

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM JASPER COUNTY
Court of Common Pleas**

Carmen T. Mullen, Circuit Court Judge

**Opinion No. 2015-UP-384
Appellate Case No. 2015-001847**

RECEIVED
OCT 13 2015
S.C. Supreme Court

Robert C. Schivera, Executor of the Estate of Fed J. Hughes, III.....Respondent

Vs.

**C. Russell Keep, III, Esquire and Rhonda Mitchell, Jasper County Tax Collector,
Defendants,**

Of Whom C. Russell Keep, III, Esquire is thePetitioner.

REPLY

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Defendants,

Of Whom C. Russell Keep, III, Esquire is the^{Petitioner}Appellant.

REPLY

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2. Benton v. Logan, 323 S.C. 338, 474 S.E.2d 446 (S.C. Ct. App. 1996) "forward order expired" - not a posting case. Argument - the problem mailing could have been cured by **Alternative Procedure for Collection of Property Taxes §12-51-40(c)** IF the tax notices are returned undeliverable" by posting.

3. Corbin v. Carlin, 366 S.C. 187, 620 S.E. 2d 745 (Ct. of Appeals October 3, 2005)
 - A) "Tract B as described in the tax deed to Peterson did not exist."
 - B) Tract 1 included tract B so taxes were paid.
 - C) Less than 6 months later, on March 15, 2006, revisions to **SC Code Sections §12-51-90(c) and §12-51-160** took effect making it more difficult to avoid the two year statute of limitations.
 - D) Not a posting case.

4. Dibble v. Bryant, 205 S.E. 2d 673, 274 S.C. 481 (SC Sup. Ct. 1980)
 - A) If the defaulting tax payer remains in possession, the two year statute does not begin to run.
 - B) Two year statute did not apply because the sheriff did not take possession of the land before the tax sale.
 - C) "Constructive Notice provided by the levy, advertisement and sale in the owner's name is deemed sufficient."

D) This is a posting case but the land was levied on, advertised and posted in the wrong name.

5. Donohue v. Ward, 298 S.C. 75, 378 S.E. 2d 261, (Court of Appeals, 1989)

A) Execution, levy, advertisement and sale of property not in the name of the owner is a jurisdictional error so the bar of the Statute of Limitations does not apply.

B) Not a posting case.

6. Federal Financial Co. v. Hartley, 380 S.C. 65, 618 S.E. 2d 410 (S.C. Sup. Ct. 2008)

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7. Gardner v. Reedy, 62 S.C. 503, 40 S.E. 947 (SC 1902) for the two years to run, the purchaser must be put in possession. This case is moot in light of new §12-51-40(c) "if" posting.

8. Glymph v. Smith, 180 S.C. 382, 185 S.E. 911 (SC Sup. Ct. 1936)

A) Sheriff did not take possession of the land before the tax sale so the 2 year Statute did not apply. This is old law.

B) Not a posting case.

9. Good v. Kennedy, 291 S.C. 204, 352 S.E. 2d 708 (Ct. of App. 1987)

A) Sent to wrong address - not a posting case. Argument - this postal problem could have been cured by posting pursuant to §12-51-40(c).

B) "Due care" standard for public officers violated.

10. Hawkins v. Bruno Yacht Sales, 353 S.C.31, 577 S.E. 2d 202 (SC Sup. Ct. 2002)

A) Boat / personal property case, no posting required.

B) Only sent certified mail. Not sent "restricted delivery."

11. Johnson v. Arbabi, (SC Sup. Ct. 2003)

A) Joint owners with the same address - "§ 12-51-120 does not require separate redemptive notices."

B) §12-51-120 "the return of the certified mail "undeliverable" is not grounds for a tax title to be withheld or found defective and ordered set aside or cancelled of record."

C) "Notice is constructive rather than actual."

D) Not a posting case.

12. King v. James, 388 S.C. 16, 694 S.E. 2d 35 (Ct of Appeals 2009)

A) As in Dibble, the tax payer (King) remained in possession at all times so the two year statute of limitations of 12-51-60 did not apply.

