THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of General Sessions

Honorable John C. Hayes, III, Circuit Court Judge



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Opinion Number No. 2017-UP-158 (S.C. Ct. App. Filed April 19, 2017)

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The State,

Respondent,

v.

Rion McKissick Rutledge, Appellant.

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# PETITION FOR WRIT OF CERTORARI

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 12, 2017.

## QUESTIONS PRESENTED

1. Did the Appellate Court err in affirming the lower court's denial of Petitioner's motion to sever the charge of sexual exploitation of a minor in the third degree from the charge of sexual exploitation of a minor in the second degree?

2. Did the Appellate Court err in affirming the lower court's denial of Petitioners motion for a directed verdict as no evidence was presented that appellant knew the character or content of the material as required by S.C. Code Ann. §16-15-405 and §16-15-410?

3. Did the Appellate Court err in affirming the lower court's determination not to declare a mistrial when numerous grounds arouse during the trial which resulted in the trial judge expressly stating that he was concerned about these situations?

4. Was the Petitioner deprived of a fair trial due to the improper closing argument of the State?

## STATEMENT OF CASE

The Petitioner, Rion Rutledge was indicted on four (4) indictments of Sexual Exploitation of a Minor in the Third Degree and three (3) indictments of sexual Exploitation of a Minor in the Second Degree. All of these indictments were tried together, over the objection of the Petitioner.

The indictments arouse from a routine online undercover proactive investigation where common words associated with child pornography are searched to determine if any IP addresses have material on their computer containing these search words. In performing this search, the Petitioner's IP address was revealed as an address that potentially had such files. A search warrant was issued for Petitioner's residence and ultimately several laptop computers, a desktop computer, a CD, a couple of DVD's and some memory cards were seized. After a forensic examination, three images were discovered on one of the laptop computers that had been out of the Petitioner's possession for an extended period of time.1 These images are the basis of the indictment of Sexual Exploitation of a Minor in the Second Degree. One image was found on the CD, and this image, along with the images discovered on the laptop computer are the basis of the indictment of Sexual Exploitation of a Minor in the Third Degree. Testimony by the State's experts showed that the three images discovered on the laptop computer were downloaded but they were never opened. Additionally, the forensic examination did not reveal what IP address was associated with any of these files. Furthermore, these files were actually no longer located

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[1] These images were downloaded on February 16, 2010, December 20, 2010 and December 16, 2010.

on the computer, but rather only through the forensic examination was a thumb cache or fragment of the images were able to be obtained. As to the CD, there was no testimony indicating when the image was placed on the CD or whether it had ever been opened. Lastly, there is no way to ascertain when any of the fragmented files came onto the computer only that during the undercover investigation they were present. Based upon the testimony of all parties, there is no indication that the Petitioner downloaded these files or knew the content of the files. However, the State's expert did testify that the file names were abbreviations commonly used in the child pornography industry.

The Petitioner bought the laptop at issue on March 11, 2004 through an auction along with other computer equipment. The computer in question was ultimately given to the Petitioner's brother in 2008 and was in his possession through February, 2011, when the laptop was returned to him. Testimony of the Petitioner indicated that he had not attempted to use the laptop after his brother returned it to him.

During the course of testimony of all witnesses, very technical, computer related information regarding IP addresses, file sharing, GURD, types of downloads, fragmented files, thumb caches and how software utilized by law enforcement works. It is evidenced in the record that the jurors became very confused by all the testimony. Despite being told not to deliberate until told to do so, the jurors sent numerous letters to the Court including a note that stated "we are not deliberating the case; we are trying to clarify confusing evidence". The trial judge proceeded to have each juror individually brought to the courtroom and asked about these notes and whether they still could be impartial. Each juror indicated that they could.

The trial judge indicated that he had some hesitancy in trying the indictments together

when there are multiple charges because the jury could give more weight to the charges, despite being instructed not to do so. (R. p. 13, ll. 1-8). However, it was ultimately ruled that the indictments should be tried together.

