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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of General Sessions
R. Knox McMahon, Circuit Court Judge
Appellate Case No.: 2010-178247

Opinion No. 27322 (S.C.Sup.Ct. filed October 16, 2013)

The State,

Respondent,

vs.

Steven Barnes,

Appellant.

PETITION FOR REHEARING

This Court issued an opinion in the captioned case that reversed Appellant's murder and kidnapping convictions, and his sentence of death, finding the trial judge erred in denying the motion to proceed *pro se* pursuant to *Indiana v. Edwards*, 554 U.S. 164 (2008). Pursuant to South Carolina Appellate Court Rules 221 and 224, the State petitions for rehearing and asks the Court to consider the following points that were misapprehended or overlooked:

The majority opinion essentially "decline[d] to adopt" the exception of *Indiana v. Edward*, and in doing so, reversed the trial judge's decision based upon same. However, the majority opinion evidences a clear misapprehension of the *Edwards* exception. The majority refers to a "higher standard of competency for waiver of the right to counsel" in rejecting the exception. (Opinion, p. 7). However, the entire limited exception should be considered in light of *representational* ability and the state court's acceptance of the

waiver. In short, the majority confuses two separate concepts that the United States Supreme Court has consistently divided – competency to waive and ability to represent oneself in the particular proceedings at issue. *See Godinez v. Moran*, 509 U.S. 389, 399 (1993) (“But this argument has a flawed premise; the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.”) (emphasis in original). *See also Edwards*, 554 U.S. at 173 (...*Godinez* does not answer the question before us now. In part that is because the ... *higher standard at issue in Godinez differs in a critical way from the higher standard at issue here*. In *Godinez*, the higher standard sought to measure the defendant’s ability to proceed on his own to enter a guilty plea; here the higher standard seeks to measure the defendant’s ability to conduct trial proceedings.”) (emphasis added); *Massey v. Moore*, 348 U.S. 105, 108 (1954) (“We have not allowed convictions to stand if the accused stood trial without benefit of counsel and yet was so unskilled, so ignorant, *or so mentally deficient* as not to be able to comprehend the legal issues involved in his defense. The requirement of the Fourteenth Amendment is for a fair trial.”) (emphasis added) (internal citations omitted). As such, the State seeks rehearing.

Discussion

The majority opinion’s brevity is supportive of the clear misapprehension of the exception. The majority treats the question as a *Godinez* issue on the level of competency to waive. This is incorrect. There is no question that competency to waive is the same as competency to stand trial. That was established in 1993 in the *Godinez* opinion, and is not contested here, as it was not contested in *Edwards*. The *Edwards* exception, though, is a narrowly drawn exception, applicable only in a rare set of circumstances, going to the state

court's *acceptance* of the waiver.¹ See *Edwards*, 544 U.S. at 173 (“...*Godinez* involved a State that sought to *permit* a gray-area defendant to represent himself. *Godinez*'s constitutional holding is that a State may do so. But that holding simply does not tell a State whether it may *deny* a gray-area defendant the right to represent himself—the matter at issue here.”). The majority's misapprehension appears to account for its criticism of the dissent's lack of a “new standard of competency,” see Opinion n. 11, because, truly, there is not one. See *United States v. Bernard*, 708 F.3d 583 (4th Cir. 2013) (rejecting appellant's argument *Edwards* established a higher standard of competency than that required to stand trial); *United States v. Turner*, 644 F.3d 713, 724 (8th Cir. 2011) (“*Edwards* ... does not mandate two separate competency findings for every defendant who seeks to proceed pro se.”) (internal citation omitted); *United States v. DeShazer*, 554 F.3d 1281, 1290 (10th Cir. 2009) (“while the district court was not compelled to find Mr. DeShazer competent to waive his right to counsel simply because the court had found him competent to stand trial, it does not follow that the district court was absolutely prohibited from doing so. To the contrary, *Edwards* itself reaffirmed that a court may constitutionally permit a defendant to represent himself so long as he is competent to stand trial. We are aware of no case that reads *Edwards* differently.”) (internal citation omitted); *State v. Connor*, 973 A.2d 627, 650 (Conn. 2009) (“*Edwards* did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is

