STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Lexington County
The Honorable Lee S. Alford, Circuit Court Judge

THE STATE,

Respondent,

v.

NORMAN STARNES,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

I. WAS APPELLANT CORRECTLY DENIED AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER, WHERE MERELY BEING AFRAID IN THE CONTEXT OF A CONSCIOUS DECISION OF SELF-DEFENSE DOES NOT SHOW THE UNCONTROLLABLE IMPULSE AND CRIMINAL INTENT THAT IS NECESSARY FOR HEAT OF PASSION?

II. DOES THE SIXTH AMENDMENT PRECLUDE A PER SE RULE PROHIBITING ANY AND ALL CAPITAL DEFENDANTS FROM REPRESENTING THEMSELVES?

III. DID APPELLANT VOLUNTARILY AND KNOWINGLY WAIVE HIS RIGHT TO COUNSEL IN THE SENTENCING PHASE, WHERE THE RECORD IS REPLETE WITH EVIDENCE OF HIS UNDERSTANDING OF THAT PORTION OF THE TRIAL?

STATEMENT OF THE CASE

Appellant, Norman E. Starnes, was indicted at the November 1996 term of the Court of General Sessions for Lexington County for possession or display of a firearm or knife during the commission of a violent crime, and two counts of murder in the shooting deaths of William C. Welborn and Jared Lee Champlin. **{R. 4219-20}**. The State served notice of intent to seek the death penalty.

Appellant was initially tried, convicted, and sentenced to death when tried in April 1997 before the Honorable Marc H. Westbrook, and a jury. This Court reversed the convictions on direct appeal. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000).

Appellant was re-tried before the Honorable Lee S. Alford and a jury from November 5th, 2007 to November 17th, 2007. Appellant represented himself at trial; however, the judge allowed William Nettles, Esquire, and John Delgado, Esquire, as standby counsel. The State was represented by Seventh Circuit Solicitor Harold "Trey" Gowdy, III, and Assistant Solicitors Robert Coler and Derrick Bulsa. On November 14th, 2007, the jury found Appellant guilty as charged. **{R. 2634}**.

The sentencing phase commenced on November 16th, 2007. The jury was given the following statutory aggravating circumstances to consider:

1. The defendant committed the murders while in the commission of robbery while armed with a deadly weapon.

2. The defendant committed the murders while in the commission of larceny while armed with a deadly weapon.

3. Two or more persons were murdered by the defendant by one act or pursuant to one scheme of course of conduct.

{R. 3094-3095}. The jury was given the following statutory mitigating circumstances:

1. The defendant has no significant history of prior criminal convictions involving the use of violence against another person.

2. The victims were participants in the defendants conduct or consented to the act.

3. The defendant acted under duress or under domination of another person.

4. The defendant was provoked by the victims into committing the murders.

{R. 3103}. The jury unanimously found all three aggravating circumstances, and recommended death on both murder counts. **{R. 3122-3124}**. Accordingly, Judge Alford sentenced Appellant to death. **{R. 3136}**.

This appeal follows.

STATEMENT OF FACTS

Norman Starnes admitted that he shot Bill Welborn and Jared Champlain in his living room, and then buried their bodies in a shallow grave on his Uncle Charles's farm in Aiken County. The issues on appeal concern failure to charge voluntary manslaughter and Appellant's decision to represent himself.

A. Background

Appellant ran a restaurant and sub sandwich shop in Pelion, South Carolina, called "Norman's Panther Parlor." Starnes's live-in girlfriend at the time of the killings, Gwen Ott, worked for him at the restaurant.

Starnes's first victim, Bill Welborn, was a 51-year-old retiree from the Air Force, who had opened up a "jump school" at the Lexington County Airport called the "Drop Zone." **{R. 1362-1369; 1397-1405}**. At the time of his death, Bill had a relationship with Dawn Holrath, who was one of his jump school pilots. **{R. 1365-1369}**. Starnes's other victim, Jared Champlain, had recently developed a love for skydiving under the tutelage of Bill. A few months before his murder, Jared and his fiancé, Karen Pratt, had moved to Lexington County where Jared was assisting Bill at the Drop Zone. Like Bill, Jared and Karen were also temporarily staying with Dawn until the three could move into a trailer near the Drop Zone. **{R. 1368-1370; 1397-1405}**.

Appellant first met Bill and Jared after he observed Bill participate in a demonstration jump at a Christmas parade in December 1995. Impressed, Appellant arranged for Bill to do a demonstration jump at the Pelion Christmas Parade two weeks later. **{R. 1368-1372}**. After the jump, the three men began to hang out fairly regularly.

B. January 6th, 1996: Wings and Ale

On January 6th, 1996, Bill and Dawn, Starnes and Gwen, and others went out for a Saturday night of drinking and dancing on the town. According to Dawn, Bill had $200 in money from the Drop Zone, and $120 or so of his own money. The night's activities began at the Wings and Ale in Irmo, where the group was shooting pool. Evidently, while Bill and Starnes were playing, Bill put $200 in Starnes's pocket. Dawn thought Bill and Starnes were trying to induce someone into playing for money against Bill, by showing Appellant had beaten Bill. **{R. 1374-1376; 1418-1431; 1439-1443}**.

Eventually, Bill counted the money, found only $160, and wondered why the defendant had taken $40. Bill called Starnes the next day and talked to Gwen, asking her about "$65 or $85." Bill told Dawn he did so to see if the defendant recognized that $65 or $85 was a different amount from the $40 the defendant had actually kept. Dawn told Bill she thought Starnes probably had just made a mistake. **{R. 1376}**.

C. January 8th, 1996: Bill and Jared disappear

On January 8th, 1996, Dawn took Bill to the Drop Zone, where he and Jared were working on the facility. They made arrangements for Bill and Jared to come by Dawn's house later. She left and never saw him again. **{R. 1377-1379}**.