During the course of the trial, several incidents occurred that caused concern to the Petitioner. First, the State intended on presenting other images or videos that were not subject to the indictment to the jury. It was argued by the Petitioner, and ultimately agreed upon by the trial judge, that the prejudicial value of admitting the other images or videos outweighed the probative value. Such evidence was to be excluded. The trial court took a recess to allow the State to redact the evidence based upon this ruling. However, during the course of the State's case, the State never redacted the information that was to be excluded and proceeded to present and show the evidence of at least one to two dozen sexual orientated videos, including those that mentioned minors to the jury, which was in direct violation of the trial judge's ruling regarding the evidence. The Petitioner objected to the showing of this evidence and the Court indicated that such evidence was the exact type of evidence that was to be excluded. Despite the ruling and being instructed that this evidence was not to be introduced again, the Stated continued to argue that it was acceptable for the file names to be shown on the large screen because he was not specifically talking about them, showing them and the Petitioner was not charged with them. Rather, they argued they would be just up on the screen and the jury would see them. The trial court stated that there were two concerns with what the State was attempting to do. First, the Court ruled that the State could not present to the jury anything regarding character evidence that is indications of prior bad acts and secondly, the exhibits were not redacted as the State was instructed to do. The items had now been published to the jury, over the Petitioner's objections

and trial judge's ruling, that they could not be published to the jury.

The jury had also indicated to the trial court that prior to being instructed to do so, they had in fact began discussing the case and were trying to clarify confusing evidence by submitting notes to the trial court.

Lastly, in regard to the exhibit that had not properly been redacted, the trial court ruled that it could not be given to the jurors to be used in deliberations. The Petitioner testified that he was never able to turn the laptop on after it was returned to him and also he testified and produced evidence that showed that on the date and at the time the investigator downloaded the images he was not at home (the IP address was linked to his residence) rather he was at work. Upon the Petitioner resting, the State advised the trial court they wanted to present reply evidence because "when the State presented the case there was no...indication that the laptop where there of the video files were found and the CD were not in the possession of [the Petitioner] .. and so the State did not present evidence at that time based upon that...the State intends to go through the forensic report, which is already in evidence, different pieces of the forensic report that show that ...the computer was in use during that period of time". (R. p. 166 ll. 22-25, p. 167, ll. 1-9). The trial court noted that this report was already in evidence and was not going to grant him a second opportunity to explain a piece of evidence regarding possession because he did not do so in his case in chief. (R. p. 167, ll. 10-25-p. 168, ll. 1-24). It was ruled that the State could make a proffer but that it was not appropriate reply testimony and they were not going to be allowed to present it. (R. p. 169, ll. 8-10, p. 179, l. 14, ll. 22-25).

During the State's closing argument, the State decided that despite the court's ruling regarding the proffered testimony, not redacting any portion of the exhibit, not producing any

evidence to show that the laptop was in the possession of the Petitioner, they were going to draw the jurors attention to portions of the report that was not discussed during their case in chief. (R. p. 201, l. 25-p. 202-206, ll. 1-13).

The Petitioner was found guilty of all seven charges and was sentenced to ten years on all charges with five years to serve and then five years' probation. As a condition of probation, Petitioner is required to undergo mental health counseling with an emphasis on a sexual component. He will also be required to register on the Sexual Offender Registry. A notice of intent to appeal was filed on June 26, 2015. The Appellate Court affirmed the Petitioner's conviction on April 19, 2017. A Petition for Rehearing was filed on May 3, 2017 and denied on July 12, 2017. The Petitioner seeks a writ of certiorari to review that decision.

DISCUSSION:

**A. DID THE APPELLATE COURT ERR IN AFFIRMING THE LOWER COURT'S DENIAL OF PETITIONER'S MOTION TO SEVER THE CHARGE OF SEXUAL EXPLOITATION OF A MINOR IN THE THIRD DEGREE FROM THE CHARGE OF SEXUAL EXPLOITATION OF A MINOR IN THE SECOND DEGREE?**

In dealing with issues of joinder, our Courts have applied a liberal rule on joinder of offenses reasoning that it is more economic for a single trial. *Drew v. U.S.*, 331 F.2d 85, 88, 118 U.S.App. D.C 11 (D.C. Cir. 1964). However, despite this liberal rule, in determining whether joinder is appropriate, a Court must weigh the prejudice to the Defendant against the economy and expedition in judicial administration. *Id.* "A defendant may be prejudiced because ...(2) jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which the guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of various crimes charged and find guilt, when, if considered separately, it would not so find". *Id.* "A less tangible, but perhaps equally persuasive, element may reside in a latent feeling of hostility engendered by charging of several crimes as distinct from only one". *Id.* If at any point in the trial, it appears that the Defendant is embarrassed in making his defense, there is probability that the jury will or has become confused, and then upon proper motion, the court should order a severance. *United States v. Lotsch*, 102 F.2d 35,36 (2nd. Cir.) cert. denied., 307 U.S. 622, 59 S.Ct. 793, 83 L.Ed. 1500 (1939).