B) The Certified Mail Tax Notice was returned undelivered. Beaufort County Deputy Sheriff claimed the County took exclusive possession of the Property by posting the property pursuant to new SC Code § 12-51-40(c). No pictorial proof of posting (though this is a posting case).

C) "Neither of the appellants appealed the Master's findings that the tax sale was not conducted in strict compliance with statutory requirements. - Therefore this ruling is the law of the case." (An un-appealed ruling, right or wrong, is the law of the case.)

D) The Court of Appeals recognized the "somewhat divergent decisions regarding if and when the Statute of Limitations begins to run."

13. Leysath v. Leysath, 209 S.C. 342, 40 S.E. 2d 233 (SC Sup. Ct. 1946)

A) "The sudden activity of the Plaintiff (Appellant) was not until after the Defendants (Respondents) had improved the land by their work, good management and industry, and values of real estate increased generally." - Upholding the two year statute.

B) 2 year Statute of Repose - "a Statute of Repose is not needed in favor of purchasers at valid tax sales. The very purpose of such a Statute is to shut off inquiry into such defects as are now complained of, and confirm the tax deed in spite of them, and unless it does this it is a nugatory."

C) Tax Sale upheld.

D) Irregularities which would have voided the sale if a proceeding had been timely brought. - "We may, therefore, concede the tax sale was invalid and that in a preceding timely brought, Appellant would have the tax sale declared void and set aside."

14. Osborne v. Vallentine, 196 S.C. 90, 12 S.E. 2d 856 (SC Sup. Ct. 1980)

A) "Substantial compliance" standard.

B) "It is a well established principle that Due Process of Law required *some sort* of notice to a land owner before he is deprived of his property. It is an anomalous situation that the statutes of this State require actual notice to a mortgagee if land about to be sold for taxes, and *make no such requirement for actual notice to the owner*. It would appear that the *constructive notice provided by the levy, advertisement and sale in the owner's name is deemed sufficient*. Such notice to the owner, as required by the tax sale statutes, being *constructive rather than actual*, the court requires strict compliance therein."

C) "Burden on the tax payer / homeowner to prove that the levy, advertisement and sale were not in the names of the true owners."

D) "At the time of the levy the owners of the property were the devisees, but the levy made in the name of the deceased Testatrix." "The advertisement was not in their names as owners."

E) "It would appear that the constructive notice provided by the levy, advertisement and sale in the owner's name is seemed sufficient."

F) "The levy must be made in the name of the true owner," also the advertisement and sale.

G) Not a posting case.

15. Reeping v. JEBBCO, 402 S.C. 195, 740 S.E. 2d 504 (Ct. of App. 2013)

A) Mailed to wrong address, not a posting case. Argument - if the County had posted this land using the **Alternative Procedure for the Collection of Property Taxes §12-51-40(c)** the mistaken mailing would have been cured.

16. In Re Ryan Inv. Co., Inc., 335 S.C. 392, 517 S.E. 2d 692 (S.C. 1999)

A) Not sent by Restricted mail type case not a posting case. Argument - if the County had posted this land using the **Alternative Procedure for the Collection of Property Taxes §12-51-40(c)** the mistaken mailing would have been cured.

17. Rives v. Balsa, 478 S.E. 2d 878, 325 S.C. 287 (Ct. of App. 1996)

A) Notice not sent in the name of two true owners of record nor their addresses. The property was not advertised, levied upon or sold in the true owners' names. Tax deed set aside because levy and execution not in their names.

18. Scott v. Boyle, 271 S.C. 252, 24 S.E. 2d 887 (SC Sup Ct 1978)

A) Purchaser never put in possession of property. - Old law.

B) Not a posting case.

19. Wilson v. Cantrell, 40 S.C. 114, 18 S.E. 517 (SC Sup. Ct. 1893)

A) Levy, advertisement and sale not in the names of the owners.

B) Not a posting case.

20. Wilson v. Dove, 118 S.C. 256, 110 S.E. 39 (SC Sup. Ct. 1922)

A) The Sheriff did not take timely possession of the land.

B) "The revenue of a municipal corporation is its lifeblood. The assurance of securing this revenue is in the efficacy of the ultimate remedy. This efficacy is strengthened by the presumption of regularity created by Section 474 and by the limitation to two years within which an action to recover must be brought."

