision to discharge the jury. This was not an instance where the "prosecutor[s] [had] proceed[ed] to trial *aware* that [their] key witness[] [was] not available to give testimony" — a situation where the law is clear that the Double Jeopardy Clause would bar a second prosecution. *Washington*, 434 U.S. at 508 n.24 (emphasis added). Rather, after serving Grant with a subpoena the previous month, the prosecution team had met with her frequently, including on the Friday before the trial was scheduled to begin, and they had also spoken with her by phone that Saturday. She was a cooperating witness who was told to appear in court, pursuant to her subpoena, on Wednesday, July 27. The prosecutor thus had every reason to believe that Grant would testify as instructed the following week, just as she had in their prior trial against one of Seay's alleged coconspirators. Indeed, in later explaining her surprise to Judge Harrington, who found Grant in contempt, the prosecutor reiterated that Grant had "never indicated that she would not testify." At bottom, the record contains *no evidence* that the prosecution team *was aware* on the morning of Tuesday, July 26 — when the

jury was empaneled — that Grant would refuse to testify the following day.

Without taking into account these important facts, the majority concludes that the prosecutor knew on the morning of July 26 that Grant might not appear when needed largely because she was not in court that morning or the morning before, July 25. It focuses most heavily on the simple fact that the subpoena, issued one month before trial, states in one place that the witness had to appear every day of the entire trial. Elsewhere, however, the subpoena expressly provided that Grant could remain in compliance with the subpoena if she provided her contact information to the prosecutors (which we know she did) and came to court as directed by them. And the record here conclusively shows that the prosecutor did not require Grant to appear until Wednesday, July 27, at 9:00 a.m. State Trial Judge Cooper thus found that the prosecutor was surprised when, the night before her anticipated testimony, Grant declared that she would not appear on July 27 as required, and State Judge Harrington, who later held Grant in contempt, did so because she failed to appear *on Wednesday, July 27*. State Judge Dennis concluded likewise.

The majority, however, now overrules the facts found and conclusions reached by these state judges, summarizing its own finding as follows:

> Grant was compelled by subpoena to appear in court for the full term of court beginning on Monday, July 25, 2016, but she did not comply with that directive. Nor did Grant appear the following morning on Tuesday, July 26, 2016,

> before the jury was empaneled. . . . [T]he government [thus] *knew* that its crucial witness had failed to appear as required by subpoena for two consecutive days before the jury was empaneled . . . [but] nevertheless allowed jeopardy to attach, risking the foreseeable possibility that Grant would not appear in time to testify.

Ante at 9–10 (emphasis added). But this finding rests entirely on one statement in the subpoena that the majority takes out of context. When taken in context, it is clear that Grant was not required to appear, on the directive of the prosecutor, until Wednesday, July 27, after the jury had been empaneled. Consequently, no one expected Grant to appear in court on Monday, July 25 or Tuesday, July 26. And at the point when the jury was empaneled, there is no evidence in the record that the prosecution proceeded with the awareness that Grant would not appear, as directed, the next day. To be sure, the record does indicate that at some point prior to *the morning of Wednesday, July 27*, the State's investigator had taken steps to try and locate Grant after she had temporarily stopped returning his phone calls and text messages. But there is no sound reason to infer from this that, contrary to her representation of surprise to the court, the prosecutor was actually aware *on the morning of Tuesday, July 26*, that Grant would not appear.

Thus, while the majority correctly points out that the Supreme Court in *Downum* "explained that the double jeopardy inquiry focuses on the state's *knowledge* at the time the jury is empaneled," *ante* at

8 (emphasis added), it wrongfully imputes to the prosecutor in this case a *knowledge and awareness* that the prosecutor did not have. The record demonstrates this factual error, showing that:

1) Grant was a cooperating witness who had already testified on behalf of the State against a codefendant involved in the same murder, leading to that defendant's conviction.

2) Grant met regularly with the prosecution, cooperating in the preparation for the trial of Seay.

3) At a trial preparation meeting in June 2016, prosecutors issued Grant a subpoena to appear for the week of July 25, and she expressed no reticence about responding to the subpoena as required.

4) The prosecution met with Grant on the Friday before trial and spoke with her by telephone on the Saturday before trial, giving the prosecution a firm belief that she would appear to testify at the trial the next week, when called.

5) Seay's counsel spoke with Grant on the Sunday before trial to introduce himself to her, and he did not dispute the prosecutor's statements.

6) Both the lead prosecutor and her investigator left telephone messages and texts with Grant, instructing her to appear for trial on

Wednesday, July 27. While they did not reach her by telephone, she did receive their messages, as indicated by her return text during the night of July 26.

7) There was no evidence that when the jury was picked and empaneled on July 26, the prosecutor or defense counsel had any knowledge or awareness that Grant would not appear to testify on Wednesday, July 27. Indeed, the prosecutor later stated affirmatively that she had no such awareness, as Grant "never indicated she would not testify."

8) When Grant did not appear on July 27 as instructed, claiming fear of retribution, the prosecutor claimed surprise, noting that this was the first time such a situation had occurred in her 30-year career and in her investigator's 26-year career.

Thus, not only does the majority engage in factfinding — finding as fact that the prosecutor expected Grant to appear in court on both July 25 and July 26 and therefore *knew* that there was a real risk that she would not appear for trial — but its findings are not supported by the record. And this is especially troubling when the majority overrules the findings of three different state judges:

1) State Judge G. Thomas Cooper found that when Grant did not appear on Wednesday, July 27, "the State [was] caught by surprise" and found "no reason to believe that the

State has concocted this factual situation." Moreover, in the bench warrant that the judge issued, he found that Grant "was advised by telephone communications to be present in [court] on Wednesday, July 27 . . . and willingly failed to appear."

2) State Judge Kristi L. Harrington found, in holding Grant in contempt of court, that Grant "failed to appear in court on July 27, 2016" and that she had "no justifiable defense for failing to appear in court on July 27, 2016."

3) State Judge R. Markley Dennis, Jr., in denying Seay's motion to dismiss the case against him based on double jeopardy, found that "[t]he State did not impanel a jury *with the knowledge* that they could not locate their witness nor with knowledge that the witness would refuse to cooperate due to being afraid." (Emphasis added).

With its unsupported factfinding and its ruling contrary to five judges — three state court judges and two federal judges — the majority engages in an aggressive and completely unnecessary intrusion into state proceedings, one that will deny South Carolina the right to prosecute Seay for first-degree murder.

Seay's reliance on *Downum* and *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931), provides him with little support in the circumstances of this case. The key to the Supreme Court's holding in *Downum* was that the prosecutor *knew* when he proceeded to empanel the

jury that his witness had not been located before trial. Moreover, as the Court noted, the witness had not even been subpoenaed and "no other arrangements had been made to assure his presence." 372 U.S. at 737. In those circumstances, when the prosecutor empaneled the jury "without first ascertaining whether or not his witnesses were present, he took a chance," gambling on whether his witness would appear. *Id*. The facts in the present case, however, are materially different. The state prosecutor here had been in touch with the witness, who had cooperated in a prior case with respect to the same murder and who continued to cooperate in the prosecution of Seay. Moreover, the witness had been subpoenaed and had been directed to appear at the second day of trial, on Wednesday, July 27. The prosecutor thus did not take the chance described in *Downum*.

Cornero, which was cited with approval in *Downum*, is likewise distinguishable. That case involved a federal prosecution for a violation for the National Prohibition Act, where the government's case depended on the testimony of two codefendants who had previously pleaded guilty. Rather than subpoena these witnesses, however, the district attorney relied on the fact that they had been "released under bond to appear for sentenc[ing] on the day of [Cornero's] trial." *Cornero*, 48 F.2d at 69. What is more, when the case was called for trial, the district attorney expressly noted that two of his three witnesses had failed to make an appearance but affirmatively suggested that the court empanel the jury and then allow him "a short time to ascertain [the location of] . . . the witnesses." *Id.* at 70. When the witnesses were still not located after several days and

a mistrial was declared, the Ninth Circuit ruled that the Double Jeopardy Clause should have been applied to bar Cornero's second trial, reasoning that "when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance" that a mistrial would be necessary and that a later prosecution would be barred since he had "entered upon the trial of the case without sufficient evidence to convict." *Id.* at 71. Again, the circumstances before us are totally different, presenting none of the elements required to find that the prosecutor took a chance in this case.

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 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); *see also Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (concluding that "[a]lthough the terms of AEDPA do not govern this case," a court of appeals "must be guided by the general principles underlying our habeas jurisprudence").

In addition, with the majority's holding, criminal defendants who engage in witness intimidation on the

eve of trial may now be able to avoid a trial altogether. Here, the State's theory of the case was that Seay and his coconspirators had murdered Lyles because they believed him to be a "snitch." Then, after the trial had begun, the State's key witness sent the prosecutor's investigator a message that she would not be appearing to testify because she was "scared as hell" and would rather face jail time than risk "leaving my son in this world without a mother." While the State later candidly conceded that it had "no information that [Grant] was threatened by the defendant or anybody on his behalf," at the time that the state trial judge was deciding how to proceed, it was far from clear what had transpired, and it seemed entirely possible that Grant had been threatened by someone associated with Seay or even Seay himself, as he was out on bond at the time. Indeed, as a precaution, the trial court temporarily revoked Seay's bond on July 27. In these circumstances, "unless unscrupulous [defendants] are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial." *Washington*, 434 U.S. at 513.

III

Seay also contends that the state trial judge acted "precipitately" in ordering a mistrial and failed to consider adequately whether there were reasonable alternatives to a mistrial. The majority concludes similarly, noting that the trial court "did not discuss why it did not continue the trial one additional day, or over the weekend until the following Monday, August 1, 2016, to give law enforcement authorities additional time to locate Grant." *Ante* at 14–15. These arguments,

however, fail to credit the actions that the trial judge actually took and the context in which he made his ruling.

The record shows that when, on Wednesday, July 27, the State expressed surprise by Grant's failure to appear, the state court did not precipitately grant a mistrial. Instead, it took two other actions. First, it issued a bench warrant, directing law enforcement officers to arrest Grant and bring her into the courtroom to testify. And second, it granted a postponement of the trial until the next day to give the officers an opportunity to find Grant. In addition, on the next day, when law enforcement officers reported that they were unable to find Grant, the court also took into account the fact that Grant had texted the prosecutor's investigator, telling him that she was not going to testify, *regardless of the consequences*, because she was "scared as hell" and had concluded that "[j]ail time [for not appearing] [was] better than leaving [her] son in this world without a mother." Finally, the court conducted a hearing, receiving the arguments of both parties. In these circumstances, the record does not reflect that the trial judge "act[ed] precipitately in response to the prosecutor's request for mistrial." *Washington*, 434 U.S. at 515. Instead, like in *Washington*, the court was clearly aware of "the possible double jeopardy consequences of an erroneous ruling" and "gave both defense counsel and the prosecutor a full opportunity to explain their positions on the propriety of a mistrial." *Id*. at 515–16; *cf. Jorn*, 400 U.S. at 487 (plurality opinion) (emphasizing, in holding that a defendant's reprosecution would violate the Double Jeopardy Clause, that "the trial judge acted

so abruptly" in *sua sponte* declaring a mistrial that neither defense counsel nor the prosecutor had any opportunity to object or suggest an alternative).

Thus, when the court considered the mistrial motion, it had already granted a 24-hour continuance to search for Grant to no avail, and there was no reason to believe at that time that Grant would be located any time soon were an additional continuance granted. Seay nonetheless argues that the trial judge could have required the State to present its remaining witnesses while the search for Grant continued. But the record reflects that the State at that point had only three or four witnesses left whom it had planned to call and that those witnesses' testimony was useful only to corroborate Grant's testimony.

Considering these factors, the district court rejected Seay's argument, stating:

> While the trial judge did not seem to consider another continuance immediately before he granted the mistrial, in light of the circumstances, *i.e.* Grant's declaration that she did not want to testify, the State's effort's to locate her, including involving the U.S. Marshals' Office, and the fact that a continuance had already been granted, the court finds that no other alternatives were available at that time. . . . As a continuance had already been granted and substantial efforts were already made to locate the absent witness without success, the court defers to the trial judge's

> ruling that manifest necessity warranted a mistrial.

I agree.

IV

South Carolina has probable cause to believe that Broderick Seay, Jr. committed a first-degree murder, execution-style, of a man thought to be a "snitch," and it wants only to have one full and fair opportunity to convict him for the crime and remove him from society. This case does not present any question of prosecutorial abuse, prosecutorial misconduct, or prejudice to the defendant — matters that the Double Jeopardy Clause was designed to forestall. And the majority's incautious application of the Clause in the circumstances presented is, I believe, a tragedy for public justice. The State is being denied a fair opportunity to try a person indicted by a grand jury for murder, and the public interest strongly requires us to act most cautiously. The entire purpose of the Double Jeopardy Clause is to protect defendants from prosecutorial abuse and multiple trials for the same offense. But it should rarely be applied to deny the State one full trial where, as here, the prosecutor and the trial judge acted reasonably under all the circumstances.

Accordingly, I would affirm the judgment of the district court, which denied Seay's petition for a writ of habeas corpus, and allow his retrial in state court for murder.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

C/A No. 2:17-2814-TMC

[Filed September 11, 2018]

Broderick William Seay, Jr.,	)
	)
Petitioner,	)
	)
v.	)
	)
Sheriff Al Cannon,	)
	)
Respondent.	)
	)

ORDER

Petitioner Broderick William Seay, Jr., a state pretrial detainee, is seeking habeas corpus relief pursuant to 28 U.S.C. § 2241. (ECF No. 1).[1] Petitioner filed a "Motion of Objection for Extension of Time/Dismissal of Charge as Bias and Prejudice" (ECF

[1] Petitioner was originally proceeding pro se, but he has since retained counsel. (ECF No. 22). Petitioner, through counsel, responded to Respondent's motion for summary judgment and also filed his own motion for summary judgment. (ECF Nos. 29 and 30).

No. 14) and a motion for summary judgment (ECF No. 29). Respondent has also filed a motion for summary judgment. (ECF No. 17). Before the court is the magistrate judge's Report and Recommendation ("Report"), recommending that Petitioner's motions (ECF Nos. 14 and 29) be denied and Respondent's motion for summary judgment (ECF No. 17) be granted. (ECF No. 38). Petitioner timely filed objections (ECF No. 39), and Respondent filed a reply to those objections (ECF No. 41). For the reasons stated below, the court adopts the Report as modified and denies Petitioner's motions and grants Respondent's summary judgment motion, but grants Petitioner a certificate of appealability.

I. Background/Procedural History

Petitioner is currently a pretrial detainee at the Al Cannon Detention Center. In March of 2015, Petitioner was indicted for murder (ECF No. 16-1), and on July 26, 2016, a jury trial began with State Circuit Court Judge Thomas Cooper presiding. (ECF No. 29-2 at 1).[2] Several witnesses testified on July 26th. *Id.* at 43-224. After one witness testified on the morning of July 27th, the State informed the trial judge that its next witness, the co-defendant's girlfriend at the time of the murder, Starteasha Grant ("Grant"), was not cooperating and had not shown up for court at 9:00a.m. as directed. (ECF No. 29-2 at 231). Specifically, the assistant solicitor stated:

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[2] On July 25, 2016, The trial judge had granted a one-day continuance prior to the jury being selected in order that the parties could review some new evidence. (ECF No. 16-5 at 3).

She is our significant witness. She is the one who sees Mr. Seay with Mr. Howard and Ty after their coming off of Wadmalaw Island. She was the person who then goes to her apartment, sees them taking the tote bag with the weapon or which she believes the weapon is still in the bag, tried to take that into her apartment and puts a halt to that. They then travel to Montague Avenue, try to get a hotel room. And they leave Mr. Seay behind at the Waffle House.

She is the person who sets all of that out for us. I will tell Your Honor that we met with her last Friday. We spoke to her by phone on Saturday. I think even Mr. McCoy was able to reach her Sunday. Since then she has not been cooperative with our office at all. Mr. Hair, my investigator, is present in the courtroom. He has been to her apartment. He has been to her employment. He has spoken to two of her sisters. They indicated that they felt like -- they indicated that she indicated that she had been threatened. I texted her last night and asked her to come to our office at 8:30, that she needed to be in court at 9:00. Mr. Hair texted her and told her that she needed to be present at 9:00 over at the courthouse and I believe he told her a bench warrant will be issued if she did not show.

Since then she did respond to him indicating that she was not going to come, that she was frightened. And so, Your Honor, at this time the State is asking for a bench warrant to be issued

> against her and for you to allow us some time for the deputies to make that effort.

Id. at 231-32. Defense counsel stated he did "not have any issue with a bench warrant being issued" and it was "not really [his] call." *Id.* at 232-33. At 11:12a.m., the trial judge issued a bench warrant for Grant's arrest and recessed the trial for the day. *Id.* at 235-36.