Dawn stated that Bill called about 9:55 p.m., saying he had not had time to come by her house. He then started whispering, asking Jared "if they could hear him". Bill was supposed to call back in ten minutes but never did. **{R. 1379-1381}**.

Dawn of course became very worried when Karen contacted her at 10:20 p.m. and stated she could not find the men. She tried calling Appellant numerous times at home

and at the restaurant, but he never answered – which was unusual. She finally talked to Appellant, who stated he had no idea where they were, and that he left them at the pay phone at CJ's. **{R. 1379-1385; 1447-1449}**. A missing person's report was eventually filed, and police began to investigate. **{R. 1519; 1566-1569}**.

D. January 1996 - May 1996: the investigation goes nowhere

Since he was the last person to see the victims, the police were interested in talking to Appellant. He told police he was with the victims drinking at CJ's, and that Bill was acting hyper and threatened Appellant. Appellant claimed that he last saw them walking down Highway 302, saying they were going to see "Stan the Man". **{R. 1570-1574; 1578-1581}**. A week or so after the murders, Appellant approached a telephone company employee he knew and said "those guys are dead", adding that they were at his house and he was the last to see them alive. Appellant seemed nervous, and asked if the phone company could trace phone calls the victims were making from his house. Two days later, Appellant called the employee, and carried on a rambling conversation in which he asked about phone records and tracing calls. **{R. 1590-1593}**.

In the months following the disappearance of Bill and Jared, Appellant would take their family members around Lexington to look for them, or would call in false leads to police. He put up a missing person's poster in his restaurant, and told newsman J.R. Berry of WLTX-TV that he thought the disappearance was drug related, and believed the victims "got on a plane and they were gone". **{R. 1385-1387; 1525-1529; 1632; 1673-1677; 1924-1927}**.

E. May 27th, 1996: Gwen tells police what she knows

Appellant eventually kicked his girlfriend Gwen out of his house, and she eventually ended up staying the night with her friend Vickie Kaiser after an "encounter" with Appellant. Gwen confided in Vickie what she knew about the killings, and Vickie advised her to go to police. Gwen did the next day, and gave a statement. **{R. 1634-1638; 1668; 1678-1683; 1873}**.

Gwen told police, and of course testified at trial, that Bill, Jared, and Karen had come to Appellant's restaurant on the afternoon of January 8th to eat. Eventually, Bill and Jared left with Appellant in Appellant's mother's car. Appellant came back more than once to get money out of the cash register, saying they were gambling and he needed money. She did not see Bill or Jared with him. **{R. 1612-1613}** .

Eventually, Appellant came back a third time, upset, shaking, and on the verge of tears. He had mark on temple, said had been pistol whipped in bathroom by Bill. Appellant, who often carried a gun in the small of his back, got his pistol and bullets from the kitchen and said "they will be dead tonight". Gwen did not really believe he would kill them, and went back to cleaning the restaurant. **{R. 1614-1616}**.

After a while, Appellant came back to the restaurant with a six pack of beer, and said "let's go they are dead". Gwen was washing dishes, and did not believe him, but he repeated: "Let's go and I mean now. They are dead". Appellant told Karen Bill and Jared were still at CJ's where he left them, and she left to go get them (a fruitless wild goose chase, of course). Appellant then told Gwen to lock her son in the restaurant and come with him.

As they drove the short distance to Appellant's house, Appellant told Gwen she would not like what she was about to see and it would not be pretty. When they arrived at Starnes's house, Gwen saw Bill and Jared's bodies laying on the floor. The defendant said that before he had left he heard Bill gurgling, so he checked Bill's pulse while holding a gun to his temple. The defendant then yelled obscenities at the corpses, and pistol-whipped the bodies, saying "now you know how it feels", and telling Jared it was all his fault. Appellant took everything from their pockets, and they cleaned the house, placing the bodies in the trunk. **{R. 1618-1625}**.

Appellant told Gwen Jody Fogle was on phone trying to make drug deal, and Jared put pistol to his head and cussed him. When Jared lowered the pistol from Jody's head, Appellant shot Jared first, and the turned and "popped" Bill. **{R. 1623-1624}**.

After picking up Gwen's son, they returned to the house, where Appellant called Tony Tindal to borrow his truck. He left for a while, and when he returned he told Gwen to follow him out to Aiken County to his Uncle Charlie's property. There, she saw the bodies lying on the ground behind the house. Appellant told Gwen to leave her car lights on, and then he kicked one of the bodies, and urinated on them. Eventually, he put the bodies on the truck and backed it into the woods. He then pulled away, and Gwen followed him. On the way back, Appellant stopped at a bridge over the Edisto River and threw the gun out. **{R. 1624-1632}**.

Months later, Appellant told Gwen his uncle had called and said the women were complaining about a smell like death on the property, and Appellant needed to do something. Appellant said he reburied Bill and Jared and covered them with lime. He also

brought home a piece of blue jeans and a tennis shoe. Appellant smelled them and said "yeah, that sure smells like death". **{R. 1632-1634}**.

Vickie Kaiser and Tony Tindal also testified, corroborating their portions in the information Gwen gave to police. **{R. 1678-1683; 1859-1864}**.

F. May 1996: The bodies, the gun, and other forensic evidence

Police of course headed out to Appellant's uncle's property, where they found a disturbed area in back corner of lot with nothing growing on it. As they dug, they eventually hit some concrete, and flipped it over to find a leg bone embedded in it. They dug further and found the victims wrapped together in a blanket and covered with a white powder. No wallets or money were found with them. **{R. 1711-1723; 1757; 1790}**.

Dr. Sexton's autopsy was complicated by the advanced state of decomposition, but revealed that Bill had evidence of three missiles passing through his body: (1) one that entered near the nipple; (2) one that entered near the collar, with the bullet eventually lodging near the spine; and (3) one through the collar of the shirt, but the neck flesh was missing. Jared had one gunshot wound, which entered back near spine, and exited the front of the chest. Both died from blood loss. **{R. 1768-1799}**.