In the case before this Court, the Petitioner moved to sever the indictments for Sexual Exploitation for Sexual Exploitation of a Minor Second Degree from Sexual Exploitation of a Minor Third Degree. (R. p. 6, line 25-p. 7 lines 1-4; T. p. 6, l. 25, p. 7, ll. 1-4). There were

several reasons for this. First, the testimony in this case, by forensic experts, was very convoluted, high-tech, computer related. The evidence went into depth about identification of a computer, GUID, IP addresses, law enforcement software, file sharing programs, single source downloads vs. multiple source downloads, fragmented files and thumb caches. (R. p. 21, ll. 14-15- pp. 56-88- pp. 103-120, - pp. 126-128) During the course of the trial, despite the jury being told not to discuss the case or begin deliberations until being told to do so, the jurors sent several notes the trial court. In summary, the notes asked about previous history linking the brother to the laptop, confusion as what to strike, the save date on a letter and a statement stating they were trying to clarify confusing evidence not deliberating about the case. (R. p. 165, ll. 5-10, p. 189, ll. 15-16, 18-19). There is no question that based upon this convoluted evidence and the notes of the jurors they were confused by everything that was being presented. Based upon the complexity of the evidence and in accordance with the factors set forth in *Drew*, the crimes should have been severed in order so the jurors could keep the evidence separate and apply it to the correct crime. Additionally, any evidence that is considered for admission under a res gestae theory must also satisfy the requirements of Rule 403, SCRE which requires that the evidence be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

The trial court denied the motion for severance without the benefit of hearing the evidence and based upon what he had been told. (R. p. 12, ll. 11-13). However, in denying the motion the trial court did express concern, though he would not call it second thoughts, but rather some hesitancy, when there are multiple charges the jury can give more weight to the charges, despite being charged that they are not to so. (R. p. 13, ll. 1-8). Based upon the trial courts

concern, severing the cases would ensure that the probative value outweighed the danger of unfair prejudice, confusion of the issues or misleading the jury.

Furthermore, the elements of Sexual Exploitation of a Minor Second Degree and Sexual Exploitation of a Minor Third Degree are very similar in nature. Both crimes require that the individual know the character or content of the material with the difference being what is done with the material once the individual knows of the content. If the individual merely possesses the material, he will be charged with Sexual Exploitation of a Minor in the Third Degree. However, if he knows the content or character of the material and distributes, transports, exhibits, receives, sells, purchases, exchanges or solicits the material he would be guilty of Sexual Exploitation of a Minor in the Second Degree. Essentially, if a defendant is guilty of Sexual Exploitation Second Degree he also has to be guilty of Sexual Exploitation Third Degree based upon the elements of the crime. By trying these two charges together, a Defendant cannot be found innocent of the crime in the third degree if he is found guilty of the crime in the second degree. However, severing the indictments would allow a jury to assess each crime independently and thus no prejudice would occur. The nature of the charges, being crimes against morality, a jury may also use the evidence of one of the crimes charged to infer criminal disposition on the part of the defendant from which guild of the other crimes charged are found.

The trial court, and the Appellate Court, in affirming the trial court's ruling, erred in that they failed to properly weigh the prejudice to the Petitioner, take into consideration the confusion of the jury and the fact that due to the nature of the charges, multiple charges would be given more weight that if they were tried separately. Petitioner seeks a reversal of the trial court's ruling and remanded back to the trial court for separate trials.

