STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Lexington County
Hon. Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2017-001037

The State, Respondent,

v.

David A. Land, Petitioner.

Opinion No. 5441 (S.C. Ct. App. filed September 28, 2016)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural Statement of the Case.[1]

Factual Background

Two Agents with the State Law Enforcement Division (SLED) conducted undercover online operations targeting people distributing child pornography using peer-to-peer file sharing programs. Using a program utilized by the Internet Crimes Against Children Task Force, Agents Dove and McKellar each began searches looking for individuals with child pornography available to be shared on the file sharing networks such as LimeWire, Phex, FrostWire and others. (T.141; 218-220; R. 104-106). In searching for distributors of child pornography, the programs search out specific SHA values or Hash values known to be associated with images of child pornography.[2] No matter the title of a file, the SHA value will remain constant unless something within the file changes. (T.231-232; R.117-118).

Both Agent Dove and Agent McKellar searched a computer and found images with SHA values known to represent child pornography. Agent Dove explained he downloaded the file and then viewed them to verify they were what he believed to be child pornography. (T.145; R. 31). In doing so, he would also obtain the internet protocol address or IP address. The IP address is similar to a phone number. Only one person can have one assigned at a time and it will give you the location where the computer was being used. Further, he obtained the GUID, a global unique identifying number which is generated when the software—LimeWire in the instant case—is

[1] The State only agrees with the portion labeled Procedural History and does not make any statement regarding the accuracy of Petitioner's Factual History.

[2] A SHA value or Hash value is a unique identifier for a file derived by a mathematical formula. Every file would have a unique SHA or Hash value, similar to the uniqueness of DNA. (T.141; 231; R.27; 117).

installed on the computer. The GUID is tied to that software and will not change even if the location of the computer or its IP address changes.

On December 7, 2009, Agent Dove conducted an online investigation and found a computer in Lexington, South Carolina with likely child pornography available for distribution. (T.149; R.35). Agent Dove downloaded four files from the computer. (T.178; R.64). One of the downloaded images was titled "MafiaSex.Ru_Children_Kids_Hard_000300_ChildPorn_Collection_10_Pussy_Illegal_Preteen_Underage_Lolita_Kiddy_Child_Incest_XXX_Porno_Gay_Fuck_Young_Naked_Nude_Little_Girl(1).jpg." (Indictment; T.186; R. 72). The title contained numerous words typically associated with child pornography. (T.186; R. 72). Agent Dove obtained the IP address and GUID for the computer running the LimeWire program from which he downloaded the above file. (T.189; R. 75).

Agent McKellar conducted online investigations on December 4, 2009. During her investigation, she located a computer which shared known child pornography and was able to download several files from the computer. (T.221-222; R. 107-108). The computer had an IP address in Lexington County, South Carolina. One file she downloaded was titled: "zooskool-Pthc((LELIA))11y.o with dad teach to fuck with sound.mpg." (Indictment; T.229; R. 2; 115). Agent McKellar obtained both the IP address and GUID from the computer.

On January 27, 2010, Agent McKellar again conducted an online investigation and located a computer distributing child pornography. It had the same GUID as the computer distributing child pornography on December 4, 2009, though the IP address had since changed. (T.235; R. 121). One of the files she downloaded during this investigation was titled: "8yr girl and 12 yr boy are fucking lolitas lolita preteen sex child underage Pedo Kiddy Lolita Child Porno.avi.mpg." (Indictment; T.240; R. 126).

Agents Dove and McKellar realized they had access computers using IP addresses in neighboring apartments at the same location. (T.244; R.130). During their investigation of the IP address and its location, they found an open wireless network called ADMIN. (T.246-247; R.132-133). They also determined the same GUID from the computer distributing child pornography was located previously in Ft. Campbell. (T.192; R. 78). After conducting search warrants in Lexington County at the locations of the IP address, the agents determined the defendant may be located in Greenwood, South Carolina. (T.247; R. 133).

Agent McKellar made contact with Petitioner and his grandparents in Greenwood. (T.248-249; R. 134-135). Agent McKellar interviewed Petitioner. He admitted being familiar with file sharing and discussed using LimeWire, including during the time when he was located at Ft. Campbell in the military. (T.255-256; R. 141-142). He also admitted travelling to Lexington to visit his mother as well as accessing an unsecured wireless network named ADMIN. (T.265; R. 151). Petitioner admitted intentionally receiving child pornography after using specific search terms of pre-teen and Lolita. (T.266; 269; R. 152; 155). Petitioner acknowledged and admitted downloading the three files Agent McKellar was able to download from his computer on January 27, 2010. (T.268; R. 154). Finally, he admitted after looking at the hundreds of files of child pornography he would download while in Lexington, he would perform a system restore to delete everything from his computer. (T.269; R. 155).