Divers recovered a .38 pistol registered to Starnes from the Edisto River, but it could not be conclusively identified due to its submergence. **{R. 1882-1919}**. A hole was found in the wall in Appellant's house, and burned trash was found in the dumpster. The liner had been removed from the trunk of Appellant's mother's car. **{R. 1728-1738}**. A doctor found no evidence of drug use in the toxicology report, although no test was done for methamphetamine. The blood alcohol content of Bill was only 0.09 – which could have

been from decomposition. **{R. 1950-1955}**.

G. The Letters

The State also introduced some letters Appellant wrote to a woman while in jail, which were inconsistent with his ultimate claim of self-defense. On August 11th, 1996, Appellant wrote:

> They still have not found the murder weapon and only I know where it is. They (police) know that its an important key to this case. The motive is still a mystery to them too. One other suspect in this case knows that answer but he wouldnt tell for nothing in the world. He will have no choice one day.

On August 19th, 1996, Appellant wrote:

> The possibility of me not being the person who killed the two men. There are questions pointing to my ex-girl. They want me to give a statement but I have refused to. Larry said they have way too many questions that are unanswered. That's why they are still investigating the matter. Still no weapon. No motive. No PROOF I murdered them.
>
> * * *
>
> The article said I dug them up and re-buried them. I don't think anyone would dig a body up five months after it was buried. This is shit that Gwen has told the police.

On August 21st, 1996, Appellant wrote:

> The family doesnt know what happened on the night the two were killed. They only know what has been told to them by the police. The police don't know because they werent there when it happened. They do not know a motive, where the murder weapon is, or who pulled the trigger. Police have no witnesses to the murder. Just hearsay. Thats all. Yes they were killed in my living room. Yes, they were buried on Uncle Charlie's property, but that doesn't mean I was the one who killed them and put them there.

{R. 2003-2007}.

H. The defense guilt phase case

The defense first called CJ's employee Claudette Harbert, who testified that when

Bill, Jared, and Appellant were at the pool hall on the night of their disappearance, Bill said to her "do you know this stupid motherfucker Norman?". Later, she heard a commotion near the bathroom, and Appellant came up to the counter with some beer. Bill came up and put arm around Appellant's neck, saying they were old Vietnam buddies. Bill added that he was going to "take Norman up to Platt Springs Road and blow his fucking brains out". **{R. 2074-2081}**.

Jared's girlfriend Karen Pratt testified that when Appellant returned to his restaurant he did not have any marks on his face and was not shaken up or crying. She stated that Jared did sometimes carry a gun, and she said at the prior trial she thought he was carrying it that night. **{R. 2118-2122}**. However, on cross, she noted that when Appellant came in the restaurant the last time, he offered her an beer and was acting "overly nice". She stated the guys were not wild or crazy drunk or anything that night, and that she never saw Jared pull out the gun that night. She also stated she gave Jared $10 before he left with Appellant for CJ's. **{R. 2129-2143}**.

Jody Fogle testified that Appellant showed up unexpectedly, and he went with Appellant to his house. Inside, he saw Bill and Jared. Jared approached Jody and asked "where is the dope?", and Jody responded he did not mess with dope. Jody then asked for his gun, and put it to Jody's chest. Jody responded: "Look here, Norman said yall wanted some shit; I'm here to get you some shit". Bill came over and talked to Jared and then took the gun from him. Suddenly, Appellant shot Bill twice, and then wheeled around and shot Jared as he tried to escape. **{R. 2149-2159}**.

On cross, Jody stated there was no prior plan for him to get Bill and Jared drugs,

and that Appellant just told him he needed Jody to watch his back. Appellant said someone had been "fucking with him", and asked Jody if he had his gun. Appellant said he had some trouble with the men in the bar, but they were going to go to Appellant's house and "get [his] shit". In the car, Appellant had a .38, but also had a .22, which he said was the gun the men were using to mess with Appellant. **{R. 2159-2169}**.

Jody stated that when they entered, the victims were on the couches, and Bill was not wide-eyed. Bill even gave Jody a friendly "hey" when introduced. Appellant went into the bedroom and was fumbling with something, and then Jared asked for his pistol. Once Appellant gave Jared the pistol, Jared came at Jody, chambering a round. However, no round ejected as one would expect, as Jody noticed one was in the chamber when Appellant showed him the gun in the car (the conclusion being that Appellant unloaded Jared's gun in the bedroom). About a minute passed before Appellant opened fire, during which neither Bill nor Jared were doing anything to threaten anyone. Outside, Appellant pulled the wires from his phone box in case the victims were still alive, and told Jody: "I knew I was going to kill them". Indeed, on the way over, Appellant told Jody he thought he was going to kill the victims. **{R. 2170-2192}**.

Appellant called Marion Powell, who testified he did methamphetamine with Bill in the bathroom of a biker bar on January 5th, 1996. **{R. 2225-2228}**. He also called Donna Benson, who testified she was doing methamphetamine with Bill on January 4th and 5th, 1996. **{R. 2253-2260}**. However, she also stated on cross that Bill would have never flown or jumped under the influence. **{R. 2283-2285}**.

A forensic toxicologist testified that methamphetamine can lead to psychosis,

emotional mobility, and violence. He stated nothing could be found in the hair samples from the victims, which he felt was inconclusive. However, on cross he agreed if a person was a long term user he would expect to find traces of meth. **{R. 2288-2303}**.

Finally, Appellant testified himself. He first claimed that he introduced Bill to Fogle on New Year's Eve, and Bill left with Fogle after asking where an ATM was. **{R. 2379-2381}**.

As to the Wings and Ale incident, Appellant claimed Bill gave him the $200 and asked Appellant to go get an eightball of drugs. Appellant claimed he refused, and gave Bill back his money. He stated he must have accidently spent the $40. **{R. 2382-2383}**.