The next morning, the assistant solicitor informed the trial judge that Grant had not been located, and the State moved for a mistrial. *Id.* at 238-44. The assistant solicitor informed the court that Grant had been served with a subpoena in June, and that she had met with Grant on Friday to go over her testimony. *Id.* at 238.[3] Further, the assistant solicitor stated that someone from the Solicitor's Office had spoken with Grant on Saturday and Defense counsel had spoken to her on Sunday, and that Grant did not appear for court on Wednesday as directed. *Id.* at 238 -39. Further, the assistant solicitor stated that Grant's sisters indicated to the State investigator that they had not seen Grant since Saturday and that a text message had been sent to the investigator from Grant's phone, which indicated that Grant was scared and would not be coming to court. *Id.*[4] The assistant solicitor stated that the State

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[3] The proof of service for the subpoena in the record shows that on June 23, 2016, Grant was served with the subpoena to appear at trial the week of July 25, 2016. (ECF No. 16-2 at 12-13).

[4] The text message from Grant to the State's investigator provides as follows:

> I been losing a lot of sleep over the last 3 days, I'm scared as hell, I can't afford for any of my loved ones to be

had enlisted the help of the United States Marshal's Office and had been in contact with them that day, but it had no success in locating Grant. *Id.* Petitioner's trial counsel opposed the motion arguing that the State had not shown manifest necessity. (ECF No. 29-2 at 245-47).[5] Trial counsel argued that the State still had three or four remaining witnesses that it could call. *Id.*. at 245.[6] The trial judge granted the motion for a mistrial finding that the State had been caught by surprise and that Grant was a critical witness for the prosecution. (ECF No. 29-2 at 250-51). The trial judge stated that he thought the case fell under the rubic of *Arizona v. Washington,*[7] and he found a manifest necessity to grant a mistrial. (ECF No. 29-2 at 251-52).

> harmed, I am all that my son has he has no daddy so I decided not to take the stand and I'm willing to accept all consequences. Jail time is better than leaving my son in this world without a mother.

(ECF No. 1-1 at 22).

[5] At the hearing on the subsequent motion to dismiss before State Circuit Court Judge Marley R. Dennis, Jr., defense counsel also stated that there were e-mails indicating that the State had attempted to contact Grant throughout the week of the trial and there had been no response from her. (ECF No. 16-5 at 8). This information, however, was not before the trial judge.

[6] Defense counsel also noted that at the trial of Petitioner's co-defendant, Kevin Howard, Grant testified with charges pending against her, but those charges were dismissed prior to Petitioner's trial. (ECF No. 29-2 at 247).

[7] *Arizona v. Washington*, 434 U.S. 498 (1978).

A day later, on Friday, July 29, 2016, Grant was taken into custody, and she was found to be in contempt of court and ordered to remain in custody "with the ability to purge herself of contempt by complying with the subpoena and testifying in the case of State of South Carolina versus Broderick Seay, scheduled for the December 12, 2016 term of court." (ECF Nos. 16-3, 16-4). On August 22, 2016, she was found in contempt of court and ordered to remain in custody with the ability to purge herself by testifying at Petitioner's trial, which was at that time scheduled for the December 12, 2016 term of court. (ECF No. 16-4). She since been released from jail. (ECF Nos.16 at 3 n.1, 16-5 at 26).

On July 17, 2017, Petitioner's counsel filed a motion to dismiss in state court alleging that the indictment was a violation of double jeopardy. (ECF No. 1-1). The State opposed Petitioner's motion. (ECF No. 16-2). After a hearing on the motion, on October 17, 2017, Judge Dennis denied Petitioner's motion to dismiss. (ECF No. 16-6).[8] During this hearing, defense counsel noted that the State was inconsistent in its recitation of its attempts to contact Grant. (ECF No. 16-5 at 8). Initially, defense counsel noted that he had emails from the State "indicating that they had tried contacting [Grant] via text message throughout the week of trial, and did not get a response from her." *Id.* Later, he stated that there were inconsistencies - the State initially represented that it had messaged Grant all

[8] Judge Dennis granted Petitioner a continuance - basically staying a re-trial pending a ruling on the instant habeas petition. (ECF No. 16-7 at 4).

week without any response and later the State stated it had called Grant only the night before she was to testify. (ECF No. 16-5 at 16). Defense counsel acknowledged that the State had subpoenaed Grant, but argued that the State should have made contact with Grant the first day of trial to ensure her presence at the trial. (ECF No. 16 at 32). In response, at the hearing on the motion to dismiss, the State noted that it had "contacted [Grant] throughout the week and said, you need to be in courtroom such and such at nine o'clock in the morning on this day, to let her know we expected her to be there to testify." *Id.* at 26. In his written order, Judge Dennis denied the motion to dismiss. (ECF No. 16-6). He found that the State was caught by surprise and not to blame for Grant's failure to appear, and held that the mistrial was warranted by manifest necessity. (ECF No. 16-6 at 7).

Petitioner, proceeding pro se, filed this § 2241 habeas petition the next day. (ECF No. 1).[9] The response to the Petition was due on January 3, 2018 (ECF No. 7 at 2). On January 3, 2018, Respondent filed a motion for an extension of time within which to file a response, or otherwise plead, which the magistrate judge granted on January 8, 2018. (ECF Nos. 11 and 12). Respondent thereafter timely filed its response and

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[9] The court notes that habeas relief under § 2254 is not available when a person charged in state court raises a pretrial challenge such as a double jeopardy claim. *See Benson v. Superior Court Dep't of Trial Court*, 663 F.2d 355, 358 (1st Cir. 1981); *see also Montez v. McKinna*, 208 F.3d 862, 870 (10th Cir. 2000) (McKay, Circuit Court Judge, concurring in part; dissenting in part) (collecting cases); *Jacobs v. McCaughtry*, 251 F.3d 596, 597-98 (7th Cir. 2001) (collecting cases).

motion for summary judgment on February 2, 2018. (ECF No. 16 and 17). On February 15, 2018, Petitioner filed a response to the Respondent's summary judgment motion. (ECF No. 20). Then, on March 15, 2018, after having been granted leave to do so, Petitioner, through counsel, filed another response to the Respondent's summary judgment motion and his own motion for summary judgment. (ECF Nos. 24, 29, and 30). On March 29, 2018, Respondent filed a response opposing Petitioner's summary judgment motion (ECF No. 33) and a reply to Petitioner's pro se response (ECF No. 34). On April 16, 2018, Petitioner filed a reply to Respondent's response. (ECF No. 37).[10]

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[10] The court notes, as the magistrate judge stated, that abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), is not warranted here. (Report at 5 n.4). However, the court believes it is necessary to elaborate on that issue. In *Robinson v. Thomas,* 855 F.3d 278 (4th Cir. 2017), the Fourth Circuit Court of Appeals held that in *Nivens v. Gilchrist ("Nivens I")*, 319 F.3d 151 (4th Cir. 2003), it had clarified the scope of its decision in *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996):

> In *Nivens I*, we clarified the scope of our decision in *Gilliam*. *Nivens I* concerned whether a district court properly abstained under *Younger* from intervening in a pending state criminal drug prosecution that began after the appellants had paid North Carolina's drug tax. *Nivens I*, 319 F.3d at 152. The appellants argued that the Double Jeopardy Clause barred the later criminal prosecution because the drug tax was a criminal penalty that had been satisfied; in effect, they alleged they were being twice punished for the same offense. *Id.* at 152-53. Relying on *Gilliam,* the appellants argued that abstention was improper because "a colorable claim of a double jeopardy violation [was] sufficient to establish exceptional circumstances warranting federal court intervention

II. Applicable Law

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether a genuine issue of material fact exists, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. A litigant "cannot create a genuine issue of

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> without any separate showing." *Id.* at 159 (internal quotation marks omitted). We rejected that reading of *Gilliam*, explaining "[w]e did not hold that an allegation of a double jeopardy violation automatically precludes *Younger* abstention." *Id.*

855 F.3d at 287. The Fourth Circuit stated that petitioners may not seek federal intervention into their pending state court litigation for a violation of the Double Jeopardy Clause unless they show that the state's pretrial procedures are not able to afford them adequate protection. *Id.* at 289. Here, as the South Carolina Supreme Court has held that an appeal from this type of motion would be interlocutory until after a second trial, *State v. Rearick*, 790 S.E.2d 192, 195 (S.C. 2017) (holding that denial of defendant's motion, following mistrial, to dismiss any subsequent prosecution on double jeopardy grounds was interlocutory order from which no appeal could be taken), Petitioner has shown that he will be unable to further pursue his double jeopardy defense at the state level before being put to trial. Accordingly, the court finds that abstention is not warranted here.

material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Monahan v. Cnty. of Chesterfield*, 95 F.3d 1263, 1265 (4th Cir. 1996).

III. Discussion

The Report has no presumptive weight and the responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). In the absence of objections to the Report, this court is not required to provide an explanation for adopting the recommendation. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Rather, "in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

In his § 2241 petition, Petitioner asserts that his "Fifth Amendment rights would be violated if he is subjected to a second trial where a mistrial was improvidently granted." (ECF No. 1 at 6). Petitioner asks this court to "find that a subsequent trial should be prohibited on the grounds of double jeopardy." (ECF No. 1 at 7). As noted above, Petitioner filed a motion to dismiss and a motion for summary judgment (ECF Nos. 14 and 29), and Respondent also filed a motion for summary judgment (ECF No. 17).

In her Report, the magistrate judge recommends that the court deny Petitioner's motion to dismiss. (Report at 13). The magistrate judge determined that Respondent had timely filed its response after having been granted an extension of time within which to file its response. (Report at 5 n.3). Petitioner has not objected to this portion of the Report, and finding no clear error, the court adopts this part of the Report. Accordingly, Petitioner's motion to dismiss is denied.

In her Report, the magistrate judge also recommends that the court deny Petitioner's motion for summary judgment and grant Respondent's motion for summary judgment. (Report at 13). Specifically, the magistrate judge determined that there was manifest necessity for the trial court to grant the mistrial under *Arizona v. Washington*, 434 U.S. 497, and, therefore, Petitioner's re-trial would not violate double jeopardy.

Petitioner raises several specific objections. (ECF No. 39). Petitioner objects to the magistrate judge's: (1) failure to correctly apply the "strictest scrutiny" standard of *Arizona v. Washington*; (2) failure to analyze the facts of this case under *United States v. Shafer*, 987 F.2d 1054 (4th Cir. 1993); (3) failure to analyze the facts of this case under *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931); (4) application of *Downum v. United States*, 372 U.S. 734 (1963); (5) apparent use of a harmless error analysis; and (6) recommendation that a certificate of appealability be denied. *Id.*

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that no person shall

"be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see Benton v. Maryland,* 395 U.S. 784, 794 (1969). Among other things, the Double Jeopardy Clause protects a criminal defendant from facing "repeated prosecutions for the same offense." *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). There are circumstances under which retrial is permitted after a criminal proceeding has ended in mistrial. For example, if a defendant requests or consents to a mistrial, the Double Jeopardy Clause will not bar retrial unless the prosecutor has engaged in conduct intended to provoke the mistrial request. *See Kennedy*, 456 U.S. at 675-76. If the defendant opposes the declaration of a mistrial, however, retrial is prohibited unless there was a manifest necessity for the mistrial or the failure to declare a mistrial would have defeated the ends of justice. *See Wade v. Hunter*, 336 U.S. 684, 690 (1949).

Whether the declaration of a mistrial is manifestly necessary turns on the facts before the trial court. *See Illinois v. Somerville*, 410 U.S. 458, 464 (1973); *see also Arizona v. Washington*, 434 U.S. at 506 (explaining that the "manifest necessity" standard cannot "be applied mechanically or without attention to the particular problem confronting the trial judge"). While manifest necessity for a mistrial does not require that a mistrial be "necessary" in the strictest sense of the word, it does require a high degree of necessity. *See Arizona v. Washington*, 434 U.S. at 506. "[T]he key word 'necessity' cannot be interpreted literally; instead . . . we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Id.* The clearest example of a

situation in which manifest necessity exists for a mistrial is when a jury is unable to reach a verdict. *Id.* at 509. At the other extreme are situations in which the prosecution seeks a mistrial in order to have additional time to strengthen its case against the defendant or to otherwise obtain a tactical advantage over the defendant. *Id.* at 508. Between these two extremes exists a spectrum of trial situations, some creating manifest necessity for a mistrial and others falling short of justifying a mistrial. *Id.*

"If the grant of a mistrial by the trial judge amounts to an irrational or irresponsible act, he must be found to have abused his discretion in finding that manifest necessity for the mistrial existed." *Gilliam v. Foster,* 75 F.3d at 881, 894 (4th Cir. 1996). In making this assessment, the court construing Supreme Court precedent, held that a reviewing court should consider "whether a trial judge rationally could conclude that the grant of the mistrial was compelled by manifest necessity or whether the ends of public justice demanded that one be granted on the peculiar facts presented." *Id.* Additionally, a reviewing court should consider whether the judge "acted precipitately or whether the trial judge expressed concern regarding the possible double jeopardy consequences of an erroneous declaration of a mistrial, heard extensive argument on the appropriateness of such a measure, and gave appropriate consideration to alternatives less drastic than granting a mistrial." *Id.* at 895.

Moreover, "[i]n order to determine if the mistrial was required by manifest necessity, the critical inquiry is whether less drastic alternatives were available."

United States v. Shafer, 987 F.2d 1054, 1057 (4th Cir. 1993) (citing *Harris v. Young*, 607 F.2d 1081, 1085 n.4 (4th Cir.1979)). *See also United States v. Jorn*, 400 U.S. 470 (1971) (holding that it was an abuse of discretion for trial judge to declare a mistrial without considering alternatives to the mistrial). A continuance is one viable alternative to declaring a mistrial. *See Jorn*, 400 U.S. at 487 (internal citation omitted). When such alternatives exist, manifest necessity does not exist for a mistrial. *See Shafer*, 987 F.2d at 1058. "In all cases, the determination of a trial court that a mistrial is manifestly necessary is entitled to great deference." *Sanders v. Easley*, 230 F.2d 679, 686 (4th Cir. 2000) (citing *Arizona v. Washington*, 434 U.S. at 510)). Having set forth the applicable law, the court will address each of Petitioner's objections in turn.

A. *Arizona v. Washington*

In her Report, the magistrate judge discusses the holding in *Arizona v. Washington* in depth, and clearly uses it as the framework for analyzing whether manifest necessity warranted the declaration of a mistrial. (Report at 6-7). She specifically quotes that "[t]he strictest scrutiny is appropriate when the basis for mistrial is the unavailability of critical prosecution evidence , or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or achieve a tactical advantage over the accused." (Report at 7) (citing *Arizona v. Washington*, 434 U.S. at 508) (footnotes omitted). Petitioner, however, contends that the magistrate judge failed to properly apply the "strictest scrutiny" set forth in *Arizona v. Washington*. Specifically, he contends that

the magistrate judge erred by finding manifest necessity because: (1) the trial judge did not consider alternatives; (2) the mistrial provided a tactical advantage to the prosecution; and (3) the trial judge acted precipitately by granting a mistrial less than twenty-four hours after being informed that the witness was missing. (ECF No. 39 at 2-6). In its response, Respondent contends that the magistrate judge "carefully announced and utilized [the standard set forth in *Arizona v. Washington*] throughout the report." (ECF No. 41 at 1). Further, Respondent contends that the magistrate judge correctly rejected Petitioner's arguments as to these issues. (ECF No. 41 at 1-2).

First, here, there is no evidence that, by moving for a mistrial, the State sought to obtain a tactical advantage or engaged in any misconduct. Petitioner makes much of the fact that the third alleged co-defendant, Ty Laval Drayton, was tentatively identified by Grant immediately before Petitioner's trial. (ECF No. 29-3).[11] Petitioner speculates that the

[11] On June 23, 2016, while preparing Grant for her testimony in Petitioner's trial, the assistant solicitor asked Grant about Ty. (ECF No. 29-3). Grant described Ty as "approximately 5'10" tall, brown skin, low haircut, might have a beard, might have gold in his mouth, and probably between 180-200 pounds." *Id.* The assistant solicitor ran the name "Ty" through a database and compiled a list of those who met Grant's description. *Id.* He showed Grant multiple photographs of persons named Ty from the detention center, and when he showed Grant a photograph of Tyrone Laval Drayton, Grant stated that she was 90% sure that he was the Ty involved in the murder. *Id.* She told him she could be 100% sure if she could see inside his mouth. *Id.* The assistant solicitor stated at that point, he dropped the subject and continued

mistrial gives the State an opportunity to pit Ty against Petitioner at a new trial. (ECF No. 39 at 5). However, unlike in *Shafer*, the trial judge did not state that the State's case would be strengthened with Ty's involvement. And there is nothing in the record that suggests that the trial judge was aware of anything which would give the prosecution an advantage or had engaged in any misconduct. In fact, the State referred to Ty as "an unknown Ty" before the trial judge (ECF No. 29-2 at 248), and Ty Drayton was not arrested until almost four months later on November 16, 2016. (ECF No. 29-5). There is nothing in the record which would lead this court to conclude that the State had engaged in any misconduct or was seeking to obtain a tactical advantage.

