THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY

Court of General Sessions

Honorable R. Markley Dennis, Circuit Court Judge

APPELLATE CASE NO. 2017-002104

THE STATE . . . . . RESPONDENT

v.

SAMUEL LEE BROADWAY. . . . . APPELLANT

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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PETITION FOR REHEARING
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Rules 219, 221, & 240 SCACR, Appellant, Samuel Lee Broadway, petitions the Honorable Court of Appeals for Rehearing and suggests a Rehearing En Banc.

This Court, in an unpublished Opinion, per curiam, affirmed the trial court's rulings of (1) sustaining the State's hearsay objections and (2) overruling appellant's pretrial motion to exclude video evidence under *Jackson v. Denno,* 378 U.S. 368 (1964). State v. Broadway, Opinion No. 2020-UP-118 (Ct. App. Filed April 29, 2020). The court's holding misapprehended and overlooked the appellant's arguments; and, therefore, the Petition for Rehearing and Rehearing En Banc should be granted for several reasons.

I. THE COURT ERRED IN SUSTAINING THE STATE'S HEARSAY OBJECTIONS AND STRIKING THE TESTIMONY OF MARLENE BURTON.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011)(quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). Here, the trial court's ruling was controlled by an error of law – Broadway's statement to the Burtons was not hearsay, and consequently it was not properly excluded by the trial court. Furthermore, the trial court's error was highly prejudicial to Broadway's defense, depriving him of a valid defense to the charges, and by extension depriving him of his right to a fair trial.

A. Broadway's statement was not hearsay because it made no factual assertions.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Thomas v. Dootson*, 377

S.C. 293, 659 S.E.2d 253, 256 (2008). By definition, hearsay is limited to those statements in which something is "asserted." Rule 801(c), SCRE. In the context of evaluating hearsay, the word "assert" simply means "to say that something is so, e.g. that an event happened or that a condition existed." KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 246 (6th ed. 2006). In contrast, an out-of-court statement is not hearsay "if it is not an assertion." *Id.*

Turning to the present case, the testimony offered by the defense that Broadway asked the Burtons to call the police is, in essence, not an "assertion" of any kind, as contemplated by the hearsay rule. A request that the listener call the police is a statement that conveys no factual substance, it cannot be proven or disproven, it cannot be contradicted or shown to be false. In other words, it is fundamentally devoid of any factual claims. For this reason, the statements by Broadway that were offered in this trial were improperly characterized by the trial court as hearsay, because the statements lacked any factual assertions, which is what gives rise to hearsay issues.

In *State v. Cox*, 274 S.C. 624, 266 S.E.2d 784 (1980), the supreme court considered an alleged hearsay statement that closely resembles Broadway's in the present case. *Cox* involved a sexual assault, in which the defendant abducted the victim and sexually assaulted her, and then the defendant forced the victim to accompany him on a search for someone who would sell him alcoholic beverages. *Id.* at 626. During the course of the evening, the defendant stopped at the home of a witness, who testified at trial that she heard the victim say, "Honey, please open the door." *Id.* at 628. On appeal, the defendant argued that the victim's out-of-court statement was hearsay, and that the trial judge erred by allowing the statement into evidence. *Id.* The supreme court rejected this claim of error, reasoning that the "statement was obviously not offered for the truth of the matter asserted and therefore, by definition, is not hearsay." *Id.* This case is illustrative of the principles that should have guided the trial court's analysis in the present case. The statement "Honey, please open the door" is a request; the speaker makes no factual claims, she is simply requesting that the listener open the door. Similarly, Broadway's request that the Burtons call the police made no factual claims, it was simply a request that the listener should contact the police. Like in *Cox*, Broadway's statements should have been admitted for this simple reason: his

statement was not an assertion, and therefore it lacked the primary characteristic that classifies a statement as hearsay.