Appellant claimed that on January 8th, Bill refused to come in the restaurant, and was outside still cussing about the $40. Appellant said he paid Bill from the cash register. Bill supposedly came inside, but he was fidgety, saying "come on, Norm, let's go". After a trip to Appellant's uncle's farm, Bill, Jared, and Appellant stopped at CJ's, where they played pool. Bill went outside twice to use the phone. At one point, Appellant was using the urinal and Bill came up and grabbed him from behind. Bill put some metal object to his head and said, "you don't do your f'in friends like that." Appellant said he passed it off as a joke. Later, Bill told Claudette she better call police as he was going to take Norman on Platt Springs Road and blow his brains out. **{R. 2382-2386}**.

Appellant claimed that when they all left, Bill wanted to go to Jody's house, but Appellant refused – instead taking them to his house and going to pick up Jody. Appellant asserted that when they arrived, Bill ended a call and came up and put his arm around Appellant. From behind them, Appellant heard cussing, and turned to see Jared pointing

a gun at Jody. Appellant claimed he ran in the bedroom and put his gun in his back pocket, and was running out the front door when he heard "whoa". Supposedly, Appellant turned around and saw Bill pointing a gun at him, so he fired. He then turned and shot Jared. Appellant claimed he later realized he shot an unarmed man, and was scared so he did not call police. He conceded he buried the bodies and lied to everyone. **{R. 2386-2394}**.

Appellant was cross-examined on where Jared's gun was – which he said he threw in the Black Creek. He also was examined on why if Bill was so high he took them with him from the restaurant, why he did not leave them at CJ's after the incident there, why he supposedly took these intoxicated drug-crazed men who had threatened to kill him back to his house, and why he then returned later. **{R. 2406-2446}**.

I. State's case in reply

In reply, the State called an officer who stated Donna Benson never mentioned drug use by Bill, and a diver who searched the Black Creek area and found nothing. **{R. 2454-2466}**. Dawn Holrath denied ever seeing Bill do drugs, and testified he had zero tolerance for booze on drop days. She stated he was fine when he came to her house on January 5th, 1996. She also stated she left with Bill to get fireworks for the New Year's Eve party, and Bill did not go with Fogle. **{R. 2467-2472}**.

ARGUMENT

I. APPELLANT WAS CORRECTLY DENIED AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER, WHERE MERELY BEING AFRAID IN THE CONTEXT OF A CONSCIOUS DECISION OF SELF-DEFENSE DOES NOT SHOW THE UNCONTROLLABLE IMPULSE AND CRIMINAL INTENT THAT IS NECESSARY FOR HEAT OF PASSION.

Appellant first contends that the trial court erred in charging voluntary manslaughter in the case, which he asserts was justified by his fear and the presence of guns. However, there was no evidence Appellant shot Bill and Jared in the heat of passion, where Appellant's fear was not an uncontrollable impulse to do violence but rather a conscious decision of self-defense.

A. Events at trial

The testimony has already been related in the Statement of Facts. After the close of evidence, Appellant requested voluntary manslaughter. When asked what justified it, he noted caselaw that violence to a friend can constitute provocation, and that heat of passion can result from a list of things including fear and terror. **{R. 2478-2479}**. Standby counsel argued that terror can constitute heat of passion, and noted this was especially the case as to Bill, since Appellant's testimony was Bill pointed the gun at him. As to Jared, counsel contended that Appellant did not know he was unarmed until after he shot him. The judge decided to send the jury home so he could think about the issue. **{R. 2482-2484}**. After a break, the judge noted Appellant had not testified he was under any heat of passion, but stated he was leaning towards giving the charge. As the discussion proceeded, the judge noted the real concern was what happened at the house. **{R. 2486-2493}**. Contrary to Appellant's position in his brief that the judge erroneously believed one

could not have voluntary manslaughter and self-defense in the same case, the judge to the contrary clearly stated they both could be present if the facts warranted it. **{R. 2493 ll. 14-20}**. The solicitor argued that Appellant just stated he saw Bill with the gun and instinctively fired, which was self-defense or nothing. He noted the testimony either established a premeditated desire to kill, or self-defense in a drug deal gone bad. **{R. 2493-2494}**.

The next day, there was a further charge conference. The judge stated he had decided not to charge voluntary manslaughter, noting that in their discussions Appellant had not specifically requested voluntary manslaughter, but was simply asked the judge to charge the correct law. The judge noted there was no evidence Appellant was upset or angry – just that it was a drug deal gone bad and Appellant defended himself when Bill allegedly pointed the gun. The judge concluded it would not be fair to either side to charge it since it was not requested. **{R. 2540-2543}**.

Indeed, the judge pointed out that it appeared Appellant's strategy was to expressly not ask for voluntary manslaughter, but merely request the correct law, in hopes that if the judge charged voluntary manslaughter and he was convicted of it, he could get relief on appeal by way of directed verdict, but if the judge did not charge it, he could get relief for failure to charge. **{R. 2543-2545}**.

The judge reasoned that there was obviously time to cool from the incident at the bar, and no evidence Appellant was under heat of passion when was at the house. **{R. 2547-2549}**. When Appellant contended he had made a request to charge, the judge noted that there had been no requests made, and only when the judge decided to take the

night to think about it did Appellant came forward with a number of charge requests. The judge noted he had spent hours going through them, but felt Appellant was most concerned about putting forth some charges and claiming on appeal he did not get them. **{R. 2549-2553}**.

After some discussion of imperfect self-defense, which the judge refused to charge, Appellant specifically noted for the record that he was not waiving a charge on voluntary manslaughter. The judge stated that Appellant had initially taken the previously described passive approach, and was now changing his position. **{R. 2560-2561}**.

After closing arguments and the charge, Appellant again stated he wanted to renew his request for voluntary manslaughter. After some discussion, the judge noted that while Appellant had changed his position from the passive approach, the record would reflect at this point that Appellant had requested voluntary manslaughter and it had been denied. **{R. 2618-2626}**.