Petitioner also contends that the trial judge acted precipitately by declaring a mistrial less than twenty four hours after being informed of the missing witness and by failing to consider alternatives to a mistrial, such as a continuance. The magistrate judge noted that when the State first brought Grant's absence to the trial judge's attention, "[a] mistrial was not ordered at this point - instead a mistrial was not ordered until approximately 24 hours later, after a recess in which the State (with the assistance of the United States Marshals Service) searched for Ms. Grant." (Report at 11). However, at the time that Grant's failure to appear was brought to the trial judge's attention, the State had not moved for a mistrial, or even mentioned a mistrial. Rather the State requested a bench warrant for Grant's

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preparing Grant for Petitioner's trial. *Id.* Ty Drayton was not arrested until November 2016. (ECF No. 29-5).

arrest and time to find Grant. (ECF No. 29-2 at 232). The State did not move for a mistrial until after the continuance had been granted, and it had been unable to locate Grant during the twenty-four hour continuance. *Id.* at 239.

What the court is most concerned with is the trial judge's failure to discuss and consider available alternatives prior to granting a mistrial. As noted above, the determination that a mistrial is manifestly necessary is entitled to great deference. *Arizona v. Washington*, 434 U.S. at 510. Moreover, "[i]n order to determine if the mistrial was required by manifest necessity, the critical inquiry is whether less drastic alternatives were available." *United States v. Shafer*, 987 F.2d at 1057 (citing *Harris v. Young*, 607 F.2d at 1085 n.4.). It is an abuse of discretion for a trial judge to declare a mistrial without considering alternatives. *Jorn*, 400 U.S. at 487. *When such alternatives exist*, manifest necessity does not exist for a mistrial. *See Shafer*, 987 F.2d at 1058 (emphasis added).

While the trial judge did not seem to consider another continuance immediately before he granted the mistrial, in light of the circumstances, i.e. Grant's declaration that she did not want to testify, the State's effort's to locate her, including involving the U.S. Marshals' Office, and the fact that a continuance had already been granted, the court finds that no other alternatives were available at that time.[12] In

[12] Grant was located the day after the mistrial was declared. Of course, the trial judge could not have known this at the time he declared a mistrial.

conclusion, there is no doubt that Grant, who at that time was the only witness who could link Petitioner to the murder, was a key witness, and the State was surprised by the refusal of Grant to appear and testify and not merely attempting to gain a tactical advantage. The more difficult question is whether the trial judge considered available alternatives prior to granting the mistrial. The court believes the only reasonable alternatives were to have the State present its remaining witnesses and hope Grant could be located in the interim[13] or continue the trial while the State attempted to locate Grant. As a continuance had already been granted and substantial efforts were already made to locate the absent witness without success, the court defers to the trial judge's ruling that manifest necessity warranted a mistrial.

B. *United States v. Shafer*

In *United States v. Shafer*, 987 F.2d 1054, the Fourth Circuit held that the government had failed to show manifest necessity for a mistrial. In that case, during the trial, the government produced a large quantity of discovery, including *Brady* material, which had allegedly been misplaced or lost by a local police department. *Id.* at 1056. The evidence produced was described as being on "a cart that was four feet long and stacked two to three feet high with [the defendant's company's] financial records-records that

[13] The court is not suggesting that the State should have proceeded to rest without Grant's testimony. Rather, the court is suggesting the State could have called its remaining witnesses and continued to look for Grant before a mistrial was declared.

had never been disclosed to Shafer's lawyers." *Id.* The Fourth Circuit described the government's stipulation that the evidence contained *Brady* material as being an understatement -- as the evidence "destroy[ed] the testimony" of two of the prosecution's witnesses who had testified as to Shafer's failing financial condition. *Id.* Shafer moved to dismiss the case. The trial court denied the dismissal, but then sua sponte declared a mistrial because he found that "the proceedings were 'tainted' by the Government's failure to turn over the discovery materials . . . ." *Id.* Subsequently, Shafer pled guilty, reserving the right to appeal the issue of whether the government showed manifest necessity for the court to declare a mistrial over his objection. *Id.* at 1056-57.

On appeal, the court held that the mistrial was not required by manifest necessity. *Id.* at 1059. The court suggested several alternatives, including granting a continuance to allow Shafer's attorneys an opportunity to study the material and prepare to incorporate it into the trial. *Id.* The court determined that there were available alternatives that would have alleviated the prejudice to Shafer and allowed the trial to continue and that the district court's decision to declare a mistrial was, at least partially, based upon its recognition that the government's case was weakened by the newly discovered materials. *Id.* at 1057.

Petitioner contends that the magistrate judge erred by failing to apply *Shafer* to this case. Petitioner contends that *Shafer* "stands for the proposition that if the trial court's motivation in granting a mistrial 'was partially to rescue the government from a sinking

case," then manifest necessity did not exist." (ECF No. 39 at 7) (citing *Shafer*, 987 F.2d 1059). Petitioner states that during an in-chambers off-the-record conference, the trial judge had stated that, based on the evidence that had been represented thus far, he would be inclined to direct a verdict in favor of the defense. (ECF No. 39 at 8). Petitioner contends that "[i]n ordering a mistrial, the trial court referred to Grant as a 'critical witness' for the State, improperly considering, as the trial court did in *Shafer* the prejudice to the prosecution." (ECF No. 29-1 at 7). The court finds *Shafer* is clearly distinguishable from the current case.

In *Shafer*, the trial court stated that, in its opinion, the discovery violations had hurt the government's case. 987 F.3d at 1058. The trial court noted that the testimony from numerous witnesses was affected by the lack of access to the new discovery material. *Id.* at 1059. *Shafer* prohibits a court from "granting a mistrial to allow the prosecution to strengthen its case." *Id.* at 1057. First, in the present case, any discussion in chambers about a potential directed verdict is not in the record, and therefore the court cannot properly consider it. Without a record, there is nothing to establish the context of the alleged statement. Moreover, even if this court were to assume that the trial judge made such a statement in chambers, there is no evidence that the effect of the mistrial upon the strength of the State's case played any role in the court's determination that a mistrial was necessary. A trial court's observation that, prior to Grant's testimony, the State had not meet its burden of proof is a far cry from a determination that the trial court was motivated to rescue a sinking case. As Respondent

notes, there was no question that Grant was a critical witness for the State. (ECF No. 16 at 15). Here, there is simply no evidence in the record that the trial judge was motivated to declare a mistrial in an effort to save the State from a sinking case. The mistrial was not granted to strengthen the State's case; it was granted to allow the State an opportunity to present its case as it had planned. Grant was not a new witness. Morever, the parties appreciated the importance of Grant's testimony as Grant's testimony had also been critical to the prosecution of Petitioner's co-defendant, Kevin Howard.

Further, as discussed above, Petitioner makes much of the fact that the third alleged co-defendant, Ty Laval Drayton, was identified immediately preceding Petitioner's trial. Petitioner speculates that the mistrial gives the State an opportunity to pit Ty against Petitioner at a new trial. (ECF No. 39 at 5). However, unlike in *Shafer*, the trial judge did not state that the State's case would be strengthened with Ty's involvement. And as noted above, the State referred to Ty as "an unknown Ty" before the trial judge. (ECF No. 29-2 at 248). Accordingly, the court finds this objection to be without merit.

C. *Cornero v. United States*

Petitioner contends that the magistrate judge erred by failing to examine the facts of this case under the holding in *Cornero v. United States*, 48 F.2d 69. In *Cornero v. United States*, the defendant's first trial for violations of the National Prohibition Act was discharged when prosecution witnesses, who had not been subpoenaed, failed to appear to testify and could

not be located during a five-day continuance. The defendant was convicted at a second trial. The Ninth Circuit Court of Appeals reversed, stating:

> The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy.

48 F.2d at 71. In *Wade v. Hunter*, 336 U.S. 684 (1949), the United States Supreme Court refused to follow the holding in *Cornero*, which it characterized as holding that the absence of witnesses was not such an "imperious" or "urgent necessity" as to come within the recognized exception to the double jeopardy provision. *Id.* at 691.[14] The Court said:

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[14] In *Wade*, a United States soldier was being tried for rape before a military court martial in Germany during World War II. After the court martial had begun, the presiding commander concluded that the tactical situation of his command and its distance from the trial site prevented the trial from being completed within a reasonable time frame. The charges against the defendant were withdrawn and later reinstated for trial at a location more

> We are asked to adopt the *Cornero* rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision (*United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824)) to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances, without injury to the defendants or to the public interest.

Id. Likewise, here the court declines to find that the magistrate erred by failing to apply only the holding in *Cornero*. The magistrate judge correctly took all the circumstances into account in analyzing whether the trial court erred by finding manifest necessity warranted the declaration of a mistrial. And, in fact, the magistrate judge cited to a passage in *Downum v. United States* where the Supreme Court quoted *Cornero*, and stated that each case must turn on its facts. (Report at 8-9). The court finds that the magistrate judge did not err in mechanically applying the holding in *Cornero*, and instead analyzed all the facts.

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convenient for the witnesses. The Court concluded that there was "manifest necessity" for the reprosecution under the circumstances. 336 U.S. at 691.

D. *Downum v. United States*

Petitioner contends that the magistrate judge erred her application of the holding in *Downum v. United States*, 372 U.S. 734. He contends that the magistrate judge indicated that she had doubts regarding whether there was manifest necessity based upon the magistrate judge's reference to Petitioner's arguments as having been "well made" (Report at 10). (ECF No. 39 at 10).

In *Downum v. United States*, the Supreme Court held that the Double Jeopardy Clause was violated where a trial judge granted a mistrial after finding manifest necessity when a prosecution witness did not show up to testify. 372 U.S. at 737-38. The prosecution had not subpoenaed the witness. The Court held that "[t]he situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict." *Downum*, 372 U.S. at 737 (internal citations omitted). Essentially, "when the [prosecutor] impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance." *Id*. The Court stated that it resolved any doubt in favor of liberty. *Id.* at 738.

The court disagrees with Petitioner's suggestion that the magistrate judge had doubts. The magistrate judge's references to an argument as being well made does not equate to doubts as to the conclusion that there was manifest necessity to warrant the declaration of a mistrial. Moreover, as the magistrate judge found, here, the State issued a subpoena requiring Grant to appear at Petitioner's trial and, thus, had secured its witness before the jury was

sworn, which distinguishes the instant case from *Downum*. Accordingly, the court finds this objection to be without merit.

E. Harmless Error

Petitioner contends that the magistrate judge used a harmless error analysis based upon her statement that "[t]o the extent Petitioner contends the trial court should have granted a continuance, the undersigned cannot agree that the judge's failure to do more gives rise to a constitutional violation." ECF No. 39 at 11 (quoting the Report at 11). The court declines to read a harmless error analysis into this one sentence, and, thus, finds Petitioner's objection to be without merit.

F. Certificate of Appealability

Petitioner contends that the magistrate judge erred by recommending that the court deny Petitioner a certificate of appealability. (ECF No. 39 at 11-14). Petitioner contends that the magistrate judge referred to his arguments as "well made" and jurists could differ on the magistrate judge's determination.

A certificate of appealability will not issue to a prisoner seeking habeas relief absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the court finds that Petitioner has made such a showing.

Although the court finds that there was manifest necessity for the mistrial so as not to implicate double jeopardy, it is reluctant to conclude that reasonable jurists would not find its assessment of this claim debatable or wrong. Accordingly, the court issues a certificate of appealability on this issue.

IV. Conclusion

After a thorough review of the magistrate judge's Report and the record in this case, the court finds that a second trial will not constitute a violation of Petitioner's double jeopardy rights, and thus, federal intervention is not appropriate. Accordingly, the court adopts the Report as modified. Therefore, Petitioner's motions (ECF Nos. 14 and 29) are **DENIED**; Respondent's Motion for Summary Judgment (ECF No. 17) is **GRANTED**; and Petitioner is **GRANTED** a Certificate of Appealability.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

September 11, 2018
Anderson, South Carolina

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Civil Action No.:2:17-cv-02814-TMC-MGB

[Filed July 31, 2018]

Broderick William Seay, Jr.,)
)
Petitioner,)
)
v.)
)
Sheriff Al Cannon,)
)
Respondent.)
)

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

The Petitioner, a pretrial detainee, seeks habeas relief pursuant to 28 U.S.C. § 2241. This matter is before the Court upon various motions: (a) Petitioner's "Motion of Objection for Extension of Time/Dismissal of Charge as Bias and Prejudice" (Dkt. No. 14); (b) Respondent's Motion for Summary Judgment (Dkt. No. 17; *see also* Dkt. No. 16); and (c) Petitioner's Motion for Summary Judgment (Dkt. No. 29).

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 73.02(B)(2)(c), D.S.C., this Magistrate Judge is authorized to review the instant petition for relief and submit findings and recommendations to the District Court.

The Petitioner, proceeding *pro se* at the time, brought this habeas action on October 18, 2017. (Dkt. No. 1.) On or about January 13, 2018, Petitioner–still proceeding *pro se*–filed a "Motion of Objection for Extension of Time/Dismissal of Charge as Bias and Prejudice." (Dkt. No. 14.) Respondent opposes that motion. (Dkt. No. 15.) On February 2, 2018, Respondent filed a Motion for Summary Judgment. (Dkt. No. 17; *see also* Dkt. No. 16.) By order filed February 5, 2018, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the Petitioner was advised of the summary judgment procedure and the possible consequences if he failed to adequately respond to the motion. (Dkt. No. 18.) Petitioner–still proceeding *pro se*–filed a Response in Opposition to Respondent's Motion for Summary Judgment. (Dkt. No. 20; *see also* Dkt. No. 21.)

On March 5, 2018, Attorney Jason Scott Luck filed a Notice of Appearance on behalf of Petitioner. (Dkt. No. 22.) Attorney Luck sought an extension of time to, *inter alia*, respond to the Motion for Summary Judgment. (Dkt. No. 23.) On March 8, 2018, the undersigned issued the following text order:

> TEXT ORDER granting 23 Motion for Leave to File Response to Motion. Attorney Luck filed a Notice of Appearance on March 5, 2018 (Dkt. No.

> 22), and in his Motion for Leave to File (Dkt. No. 23), he states he was retained by Petitioner that same day. Counsel requests time to "review the record of the underlying action, perform research, prepare a formal response to Respondent's motion, and/or file a cross-motion." (Dkt. No. 23 at 1.) Petitioner's Motion for Leave to File Response to Motion (Dkt. No. 23) is GRANTED. Petitioner's Response in Opposition to the Motion for Summary Judgment (Dkt. No. 17) is due May 7, 2018.

(Dkt. No. 24.)

On March 15, 2018, Petitioner filed a Cross Motion for Summary Judgment, (Dkt. No. 29), as well as a Response in Opposition to Respondent's Motion for Summary Judgment, (Dkt. No. 30). The Cross Motions for Summary Judgment have been fully briefed. (*See* Dkt. No. 16; Dkt. No. 17; Dkt. No. 20; Dkt. No. 21; Dkt. No. 29; Dkt. No. 30; Dkt. No. 33; Dkt. No. 34; Dkt. No. 37.) For the reasons set forth herein, the undersigned recommends (a) denying Petitioner's "Motion of Objection for Extension of Time/Dismissal of Charge as Bias and Prejudice" (Dkt. No. 14); (b) denying Petitioner's Motion for Summary Judgment (Dkt. No. 29); and (c) granting Respondent's Motion for Summary Judgment (Dkt. No. 17; *see also* Dkt. No. 16).

PROCEDURAL HISTORY

The Petitioner is currently confined, as a pretrial detainee, at the Al Cannon Detention Center. In March of 2015, the Charleston County Grand Jury indicted Petitioner for murder. (Dkt. No. 16-1.) On July 26,

2016, a jury was empaneled, and Petitioner's jury trial before the Honorable Thomas Cooper began. (*See* Dkt. No. 29-2 at 1-33 of 258; Dkt. No. 16-5.) Several witnesses testified. On July 27, 2016, the State informed the Court that its next witness–the State's "significant witness"–was not cooperating with the Solicitor's Office. (Dkt. No. 29-2 at 231 of 258.) The assistant solicitor, Ms. Shealy, stated,

> Your Honor, our next witness would be Starteasha Grant. For purposes of the record she was the girlfriend of Kevin Howard at the time that this incident occurred. She is our significant witness. She is the one who sees Mr. Seay with Mr. Howard and Ty after their coming off of Wadmalaw Island. She was the person who then goes to her apartment, sees them taking the tote bag with the weapon or which she believes the weapon is still in the bag, tried to take that into her apartment and puts a halt to that. They then travel to Montague Avenue, try to get a hotel room. And they leave Mr. Seay behind at the Waffle House.
>
> She is the person who sets all of that out for us. I will tell Your Honor that we met with her last Friday. We spoke to her by phone on Saturday. I think even Mr. McCoy was able to reach her Sunday. Since then she has not been cooperative with our office at all. Mr. Hair, my investigator, is present in the courtroom. He has been to her apartment. He has been to her employment. He has spoken to two of her sisters. They indicated that they felt like -- they

> indicated that she indicated that she had been threatened. I texted her last night and asked her to come to our office at 8:30, that she needed to be in court at 9:00. Mr. Hair texted her and told her that she needed to be present at 9:00 over at the courthouse and I believe he told her a bench warrant will be issued if she did not show.
>
> Since then she did respond to him indicating that she was not going to come, that she was frightened. And so, Your Honor, at this time the State is asking for a bench warrant to be issued against her and for you to allow us some time for the deputies to make that effort.