C) "It is clear that to permit an action such as the one at the bar, after the lapse of more than 3 years, the purchaser in the mean time in possession, would be to practically annul the limitation provided therein."

D) Tax Deed as a cloud of title. Plaintiff sought to remove it after 3 years - too late.

21. Wilson v. Mosely, 327 S.C. 144, 488 S.E. 2d 862 (SC Sup. Ct. 1997)

A) After two years there is no cloud on the tax sale title.

B) See Federal Financial v. Hartley.

SC Code Section §12-51-90 - Redemption of real property; assignment of purchaser's interest.

(A) The defaulting taxpayer, any grantee from the owner, or any mortgage or judgment creditor may within twelve months from the date of the delinquent tax sale redeem each item of real estate by paying to the person officially charged with the collection of delinquent taxes, assessments, penalties, and costs, together with interest as provided in subsection (B) of this section. If prior to the expiration of the redemption period, the purchaser assigns his interest in any real property purchased at a delinquent tax sale, the grantee from the successful bidder shall furnish the person officially charged with the collection of delinquent taxes a conveyance, witnessed and notarized. The person officially charged with the collection of delinquent taxes shall replace the successful bidder's name and address with the grantee's name and address in the delinquent tax sale book.

(B) The lump sum amount of interest due on the whole amount of the delinquent tax sale based on the month during the redemption period the property is redeemed and that rate relates back to the beginning of the redemption period according to the following schedule:

Month of Redemption Period	Amount of Interest Imposed	Property Redeemed
First three months	three percent of the bid amount	
Months four, five, and six	six percent of the bid amount	
Months seven, eight, and nine	nine percent of the bid amount	
Last three months	twelve percent of the bid amount	

However, in every redemption, the amount of interest due must not exceed the amount of the bid on the property submitted on behalf of the forfeited land commission pursuant to Section 12-51-55.

(C) If the defaulting taxpayer, grantee from the owner, or mortgage or judgment creditor fails to redeem the item of real estate sold at the delinquent tax sale within the twelve months provided in subsection (A) and after the passing of an additional twelve months, the tax deed issued is incontestable on procedural or other grounds.

SC Code Section 12-51-140(c) Deed as evidence of good title; statute of limitations.

In all cases of tax sale the deed of conveyance, whether executed to a private person, a corporation, or a forfeited land commission, is prima facie evidence of a good title in the holder, that all proceedings have been regular and that all legal requirements have been complied with. An action for the recovery of land sold pursuant to this chapter or for the recovery of the possession must not be maintained unless brought within two years from the date of sale as provided in Section 12-51-90(C).

SC Code Section 12-51-40(c) Default on payment of taxes; levy of execution by distress and sale; notice of delinquent taxes; seizure of property; advertisement of sale.

(c) If the "certified mail" notice has been returned, take exclusive physical possession of the property against which the taxes, assessments, penalties, and costs were assessed by posting a notice at one or more conspicuous places on the premises, in the case of real estate, reading: "Seized by person officially charged with the collection of delinquent taxes of (name of political subdivision) to be sold for delinquent taxes", the posting of the notice is equivalent to levying by distress, seizing, and taking exclusive possession of it, or by taking exclusive possession of personalty. In the case of personal property, the person officially charged with the collection of delinquent taxes is not required to move the personal property from where situated at the time of seizure and further, the personal property may not be moved after seized by anyone under penalty of conversion unless delinquent taxes, assessments, penalties, and costs have been paid. Mobile homes are considered to be personal property for the purposes of this section unless the owner gives written notice to the auditor of the mobile home's annexation to the land on which it is situated.

ARGUMENTS

1. The Respondent states in his Return that no issue raised by the Petitioner in his Brief addresses the issues of Rule 242(p) of the South Carolina Rules of Appellate Procedure. Not so. There is a novel question of law and the Court of Appeals decision in this case is in conflict with not only prior decisions of the South Carolina Supreme Court but with new legislation and the Court of Appeals' own prior decisions.

The novel question of law for the Supreme Court is - "if the tax notice is returned undeliverable" and the County utilizes the revised in 2006 **Alternative Procedure for Collection of Property Taxes § 12-51-40(c)** and two years goes by from the date of the tax sale, can the former owner sue to get his or her land back?