B. General Rules

It is proper for a trial court to refuse to charge voluntary manslaughter in a murder case where it very clearly appears there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000). "'Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.'" Id. at 359, 535 S.E.2d at 424 (quoting State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998)). Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter. Locklair, 341 S.C. at 359-60, 535 S.E.2d at 424; see State v. Gilliam, 296

S.C. 395, 397, 373 S.E.2d 596, 597 (1988). Sudden heat of passion upon sufficient legal provocation that mitigates a felonious killing to manslaughter must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called "an uncontrollable impulse to do violence." Id. at 360, 535 S.E.2d at 424.

In determining whether the act that caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969). In cases where both self-defense and voluntary manslaughter jury instructions may be involved, the court should review the facts to see if a charge on both is warranted. Gilliam, 296 S.C. at 396-7, 373 S.E.2d at 597. "Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if supported by the evidence." Id. "The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter." Id. However, a jury instruction for a charge of voluntary manslaughter is not warranted when no evidence is presented that shows the defendant was overcome by a sudden heat of passion that would produce that uncontrollable impulse. State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Indeed, a finding that there is evidence of adequate legal provocation has no bearing on whether a defendant may have acted in a sudden heat of passion. See State v. Cole, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000).

C. There was no evidence Appellant shot Bill and Jared in the heat of passion, where Appellant's fear was not an uncontrollable impulse to do violence but rather a conscious decision of self-defense.

Here, the judge correctly reviewed the evidence and concluded that there was no evidence Appellant shot the victims in the heat of passion.

Undoubtedly, older cases have referred to heat of passion as being "the highest degree of exasperation, rage, anger, sudden resentment or terror, rendering the mind incapable of cool reflection". State v. Davis, 50 S.C. 405, 423, 27 S.E. 905, 911 (1897). Indeed, State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), affirmed the giving of a voluntary manslaughter charge because the defendant was in a heated argument and testified he was afraid for his life because he had been threatened. See also State v. Penland, 275 S.C. 537, 540, 273 S.E.2d 765, 766 (1981) (evidence of provocation and heat of passion from pointing of a gun at appellant and the subsequent struggle).

However, while there is no doubt voluntary manslaughter can be charged in case where self-defense is charged, it does not follow that manslaughter should be charged simply because a defendant claiming self-defense testifies he was afraid. If some testimony that the defendant was afraid is enough for voluntary manslaughter to be charged, it would have to be charged in *every* self-defense case, bar none. This is because it is hard to conceive of a case where whatever the victim did to put the defendant in reasonable fear of his or her life for self-defense would not also be sufficient legal provocation, and of course that reasonable fear of imminent bodily harm – a necessary element for self-defense – would then also constitute the passion for voluntary manslaughter. Voluntary manslaughter is more than "I was afraid" – it is the "highest

degree of . . . terror" that causes a loss of control.

Chief Justice Toal elaborated on this very issue in her concurrence in State v. Childers 373 S.C. 367, 375-376, 645 S.E.2d 233, 237-238 (2007):

> This factual scenario is completely void of any evidence remotely supporting a charge of voluntary manslaughter. Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever.
>
> If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court. Similarly, the trial court charged the jury on the law of involuntary manslaughter; perhaps because it was possible for the jury to believe that the defendant's initial returning of fire was justified, but ultimately find that the defendant was criminally reckless in firing multiple times over his shoulder as he retreated. Without any evidence supporting the view that the defendant fired the fatal shots while under an " uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury.
>
> In support of their holding that the defendant was entitled to a voluntary manslaughter charge, the court of appeals relied on this Court's holding in State v. Penland, 275 S.C. 537, 540, 273 S.E.2d 765, 766 (1981). As the court of appeals noted, that case arguably stands for the proposition that a jury issue on the voluntary manslaughter element of heat of passion can be created in a case similar to the instant case.
>
> Penland cannot be so broad. Read literally, the opinion seems to impermissibly blend the concept of voluntary manslaughter with the defense of self-defense. The opinion provides no substantial factual background for the case, and no description of the events leading up to the apparently fatal incident. To the extent Penland stands for the proposition that a person who simply defends himself while in fear for his life is entitled to a voluntary manslaughter charge, the case should be overruled.

Here, there likewise is no evidence of criminal intent. Appellant testified he took the men to his house and then went to get Jody Fogle to get drugs for them – hardly indicative of uncontrollable fear. Indeed, he specifically testified he was not angry at them from the incident at the bar. **{R. 2445}**. He got his gun when he saw Jared put the gun to Jody's

chest, but he was heading out the door when he heard "whoa" and turned to see Bill pointing the gun at him. Appellant fired at Bill, and then shot Jared. **{R. 2387}**. Appellant stated he thought they both had a gun. While he talks about being scared on the next page, that was being scared at what he had done. **{R. 2388}**. The closest Appellant gets is at the end of his direct, when he states:

> I was scared and I was frightened. When Jared pulled the gun on Jody, it scared me. And I didn't know what his intentions was, but if someone pulls a gun on another individual, its usually to shoot them.

{R. 2396}. Like what Chief Justice Toal described in Childers, this does not describe criminal intent, but fear of imminent bodily harm – which justifies a killing, rather than merely mitigating it. It is not uncontrollable terror.

Appellant's testimony on cross confirms this. While he later states he was afraid and terrified, this was in response to questions on why he did not call police instead of hiding the bodies and lying to everyone. **{R. 2418}**. As the cross proceeds, he again states he was scared, but notes it was because there were no police there to protect him, and "I had to protect myself and protect Jody". **{R. 2420-2421}**. Again, this is not evidence of uncontrollable passion to kill, but rather conscious self-defense.

