STATE OF SOUTH CAROLINA	**IN THE COURT OF GENERAL SESSIONS**
COUNTY OF CHARLESTON	**FOR THE NINTH JUDICIAL CIRCUIT**
	Warrant No.: 2015A10[redacted]21001053
	Indictment No.: 2016GS1003454
	Charge: Reckless Homicide
STATE OF SOUTH CAROLINA	
vs.	
	DEFENDANT'S MOTION FOR NEW TRIAL
JOHN ANDREW BIGGS,	
Defendant	

The Defendant, indicted for Reckless Homicide, proceeded to trial on December 12, 2016. The jury returned a verdict on Wednesday, December 16, 2016, finding the Defendant guilty. The Court allowed Defendant ten (10) days to file any post-trial motions. Defendant moves for a new trial, pursuant to S.C. Code Ann. Section 17-23-110 (2016) and Rule 29, S.C. R. Crim. P. Defendant moves for a new trial on the following grounds:

I. The Court's erroneous jury charge;

II. The Court's denial of Defendant's Motion for Directed Verdict;

III. The Court's denial of Defendant's Motion for a Mistrial.

Respectfully submitted,

John J. Kozelski, III
Assistant Public Defender
Attorney for Defendant

Charleston, South Carolina
Dated: December 21, 2016.

CERTIFICATE OF SERVICE

I hereby certify that this document was served on the Solicitor for the Ninth Judicial Circuit on December 21, 2016.

Charleston County Public Defender's Office

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STATE OF SOUTH CAROLINA	)	
	)	
vs.	)	**MEMORANDUM IN SUPPORT OF**
	)	**DEFENDANT'S MOTION FOR**
JOHN ANDREW BIGGS,	)	**NEW TRIAL**
	)	
Defendant	)	
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Defendant, indicted for Reckless Homicide, proceeded to trial on December 12, 2016. The jury returned a verdict on Wednesday, December 16, 2016, finding the Defendant guilty. The Court allowed Defendant ten (10) days to file post-trial motions. Defendant moves for a new trial, pursuant to S.C. Code Ann. Section 17-23-110 (2016) and Rule 29, S.C. R. Crim. P. Defendant moves for a new trial on the following grounds: (1) the Court's denial of Defendant's Motion for Directed Verdict; (2) the Court's denial of Defendant's Motion for a Mistrial; (3) the Court's erroneous jury charge; (4) all defense motions made, but denied; and (4) all defense objections made, but denied.

Defendant argues that the Court's jury charge was erroneous because the Court instructed the jury that "[i]ntent is not an element of the crime." Defendant also argues that the Court should have directed a verdict of not guilty because the State failed to produce any direct evidence or substantial circumstantial evidence of the Defendant's reckless criminal intent. Lastly, Defendant argues the Court erred by failing to grant a mistrial after the State's comments in closing argument amounted to impermissible burden shifting. Defendant's Motion is made based on the relevant statutes, case law, and argument enumerated below.

I. FACTUAL AND PROCEDURAL SUMMARY

At trial, the State presented evidence that on October 8, 2015 at approximately 3:58 AM on Rivers Avenue in North Charleston, the Chevrolet Silverado that Defendant was driving struck the rear of a Mustang at approximately 101.5 miles per hour, which then collided into a third car. The State presented evidence that Defendant maintained speed up to 5 seconds before impact, did not depress the brake, nor make any evasive maneuvers through the testimony of a City of North Charleston police officer and several South Carolina Highway Patrolmen, including members of the Multi-disciplinary Accident Investigation Team (MAIT). The officers testified that they could not opine whether the driver was conscious, awake, or asleep at the time of the incident and that it was possible for a vehicle to drive straight if the driver was slumped over the steering wheel. The accident reconstructionist, Officer Anthony King of the North Charleston Police Department, testified that the road is constructed with a slope higher in the middle, which could cause a vehicle to veer to one side within seconds of losing control. During cross examination, King admitted that the road grade was 1.8% and the slope of this particular section of road drops about 18 feet in a 1,000 foot span. In concluding that the Defendant's truck hit the Mustang squarely from behind, King was unable to testify whether Defendant was traveling straight within his lane or whether Defendant was traveling from the left or right lane prior to the collision. King characterized the collision as a "fender bender, but with excessive speed."