ARGUMENT

I. The Court of Appeals applied the correct legal standard in determining the trial court properly denied Petitioner's motion for a directed verdict. (Petitioner's Question II).

The Court of Appeals correctly applied the appropriate legal standard articulated by this Court in reviewing the trial court's denial of Petitioner's motion for a directed verdict. Petitioner asks this Court to depart from its longstanding jurisprudence and require a weighing of the evidence by the trial court. The weight of the evidence is solely in the province of the jury and should not be considered by a court, especially on appeal. This Court has articulated the appropriate standard by which a directed verdict motion is to be judged by both jury and court, and there is no reason to depart from the standard.

Over sixty years ago, in State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955), this Court addressed the distinction between a trial judge's consideration of circumstantial evidence at the directed verdict stage of a trial and a jury's consideration of circumstantial evidence during deliberations. By comparison, regarding the jury's consideration of circumstantial evidence, this Court instructed:

> [I]t is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one; and if, assuming them to be true, they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Id. Regarding the trial judge's consideration of circumstantial evidence at the directed verdict stage, this Court explained:

> But on a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence **which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced**.

Id. at 329, 89 S.E.2d at 926 (emphasis added). Continuing: "It must be remembered . . . that there is one test by which circumstantial evidence is to be measured by the jury in its deliberations, and quite another by which it is to be measured by the trial judge in his consideration of the accused's motion for a directed verdict." Littlejohn, 228 S.C. at 328, 89 S.E.2d at 926.

This Court recently reiterated the applicable standard for considering a directed verdict motion: "[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) (quoting Littlejohn, 228 S.C. 324, 89 S.E.2d 924). "Therefore, although the jury must consider alternative hypotheses, **the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt**." Id. (emphasis added). "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id.

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, **a rational trier of fact** could find all the elements beyond a reasonable doubt. See State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding "any rational trier of

fact could have found all the elements of the crime beyond a reasonable doubt" in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

This Court has recently reaffirmed the fact neither the trial court nor the appellate court are concerned with the weight of the evidence. This Court stated: "In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight." State v. Phillips, 416 S.C. 184, 192, 785 S.E.2d 448, 452 (2016). This is consistent with the rulings of the United States Supreme Court:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the **trier of fact** fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson, 443 U.S. at 319 (italics in original) (bold emphasis added). Notably, the United Stated Supreme Court, as has this Court, recognized that the responsibility to weigh the evidence falls exclusively to the jury, not the trial judge and not the appellate court.

The United States Supreme Court made the following observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, **a jury is asked to weigh** the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, **the jury must use its experience with people and events in weighing the probabilities**. If the jury is convinced beyond a reasonable doubt, we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) (emphasis added) cited with approval in Jackson, 443 U.S. at 317 n.9.

Petitioner focuses on the word "substantial" in this Court's pronouncement of the standard of review for directed verdict motions. The word "substantial" does not indicate a need to weigh the evidence. As discussed above, weighing of the evidence by the courts is expressly prohibited. Instead, "substantial" means the evidence must be "of substance" such that the total of the circumstantial evidence would allow a reasonable jury to find all the elements of a crime beyond a reasonable doubt and not leave any of the determinations of guilt to "mere suspicion." "Substantial circumstantial evidence" must remove the determination of guilt from the realm of conjecture and speculation. See e.g. Boone v. State, 282 Ark. 274, 277, 668 S.W.2d 17, 20 (1984) (defining "substantial evidence" to mean "whether the jury could have reached its conclusion without having to resort to speculation or conjecture."). Additionally, North Carolina has explained: "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." State v. Mann, 560 S.E.2d 776, 781 (2002). The Court in Mann continued: "As to whether substantial evidence exists, the question for the trial court **is not one of weight**, but of the sufficiency of the evidence." Id. (emphasis added). The Supreme Court of Montana explains: "We have defined 'substantial' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" State v. Bernhardt, 813 P.2d 436, 437 (1991).