Self-defense is a deliberate and justified action based on a valid set of existing circumstances. Voluntary manslaughter is provocation to the point of loss of control. There was no testimony here Appellant was in such uncontrollable terror that he lost control and acted with criminal intent. It is respectfully submitted that Chief Justice Toal's concurrence in Childers precisely analyzes such an issue, and Wiggins and Penland should be clarified inasmuch as they may be read too broadly. Otherwise, virtually every

self-defense case will also be a voluntary manslaughter one.[1]

II. THE SIXTH AMENDMENT PRECLUDES A PER SE RULE PROHIBITING ANY AND ALL CAPITAL DEFENDANTS FROM REPRESENTING THEMSELVES.

Appellant next contends this Court should overrule its caselaw and create a *per se* rule that capital defendants do not have the right to represent themselves. He asserts that since the decision affects the interests of the State and other inmates in the broader sense, the decision should not be allowed. However, the issue is not preserved. In any event, a competent defendant with no mental illnesses precluding self-representation has a Sixth Amendment right to represent himself that must be respected by the courts. This right can only be abridged where the specific circumstances of a particular case warrant it, and Appellant's suggestion of a *per se* rule cannot stand.

A. The issue is not preserved.

At no time in the trial court did Appellant or his counsel assert that this Court should completely override the federal and state constitutional right to self-representation in capital cases based on the policy arguments asserted now. As such, the issue is not preserved for appeal. State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996) (constitutional basis must be asserted at trial to be preserved for appeal).

B. Appellant, a competent defendant with no mental illnesses precluding self-representation, has a Sixth Amendment right to represent himself that must be respected by the courts.

Of course, "the Sixth and Fourteenth Amendments of our Constitution guarantee that

---

[1] Indeed, unlike Wiggins there was no protracted and heated argument here; Appellant went back to his house neither scared nor angry. Inasmuch as Appellant asserts he must receive the lesser included offense based on Beck v. Alabama, 447 U.S. 625 (1980), Beck only requires lesser included offense instructions as a matter of due process where they are warranted under state law. Id. at 635-36.

a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). However, due to our system's respect for the individual, a person may waive the right to counsel, as long as the waiver is knowing, voluntary, and intelligent. Id. at 835; State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). Faretta allows a defendant to waive his right to counsel if the following conditions are satisfied: (1) the accused is advised of his right to counsel, and (2) he is adequately warned of the dangers of self-representation. Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990).

"Although a defendant's decision to proceed pro se may be to his own detriment, it must be honored out of that respect for the individual which is the lifeblood of the law." Faretta. This is because a State "may [not] constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense". Faretta, 422 U.S. at 807. Accordingly, there is a federal constitutional mandate requiring a knowing and voluntary desire for *pro se* representation.

The only remaining question is the existence of limits on that constitutional mandate. Prior to the United States Supreme Court's decision in Indiana v. Edwards, 128 S.Ct. 2379 (2008), it was clear that a defendant found competent to stand trial had a completely absolute right to waive counsel. First, this Court noted that there is no difference between the level of competence required to stand trial and the level required to waive the right to counsel, as long as the waiver is knowing and voluntary. Sims v. State, 313 S.C. 420, 438 S.E.2d 253 (1993) (discussing and quoting Godinez v. Moran, 509 U.S. 389 (1993)).

Moreover, in State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997), the South

Carolina Supreme Court reversed the decision of the trial judge to prevent capital defendant from proceeding *pro se*. In that case, the judge believed the defendant understood the dangers of self-representation, but "for whatever reason . . . failed to accept it". The court noted that "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", and pointed out that a "decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one". Thus, it concluded that the trial judge violated the defendant's Sixth Amendment right to proceed *pro se*.

In State v. James Earl Reed, 332 S.C. 35, 503 S.E.2d 747 (1998), this Court Affirmed the decision to allow a defendant to represent himself where he was found competent to stand trial. There, the defendant who represented himself in the guilt phase asked for counsel at sentencing because he was too emotional, and standby counsel objected that defendant was not competent to represent himself there. However, this Court found the complaint to be made too late, since the defendant had made the waiver.

Brewer, Sims, and Godinez were of course all in existence at the time of Applicant's trial and direct appeal. However, just this past year, the United States Supreme Court issued Edwards, which called into question the efficacy of the single competency standard and the absolute nature of the right of a competent defendants to represent themselves. In Edwards, an initially incompetent defendant was given mental health treatment and ultimately found competent to stand trial. He wanted to represent himself, but the trial court denied the request. The judge there found that while the defendant was competent and could cooperate with his attorney, his delusional disorder and schizophrenia precluded him from staying focused enough to represent himself. However, the Indiana appellate

courts reversed the decision, noting that they were bound by Godinez's single competency standard, and Faretta's statement that "a state may not 'constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense'". Edwards v. State, 854 N.E.2d 42, 46 (Ind. Ct. App. 2006) (quoting Faretta, 422 U.S. at 807). See also Edwards, 128 S.Ct. at 2382-83.

The United States Supreme Court reversed the Indiana appellate courts and upheld the trial court's ruling that the defendant was competent to stand trial but not competent to represent himself. Formulating the question before it as whether there was a "mental-illness-related limitation on the scope of the self representation right", the Court began by noting that the competence standard itself refers to the ability to consult with a lawyer, and also that Faretta did not deal with the issue of the relationship between mental competency and self-representation because the defendant there had no such issues. The Court rationalized away Godinez's expression of a single competency standard by stating:

> 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.

Edwards, 128 S.Ct. at 2383-85. The Court concluded that there may be times where a defendant met the competency standard for going to trial but lacked the ability to "carry out the basic tasks needed to present his own defense", and noted that such situations would do nothing dignity of the individual or the right to a fair trial, and would call the integrity of the system into question. Thus, Edwards held:

> We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States

> to insist upon representation by counsel for those competent enough to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

128 S.Ct. at 2385-88.

Thus, Edwards is properly interpreted as only *allowing* a State to force representation on a "grey area" defendant incapable of conducting trial proceedings – not as requiring the State to do so. Indeed, that is precisely what Godinez held – that a State is not required to override a defendant's wishes. And of course, here, there is and can be no contention that Appellant is anywhere close to a "grey area" defendant. There have never been any issues raised as to his competency or mental status, and, as will be more explored in the next issue, his conduct of this trial certainly rebuts any contention he was anywhere near the "grey area". Accordingly, Appellant had an absolute federal constitutional right to represent himself, which the trial court appropriately honored.

