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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 30, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Bryan Rearick v. State of South Carolina

Dear Mr. Shearouse:

Enclosed is a copy of the petition for writ of certiorari and IFP motion and order of appointment which I have filed today in the United States Supreme Court. Please contact me if you have any questions.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/blw

Enclosure

cc: Deborah R. J. Shupe, Esquire

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December 30, 2016

RECEIVED
DEC 30 2016
S.C. SUPREME COURT

Honorable Scott S. Harris
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Bryan Rearick v. South Carolina

Dear Mr. Harris:

Enclosed is Petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/blw

Enclosure

cc: Deborah R.J. Shupe, Esquire
Honorable Daniel E. Shearouse, Clerk

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December 30, 2016

Honorable Scott S. Harris
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Bryan Rearick v. State of South Carolina

Dear Mr. Harris:

Enclosed are the petition for writ of certiorari, a motion for leave to proceed *in forma pauperis*, and the order appointing counsel in support of motion to proceed *in forma pauperis*. The certificate of service is attached to the original petition. Representing the State of South Carolina is Deborah R.J. Shupe, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. Her phone number is (803) 734-3970. I represent Petitioner Bryan Rearick. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

Sincerely,

Robert M. Dudek
Chief Appeallate Defender

RMD\blw

Enclosure

cc: Honorable Daniel E. Shearouse
Deborah R. J. Shupe, Esquire

No. 16A462

In The
Supreme Court of the United States
October Term, 2016

BRYAN REARICK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TO THE SOUTH CAROLINA SUPREME COURT

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ATTORNEYS FOR PETITIONER

* Counsel of Record

QUESTIONS PRESENTED

1.

Whether the South Carolina Supreme Court erred by holding, and citing an entrenched split in the states, that South Carolina is not bound under the Supremacy Clause, and this Court's holding in Abney v. United States, 431 U.S. 651 (1977), to allow an immediate appeal from the the granting of a mistrial for the government over Petitioner's objection, since double jeopardy should have attached under the Fifth and Fourteenth Amendments, and Petitioner should not have to endure the prejudice of pending criminal charges remaining against him and a second trial because the government was unable to marshal its evidence when it called his case to trial?

2.

Whether the trial court erred by ordering a mistrial over Petitioner's objection since the government's inability to marshal its evidence after it called Petitioner's case to trial, and its disorganization did not constitute the "manifest necessity" necessary for the court to *sua sponte* grant a mistrial?

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No. 16A462

In The
Supreme Court of the United States
October Term, 2016

BRYAN REARICK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Counsel for Bryan Rearick petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court dismissing his double jeopardy appeal.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as The State v. Bryan Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016). The opinion is reproduced in the appendix at pages App. 1-14.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Petitioner is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in pertinent part, "[N]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . ."

This case also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law. . ."

STATEMENT OF THE CASE

Petitioner Bryan Rearick was indicted for felony driving under the influence, resulting in death, by the Beaufort County grand jury. R. 238. Both the State and Petitioner agreed to waive a jury trial, and to have a bench trial before the Honorable Carmen T. Mullen. This bench trial commenced on January 30, 2014. R. 1. Lauren Carroway represented Petitioner. Adam Russo and Lynorr Musser were the assistant prosecutors. R. 2.

The defense moved to suppress the blood sample ordered taken from Petitioner by Highway Patrolman Summers pursuant to Missouri v. McNeely, 133 S.Ct. 1552 (2013) since it was obtained without a warrant, and without any exigency. R. 51, l. 7 – 57, l. 6; 120, l. 19 – 127, l. 20. The defense also argued that the chain of custody of Petitioner's blood was fatally defective because the nurse who allegedly drew the blood at the hospital was not being produced as a necessary witness by the state. The defense argued, inter alia, that this denied Petitioner his right to confrontation. R. 126, l. 25 – 128, l. 17.

Throughout the bench trial, the judge referenced the serious problems with the State's apparent failure to provide discovery and potentially exculpatory information to the defense. At

the conclusion of court on January 30, 2014, the judge recessed court to allow the state additional time to review the documents in its possession pertaining to the fatal May 30, 2010 auto accident. (3 ½ years later). R. 173, l. 3 – 182. l. 8.

Court convened again on February 3, 2014. R. 184. At the beginning of the recommencement of the bench trial the judge and attorneys again discussed documents that had not been turned over to the defense, or which now appeared inconsistent with prior testimony. For example, the judge noted documents that now revealed that when police arrived on the scene: "Two people on the ground, possible entrapment." The evidence from the arresting officer was that Petitioner and the decedent were both in respective EMS ambulances at the time he arrived so obviously other law enforcement who arrived earlier possibly had more critical information about the accident. R. 186, l. 1 – 5, l. 10. Defense counsel moved for a dismissal arguing that Petitioner's due process rights were being violated by the state's "huge" failure to provide evidence that may well be exculpatory to Petitioner. R. 188, l. 11 – 197, l. 5.

The prosecutor argued that "a continuance would be the appropriate remedy." He argued the critical witness, Ashe, who "did the MAIT report was in California and unavailable at that time." R. 197, l. 7 – 198, l. 6. The judge stated that given the passage of time she disagreed with the prosecutor, and she did not think the continuance the prosecution desired was a proper or useful remedy. However, the judge ruled she was going to declare a mistrial over the defense objection because: "We all know a trial is the search for the truth. Doesn't matter where the source is, it is a search for the truth. That is the only way the system works. Certainly that is my ultimate goal and certainly the oath that I took. I am concerned in this case that later discovered evidence, potential evidence and again this may not turn out to be anything that we don't have

everything that is necessary to be able to reach that conclusion, and appropriate one so, to that extent, again, I am declaring a mistrial." R. 206, ll. 1-10.

On February 13, 2014 the defense filed a motion to bar subsequent prosecution citing petitioner's rights under the Double Jeopardy Clause. R. 208. The motion noted that the defense opposed a continuance or a mistrial, and that the judge granted a mistrial over the objection of the defense. R. 209.

The defense further argued in the motion that a mistrial could only be declared when dictated by "manifest necessity" or "the ends of public justice." The defense argued there was no reason that the court, as the trier of fact in this case, could not have reached a verdict. The defense argued: "There was no reason the court could not have reached a verdict. The court simply renounced its responsibility and duty to return a just verdict." R. 209-212.

The prosecution filed a return to this motion noting the judge determined that a continuance would only prejudice the defendant, and that dismissal was not warranted. The prosecution argued the lack of other viable options, by itself, constitutes "manifest necessity." R. 218.

A hearing on the motion to bar further prosecution based on double jeopardy was held on April 8, 2014. Lauren Carroway again represented Petitioner. Lynorr Musser represented the State of South Carolina. R. 220-221.

The defense argued that double jeopardy had attached because the court declared a mistrial over the defense objection, and where the prosecution never requested a mistrial. The defense noted there was no "manifest necessity for the mistrial, and because of that, the controlling case law indicates double jeopardy has attached." Defense counsel cited State v.

Prince[1] wherein the South Carolina Supreme Court held the retrial of the defendant was barred by double jeopardy where the trial judge ordered a mistrial over the defendant's objection where the jury had only deliberated for several hours and requested to have the testimony of two witnesses read. The state supreme court held that there was not the "manifest necessity" necessary for the trial judge to grant a mistrial over the objection of the defense. Defense counsel here argued there was not anything which barred or prohibited the judge for making applicable rulings and reaching a verdict in this bench trial. R. 223, l. 3 – 224, l.6.

The prosecutor argued there was the "manifest necessity" necessary for the judge to grant a mistrial on her own motion. The prosecution maintained that certain information or evidence had been lost and the judge was only left with two choices: "either dismiss the case or to declare the mistrial." R. 224, l. 12 – 226, l. 10. He maintained that Prince was distinguishable because the judge in that case had viable options other than to declare a mistrial. R. 226, ll. 5-10.

Defense counsel noted the "huge discovery problems" in this case because of the State's disorganization. For example, there was evidence Beaufort County sheriff's deputies may have been on the accident scene who could have been interviewed for exculpatory evidence, there was the remaining question whether a videotape existed of the accident scene, and whether that videotape had been destroyed. In addition, at least fifty pages were missing from the MAIT report turned over to the defense discussing the reconstruction of the accident scene.

