

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**The Honorable James R. Barber
Richland County
Court of General Sessions
Trial Court Case No. 2009GS4006690, 2009GS4006691,
2009GS4006696, 2009GS4006689**

Ex Parte: Tara Dawn Shurling, Attorney, Appellant,

**In Re:
State of South Carolina, Respondent,**

v.

Anthony Hackshaw, Defendant

Appellate Case No. 2012-208848

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I.

Does S. C. Code Ann. § 17-3-50, (C) require advance approval of fees in excess of the statutory cap?

II.

Did the lower court err in interpreting the previous order of the Chief Administrative Judge to limit total fees in this murder case to \$15,000.00 regardless of the circumstances which developed subsequent to the date of that order?

III

Did the lower court err in interpreting the previous order of the Chief Administrative Judge pre-approving fees up to \$15,000.00 in this murder case to mean that Appellant's total fees for this case could not exceed that figure without advance approval of the court?

IV

Did the lower court abuse its discretion by refusing to allow Appellant leave to seek clarification from the former Chief Administrative Judge regarding her intent in signing the fee order in dispute?

V.

Did the lower court abuse its discretion by declining to contact former Chief Administrative Judge J. Michelle Childs to seek clarification from her regarding her recollection of this case and her intent in signing the fee order in dispute?

VI.

Did the lower court abuse its discretion in declining to authorize payment of expenses which total less than the amount authorized in advance by the former chief Administrative Judge?

VII.

Did the lower court abuse its discretion in declining to authorize payment of expenses which totaled \$186.58 more than the total authorized in advance by former Chief Administrative Judge even if the total expended in this case takes into account additional expenses approved by subsequent order of another Chief Administrative Judge?

VIII.

Did the lower court abuse its discretion in declining to authorize payment of Appellant's expenses which totaled less than the amount authorized in advance by the former chief Administrative Judge, but exceeded the amount authorized for a certain category of expenses, where the South Carolina Commission on Indigent Defense routinely pays expenses authorized at the end of a case by the trial judge and regularly pays expenses of up to \$500.00 without any court order approving those expenses?

STATEMENT OF THE CASE

Appellant was court-appointed in this case by Order dated December 9, 2009. By Order issued pursuant to S.C. Code Ann. § 16-3-26(B), the Honorable J. Michelle Childs, then Chief Administrative Judge for the Richland County Court of General Sessions, authorized Appellant to be paid a rate of one hundred dollars (\$100.00) per hour for both out-of-court and in-court services. In addition, said Order specifically provided that “the presiding Judge will determine whether the total fees claimed by Attorney Shurling are reasonable at the conclusion of this case.” In addition, this Order provided that “Subject to final approval by the presiding judge, this Court hereby approves Appellant’s fees in excess of the statutory cap. Appellant may submit for approval by the Court a voucher for payment of fees up to \$15,000.00 without further advance approval of this Court.” The Order issued by Judge Childs also authorized payment of Jeremy A. Thompson, then an associate in Attorney Shurling’s law firm, as a second chair in this case in the event the matter proceeded to trial. R. p. 123-125; Order of the Honorable J. Michelle Childs. The Order of Judge Childs addressing expenses approved \$1,000.00 for witness fees and mileage reimbursement and \$1,500.00 in general expenses for a total expense total of \$2,500.00 in this case. R. p. 126-127. Appellant’s total expense bill in this case totaled \$1,962.66 and therefore, exceeded the amount approved in advance by Judge Childs by \$462.66.

This matter involved a felony trial for Murder. In addition, the Defendant was also charged with Assault with Intent to Kill, Criminal Conspiracy, Possession of a Weapon During a Violent Crime, and Possession of Marijuana or of Hash. At trial, the State’s case included testimony from multiple jail house informants in addition to many witnesses more directly involved in this case. A significant portion of the State’s case involved the

presentation of and interpretation of cell phone transmission records and required the preparation of defenses to this highly technical evidence. The discovery materials in this matter were voluminous. These charge ultimately resulted in convictions on all counts following a week long jury trial. Appellant filed a timely Notice of Appeal on behalf of the Defendant and forwarded the matter to the Appellate Division of SCCID for representation of the Defendant on appeal. The trial transcript in this case is 1687 pages long.