C. Appellant's policy arguments are insufficient to override a clear federal constitutional right, which can only be abridged where specific circumstances of a particular case warrant it.

Appellant contends that capital cases fall out of the purview of Faretta because of the State's interest in the fair administration of justice in its death penalty system, which he asserts overrides the defendant's constitutional right to represent himself. However, this fails as a justification for overriding a clear constitutional mandate.

First, of course, is the fact that the United States Supreme Court obviously considers the right of self-representation to be so rooted in the Sixth Amendment – indeed, part of the "lifeblood of the law", that it cannot be circumscribed by a *per se* rule applicable to all capital defendants. A review of Edwards shows that the concern there was with a

defendant who was otherwise competent but suffering from mental illness that would make him "unable to carry out the basic tasks needed to present his own defense without the help of counsel". The Court noted that in such a situation, letting a mentally ill defendant defend himself does nothing for the dignity of the individual or the right to a fair trial, and would call the system into question. Ultimately, the court noted that trial courts were in the best position to make case-by-case determinations of a defendant's mental illness and his ability to conduct the trial. The important point is that the right of self-representation is important enough that its abridgment for competent people is allowed only on a case-by-case basis where the mental illness is so bad that it is warranted – a determination which is flatly inconsistent with the *per se* prophylactic rule suggested by Appellant.

Other decisions also show the paramount importance of this right, and the fact that it may be circumscribed only on a case-by-case basis where the circumstances warrant it. For example, in McCaskle v. Wiggins, 465 U.S. 168 (1984), the Court addressed a situation where there was unsolicited participation by stand-by counsel, and held that the right was not violated by such participation as long as the defendant retained actual control over the case presented to the jury, and counsel was not able to destroy the impression before the jury that the defendant is representing himself. And, of course, many decisions have carefully dealt with situations where a defendant lost his right to self-representation by misbehavior, delay or manipulation. See, e.g. U.S. v. Frazier-El, 204 F.3d 553 (4th Cir. 2000) (affirming refusal of self-representation where manipulative); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998) (while post-trial requests of a *pro se* defendant for counsel should normally be honored, request was properly denied where it was made 24 hours before the sentencing proceeding, in which the same jury was sequestered); State v.

Cabrera-Pena, 350 S.C. 517, 567 S.E.2d 472 (Ct. App. 2002) (last minute letter complaining about counsel was an attempt to delay the proceedings and the trial court was within its discretion in not indulging it). A *per se* rule abrogating a right entirely for a class of defendants is simply inconsistent with the importance of this individual right and the care with which it has been treated by the courts.

Indeed, Appellant's contentions would be in many ways applicable in the non-capital setting. Fair administration of justice is important in non-capital cases as well. While certainly death penalty cases are different in procedure and in sentencing, if in fact *pro se* representation is so destructive to the reliability of the system as Appellant suggests, then there would be no basis for distinguishing between capital and non-capital cases.

Next, the concerns Appellant has about the reliability of the process can be soothed by exactly what happened in this case – the appointment of standby counsel. Faretta allows a trial court to appoint standby counsel to aid pro se defendants "if and when [they] request help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." Faretta, 422 U.S. at 834 n. 46, 95 S.Ct. 2525. While there is no requirement of standby counsel, their existence provide an important mechanism to ensure fairness and reliability. Again, though, the point is they are allowed on a case by case basis where the trial judge finds they are warranted.

Indeed, Article I, section 14 of the South Carolina Constitution specifically provides that a defendant has the right to be heard "in his defense by himself or by his counsel or by both". While there is no right to hybrid representation, see Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989), and State v. Sanders, 269 S.C. 215, 237 S.E.2d 53 (1977), this provision provides yet another overlay which would preclude this Court from creating

a *per se* rule prohibiting all *pro se* representation.

Appellant finally contends that because of this Court's statutory duty to review death sentences for proportionality, allowing *pro se* representation could affect other death sentenced inmates represented by counsel inasmuch as the *pro se* cases are compared to the represented cases. Of course, S.C. Code Ann. § 16-3-25(C) (Rev. 2003) requires this Court to review a death sentence to see if it is excessive or disproportionate to the penalty in other cases, considering the crime and the defendant. Of course, this Court could if it desired take such a fact into consideration in its review process, if it was concerned. But there is simply no standing here for Appellant to assert a *per se* rule after taking his chance at trial, where no specific circumstances of his case warrant trampling on the right of self-representation, and his contentions are based on the possible effect his case might have on hypothetical other people who receive death sentences in the future.

As to Appellant's concern that a capital case is too complex and difficult to try by an incarcerated inmate, that is a concern for the waiver inquiry, and also one that is handled on a case-by-case basis by the judge's effort to provide the defendant with reasonable resources. Standby counsel also are adequate to address this concern. Indeed, the judge here noted he did everything he could for Appellant with regard to funding, westlaw access, and getting the jail to bend or break rules so that Appellant could make his case. **{R. 3135}**. And, Appellant was specifically warned of these potential difficulties before proceeding, but elected to do so anyway. **{R. 4243}**.

While this Court obviously has the power to interpret and apply the federal constitution, it is respectfully submitted that this Court of course cannot simply and

completely override for policy reasons the clear constitutional mandate from the United States Supreme Court on the sanctity of the right to represent oneself. Moreover, nothing about Indiana v. Edwards changes this conclusion – particularly for someone as clearly competent and reasonably intelligent as Appellant. The issue should be rejected.

III. APPELLANT VOLUNTARILY AND KNOWINGLY WAIVED HIS RIGHT TO COUNSEL IN THE SENTENCING PHASE, WHERE THE RECORD IS REPLETE WITH EVIDENCE OF HIS UNDERSTANDING OF THAT PORTION OF THE TRIAL.