**B. DID THE TRIAL COURT ERR IN DENYING PETITIONER'S MOTION FOR A DIRECTED VERDICT AS NO EVIDENCE WAS PRESENTED THAT PETITIONER KNEW THE CHARACTER OR CONTENT OF THE MATERIAL AS REQUIRED BY S.C. CODE §16-15-410 AND §16-15-405?**

A directed verdict motion should be granted when the "evidence merely raises a suspicion that the accused is guilty". *State v. Cherry*, 348 S.C. 281, 285, 559 S.E.2d 297 (S.C.App.2001). In the case before this Court, the Petitioner moved for a directed verdict based upon the fact that the State failed to prove that the Petitioner had any knowledge of the character or content of the material that was discovered on the laptop. In fact, the State never produced any evidence indicating that the Petitioner had possession of the laptop. This was acknowledged by the State when they were denied by the trial court of offering any evidence in reply. The State indicated to the Court that they wanted to present reply evidence because "when the State presented the case there was no...indication that the laptop, where three of the video files were found and the CD were not in the possession of [the Appellant] in his house, and so the State did not present evidence at that time based upon that. ...the State intends to go through the forensic report, which is already in evidence different pieces of the forensic report that show that ...computer was in used during that time period". (R. p. 166 lines 22-25-p. 167, lines 1-9; T. p. 255, ll. 22-25, p. 256, ll. 1-9). The trial court noted that this report was already in evidence and now he wants a second opportunity to explain a piece of evidence that was already in evidence because he did not get into the issue of possession in its case in chief. (R. p. 167, lines 10-25-p. 168 lines 1-24; T. p. 256, ll. 10-25, p. 257, ll. 1-24). The trial court found that he would allow the State to make a proffer but he found that it was not appropriate reply testimony and he was not going to be allowed to present it. (R. p. 169, lines 8-10; T. p. 258, ll. 8-10). Without being allowed to

offer any testimony regarding the Petitioner having possession of the laptop or the CD (as opposed to the laptop and CD merely being found in his house as the State's evidence showed), the State could not prove or provide any evidence that the Petitioner had any knowledge as to what was on the computer and CD. Essentially one cannot have knowledge of something on a computer if there is never any proof they ever had possession of it.

Furthermore, testimony revealed that the files that were downloaded on the laptop and the CD were never opened. (R. p. 119, ll. 10-11, ll. 19-24, R. p. 121, ll. 23, 25). This testimony was presented by the State's investigator. Furthermore, all of the actual files were no longer located on the laptop; rather only through the forensic examination of the laptop was a thumb cache or fragment of the images able to be obtained. (R. p. 125 lines 4-8).

In order for someone to be convicted of the crime of Sexual Exploitation of a Minor in the Second or Third Degree, the State must prove the element of knowing the character or content of the material and that he possesses the material. The State failed to prove that the Petitioner had possession of the material (or the laptop or CD) at any time, failed to prove the files were opened and failed to prove that the Petitioner had knowledge of any of the content. The only evidence that was presented was that the material was downloaded from an IP address that was registered to Petitioner's physical address to a laptop that other people had use and possession of.

Lastly, in denying the motion, the trial court stated that in looking at the statute, he did not see where it says "...knowing the character or content of the materials". (R. p. 134, ll. 12-14, 16). Both §16-15-405 and §16-15-410 require that the individual knows of the content to be guilty of the offense. Based upon the fact that the trial judge made his

decision to deny the motion for a directed verdict on an erroneous understanding of the statutes by missing a required element, the motion was improperly denied.

As a result, the trial court, and the appellate court in affirming the trial court, erred in denying the Petitioner's Motions for Directed Verdict on both charges and the convictions should be reversed.

**C. DID THE TRIAL COURT ERR IN NOT DECLARING A MISTRIAL WHEN NUMEROUS GROUNDS FOR A MISTRIAL AROUSE DURING THE TRIAL AND THE FAILURE TO DECLARE A MISTRIAL RESULTED IN A MANIFEST INJUSTICE.**

A mistrial should be used with the greatest of caution and under urgent circumstances and for very plain and obvious causes. *State v. Kirby*, 269 S.C. 25, 236 S.E.2d 33, 34 (S.C. 1977). The test in determining whether to grant a mistrial is dictated by manifest necessity or the ends of public justice. *Illinois v. Somerville,* 410 U.S 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). When the ends of substantial justice cannot be attained without discontinuing a trial, a mistrial may be declared without a defendant's consent and even over his objection. *Id.*

In the case before this Court, there are numerous incidents that mandated declaring a mistrial. First, the Petitioner raised the issue to the trial court that the State intended on presenting other images or videos that were not part of the indictment to the jury. (R. p. 13, ll. 13-17). The Petitioner objected to this evidence on the grounds that it violated Rule 404, SCRE in that it was intended on being introduced to show that the Petitioner may have had other images and thus had a propensity to engage in this type of behavior. (R. p. 13, ll. 16-17). The Petitioners objection was sustained based upon a Rule 403, SCRE analysis. Despite this ruling, the State proceeded to present testimony and showed evidence of at least one to two dozen sexual orientated videos, including those that mentioned minors, to the jury. (R. p. 101, ll. 19-25, p.