B. Broadway's statement was not hearsay because it was not offered for the truth of the matter asserted.

Moving beyond this fundamental problem with the trial court's ruling, there are numerous ways that Broadway's statement could be utilized for valid non-hearsay purposes, even assuming *arguendo* that the instruction to call police is an "assertion" for hearsay purposes. In other words, there are numerous bases to conclude that the statements were offered not for the truth of the matter asserted, but for some other valid purpose. The Appellant respectfully sets forth the following non-hearsay applications of Broadway's statements for this Court's consideration.

i. Broadway's statement was admissible as conduct with legal significance.

In *Waites v. S.C. Windstorm & Hail Underwriting Ass'n*, 279 S.C. 362, 307 S.E.2d 223 (1983), the supreme court considered a dispute over whether the plaintiffs in a lawsuit had complied with a particular statute, which required the plaintiffs to exhaust their administrative remedies prior to filing suit. *Id.* at 364. In order to show that they had complied with the statute in question, the plaintiffs introduced a letter from the Department of Insurance to the defendant, which the plaintiffs argued put the defendants on notice that the plaintiffs intended to pursue further legal action if their claim was denied. *Id.* at 365. In other words, the plaintiffs argued that the letter itself carried legal significance because it manifested their attempt to comply with the statute at issue. *Id.* Considering the admissibility of this letter, the supreme court stated as follows:

> While the contents of the letter were not admissible for the purpose of proving the facts therein stated, we think that the letter was *admissible as evidence of an attempt to comply with the statute.* "Where, regardless of the truth or the falsity of a statement, the fact that it has been made is relevant, the hearsay rule does not apply, but the statement may be shown."

Id. at 365 (quoting 31A C.J.S. *Evidence* § 239)(emphasis added). Put another way, the letter that the plaintiffs sought to introduce constituted legally significant conduct – it manifested their intent to comply with the statute, which was clearly admissible based on the defendants' argument that

the plaintiffs had failed to comply with that very statute. As the supreme court recognized, it was not the substance of the letter itself that was significant (or admissible), it was the fact that the plaintiffs had undertaken steps to comply with the statute, and they were entitled to present evidence of same.

Turning to the present case, Broadway was convicted for violating S.C. Code §56-5-1210, which states that an individual who has been involved in an accident resulting in injury or death "may temporarily leave the scene to the report the accident to the proper authorities." Much like in *Waites*, the fact that Broadway notified the Burtons of the accident and then asked them to call the police was conduct with legal significance. These facts created a jury question regarding whether Broadway's conduct complied with the requirements set forth in S.C. Code §56-5-1210. Like in *Waites*, Broadway's conduct carried legal significance, in that it constituted an attempt to comply with the statute, and squarely rebutted the State's position that Broadway had failed to do so. Consequently, Broadway's statement was not offered for the truth of the matter asserted, but rather to show Broadway's compliance with S.C. Code §56-5-1210, which was at issue in this case.

ii. Broadway's statement was admissible to show notice and/or knowledge.

"A statement that D made a statement to X is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in X, such as receiving notice of having knowledge . . ." KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 249 (6th ed. 2006). In *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972), the supreme court considered a civil suit relating to a car accident. There, the plaintiff argued that the defendant's vehicle had bald tires, which rendered it dangerous to drive. *Id.* at 605. To that end, the plaintiff sought to introduce testimony that a vehicle inspector had informed the defendant approximately three weeks before the accident that she needed new tires on her car. *Id.* at 607-08. The supreme court held that this testimony was admissible, "not as a testimonial assertion by the attendant to prove the fact of slick tires, but as indicating that [the defendants] obtained knowledge of the slick tires, the fact of slick tires being proved by other evidence." *Id.* at 610. The supreme court further noted that this

testimony was not offered for the truth of the matter asserted, "but solely to prove notice, which is a state of mind . . ." *Id.*