(Dkt. No. 29-2 at 231-32 of 258.)[1] Petitioner's counsel, Mr. McCoy, confirmed that he spoke with Ms. Grant on Sunday. (Dkt. No. 29-2 at 232 of 258.)

Judge Cooper issued a bench warrant for Ms. Grant's arrest. (Dkt. No. 29-2 at 233-34 of 258.) He sent

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[1] Petitioner asserts that although the State "produced a copy of Hair's ([the State investigator]) alleged transcription, [the State] never produced any screenshots of the phone or other proof of the message." (Dkt. No. 29-1 at 3 of 10.) The "alleged transcription" of the message from Ms. Grant to Hair, the State's investigator, provides as follows:

> I been losing a lot of sleep over the last 3 days, I'm scared as hell, I can't afford for any of my loved ones to be harmed, I am all that my son has he has no daddy so I decided not to take the stand and I'm willing to accept all consequences. Jail time is better than leaving my son in this world without a mother.

(Dkt. No. 1-1 at 22 of 22.)

the jury home for the rest of the day with instructions to return the following morning. (Dkt. No. 29-2 at 235-36 of 258.) On July 28, 2016 (the following day), court resumed, and the assistant solicitor indicated that, even with the assistance of the United States Marshals Service, Ms. Grant had not been located. (Dkt. No. 29-2 at 238-39.) The State moved for a mistrial. (Dkt. No. 29-2 at 239-44 of 258.) Petitioner's counsel, Mr. McCoy, opposed the State's request, arguing there was no showing of "manifest necessity or . . . the best interest of the public." (Dkt. No. 29-2 at 247 of 258.)

Judge Cooper granted the State's motion for a mistrial; he stated, *inter alia*,

> I do feel that the State has been caught by surprise. I have no reason to believe that the State has concocted this factual situation to aid in the trial of your client. I think it has created a fact that this witness is a critical witness to the prosecution of the Defendant and the almost simultaneous absence of the witness once the case is called and once the witness is called based on the fact as you have both pointed out the witness was available as of perhaps Friday or as late as Sunday before the trial started on Monday and then to have her disappear when her name is called is in my opinion not the fault of either one of you. There is obviously a reason this Court is not aware of as to why she's not available.
>
> I think it does fall within the rubric of Arizona v. Washington that this creates and I will use the word manifest necessity to grant a

> mistrial. In the interest of public justice, that's a pretty general phrase, but it is used in court decisions. And there certainly is a public interest in the fair trial of the Defendant. He continues to be presumed innocent. He's not been held in custody, although he has been subject to a bond, he's not been held in custody all this time since the event occurred. He may have been held in custody some period of time, but when he appeared in this court he was on bond. I don't think the inconvenience, I hate to use that word because we're not really talking about convenience, but the prejudice I should say to your client is so great that I should not grant a mistrial.
>
> The State has not rested its case. I don't believe you can move for a directed verdict at this time. I think had the State rested their case, the case is ongoing as of this moment. I think the public is entitled to a fair trial as is your client. And these unique circumstances I think compel this Court to grant a mistrial and I so do at this time. I grant a mistrial to the State and this case for this time has ended.

(Dkt. No. 29-2 at 250-52 of 258.)

The day after Judge Cooper granted the mistrial, Ms. Grant was taken into custody. (Dkt. No. 16-4 at 1 of 2.) Contempt proceedings were brought against Ms. Grant; she appeared before the Honorable Kristi L. Harrington on August 22, 2016. (Dkt. No. 16-3.) Judge Harrington found Ms. Grant to be in contempt of court; her order stated, *inter alia*, "[T]he Defendant

[Startaeshia Grant] will remain in custody with the ability to purge herself of contempt by complying with the subpoena and testifying in the case of State of South Carolina versus Broderick Seay, scheduled for the December 12, 2016 term of court." (Dkt. No. 16-4.)

Meanwhile, on July 17, 2017, Petitioner's counsel filed a Motion to Dismiss Indictment on Ground of Double Jeopardy; Petitioner supplemented this motion on September 15, 2017. (Dkt. No. 1-1 at 2-17 of 22.) The State opposed Petitioner's motion. (Dkt. No. 16-2.) On September 15, 2017, the Honorable R. Markley Dennis, Jr. held a hearing on the Petitioner's Motion to Dismiss Indictment on Ground of Double Jeopardy. (Dkt. No. 16-5.) Attorney Sara A. Turner represented Petitioner at this hearing. (Dkt. No. 16-5 at 1 of 32.) In an order dated October 17, 2017, Judge Dennis denied Petitioner's motion to dismiss his murder charge. (Dkt. No. 16-6.)[2] The following day, Petitioner filed the instant § 2241 petition. (Dkt. No. 1.) In his § 2241 petition, Petitioner asserts that his "Fifth Amendment rights would be violated if he is subjected to a second trial where a mistrial was improvidently granted." (Dkt. No. 1 at 6 of 8.) Petitioner asks this Court to "find that a subsequent trial should be prohibited on the grounds of double jeopardy." (Dkt. No. 1 at 7 of 8.)

DISCUSSION

As noted above, this matter is before the Court upon several motions: (a) Petitioner's "Motion of Objection

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[2] In state court, Petitioner moved to continue any retrial until such time as the instant § 2241 petition could be heard; the state court granted that motion. (Dkt. No. 16-7.)

for Extension of Time/Dismissal of Charge as Bias and Prejudice" (Dkt. No. 14);[3] (b) Respondent's Motion for Summary Judgment (Dkt. No. 17; *see also* Dkt. No. 16); and (c) Petitioner's Motion for Summary Judgment (Dkt. No. 29).

Despite the fact that numerous motions are pending, there is but one issue in the instant § 2241 action: whether double jeopardy prevents Petitioner's pending trial.[4] The Fifth Amendment to the United States Constitution provides that no person "shall . . . be subject for the same offense to be twice put in

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[3] In this filing, Petitioner asserts the Respondent is in default. (*See* Dkt. No. 14 at 1-2 of 3.) The undersigned disagrees, as Respondent requested–and was granted–an extension of time to file a return or otherwise plead, such that Respondent's response was due February 2, 2018. (*See* Dkt. No. 11; Dkt. No. 12.) Respondent timely filed a Motion for Summary Judgment on February 2, 2018. (Dkt. No. 17; *see also* Dkt. No. 16.)

[4] Abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971) is not warranted in the case *sub judice*. *See Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) ("The State is correct that ordinarily irreparable harm cannot be shown simply because a defendant will be subject to a single criminal prosecution in which he must raise any constitutional claims he wishes as a defense to his conviction. . . . However, because the Double Jeopardy Clause of the Fifth Amendment protects not only against multiple convictions but also against being twice put to trial for the same offense, a portion of the constitutional protection it affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level. Thus, the irreparable deprivation of this Fifth Amendment Double Jeopardy right is an extraordinary circumstance warranting federal court equitable intervention in Petitioners' state criminal proceeding." (quotation marks and citations omitted)).

jeopardy of life or limb. U.S. CONST. amend. V. "Among the protections provided by [the Double Jeopardy] Clause is the assurance that a criminal defendant will not be subjected to 'repeated prosecutions for the same offense.'" *Gilliam v. Foster*, 75 F.3d 881, 893 (4th Cir. 1996) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982)); *see also Arizona v. Washington*, 434 U.S. 497, 503 (1978) ("A State may not put a defendant in jeopardy twice for the same offense." (citing *Benton v. Maryland*, 395 U.S. 784 (1969))). As noted in *Arizona v. Washington*,

> Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's valued right to have his trial completed by a particular tribunal. The reasons why this valued right merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona v. Washington, 434 U.S. at 503-05 (internal quotation marks, citations, and footnotes omitted).

However, there are circumstances where a defendant may be retried when a "criminal proceeding is terminated by a mistrial without a final resolution of guilt or innocence." *Gilliam*, 75 F.3d at 893. "[W]hen a defendant opposes the grant of a mistrial, he may not be retried unless there was a manifest necessity for the grant of the mistrial or the failure to grant the mistrial would have defeated the ends of justice." *Id.* (citing *United States v. Dinitz*, 424 U.S. 600, 606-07 (1976); *Wade v. Hunter*, 336 U.S. 684, 690 (1949)). A determination of whether "manifest necessity" has been shown is not a mechanical one; attention must be paid "to the particular problem confronting the trial judge." *Arizona v. Washington*, 434 U.S. at 506. In addition, the word "'necessity' cannot be interpreted literally," but a "high degree" of necessity is required "before concluding that a mistrial is appropriate." *Id.*; *see also United States v. Sloan*, 36 F.3d 386, 394 (4th Cir. 1994) (noting that "precisely what constitutes manifest necessity is not at all clear," and "because these cases turn on their own facts they escape meaningful categorization," "[a] single test is . . . not appropriate, or even possible" (citations omitted)). "[T]he strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Arizona v. Washington*, 434 U.S. at 508 (footnotes omitted).

The *Arizona v. Washington* Court "offered examples of cases that do–and do not–involve a high degree of necessity." *Baum v. Rushton*, 572 F.3d 198, 207 (4th Cir. 2009). One "extreme" is a case "in which a

prosecutor requests a mistrial in order to buttress weaknesses in his evidence"–an "abhorrent practice" that "the prohibition against double jeopardy . . . was plainly intended to condemn." *Arizona v. Washington*, 434 U.S. at 507-08. On the other hand, "the other extreme" of cases involves "the classic basis for a proper mistrial": "the trial judge's belief that the jury is unable to reach a verdict." *Id.* at 509. In assessing whether the trial judge exercised "sound discretion" in declaring a mistrial, the following factors are relevant:

> (a) "whether a trial judge rationally could conclude that the grant of the mistrial was compelled by manifest necessity or whether the ends of public justice demanded that one be granted on the peculiar facts presented," and
>
> (b) "whether the trial judge acted precipitately or whether the trial judge expressed concern regarding the possible double jeopardy consequences of an erroneous declaration of a mistrial, heard extensive argument on the appropriateness of such a measure, and gave appropriate consideration to alternatives less drastic than granting a mistrial."

Gilliam, 75 F.3d at 894-95.

The case of *Downum v. United States*, 372 U.S. 734 (1963), is instructive in the instant case, as *Downum* addresses a claim of double jeopardy that arose when one of the prosecutor's witnesses did not appear. In

that case, the matter was called for trial, both sides indicated they were ready to proceed, and a jury was selected and sworn and instructed to return that afternoon. *Downum*, 372 U.S. at 735. When the jury returned that afternoon, the prosecutor asked that the jury be discharged because "its key witness on Counts 6 and 7 was not present." *Id*. The petitioner sought to have "Counts 6 and 7 . . . dismissed for want of prosecution and asked that the trial continue on the rest of the counts." *Id*. The trial judge denied the petitioner's motion and discharged the jury over the petitioner's objection. *Id*. When the case was subsequently called, the petitioner pleaded double jeopardy. *Id*. Petitioner's "plea was overruled, a trial was had, and he was found guilty." *Id*. The Court of Appeals affirmed. *Id*.

The Supreme Court reversed the Court of Appeals decision. The Court noted that petitioner's case "was one of a dozen set for call . . . , and those cases involved approximately 100 witnesses." *Id*. Subpoenas for all of the witnesses–including the key witness named Rutledge–had been delivered to the marshal for service. *Id*. The day before the petitioner's case was called, "the prosecutor's assistant checked with the marshal and learned that Rutledge's wife was going to let him know where her husband was, if she could find out." *Id*. However, "[n]o word was received from her and no follow-up was made," and "[t]he prosecution allowed the jury to be selected and sworn even though one of its key witnesses was absent and had not been found." *Id*.

In reversing the Court of Appeals, the Supreme Court stated,

> The jury first selected to try petitioner and sworn was discharged because a prosecution witness had not been served with a summons and because no other arrangements had been made to assure his presence. That witness was essential only for two of the six counts concerning petitioner. Yet the prosecution opposed petitioner's motion to dismiss those two counts and to proceed with a trial on the other four counts—a motion the court denied. Here, . . . we refuse to say that the absence of witnesses can never justify discontinuance of a trial. Each case must turn on its facts. On this record, however, we think what was said in *Cornero v. United States* . . . states the governing principle. There a trial was first continued because prosecution witnesses were not present, and when they had not been found at the time the case was again called, the jury was discharged.
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> A plea of double jeopardy was sustained when a second jury was selected, the court saying:
>
> > 'The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at

> that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses.'
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> 48 F.2d at 71, 74 A.L.R. 797.
>
> That view . . . is in our view the correct one. We resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion

Downum, 372 U.S. at 737-38 (citing *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931)).

As noted above, the jury was sworn on July 26, 2016. On July 27, 2016, the State informed the Court that its next witness–the State's "significant witness"–was not cooperating with the Solicitor's Office. (Dkt. No. 29-2 at 231 of 258.) The judge issued a bench warrant for Ms. Grant's arrest, but despite a 24-hour recess, the State (even with the help of the United States Marshals Service) was unable to locate

Ms. Grant within that 24-hour period. When court resumed on July 28, 2016, a mistrial was ordered.

In his filings, Petitioner contends, *inter alia*, that manifest necessity did not exist because other options–instead of a mistrial–were not explored. According to Petitioner, the "State did not seek to call any of its remaining eighteen witnesses; upon information and belief, two of these witnesses (Jeremy Krause and Willis Walker) were to testify as to Seay's location during the alleged murder via his mobile phone's 'pings' on transmission towers." (Dkt. No. 29-1 at 2 of 10.) He contends the State could have called other witnesses (out of its eighteen witnesses remaining on the witness list) "while also continuing its search for Grant." (Dkt. No. 29-1 at 7 of 10.) He further asserts the trial court "could have continued the trial until the following week to allow the State to search for Grant." (Dkt. No. 29-1 at 6 of 10.) Petitioner states, "It is worthwhile to note that had the trial court pursued a continuance, this trial would have been completed with Grant's testimony–Grant was taken into custody on July 29, 2016, *the day after the trial court granted a mistrial*." (Dkt. No. 29-1 at 7 n.4 of 10.)

Respondent contends, on the other hand, that the trial court explored other options but ultimately found manifest necessity warranted a mistrial. Respondent asserts that, when the issue with Ms. Grant's appearance at trial arose, the "State's case in chief was nearly completed and was unable to be completed without the critical witness." (Dkt. No. 33 at 10.) According to Respondent, "The suggestion . . . that the State actually had some 'eighteen remaining potential

witnesses,' does not square with what the parties knew and admitted during the state court proceedings." (Dkt. No. 33 at 9.) Respondent states,

> To be clear, Respondent agrees the initial potential witness list for the State contained numerous witnesses – naming almost every officer to have in anyway come in contact with the case. However, this was necessary for jury qualification and to be prepared to meet whatever the defense would raise either in cross-examination and/or the defense case. Upon information and belief, the only remaining witnesses would have been . . . Grant, and two or three witnesses that could corroborate the location evidence from cell phone tracking. Without Grant to link the evidence, the corroborative value was lost.

(Dkt. No. 33 at 9.)

In the case *sub judice*, the undersigned agrees with Respondent that there was manifest necessity for the mistrial. Though well made, the undersigned is not persuaded by Petitioner's arguments. Petitioner asserts the State "chose" not to "secure its witnesses." (Dkt. No. 29-1 at 4 of 10.) The undersigned disagrees. The State had secured its witness; before the jury was sworn, the State had issued and served a subpoena upon Ms. Grant in order to secure her testimony. This case is therefore easily distinguishable from *Downum*; the State in the case *sub judice* did not take a chance. In addition, the State–and Petitioner's counsel–had been in contact with Ms. Grant the weekend before trial began, and nothing suggested she would not be

present for trial; she had, in fact, testified during the trial of one of Petitioner's codefendants. After the jury was sworn, Ms. Grant stopped cooperating with the State and failed to appear, despite her subpoena. In response to the State's attempts to get in touch with her, she (or someone using her cellular telephone) sent a text message to the State's investigator advising that she was not coming to testify.

A mistrial was not ordered at this point–instead a mistrial was not ordered until approximately 24 hours later, after a recess in which the State (with the assistance of the United States Marshals Service) searched for Ms. Grant. When she was not found, the trial judge granted the State's motion for a mistrial. The trial judge in this case was clearly aware of the implications of his decision; he and counsel discussed whether double jeopardy might bar retrial of Petitioner, though the judge correctly indicated "the issue of double jeopardy, if a mistrial is granted, would be for a later determination." (R. at 275; *see also* R. at 264-78.)

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.