Following the Defendant's trial, Appellant was notified that, through the State's DNA database, trace DNA taken from a shell casing found at the scene of this homicide had been matched to a third party (with no prior connection to the investigation of this case) recently incarcerated on unrelated charges. Appellant left her file in this matter open pending further developments relating to the discovery of that DNA match. When no further developments followed, Appellant closed her file and notified the Fifth Circuit Solicitor's Office that any further developments in this case should be reported to the Appellate Division of SCCID inasmuch as they were representing the Defendant in a pending direct appeal.

On October 31, 2011 Appellant submitted her voucher for payment of attorney fees and expenses relating to this case, along with detailed time and expenses records, to the Honorable James R. Barber, II, presiding circuit judge, for his approval. R. p. 1 – 14, 22-58; payment request with fee and expense records. The total fees submitted for payment in this case came to \$33,570.00 for Attorney Shurling, using the \$100.00 per hour rate approved in advance by Judge Childs as Chief Administrative Judge by previous order. The total fees submitted for Jeremy A. Thompson, totaled \$11,406.00 at the standard statutory rate. R. p. 15-21.

The trial judge subsequently held two hearings in connection with Appellant's fee and

expense requests on January 4, 2012 and January 24, 2012. Appellant appeared at both hearings held in this matter. Hugh Ryan, General Appellant for SCCID, appeared at the second hearing.

By Order dated January 25, 2012, Judge Barber issued a written Order in which he found that both the total attorney fees and total expenses in this case were limited to the amounts approved in advance by Judge Childs. R. p. 188; Order filed January 25, 2012. Appellant subsequently filed a Motion to Reconsider on February 6, 2012, asking the Court to reconsider its ruling that the total fees and expenses in this matter were limited to the amounts approved in advance by Judge Childs. R. p. 189-192; Motion to Reconsider. In the alternative, Appellant renewed her request, made repeatedly at both hearings held on Appellant's fee requests, that she be permitted to contact Judge Childs, by then a United States District Court Judge, and ask for clarification "as to whether it was her intent to restrict payment of fees to \$15,000.00 and expenses to \$1,500.00, and whether it was ever her intent to prohibit Attorney Shurling from requesting payment of fees and expenses in excess of those limits from the presiding judge at *the conclusion* of the case. R. p. 139, lines 13-24 1/4/12 hearing and ROA p. 179, lines 7-11 1/24/12 hearing. Alternatively, Attorney Shurling asked the trial judge to call Judge Childs directly and inquire as to her recollection of this case and her intent at the time these orders in question were signed." *See*, R. p. 192; Motion to Reconsider. By Order filed February 15, 2012, Appellant's Motion to Reconsider was denied. R. p. 205; Order of Judge Barber, filed February 15, 2102. Appellant filed a Notice of Appeal from both Orders issued in connection with her payment requests in the Supreme Court of South Carolina on February 27, 2012. ROA p. 226. Appellant was subsequently

notified that this appeal had been transferred to the Court of Appeals.¹ The South Carolina Commission on Indigent Defense did not file an appeal from the Order of Judge Childs setting a fee rate of \$100.00 per hour for Appellant's fees in this case nor did they file an appeal from Judge Childs' Order authorizing the payment of a second attorney in this matter.

¹ Appellant filed her Notice of Appeal in this matter with the Supreme Court of South Carolina due to the fact that a recent decision regarding attorney fees for court-appointed lawyers had been issued by the Supreme Court of South Carolina. Ex Parte Brown, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (2011).

ARGUMENT

Attorney Fees

Questions I, II, III, IV and V.