The defense noted that the judge had watched on the computer in the courtroom the display of the proof that there were more the fifty pages missing from the MAIT report because the apparent disorganization or bad faith of the prosecution. R. 227, l. 3 – 229, l. 18. The judge took the matter under advisement and said that she would issue an order. R. 229, ll. 19-21.

[1] 279 S.C. 30, 301 S.E.2d 471 (1983).

On June 24, 2014 the judge issued an order denying Petitioner's motion to bar prosecution under the double jeopardy clause. The order noted the problems with the prosecution's evidence, and whether certain exculpatory evidence had been turned over to the defense. The court wrote that it had three options which were continuing the case, dismissing the case, or declaring a mistrial. The judge noted that she granted a mistrial over Petitioner's objection. R. 233-235; App.17.

The judge *citing* State v. Prince 279 SC 30, 33, 301 S.E.2d 471, 473 (1983) observed that: "[D]iscovery issues became clear throughout the proceedings and continued on the day that the bench trial was set to resume. Five different assistant solicitors had handled the file over a three and a half year period between indictment and trial." R. 234; App.18. The court ruled that the granting of the mistrial over objection in this case was based on "manifest necessity," and she denied Petitioner's motion to bar further prosecution as violating double jeopardy. R. 234-235; App. 19.

Petitioner filed a notice of intent to appeal, and he filed his initial brief and designation of matter with the Court of Appeals on May 29, 2015. The State filed a motion to dismiss Petitioner's appeal, and a motion to certify this case to the state supreme court on June 2, 2015. Petitioner filed a return dated June 15, 2015 opposing the motion to dismiss, but agreeing that this case should be certified to the state supreme court.

The state supreme court issued an order dated October 8, 2015 denying the motion to dismiss. That Court ordered Petitioner to file an amended initial brief with the Court addressing the issue included in the first initial brief (no "manifest necessity" to grant a mistrial over Petitioner's objection), "along with the issue of appealability." R. 236.

On May 25, 2016 Petitioner moved to "to argue against the precedent of State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986), the seminal contrary state case to Abney v. United States, 431 U.S. 651, 660-62 (1977)." The motion to argue against precedent was granted by order dated June 1, 2016. Oral argument was held before the state supreme court on June 15, 2016. The Supreme Court, in State v. Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016) (Pleicones, C.J., and Hearn, J., concurred in result only) dismissed the appeal as interlocutory. App. 1-14.

WHY CERTIORARI SHOULD BE GRANTED

1.

The Court erred by ruling that the granting of a mistrial for the state over Petitioner's objection did not constitute double jeopardy in violation of the Fifth and Fourteenth Amendments and was not immediately appealable. The Court cited an entrenched split in the states, while ruling this South Carolina Petitioner will have to endure the prejudice of pending criminal charges remaining against him and a second trial because the state was unable to marshal its evidence when it called the case to trial. This Court's opinion in *Abney v. United States*, 431 U.S. 651 (1977), controls any contrary state precedent under the Supremacy Clause of the United States Constitution, and the Double Jeopardy Clause of the Fifth Amendment applying to the states pursuant to the Fourteenth Amendment.

In Abney v. United States, 431 U.S. 651 (1977), this Court held that a pre-trial order denying a defendant's motion to dismiss on double jeopardy grounds was a "final decision," and that it was immediately appealable. This Court noted, "the rights conferred on a criminal accused by the double jeopardy clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." Abney v. United States, 431 U.S. at. 660.

This Court in Abney also reasoned: "If a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be available before that subsequent exposure occurs . . . We therefore hold that the pre-trial orders rejecting claims of former jeopardy, such as that presently before us, constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of Section 1291." Abney v. United States, 431 U.S. at. 662.

In State v. Rearick, 417 S.C. 391, 403-405, 790 S.E.2d 192, 198-99 (2016), the South Carolina Supreme Court noted:

> Despite the wealth of South Carolina authority to the contrary, Rearick maintains that Abney is controlling because the federal constitutional right against double jeopardy cannot be trumped by a state procedural rule.
>
> We recognize the split of authority as to the import of Abney in the state appellate court realm. Some courts "suggest that the state, as part of its constitutional obligation to effectively enforce the double jeopardy bar, must provide for an immediate appeal from the trial court's denial of a non-frivolous double jeopardy objection." 7 Wayne R. LaFave et al., *Criminal Procedure* § 27.2 (c) (4th ed. 2015). In contrast, some courts reject Abney's application to state courts on the ground that Abney "is better interpreted as a case interpreting the federal statute governing appeals, not the scope of the constitutional prohibition against double jeopardy, so that its holding is not binding on state courts interpreting their own law.' *Id.*
>
> We are persuaded by the holdings in those state jurisdictions that decline to adopt Abney. A careful review of Abney reveals the USSC's analysis is narrowly confined to an interpretation of federal law with no indication of a mandatory application in state courts. As we interpret Abney, the USSC was not analyzing whether a defendant has a constitutional right to appeal the denial of a pretrial motion to dismiss on double jeopardy grounds. Rather, the USSC was deciding whether such denial was a "final decision" within the context of 28 U.S.C. § 1291, the federal appeals statute. Thus, we find those state jurisdictions that adopt the rationale in Abney misconstrue the holding and extend it beyond what was intended by the USSC.
>
> Further, we believe an adoption of the rationale in Abney would have dire consequences for the future appellate review in South Carolina. If we were to carve out an exception for the denial of a double jeopardy claim, we believe all pretrial motions implicating a constitutional right would be subject to immediate appeal.

As to the entrenched split in the states, the South Carolina Supreme Court in State v. Rearick, 417 S.C. 391, 403 n.11, 700 S.E.2d 192, 198, n. 11 (2006), recognized the states

supporting Petitioner's position that Abney constitutionally mandates an interlocutory appeal of a double jeopardy claim:

> See, e.g., State v. Choate, 151 Ariz. 57, 725 P.2d 764, 764(Ct. App. 1986) (citing Abney and finding that "an interlocutory appeal of a double jeopardy claim is constitutionally mandated"); State v. Baranco, 77 Hawai'i 351, 884 P.2d 729, 733 (Haw. 1994) (adopting Abney rationale and holding that "the collateral order exception to the final judgement rule permits an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds"); People v. Torres, 452 Mich. 43, 549 N.W.2d 540, 552 (1996) (discussing Abney and concluding that trial court's nonfinal decision to grant a new trial was immediately appealable because the defendant "could only have avoided the second trial by seeking an immediate appeal"); Roberson v. State, 856 So.2d 532, 533 (Miss. Ct. App. 2003) (referencing Abney and determining that "[a]n immediate appeal regarding a denied double jeopardy claim is permitted"); State v. Milenkovich, 236 Neb. 42, 458 N.W.2d 747, 750 (1990) (analyzing Abney concluding that "a defendant must be granted the opportunity to raise a claim of double jeopardy prior to being subjected to the second trial"); State v. Anderson, 138 Ohio St. 3d 264, 6 N.E.3d 23, 32 (2014) (discussing Abney and concluding that "an accused would not be afforded a meaningful review of an adverse decision on a motion to dismiss and discharge on double-jeopardy grounds if that party must wait for final judgement as to all proceedings in order to secure review of the double jeopardy decision."); Commonwealth v. Orie, 610 Pa. 552, 22 A.3d 1021, 1027 (2011) (permitting immediate appellate review of trial court's order determining that petitioner's double jeopardy challenge was frivolous); State v. Godette, 751 A.2d 742, 745-46 (R.I. 2000) (citing Abney and recognizing that the denial of a motion to dismiss on double jeopardy grounds constitutes an exception to the general rule regarding appeals in criminal cases).

App. 11-12.