¹ Federal courts, of course, recognize the limited *Edwards* exception in that due process and fairness are equally guaranteed in the federal arena. See *United States v. Berry*, 565 F.3d 385, 392 (7th Cir. 2009) (“Because both state and federal courts are bound to uphold the right to a fair trial (nixing trial of the mentally incompetent), and the right to self-representation, it follows that *Edwards* applies to the federal courts equally.”).

competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.”). In short, the majority opinion stops the analysis too soon and decides a question not asked. The common ground – the agreement on competency to stand trial – should be the *starting* point of the *Edwards* exception discussion, not its conclusion.

The majority opinion, however, correctly references another limitation on the right to self-representation, the timeliness of the request, (Opinion, p. 7), and this Court has previously recognized the limitation of appointing standby counsel. These exceptions to the right to self-representation are based on concern for orderly proceedings. *See State v. Winkler*, 388 S.C. 574, 587, 698 S.E.2d 596, 603 (2010) (“the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress” in denying late request); *State v. Reed*, 332 S.C. 35, 44, 503 S.E.2d 747, 751 (1998) (“there are times when the criminal justice system would be poorly served by allowing the defendant to reverse his waiver at the last minute particularly where delay would result”) (*citing Menefield v. Borg*, 881 F.2d 696 (9th Cir. 1989)); *State v. Brown*, 289 S.C. 581, 584, 347 S.E.2d 882, 884 (1986) (the trial judge found “waiver of his right to counsel was made knowingly and intelligently, and permitted him to appear *pro se*. However, he ordered that a previously appointed public defender remain available to Brown throughout the proceedings as ‘standby counsel.’”). Such exceptions find support in federal precedent. *See McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) (“A defendant’s Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant’s objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant’s achievement of his own clearly indicated goals”);

Faretta v. California, 422 U.S. 806, 834 n. 46 (1975) (“the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct” and “a State may—even over objection by the accused—appoint a ‘standby counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.”) (internal citations omitted). Likewise, federal precedent now embraces a limited exception to the acceptance of the waiver, the *Edwards* exception.

Yet, the majority rejects any consideration of this limitation – a limitation expressly approved to allow the states the ability to ensure a fair proceeding where severe mental illness would otherwise present a significant obstacle. The majority writes: “We do not find public policy supports such a distinction.” (Opinion, p. 8). While within constitutional limits, *Edwards, supra*, it appears an odd policy decision in these discrete circumstances and in light of other exceptions embraced by this Court.² In fact, this rejection creates tension with the Court’s prior precedent. For example, under existing state precedent, when a defendant intentionally disrupts or attempts to disrupt the proceedings, his right to self-representation may be limited to secure fair and orderly proceedings, but if he cannot help it, he is bound to equally disrupted proceedings without recourse. Further, it is

² While acknowledging the permissive nature of the *Edwards* exception, one observer has noted, if declined, “a state would lose the opportunity provided by the Supreme Court to improve the fairness, reliability, and efficiency of criminal trials. Trial courts would continue to be required to grant self-representation to those who, while satisfying the Dusky test of being aware of the charges against them and the nature of the proceedings and able to communicate to some extent with their attorneys, are, due to mental disorder or disability, largely or completely incapable of undertaking the much more complex and difficult tasks involved in defending themselves at trial.” Marks, *State Competence Standards for Self-representation in a Criminal Trial: Opportunity and Danger for State Courts After Indiana v. Edwards*, 44 U.S.F. L. Rev. 825, 837 -838 (Spring 2010).

contrary to this Court's express logic in collateral civil proceedings following criminal convictions which has underscored a lack of understanding as a reason to deny such requests even while finding the convicted defendant competent. *See Reed v. Ozmint*, 374 S.C. 19, 29, 647 S.E.2d 209, 214 (2007) ("Although Petitioner is competent to waive this right, we find troubling the fact that Petitioner clearly does not understand the procedural posture of his case. For this reason, we deny Petitioner's motion to relieve counsel at this stage of the proceeding.").