In the lower court, Appellant noted that the total fees claimed for her and second chair, Attorney Thompson, \$44,976.00, even if paid as billed, would barely cover the overhead of her law firm *excluding any compensation for herself* for the total time period represented by the aggregate time spent on this case by Appellant alone.² R. p. 159, 1/24/12 hearing; p.182, line 22 - p. 183, line 14. Therefore, Appellant argued that the payment of only \$15,000.00 in attorney fees would represent an unconstitutional taking by the State of South Carolina *even if* it were acceptable to pay Appellant *nothing* for her representation. R. p. 159, 1/24/12 hearing; p. 183, line 15 – p. 186, line 2. The Appellant now urges this Court to recognize that the limitation placed on her fees by the trial judge would result in an unconstitutional taking. U.S.C.A. Const. Amends,6,14. The total number of hours spent on this case by Attorney Shurling came to 295.7 out-of-court and 40.00 in-court for a total of 335.7 hours. Her associate Jeremy Thompson, spent a total of 226.2 out-of-court hours on this case and 39.3 in-court hours for a total of 265.5 hours. As required by the terms of Judge Childs' Order, these figures *do not* include time spent by Attorney Thompson spent on this case before it was confirmed that this matter could not be resolved by a plea agreement. If paid as originally submitted, the payment of Appellant's bill would therefore pay her overhead for the time period she devoted to this case, and would reimburse her for the salary

² This representation took into account the firm's average weekly expenses, including the salary of Appellant's associate, Attorney Thompson, but excluded any payments to Appellant either in the form of salary or profit distributions.

she paid Attorney Thompson while working on this case but, it would still not compensate her for her time expended in this matter. Appellant has nevertheless, elected not make a claim that her payment for all her time, and that of her then associate as second chair, at the rates authorized by Judge Childs' Order, would constitute an unconstitutional taking. She does stand by her argument however, that limitation of her payment to the amount pre-approved by Judge Childs' Order would have the effect of an unconstitutional taking.

As noted in arguments before the lower court, Judge Childs authorized a fee rate of \$100.00 per hour for in-court and out-of-court time. In the lower court Appellant noted that even if her time is calculated at the standard statutory rate of \$40.00 per hour for out-of-court and \$60.00 for in-court time, her total fees would come to \$14,228.00. That amount added to the total fees for Jeremy A. Thompson, also calculated at the standard statutory rates, would total \$25,634.00. R. p. 213, 82.

The lower court's comments from the bench, as well as the language of the Court's Order dated January 25, 2012, indicate that the restriction of payment for fees to \$15,000.00 was based solely on language in Judge Child's Order authoring fees in which it is stated, "*Appellant may submit for approval by the Court a voucher for payment of fees up to \$15,000.00 without further advance approval of this Court.*" R. p. 188. The lower court did not expressly find that Appellant's fees were unreasonable on the facts of this case. During the January 4, 2102 hearing Judge Barber specifically stated that he was not finding that the \$100.00 per hour rate approved by Judge Childs was either reasonable or unreasonable. He did acknowledge that the rate of \$60 and \$40 was not reasonable. R. p 128, 1/4/12 Hearing, p. 153, line 11 – 22. Appellant submitted that she did not randomly pick the \$100.00 per hour rate and noted that the previous lawyer appointed in this same case had been granted the

hourly rate of \$100.00 per hour in this matter. Appellant further noted that in three more recent murder cases her fee rate had been set at \$70, \$80 and \$100.00 per hour by orders of Judge Newman as Chief Administrative Judge. The lower court did point to problems it observed in the time records kept by Appellant concerning phone records and correspondence. The trial judge went on to note that he could not tell if Appellant's records concerning letters were accurate without reviewing each letter and then acknowledged that he wasn't going to do that. Counsel on the other hand assured the Court that she is not a dishonest person and stated that her time records were detailed and accurate. R. p. 159, 1/24/12 hearing; p. 175, line 10-24 and p. 182, line 14 – p.184, line10. While SCCID expressed its general sentiment that the rates approved by Judge Childs and the total fees requested in this matter were out of line with the average fees paid by them in murder cases, they did not point to any particular aspect of Appellant's time expenditures which they believed to be unreasonable or inflated. SCCID argued that the total fee claimed in this case, "is just unreasonable." R. p. 159, 1/24/12 hearing p. 171, line 19 – p. 172, line 23. SCCID offered, by way of support of their position a chart showing average fees paid in Murder cases however, they did not demonstrate the average fees paid in murder cases which went to trial versus those which resolved in pleas. R. p. 211, Court's Exhibit 3. They did not file an appeal from that portion of Judge Childs' Order regarding fees. Likewise, while SCCID expressed their displeasure over the ruling of Judge Childs that this Defendant's case warranted the approval of funds for a second chair, they did not formally appeal her order on that issue.