The victim's son testified that Defendant and the victim were never acquainted and that he knew of no reason that Defendant would want to harm his father. The pathologist testified that the victim died instantly as a result of the collision from an aortic transection.

The Solicitor's Office investigator testified that Defendant usually worked about 4 days a week from approximately 6:00 AM to 4:30 PM. Additionally, two eyewitnesses testified to hearing and observing Defendant's truck traveling at a high rate of speed and hearing the collision and a third eyewitness who observed Defendant's truck immediately after the collision. No witnesses testified to observing Defendant consciously driving before, during, or after the accident. Three witness testified that Defendant was discovered unconscious immediately following the accident with his head resting on the horn.

At the close of the State's case, Defendant moved for a directed verdict and argued that the State failed to present any evidence of Defendant's willful, heedless, conscious, and reckless disregard for the safety of others. The State argued that reckless homicide has no criminal intent requirement; that driving a car is a conscious activity, sufficient to prove conscious disregard for the safety of others; and that lack of memory is insufficient to prove lack of consciousness. Specifically, the Defense argued that while the State proved Defendant drove his truck full throttle at the time of the collision, no evidence showed Defendant's criminal intent to drive at a high rate of speed. The State presented no evidence of Defendant's motive to drive fast; no explanation for the collision; no evidence that Defendant was conscious and aware at the time of the accident; and no evidence that Defendant was able to choose his actions.

Defendant submitted and filed a Memorandum in Support of Defendant's Motion for Directed Verdict enumerating the statutes and relevant case law. The Court opined that Defendant's failure to brake and stop before the collision was evidence of recklessness and that Defendant was likely conscious and in control because the car did not veer off. The Court denied Defendant's Motion.

Defendant John Biggs testified on his own behalf that he had no memory of the accident or the moments leading up to the accident. He testified that he has never driven a car that fast, has never been cited for any driving violation, and his only adverse interaction with law enforcement was when he was required by law to get a license at the age of eighteen (18).[1] He testified that he was a maintenance man by trade with a high mechanical aptitude. Although he is blind in his right eye and is required to wear a corrective lens in his left eye, Biggs testified he believed he was wearing his contact at the time because he was wearing his same contact that was provided to him at the hospital. Biggs testified regarding his medical history that he remembers having a single panic attack more than a decade before this accident. He testified that he has never fallen asleep at the wheel and because he has lived as a bachelor his entire life he is unaware if he sleepwalks, but was told by his adopted parents that he had a sleep walking episode when he was 9 or 10 years old. He also testified he does not drink alcohol or use drugs; has never been suicidal or suffered from depression; and has no other mental health issues. During his testimony, Biggs relayed that he did not know the victim or many people in the area. He also testified that because he had only lived in North Charleston for two months, he was not very familiar with the area of the crash, forgot to bring his cellphone and cigarettes, and had no idea why he would be on the roadway at that time. Biggs testified further that he was seriously injured as a result of the accident and sustained multiple facial fractures, lost a majority of his teeth, broke both ankles and legs, cracked multiple ribs, had his spleen removed.. Defendant's blood tests were negative for both drugs and alcohol.

[1] At the time of trial. Biggs was 49 years old.

The Court charged the jury on the elements of reckless homicide from *State v. Rowell*, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997): "Reckless disregard for the safety of others means an indifference to the consequences or results of one's acts; a conscious indifference to the rights and safety of others; or a conscious failure to exercise ordinary care." *Id.* (citing *State v. Tucker*, 273 S.C. 736, 259 S.E.2d 414 (1979)). The Court further charged that consciousness was awareness and more than mere accident or carelessness. The Court did not instruct the jury that recklessness is more than mere negligence. The Court additionally instructed the jury that the State was not required to prove intent and that intent is not an element of the crime. The Court denied Defendant's requests to charge S.C. Code Ann. Section 56-5-6170 (2016); accident; that recklessness does not lie in speed alone; and that civil and traffic violations tending to prove negligence do not prove criminal recklessness—Court's Exhibits 1 & 2.