The South Carolina Supreme Court decisions which the Court of Appeals in the present Case are in conflict with begin with Leysath v. Leysath, 209 S.C. 342, 40 S.E. 2d 233 (SC Sup. Ct. 1946):

A) "we may, therefore, *concede the tax sale was invalid* and that in a proceeding timely brought, Appellant would have the tax sale declared void and set aside (italics added)." Leysath upheld the tax sale because the case was not brought, like in the present case, within two years of the tax sale.

B) Leysath refers to a 2 year Statute of Repose. "A Statute of Repose is not needed in favor of purchasers at valid tax sales. The very purpose of such a Statute is to shut off inquiry into such defects as we are now complained of, and confirm the tax deed in spite of them, and unless it does this it is nugatory."

C) Leysath stands for the principle that if the deed is regular on its face ("the tax deed is not included in the record before us, but we may assume that it was regular in form and valid on its face") and if the land was advertised, levied, sold, etc in the true name of the owner then,

all defects, irregularities, informalities, errors and omissions in the antecedent proceedings of assessments, taxation, and sale, which are not jurisdictional however grave and fatal to the validity of the tax deed in an action seasonable begins, are cured and foreclosed when the specific Statute has run the prescribed length of time.

The Court of Appeals decision in this Case is in conflict with Leysath.

Osborne v. Vallentine, 196 S.C. 90, 12 S.E. 2d 856 (SC Supreme Ct. 1941) only requires "constructive notice" and "*some sort of notice*" to the owner (italics added). to the tax payer;

It is a well established principle that Due Process of Law required *some sort of notice* to a land owner before he is deprived of his property. It is an anomalous situation that the statutes of this State require actual notice to a mortgagee if land about to be sold for taxes, and *make no such requirement for actual notice to the owner*. It would appear that the *constructive notice provided by the levy, advertisement and sale in the owner's name is deemed sufficient*. Such notice to the owner, as required by the tax sale statutes, being *constructive rather than actual*, the court requires strict compliance therein.

Such "some sort of notice" is provided by the strict compliance of posting pursuant to **SC Code § 12-51-40(c) Alternative Procedure for Collection of Property Taxes**, "IF the tax notices are returned undelivered." Osborn is another wrong named tax payer case ("at the time of the levy the owners of the property were the devisees but the levy was made in the name of the deceased testatrix"), unlike the case at hand. Osborne is also not a posting case.

The Court of Appeal's decision in this case is in conflict with Osborne.

In Dibble v. Bryant, 274 S.C. 481, 205 S.E. 2d 673 (S.C. Sup. Ct. 1980), the South Carolina Supreme Court ruled that "The constructive notice provided by the levy, advertisement and sale in the owner's name is deemed sufficient." This is a posting case but the land was posted, etc. in the wrong name.

The Court of Appeal's decision in the present case is in conflict with Dibble. "Constructive Notice" by the **Alternative Procedure for the Collection of Property Taxes SC Code §12-51-40(c)** is all that the Legislature and the SC Supreme Court in Osborne and Dibble require.

The Return has no mention of King v. James, 388 S.C. 16, 694 S.E. 2d 35 (Ct. of App. 2009) which recognized "a review of case law in this area reveals somewhat divergent decisions regarding if and when the Statute of Limitations begins to run in situations such as this."

A) In King, "the certified mail notice was returned undelivered. In response to the return of the certified mail notice, Evans (Beaufort County Deputy Treasurer) claimed the County took exclusive possession of the property by posting properly pursuant to SC Code §12-51-40(c)."

B) "The County failed to establish by a preponderance of the evidence that it took "exclusive possession" of the property by posting, as is required under SC Code §12-51-40(c)," because there was no photographic evidence of the posting, unlike the case at hand.

The Purchaser lost in King because Beaufort County had no photo evidence of the posting. In Jasper County the posting is photographed which was done in the present Case. Had

Beaufort County done so, the purchaser would have prevailed under SC Code §12-51-40(c). The Court of Appeals decision in this case is in conflict with its own decision in King¹.