Accordingly, the emphasis is not on whether, after weighing the circumstantial evidence, it can be deemed substantial. The emphasis of the appellate court reviewing the denial of a motion for directed verdict is whether there is any evidence from which a reasonable jury could find all the elements beyond a reasonable doubt. This is the standard properly applied by the Court of Appeals in the instant case. This Court should deny the Petition for Writ of Certiorari as to Petitioner's Question II.

II. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict. (Petitioner's Question I).

The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion for a directed verdict. Petitioner contends the State failed to prove he intended to share the child pornography he downloaded and knew the items could be shared. First, the State presented direct evidence Petitioner violated section 16-15-405(A)(2) of the South Carolina Code by soliciting and receiving files containing a visual representation of a minor engaged in sexual activity—child pornography. Additionally, Petitioner contends the State failed to establish he had the requisite *mens rea* of knowingly distributing the child pornography. The State submits the proper standard is not one of knowing distribution. In addition, the establishment of intent and *mens rea* is quintessentially a question for the jury. Further, even if the proper *mens rea* requires knowing distribution, the State presented ample evidence from which a reasonable jury could conclude Petitioner guilty beyond a reasonable doubt.

As discussed above the standard for considering the denial of a motion for a directed verdict was recently established by this Court. "On appeal from the denial of a directed verdict, [the Appellate] Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). As this Court recently reiterated: "[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced."" State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) (quoting State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955)). "Therefore, although the jury must consider alternative hypotheses, the court must concern itself

solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." Id. "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id.

> Section 16-15-405 provides:
>
> (A) An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:
>
> > (1) records, photographs, films, develops, duplicates, produces, or creates digital electronic file material that contains a visual representation of a minor engaged in sexual activity; or
> >
> > (2) **distributes**, transports, exhibits, **receives**, sells, purchases, exchanges, or **solicits** material that contains a visual representation of a minor engaged in sexual activity.

S.C. Code Ann. § 16-15-405 (Supp. 2013) (emphasis added).

The statute prohibiting second degree sexual exploitation of a minor expressly requires the State prove the defendant knew the character or content of the material but does not place the "knowing" requirement prior to the acts the defendant is prohibited from performing. The legislature chose to make "knowing the character or content of the material" an element of the crime of second degree sexual exploitation of a minor without requiring a showing he knowingly committed the acts forbidden by the statute. Because the legislature placed the knowing requirement in one part of the statute related to the element of the content or character of the material, it clearly did not intend to have a knowing requirement associated with the acts committed by the defendant. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or

of the alternative.' "); see also State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute.").

Further, the proper construction of the statute is in light of the intended purpose of the statute and the legislative intent behind the statute. It is clear the legislature sought to criminalize any actions taken by someone who knows they are dealing with child pornography. The analysis of the intent or *mens rea* required should be similar to this Court's analysis in State v. Jenkins, 278 S.C. 219, 294 S.E.2d 44 (1982), analyzing old unlawful conduct toward a child statute. This Court relying on prior case law explained:

> "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 a duty or to consequences as is regarded by the law as equivalent to a criminal intent. The Statute, however, may forbid the doing of an act, and make its commission a crime, regardless of the intent or knowledge of the doer, and, if such legislative intention appears, the Court must give it effect, although the intent of the doer may have been innocent."

Id. at 221, 294 S.E.2d at 45 (quoting State v. American Agr. Chemical Co., 118 S.C. 333, 110 S.E. 800, 802 (1922)).

The Court continued:

> "The legislature ... may forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer.... This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the state, where the word, 'knowingly' or other apt words are not employed to indicate that knowledge is an essential element of the crime charged. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of

> its criminal character, are immaterial circumstances on the question of guilt."

Id. at 221-222, 294 S.E.2d at 45 (quoting Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392, 395 (1973)). This Court ultimately concluded the *mens rea* was not one of knowledge because the statute did not expressly require knowledge and the nature of statute was to provide protection to children, thereby prohibiting the acts even without knowledge of their criminal nature.

The same ultimate conclusion exists in the instant case with regard to the crime of second degree sexual exploitation of a minor. The legislature specifically did not include a "knowing" requirement even though in the same statute it did require knowledge for one element. The legislature passed the law to curb the scourge of child pornography and to protect children from the harms associated with being an initial victim and being revictimized every time the images are distributed, transported, exhibited, received, sold, purchased, exchanged, or solicited. Accordingly, this Court should deny the petition for writ of certiorari because the proper *mens rea* is not that the defendant knowingly acted, but merely that he knew the content and subsequently acted in one of the way listed by section 16-15-405(A)(2), even if he acted in ignorance of its criminal character.[3]

In State v. Tuckness, the South Carolina Supreme Court examined criminal intent:

> The question of criminal intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

[3] It is without question that Petitioner knew the content of the material as he admitted downloading the files as well as hundreds of other files containing child pornography.