II. ARGUMENT

A. THE COURT ERRONEOUSLY CHARGED THE JURY THAT THE STATE WAS NOT REQUIRED TO PROVE CRIMINAL INTENT

The Court erroneously instructed the jury that the State was not required to prove intent by specifically charging that "[i]ntent is not an element of the crime." Further, the Court erred by failing to charge the jury on accident; that recklessness does not lie in speed alone; and that civil and traffic violations tending to prove negligence do not prove criminal recklessness.

The Court's instructions conflate civil and criminal concepts of liability and equate negligence and recklessness. Moreover, the Court's instruction that the State is not required to prove intent forecloses the possibility that the jury could acquit Defendant if they find that Defendant did not intentionally, consciously, and recklessly disregard the safety of

others. The Court confused the jury by instructing them that if Defendant intended to drive in this case, they must find him guilty of reckless homicide. Additionally, the Court's charge confuses reckless criminal intent with a strict liability offense.

The Defense argued that the evidence failed to prove that Defendant intended to drive with reckless disregard for the safety of others. The Court mistakenly interpreted the statute to mean that in this factual scenario, if a defendant intends to drive, he intends to commit reckless vehicular homicide. Similarly, the Court erroneously interpreted the case law to hold that a defendant need not intend the consequences of his driving in order to be guilty of reckless homicide; the defendant need not intend to commit a vehicular homicide. The defense argued that recklessness is a specific *mens rea* that requires a conscious awareness of wrongdoing and willing, heedless indifference to its consequences.

Failure to elaborate on the general criminal intent instruction is error. *See generally McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361–62 (2008) (in homicide by child abuse case, trial court's recitation of the general criminal intent charge alone confused the jury by referencing mere negligence and otherwise failing to clarify the particular mental state required for the specific crime).

If any evidence exists to support a charge, then it should be given. *State v. Burris*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." *State v. Peer*, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). "Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "It is error to give

instructions which may confuse or mislead the jury." *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990).

"To convict an individual of reckless homicide, the State must prove the individual was driving a vehicle 'in reckless disregard of the safety of others.'" *Rowell*, 326 S.C. at 315, 487 S.E.2d at 186 (quoting S.C. Code Ann. § 56–5–2910 (Supp. 1996)). "Reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes a *conscious* failure to exercise due care or ordinary care or a *conscious* indifference to the rights and safety of others or a reckless disregard thereof." *Id.* (citing *State v. Tucker*, 273 S.C. 736, 259 S.E.2d 414 (1979)) (emphasis added). "[T]he State must prove beyond a reasonable doubt that the actions of the defendant were culpable, which excludes the theories of an unavoidable accident or one brought about by an intervening cause." *Id.* at 739, 259 S.E.2d at 415–16.

"The criminal law ordinarily requires that the defendant possess both 'an evil meaning mind [and] an evil doing hand' before liability is imposed." *Rowell*, 326 S.C. at 315, 487 S.E.2d at 186 (quoting *State v. Jefferies*, 316 S.C. 13, 446 S.E.2d 427 (1994)). Criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense. *United States v. Bailey*, 444 U.S. 394, 402, 100 S. Ct. 624, 630–31, 62 L.Ed.2d 575 (1980) (cited in McAninch & Fairey, *The Criminal Law of South Carolina* 1 (1996)). "A defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." *State v. Fennell*, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal

and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States,* 342 U.S. 246, 250, 72 S. Ct. 240, 243, 96 L. Ed. 288 (1952).