In further conflict, this Court expressly acknowledged the *Edwards* exception in *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604 (2010),³ and noted with favor that the trial judge in *Starnes* "inquired into Appellant's mental state." 388 S.C. at 600-601, 698 S.E.2d at 610-611. This Court rejected appellant's argument to "create a *per se* rule prohibiting capital defendants from representing themselves" finding "a *per se* ruling forbidding capital defendants from representing themselves would violate both the South Carolina and United States Constitutions." *Id.* That prohibition stands unchallenged here as the *Edwards* exception does not create a *per se* rule for any defendant, capital or otherwise. On the other side of the coin, however, is now the majority's *per se* rejection of any narrow exception. This simply does not account for the *reason* for the limitation. As with any bright-line rule, it is admittedly easy to administer, but may be difficult to justify in light of the evidence.

Further, the specter of a parade of horrors apparently envisioned and feared by the majority – namely, the misuse of the *Edwards* exception to deny a capital defendant's right

³ It is of no little note that *Starnes* which acknowledged the *Edwards* exception, was issued on August 16, 2010, before the determination in this case made in November 2010.

to self-representation – easily begins to dissipate upon consideration of the existing cases. Simply, the courts considering *Edwards* have uniformly adhered to strict limitations in applicability.

As a first point in limitation, the exception is only applicable where the defendant suffers from severe mental illness which is brought to the attention of the trial judge⁴ prior to the start of the trial:

...because the defendants in this case fail to get through the door to making an *Edwards* claim at all, because they were clearly fully competent, albeit foolish, to represent themselves.

United States v. Johnson, 610 F.3d 1138, 1145 (9th Cir. 2010). This has been underscored in a number of opinions:

...the *Edwards* Court repeatedly cabined its holding with phrases like “mental derangement,” 128 S.Ct. at 2386, “gray-area defendant,” *id.* at 2385, “borderline-competent criminal defendant,” *id.* at 2384, and, of course, “severe mental illness,” *id.* at 2388. *Edwards* himself, after all, suffered from schizophrenia and delusions, not just a personality disorder. So even if we were to read *Edwards* to *require* counsel in certain cases—a dubious reading—the rule would only apply when the defendant is suffering from a “severe mental illness.” Nothing in the opinion suggests that a court can deny a request for self-representation in the absence of this. Because there was no evidence before the trial court showing that Berry had such an affliction, *Edwards* was simply off the table.

⁴ As the majority correctly noted, defense counsel in the instant case brought the diagnosed mental illness and severe cognitive difficulties to the attention of the trial judge and requested the trial judge consider evidence of mental illness affecting representational ability. (Opinion, pp. 4-5). This was done without participation or input from the prosecution, and outside the presence of the prosecution team. (R. pp. 122-124). Further, the trial judge advised the remaining security officers that they could not relate what happened in the closed proceedings. (R. p. 124). The prosecution would not have access to such defense evidence at that point. Consequently, it appears that if applicable at all, it would most likely be a defense issue to present. Further, it is not always the case that defense counsel would challenge representational competency. See *United States v. Gorbey v. United States*, 54 A.3d 668 (D.C. 2012) (noting defense counsel advised on record defendant “competent” and such assertion should be afforded “some credence”). Thus, again, the exception has limited applicability.

United States v. Berry, 565 F.3d 385, 391 (7th Cir. 2009).