102, ll. 5-6). The Petitioner objected and the State continued to argue that such evidence was proper because it only showed file names on a large screen and he was not going to talk about them, show them and the Petitioner was not charged with them. (R. p. 103-104, ll. 1-16). The trial judge ruled that he was not going to allow such evidence to be presented to the jury because it was character evidence regarding prior bad acts and also he was concerned because the State was instructed to redact the evidence/exhibit immediately after the trial judge issued his ruling regarding this testimony and evidence but failed to do so. (R. p. 104, ll. 17-20-22) Despite the Petitioners objection and the court's ruling, the exhibit was now published to the jury and the jury was aware that additional files showing sexually orientated material involving minors was located on the laptop. (R. p. 105, ll. 1-22). The trial judge admitted that he would "have a hard time...disassociating those type – that type of language with single shots that, obviously, are indications that they're films or images associated with them, that they are not number one, sexual in nature, and number two, involve teens (R. p. 105, ll. 14-21). Counsel for Petitioner asked for a curative instruction and the jury was told that they were to not consider the last things shown on the screen during the deliberations because they were not relevant. It should be noted that these files were the basis of one of the notes the jurors sent to the trial judge prior to deliberations. (R. p. 108, ll. 9-17).

Second, the trial court received another not from the jury which raised concerns that the jurors had starting discussing the case with each other prior to being instructed to do so. (R. p. 166, ll. 10-18). Madam forelady was questioned and admitted that they jurors had in facts started discussing the case prior to deliberations. Another note was send to the court advising that they were not deliberating but trying to clarify confusing evidence. (R. p. 184, ll. 16-22, p. 189. L. 17-

19).

Based upon the above situations, the ends of justice could not be obtained unless the trial was discontinued. The jurors received a dozen to two dozen prejudicial pieces of evidence they should not have received, but the State did not redact the evidence as instructed and proceeded with questioning the witness regarding the evidence despite the court ruling that such was improper due to the prejudice nature. The judge himself indicated that it would be hard for him to disassociate the files as child pornography. The jurors were discussing the case and confused prior to being instructed to do so. Even though the Petitioner elected not to desirous to seek a mistrial, a trial court has an inherent right to declare a mistrial, without Petitioners consent and over his objections in order to ensure a fair trial that ended in a just judgment. *Illinois v. Summerville*, supra. The failure of the trial court to declare a mistrial was manifestly unjust.

## D. WAS THE PETITIONER DEPRIVED OF A FAIR TRIAL DUE TO THE IMPROPER CLOSING ARGUMENT OF THE STATE?

When hearing closing arguments, a trial judge is vested with broad discretion. *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873(S.C. 2007) citing *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1977). An appellant has the burden of showing any alleged error in argument deprived him of a fair trial or a fair determination of his guilt or innocence. *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1988). The Appellate Court must review the argument in the context of the whole record. *State v. Northcutt*, 324 S.C. at 17, 482 S.E.2d at 766. Additionally, in a prosecution a case, a prosecutor is bound to rules of fairness in their closing argument. *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). In the case before this Court, the State's closing argument deprived the Petitioner of his right to a fair trial and a fair determination of his

guilt or innocence.