Mens rea is the yardstick by which we measure criminal intent. "The required *mens rea* for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence." *Jeffries*, 316 S.C. at 18, 446 S.E.2d at 430. *See State v. Rowell*, 321 S.C. 114, 119-20, 467 S.E.2d 247, 250 (Ct. App. 1995), *rev'd*, 326 S.C. 313, 487 S.E.2d 185 (1997).[2] "[T]he legislature, if it so chooses, may make an act or omission a crime regardless of fault. . . . These crimes are referred to commonly as 'strict liability' offenses." *State v. Ferguson*, 302 S.C. 269, 271–72, 395 S.E.2d 182, 183 (1990). Trial courts commit error in ruling that crimes that are not specifically strict liability require no mental state: "In offenses at common law, and under statutes which do not disclose a contrary legislative purpose, to constitute a crime, the act must be accompanied by a criminal intent, or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent." *State v. American Agricultural Chem. Co.*, 118 S.C. 333, 337, 110 S.E. 800 (1922).

In a reckless homicide case, "heedlessness or willfulness is an essential element of the offense charged." *State v. Jenkins*, 249 S.C. 570, 576, 155 S.E.2d 624, 627 (1967). The defendant's subjective state of mind is an indispensable requirement to prove recklessness: "In cases where recklessness, wantonness, or wilfulness is in issue it is frequently

[2] The holding of *State v. Rowell*, 321 S.C. 114, 119, 467 S.E.2d 247, 250 (Ct. App. 1995) was reversed on appeal based on the South Carolina Supreme Court's interpretation of the facts presented at trial. *State v. Rowell*, 326 S.C. 313, 317, 487 S.E.2d 185, 187 (1997). The Supreme Court did not reverse the Court of Appeals' legal conclusions or summary of the law. *See id.*

necessary, or desirable in order to establish a strong case, to show not only an indifference to consequences at the instant the accident occurred, but also a state of mind, such as heedlessness or willfulness, that persisted at least several minutes prior to the accident." *Id.* (quoting 46 A.L.R. (2d), p. 14.) (internal quotations omitted). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." *State v. Rachels*, 218 S.C. 1, 8, 61 S.E.2d 249, 252 (1950).

Reckless homicide case law clearly differentiates between negligence and recklessness. "[I]n a criminal case, the State cannot rely on civil concepts of negligence and recklessness, that is, statutory violations, to meet its burden of proving the defendant's state of mind." *Rowell*, 326 S.C. at 317, 487 S.E.2d at 187. The State must prove *heedlessness* or *willfulness*; mere negligence does not support the conviction. *DeLee v. Knight*, 266 S.C. 103, 110, 221 S.E.2d 844, 846 (1975) (citing *State v. Phillips*, 226 S.C. 297, 84 S.E.2d 855 (1954)). "[I]n a criminal case, the State cannot rely on civil concepts of negligence and recklessness, that is, statutory violations, to meet its burden of proving the defendant's state of mind. The import of the terms negligence and recklessness as used in the civil law and in the criminal law are neither equivalent nor interchangeable." *Rowell*, 326 S.C. at 317, 487 S.E.2d at 187. The State must show a much higher degree of culpability than mere ordinary negligence. *See Rowell*, 321 S.C. at 123, 467 S.E.2d at 252.

Moreover, the Court's erroneous charge that intent is not an element of the offense is prejudicial because reckless criminal intent was the central issue in this case; the jury is required to find Defendant's reckless criminal intent beyond a reasonable doubt in order to convict Defendant. *See generally State v. Lowry*, 376 S.C. 499, 507-508, 657 S.E.2d 760,

764-65 (2008). But for the Court's erroneous charge, the outcome of the trial would have been different. *See id.* The Court's charge that the State was not required to prove intent and the State's failure to prove reckless criminal intent was plain error that confused the jury and precluded a fair verdict.