2. Reeping v. JEBBCO, 402 S.C. 195, 740 S.E. 2d 504 (Ct. of App. 2013): The

Respondent states in his Return to Petition for Writ of Certiorari that;

The Appellant makes numerous arguments about statutory changes done by the legislature and proposes a "drop-dead" date of two years after the sale in which to bring suit. This is easily dealt with by a mere reference to *Reeping* which was decided after the legislature changes and again reiterated the black letter law that the statute of limitations did not apply to jurisdictional defects.

Reeping is not a "posting" case. The facts of Reeping are totally inapplicable and irrelevant to the present § 12-51-40(c) "posting" case. The imperfectly mailed tax notices in Reeping would have been fixed by **§12-51-40(c) Alternative Procedure For the Collection of Taxes;**

If the "certified mail" notice has been returned, take exclusive physical possession of the property against which the taxes, assessments, penalties, and costs were assessed by posting a notice at one or more conspicuous places on the premises, in the case of real estate, reading: "Seized by officially charged with the collection of delinquent taxes of (name of political subdivision) to be sold for delinquent taxes", **the posting of the notice is equivalent to levying by distress, seizing, and taking exclusive possession of it** (bold added).

In 2006 the Legislature, by using the words **Alternative** procedure and **If** ("if the certified notice has been received") clearly contemplates that posting, pursuant to §12-51-40(c) is an *alternative* way to levying by distress, seizing, and taking exclusive possession of the land for which taxes are owed. **SC Code Section §12-51-160** was also modified in 2006. It states;

In all cases of tax sale the deed of conveyance, whether executed to a private person, a corporation, or a forfeited land commission, is prima facie evidence of a good title in the holder, that all proceedings have been regular and that all legal

¹ Neither "of the Appellants Appealed the Master's finding that the tax sale was not conducted in strict compliance with statutory requirements. Therefore this ruling is the law of the case." - An Appellants nightmare.

requirements have been complied with. An action for the recovery of land sold pursuant to this chapter or for the recovery of the possession must not be maintained unless brought within two years from the date of sale as provided in Section 12-51-90(C).

Why doesn't SC Code Sections §12-51-90(c) and 160 mean what they say? 2 years, with proper posting, it meant to be a "drop dead date" by the legislature in 2006.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E. 2d 6 (1993). "What a legislature says in the text of a statute is considered the best evidence of the legislature intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000) (citing Norman J. Singer, Sutherland Statutory Construction §46.03 at 94 (5th ed. 1992)). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 (1998) (citations omitted). When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this court has no right to impose another meaning. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 525, 642 S.E. 2d 751, 754 (2007).

3. Donohue v. Ward, 298 S.C. 75, 378 S.E. 2d 261 (Ct. of App. 1989) is also quoted in Respondent's Return. Donohue is also not a §12-51-40(c) "posting" case. Donohue simply stands for the proposition that execution, levy, advertisement and sale of the property not in the name of the owner is a jurisdictional error so the bar of the Statute of Limitations does not apply. In the present case, the execution, advertisement and sale of the property were in the correct name of the owner. Sending the notice to the wrong address is not a jurisdictional error if it is corrected by proper posting pursuant to law.

The South Carolina Supreme Court has recently ruled in Stokes-Craven Holding Corp. v. Scott Robinson, et al, Appellate Case No. 2013-001452 that;

Furthermore, this rule advances the purpose of the statute of limitations, which is to punish Plaintiffs who sleep on their rights, protect Defendants from stale claims, and lend order to the judicial system.

The Respondent slept on his rights for over 2 years from the tax sale even though the land was posted pursuant to §12-51-40(c) and he should be punished.

It should also be considered that the revenue of a municipal corporation is its lifeblood.

Wilson v. Dove, 118 S.C. 256, 110 S.E. 2d 1922.

The revenue of a municipal corporation is its lifeblood. The assurance of securing this revenue is in the efficacy of the ultimate remedy. This efficacy is strengthened by the presumption of regularity created by Section 474 and by the limitation to two years within which an action to recover must be brought.

Rives v. Balsa, 325 S.C. 287, 487 S.E. 2d 878 (SC Ct. App. 1996) is cited in the Return.