As discussed *supra*, the statute in question permits Broadway to temporarily leave the scene of the accident in order to alert the authorities that an accident had taken place. This duty gave rise to a jury question; the jurors were asked to consider whether Broadway complied with the statute in the hours that followed the accident. There is nothing in the text of the statute to suggest that notifying authorities by way of a third party would fall short of one's statutory duty. Consequently, the jury was authorized to consider whether Broadway's actions placed the Burtons on notice that they should call the police. Having heard testimony about Broadway's statement to the Burtons, it would fall to the jury to decide whether the Burtons were in fact placed on notice of this desire by Broadway's statement, and further whether this notice adequately fulfilled Broadway's duties under the statute. However, the jury was never given an opportunity to consider these questions, because the trial court erred by disallowing this critical testimony.

iii. Broadway's statement was admissible to show the effect on the listeners – Harvey and Marlene Burton – and to explain the Burtons' subsequent conduct.

"Proof of a statement introduced for the purpose of showing a party relied and acted upon it is not objectionable on the ground of hearsay." *Webb v. Elrod*, 308 S.C. 445, 449, 418 S.E.2d 559 (1992)(citing *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972)). In *Webb*, this Court considered a case involving a dispute between two parties arising from the defendants' alleged interference with the plaintiffs' contractual relations with third parties. *Id.* at 446. The plaintiffs were prevented from introducing statements made by one of the defendants to those third parties; the plaintiff argued that these statements were admissible to show that the third parties acted upon the defendants' statements, to the detriment of the plaintiffs. *Id.* at 448-49. This Court acknowledged that such statements are generally admissible, and that when a statement is

presented to prove that the listener relied upon the statement, a hearsay objection will not prevail. *Id.* 449.[1]

Here, Broadway's statement to the Burtons that they should call the police was properly admissible to show that the Burtons perceived this request and relied upon it, and further that Harvey Burton's call to police was at Broadway's behest. Broadway's compliance with S.C. Code §56-5-1210 was at issue in this case, and therefore the fact that Broadway had, by Marlene Burton's account, instructed the Burtons to call the police was highly relevant to the jury's consideration of the evidence. The admission of Broadway's statement to the Burtons would have authorized the jury to conclude that Harvey Burton called the police as a direct consequence of Broadway's statement. In this regard, Broadway's statement was not hearsay, and was instead evidence that explained the Burtons' state of mind and their subsequent conduct. Because the evidence was not offered for the truth of the matter asserted, but rather to explain the Burtons' state of mind and subsequent conduct, the trial court erred by sustaining the State's hearsay objections.

iv. Broadway's statement was admissible to show the state of mind of the declarant.

In *State v Lewis*, 293 S.C. 107, 359 S.E.2d 66 (1987), the supreme court considered the appeal of a defendant who had been convicted for her involvement in a murder-for-hire plot. *Id.* at 108. After Lewis' cousin was murdered, the State alleged that Lewis had hired her co-defendant Lee Grant Bellamy to kill her cousin, and that Bellamy had carried out the killing. *Id.* at 109-10. At their joint trial, Bellamy testified that he purchased the murder weapon not because he intended to kill Lewis' cousin with it, but rather because he had heard rumors that Lewis had made threats on his (Bellamy's) life. *Id.* 110. Lewis posed a hearsay objection to this testimony and was overruled at trial, and Lewis enumerated this ruling as error on appeal. *Id.* at 110-11. The supreme

[1] This Court ultimately affirmed the lower court, however, because it could not discern any harm from the defendants' statements being excluded, in light of the other evidence and testimony presented below. *Id.* at 449.

court held that Bellamy's testimony regarding alleged third-party statements was not hearsay because it was not offered for the truth of the matter asserted, i.e. "it was not offered to prove that Lewis intended to kill [Bellamy]." *Id.* at 110. "Rather," the supreme court continued, "it was offered to show Bellamy's state of mind, that is, the reason he bought the gun and had it with him on the night of the murder." *Id.* at 110-11.