Regarding the state's favoring the position of the South Carolina Supreme Court, the Court in State v. Rearick, 417 S.C. 391, 404 n. 12, 700 S.E.2d 192, 199 n. 12 (2006), cited:

> Jones v. State, 450 So.2d 186, 187 (Ala. Crim. App. 1984) (acknowledging split of authority on Abney but taking "the view that a denial of a pretrial motion based on a plea of double jeopardy is not immediately appealable"); State v. Fisher, 2 Kan. App.2d 353, 579

> P.2d 167, 170 (1978) (limiting Abney to construction of federal appeals statute and ruling that denial of motion to dismiss did not constitute a "judgment" within the meaning of a state statute providing for appeals in criminal cases); Huff v. State, 325 Md. 55, 599 A.2d 428, 436 (1991) (finding Abney "does not constitutionally mandate interlocutory appeals" and that due process does not require the State to provide an immediate appeal); State v. Murphy, 537 N.W. 2d 492, 495 (Minn. Ct. App. 1995) (rejecting application of Abney where state has specific jurisdictional rule prohibiting review of a pretrial order denying defendant's motion to dismiss on double jeopardy grounds); State v. Nemes, 405 N.J. Super. 102, 963 A.2d 847, 848 (Ct. App. Div. 2008) (concluding that Abney does not embody a constitutional holding and, thus, defendant could not appeal as of right from trial court's interlocutory order denying his motion to dismiss on double jeopardy grounds); State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132, 135 (1988) (limiting Abney to federal statute and concluding order denying defendant's motion to dismiss on double jeopardy grounds was not immediately appealable): State v. Salzman, 119 Or. App. 217, 850 P.2d 1122, 1126 (1993) ("The nature of the Court's analysis and the specificity in its holding persuade us that Abney is merely a case of statutory construction of a federal statute and not one that establishes a constitutional mandate for interlocutory appeals throughout the several states.").

App. 12.

The argument put forward by the State that Petitioner's assertion of double jeopardy here cannot be maintained unless and until he is convicted and sentenced must give way to the supreme law of the land as explained by this Court in Abney v. United States. "Initially, we note that an interlocutory appeal before retrial is proper in this kind of case, for otherwise the defendant could be subjected to the very thing the double jeopardy clauses are designed to guard against, retrial for the same offense." State v. Janvrin, 121 N.H. 370, 371, 430 A.2d 152, 153 (1981) (*citing* Abney). A state procedural rule that conflicts with the defendant's constitutional rights, here, his right not to be tried twice for the same crime, cannot prevail. See Chambers v. Mississippi, 410 U.S. 284 (1973).

State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986), the seminal contrary state case, is based on case law that long antedates Federal Double Jeopardy Protection being part of a state defendant's due process rights. Cf. Benton v. Maryland, 395 U.S. 784 (1969).

The "gotcha" nature of Miller saying you have only a statutory right of appeal, resulting in you being denuded of your Federal Double Jeopardy rights, is repellent. The Romans noted, "Ubi Jus, Ibi Remedium," "where there is a right there is a remedy."

Abney contains substantial analysis of the Federal constitutional ban against double jeopardy. Abney demonstrates why an appeal *now* for Petitioner is required. Abney holds that an adverse ruling on a motion to dismiss on Double Jeopardy Grounds is a "final decision," and it is immediately appealable.

Petitioner should not unjustifiably continue to have these criminal charges looming over his head where there was no manifest necessity for a mistrial, nor did the ends of public justice demand it, and particularly where it strongly occurred the state would not be able to prove its case beyond a reasonable doubt for the reasons explained more fully infra.

2.

The lower court erred by ordering a mistrial over Petitioner's objection since the state's inability to marshal its evidence and its disorganization did not constitute the "manifest necessity" necessary for the court to *sua sponte* grant a mistrial.

Trial Facts

The auto accident giving rise to this case occurred on May 30, 2010 on Highway 278 going toward Bluffton, South Carolina. The decedent's car apparently pulled on to the highway out of the parking lot of the Crazy Crab. It was a head on collision. The facts of exactly what happened were disputed. R. 12, l. 13 – 14, l. 7. The defense noted that at one point in a report from Mr. Ashe, the MAIT report, he stated the decedent "was traveling at such a high rate of speed that there was no way he could have stopped at the stop sign." R. 14, l. 18 – 15, l. 6. The prosecutor disputed this fact and argued the evidence would show Petitioner was "driving slightly faster." R. 15, ll. 7-20.

The State's first witness during the bench trial, and the motion to suppress the blood alcohol evidence was Trooper Thomas Summers, III. R. 21, l. 5 – 22, l. 10. Summers testified that when he arrived at the scene of the accident at about 1 a.m. on May 30-31, 2010 that Petitioner "was in the back of the ambulance." R. 22, ll. 2-16. Summers stated he was called on the telephone by one of the Beaufort County Sheriff's deputies reporting the automobile accident. Summers said that his video camera would have been running as soon as he turned on his blue light. R. 23, l. 5 – 25, l. 19; 37, ll. 3-24. Summers was very vague about how many police officers were on the scene when he arrived "it might have been one." R. 26, ll. 14-20.

On cross-examination, Summers agreed that the best evidence of what happened would be in the report contemporaneously made. R. 29, ll. 14-20. Summers stated that the fire

department and EMS were already on the scene and at some point Sergeant Gregory arrived. Summers believed he talked to a fireman first and then he "stuck his head" in the ambulance and identified himself to Petitioner at the accident scene. R. 30, l. 16 – 32, l. 2. His usual practice was that he would ask for a driver's license and registration at the accident scene. The judge asked Summers if he had a chance to review his report and handwritten notes. Summers responded that he had not reviewed those documents. The judge then stated they would take a ten minute break to allow Summers to prepare. R. 31, l. 24 – 33, l. 16. The judge told Summers he could not talk to the prosecutor since he was under oath but he could review the "wreck report" and the DVD and interview with Public Safety, which defense counsel agreed that Summers could review. R. 33, l. 11 – 35, l. 11.

After about a forty-five minute break, the court reconvened and Summers testified there "were some deputies there" at the accident scene. He said there was more than one deputy there. Summers estimated he spent 30-45 minutes at the accident scene and that his videotape was running at the time from his squad car. "I don't know how long [the videotape was running] - it activated when I cut the blue light on." R. 36, l. 6 – 37, l. 6.

Defense counsel noted she was concerned about the evidence not having been turned over to the defense under Brady[2], and Rule 5 of the Criminal Rules. She argued that Petitioner's demeanor, his conversations, and indications that he was not intoxicated were critical in this case and that the state's disorganization was very troubling. R. 39, l. 6 – 41, l. 24. Counsel argued perhaps most bothersome was that there were other Beaufort County deputies on the scene of the accident and that at this late point the state was unable to accurately say who was at the scene of the accident. R. 41, l. 25 – 47, l. 14.

[2] Brady v. Maryland, 373 U.S. 83 (1963).

As stated, defense counsel had moved to suppress the blood sample taken from Petitioner at the scene of the accident under Missouri v. McNeely.[3] She argued there was no exigency that prohibited the State from getting a search warrant and that Summers ordering the blood drawn simply because he opined this may have been a felony DUI resulted in an unconstitutional violation of Petitioner's Fourth Amendment rights. R. 51, l. 13 – 58, l. 5. The judge ruled that she would take the matter under advisement. R. 58, ll. 6-11. The state's first witness during the bench trial, when jeopardy attached, was Trooper Thomas Shadrach Summers, III. R. 74, l. 9 – 77, l. 7. See, Serfass v. United States, 420 U.S. 377, 388 (1975).

When court reconvened on February 3, 2014, the judge asked if documents referenced in an affidavit of Captain Mike Maddox had been turned over to the defense. The prosecutor said that they were not turned over to the defense. However, he maintained of the three and a half year investigation: " I only found them the other day." R. 186, l. 4- 8. The judge observed that this report referenced "two people on the ground, possible entrapment." This seemed inconsistent with prior testimony as stated above. R. 186, l. 9 – 187, l. 5.

Defense counsel referenced documents that were missing, and she noted the passage of time between the accident and trial. Counsel argued that a dismissal of the case was the only proper remedy. "I believe this case has been pending for three and a half years. The essence of due process has been violated in every way during this case. I do believe that dismissal is the appropriate remedy. Not only do we have these new documents but we have the issue of this video, and with all due respect to Trooper Summers it's not up to him what is good evidence and what is not." R. 188, l. 1 – 197, l. 5.

The judge further noted that Investigator Ashe, who authored the MAIT report, was now

[3] 133 S.Ct. 1552 (2013).

in California, and was not available to testify. R. 197, l. 7 – 198, l. 6. Defense counsel also reminded the judge that the Beaufort County Sheriff deputies, who could not be named today, who were on the scene of the accident on May 30, 2010. Those deputies "might not have any recollection today, [but] that's my point exactly, this is the same as evidence that has been lost or destroyed. Their memories have been – it's 4 years old, Your Honor. But if I had known about them in 2010 they would have been able to provide lots of useful information..." R. 198, l. 9 – 199, l. 1.