However, Rives is also not a posting case. In Rives, the property was seized, levied and sold at tax sale not in the names of the owner of record as per SC Code Ann § 12-51-40(a) and (b), unlike the present case.

Aldrige v. Rutlege, 269 S.C. 475, 238 S.E. 2d 165 (SC Supreme Ct. 1977) also cited in the Return is also not a posting case. In it the land was sold in the name of the true owner's *father*.

Donohue v. Ward, 298 S.C. 75, 378 S.E. 2d 261, (Ct of App. 1989), referred to in the Reply, is another assessed, levied upon, advertised and sold in the name of the wrong person case, not the owner and it therefore irrelevant. It is not a posting case.

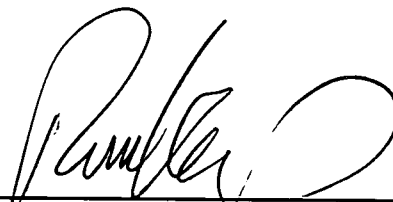
Good v. Kennedy, 291 S.C. 204, 352 S.E. 2d 708 (Ct. of App. 1987), referred to in the Reply, is likewise not a posting case. It is a wrong address case, which was not cured by posting under **SC Code §12-51-40(c)**.

CONCLUSION

The Respondent's Table of Authorities lists not one single "posting" (pursuant to SC Code §12-51-40(c) or otherwise) case. Every single one of the Respondent's cases are irrelevant or not on point. The only posting case, which is cited only by the Appellant, is King. King is a failed posting (or at least the County couldn't prove it with photographic evidence) case and only proves that had posting been proven, the purchaser would have prevailed. There is not one single case reported where the misaddressed tax notice was not cured by posting pursuant to SC Code §12-51-40(c). The South Carolina Supreme Court should address this novel question of law and clear up the "divergent decisions" noted in King.

Put another way, the South Carolina Supreme Court should rule if the tax notices are returned undeliverable, is this a jurisdictional error or can this be cured by posting pursuant to §12-51-40(c) **Alternative Procedure for the Collection of Property Taxes** as clearly the Legislature meant it to be. The South Carolina Supreme Court should also rule if the Statute of Limitations of §12-51-90, 160 means what they say or must the South Carolina Courts continue hearing a unending multitude of stale claims brought after 2 years from the tax sale, where the "alternative" and "constructive" notice has been given by posting.

Respectfully submitted,



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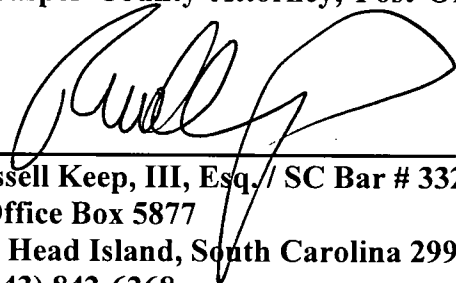
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Of Whom C. Russell Keep, III, Esquire is thePetitioner.

PROOF OF SERVICE

I certify that I have served a copy of the Reply to the Respondent's Return to Petition for a Writ of Certiorari, upon the Respondent, Robert C. Schivera and Rhonda Mitchell by depositing a copy in the United States Mail, postage prepaid, on September 29, 2015, and addressed to their Attorney of Record, Thayer Rivers, Esq., Post Office Box 668, Ridgeland, SC 29936 and David Tedder, Jasper County Attorney, Post Office Box 1282, Beaufort, SC 29901.



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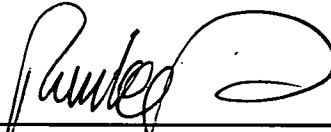
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Of Whom C. Russell Keep, III, Esquire is the^{Petitioner}~~Appellant~~.

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I certify that I have served a copy of the Reply to the Respondent's Return to Petition for a Writ of Certiorari, upon the Respondent, Robert C. Schivera and Rhonda Mitchell by depositing a copy in the United States Mail, postage prepaid, on September 29, 2015, and addressed to their Attorney of Record, Thayer Rivers, Esq., Post Office Box 668, Ridgeland, SC 29936 and David Tedder, Jasper County Attorney, Post Office Box 1282, Beaufort, SC 29901.



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September 29, 2015