To the extent Petitioner contends the trial court should have granted a continuance, the undersigned cannot agree that the judge's failure to do more gives rise to a constitutional violation. 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. (Dkt. No. 29-2 at 238-52 of 258.) When she was subsequently arrested–albeit a day later–she was found to be in contempt. And while she was arrested the following day, the information Judge Cooper had was that she was uncooperative and had decided she was not going to testify, no matter the consequences. There appears to have been no fault on behalf of the State (or the Petitioner)–Ms. Grant simply decided, at

the eleventh hour, not to testify. The undersigned therefore recommends concluding that Petitioner is not entitled to relief pursuant to § 2241.[5] *See Downum v. United States*, 372 U.S. at 737 ("[W]e refuse to say that the absence of witnesses can never justify discontinuance of a trial." (internal quotation marks and citation omitted)); *see, e.g., McCorkle v. State*, 619 A.2d 186, 201 (Md. Ct. Spec. App. 1993) (finding "manifest necessity to declare a mistrial" where "the witness who was absent was the key prosecution witness; in their respective opening statements, both

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[5] Petitioner cites *Mizell v. Attorney General of State of New York*, 586 F.2d 942 (2d Cir. 1978) for the following proposition: "Failure of two subpoenaed witnesses to appear after a three-and-a-half day adjournment on their account did not constitute 'manifest necessity.'" (Dkt. No. 37 at 1 of 4.) In *Mizell*, the prosecutor asked the court for a continuance, from a Thursday to a Monday, because two state witnesses who had been subpoenaed failed to appear. *Mizell*, 586 F.2d at 943. The court declined to grant a continuance and subsequently discharged the jury, and "[t]he only reason given by the court for the failure to grant a continuance was the convenience of the jury." *Id.* at 947. The Second Circuit held that the discharge of the jury was not "necessitated by manifest necessity," stating, "The prosecutor asked for a continuance until Monday. There was no indication that either of the two witnesses would be unavailable by Monday. In fact, the request would indicate that the State could reasonably predict their attendance at that time. Moreover, the fact that on Monday the prosecutor moved for trial indicates that the witnesses were not irretrievably lost." *Id.* The Second Circuit found that a continuance should have been granted, as "neither the 'ends of public justice' nor manifest necessity' required a mistrial." *Id.* In the case *sub judice*, however, there was no indication–at the time the judge ordered a mistrial–that Ms. Grant would be available the following day or the following week; he had been advised she did not intend to testify, regardless of the consequences.

parties had made extensive reference to this witness's expected testimony, and thus it is reasonable to expect that the absence of this witness would cause unfair jury bias to the State's detriment; the key witness's 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; [and] the trial judge considered alternatives to declaring mistrial, but that none of these alternatives appeared efficacious. . . ."). *Cf. Walck v. Edmondson*, 472 F.3d 1227, 1239 (10th Cir. 2007) (no manifest necessity where, *inter alia*, the "prosecution proceeded to trial in the face of a known risk that Ms. Moore would be unavailable at trial," as the "prosecutor . . . was told prior to the completion of voir dire, and prior to the jury being sworn, that Ms. Moore was on her way to the hospital to deliver her child. . . . The prosecutor here, like the prosecutor in *Downum*, proceeded in the face of a great risk of unavailability. Despite this great risk, the prosecution pushed on, and thus there was no manifest necessity.").

CONCLUSION

It is therefore RECOMMENDED, for the foregoing reasons, that Petitioner's "Motion of Objection for Extension of Time/Dismissal of Charge as Bias and Prejudice" (Dkt. No. 14), and Petitioner's Motion for Summary Judgment (Dkt. No. 29) be DENIED. It is further RECOMMENDED that Respondent's Motion for Summary Judgment (Dkt. No. 17) be GRANTED.

The undersigned further RECOMMENDS that a certificate of appealability be DENIED.[6]

IT IS SO RECOMMENDED.

/s/Mary Gordon Baker
MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

July 31, 2018
Charleston, South Carolina

The parties' attention is directed to the important notice on the next page.

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[6] Title 28, Section 2253 provides in relevant part,

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.

28 U.S.C. § 2253. A prisoner satisfies this standard by demonstrating that reasonable jurists would find this court's assessment of his constitutional claims debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In the case *sub judice*, the legal standard for a certificate of appealability has not been met. The undersigned therefore recommends that a certificate of appealability be denied.

APPENDIX D

IN THE COURT OF GENERAL SESSIONS
NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Arrest Warrant #2014A1010201292

Indictment #2015GS1000972

[Filed October 17, 2017]

STATE OF SOUTH CAROLINA)
)
vs.)
)
BRODERICK WILLIAM SEAY, JR,)
)
DEFENDANT)
)

ORDER DENYING DEFENSE MOTION TO DISMISS

This matter came before me on September 15, 2017 by way of a motion hearing on the Defense's Motion to Dismiss. The Defendant, Broderick Seay, was represented by Sara Turner of the McCoy and Stokes Law Firm. Chris Lietzow appeared for the State. The Defense previously filed a Motion to Dismiss based on double jeopardy, and the State filed a Response to the Defense Motion to Dismiss and an Addendum to the

State's Response to the Defense Motion to Dismiss. At the hearing, both the Defense and the State were afforded the opportunity to fully argue their positions.

On March 29, 2012, Adrian Lyles' body was located in a remote area on Wadmalaw Island. He was shot ten times. Subsequent investigation revealed the victim's cousin, Kevin Howard, and a man named Ty kidnapped the victim from his apartment. The State asserts that the Defendant, Ty, and Howard later drove the victim to Wadmalaw Island. Once there, the State assets that victim was shot by all three men using three different weapons.

In 2014, Kevin Howard was tried and convicted of murder, kidnapping, and burglary first degree. He was sentenced to life in prison. During the trial, Howard's girlfriend, Starteisha Grant, cooperated with the State. Her testimony helped secure his conviction.

Based on Ms. Grant's information, cell tower records, hotel records, and post arrest records, Broderick Seay was arrested on March 28, 2014 and charged with murder. Seay's trial began on July 26, 2016 in Charleston County General Sessions Court.

Prior to trial, Ms. Grant was cooperative with the State and prepared to testify during the Defendant's trial. Ms. Grant was served a subpoena and showed no reticence in cooperating. She frequently met with the State and participated in interviews each time it was requested. As recently as the Saturday before the trial, Ms. Grant was engaged with the State in trial preparation. The State learned prior to jury selection,

that defense counsel spoke with Ms. Grant the Sunday evening before trial.

On July 26, 2014, a jury was selected and sworn, the witnesses were sequestered, and several witnesses testified. The evening before Ms. Grant was scheduled to testify, she did not answer phone calls from the State's Investigator, Keith Hair. He left her voice and text messages instructing her to appear in court the following morning at 9:00am. She did not show up at the appointed time. The State brought this matter to the attention of the Court and requested a bench warrant be issued to secure her presence. The Court granted a twenty-four-hour recess to allow the United States Marshalls time to locate Ms. Grant. During that time, Ms. Grant or someone using her phone texted Investigator Hair and indicated she was scared and not coming to Court.

The United States Marshalls were unable to locate Ms. Grant during the twenty-four-hour recess. As a result, the State moved for a mistrial. The Honorable Thomas Cooper heard the matter in full. After hearing arguments from the State and Defense, Judge Cooper declared a mistrial.

In granting the mistrial, Judge Cooper found "I do feel that the State has been caught by surprise. I have no reason to believe that the State has concocted this factual situation to aid in the trial of your client." (Transcript from trial pages 276-77). Further, Judge Cooper ruled, "I think it falls within the rubric of Arizona v. Washington that this creates and I will use the word manifest necessity to grant a mistrial. And there certainly is a public interest in the fair trial of

the Defendant." (Transcript 277). Judge Cooper also held, "I think the public is entitled to a fair trial as is your client. And these unique circumstances I think compel this Court to grant a mistrial and I so do at this time." (Transcript 278). Attached is the portion of the transcript from the mistried case that addresses the arguments by the parties and the findings of the court. (Attachment 2).

The State upon locating Ms. Grant filed a Contempt Motion, and Ms. Grant was found to be in contempt pursuant to a hearing in front of the Honorable Kristi Harrington. Ms. Grant was sentenced to jail time.

The Double Jeopardy clauses of the United States and South Carolina Constitutions protect citizens from being twice placed in jeopardy of life or liberty. *See* U.S. Const. amend. V; S.C. Const. art. I, § 12; *State v. Parker,* 391 S.C. 606, 612 (2011). Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial. *Parker,* 391 S.C. at 612. The issue is whether the double jeopardy clause of the United States Constitution's Fifth Amendment and South Carolina Constitution's Article I bar the State from prosecuting the Defendant for murder. More specifically, the issue is whether Judge Cooper abused his discretion in determining that a mistrial was warranted by manifest necessity, and as such, whether Judge Cooper improvidently granted a mistrial.

A. Judicial Discretion

Essentially, the Defense has asked this Court to find that Judge Cooper abused his discretion in

determining that a mistrial was dictated by manifest necessity. The Defense asks this Court to find that Judge Cooper improvidently granted a mistrial in order for double jeopardy to apply to the Defendant.

Both the United States Supreme Court and the South Carolina Supreme Court are unequivocal in granting broad discretion to trial courts when declaring mistrials. *See Somerville,* 410 U.S. 458 (1973); *Kirby,* 269 S.C. 25 (1977). The South Carolina Court of Appeals has clarified this even further. They have held that a trial judge's decision to grant a mistrial will not be overturned absent an abuse of discretion amounting to an error of law. *Baum,* 355 S.C. 209 (Ct. App. 2003); *Rowlands,* 343 S.C. 454 (Ct. App. 2000). The courts recognize that varying and unique situations arise during the course of a criminal trial. *See Baum,* 355 S.C. 209 (Ct. App. 2003). This is precisely the reason that other courts do not frequently interfere in the decision of a trial court to grant a mistrial. Judge Cooper was aware of the legal requirements and ramifications of granting a mistrial. During his ruling, Judge Cooper stated "I do think this is a very unique situation...I do feel that the State has been caught by surprise. I have no reason to believe that the State has concocted this factual situation to aid in the trial of your client (sic). I think it has created a fact that this witness is a critical witness to the prosecution of the Defendant and the almost simultaneous absence of the witness once the case is called (sic) and once the witness is called based on the fact as you have both pointed out the witness was available as of perhaps Friday or as late as Sunday before the trial started on Monday (sic) and then to have her disappear when her

name is called is in my opinion not the fault of either one of you (sic).... (Transcript 276-277). Judge Cooper further elaborated stating "I think it does fall within the rubric of Arizona v. Washington that this creates and I will use the word manifest necessity to grant a mistrial... And there certainly is a public interest in the fair trial of the Defendant. He continues to be presumed innocent. He's not been held in custody, although he has been subject to a bond, he's not been held in custody all this time since the event occurred... I don't think the ... the prejudice I should say to your client (sic) is so great that I should not grant a mistrial. (Transcript 277-278). Judge Cooper concluded by stating "I think the public is entitled to a fair trial as is your client (sic). And these unique circumstances I think compel this Court to grant a mistrial and I do so at this time. (Transcript 278).

This Court finds that Judge Cooper did not abuse his discretion by granting a mistrial based on manifest necessity. Considering the broad discretion given to trial courts in these situations, it is clear that Judge Cooper did not abuse his discretion in any way that would amount to an error of law. Judge Cooper carefully weighed the appropriate factors set forth in case law when making his decision.

B. Manifest Necessity

Generally, jeopardy attaches when the jury is sworn and impaneled, unless the defendant consents to the jury's discharge before it reaches a verdict or legal necessity mandates the jury's discharge. *Rowlands,* 343 S.C. at 457; *Baum,* 355 S.C. at 214. Unlike the situation in which the trial has ended in an acquittal or

conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. *Arizona v. Washington,* 434 U.S. 497, 505 (1978); *Baum,* 355 S.C. at 214. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. *Id.* The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgement. *State v. Prince,* 279 S.C. 30, 33 (1983).

"Manifest Necessity" is not a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. *Arizona,* 434 U.S. at 505-06. Further, the word "necessity" is not to be interpreted literally. *Id.* Rather, there need only be a "high degree" of necessity in order to conclude that a mistrial is appropriate under the circumstances. *Id.* at 506. Whether a mistrial is mandated by manifest necessity is a fact specific inquiry. *Baum,* 355 S.C. at 215. If a mistrial is granted based on a properly founded manifest necessity, it is not improvidently granted and double jeopardy does not apply. *See Parker,* 391 S.C. at 612.

A properly granted mistrial poses no double jeopardy bar to a subsequent prosecution. *Parker,* 391 S.C. 606 (2011). The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgement. *Baum,* 355 S.C. 209 (Ct. App. 2003).

In *Baum,* the victim's body was discovered during the trial. The State moved for a mistrial and the court granted their request. The trial court recognized the public's interest in a fair adjudication was implicated by the discovery of the body and the jury should have the benefit of the full developed facts when rendering their verdict. The South Carolina Court of Appeals determined that manifest necessity was clearly established and found no abuse of discretion in the trial judge's determination that a mistrial was warranted.

Like in *Baum,* Judge Cooper determined the public's interest in a fair adjudication was implicated by the surprise absence of the State's witness. A jury deserves to have the benefit of the fully developed facts this witness will present when rendering their verdict. For this reason, Judge Cooper properly granted a mistrial due to manifest necessity and the ends of public justice. Because of this, there is no double jeopardy bar to a subsequent prosecution.

In *Rowlands,* the State realized they were missing a witness before the jury was sworn. The State brought this to the Court's attention. However, the State did not object to the jury being impaneled. Once the jury

was impaneled, the State moved for a mistrial which was granted by the court. The Court determined the State was at fault in the facts leading to a mistrial. The Court of appeals determined at the very least, the State should have asked the court to delay swearing the jury until after informing the judge they were missing a witness. The absence of a State's witness, where the State was at fault, did not constitute a manifest necessity for a new trial. For this reason, the Court held the mistrial was improvidently granted and double jeopardy applied.

In *Downum v. United States,* a jury was sworn and the prosecutor subsequently requested a mistrial due to missing one of their witnesses. The prosecution allowed the jury to be selected and sworn even though the prosecutor knew one of its key witnesses was not under subpoena and had not been located. *Downum,* 372 U.S. 734, 735 (1963). The Court stated the jury first selected to try petitioner and sworn was discharged because a prosecution witness had not been served with a summons and because no other arrangements had been made to assure his presence. *Id.* at 737-38. Essentially, the prosecutor did not serve their witness a subpoena, had no idea where the witness was, had no idea whether the witness was going to show up to testify, and made no proactive efforts to secure their attendance at trial. Like in *Rowlands,* the Court determined the prosecutor was at fault for the circumstances leading to a mistrial. The Court ruled that by impaneling the jury without first determining the whereabouts of his or her witness, the prosecutor took a chance. *Id.* at 737. It is important to note, the United States Supreme Court stated in this

opinion, "we refuse to say that the absence of witnesses can never justify discontinuance of a trial." *Id.* at 738. Each case must turn on its facts. *Id.* But in this particular case, because the prosecutor was at fault, the Court held a manifest necessity did not exist, the mistrial was improvidently granted, and double jeopardy attached.

In both *Rowlands* and *Downum,* the Court found the prosecutor was at fault for the facts leading to a mistrial. For that reason, both courts determined that a manifest necessity did not exist and the double jeopardy clause attached.

The instant case is distinguishable and dissimilar to *Rowlands* and *Downum*. Unlike *Rowlands* and *Downum,* the State had no advance notice their witness was missing. The State did not impanel a jury with the knowledge that they could not locate their witness nor with knowledge that the witness would refuse to cooperate due to being afraid. Judge Cooper made a very clear and very specific finding on the record that the State was not at fault for the facts leading to the mistrial. He determined the State was caught by surprise. Neither side was to blame.

Instead, the instant case belongs in the rubric of *Baum*. In *Baum,* the facts leading to a mistrial were the fault of neither party. Both parties were caught by surprise by the discovery of the victim's body during the trial. The Court determined the public's interest was implicated and the jury should have the benefit of the fully developed facts when deciding the matter. A mistrial dictated by manifest necessity is a properly granted mistrial and pursuant to *Parker* poses no

double jeopardy bar to subsequent prosecution. Therefore, the double jeopardy clause does not apply, and the Defendant's charge should not be dismissed.

Judge Cooper properly acted within his discretion by determining that a mistrial was warranted by manifest necessity. Therefore, the mistrial was not improvidently granted. As a result, double jeopardy does not apply to Broderick Seay, and the State should not be barred from prosecuting Seay for murder. The Defendant's motion to dismiss his murder charge is denied.

AND IT IS SO ORDERED.

/s/R. Markley Dennis, Jr.

R. Markley Dennis, Jr.

Chief Administrative Judge, General Session

Ninth Judicial Circuit, Charleston County

Charleston, South Carolina

October 17, 2017

APPENDIX E

IN THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Bench Warrant#: 2016B0729201600
Contempt of Court

[Filed August 25, 2016]

STATE OF SOUTH CAROLINA,)
)
vs.)
)
STARTAESHIA GRANT,)
)
Defendant.)
)

ORDER FINDING CONTEMPT OF COURT

This matter came before the court pursuant to a bench warrant previously issued against the above-named Defendant by the Honorable G. Thomas Cooper.

It appears that the Defendant was a witness in the case of State of South Carolina versus Broderick Seay. The Defendant was served with a lawful subpoena and failed to appear in court on July 27, 2016. The Honorable G. Thomas Cooper signed a bench warrant on that date authorizing the Defendant's arrest. The Defendant was taken into custody on July 29, 2016

pursuant to that bench warrant. The defendant has remained in custody since her arrest.

