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March 31, 2017

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MAR 31 2017

S.C. SUPREME COURT

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

Re: Bryan Rearick vs. State of South Carolina
No. 16-7406

Dear Mr. Harris:

Enclosed please find an original and ten (10) copies of the Reply Brief to the Brief in Opposition, with Proof of Service, regarding the above-captioned matter.

Thank you for your kind consideration in this matter.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/cnp

Enclosure

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

IN THE
Supreme Court of the United States
October Term, 2016

BRYAN REARICK,

Petitioner,

V.

STATE OF SOUTH CAROLINA,

Respondent.

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S.C. SUPREME COURT

**REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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ARGUMENT IN REPLY

Petitioner will respond to four assertions by the Attorney General in its brief in opposition. First, the Attorney General argues that the Petition for Writ of Certiorari should be denied because the South Carolina Supreme Court identified other remedies for a double jeopardy violation: “Specifically, (1) a petition for federal habeas corpus relief, or (2) a petition for [The South Carolina Supreme Court] to issue an extraordinary writ.” Brief and Opposition at 7-8.

However, unlike an indigent defendant on direct appeal to the South Carolina Supreme Court, there is not any right to the appointment of counsel for an indigent person in a non-capital action seeking federal habeas corpus relief. 28 U.S.C. §2254, Rule 8(c). Similarly, there is also no statutory right to counsel for an indigent person seeking an extraordinary writ -- an action for

a writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court. See, Article V, §5, of the South Carolina Constitution. Further, an extraordinary writ in the original jurisdiction of the South Carolina Supreme Court, to have any possibility of success, would also require the assistance of counsel where there is no right to counsel. Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991).

Second, the Attorney General also proclaims that “Petitioner’s assertion of ‘an entrenched split’ in authority does not signal an issue worthy of discretionary certiorari review. Though courts addressing the applicability of *Abney* have reached different results, the split merely reflects a difference in state decisions on **state** appellate jurisdiction, not a federal issue.” Brief in Opposition at 7. (Respondent’s emphasis).

An entrenched split does make this case worthy of discretionary certiorari review, and the split in the states involves whether Abney v. United States, 431 U.S. 651 (1977) provides that a true double jeopardy claim can only be truly vindicated by the right to an immediate appeal. See Petition for writ of certiorari at 9-11.

Third, the Attorney General also states that “[t]he double jeopardy issue could be raised on direct appeal if Petitioner was tried and convicted.” Brief and Opposition at 8. However, that is the essence of Petitioner’s claim that his protection against double jeopardy cannot be vindicated under Abney v. United States, 431 U.S. 651 (1977), unless he has the right to an immediate appeal that was denied in State v. Rearick, 447 S.C. 391, 790 S.E.2d 192 (2016).

Petitioner should not have to undergo the stress of another trial where the trial judge erroneously granted a mistrial over his objection because the prosecutor -- who called his case to trial in the first place -- was not prepared for trial. Justice delayed is justice denied is a two-way street.

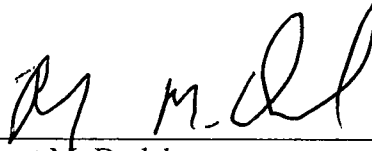
Fourth, and finally, the Attorney General asserts “[t]he trial judge knew the State had sufficiently laid out its case against Petitioner, and the mistrial was declared to afford Petitioner more time to prepare his defense, as well as again assert his right to a jury trial.” Brief in Opposition at 9, n. 1. This assertion is simply not true. The mistrial was granted over Petitioner’s vehement objection at the time the prosecutor wanted a continuance as a remedy for its inability to marshal its evidence against Petitioner.

Further, Petitioner’s desire to have a bench trial with a judge rather than a potentially prejudiced jury on the hot button issue of Felony Driving Under the Influence Causing Death was a strategic choice. It was apparent the trial judge was protecting the State, and not the defense. To the extent the trial judge avoided making the looming difficult decision of directing a verdict in Petitioner’s favor by declaring a mistrial that should hardly redound to the State’s benefit here.

CONCLUSION

For the reasons articulated in the Petition for Writ of Certiorari, and in this Reply in Support of the Petition for Writ of Certiorari, this Court should respectfully grant the writ.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

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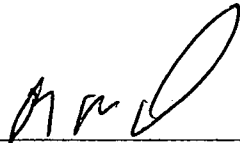
V.

THE STATE OF SOUTH CAROLINA,

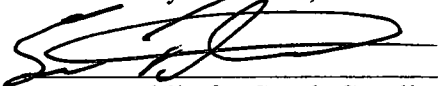
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply Brief to the Brief in Opposition in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of March, 2017.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of March, 2017.



Notary Public for South Carolina
My Commission Expires: October 30, 2022.