The judge opined that she did not think there was any prosecutorial misconduct involved in this case. "I think that Mr. Russo got a very stale file." The judge said that Russo was the fifth prosecutor on the case, and that she agreed a continuance would not solve any of multiple problems that existed in this case. However, the judge ruled that she was not going to dismiss the case, and that a mistrial on her own motion was the proper remedy since "a trial is a search for the truth." The judge apparently reasoned that the state had not been able to present a coherent case, and therefore she could not reach a verdict. R. 204, l. 13 – 206, l. 15. The day before the filing of this certiorari petition, the state supreme court issued an opinion in State v. Michael Vernon Beaty, Jr., Op. No. 27693 (filed December 29, 2016) at pp. 3-4, in which it again reiterated:

> [A] trial court should refrain from informing the jury, whether through comments or through a charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Legal Discussion

The judge's ruling that a mistrial was necessary because the trial was "a search for the truth" was an admission that the state was so disorganized, and its lack of preparation showed it could not prove Petitioner's guilt beyond a reasonable doubt. The South Carolina Supreme Court in State v Needs, 333 SC 134, 508 S.E.2d 857 (1998), took the opportunity to strongly urge trial courts to avoid using "seek the truth language" when instructing jurors on the definition of a reasonable doubt.

Yet, the trial judge in this case, as the trier of fact, clearly determined that her duty was to find the truth, and she mistakenly confused her real function which was to determine whether the state had proved Petitioner's guilt beyond a reasonable doubt.

The defense correctly argued that once the trial began, and jeopardy had attached, that the judge could not validly use the state's ineptitude and its lack of preparation to fail to reach a verdict. R. 223. The judge, respectfully, failed to fulfill her duty as the trial judge, and the trier of fact, when she granted a mistrial out of convenience, and to allow the state a second attempt to save its case at a later date to Petitioner's considerable detriment. The Double Jeopardy Clause does not allow Mulligans where the state – which gets to time the call of the case – is unprepared.

In State v. Prince, 279 SC 30, 301 S.E.2d 471 (1983), the South Carolina Supreme Court, consistent with federal constitutional law, held that once the trial has begun there must be a "manifest necessity" for the discharge of the jury. If such manifest necessity exists, a plea of former jeopardy will not prevail. However, where a mistrial is not dictated by manifest necessity or the ends of public justice a plea of double jeopardy will prevail. See Illinois v. Somerville, 410 U.S. 458 (1973).

In Prince, as in this case, a mistrial was granted by the court, respectfully, for the convenience of the court. As in Prince, this record fails to reveal facts which justify declaring a mistrial over the objection of Petitioner, and by doing so subjecting him to a new trial before the same or different judge or jury at a future time.

The double jeopardy clause of the United States Constitution prevents all citizens from being placed twice in jeopardy of life or liberty. See Amend. V.

Pursuant to the double jeopardy clause, a defendant is protected against not only prosecution for the same offense after acquittal, and prosecution for the same offense after conviction, but against multiple prosecutions for the same offense after an improvidently granted mistrial. See State v. Baum, 355 S.C. 209, 213, 584 S.E.2d 419, 421-422 (Ct. App. 2003) *citing* State v. Kirby 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977).

In Baum, the Court noted that the prohibition against double jeopardy was intended to condemn the practice of a mistrial being granted for the purpose of prosecution being allowed to buttress weaknesses in its evidence. In Baum, the discovery of the body of the victim during a murder trial was critical evidence because it had the tendency to exonerate or inculpate the accused so it was not an abuse of discretion because a manifest necessity for granting a mistrial existed.

In Taylor v. Florida, 811 So.2d 803 (Ct. App. 1st Dist. 2002), the court held that the trial court granting of a mistrial was not based on manifest necessity. In Taylor, the assistant manager of the store that had been robbed testified at trial he knew the names of certain customers who were in the store during the robbery. This information had not been previously disclosed to the defense so counsel for the co-defendant moved for discovery sanctions and a mistrial. After a hearing, the court concluded that the assistant manager had given this information to the

investigating officers, but it had not been recorded in any police report nor shared with the prosecuting attorneys. The trial court determined that a mistrial was the proper remedy. Taylor's attorney objected to the granting of a mistrial, and moved to dismiss on double jeopardy grounds when that mistrial motion was granted over his objection.

The Court in Taylor found the case was materially indistinguishable from the United States v. Chica, 14 F.3d 1527 (11th Cir. 1994) in which four co-defendants were jointly tried on drug-related offenses. When a witness gave unexpected testimony, a mistrial was granted to all four defendants. The Court agreed with Chica that the prosecution had failed in its "heavy burden" to show a mistrial was the result of manifest necessity. The court found that the state had failed to show manifest necessity to grant a mistrial in Taylor's case, and that Taylor was entitled to dismissal of his charges on the grounds of double jeopardy.

The double jeopardy clause prohibits that a defendant, such as Petitioner be subject to trial twice for the same offense. See, Oregon v. Kennedy, 456 U.S. 667, 671 (1982); Benton v. Maryland, 395 U.S. 784 (1969).

In this case it is apparent that the State's inability to marshal its evidence to prove Petitioner's guilt beyond a reasonable doubt was due to its own ineptitude, and the judge mistakenly thought her duty as a trier of fact was to "search for the truth." This was the wrongful basis for the granting of the mistrial on the court's own motion.

Moreover, the unavailability of critical evidence for the prosecution to prove its case must be subject to the strictest scrutiny when it becomes the basis for a mistrial. See Arizona v. Washington 434 U.S, 497, 508 (1978). An overbroad definition of "manifest necessity," as used by the trial judge in this case, invites the discretion of "an unlimited, uncertain, and arbitrary judicial discretion." Downum v. United States, 372 U.S. 734, 738 (1963).

The State's failure to marshal its evidence, and its failure to turnover and retain potentially strong exculpatory evidence did not constitute a "manifest necessity" for a mistrial. Further, it is apparent that the State was very unlikely to secure a conviction in this case because the blood alcohol evidence was not going to be admissible under Missouri v. McNeely where Trooper Summers admitted he ordered the blood taken because he suspected this was a felony DUI case. The record showed there was no exigency involved particularly since the Trooper had a cell phone, and the Trooper admitted he did not even think of securing a search warrant, even where Magistrates were obviously readily available to consider application for such warrants.

Further, the State would not have been able to establish a chain of custody because the nurse who allegedly drew Petitioner's blood upon the order of the Trooper was not called by the State to testify at trial. The fact that the nurse had moved to another state did not render her unavailable, or make it impractical for the State to produce her for trial. The State simply could not prove the chain of custody as far as practicable in this case given the absence of the nurse. See State v. Joseph, 328 S.C. 352, 364-365, 491 S.E.2d 275, 281-282 (Ct. App. 1997).

The defense objected to the chain of custody, and further noted that the hospital records themselves stated that the chain of custody could not be established for "legal or employment purposes" from the hospital records. R. 57.

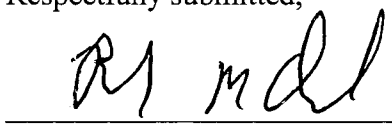
The trial court erroneously ruled that there was "manifest necessity" necessary for the granting of a mistrial over Petitioner's objection. Petitioner respectfully submits this Court should reach the merits of the double jeopardy issue, even though the South Carolina Supreme Court failed to address the merits given its erroneous holding that it was not bound by Abney, and federal Constitutional law to provide Petitioner an appeal. This record amply establishes

there was not the manifest necessity necessary for the trial court to order a mistrial over Petitioner's objection. Illinois v. Somerville, 410 U.S. 458 (1973).

CONCLUSION

By reason of the foregoing arguments this Court should grant a writ of certiorari.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

December 30, 2016

No. 16A462

In The
Supreme Court of the United States
October Term, 2016

BRYAN REARICK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

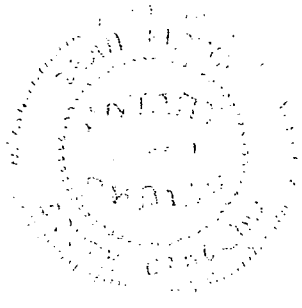
CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel, Deborah R.J. Shupe, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 30th day of December, 2016.

ROBERT M. DUDEK
Counsel of Record

SWORN TO BEFORE me this 30th
day of December, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.



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APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bryan Rearick, Appellant.