In the lower court, Appellant has advised the trial judge that the language in question from Judge Childs' Order was drafted *by her* and was in the proposed order sent to Judge

Childs for approval. R. p 128, 1/4/12 Hearing; p. 131, line19 - p.132, line 7. In support of this position, Counsel submitted that the proposed order drafted and submitted to Judge Childs by her was identical to the Order ultimately adopted by Judge Childs in this matter. Appellant asserted that this portion of her proposed order was intended to establish the pre-approval of up to \$15,000.00 in fees in the unlikely event her firm needed to submit an interim request for payment of attorney fees before the conclusion of the case. She acknowledged that the sentence in question was perhaps poorly written, however, she submitted that it was intended to indicate that she need not obtain further advance approval from the Court for submission an interim bill for attorney fees up to \$15,000.00. R. p. 159, 1/24/12 hearing; p. 178, line1-20. Appellant expressed her belief that Judge Childs understood her intent in including the language in question in her proposed order.

At both hearings held in connection with her fee requests, Attorney Shurling requested leave of the lower court to seek clarification from former circuit court Judge Childs, as to her intent when she signed Appellant's proposed orders, *as submitted*. The trial judge denied this request. Attorney Shurling advised the lower court that she felt confident that Judge Childs would recall this specific court-appointment because the judge herself called Attorney Shurling and asked her to accept the appointment. R. p. 159, 1/24/12 hearing, p. 183, line 7-21. While Judge Childs, now a U. S. District Court Judge, would not have had jurisdiction to alter or amend the order she signed in this case regarding fees, she could have provided clarification for the Court as to whether it was ever her intent to set an absolute cap of \$15,000.00 for fees in the case regardless of whether the case went to trial or other relevant circumstances developed. It was Appellant's position that she should be allowed to seek clarification from Judge Childs as to whether it was her intent to sign an

Order allowing Appellant to seek interim payment of fees of up to \$15,000.00 without further advance approval of the Court or whether, as the lower court interpreted the Order, it was her intent to prohibit Appellant from seeking payment of fees in excess of that amount at the conclusion of the case unless she had obtained advance approval from the Court. R. p. 159, 1/24/12 hearing; p. 178, line1 – 20. Likewise, in her Motion to Reconsider Appellant urged the lower court alternatively, to contact Judge Childs directly and to inquire as to her recollection as to this case and her intent concerning the orders signed by her in this matter. The lower court denied the Motion to Reconsider and thereby once again refused to allow Appellant to request clarification from Judge Childs and declined to request clarification directly from Judge Childs.

S. C. Code Ann. § 17-3-50 (C) *does not* require advance approval of fees in excess of the statutory cap for fees. It states,

Payment in excess of the hourly rates and limits in subsection (A) or (B) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of Appellant and payment in excess of that limit is appropriate because the services provided *were* reasonably and necessarily *incurred*. (Emphasis added).

The language of that section in fact requires that approval of fees in excess of the cap set forth therein be supported by a detailed order with findings as to why “the services *provided were* reasonably and necessarily *incurred*.” (Emphasis added) Thus, the relevant statutory provision clearly envisions approval of total fees in excess of the cap of the conclusion of the case. It would be impossible for the Court to issue the required order finding that fees in excess of the cap provided by §17-3-50(A) *were reasonably and necessarily incurred* until after the conclusion of the case. The fact that this statutory

provision is worded in the past tense gives testimony to the fact that the legislature recognized as much in drafting this provision. This interpretation of S. C. Code Ann. § 17-3-50 (C) is consistent with the previous rulings of this Honorable Court in which the Court has found that an award of attorney fees in excess of the section 17-3-50 cap is “**within the sound discretion of the trial judge.**” *Ex Parte Brown*, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (2011), citing, *Bailey v. State*, 309 S. C. 455, 464, 424 S.E.2nd 503, 508 (1992).