During the course of the trial, the State failed to redact an exhibit as it had been instructed to do and thus the exhibit could not be given to the jurors during deliberations. (R. p. 107, ll. 16-18). Additionally, after the Petitioner testified and his testimony was corroborated, that the laptop at issue was loaned to his brother and he was never able to turn it on after he received it back and that at the times the investigator downloaded images from the laptop he was working, the State indicated that they wanted to present reply testimony. (R. p. 146, ll. 1-14, 147-pp.147-150). In doing so, the State explained to the trial court that "when the State presented its case there was no... indication that the laptop, where the three files of the video files were found and the CD were not in the possession of [the Petitioner] in his so house, ...so State did not present evidence at that time ..." and now "the State intends to go through the forensic report which is already in evidence...to show that the computer was used during that time period". (R. p. 166, ll. 22-25-p. 167, ll. 1-9). The trial judge indicated that he would allow him to make a proffer but found, after listening to the in-camera testimony, that it was not appropriate reply testimony and he was not going to allow him to present it. (R. p. 179, l. 14, ll. 22-25). The trial judge noted that the report was already in evidence and he was essentially wants a second opportunity to explain a piece of evidence because he did not get into an issue in his case in chief. (R. p. 167, ll. 10-25,-p. 168, ll. 1-24-p. 169, ll. 8-10).

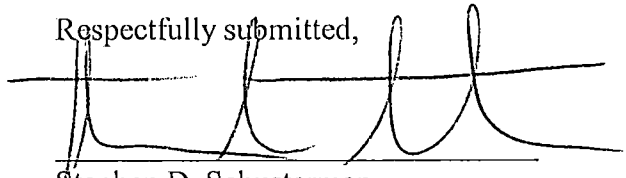
At this point, despite the trial court's rulings throughout the trial, the State decided in its closing statement, that it was going to draw the jurors attention to each and every one of the items that the investigator testified to in-camera but did not testify to during the State's case in chief. (R. p. 201, l.25-p. 202-206, ll. 1-13). Due to the conduct of the prosecutor, the jurors had

been provided with information directly from the State that should not have been privy to. Essentially, the State back-doored their way into getting evidence to the jury that they were prohibited by the Court from presenting. As a result, the State exceeded the rules of fairness that our laws require when presenting closing arguments and in doing so the Petitioner was denied a fair trial. Furthermore, without the State mentioning information that contradicted the Petitioner's testimony regarding his lack of use of the laptop, the State was well aware that they did not satisfy one of the key elements of the statutes charged and the jury could potentially render a verdict of not guilty because of this. As a result of the comments made by the State in their closing argument, the Petitioner was denied the right to have a fair determination of his guilt or innocence. The Appellate Court erred in not granting a new trial based upon the State's closing argument.

## CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



August 10, 2017

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of General Session

John C. Hayes, III

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Opinion Number No. 2017-UP-158 (S.C. Ct. App. Filed April 19, 2017)

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The State

Respondent,

v.

Rion McKissick Rutledge Appellant.



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PROOF OF SERVICE

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I certify that I have served the Petition For Writ of Certorari on Alan Wilson, Attorney General and William Blitch, Jr., Assistant Attorney General, by depositing a copy of it in the United States Mail, postage prepaid, on August 10, 2017, addressed as follows:

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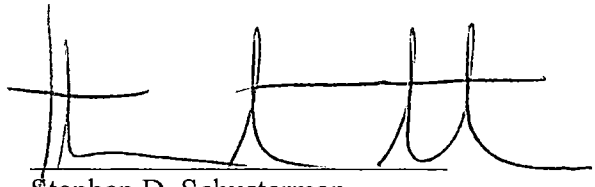

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August 10, 2017



The Honorable Daniel E. Shearouse
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Re: The State v. Rion Rutledge
Opinion No. 2017-UP-158(S.C. Ct. App. Filed April 19, 2017)

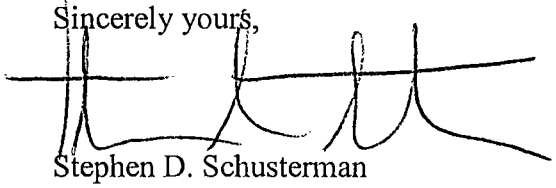
Dear Honorable Shearouse:

Enclosed please find an original and Six (6) copies of the Petition For Writ of Certorari along with a Proof of Service in the above referenced case.

If you should have any questions please feel free to contact my office.

With best regards, I am

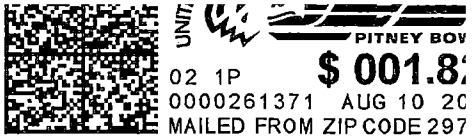
Sincerely yours,



Stephen D. Schusterman

Enclosure
SDS/as

cc: Alan Wilson, Attorney General
William Blitch, Jr, Assistant Attorney General
Jenny Kitchings, Clerk of Court of Appeals
Rion Rutledge

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