Like in *Lewis*, Broadway's statement to the Burtons was properly admissible in this case to show his state of mind when he arrived at the Burtons' home. Due to the fact that Broadway departed from the scene of the collision and ended up driving to the Burtons' home in the middle of the night, the defense was tasked with explaining *why* Broadway chose to go to the Burtons house, rather than returning to the scene of the collision. The fact that Broadway departed from the scene of the collision creates a difficult inference that he did so in order to *avoid* the police, rather than to make contact with them. Testimony from Marlene Burton that Broadway told them to call the police squarely rebuts this inference by supplying proof that Broadway went to the Burton home with the intention of asking them to contact the police. In other words, it provides the jury with concrete evidence that Broadway's intent was to substantially comply with his duties under S.C. Code §56-5-1210. Without hearing what Broadway told the Burtons, the jury was left with an incomplete portrait of Broadway's mental state on the night of the incident, and left only with the inference that he intended to avoid detection by driving away from the scene of the collision and going to the Burtons' home.

v. Broadway's statement was admissible to show the reasonableness and/or good faith of Broadway's subsequent conduct.

In *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1990), the supreme court considered the admissibility of certain out-of-court statements made to the arresting officer. The defendant in that case was charged with murder, and fled to Florida, California, and then Nevada to avoid apprehension. *Id.* at 413-14. The State presented the testimony of the officer who ultimately located and arrested Sims. *Id.* at 419. The officer testified that when he arrived at the scene, a woman met him and said to him, regarding Sims, "He has a gun," and "He's going to kill my

sister." *Id.* The officer further testified that as he approached Sims, Sims reached toward his pocket, and the officer had to forcibly restrain Sims' hand while he retrieved a gun from Sims' pocket. *Id.* On appeal, Sims claimed that the officer's testimony concerning the statements made to him by the woman should have been excluded as hearsay. *Id.* The supreme court disagreed, holding that "the officer's testimony was not hearsay as it was not offered to prove that Sims intended to kill the woman in question." *Id.* at 420. The court noted that, "the evidence was offered to explain the officer's actions in restraining Sims when he reached towards his pocket." *Id.*

Turning to the present case, Broadway's request that the Burtons call the police can similarly be understood as explaining Broadway's conduct in the minutes and hours that followed his arrival at the Burtons' home. Harvey Burton testified that Broadway simply went to sleep after informing the Burtons that the collision had taken place. (Tr. 276-77). Marlene Burton corroborated that portion of Harvey Burton's testimony, stating that after she spoke with Broadway, he went into the bedroom where his daughters were sleeping and laid across the foot of the bed. (Tr. 337). Based on the Burtons' account of events, it would seem that Broadway's actions after his arrival demonstrate at best total indifference towards whether the police were notified of the collision, and perhaps even an affirmative attempt to avoid detection. However, if the jury had also learned that before lying down, Broadway had urged the Burtons call the police, his subsequent conduct appears far more reasonable. In fact, this additional information completely undermines the inference that Broadway intended to avoid police detection by going to the Burtons, or by lying down in one of the bedrooms after he arrived there. On the contrary, knowing that Broadway had requested that the Burtons call the police, Broadway's subsequent conduct could more easily be understood as manifesting his belief that the police would be on their way, and that he had fulfilled his duty to notify law enforcement of the collision that had taken place.

C. The trial court abused its discretion in excluding this non-hearsay testimony, and this error was prejudicial to Broadway.