Appellant submits that the fees claimed in this case were reasonable and necessary to provide the Defendant reasonable professional assistance of Appellant in this extremely complex case. Appellant asks this Honorable Court to take judicial notice of this fact from the direct appeal currently pending before this Court in this matter. The record from this trial will establish, among other factors, that the State had *three* attorneys prosecuting this case at trial and that they each actively participated in this trial. The Record on Appeal will additionally support Appellant’s contention that both she and Attorney Thompson were exceptionally well prepared to try this complex case.

Expense Reimbursement

Issues VI, VII and VIII

During the second hearing on Attorney Shurling’s fee and expense requests, Attorney Shurling asserted that even if SCCID is correct, and there is a statutory requirement of *advance* approval of expenses, that requirement is not routinely enforced by SCCID *provided* such fees are approved by order of the court at the conclusion of the case. In support of this position, Attorney Shurling further noted that vouchers for up to \$500.00 are now routinely accepted and paid by SCCID *without any order approving expenses*. Appellant also noted

that in her extensive experience with court-appointed cases, SCCID had routinely paid expenses submitted by Appellant at the conclusion of the case so long as they were authorized by Order of the presiding judge. The Record below reflects that SCCID did not dispute these assertions by Appellant. R. p. 159, 1/24/12 hearing, p. 184, line 22- p. 185, line 21. Attorney Shurling specifically noted that in her experience, with literally hundreds of court-appointed cases, SCCID routinely pays expenses approved by the Court at the conclusion of the case. Appellant now respectfully argues that SCCID should not be allowed to selectively enforce the advance approval requirement arguably found in S.C. Code Ann. § 17-3-50 (B).

S.C. Code Ann. § 17-3-50 (B) *arguably* requires advance approval of all expenses for “investigative, expert, or other services” and caps expenditures for such expenses at \$500.00.

It states:

Upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant’s attorney *to obtain* such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed five hundred dollars as the court considers appropriate. (Emphasis added.)

SCCID interprets this section to require advance approval of all expenses since it provides for the Court to authorize Appellant *to obtain* such services. In actuality, this section is silent as to whether advance approval of more general expenses, such as copies, postage, records, etc., would be required before the expenses were incurred by court-appointed Appellant. Appellant would assert that requiring the advance approval of expert witnesses, investigators and other service providers makes more sense than requiring the

advance approval of other more general expenses likely to be incurred in any case from day one of a court-appointment.³

While the expenses claimed by Appellant came to a total of \$1,962.66, she requested authorization from the trial court for their payment by SCCID because while *the type* expenses claimed by her were restricted by Judge Childs' order to \$1,500.00 without *additional authorization* from the court, that order only required *prior* authorization from the court if her total expenses expended a total of \$2,500.00 for all categories of expenses. Appellant's general expenses exceeded the total authorized for that category of expenses by \$462.66.⁴ Appellant however, did not exceed the total expense cap set of \$2,500.00 set by Judge Childs. Thus, this order, as adopted and signed by Judge Childs, required additional approval of the Court to exceed any category of expense but, only required further *advance* authorization from the court if *total expenses claimed exceeded the \$2,500.00 for expenses*. See, R. p. 126 - 127; *Judge Childs Expense Order*.

As previously noted, Appellant's total general expenses totaled \$1,962.66. In her voucher submitted at the conclusion of this case, Appellant did not claim expenses from the \$1,000.00 separately approved for witness fees and mileage. After Judge Childs left the state bench, then Chief Administrative Judge G. Tomas Cooper, Jr., subsequently issued a separate order, giving advance approval for payment of travel expenses for one out-of-state witness. Those expenses were ultimately paid in the amount of \$723.92. R. p. 215-225; Order dated October 22, 2010 and payment records. If that amount is added to the total general expenses

³ Another statutory provision, §17-3-85, actually provides for private-appointed Appellant to be reimbursed for up to \$2,000.00 in expenses per case "so long as the expenses are approved by the trial judge." This provision does not contain language suggesting the advance approval of such expenses.