The Defendant appeared before the Honorable Judge Kristi Harrington on August 22, 2016 for a contempt of court hearing. The Defendant was represented al that hearing by Rodney Davis, Esquire. Following the presentation of evidence by the State, and with the Defendant offering no justifiable defense for failing to appear in court on July 27, 2016, the Court finds the above-named defendant is in willful violation of a lawful subpoena constituting an indirect civil contempt of court violation. Accordingly, the Defendant will remain in custody with the ability to purge herself of contempt by complying with the subpoena and testifying in the case of the State of South Carolina versus Broderick Seay, scheduled for the December 12, 2016 term of court.

The Defendant is ordered to appear before Judge Harrington or December 13, 2016 at 9:00 a.m. to determine the terms of her release or continued incarceration.

IT IS SO ORDERED.

/s/Kristi Harrington
Presiding Judge
Ninth Judicial Circuit

This 24th day of August, 2016
Charleston, South Carolina

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 18-7242
(2:17-cv-02814-TMC)

[Filed July 19, 2019]

BRODERICK WILLIAM SEAY, JR.

Petitioner - Appellant

v.

SHERIFF AL CANNON

Respondent - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Keenan, and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX G

COURT OF GENERAL SESSIONS
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

2015-GS-10-00972

[Dated July 26-28, 2016]

STATE OF SOUTH CAROLINA,	)
	)
PLAINTIFF,	)
	)
VS.	)
	)
BRODERICK SEAY, JR.,	)
	)
DEFENDANT.	)
	)

TRANSCRIPT OF RECORD

JULY 26-28, 2016
CHARLESTON, SC

B E F O R E:

HONORABLE THOMAS COOPER, JUDGE, AND A JURY.

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

JENNIFER SHEALY, ESQUIRE
CHRIS LIETZOW, ESQUIRE
Attorneys for the State

PETER MCCOY, ESQUIRE
SARA TURNER, ESQUIRE
Attorneys for the Defendant

* * * * * * * * * * * * * * * * * * * *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

* * *

[p.7]

Mr. McCoy does not have an objection to him being able to come in and out to assist.

MR. MCCOY: That's correct.

THE COURT: Okay. Well, solicitor, call your case.

MS. SHEALY: Right now for the record, Your Honor?

THE COURT: For the record.

MS. SHEALY: This is the State versus Broderick Seay. Do you have the number?

MR. MCCOY: I can read it. It's warrant number --

MS. SHEALY: I have got it, Your Honor. 2015-GS-10-00972. One charge of murder.

THE COURT: State ready to proceed?

MS. SHEALY: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MR. MCCOY: We are, Your Honor.

THE COURT: All right. I have the voir dire and witness lists. Prepared to strike a jury?

MS. SHEALY: Yes, Your Honor.

MR. MCCOY: We are ready, Your Honor.

THE COURT: Bring the jury in.

THE CLERK: Yes, sir.

MR. MCCOY: Judge, briefly before the

[p.8]

jury comes in, are you inclined to have one or two alternates?

THE COURT: Two.

MR. MCCOY: Okay. Sounds good to us, Judge.

MS. SHEALY: Judge, may we inquire, do you have a traditional time that you like to stop for lunch just for purposes of making sure I have my witnesses here?

THE COURT: No more than any other judge has a traditional time for lunch. I'd say between 12:30 and 1:00.

MS. SHEALY: I have a pathologist I need to get here. I was trying to figure out when I need to get her over here.

THE COURT: Get her over and let her sit. I have dealt with doctors. Why don't you just tell her 2:00 if that's -- I don't know how it fits into your evidence.

MS. SHEALY: That's good, thank you, Judge.

THE COURT: We are basically working business hours unless it becomes apparent that you are getting close on time.

MS. SHEALY: Yes, sir. Thank you.

* * *

[p.122]

Lyles had ten gunshot wounds to his body. He also had various areas of bruising, particularly on his face and on his lip.

Q. Let me stop you there for just a second. Showing you what has been previously marked as State's Exhibit 109, could you point out any visible signs of trauma or injury in that photograph?

A. Do I use my finger?

Q. Yes. You can circle.

A. So this area is some bruising or contusion. And then actually on both sides of the lips he has a bruise and a laceration where his lip is split.

Q. Showing you State's Exhibit --

A. There's a little bit of bruising also on the side of the left eye.

Q. Showing you State's Exhibit 110, if you will hit clear? You see that?

A. I do. (Witness complies with request.)

Q. Could you tell us about the evidence of injury there?

A. Well, you can see on the left side of his lip right here he has a -- where it's split and bruised and then also some adjacent on the top

[p.123]

lip.

Q. Showing you State's Exhibit 111, is that a closer view of the area your near the eye?

A. Right. And actually you can see part of a gunshot wound right here.

Q. In addition to the injuries to the facial area of Mr. Lyles, what else did you observe?

A. Ten gunshot wounds.

Q. If you could walk us through those, please.

A. All right. Yes, he had six gunshot wounds to the head. We are going to go through these a little more individually, actually put them together, six to the head, two to the back of the left shoulder, and one to the midback, as well as one to the abdomen. So six to the head, one was -- actually this would be easier with a diagram.

Q. Are you interested in the one showing the front of the face or the front of the head or the back of the head?

A. The back of the head and the side of the head.

Q. So showing you what's previously been marked as State's Exhibit 119.

* * *

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bullet.

Q. And then State's Exhibit 136 and that would be SLED No. 2?

A. I don't believe I have that.

Q. Is it in that pile right there?

A. Yes. Here it is.

Q. What's that?

A. May I open it?

Q. Yes, ma'am.

A. My item 2 was another nominal .38 fired caliber bullet most consistent with .38 Special or .357-Magnum.

Q. So how many different types of ammunition do we have in this case?

A. Types of ammunition? Or calibers.

Q. Calibers?

A. Well, we have .38-caliber, we have that lead fragment which could be a shotgun slug, so that's another one. Then we have .22 short. So we have at least three different calibers.

Q. And in your opinion how many different guns were used to fire the different types of caliber that we have?

A. I have a minimum of three guns represented here.

* * *

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(The following proceedings were held outside the hearing of the jurors.)

THE COURT: All right. Ms. Shealy.

MS. SHEALY: Your Honor, our next witness would be Starteasha Grant. For purposes of the record she was the girlfriend of Kevin Howard at the time that this incident occurred. She is our significant witness. She is the one who sees Mr. Seay with Mr. Howard and Ty after their coming off of Wadmawlaw

Island. She was the person who then goes to her apartment, sees them taking the tote bag with the weapon or which she believes the weapon is still in the bag, tried to take that into her apartment and puts a halt to that. They then travel to Montague Avenue, try to get a hotel room. And they leave Mr. Seay behind at the Waffle House.

She is the person who sets all of that out for us. I will tell Your Honor that we met with her last Friday. We spoke to her by phone on Saturday. I think even Mr. McCoy was able to reach her Sunday. Since then she has not been cooperative with our office at all. Mr. Hair, my investigator, is present in the courtroom. He has been to her apartment. He has been to her employment. He has spoken to two of her sisters.

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They indicated that they felt like -- they indicated that she indicated that she had been threatened. I texted her last night and asked her to come to our office at 8:30, that she needed to be in court at 9:00. Mr. Hair texted her and told her that she needed to be present at 9:00 over at the courthouse and I believe he told her a bench warrant will be issued if she did not show.

Since then she did respond to him indicating that she was not going to come, that she was frightened. And so, Your Honor, at this time the State is asking for a bench warrant to be issued against her and for you to allow us some time for the deputies to make that effort.

I have contacted the deputies to indicate that I believe a bench warrant may be forthcoming. And so

they are prepared to do so. I apologize for the inconvenience, but this is frankly out of my control.

THE COURT: Defense position?

MR. MCCOY: Judge, I can corroborate what was said, that I did speak to the witness that we're discussing right now. This was Sunday. And, Judge, I don't have any issue with a bench warrant being issued. It is my not client, not really my

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call.

THE COURT: Let me ask you, is she represented by counsel?

MS. SHEALY: She's not.

MR. MCCOY: She was, Judge, when she did have charges. Those charges have been dismissed, expunged.

THE COURT: Are we expecting based on my limited knowledge of the facts that it would be wise for her to be represented by counsel? She apparently wasn't in the first trial.

MR. MCCOY: She was, Judge, in the first trial, yes, sir, she was.

THE COURT: Let me ask the other question. Did this lady testify in the first trial?

MS. SHEALY: She did.

THE COURT: All right. Is her testimony available?

MS. SHEALY: It is available.

THE COURT: I will issue a warrant for her arrest.

MS. SHEALY: May I present this to you, Your Honor?

THE COURT: Certainly.

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MS. SHEALY: Your Honor, the bench warrant I have asked that they bring her to the courthouse if they find her during the normal workday hours, so they do not take her to the jail, then we have to bring her over.

THE COURT: That's fine.

MS. SHEALY: I'm going to staple this so her subpoena is attached to it.

(Off-the-record conference.)

THE COURT: We will stand at ease for a few minutes.

(A recess transpired.)

THE COURT: Counsel, based on conversations in chambers, the fact that the State has some difficulty in locating a witness, it is my decision to send the jury home and ask them to be back in the morning. Tell them we have scheduling conflicts.

MS. SHEALY: Thank you, Your Honor.

THE COURT: Any objection?

MR. MCCOY: No objection on this side, Judge.

THE COURT: Bring the jury, please.

(Whereupon, the jury entered the courtroom at 11:12 a.m.)

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THE COURT: Thank you very much. Ladies and gentlemen of the jury, sorry to keep you waiting in the jury room. But apparently there have been some scheduling problems with witnesses. This is a little unusual, but it is not unheard of that witnesses have problems, can't come or any number of things that can disrupt the flow of a trial. Anyway that has happened in this case.

So rather than keep you here and wait for this or these witnesses to appear, it's my decision to send you home, release you for the day and ask you to be back here at 9:30 in the morning at which time hopefully we will be able to continue to the trial.

If circumstances arise where we have to make other decisions we will have to make other decisions, but at this point I think the most expeditious use of your time and the litigants time is to go ahead and excuse you for the day and ask you to be back in the morning at 9:30.

Again, don't discuss the case among yourselves when you return to the jury room or with anyone else

over the evening hours. Try not to or don't make any independent investigation on your own. We will do the best we can to have this trial

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conclude successfully starting tomorrow. So thank you very much for your patience and we will see you at 9:30 in the morning. Thank you very much.

(Thereupon, the jury exited the courtroom at 11:12 a.m.)

THE COURT: Approach the beach, counsel.

(Off-the-record conference.)

THE COURT: Mr. McCoy, based on the situation it appears to the Court at the present time based on conversations I have had with you and the state solicitor's office, I feel it is necessary to take your client into custody. Temporary custody. Hold him at least until tomorrow when we find out more about -- if we find out more about what the condition of this witness is. All right.

MR. MCCOY: Yes, sir, for his safety as well.

THE COURT: Yes, sir, I believe so. I am dealing with the unknown and in an abundance of caution, I feel it is necessary to take your client, hold him in protective custody over the evening until tomorrow. Not revoking his bond, just taking him into protective custody

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temporarily. All right.

MR. MCCOY: Thank you, Judge.

THE COURT: Thank you very much. 9:30. We will stand at ease until 9:30.

MS. SHEALY: Thank you, Your Honor.

(These proceedings were adjourned at 11:15 a.m., July 27, 2015, Charleston County, South Carolina.)

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(The following proceedings continue on July 28, 2016, Charleston County, South Carolina, @ 10:20 a.m.)

(The following proceedings were held outside the hearing of the jurors.)

THE COURT: State ready to proceed?

MS. SHEALY: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MR. MCCOY: Yes, sir.

MS. SHEALY: Your Honor, as an update from our situation yesterday, and just as a reminder for the record, our next witness is a young lady name Starteasha Grant. She was the girlfriend of Kevin Howard, one of the codefendants in the case who has previously been convicted. We served her with a subpoena back in June. We attached that yesterday to a bench warrant. She met with us on Friday and we went over her testimony. We spoke to her by phone on

Saturday and it's my understanding that Mr. McCoy spoke with her on Sunday.

She did not show up to court yesterday after being advised by me to as when to come and by my investigator Keith Hair as to when to come. Mr. Hair then spoke with her sisters. They have not

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seen her since Saturday. She left a message for -- either she or someone using her phone, sent a text to my investigator indicating that she was scared and that she would not be coming.

Since then, Your Honor has signed a bench warrant. We enlisted the help of the U.S. Marshal's Office. We have been in contact with them today. They have had no success in locating her.

Your Honor, at this time the State would move for a mistrial. In addressing the appropriateness of a mistrial at this juncture on the part of the State, I would like to state for the record that this is not a situation where the State failed to have a witness subpoenaed before trial started. This is not a situation where the State is requesting a mistrial for any reason to better our case recognizing it was weak or in any way inflict any type of injustice toward the Defendant.

We are asking for a mistrial because at this point we do not know if Starteasha Grant is alive. We do not know if she has been injured. We do not know if she is just scared. We do not know if she has been threatened.

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In evaluating the situation, it is imperative I believe for the Court to determine what is in the public interest. I have practiced law since 1986. My investigator has been an investigator for 26 years. And neither he nor I have ever had this situation arise. So it is not something that is frequently an issue in trial.

Obviously this is not a DUI case. This is not a theft case. This is a murder case that involves a victim being shot ten times with three different types of ammunition and three different men being involved in his execution.

Interestingly, the purported motive for the killing was that Kevin Howard believed that the victim had been a snitch. Here we find ourselves in a position where our missing witness could certainly be categorized as a snitch. Your Honor, it would be the State's position that a mistrial is in order.

In looking at some of the case law regarding the matter, Arizona v. Washington states, Your Honor, and again, the cases are going to be in the posture of the retrial in this situation after a mistrial had been granted. And Arizona v. Washington states a retrial is not automatically

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barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded. And because those

circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.

Here, Your Honor, I think that obviously the State needs one fair and full opportunity to present the evidence in the jury. Mr. Seay has been out on bond. He was taken in last night by consent. Also to protect him. That's a part of the language in the bench warrant. He has been in court. We essentially did not get started until Tuesday, yesterday stood down after one witness. There has been no unfairness to the Defendant in this trial beginning and not completing.

If anything, he has had the opportunity now to see a number of the witnesses, how they will

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testify, and what the evidence is. So this young man has not been prejudiced by what has occurred.

That invites the question what is the public's interest? Well, obviously if we have one man charged with murder, and the cooperating witness is missing, the public interest is the safety of the streets. The safety of the witness. That all those involved in the killing in this case need justice.

When you compare that to the fact that this young man has been in court this week with his family in the courtroom, that there's no final judgment that has been entered in the case, the public interest I think

always outweighs any discomfort to him, any inconvenience to him. He has not been prejudiced in the least by this procedure.

There has been no unfairness to the accused. Again, State vs. Baum for example, Your Honor, discusses the test to determine whether sound ground exists for declaring a mistrial after the jury is sworn is whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end

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in just judgment.

And I think that's the posture that we find ourselves in. This is no manipulation on the part of the State. We have been prepared. We had her served. We met with her. We want a just end result not only for the public's interest, but for the interest of the victim as well.

State v. Baum is also quoting state -- or Arizona v. Washington again actually unlike the situation in which the trial has ended in the acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. There has been no final resolving of the merits. Because of the variety of circumstances that make it necessary to discharge a jury, that's the part I previously read, that it does not innately mean that a mistrial should not be granted.

State v. Baum also asserts, Your Honor, that broad discretion is left to the trial judge. It states we agree that -- I am sorry -- given the varying and often unique situations arising during the course of the criminal trial, the United States Supreme Court has recognized a broad discretion

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reserved to a trial judge in declaring a mistrial.

I think the case law dictates it is Your Honor that has broad discretion here. You need to evaluate what harm has been done to Mr. Seay and what harm could be done to the public? And what harm could be done to the public interest in getting a fair and full and just resolution to the charges. This is not being done just for us to be able to buttress any weakness in the case. Is there some motive on the part of the State that is unfair to the Defendant, have they come in unprepared and want a second chance? None of those things exist in this case. I think it is clear to Your Honor.

For those reasons we would ask Your Honor to grant a mistrial. We think it is appropriate in this case. We think that we have given examples as to why it is in no way detrimental to the Defendant and that public interest demands it. Thank you, Your Honor.

THE COURT: Mr. McCoy.

MR. MCCOY: Thank you, Judge. May it please the Court, Judge, in looking at the issue that we have here today I had the opportunity to review two cases that I would like to have the

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Court take a look at. One is Martinez v. Illinois, the cite is 134 S. Ct. 2070. Next is a South Carolina Supreme Court case, State v. Kirby, 269 S.C. 28.

Judge, I think for the Court to make any sort of determination on whether we are going to have a mistrial here or not you have a little bit of an analysis to do. No. 1, has jeopardy attached. And I think the answer is clear that jeopardy has attached in this particular circumstance because the jury has been sworn. We have taken testimony from seven or eight witnesses, Judge. The State still has I believe three or four witnesses they could call and we have done opening statements as well, Judge. So there has been an opportunity for the jury to be sworn, for the jury to hear information, and for the jury to sit through not only witnesses, but opening statements that have been made by both the State and the defense.