We emphasize that the issue to be decided on remand is not whether the defendant lacked the technical legal skill or knowledge to conduct the trial proceedings effectively without counsel. Indeed, it appears quite clear that he did lack such skill or knowledge. That fact, however, has no bearing on whether he was competent to represent himself for purposes of *Edwards*. Rather, the determination of his competence or lack thereof must be predicated solely on his ability to “carry out the basic tasks needed to present his own defense without the help of counsel”; *id.*, at 2386; notwithstanding any mental incapacity or impairment serious enough to call that ability into question.

State v. Connor, 292 Conn. 483, 530, 973 A.2d 627, 657 (Conn. 2009).

Nothing within the knowledge of the court at the relevant time suggested that this was one of those extremely “exceptional context[s]” (*Edwards*, 554 U.S. at 176, 128 S.Ct. 2379, 171 L.Ed.2d 345) in which a defendant who is competent to stand trial is nonetheless incompetent to proceed pro se.

People v. Stone, 98 A.D.3d 910, 911 (N.Y.A.D. 1 Dept. 2012).

...there was no record evidence that appellant suffered from severe mental illness, as the mental health experts who evaluated appellant opined that he was malingering and that there was no reason to believe he was mentally ill. Because the record evidence does not support the conclusion that appellant suffered from a severe mental illness, the *Edwards* exception to the constitutional right of self-representation does not apply.

Holley v. State, 91 So.3d 216, 217 (Fla.App. 4 Dist. 2012). *See also United States v. Reed*, 668 F.3d 978, 987 (8th Cir. 2012) (finding limited exception not applicable where “Reed does not argue that he suffers from the kind of severe mental illness at issue in *Edwards*”); *People v. Weber*, 217 Cal.App.4th 1041, 1054, 159 Cal.Rptr.3d 228, 240 (Cal.App. 3 Dist. 2013) (“the psychiatric evaluations in the record show that defendant does not suffer from any mental illness, that is, he is not a ‘gray area’ defendant as that term was used in *Edwards*. The diagnoses merely showed that he had or probably had a narcissistic

personality disorder. Defendant does not argue that equates to a mental illness.”); *State v. McNeil*, 963 A.2d 358, 366 (N.J. App. Div. 2009) (“a defendant must be mentally ill and not merely difficult to handle or disruptive to be deprived of the right of self-representation”). Further, this acknowledged limitation is consistent with our own stated policy: “A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation....” *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997).⁵

As a second point in limitation, the exception available to the state does not create a “constitutional right” that would allow repeated collateral attacks on the discretionary decision to insist upon counsel. *See Hernandez-Alberto v. State*, 2013 WL 3334919, * 14 (Fla. 2013) (“*Edwards* did not grant any substantive rights to defendants. The decision only explained that states are constitutionally permitted to deny self-representation rights to defendants who are competent to stand trial but not competent to represent themselves” which Florida embraced by court rule); *State v. Cureton*, 734 S.E.2d 572, 584 (N.C.App. 2012) (“defendant’s argument that it violates the Sixth Amendment to force a ‘gray-area’ defendant to represent himself at trial is not supported by Supreme Court precedent.”).

As a third point in limitation, the discretionary ruling has not been expanded past its very narrow reach, even in capital cases. *See, for example, State v. Maestas*, 299 P.3d 892,

⁵ Further still, this State’s policy is consistent with federal precedent. *See Faretta*, 422 U.S. at 836 (“We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.”); *United States v. Berry*, 565 F.3d at 391 (“Certainly, the right to self-representation cannot be denied merely because a defendant lacks legal knowledge or otherwise makes for a poor advocate.”). Respondent notes, however, that even in *Faretta*, the Court referenced the record supported that “Faretta was literate, competent, and understanding....” 422 U.S. at 835.

961-962 (Utah 2012) (rejecting argument based on *Edwards* that “because [defendant] suffers from some degree of intellectual impairment, this inquiry was not sufficient to determine if he had knowingly and voluntarily waived his right to present mitigating evidence” finding “we decline to require defendants to demonstrate a higher level of competency to waive the right to present mitigating evidence than we require them to demonstrate to stand trial, plead guilty, or waive other rights.”). The fact that the limitations may, due to the level of investigation and resources afforded a capital defendant, arise most often in the capital setting is logical, but does not ensure a *per se* exception in all capital cases where any mental health issue may be detected.