B. THE COURT ERRED BY DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT

The Court should have granted Defendant's Motion for Directed Verdict because the State's circumstantial evidence failed to prove Defendant's guilt to the exclusion of any other reasonable hypothesis. *See State v. Dobson*, 281 S.C. 36, 38, 314 S.E.2d 310, 311 (1984) (citing *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627 (1982) ("[W]hen the case rests entirely on circumstantial evidence, a directed verdict is proper when the evidence fails to positively prove the guilt of the accused to the exclusion of any other reasonable hypothesis."). The State's theory of the case was that because Defendant drove fast while staying on the road, he is guilty of reckless homicide; the essence of the State's case relied on speed alone to prove Defendant's reckless disregard for the safety of others. However, evidence that Defendant drove 101.5 miles per hour, without breaking or attempting any evasive actions, causing a relatively square impact fails to positively prove Defendant intentionally, willfully, heedlessly, consciously, and recklessly committed vehicular homicide. The State failed to prove Defendant's criminal intent.

The State presented evidence that the Biggs was behind the wheel of the Chevrolet Silverado that was speeding on Rivers Avenue at the time of the accident. The State presented no other evidence of reckless conduct, but merely a cause-in-fact legal theory of guilt, with no evidence of criminal intent. "[T]he State may not rely simply on the fact of

the accident itself to establish recklessness." *State v. McConnell*, 316 S.C. 272, 276, 449 S.E.2d 778, 780 (Ct. App. 1994).

Even if the State can show that Defendant violated driving statutes and that Defendant's driving was the cause of the accident, the State cannot explain why the accident happened. "The state cannot be allowed to infer intent in a case where, for the purposes of reviewing a motion for directed verdict, there is no explanation for the accident." *Rowell*, 321 S.C. at 122, 467 S.E.2d at 251–52. Simply put, the State is unable to prove that Defendant sped into the victim's car because of his conscious, willful, and reckless disregard for the safety of the victim.

Moreover, the facts of other reckless homicide cases within South Carolina are distinguishable from the present case. In most reckless homicide cases, drivers were persistently speeding, driving erratically, violating the traffic laws, or under the influence of alcohol or drugs. *See Knight*, 266 S.C. at 110 ("The evidence of persistent speed, lack of control, which resulted in an unexplained departure from the road, and a pattern of careless weaving from one side of the road to the other, while operating a bus overcrowded with young children, supports a finding of criminal negligence."); *Tucker*, 273 S.C. at 737-38 (the State presented evidence that the defendant was speeding, weaving in and out of traffic, and fishtailed for approximately nine-tenths of a mile before the site of the collision); *McConnell*, 316 S.C. at 273-75 (evidence that motorcycle that may have been driven by inexperienced driver or driver with a BAC of 0.133 was speeding, ran a stop sign, struck a curb, and crashed into a garage); *State v. Hicks*, 305 S.C. 277 (Ct. App. 1991) (driver admitted to drinking before the accident, made uncorroborated statement that he thought he hit a mailbox or a deer, and drove home without reporting the incident to the

authorities); *Jenkins*, 249 S.C. at 571-574 (witnesses testified to erratic driving up to 15 minutes prior to accident and driver who was speeding up to a visible railroad crossing with children on bicycles in plain view for eight tenths of a mile had a faint odor of alcohol on him and his eyes were glassy, his pupils enlarged, and exhibited other signs of intoxication); *State v. Horton*, 359 S.C. 555 (2004) (driver sped up to pedestrians, appeared to be under the influence based on odor of alcohol, had alcohol, THC, opiate derivatives, and cocaine metabolite in his system, was unemotional after the accident, and testimony was presented that driver said he hit pedestrian "because he wouldn't get out of my way."). In this case, the State proved only that the Chevrolet Silverado that Defendant had operated was speeding moments before the crash and offered no other evidence indicating reckless disregard for the safety of others.

C. THE COURT SHOULD HAVE GRANTED A MISTRIAL BASED ON IMPERMISSIBLE BURDEN SHIFTING

In response to defense counsel's argument asserting the State failed to prove conscious disregard beyond a reasonable doubt, in his closing argument the solicitor stated: "If there was medical evidence, you would have heard about it." The Solicitor argued to the jury that Defendant presented no evidence negating his reckless intent, therefore he has no medical defense to the charge. The Solicitor's comment invited the jury to believe that Defendant was required to disprove criminal intent and provide a defense in order to prove his innocence.