State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) (emphasis added) (citations omitted). Thus, the issue of whether a defendant possessed the requisite intent at the time a crime was committed is typically a question for jury determination because, without a statement of intent by an actor, proof of intent must be determined by inferences from conduct. State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971). Therefore, the determination of intent and *mens rea* is the quintessential jury determination and, as a result, this Court should deny the Petition for Writ of Certiorari because the Court of Appeals determined the issue was properly submitted to the jury for consideration.

Even if the proper *mens rea* of the crime of sexual exploitation of a minor in the second degree is knowledge, there was ample evidence presented by the State demonstrating Petitioner's knowledge and intent to perform one or more of the acts specified in section 16-15-405(A)(2). The statute criminalizes distributing, transporting, exhibiting, receiving, selling, purchasing, exchanging, or soliciting child pornography. The State merely must demonstrate Petitioner performed one of these acts.[4]

Initially, Petitioner's statement, which was clearly corroborated by the evidence of child pornography being downloaded by Agent's McKellar and Dove, constituted sufficient **direct** evidence warranting sending the case to the jury.[5] His statement contains admissions he knowingly solicited and received material he knew to contain a visual representation of a minor engaged in sexual activity. He admitted using LimeWire. He admitted searching, using terms "pre-teen" and "Lolita," for child pornography with the intent to have someone else send it to him, thereby **soliciting**. (T. 269; R. 155). He admitted downloading child pornography;

[4] It should be noted the indictments contained all the various acts listed under section 16-15-405(A)(2), so there is no argument Petitioner was not on proper notice.

[5] If the Court relies upon the admissions by Petitioner in his statement as direct evidence of his guilt the entire discussion of "substantial circumstantial evidence" is moot.

downloading not only the specific files later distributed to undercover agents, but hundreds of files of child pornography. (T.266-267; 268; R. 152-153; 154). He admitted the files were the ones he sought and that he **intentionally received** them through the downloads. (T.266; R. 152). As a result, Petitioner's statement was sufficient direct evidence of his violation of section 16-15-405(A)(2) to warrant sending the case to the jury.[6]

Even considering just the act of distribution and ignoring the direct evidence of Petitioner soliciting and receiving the child pornography in violation of section 16-15-405(A)(2), the State presented ample evidence to send the issue to a jury. First and foremost, Petitioner used a **file sharing** program to look for and solicit, download and receive, and distribute child pornography. File sharing programs, also known as peer-to-peer file sharing programs, enable computer users to share and receive electronic files, including images, videos, and audio files, with a network of other users. (T.140; R. 26). As the court stated in United States v. Bastian, 650 F.Supp.2d 849, 861 (N.D.Iowa 2009): "It is axiomatic that a person who installs a file-sharing program on a personal computer intends to use that program to share files. Otherwise, there would be no reason to install it." LimeWire is a "peer to peer" program allowing people to access files stored on other people's computers and Petitioner specifically used this program to find, download, and distribute child pornography. (T.139-140; 267-269; R. 25-26; 153-155). The mere fact he used a program whose specific function is to download and distribute files, including the child pornography downloaded and distributed by Petitioner, is sufficient evidence to send it to the jury on the issue of whether he had the requisite knowledge and intent to be convicted of the crime.

[6] The trial court properly charged the jury regarding all prohibited acts under section 16-15-405(A)(2). Additionally, the court correctly instructed the jury that they need to only find one or more of the various acts, including distributing, receiving, and soliciting. (R.278).

Petitioner maintains because he simply clicked on the program's default settings the State did not prove he knew he was distributing the files ultimately downloaded by Agents McKellar and Dove. Petitioner specifically admitted being familiar with file sharing and LimeWire. He admitted using the **file sharing program** to obtain child pornography.