Lastly, the majority may have failed to address the exception for concerns over ease in administration in the trial courts. But this is no more than granting discretion to appoint standby counsel, or to order a competency evaluation. As far as the ultimate ruling, there must be a factual finding of a *severe* mental illness *affecting ability* to conduct the proceedings. Like any other abuse of discretion standard, the ruling may be appealed and reviewed for a sound factual basis in the record. *See, e.g., State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (*citing Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)) (“An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.”).

In accepting the possibility of the exception in Florida, the Florida Supreme Court simply added the presence of severe mental illness and its impact on representational ability as a factor to consider. *See In re Amendments to Florida Rule of Criminal Procedure 3.111*, 17 So.3d 272, 275 (Fla. 2009) (stating exception as follows in underline: “Regardless of the defendant’s legal skills or the complexity of the case, the court shall not

deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, and does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by himself or herself."). The Florida Supreme Court authorized the amendment "to implement the narrow limitation upon the right to self-representation recognized in *Edwards*" and found the amendment "tracks the language of *Edwards*." 17 So.3d at 274. The Court, however, "decline[d] at this time to further refine that limitation." *Id.* Here, though, in note 11 of the Opinion, the majority appears to criticize the dissent for "craft[ing] a new test for capital cases only" and suggesting a purely "paternalistic" approach. Yet, like the language in the Florida rule, the dissent relies specifically on the language of *Edwards*. (Opinion, p. 11). There appears to be no prohibition in limiting the narrow exception to capital cases (presumably, in light of an express recognition of the complexity of the litigation), but that is a far cry from reading out the basis for the exception *in toto* simply because it arises most frequently in such cases. Again, the majority's conclusion must be based on a misapprehension of the narrow rule in *Edwards* as the criticism completely overlooks the required evidence of severe mental illness in affecting the defendant's ability *in the trial proceedings at issue*. A closer look at the dissent, through the correct lens of a discretionary exception in narrow circumstances, shows a realistic review of the demands of a capital proceeding on one with severe mental illness. *This is merely one factor in accessing the representational ability.* This is also a factor dutifully considered by the trial judge in this case.

The facts of the case in regard to this issue are not fully set out in the majority opinion, but include the following pertinent testimony:

(1) Dr. Price, an expert in clinical psychology, forensic psychology, and forensic neuropsychology and *expert for the defense*,⁶ testified appellant “has had 16 different psychiatric diagnoses throughout his lifetime” and “six involuntary admissions, psychiatric admissions,” some of those were close to month long admissions, (R. p. 138, lines 2-11);

(2) Dr. Price, while he did not question competency to stand trial, testified that he believed appellant lacked the competency for self-representation for several reasons which included appellant’s significant psychiatric history and cognitive issues including when appellant “loses trains of thought... blank out... lapse into prayer not realizing he’d rub his thumb and you’d see his lips moving” and his memory problems, and problems with “judgment and the ability to abstract about decisions.” (R. p. 139, line 9 - p. 141, line 24);

(3) Dr. Price testified he was “concerned about the distractibility, the memory impairment he’s demonstrated, intellectual function, the difficulty in being able to abstract and apply that.” (R. p. 150, lines 8-11). Further, he testified the impairments were related to appellant’s “issues of PTSD and cognitive disorders” (R. p. 151, lines 2-7).

With due consideration that appellant had previously answered his questions during the prior Friday hearing, “for the most part appropriately,” (R. p. 151, line 23 - p. 152, line 1), the trial judge considered his prior observations of appellant with counsel in the throwing bodily fluid’s trial, and appellant’s responses in the Friday hearing; however, he was “concerned about the information that was provided to the Court” by Dr. Price. (R. p.