"The trial court has broad discretion in dealing with the propriety of the solicitor's closing argument." *State v. McFadden*, 318 S.C. 404, 458 S.E.2d 61 (Ct. App. 1995). "The State may not comment on a defendant's exercise of a constitutional right. Specifically, the Solicitor must not comment, either directly or indirectly, on a defendant's silence, failure

to testify, or failure to present a defense." *Id.* at 640, 539 S.E.2d at 393. Furthermore, the South Carolina Supreme Court has stated that "invocation of the missing witness rule should be limited to fact witnesses, and it should not be invoked as to medical, psychological, psychiatric, or similar medical expert *opinion* witnesses." *Way v. State*, 410 S.C. 377, 384 (2014).

The facts of this case are most analogous to *In re Stacy Ray A.*, 303 S.C. 291, 400 S.E.2d 141 (1991). In *In re Stacy Ray A.*, the defendant's car was discovered in a head-on position to the victim's car in the victim's lane of traffic. 303 S.C. 291, 292, 400 S.E.2d 141, 142. Although there was no evidence of speeding, it appeared that the defendant's car crossed the center lane to collide with the victim's vehicle. *Id.* No witnesses observed the collision and the defendant was disoriented and stated that he did not know what happened. *Id.* The South Carolina Supreme Court held that mere statutory violations, such as crossing the center line do not prove reckless criminal intent and that the State failed to prove the defendant's recklessness beyond a reasonable doubt. *Id.* at 294, 400 S.E.2d at 143. Specifically, the Court held that evidence of a collision and driving violation is insufficient to prove reckless homicide. *Id.* at 293–94, 400 S.E.2d at 142. The State could not explain why the defendant's vehicle crossed the center lane to cause the traffic collision. In holding that the State failed to prove reckless criminal intent, the court explained:

> The only evidence we have here is the physical fact of the collision, with the cars coming to rest on [the victim's] side of the road. The State would have this Court view this physical fact, then address the defendant: it appears you may have been at fault here; prove to us you were not. The State may not rest upon such inferences and shift the burden of proof onto the defendant.

> Too many unanswered questions exist in this case, none of which the State has answered. [The defendant] could have blacked out; could have swerved to miss a pedestrian in his traffic lane; or could have had a blown left tire which caused his car to swerve. Instead of presuming any of these scenarios and requiring the State to present evidence making them less probable; the trial judge here has *presumed* [the defendant] drove recklessly and required him to disprove it. This is a presumption of guilt rather than of innocence, and may not be allowed to stand.

Id. at 293–94, 400 S.E.2d at 142–43.

In the present case, the State presents no explanation for why Defendant's car accelerated into the victim's vehicle causing the accident. Like Stacy Ray A., Defendant could have blacked out, had a seizure, lost consciousness, or experienced any number of unavoidable forces that ultimately caused the accident. Questions regarding the cause of the accident signify the State's failure to prove the element of criminal intent beyond a reasonable doubt. The Solicitor's statement confused the burden of proof to the jury arguing that if a medical defense was possible, Defendant would have presented a medical expert to prove that Defendant was not criminally liable for the incident. Requiring a Defendant to prove his innocence and to ultimately disprove reckless criminal intent is impermissible burden-shifting requiring a mistrial.

III. CONCLUSION

The Court's jury charge was erroneous because the Court instructed the jury that the State was not required to prove intent and that intent was not an element of the crime. The Court should have directed a verdict of not guilty because the State failed to prove Defendant's reckless criminal intent. The Court erred by failing to grant his Motion for Mistrial because the State made a burden shifting comment in its closing argument.

Based on the above, Defendant moves for a new trial, pursuant to S.C. Code Ann. Section 17-23-110 (2016) and Rule 29, S.C. R. Crim. P.

Respectfully submitted,

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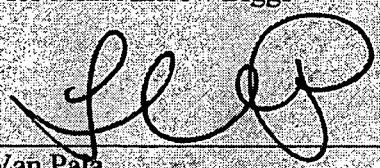

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Dated: December 21, 2016.