Appellant finally contends that he did not knowingly and intelligently waive his right to counsel during the sentencing phase of trial. However, the record is replete with evidence that Appellant was well aware of the issues regarding a penalty phase, and regardless, even if this Court was concerned about his understanding, the issue would be for PCR.

A. General Rules

Faretta allows a defendant to waive his right to counsel if (1) the accused is advised of his right to counsel and (2) he is adequately warned of the dangers of self-representation. Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990). In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the appellate court] will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." Id. (citation omitted). To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors including:

> (1) the accused's age, educational background, and physical and mental health;
>
> (2) whether the accused was previously involved in criminal trials;
>
> (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
>
> (4) whether the accused was represented by counsel before

> trial and whether that attorney explained to him the dangers of self-representation;
>
> (5) whether the accused was attempting to delay or manipulate the proceedings;
>
> (6) whether the court appointed stand-by counsel;
>
> (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
>
> (8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;
>
> (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and
>
> (10) whether the accused's waiver resulted from either coercion or mistreatment.

Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002). The ultimate test is not the trial judge's advice, but rather the defendant's understanding of the risks. Gardner.

B. Appellant's contention that he was unaware of the danger of self representation in the penalty phase is refuted by the record.

Here, Appellant's brief sets forth part of the extensive colloquy in which the late Judge Westbrook engaged with Appellant regarding *pro se* representation. **{Brief of Appellant pp. 11-12}**. His only contention here is there was no colloquy specifically regarding the penalty phase, and thus he asserts his waiver was not knowing and voluntary.

This contention is specious. Again, the test is the defendant's understanding, not the trial judge's advice. Respondent will not attempt to cite every portion of the record, but

a reading of the record as a whole more than establishes that Appellant very well knew exactly what was entailed.

First, of course, is the fact that Appellant already had one capital trial in which he was represented by counsel.

Second is the fact that Appellant had in this trial and in all pretrial proceedings either full counsel or standby counsel who were very experienced capital attorneys and who would have explained the process to Appellant.

Specific portions of the various pre-trial hearings are noteworthy in this regard. Appellant indicated he understood capital trials had different rules. **{R. 3168}**. He noted he wanted to *voir dire* the jury because "it's a capital case and these jurors are going to make a decision whether I am guilty or not guilty and possibly make a decision whether I live or die" – clearly showing his knowledge of the contingent nature of the penalty phase. **{R. 3170}**. He noted he had read a lot of death penalty opinions, and was aware of another inmate who went pro se and won the penalty phase. **{R. 3184}**. He noted he had read a lot of closing arguments done by David Bruck. **{R. 3190}**. He was told by the judge he might find himself wanting to turn the case over to attorneys in the middle and they would be unable to do that. **{R. 3193}**. He told the judge that if the jury came back with manslaughter they would not have to go to the penalty phase, where the State would try to put up "every bad thing that they can come up with". **{R. 3203-3204}**. Attorney Nettles noted he had spent a lot of time talking with Appellant on his decision to proceed pro se. **{R. 3210}**. Appellant told the judge he understood Faretta and the risks. **{R. 3374-3375}**. He requested the same investigator to work on his mitigation in the penalty phase, and

noted the need to get school records and medical records. **{R. 3422-3423}**. He discussed the State's evidence in aggravation regarding his other bad acts. **{R. 3444}**. He was present when the judge explained the capital process to the potential jurors. **{R. 428}**. He asked potential jurors about mitigation in *voir dire*. **{R. 453; 482; 572; 896; 1062}**. In arguing to the judge for a *voir dire* question, he specifically noted that he may get to the penalty phase and be too shocked to put up a case – showing he was quite aware of that risk. **{Tr. 486-489}**. He made a very reasonable Wainwright argument that succeeded in qualifying a juror. **{R. 1069; 1181}**.

Thus, the record is replete with evidence that Appellant was very familiar with capital proceedings and the penalty phase of a capital trial. His handling of this case and discussion of legal issues throughout the trial shows his capability and intelligence to be far above average for a lay person. However, even if this Court had some concern, the issue would need to be addressed in PCR, where the discussion between Appellant and others (such as standby counsel) could be explored. See Watts v. State, 347 S.C. 399, 556 S.E.2d 368 (2001). Again, the test is the defendant's ultimate understanding, not the colloquy.

The issue should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment and conviction of the trial court should be affirmed.

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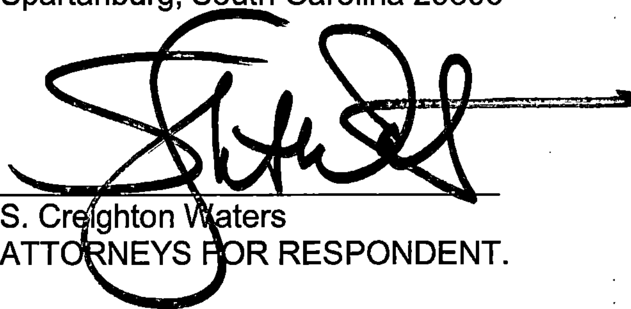

S. Creighton Waters
ATTORNEYS FOR RESPONDENT.

December 29, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
The Honorable Lee S. Alford, Circuit Court Judge

THE STATE,

Respondent,

v.

NORMAN STARNES,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

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December 29, 2009.

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S.C. SUPREME COURT

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Appellant.

AMENDED PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the ***Final Brief of Respondent***, dated December 29, 2009, on Appellant by depositing tow (2) copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Joseph L. Savitz, III
South Carolina Office of Appellate Defense
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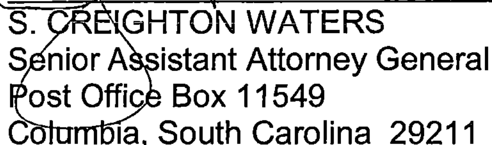
I further certify that I have served all parties required by Rule to be served.

This 5th day of January, 2010.



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