The testimony by Agent Dove indicated LimeWire provided a series of questions and instructions during its installation. One of the questions presented is where to download the files received from another computer using the LimeWire program. The program has a default setting which is to keep the files in the Shared folder. Otherwise, it provides the user the ability to change the default setting and enter another location, which as Agent Dove explained, would not be accessible and allow for further distribution. (T.144-145; R. 30-31). Petitioner retained the default location, thereby allowing the files he downloaded to also be available for distribution to anyone else looking on the **file sharing program** for similar files. As this Court explained in State v. Sterling when discussing the *mens rea* of knowledge in a security fraud case, "one cannot escape liability by 'shutting one's eyes to what would otherwise be obvious.'" State v. Sterling, 396 S.C. 599, 617, 723 S.E.2d 176, 186 (2012) (quoting State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549 (1975)). By claiming he merely accepted the defaults, Petitioner is attempting to cover his eyes to the fact the program specifically allowed him the opportunity to provide a location for the files which would ensure they would not be later downloaded by Agent Dove, Agent McKellar, or anyone else.

Petitioner also claims the State failed to present evidence of his computer knowledge and that he had sufficient knowledge to understand how to change the setting on the LimeWire program. The State demonstrated Petitioner was very well versed in the use of the computer, the internet, and LimeWire. He admitted in his statement being familiar with the program. He also

acknowledged he would download a large quantity of child pornography, view it and delete it. He would delete the images and his tracks by performing a system restore on the computer, to bring it back to the condition it was in prior to his download of the illegal material. (T.269-270; R. 155-156). The jury could certainly and reasonably infer from Petitioner's actions and ability to thwart law enforcement from finding any downloaded material on his computer, even after he admitted downloading and receiving it, that he had the requisite knowledge to use LimeWire and to distribute the child pornography over the **file sharing** program. The trial court properly submitted the case to the jury for consideration because the State amply demonstrated Petitioner knew or should have known the obvious fact, he would be distributing the child pornography he already solicited and received.

Petitioner relies on several out of court decisions to indicate the facts of this case were not sufficient to warrant sending the case to the jury. Those cases all rely on completely different statutes with different requirements and elements. In Smith v. State, 204 So.3d 18 (Fla. 2016), the court analyzed a statute which required the person "transmit" the child pornography and defines "transmit" to require "an act of 'sending and causing to be delivered.'" Smith, 204 So. at 20 (Fla. 2016). The requirement in Smith is entirely different from the requirement in South Carolina under section 16-15-405(A)(2). In State v. Tremaine, 315 S.W.3d 769 (Mo. Ct. App. 2010), the crime is committed by one who "promotes" the child pornography and the Court specifically addressed the elements of "offers" or "disseminates" the material. The Court found knowing dissemination in that case, but specifically did not conclude the State had to prove a knowing *mens rea*, nor did the court have to address whether merely using a file sharing program was sufficient because there was additional evidence Tremaine specifically allowed people to download files.

Petitioner also relies upon United States v. Husmann, 765 F.3d 169 (3rd Cir 2014) for the proposition that merely placing the files into a shared folder is not sufficient to constitute distribution. The Court in Husmann, however, continued by finding that distribution does occur when the file is actually transferred to or downloaded by another person. Id. at 174. The files in the instant case were not merely placed into the shared folder by Petitioner. The files were downloaded and transferred to both Agents Dove and McKellar. Under the requirements of Husmann, Petitioner distributed the files at issue in this case.

Several other federal courts have concluded the use of a file sharing program such as LimeWire is sufficient evidence to support a conviction for distributing child pornography. See e.g., United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (holding "that use of a peer-to-peer file-sharing program constitutes 'distribution'"); United States v. Richardson, 713 F.3d 232, 236 (5th Cir.2013) (upholding a distribution conviction where a law enforcement officer "actually downloaded" a child pornography video stored in the defendant's shared folder); United States v. Collins, 642 F.3d 654, 656–57 (8th Cir.2011) (finding sufficient evidence of attempted distribution of child pornography where defendant downloaded, installed, and used file-sharing program and possessed knowledge of computers); United States v. Shaffer, 472 F.3d 1219 (10th Cir. 2007) (finding the use of a peer-to-peer program sufficient for distribution and comparing the use of the program to a self-service gasoline station in which the gasoline is made available to the public and is distributed by the owner); United States v. Dunn, 777 F.3d 1171, 1175 (10th Cir. 2015) (defendant's placement of child pornography files into shared folder accessible to other users was sufficient to establish distribution even without active transfer of possession to another user).

Accordingly, the State presented evidence showing Petitioner violated section 16-15-405(A) of the South Carolina Code by soliciting, receiving, and then distributing a visual representation of a minor engaged in sexual activity. As a result, the Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict. This Court should deny the Petition for Writ of Certiorari as to Petitioner's Question I.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 12th day of June, 2017.

Anne Mueller

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