Appellate Case No. 2014-001692

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 27654
Heard June 15, 2016 – Filed August 17, 2016

DISMISSED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General John Benjamin Aplin, Senior Assistant Deputy Attorney General Deborah R. J. Shupe, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

JUSTICE BEATTY: Following the circuit court judge's declaration of a mistrial over defense counsel's objection, Bryan Rearick moved to bar subsequent prosecution of the charge of felony driving under the influence resulting in death ("felony DUI") on the ground a second trial would violate the Double Jeopardy

Clause of the South Carolina and United States Constitutions.[1] Rearick appeals the judge's order denying this motion, arguing: (1) the denial of a motion to dismiss on double jeopardy grounds is immediately appealable; and, if so, (2) the judge's declaration of a mistrial was erroneous in that there was no "manifest necessity" to justify the ruling. We adhere to well-established appealability precedent and dismiss the appeal as interlocutory.

I. Factual / Procedural History

During the late evening hours of May 30, 2010, Rearick was involved in a head-on collision on Hilton Head Island that resulted in the death of the driver of the other vehicle. Trooper Thomas Summers with the South Carolina Highway Patrol was dispatched to the accident scene where he found Rearick receiving medical treatment in an ambulance. Trooper Summers followed the ambulance to the hospital, interviewed Rearick, and ordered that blood be drawn for forensic toxicology analysis. On July 22, 2010, a Beaufort County grand jury indicted Rearick for felony DUI.[2]

Rearick waived his right to a jury trial and the case proceeded as a bench trial on January 30, 2014. At the beginning of the trial, defense counsel raised several pretrial motions. Initially, counsel moved to dismiss the case based on the State's failure to produce the arresting officer's video recording of the incident in violation of section 56-5-2953 of the South Carolina Code.[3] Additionally, counsel moved to suppress the blood sample taken from Rearick on the grounds: (1) it was obtained without a warrant and without any exigency in contravention of *Missouri v. McNeely*, 133 S. Ct. 1552 (2013);[4] (2) it was obtained in violation of section 56-

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[1] U.S. Const. amend. V; S.C. Const. art. I, § 12.

[2] S.C. Code Ann. § 56-5-2945(A)(2) (Supp. 2015).

[3] *Id.* § 56-5-2953 (Supp. 2015) (requiring that a person charged with DUI have his conduct at the incident site recorded on video, including field sobriety tests, unless certain exceptions apply); *see City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding dismissal of a DUI charge "is an appropriate remedy provided by [section] 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions").

[4] *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (holding that, in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not

5-2950,[5] which requires that a driver who is accused of DUI be offered a breath test before a blood sample is requested; and (3) the chain of custody of the sample was fatally defective in that the State failed to produce as a witness the nurse who allegedly drew the blood at the hospital.

The State called Trooper Summers as its primary witness during the pretrial hearing. According to Trooper Summers, the video recording device in his patrol car was activated when he turned on his blue lights to respond to the accident scene. When Trooper Summers arrived at the accident site, he encountered the EMS, the fire department, and deputies with the Beaufort County Sheriff's Department. However, he could not recall how many individuals were present and could not identify anyone by name. Yet, he specifically remembered speaking with Rearick at the scene.

On cross-examination, Trooper Summers admitted that he did not know whether a video recording of the incident had been placed into evidence. Defense counsel further questioned Trooper Summers regarding the contents of his accident report as well as the videotaped interview he provided to the South Carolina Department of Public Safety about the case. When it became evident that Trooper Summers could not recall the details of the incident, the trial judge took a forty-five minute recess to permit Trooper Summers to review his notes, the accident report, and the DVD of his interview.

Once Trooper Summers resumed his testimony, he recalled that "[t]here were some deputies" at the accident scene. He estimated that he spent approximately thirty to forty-five minutes at the accident scene and that the video recorder in his patrol car was running during that time. After hearing this testimony, defense counsel expressed concern that potentially exculpatory evidence had not been turned over by the State pursuant to *Brady*[6] and Rule 5,

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constitute an exigency in every case sufficient to justify conducting a blood test without a warrant).

[5] S.C. Code Ann. § 56-5-2950 (Supp. 2015) (providing that a person driving a motor vehicle in South Carolina is deemed to have consented to a chemical test of his breath, blood, or urine if arrested for an offense arising out of acts alleged to have been committed while under the influence of alcohol, drugs, or a combination of the two).

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

SCRCRimP. Counsel explained that the video recording may have contained images of Rearick's conduct and demeanor at the time of the accident and that Trooper Summers's lapel microphone may have recorded his conversations with Rearick.

The judge determined that a videotape from Trooper Summers's vehicle was not required under the circumstances and, thus, denied counsel's motion on that basis. However, the judge shared counsel's concern that the other deputies on the scene may have videotaped Rearick's conduct and that those recordings were either not available or had not been provided to defense counsel. When defense counsel moved to dismiss the case based on the State's failure to provide these videotapes, the trial judge took the motion under advisement.

With respect to defense counsel's remaining pretrial motions, the judge found no violation of the implied consent statute and ruled that any statements Rearick gave to Trooper Summers at the hospital were admissible. Still, the judge took under advisement defense counsel's motion to suppress Rearick's blood alcohol content.

When trial testimony began, the State presented several witnesses to establish the chain of custody of Rearick's blood draw at the hospital after the accident. At the conclusion of this testimony, the judge found the State had established the chain of custody and admitted the toxicology results of Rearick's blood alcohol content subject to defense counsel's ongoing, yet unresolved, objection that the blood evidence was obtained without a warrant.

The State then called Trooper Scott Ashe, a member of the Multi-Disciplinary Accident Investigation Team ("MAIT") and an expert in accident reconstruction, who testified regarding MAIT's conclusions regarding the accident. Following this testimony, defense counsel advised the judge that the State and Trooper Ashe had referred to documents that were not included in the materials turned over to her as part of discovery. The judge recessed to allow the State time to ascertain what was not included in the discovery materials provided to the defense, to obtain the identities of any Beaufort County deputies present at the accident scene, and to determine whether there were any video recordings of the accident scene.

Once the trial reconvened the following week, the judge inquired whether all discovery material had been turned over to defense counsel. Defense counsel acknowledged that she received the missing MAIT notes the afternoon the court recessed, but stated she was also provided a number of pages identifying vehicle

recall information regarding both vehicles involved in the accident. As a result, defense counsel moved for a dismissal on the ground that Rearick's due process rights had been violated by the State's failure to provide evidence that may have been exculpatory. In response, the State asserted that a continuance was the more appropriate remedy. The judge, however, declared a mistrial over the objection of defense counsel.

Nine days later, defense counsel filed a motion to bar subsequent prosecution on the ground a second trial would violate the Double Jeopardy Clause of the South Carolina and United States Constitutions. The judge denied this motion. While the judge noted the problems with the State's evidence and questioned whether certain exculpatory evidence had been turned over to the defense, the judge found there was no prosecutorial misconduct. The judge then explained that she considered the competing alternative remedies of a continuance, a dismissal, and a mistrial. After assessing these options, the judge determined there was "a high degree of necessity to declare a mistrial in the instant circumstance[s]." Having granted the mistrial "out of manifest necessity," the judge ruled that double jeopardy had not attached and, thus, the State was not barred from prosecuting the felony DUI charge.

Rearick appealed this order to the Court of Appeals and, subsequently, filed a motion to certify the appeal to this Court pursuant to Rule 204(b), SCACR. The State filed a motion to dismiss the appeal as interlocutory. This Court granted Rearick's motion to certify the appeal and denied the State's motion to dismiss.

II. Discussion

A. Appealability of An Order Denying A Double Jeopardy Claim

1. Arguments

Rearick readily acknowledges this Court in *State v. Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986), expressly held that an order denying a double jeopardy claim is not immediately appealable. However, he contends *Miller* conflicts with the United States Supreme Court's ("USSC") decision in *Abney v. United States*, 431 U.S. 651 (1977), which held that a pretrial order denying a defendant's motion to dismiss on double jeopardy grounds was a "final decision" and is "immediately appealable." Referencing *Abney*'s "substantial analysis of the Federal constitutional ban against double jeopardy," Rearick maintains *Abney* "demonstrates why an appeal *now* is required." Ultimately, Rearick seeks for this Court to overrule *Miller* and related precedent, reasoning that a state procedural

rule that conflicts with a defendant's constitutional right not to be tried twice for the same crime cannot prevail.

2. *Abney*

In *Abney*, the USSC "granted certiorari to determine whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291."[7] *Abney v. United States*, 431 U.S. 651, 653 (1977). The USSC determined that such pretrial orders "constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." *Id.* at 662.