⁴ Appellant has been paid \$1,500.00 in expenses pursuant to Judge Childs order. What remains in dispute is the \$462.66 in general expenses not covered by the cap for general expenses contained in that order.

claimed by Appellant, the total expended comes to \$2,686.58 or \$186.58 over the total for expenses pre-approved by Judge Childs. Appellant would argue however, that the order of Judge Cooper authorized these funds *in addition to* those previously approved by Judge Childs. If this Court concludes that the funds authorized by Judge Cooper should count toward the total authorized in advance by Judge Childs, Appellant would argue that §17-3-50 (C) still authorizes the trial judge to find, *after the fact*, that the total expenses “were reasonably and necessarily incurred.” Clearly, §17-3-50 (C) addresses payment in excess of limits set by subsection (B) as well as subsection (A). Based upon the forgoing, Appellant submits that the trial court erred in finding that it did not have the authority to approve all of Appellant’s general expenses totaling \$1,962.66 where they exceeded the \$1,500.00 initial cap set by the Order of Judge Childs for general expenses by \$462.66.

CONCLUSION

The Appellant now respectfully asks this Court to find that §17-3-50(C) does not require the advance approval of fees in excess of the rates or statutory limits set by §17-3-50(A). Appellant further seeks this Court's finding that the language of the Order entered by Judge Childs did not limit the trial judge's ultimate authority to decide whether the payment of the fees in excess of the statutory limit, as requested by Appellant at the conclusion of this case, was reasonable and necessary under the terms of §17-3-50(C). Alternatively, Appellant requests this Court's finding that the trial court should have either allowed her to seek clarification from Judge Childs concerning her intent with regard to the order in dispute, or, should have contacted Judge Childs directly for the purpose of ascertaining her intent with regard to the terms of her Order in this matter.

In addition, the Appellant asks this Court to find that §17-3-50 (C) permits the trial judge to authorize the reimbursement of court-appointed Appellant for expenses in excess of the cap set by §17-3-50 (B), at the conclusion of the case where the trial judge finds the expense were reasonably and necessarily incurred. Likewise, Appellant seeks a ruling by this Court that nothing in the expense order signed by Judge Childs prohibited the trial judge from approving expenses, in excess of the limits pre-approved by that Order, at the conclusion of this case.

Appellant asks this Court to find that the total fees and expenses submitted for payment in this case were necessary and appropriate on the facts of this extremely complex murder case and to direct SCCID to pay Appellant's bills as submitted to the lower court for approval. In the alternative, she would ask that her payment requests be remanded for a

hearing at which the trial judge be directed to make a finding as to whether Appellant's total fee and expense requests are reasonable and necessary on the facts of this case.

Respectfully submitted,


TARA DAWN SHURLING
ATTORNEY FOR APPELLANT

This 1st day of August, 2013.

STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

The Honorable James R. Barber
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CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that certificate that this Final Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief is in compliance with the August 13, 2007 Order of the Supreme Court of South Carolina relating to the inclusion of personal data identifiers and other sensitive information in documents.


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ATTORNEY FOR APPELLANT.

This 1st day of August, 2013.

STATE OF SOUTH CAROLINA
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Richland County
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In Re:
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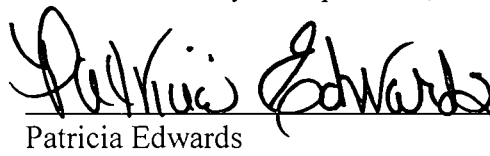
v.

Anthony Hackshaw, Defendant

Appellate Case No. 2012-208848

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Attorney/Appellant's Final Brief and Final Reply Brief in the above-entitled case have been served upon opposing counsel, J. Hugh Ryan, III, Deputy Director and General Counsel, SCCID, by hand delivery: SCCID, The Keenan Bldg., 1330 Lady Street, Columbia, SC 29201 3rd day of September, 2013.



Patricia Edwards

Assistant to Tara Dawn Shurling, Attorney/Appellant

SWORN TO BEFORE me this 3rd day
of September, 2013.

Sharon J. McCallister (L.S.)

Notary Public for South Carolina

My Commission Expires: Apr 16, 2017

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SC Court of Appeals