⁶ This hearing was held outside the presence of the jury and was limited to the *pro se* issue. As has been established in regard to other pre-trial evaluations, the trial court can limit access and admissibility to ensure fairness in the proceeding without disadvantaging the defendant in the case. *See generally State v. Bixby*, 388 S.C. 528, 558-559, 698 S.E.2d 572, 588 (2010) (“we must address whether a court can order a criminal defendant to submit to a mental health evaluation where that defendant indicates his intent to introduce evidence concerning his mental health during the sentencing phase of his trial. This is a novel issue in South Carolina. We answer the question in the affirmative.” Further, the Court found “the trial court’s order compelling Appellant to submit to a mental evaluation did not violate his Fifth Amendment right to self-crimination” and safeguards were used to protect the information for the appropriate phase); *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000) (regarding mental evaluation for competency).

154, line 22 - p. 155, line 6). In making his determination, the trial judge gave a detailed review of the testimony, and determined Dr. Price to be credible, noting, again, his own observations of appellant's interactions with counsel. (See R. p. 155, line 7 - p. 157, line 7).

He concluded:

Given the doctor's testimony and his expert opinion that the defendant has not knowingly and intelligently waived his right to counsel, I find the defendant does not have a clear understanding of the dangers of self-representation in the guilt nor the sentencing phase of the trial.

I further find that the defendant does not knowingly, intelligently understand the dangers inherent in self-representation. I feel like I would not be fulfilling my responsibilities under the law to an individual that deserved a fair trial if I allow [*pro se* representation] on this record, and I might add, my observations of Mr. Barnes.

Mr. Barnes has always been during these proceedings respectful to this Court I've noted him to appear to be respectful, although not necessarily pleased at times, with his attorneys. However, he is prone to ramble. He's prone to act extra-judicious, and by that I mean not appropriate, but to act as if he were conducting his defense on the streets, so to speak, and as we all know, the courtroom is not the place for that kind of decorum or demeanor. I think it would be abuse of my discretion to allow him to represent himself in trying to do all I can do to make sure Mr. Barnes in this very serious matter gets a fair trial. So I am denying your motion.

(R. p. 157, line 21 - p. 158, line 20).⁷

As the dissent found, the record well and fully supports "the trial court did not err."

(Opinion, p. 17). Rather, "[t]he trial court's order exemplifies the balancing that must take place in a capital trial when a defendant desires to represent himself." (Opinion, p. 17). Simply, there may be the rare occasion when severe mental illness would prevent the

⁷ The majority correctly notes the relevant observations should go to representational capacity not knowing and intelligent waiver. (See Opinion, p. 6 n.8). However, the majority incorrectly reads the conclusion in which the trial judge clearly considered representational capacity.

mental capacity to conduct the proceedings. The majority's wholesale rejection of *any* exception is the erroneous negative of the wholesale rejection in *Starnes* that capital case defendants may never represent themselves. The *Edwards* exception, far from undermining this Court's prior ruling in *Starnes*, is actually in accord with the recognition that capital defendants, like any other defendants, may waive the right to counsel and conduct their own defense in the vast majority of cases. *Edwards* merely allows a court to acknowledge only in the narrowest of circumstances a state imposed limitation where there is a severe mental illness affecting representational ability. This Court need not reject *Starnes* to accept *Edwards*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court should grant rehearing on these points in light of the misapprehension of the scope and definition of the *Edwards* exception in this case of first impression in this Court.

Respectfully submitted,

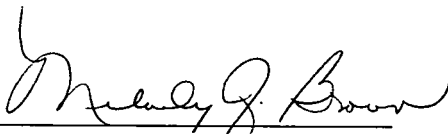
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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
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Appellate Case No.: 2010-178247

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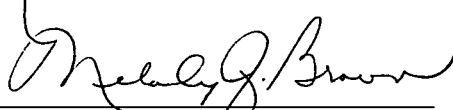
PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Petition for Rehearing* on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorneys of record as follows:

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