In reaching this conclusion, the USSC prefaced its analysis by recognizing that there is no constitutional right to an appeal and there is a "firm congressional policy against interlocutory or 'piecemeal' appeals." *Abney*, 431 U.S. at 656. However, the USSC found that an order denying a defendant's motion seeking a dismissal on double jeopardy grounds satisfied the prerequisites for fitting within "'the small class of cases' that *Cohen*[8] has placed beyond the confines of the final-judgment rule." *Id.* at 659. The Court explained that: (1) these orders "constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim"; (2) "the very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial"; and (3) "the elements of [the double jeopardy] claim are completely independent of [a defendant's] guilt or innocence." *Id.* at 659-60.

Finally, the USSC emphasized that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction

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[7] Section 28 U.S.C. § 1291 provided: "The courts of appeals shall have jurisdiction from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." *Abney*, 431 U.S. at 653 n.1.

[8] *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (establishing "collateral order doctrine" as an exception to the final-judgment rule; describing collateral orders as "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated").

and sentence." *Abney*, 431 U.S. at 660. The Court noted that it had long "recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense." *Id.* at 660-61. The Court concluded, stating "if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.* at 662.

Although we appreciate the merit of *Abney*, it cannot be considered in a vacuum since we must analyze *Abney* in the context of the statutory prerequisites for appellate jurisdiction as prescribed by the South Carolina General Assembly.

3. A Criminal Defendant's Right to Appeal in South Carolina

In South Carolina, a criminal defendant has no constitutional right to appeal. Rather, a defendant's right to appeal is authorized by statutes and appellate court rules of procedure. *See State v. Wilson*, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010) ("The right of appeal arises from and is controlled by statutory law." (citation omitted)). To appeal, a defendant must be "aggrieved"[9] by a decision that is statutorily classified as one that is appealable, which generally involves a final judgment. S.C. Code Ann. § 18-1-30 (2014) ("Any party aggrieved may appeal in the cases prescribed in this title."); Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); *see* Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision.").

The General Assembly has expressly limited those decisions that are immediately appealable.[10] Originally enacted in 1896, section 14-3-330 of the South Carolina Code provides, in pertinent part, that an immediate appeal may be taken in a law case from:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and

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[9] "[A]n aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property." *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997).

[10] *See* S.C. Const. art. V, § 5 ("The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe.").

general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment.

S.C. Code Ann. § 14-3-330(1), (2), (3) (1976); *see State v. Samuel*, 411 S.C. 602, 604, 769 S.E.2d 662, 663 (2015) ("Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [section] 14-3-330 [of the South Carolina Code]." (citation omitted)); *see also* S.C. Code Ann. § 18-1-130 (2014) ("Upon an appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment.").

Significantly, appellate court decisions that pre-date and post-date the enactment of section 14-3-330 have consistently held that a defendant may appeal only after sentence has been imposed. Without explanation, this Court in 1880 dismissed a defendant's appeal, holding that the sentence of the defendant in the Court of General Sessions is the final judgment, from which alone an appeal may be taken. *State v. McKettrick*, 13 S.C. 439, 439 (1880).

Twenty years later, the Court applied the holding in *McKettrick* to dismiss as interlocutory an appeal of an order granting a mistrial. *State v. Hughes*, 56 S.C. 540, 35 S.E. 214 (1900). In so ruling, the Court explained:

> It is a bad practice, and generally condemned, to hear appeals by piecemeal, especially in criminal cases; for it is destructive of the prompt administration of justice, which is so essential to the peace of society. To allow appeals to be heard from such preliminary rulings would enable a party charged with the most serious crime always to

> secure a continuance, when otherwise not entitled to it, by simply moving to quash the indictment, and, when his motion is overruled, give notice of appeal from such ruling, and thereby stop the trial, as was in the present case. [But not so in the appeal at bar, for then several justices of this court refused to allow an appeal from a preliminary order to stay the wheels of justice.]. Both reason and authority require us to hold that this appeal is premature, and must therefore be dismissed.

Hughes, 56 S.C. at 543, 35 S.E. at 215.

For decades, this Court relied on *Hughes* and has consistently held that a criminal defendant may not appeal until sentence is imposed. In 1921, the Court relied on this authority to find that an order denying a motion to dismiss based on double jeopardy grounds following a mistrial provided no exception to well-established rules of appealability. *State v. Wyatt*, 115 S.C. 325, 326, 105 S.E. 704, 704 (1921) (dismissing appeal from an order denying a defendant's plea of former jeopardy following a mistrial on the ground that there had "not been any final judgment, the ruling of his honor, the presiding judge, is not appealable").

In 1986, the Court expressly considered the implications of *Abney* to extant appealability rules, including *Wyatt*. *State v. Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986). In *Miller*, the defendant was convicted of murder, grand larceny, and housebreaking; however, the trial judge granted the defendant's motion for judgment notwithstanding the verdict ("JNOV"). *Id.* at 426, 346 S.E.2d at 705. The State appealed, and this Court reversed the judge's grant of JNOV and reinstated the verdicts of guilty on the charges of murder and grand larceny. *Id.* This Court, however, upheld the dismissal of the housebreaking conviction and remanded the case for sentencing. *Id.* (citing *State v. Miller*, 287 S.C. 280, 337 S.E.2d 883 (1985)). On remand, Miller moved to bar the capital sentencing proceeding on double jeopardy grounds. *Id.* The trial judge denied the motion, after which Miller filed a notice of appeal. *Id.*

This Court dismissed the appeal without prejudice to Miller's right to appeal from final judgment. *Miller*, 289 S.C. at 428, 346 S.E.2d at 706. In so ruling, the Court relied on its prior decisions holding that a criminal defendant may not appeal until sentence has been imposed and decisions holding that an order denying a double jeopardy claim is not immediately appealable. *Id.* at 427, 346 S.E.2d at 706 (citing *Hughes* and its progeny as well as *Wyatt*). The Court acknowledged Miller's argument that the rule prohibiting an immediate appeal from an order denying a double jeopardy claim had been overruled by federal decisions,

including *Abney*, which hold that appeals based on double jeopardy grounds involve final judgments that are directly appealable. *Id.* Nevertheless, the Court found that in both state and federal courts, the right to appeal a criminal conviction is conferred by statute and, as noted in *Abney*, in order to exercise that statutory right to appeal, a defendant must come within the terms of the applicable statute. *Id.* Significantly, the Court concluded that the cases cited by Miller, including *Abney*, which were based on 28 U.S.C. § 1291 had "no application to state court appeals." *Id.* The Court explicitly adhered to its "view that under § 14-3-330 (1976) a criminal defendant may not appeal until after sentence has been imposed." *Id.*

Fourteen years later, the Court reaffirmed *Miller* in *State v. Gregorie*, 339 S.C. 2, 528 S.E.2d 77 (2000). In *Gregorie*, the defendant was convicted in magistrate's court of speeding. *Id.* at 3, 528 S.E.2d at 78. He appealed to the circuit court, which reversed and remanded for a new trial, finding the State failed to introduce any evidence of the applicable speed limit. *Id.* On appeal, the Court of Appeals initially dismissed the appeal, but reinstated it and affirmed the circuit court's ruling. *Id.*

This Court overruled *Gregorie* and another related decision in which the Court of Appeals erroneously created an exception to the rule established in *Miller* that "a criminal defendant claiming a double jeopardy violation is not exempt from the regular appealability requirements." *Gregorie*, 339 S.C. at 4 n.1, 528 S.E.2d at 78 n.1. The Court clarified that the test for appealability is "not whether the appeal involves a double jeopardy claim . . . but whether the party bringing the appeal is aggrieved." *Id.* at 4, 528 S.E.2d at 78.

Applying this rule, the Court found Gregorie's appeal was immediately appealable not because it involved a double jeopardy claim, but because Gregorie was otherwise aggrieved by the new trial remedy ordered by the circuit court. *Id.* The Court noted that the circuit court found the State failed to meet its burden of proof and the State's failure to appeal that finding became the law of the case. *Id.* Ultimately, the Court found Gregorie correctly asserted that, under those circumstances, a second trial in magistrate's court would violate his double jeopardy rights. *Id.*

Recently, this Court analogized a denial of a request for immunity under the South Carolina Protection of Persons and Property Act ("Act") to a denial of a motion to dismiss a criminal case on the ground of double jeopardy. *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013). Citing *Miller*, the Court held a denial of a request for immunity under the Act is not immediately appealable. *Id.* at 185, 747

S.E.2d at 681. The Court reasoned that "[a]bsent an unambiguous expression of legislative intent, we see no reason to alter settled law concerning appealability, which additionally would have the illogical effect of elevating a statutory immunity claim over one constitutionally based." *Id.* at 184, 747 S.E.2d at 680.