So Judge, again, analysis part one is has jeopardy attached and I believe the argument is clear, jeopardy had attached. And when I looked at the case law here well obviously, Judge, if there been had any sort of decision that had been made by

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the jury itself, then it is absolutely certain that a mistrial would not be appropriate at all. So we are kind of in a gray area that's in between opening statements, jeopardy attaching and a decision that's been made by the jury.

Judge, I would add that this would be to a disadvantage to the Defendant for several reasons. If you look at this trial, notice was sent to us on April 29th of 2016. It's been set almost two months out, Judge. The case is almost over four years old. And the Defendant was charged two years ago. And Ms. Shealy mentioned that Mr. Seay could actually gain an advantage by sitting and listening to witnesses who testified in this court over the past day and-a-half. Judge, we have a transcript from the previous trial so we know exactly what every witness is going to say when they come in, especially the ones that have already testified because they were basically the law enforcement and the expert witnesses that came in from SLED.

So, Judge, I would add to the Court as well that the testimony we have heard, none of the witnesses whatsoever link Mr. Seay to this crime. Link Mr. Seay to any sort of forensic evidence

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related to this crime. Nor is there any eyewitnesses testimony that was offered by one lay witness Katrina Stephens that puts Broderick Seay on the scene beforehand, Judge.

There have been no documented threats or intimidation that has been made on the part of the Defendant. And, Judge, at the last trial, I think this is important as well, the witness that is not here, that witness at the last trial had pending charges, obstruction of justice. Those charges have later been dismissed. Those charges have later been expunged

and she also had counsel with her at the last trial as well.

So, Judge, I would argue that if we are looking at a mistrial the case law that I read from, the two cases that I read aloud to the Court indicate that a mistrial should be granted basically under rare circumstances. I don't believe there has been a finding shown by the State that shows manifest necessity or in the best interest of the public, Judge. Thank you.

MS. SHEALY: If I may respond briefly?

THE COURT: Yes, ma'am.

MS. SHEALY: Mr. McCoy points out that they have had the opportunity to read the

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transcript from the other trial. And certainly what that would do for Mr. Seay is to know how pivotal Starteasha Grant is to the prosecution of this case, how she can identify him, how she can testify to some history with him, how she links him to the vehicle in the car and how she links him to Ty and to Kevin Howard. And how she links him to Horizon Village.

Your Honor doesn't have the benefit yet of knowing that what she will testify to is that minutes after fleeing from Wadmawlaw Island, this Defendant along with Kevin Howard and an unknown Ty meet up with her, all agitated, Kevin Howard with his finger bleeding, and they separated to two cars. That he and Ty joined them at her apartment, and that they are

taking from their car the tote bag that Kevin Howard keeps his shotgun in.

Your Honor has had the benefit of hearing the testimony of the pathologist who was certain one of the ten shots to this victim appeared to be a shotgun blast. Ms. Grant then continues to describe the rest of the events of the evening which would put this Defendant going with the others in two cars to seek hotel rooms to hide out.

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That he and Mr. Howard have an argument at the Waffle House on Montague and he gets left behind. That he then begins calling her. So Mr. Seay is well aware of the value of Ms. Grant's testimony to the prosecution of him. Additionally, because of how important she is, that is why the State believes that in this case it is necessary and it is in the public interest that we be allowed a mistrial so that we can number one, determine why she is not here in case any threat occurred, and number two, to secure her for purposes of the next trial. Thank you.

THE COURT: Anything further?

MR. MCCOY: Judge, again I would close by adding that the double jeopardy provision that's provided in the United States Constitution is there for a reason. The jury has been sworn in this particular instance. And I think that could cause at least a question for appeal, a question for PRC later if a mistrial is granted now.

THE COURT: All right. Well, I think the issue of double jeopardy, if a mistrial is granted, would be for a later determination. If the State again tries to try your client that is the point at which jeopardy and double jeopardy,

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that's the two, jeopardy and double jeopardy, two jeopardies, that would be the point at which double jeopardy would have to be raised. I don't think it can be raised before this Court other than as a potential consequence of granting a mistrial.

MR. MCCOY: And I agree, Judge. I think that would be a situation just like as the case law that we have all read. The case law is pivoted more towards the second trial and the issues of double jeopardy, so agree with that, Judge.

THE COURT: All right. Based on -- so I don't think this court can or needs to rule on that issue at this time. That's an issue for the future if the State chooses to try your client again in the event a mistrial is granted.

But I do think this is a very unique situation that may not be as rare as it appears to us here in this courtroom, but I'm sure that it is not the first time that a witness has not become available after a trial has begun.

Having read basically the same case law that both of you have read and put on this record, I wanted to make a complete record of this proceeding, I do feel that the State has been

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caught by surprise. I have no reason to believe that the State has concocted this factual situation to aid in the trial of your client. I think it has created a fact that this witness is a critical witness to the prosecution of the Defendant and the almost simultaneous absence of the witness once the case is called and once the witness is called based on the fact as you have both pointed out the witness was available as of perhaps Friday or as late as Sunday before the trial started on Monday and then to have her disappear when her name is called is in my opinion not the fault of either one of you. There is obviously a reason this Court is not aware of as to why she's not available.

I think it does fall within the rubric of Arizona v. Washington that this creates and I will use the word manifest necessity to grant a mistrial. In the interest of public justice, that's a pretty general phrase, but it is used in court decisions. And there certainly is a public interest in the fair trial of the Defendant. He continues to be presumed innocent. He's not been held in custody, although he has been subject to a bond, he's not been held in custody all this time since the event occurred. He may have been held in

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custody some period of time, but when he appeared in this court he was on bond. I don't think the inconvenience, I hate to use that word because we're not really talking about convenience, but the prejudice I should say to your client is so great that I should not grant a mistrial.

The State has not rested its case. I don't believe you can move for a directed verdict at this time. I think had the State rested their case, the case is ongoing as of this moment. I think the public is entitled to a fair trial as is your client. And these unique circumstances I think compel this Court to grant a mistrial and I so do at this time. I grant a mistrial to the State and this case for this time has ended.

I'm going to dismiss the jury. I probably will tell them. I can do that on the record or do it with them privately in your presence. I think the jury needs to know why they have been held for two days with no appearance in the courtroom. Anything further?

MS. SHEALY: No, Your Honor.

MR. MCCOY: Briefly, Judge. Just in what would be addressed to the jury just because they are members of the public in terms of how that

* * *

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courtroom at 10:47 a.m.)

(The following proceedings were held outside the presence of the jurors.)

THE COURT: This matter is concluded. There are other cases waiting to be tried. Please clear the courtroom as soon as you can. We are going to take a ten-minute break.

MR. MCCOY: Judge, briefly before you exit, I'd like to renew my objection to the mistrial number one;

number two, we did have an issue of a temporary bench warrant on Mr. Seay.

THE COURT: I vacate the bench warrant.

MR. MCCOY: And I personally did not speak to the bondsman, but Sara just spoke to the bondsman and he told us that he will remain on the bond; is that correct?

MS. TURNER: Yes.

THE COURT: The bench warrant is vacated.

MS. SHEALY: May I ask the Court to advise the Defendant to have not any contact towards of the State's witnesses or ask anybody on his behalf to do so?

THE COURT: It may be a condition of his bond.

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MS. SHEALY: I think it is and since we have the opportunity and level of dangerousness in this case I would ask Your Honor admonish him.

THE COURT: Well, Mr. McCoy, you can consult with your client.

MR. MCCOY: I will.

THE COURT: Advise him of the concern of the State as indicated yesterday not only for the safety of the witnesses, but for his own safety.

MR. MCCOY: I have, Judge, and I will.

THE COURT: There may be volatile situations in the community that none of us are aware of.

MR. MCCOY: Yes, sir.

MS. SHEALY: Your Honor, also just for the record the State would oppose him being able to remain out on bond.

THE COURT: Well, I have no indication that he has violated his bond. So I have no choice other than to rescind the bench warrant. It was issued for a temporary purpose. Temporary purpose having been satisfied, the bench warrant needs to be lifted. Correct, sir?

THE DEPUTY: Sorry? Yes, sir.

APPENDIX H

IN THE COURT OF GENERAL SESSIONS
NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

INDICTMENT #: 2015GS1000972
WARRANT #: 2014A1010201292
CHARGES: Murder

[Filed July 27, 2016]

STATE OF SOUTH CAROLINA)
)
-versus-)
)
BRODERICK WILLIAM)
SEAY JR.)
)
Defendant)
)

BENCH WARRANT

TO: JULIE J. ARMSTRONG, CHARLESTON COUNTY CLERK OF COURT

The State of South Carolina, through the undersigned, requests that this Court issue a Bench Warrant for Startaeshia Kierra Shawn Grant (DOB: [redacted].

The undersigned attests:

That the State directly served a subpoena on June 23, 2016 on Startaeshia Kierra Shawn Grant (Attachment 1). The subpoena advised the witness to be present in the General Sessions Court of Charleston County on Monday July 25, 2016 at 9:00am. Further, the witness was advised by telephone communications to be present in the General Session Court of Charleston County on Wednesday July 27, 2016 at 9:00am, pursuant to the issued subpoena.

That as of Wednesday July 27, 2016 at 9:00am, the witness willingly failed to appear in the General Sessions Court of Charleston County pursuant to the issued subpoena.

7-27-2016 /s/Jennifer Shealy
Date: Assistant Solicitor

Based on the foregoing, LET A BENCH WARRANT BE ISSUED FORTHWITH FOR THE ABOVE-NAMED WITNESS. Furthermore, the Charleston County Sheriff's Office in conjunction with any other law enforcement agency that may be able to assist is to immediately attempt to locate the above-named witness and take her into custody pursuant to this bench warrant and bring her to the Charleston County General Sessions Court House if located during the course of normal business hours.

7-27-16 /s/G. Thomas Cooper 10:06AM
Date: Judge:

SUBPOENA IN A CRIMINAL CASE

<table>
<tr><td>SOUTH CAROLINA GENERAL SESSIONS COURT</td><td>COUNTY OF CHARLESTON</td></tr>
<tr><td rowspan="2">THE STATE OF SOUTH CAROLINA

V.

BRODERICK WILLIAM SEAY JR.</td><td>CASE NO.: JKS 20120402556
INDICTMENT NUMBER: 2015GS1000972
WARRANT(s): 2014A1010201292
CHARGES: MURDER</td></tr>
<tr><td>SUBPOENA FOR
⊠ PERSON
⊠ DOCUMENT(S) OR OBJECT(S)</td></tr>
<tr><td colspan="2">TO: STARTASIA GRANT

OCA #: 2012005013B
SLED Lab # L12-04068</td></tr>
<tr><td colspan="2">⊠ YOU ARE HEREBY COMMANDED to appear in the above-named court at the place, date, and time specified below to testify in the above-entitled case.</td></tr>
<tr><td rowspan="2">PLACE

CHARLESTON COUNTY JUDICIAL CENTER
100 BROAD STREET
CHARLESTON, SC 29401</td><td>COURTROOM
GENERAL SESSION COURTHOUSE</td></tr>
<tr><td>DATE AND TIME
WEEK OF JULY 25, 2016, AT 9:00 A.M. each day this term of court or until disposition of case</td></tr>
</table>

<table>
<tr><td colspan="3">☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s).</td></tr>
<tr><td colspan="3">LIST DOCUMENT(S) OR OBJECT(S): See special instructions on reverse side for a Duces Tecum subpoena.
*Immediately upon receipt of this subpoena, please call Investigator Keith Hair at (843) 958-1975 or Assistant Solicitor Jennifer Kneece Shealy at (843) 958-1959 to advise us of where you can be reached during this term of Court. If connected to a voicemail, please leave your name, a viable day and evening phone number and the defendant's name referenced in the upper left corner of this subpoena.

*PLEASE READ ADDITIONAL INSTRUCTIONS ON REVERSE SIDE</td></tr>
<tr><td colspan="3">This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.</td></tr>
<tr><td colspan="2">CLERK OF COURT
/s/</td><td rowspan="2">DATE
June 1, 2016</td></tr>
<tr><td colspan="2">(BY) DEPUTY CLERK
/s/</td></tr>
<tr><td>THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE:

☒ SOLICITOR
☐ DEFENDANT</td><td colspan="2">NAME AND ADDRESS OF ATTORNEY or DEFENDANT
(IF PRO SE/SELF REPRESENTED)
JENNIFER KNEECE SHEALY
ASSISTANT SOLICITOR</td></tr>
</table>

	NINTH JUDICIAL CIRCUIT CHARLESTON COUNTY O.T. WALLACE COUNTY OFFICE BUILDING 101 MEETING STREET, 4TH FLOOR

SCCA 253 (10/2011)

PROOF OF SERVICE

SERVED 6/23/16	DATE 6/23/16	PLACE 101 Meeting St.
SERVED ON (PRINT NAME) Startaeshia Grant		MANNER OF SERVICE Person
SERVED BY (PRINT NAME) Keith L. Hain		TITLE Investigator

DECLARATION OF SERVER

I certify that the forgoing information contained in the Proof of Service is true and correct.

Executed on 6/23/16 /s/Keith L. Hain
SIGNATURE OF SERVER

101 Meeting St. Chas. SC.
ADDRESS OF SERVER

ADDITIONAL INSTRUCTIONS:

Upon arrival at the Charleston County Judicial Center, please report to the courtroom assigned for general sessions trials, which will be displayed on a monitor by the courthouse elevators. Please wait outside the specified courtroom until noticed by the Investigator referenced in this subpoena or by an officer acting on behalf of the Court.

IF YOU PROMPTLY FURNISH THIS OFFICE with your contact information, it may not be necessary for you to attend court on each day of the entire term set forth in this subpoena. If you contact our Office and supply us with all of your pertinent information we may be able to give you a more specific date and time to appear in Court for the disposition of this case.

IF YOU DO NOT CONTACT THIS OFFICE upon receipt of this subpoena and provide the requested information, ***you must appear in Court at the time and place set forth in this subpoena.***

IF THE "DOCUMENT(S) OR OBJECT(S)" BOX IS CHECKED, and you promptly furnish the Office with the requested item(s) listed below, it may not be necessary for you to appear in court. ***If the requested item(s) are not provided, you must appear in Court at the time and place set forth in this subpoena.***

Failure to appear in court pursuant to this subpoena constitutes contempt of court.

SPECIAL INSTRUCTIONS:

SCCA 253 (10/2011)

APPENDIX I

IN GENERAL SESSIONS COURT
NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

2016B07292016000

[Dated August 22, 2016]

State of South Carolina)
)
Vs.)
)
Startaeshia Grant,)
)
Defendant.)
)

Transcript of Record

August 22, 2016

Charleston, South Carolina

BEFORE:

The Honorable Kristi L. Harrington, Presiding Judge

APPEARANCES:

Jennifer Shealy, Assistant Solicitor

Attorney for the State

Rodney D. Davis, Esquire

Attorney for the Defendant

SHARON L. VIZER

CIRCUIT COURT REPORTER

* * *

[p.4]

MS. SHEALY: I think, Your Honor, that it does fall under the common law which would make the punishment -- it could be up to 10 years. It's oddly written in the statute that the language being used at the discretion of the Court.

THE COURT: Again, what are you asking me to do?

MS. SHEALY: Globally or just as to that one issue?

THE COURT: Globally.

MS. SHEALY: Your Honor, we are before you today, Ms. Startaeshia Grant has been picked up on a bench warrant that was signed by Judge G. Thomas Cooper after she had been subpoenaed to appear in trial and to testify in the case of the State of South Carolina vs. Broderick William Seay, and that was indictment number 2015-GS-10-00972, an indictment for murder.

Judge Cooper did sign the bench warrant after we provided him with a copy of a subpoena that showed

the date in which Ms. Grant had been served by my investigator at the time, Keith Hair.

Ms. Grant prior to the week of trial met with us on that Friday afternoon. We spoke to her again on Saturday with a follow-up question. It's my understanding from the defense counsel in Broderick Seay, Peter McCoy, that he spoke with her on Sunday. And we began the trial, put up a number of witnesses that are articulated in our

[p.5]

memoranda, and she was given notice to appear in court on the Wednesday of that week. She failed to show.

When we were trying to get in touch with her she ultimately texted my investigator at the time, Keith Hair, and indicated that she would not be present for court, that she would rather go to jail than to appear in court. The Judge gave me 24 hours to try to secure her presence.

The following day, that Thursday of court week, she had not been found and did not show up. I moved for a mistrial and Judge Cooper granted the mistrial.

Prior to all of that occurring we had had a number of witnesses testify, including a pathologist from MUSC, several witnesses from SLED --

THE COURT: Hold on one second.

Do you need some more time to talk to your client?

MR. DAVIS: Perhaps, Your Honor. Perhaps. One of the biggest concerns I have is one of the first issues the State raised. Of course, I will address it at the appropriate time. But the fact that they are going commonwealth 10 or the statute 14-5-320 I would have a response to that at the appropriate time.

THE COURT: Okay. Do you need to -- it's somewhat distracting, and I'll give you all time. If you need to talk to her I'll be more than happy to get off the bench

* * *

[p.17]

THE COURT: Nine o'clock. I will review her status December 13th at 9:00 a.m. and we'll make a determination, Mr. Davis, at that whether or not where we are. All right? So that way I always like to have a date in case for some reason that case got continued or something so that there -- we have a monitor on how long Ms. Grant will be in custody.