4. Import of *Abney* to Appellate Review in State Courts

Despite the wealth of South Carolina authority to the contrary, Rearick maintains that *Abney* is controlling because the federal constitutional right against double jeopardy cannot be trumped by a state procedural rule.

We recognize the split of authority as to the import of *Abney* in the state appellate court realm. Some courts "suggest that the state, as part of its constitutional obligation to effectively enforce the double jeopardy bar, must provide for an immediate appeal from the trial court's denial of a non-frivolous double jeopardy objection." 7 Wayne R. LaFave et al., *Criminal Procedure* § 27.2(c) (4th ed. 2015).[11] In contrast, some courts reject *Abney*'s application to state

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[11] *See, e.g.*, *State v. Choate*, 725 P.2d 764, 764 (Ariz. Ct. App. 1986) (citing *Abney* and finding that "an interlocutory appeal of a double jeopardy claim is constitutionally mandated"); *State v. Baranco*, 884 P.2d 729, 733 (Haw. 1994) (adopting *Abney* rationale and holding that "the collateral order exception to the final judgment rule permits an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds"); *People v. Torres*, 549 N.W.2d 540, 552 (Mich. 1996) (discussing *Abney* and concluding that trial court's nonfinal decision to grant a new trial was immediately appealable because the defendant "could only have avoided the second trial by seeking an immediate appeal"); *Roberson v. State*, 856 So. 2d 532, 533 (Miss. Ct. App. 2003) (referencing *Abney* and determining that "[a]n immediate appeal regarding a denied double jeopardy claim is permitted"); *State v. Milenkovich*, 458 N.W.2d 747, 750 (Neb. 1990) (analyzing *Abney* and concluding that "a defendant must be granted the opportunity to raise a claim of double jeopardy prior to being subjected to the second trial"); *State v. Anderson*, 6 N.E.3d 23, 32 (Ohio 2014) (discussing *Abney* and concluding that "an accused would not be afforded a meaningful review of an adverse decision on a motion to dismiss and discharge on double-jeopardy grounds if that party must wait for final judgment as to all proceedings in order to secure review of the double-jeopardy decision"); *Commonwealth v. Orie*, 22 A.3d 1021, 1027 (Pa. 2011) (permitting immediate appellate review of trial court's order determining that petitioner's double jeopardy challenge was frivolous); *State v. Godette*, 751 A.2d 742, 745-46 (R.I. 2000) (citing *Abney* and recognizing that the

courts on the ground that *Abney* "is better interpreted as a case interpreting the federal statute governing appeals, not the scope of the constitutional prohibition against double jeopardy, so that its holding is not binding on state courts interpreting their own law." *Id.*[12]

We are persuaded by the holdings in those state jurisdictions that decline to adopt *Abney*. A careful review of *Abney* reveals the USSC's analysis is narrowly confined to an interpretation of federal law with no indication of a mandatory application in state courts. As we interpret *Abney*, the USSC was not analyzing whether a defendant has a constitutional right to appeal the denial of a pretrial motion to dismiss on double jeopardy grounds. Rather, the USSC was deciding whether such denial was a "final decision" within the context of 28 U.S.C. § 1291, the federal appeals statute. Thus, we find those state jurisdictions that adopt the

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denial of a motion to dismiss on double jeopardy grounds constitutes an exception to the general rule regarding appeals in criminal cases).

[12] *See, e.g.*, *Jones v. State*, 450 So. 2d 186, 187 (Ala. Crim. App. 1984) (acknowledging split of authority on *Abney* but taking "the view that a denial of a pretrial motion based on a plea of double jeopardy is not immediately appealable"); *State v. Fisher*, 579 P.2d 167, 170 (Kan. Ct. App. 1978) (limiting *Abney* to construction of federal appeals statute and ruling that denial of motion to dismiss did not constitute a "judgment" within the meaning of a state statute providing for appeals in criminal cases); *Huff v. State*, 599 A.2d 428, 436 (Md. 1991) (finding *Abney* "does not constitutionally mandate interlocutory appeals" and that due process does not require the State to provide an immediate appeal); *State v. Murphy*, 537 N.W.2d 492, 495 (Minn. Ct. App. 1995) (rejecting application of *Abney* where state had specific jurisdictional rule prohibiting review of a pretrial order denying defendant's motion to dismiss on double jeopardy grounds); *State v. Nemes*, 963 A.2d 847, 848 (N.J. Super. Ct. App. Div. 2008) (concluding that *Abney* does not embody a constitutional holding and, thus, defendant could not appeal as of right from trial court's interlocutory order denying his motion to dismiss on double jeopardy grounds); *State v. Joseph*, 374 S.E.2d 132, 135 (N.C. Ct. App. 1988) (limiting *Abney* to federal statute and concluding order denying defendant's motion to dismiss on double jeopardy grounds was not immediately appealable); *State v. Salzmann*, 850 P.2d 1122, 1126 (Or. Ct. App. 1993) ("The nature of the Court's analysis and the specificity in its holding persuade us that *Abney* is merely a case of statutory construction of a federal statute and not one that establishes a constitutional mandate for interlocutory appeals throughout the several states.").

rationale in *Abney* misconstrue the holding and extend it beyond what was intended by the USSC.[13]

Further, we believe an adoption of the rationale in *Abney* would have dire consequences for the future of appellate review in South Carolina. If we were to carve out an exception for the denial of a double jeopardy claim, we believe all pretrial motions implicating a constitutional right would be subject to immediate appeal.

B. Other Remedies

While the procedural bar of *Miller* may seem harsh, a defendant is neither denied a future appeal nor other remedies. A defendant may still challenge the denial of a motion to dismiss on double jeopardy grounds *via* (1) a petition for federal habeas corpus relief, or (2) a petition for this Court to issue an extraordinary writ.[14] *See Livingston v. Murdaugh*, 183 F.3d 300, 301 (4th Cir. 1999) (affirming grant of writ of federal habeas corpus on double jeopardy grounds and recognizing that "appeal of a denial of a double jeopardy claim would be futile because the South Carolina Supreme Court has held that 'an order denying a double jeopardy claim is not immediately appealable'" (quoting *Miller*, 289 S.C. at 427, 346 S.E.2d at 706)); *Gilliam v. Foster*, 63 F.3d 287, 291 (4th Cir. 1995) (denying State's motion to stay federal district court's grant of habeas corpus for pending decision on merits of defendant's double jeopardy claim in state court proceedings; stating, "[i]t is also regrettable that, because South Carolina law does not permit an interlocutory appeal of the double jeopardy ruling, the appellate courts of that state were not the ones to rule on the matter in the first instance"); *cf. Paul v. People*, 105 P.3d 628, 633 (Colo. 2005) (en banc) (concluding that denial of defendant's

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[13] Notably, this Court has expressly recognized that the federal collateral order doctrine, upon which *Abney* is based, is not applied in our state courts. *See Capital U-Drive-It, Inc. v. Beaver*, 369 S.C. 1, 8 n.2, 630 S.E.2d 464, 468 n.2 (2006) ("Although the federal collateral order doctrine is not applied in our state courts, we believe the reasoning of these cases is sound.").

[14] S.C. Const. art. V, § 5 ("The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs."); S.C. Code Ann. § 14-3-310 (1976) ("The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other remedial and original writs.").

motion to dismiss on double jeopardy grounds was not immediately appealable, but reviewing the appeal pursuant to appellate court's original jurisdiction).

III. Conclusion

Despite Rearick's arguments to the contrary, we conclude that *Abney* does not alter the rule in *Miller*. Consequently, we dismiss this appeal without prejudice.[15]

APPEAL DISMISSED.

KITTREDGE and FEW, JJ., concur. PLEICONES, C.J., and HEARN, J., concurring in result only.

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[15] In view of our decision, we need not address Rearick's remaining issue regarding the trial judge's declaration of a mistrial. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when decision regarding a prior issue is dispositive).

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF GENERAL SESSIONS FOURTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	)	INDICTMENT NO.: 2010-GS-07-1469
vs.	)	Order Denying Defendant's Motion to Bar Prosecution
BRYAN REARICK, Defendant.	)	

NOW COMES BEFORE THE COURT Defendant's Motion to Bar Prosecution, heard April 8, 2014. Present on behalf of Defendant Bryan Rearick was Lauren Carroway, Esq., of the Beaufort County Public Defender's Office. Present on behalf of the State was Assistant Solicitor Lynorr Musser. The instant motion arises out of a bench trial which began Thursday, January 30, 2014, was continued to February 4, 2014, and ended in a mistrial.

BACKGROUND

The incident lending to the prosecution at issue occurred on May 30, 2010, at which time it is alleged that the Defendant left a drinking establishment on Hilton Head Island and was driving West on Route 278 when he entered the wrong lane of travel while making a left-hand turn, struck another vehicle and caused a head-on collision. The victim died as a result of the injuries sustained. The Defendant was indicted for Driving Under the Influence, Death Results pursuant to S.C. Code Ann. § 56-05-2945(A)(2) on July 22, 2010.

Upon the agreement of counsel and waiver by the Defendant, the case was called for a bench trial before me on January 30, 2014. Testimony and oral argument commenced related to several pre-trial motions as well as the trial. After testimony from the State's MAIT expert, Ben Ashe, Ms. Carroway advised the Court that Mr. Ashe had referred to a page in his report that she did not receive in her discovery.

The State's trial attorney, Assistant Solicitor Adam Russo, advised the Court that former Deputy Solicitor Angela McCall-Tanner had turned over discovery to Ms. Carroway and had documented the file by way of copies of correspondence to Ms. Carroway. The file contained four (4) letters to Ms. Carroway dated July 6, 2010, August 31, 2010, November 1, 2010, and November 15, 2010. The letter dated November 1, 2010, specifically indicates that a CD containing the complete MAIT file was being provided to Ms. Carroway.

Additionally, the State called lead investigator Trooper Summers to testify regarding the Defendant's Pre-Trial Motion to Dismiss for Failure to Comply with § 56-5-2953 and § 56-5-2950 as well as its case-in-chief. Trooper Summers' testimony raised additional questions regarding whether all discoverable information had been made available to Ms. Carroway. Specifically, Trooper Summers' testimony included the names of Beaufort County Sheriff Deputies that were present at the time he arrived at the accident scene as well as the potential existence of video taken from his patrol vehicle. The fact that Trooper Summers had previously prepared an Affidavit with respect to the lack of video confounded the issue of whether video presently exists or existed in the past but was not preserved.

As this potential problem with discovery arose, the Court recessed and scheduled the trial to resume the following Tuesday, directing Assistant Solicitor Russo to either locate the outstanding evidence or obtain affidavits from the South Carolina Highway Patrol and Beaufort County Sheriff's Office stating that said evidence does not exist and scheduled a meeting with them on Monday, February 3, to confirm that this discrepancy in discovery had been resolved in the manner prescribed.

At that meeting, Mr. Russo provided affidavits stating that video in this case did not exist; however, he had received a CAD report and one page Incident Report from the Beaufort

County Sheriff's Office which indicated that several additional previously unidentified Sheriff Deputies were present at the accident site.

At the time the trial was scheduled to resume, the undersigned declared a mistrial, making a finding that although there had been some documents that were not turned over to defense counsel, there was no prosecutorial misconduct. Five separate Assistant Solicitors had dealt with the file in the three and a half years from in the case's inception. In support of its ruling, the Court outlined the options currently before it: (1) continuing the trial to give defense counsel additional time to prepare in light of the recently obtained information, (2) dismissing the case or (3) declaring a mistrial. A mistrial was declared over the Defendant's objection for reasons discussed herein.

LEGAL STANDARD

In a bench trial, jeopardy attaches when the court begins to hear evidence. *Serfass v. U.S.*, 420 U.S. 377, 388 (1975). The principles of double jeopardy bar a subsequent prosecution following an improvidently granted mistrial. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 718 (Ct. App. 2000).

A mistrial is not improvidently granted so long as the declaration of a mistrial is "dictated by manifest necessity of the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Baum*, 355 S.C. 209, 214, 584 S.E.2d 419, 422 (Ct. App. 2003) (quoting *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "Manifest necessity is not a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Id.* The word 'necessity' is not to be interpreted literally, and "there need only be a 'high degree' of necessity in order to conclude that a mistrial

is appropriate under the circumstances." *Id.* (quoting *Arizona v. Washington*, 434 U.S. 497, 505-06 (1978).

"The 'manifest necessity' rule is easy to state but sometimes difficult to apply. In borderline cases, it is the inclination of appellate courts to sustain the judge in the exercise of his discretion." *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 473 (1983). "The power of the court to declare a mistrial ought to be used with the greatest of caution and for plain and obvious causes stated into the record by the judge." *Id.* at 33, 301 S.E.2d at 472. Further, "'manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.'" *State v. Kirby*, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) (quoting *U.S. v. Jorn*, 400 U.S. 470, 485 (1971).

DISCUSSION

The declaration of a mistrial was warranted and supported by the facts contained in the record. Discovery issues became clear throughout the proceedings and continued on the day that the bench trial was set to resume. Five different Assistant Solicitors had handled the file over a three and a half year period between indictment and trial. Each available outcome was considered in the light most favorable to the Defendant to determine what, if any, prejudice the Defendant might suffer under each scenario.

A continuance was not appropriate because the trial had already commenced, defense counsel had not been given sufficient time to review the new information on her own or with an expert, the opportunity for the defense to cross-examine witnesses had been lost, and the defense did not have time to locate the additional Sheriff's deputies. Additionally and of added import,

the Defendant's election to waive his right to a jury trial may have been different had he known about the evidence that was not previously produced.

Dismissing the case as requested by the Defendant is not in the public interest given the nature of the charge. The public interest in a felony driving under the influence case where the victim has died as a direct result of injuries sustained in the collision is great, and the Defendant is entitled to a just result and an opportunity to fully prepare a defense to the case against him. Dismissal of the charge was also not appropriate due to the evidence presented by the State at the time the mistrial was declared.

After full consideration of the options available to the Court, I do find in the exercise of judicial discretion that there does exist a high degree of necessity to declare a mistrial in the instant circumstance. Late-appearing discovery prejudices the Defendant's ability to adequately prepare for the trial that was already underway. Further, the nature of that discovery may lead to the Defendant's altering his decision to agree to a bench trial.

CONCLUSION

Given the foregoing reasons, it is hereby ORDERED, ADJUDGED, AND DECREED THAT the Defendant's Motion to Bar Prosecution is DENIED because of the granting of a mistrial out of manifest necessity. As such, double jeopardy has not attached and the State is not barred from prosecution.

AND IT IS SO ORDERED.

Carmen Mullen
Fourteenth Judicial Circuit

June 24, 2014
Beaufort, South Carolina

No. 16A462

IN THE

SUPREME COURT OF THE UNITED STATES

Bryan Rearick — PETITIONER

VS.

The State of South Carolina — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

South Carolina Court of General Sessions

South Carolina Supreme Court

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☒ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☒ The appointment was made under the following provision of law: Rule 608, SCACR, or

☒ a copy of the order of appointment is appended.

(Signature)

OFFICE OF THE CLERK OF COURT
Jerri Ann Roseneau
Post Office Drawer 1128
Beaufort, South Carolina 29901-1128
Phone: (843) 255-5050 Fax: (843) 255-9412

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

VS.

Bryan Lee Rearick
DEFENDANT
M056267

ORDER OF APPOINTMENT OF LEGAL COUNSEL FOR INDIGENT DEFENDANT

The defendant contends that he/she is indigent and in need of services of an attorney as contemplated by law. Therefore, Helen Roper, Attorney-at-Law, is appointed as counsel for the defendant, pursuant of Rule 608, SCACR.

AND IT IS SO ORDERED this 15th day of June, 2010

Jerri Ann Roseneau
Clerk of Court for Beaufort County

by
Tarik K. Cannick
Deputy Clerk of Court

Certified - A True Copy

Jerri Ann Roseneau - Clerk of Court
Beaufort County, SC - Jennifer Petroff

No. 16A462

In The
Supreme Court of the United States
October Term, 2016

BRYAN REARICK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I certify that copies of the motion for leave to proceed in forma pauperis have been served upon opposing counsel, Deborah R.J. Shupe, Esquire by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 30th day of December, 2016.

ROBERT M. DUDEK
Counsel of Record

SWORN TO BEFORE me this 30th
day of December, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.