Anything further, Mr. Davis?

MR. DAVIS: Just two things briefly, if I may, Your Honor. First of all, for my understanding too that I will appear with her on Tuesday morning, December 13th, 9:00 a.m. for a status update. Fair enough, Judge. I'll calendar that. Second of all --

THE COURT: And I meant to put I signed that order appointing you, so you are appointed as her attorney.

MR. DAVIS: Yes, Your Honor. Out of an abundance of caution, if I may, Judge, if I can have just briefly some mitigation because we do not have any evidence to present to your finding of civil contempt. We have no evidence to present in a defense of that. But just briefly in mitigation, Judge, I would point out, 21 years old when I represented her previously and she testified in a other co-defendant's murder trial. She's now 25. She does have a baby boy now that's just over two years old. She's been in jail now 25 days since picked up on

[p.18]

this bench warrant.

The State referenced certainly some phone calls and her attitude while in jail. If I could just briefly, Your Honor, on that. I believe I mentioned this a week ago. The only two times she's been in court was to testify in that other murder trial, and this is the third time, last Monday and today. We were barely in the courtroom last time. So she's 25 with little to no experience with the criminal justice system.

You know because of on the record and some in chambers Ms. Shealy and I -- I say for myself, over two decades the first time dealing with this, so it is a unique thing. We understand that she has made some comments about not wanting to be a witness in this case but she understands now clearly the consequences for not appearing for a subpoena.

I know the State referenced some comments on the phone. I can tell the Court, she's allowed me to represent to the Court, I've spoken with her a few

times either in person or by video conference while she's been in custody during the 25 days. As recently as Friday, Your Honor, she expressed some suicidal ideations. We had conversations about that.

For lack of a better term I asked her to, you know, agree to a promise with me that if she had feelings like

[p.19]

that that she would have someone contact me or notify the folks at the jail. She was, in fact, in a protective suit when I met with her that day. She's not today. So I do believe and think she's doing better.

But I do want the Court to understand, and I think you do, Your Honor, I know you are a parent, that she is different now at 25 and a mother than she was back then. She did not understand the consequences, and the State lays out several things in their memo. She did not understand the consequences of that.

We understand the State's concern and your concern and I do not mean to be arguing the issue really but if I may we would ask you to consider something less restrictive. I just would like to make a record of that. I certainly understand your ruling on that but we could argue that there are less restrictive means.

And the final thing, Judge, is we would argue that this is not a contempt -- a civil contempt in the sense that on civil it can be purged at the defendant's choosing. The quickest analogy is you have child

support to pay, you pay that today, you're out. She cannot testify today so she does not have keys to the courthouse and therefore it's not civil contempt, but we do understand Your Honor's ruling. We would make an objection to that. If you'd be inclined to fashion some

[p.20]

less restrictive punishment we'd appreciate that. We certainly understand the Court's ruling. Thank you for letting me put that on the record, Your Honor.

THE COURT: All right. I have ruled.

Good luck to you, Ms. Grant.

Please make sure that you let transport know when she gets to the jail that there have been some discussion of suicidal thoughts, just to make sure before she leaves.

MR. DAVIS: If I may, Judge, we certainly appreciate the concern but she just came off of --

THE COURT: I understand. Again, I just want to make sure. Thank you. Thank you, Mr. Davis.

MR. DAVIS: Thank you, Your Honor.

THE COURT: I'm going to need you to do the order for me, Ms. Shealy. Thank you.

MS. SHEALY: Thank you, Your Honor.

(WHEREUPON, the hearing was concluded.)

APPENDIX J

EXHIBIT B

Sara Turner

From: Jennifer Shealy <shealyj@scsolicitor9.org>
Sent: Wednesday, October 26, 2016 10:31 AM
To: Peter M. McCoy, Jr.; Sara Turner
Cc: Daniel P. Eckert; Chris Lietzow
Subject: FW: State VS Broderick Seay/ Text Message between Keith and Star

Peter,

Please see below for an update.

Thanks,

Jennifer

Jennifer Kneece Shealy
Ninth Circuit Solicitor's Office
O. T. Wallace Building
101 Meeting Street, 4th Floor
Charleston, South Carolina 29401
843.958.1959(tel)
843.958.1905 (fax)
shealyj@scsolicitor9.org

From: Daniel P. Eckert
Sent: Wednesday, October 26, 2016 10:28 AM
To: Jennifer Shealy; Chris Lietzow

Subject: State VS Broderick Seay / Text Message between Keith and Star

I spoke with Keith on my way into work this morning.

He informed me that he had sent Star text messages throughout the week reminding her about court, that she was under subpoena, and that she needed to appear or a warrant could potentially be issued for her arrest.

He advised that Star didn't reply until the final message which we transcribed for you on the day when the bench warrant was issued.

I have also been in contact with Sgt. James from the county and he is pulling the body camera video from the night that Star was arrested by the US Marshals Service with the assistance of the Charleston County Sheriff's Office.

Hope that helps,

Daniel Eckert
Special Investigator
9th Circuit Solicitors Office
101 Meeting Street
Charleston, SC. 29401
Main: 843-958-1900
Desk: 843-958-1975
Fax: 843-958-1905
Email: Eckertd@scsolicitor9.org

[SEAL]

EXHIBIT C

I been losing a lot of sleep over the last 3 days, I'm scared as hell, I can't afford for any of my loved ones to be harmed, I am all that my son has he has no daddy so I decided not to take the stand and I'm willing to accept all consequences. Jail time is better than leaving my son in this world without a mother

RULE 5 1668

APPENDIX K

COURT OF GENERAL SESSIONS
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Case No. 2014A-10-0972

[Dated September 15, 2017]

STATE OF SOUTH CAROLINA	)
	)
vs.	)
	)
BRODERICK WILLIAM SEAY, JR.,	)
	)
Defendant.	)
	)

Transcript of Record

DATE: September 15, 2017

BEFORE:

THE HONORABLE R. MARKLEY DENNIS, JR.

APPEARANCE:

Christopher Scott Lietzow
Attorney for the State

Sara A. Turner
Attorney for the Defendant

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

* * *

[p.8]

THE COURT: That's fine. Okay.

MS. TURNER: Our issue, Your Honor, is, while I understand that different witnesses come in and testify at different times, that the State knew that this witness was so important to them that they could not continue with trial after eight witnesses already testified, and that their other witnesses who were going to testify depended upon her. And in addition, there's e-mails that are going -- that have come to us from the State indicating that they had tried contacting her via text message throughout the week of the trial, and did not get a response from her.

And our argument would be that in cases like *Downum,* where the solicitor's office decided to move forward with the trial where they knew this one person was the link, that had all the information, that they should have known at the start of the trial where she was. She has -- she was charged originally with obstruction of justice with this case. And she testified in a previous trial, when she still had that criminal charge pending. That charge had been dismissed and expunged from her record.

So she has a history of not always telling the truth and being dishonest. She had a motive in the initial trial to testify. She lost that motive the second

time around because she didn't have a criminal charge pending against her.

[p.9]

You know, the fact that she testified the first time, and it's been a couple of years since that initial trial, you know, she's no longer in the spotlight as a tattletale, as somebody who is being put on the stand where people in her community are seeing her. So she stepped away from that at this point in time. And I would argue that she should -- that the State should have known where she was. If there's someone who was that important, at least to me, who is a witness in a case who is going to change my case, I'm calling them every day to make sure they are still around and able to testify. I think --

THE COURT: Let me ask you a question. That means there's no need for us to ever issue a subpoena. "Us" meaning when I was a lawyer. We have a right to rely on the fact that a person is not going to ignore the law. We have a right to presume that somebody that's duly served will appear in accordance with the subpoena. Don't you agree with that?

MS. TURNER: I do agree with that.

THE COURT: Then the fact that she's not -- if that's the case, we would do away with subpoena and just simply mandate the person be physically present at all times until they are called and can't be dismissed. And we couldn't function that way. You couldn't function that way either in defense of someone.

[p.10]

So I understand all the issues that you are talking about why she may have chosen not to testify and why she chose to be noncooperative. But most of that material is great for cross-examination to attack her. But the bottom line is, I think to me, if a judge found that this witness violated a court directive, that is a subpoena, and found her to be in contempt of court, that's a pretty good indication that she's the wrong party, not the State.

I mean, first of all, it would seem to me that there would have had to have been -- I understand what you are saying. But once you have that contempt determination by the court, the court is basically saying -- because that's what a contempt proceeding is, it's a rule to show cause. Why should I not be found in contempt of court? She comes forward. Well, because the State wasn't really interested in me. They didn't pursue me. They didn't do anything. They didn't make the contacts.

To me, those are issues that would be raised to defeat or defend against the contempt threat. She was found in contempt. That means there was no reason for her to not be there. So I see that as a real obstacle here.

Let's put it this scenario. Assuming that the State moved for a mistrial and informed the witness, but did nothing, followed up. That's why I asked the question, did they file -- seek contempt. They did. If they did nothing,

[p.11]

I agree with you. I would do it. I would agree with you, notwithstanding the subpoena being issued. But they did something. They sought to punish the person. I don't know what more the State could do.

And as I said, I hear you. And I understand what you are saying. And I understand the critical nature of it. But as a lawyer, you know and I know, in trying a case, you can't sit there -- that's why people, when they represent themselves, it's a nightmare. Because you and I both know, when you are trying a case, you've got to have all these things in the back of your head. But most important thing is the one you are dealing with right now. These other things, you've got other people hopefully doing some things. But you are not concerning yourself with that.

The order in which she's presented, you know, that's a discretionary matter that will always be left to lawyers. I enjoy the role that I have because I get to watch y'all good lawyers present and your strategies and when to present a witness. You know, that's a critical part of it as a trial lawyer. You know, sometimes you have to build it. And sometimes you want to lay it out all at once at first and then support it. There's all sorts of theories behind that.

But I am not aware of any case law that says a solicitor or any attorney with the burden of proof has to

[p.12]

make sure that all their necessary witnesses are present and accounted for.

But you've mentioned a case. And I want to read that case fully, obviously. And, again, to reiterate, you've taken the time to put together a very extensive memorandum in support. And you are entitled to rely fully on that if it becomes necessary to review this issue.

MS. TURNER: Your Honor, in the *Downum* case, the major quote out of that is: The fact is that when the district attorney impanelled the jury trial without first ascertaining whether or not his witnesses were present, he took a chance.

THE COURT: Well, did they subpoena the witnesses in that case?

MS. TURNER: In that particular case, I do not believe that they had subpoenaed the witness.

THE COURT: Therein lies the issue precisely. And, frankly, if you want to know something, that's exactly what I just said. That's precisely what I was eluding to when I said, if the solicitor had chosen not to seek contempt citation, I think they basically put themselves in that case, in the purview of that case, because it really didn't matter. They just did it for show.

This one, I'm sure they talked to him. And I agree. But there was a tool in place. And that critical

[p.13]

tool was not there. And I don't argue with the logic. I agree with that. You need to be prepared if you have

the burden of proof. But, again, it goes back to what document was there.

Anyway, I'm going to read that case. I am not going to rule. I'm going to study your memorandum. And I will reread the case. But that's my reaction to that case.

MS. TURNER: Yes, Your Honor. And there's a South Carolina case as well, *State v. Rowlands* where the prosecutor as well discovered that their key witness wasn't there after swearing a jury. And that was something that they discovered immediately. And that person was subpoenaed. So there's definitely case law that backs up our position in that the fact that the State did not -- if it were someone who was so material to their case --

THE COURT: Let me add something here. Obviously, they did know where she was, because they were able to serve her a subpoena. No question the subpoena was served, correct?

MS. TURNER: Yes.

THE COURT: Okay. So when you say they didn't know where she was, they didn't know that she was not physically in the courtroom. But that doesn't mean maybe -- I don't know. I dodged bullets for 21 years, but I can promise you, especially in civil cases where you have physicians

[p.14]

subpoenaed, I didn't make them come sit in the courtroom until I called them. I said, give me a

number, I will call you; how long will it take you to get from your business to here? And that's the way I worked that. That's the way -- I see lawyers do that a lot. And I've had cases where I've had to take a recess because they called, and for whatever reason, they were en route, but they hadn't gotten there. So it wasn't the fact that I didn't know where they were. I just didn't have them physically in the courtroom.

But I hear you. And I will look at that case and read it in context of the factual situation. I don't argue with your argument that -- especially the Downum, that first case --

MS. TURNER: Downum.

THE COURT: That case, clearly. But the fact that there was no subpoena issued is critical to me in distinguishing that. But anyway, it may still control. I will look at it.

MS. TURNER: Yes, Your Honor. And the only other -- I know you are going to review all the material. And I don't want to read my brief to you or all the case law, but --

THE COURT: Please stress whatever you feel I should hear. Seriously, don't let that interfere with what you want to present or say here.

[p.15]

MS. TURNER: Your Honor, I believe that the high degree that's required for manifest necessity and then on top of that, strict scrutiny on the part of the prosecution's witness being available -- and I

understand that she was under subpoena. Therefore, I think that subpoenas are 100 percent necessary in order to have a trial and that there has to be some kind of recourse for someone not showing up. But our concern, again, is the timeline as to the last time they spoke with her, being Friday.

You know, not having her testify until another day later in the week, and the fact that she had been criminally involved with this case, I think that adds another layer to it, in that she had been originally charged with obstruction of justice for trying to create an alibi for her ex-boyfriend who was a co-defendant in the first trial. She had, like I said, a motive to testify the first time around. And she was dishonest with authorities previously.

THE COURT: And I understand that, but those don't really move me at all to the point, because those are really issues -- frankly, those are the risks the State knows they've got to deal with when they call her. They are calling this witness. And she's not exactly a favorable witness. But they call her because this witness knows certain information which they are trying to get. And that's the beauty of the process. They know this is a

[p.16]

negative witness. I mean, they have to know that.

And so from the standpoint of -- that happens every day. I mean, that doesn't mean anything to me. Wait a minute, I'm on notice this person may be adverse to me, so, therefore, I have to assume they are not going to comply with what they are telling me they

are going to do. I don't think it works that way, but that's just my reaction to that.

MS. TURNER: Your Honor, the only other point I would like to stress is the fact that while that's obviously for us to use in cross-examination of that witness, is that based upon their interactions with her previously from the first trial, that they know this about this person and that there should have been contact made at least on the first day of trial to make sure that she was still going to be there. And that's something that at least I do, if I have a witness, which on the defense side I don't always have.

But if I do have one who I feel is so important that I cannot conduct my case or trial without them, then waiting until -- like I said, the inconsistencies are that they were messaging her all week without a response until Wednesday. And then there's the other story that they messaged her or tried to call her the night before she was supposed to testify. So there's two different stories, if I'm understanding that, or if I don't understand still, I

[p.17]

guess, at this point in time.

And my stress -- what I want to stress is the fact that I think that they should have been more prepared if that is their star witness. If that's their star witness, then they should know exactly where she is at the beginning of trial before they go forward. Because at the point that they went forward, if they did not have her, they didn't have enough evidence to convict.

THE COURT: Well, let's just assume for the sake of discussion that you are right. Does that mean at the close of business, we do like we do with persons on bond? We incarcerate them to make sure they come back tomorrow?

I mean, the problem that I have with this is, again, how far do we go and what control -- in your situation, you don't take that person in custody. I mean, you are not going to expect that person to come stay in your home. I mean, when they leave for the day, assume for the sake I'm going to see her in my courtroom, I want to see her sitting there. That's one way of doing it for sure. But when you adjourn court, unless you are putting them in custody or you are going to take them home with you, I don't think you got a guarantee that that person is going to be back tomorrow.

And so that's why I say, at some point, we have to look at what is the purpose of this subpoena and what effect

[p.18]

do we as lawyers and the court, what do we say about that? And to me, I will give you this analogy -- maybe it's not analogous, but to me, it is. One of the issues that we have come up from time to time in civil proceedings is whether or not service was effected. Because, obviously, if we didn't serve summons and complaint, would have no authority to act on. And the law is very clear. Until you put on notice, until the Court is presented with something that challenges the efficiency and the effectiveness of the service, you are

entitled to presume if they, for instance, file -- I served this person on such and such date, such and such time, typically the affidavit of service, it's fine. I don't have to say, did they really do that? Did they really serve that person? I'm entitled to rely on that.

And only until -- and we know that's why jurisdiction, personal jurisdiction, is challenged even on appeal, because if they can show I was never served, okay, it was all for naught. But we've got to have some effectiveness to these documents.

To me, I don't know what else to say could have been done. But I'm going to hear from why don't we do this. I'm going to hear what they want. And you can respond specifically to those positions. Thank you. I appreciate that. And I appreciate the thoroughness of your presentation as well.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7242
(2:17-cv-02814-TMC)

[Filed August 2, 2019]

BRODERICK WILLIAM SEAY, JR.

Petitioner - Appellant

v.

SHERIFF AL CANNON
Respondent - Appellee

O R D E R

Upon consideration of submissions relative to appellee's motion to stay mandate pending petition for writ of certiorari, the court denies the motion.

Judge Keenan and Judge Quattlebaum voted to deny the motion. Judge Niemeyer voted to grant the motion.

For the Court

/s/ Patricia S. Connor, Clerk