As previously noted, the admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564

S.E.2d 87 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Determining whether prejudice exists "depends on the circumstances" and "the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998)(quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). Prejudice in this context means "there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

In the present case, there is more than a "reasonable probability" that the jury's verdict was influenced by the exclusion of Broadway's out-of-court statement. Indeed, Broadway's entire defense was predicated on the notion that he complied with the statute, and that he made good-faith efforts to notify the police of the collision. The fact that Broadway allegedly directed the Burtons to call the police could rightly be characterized as the most critical piece of evidence in this case, from the defense's standpoint. And, in contrast, the State was permitted to offer affirmative testimony that Broadway *did not* tell the Burtons to call police, and in fact it was Harvey Burton who told Broadway to call the police. (Tr. 276, 283). The jury was left only with evidence that Broadway left the scene of the accident, attempted to locate his phone at BFE Bar, proceeded to the Burtons' home, informed them that he had been in a collision, and then rather than making attempts to notify the police, Broadway simply went to sleep. The prosecution latched onto these facts, making repeated references throughout closing argument to the fact that there was no evidence before the jury that Broadway had attempted to notify the police of the collision.[2] Due

[2] "Mr. Broadway didn't ask people to call the police." (Tr. 374). "There is no testimony that [Broadway] tried to call 911." (Tr. 374). "Richley Campbell, which you've heard, and Harvey Burton who he told you about his 911 call. Those are the only two [911 calls]." (Tr. 377). "Well, if Mr. Broadway was intending to call the police, he never did it . . . He didn't call the police." (Tr. 378). "Mr. Broadway, by all accounts, didn't call the police at that time and Marlene [Burton] didn't call the police at that time." (Tr. 379). "Besides Richley Campbell, Harvey Burton is the only one that called 911 that morning." (Tr. 379). "Broadway never called the police or returned

to the exclusion of Marlene Burton's account of these events, Broadway was completely unable to contradict these arguments.

Without knowing that Broadway intended for the Burtons to call the police, all of his conduct that followed the collision suggests that Broadway never intended to contact the police, and that he hoped he would not be discovered at the Burton home. Knowing that Broadway had in fact asked the Burtons to call the police casts Broadway's conduct in an entirely different light, and creates a very clear jury question regarding Broadway's compliance with the statute's requirements. Without Broadway's statement, no plausible argument could be made that Broadway meaningfully complied with the statute. In essence, Broadway had no defense without his statement to the Burtons.

In the end, the State was allowed to present evidence and testimony that Broadway had neglected to contact authorities, or perhaps even made efforts to avoid discovery. The trial court simultaneously prevented Broadway from presenting admissible evidence that squarely contradicted that critical fact. The trial court's ruling was based solely on its mischaracterization of Broadway's statement as hearsay. It was not hearsay. The trial court's erroneous ruling prejudiced Broadway's defense, and consequently Broadway is entitled to a new trial.

II. THE COURT ERRED IN OVERRULING THE DEFENDANT'S PRETRIAL MOTION TO EXCLUDE VIDEO EVIDENCE UNDER JACKSON V. DENNO.

The Supreme Court has recognized "two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination, and the Due Process Clause of the Fourteenth Amendment." *Dickerson v. United States*, 530 U.S. 428, 433 (2000)(citations omitted). Pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), the defendant is entitled to a "reliable determination as to the voluntariness of his

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to the scene, which is required by the statute." (Tr. 379). "All [Broadway] had to do was stop, go get help, come back and we wouldn't be here today." (Tr. 380).

confession by a tribunal other than the jury charged with deciding his guilt or innocence." *State v. Fortner*, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976). At such a hearing, the State bears the burden of proving by a preponderance of the evidence that a defendant's confession is voluntary. *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996).

Confessions given during custodial interrogation are further governed by the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). If a confession was taken and obtained in the context of a custodial interrogation, the State must affirmatively show that the statement was not just voluntary, but also that it was taken in compliance with *Miranda*. *State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). A defendant may invoke his right to counsel under *Miranda* either prior to or during an interrogation, and after such an invocation, the police must immediately cease all questioning of the defendant. *Davis v. United States*, 512 U.S. 452, 458-59 (1994); *State v. Franklin*, 390 S.C. 535, 702 S.E.2d 568 (2010).

As a preliminary matter, Broadway was in custody for the purposes of *Miranda* during his questioning by officers, and the trial court erred by finding to the contrary. In determining whether an individual is "in custody" for *Miranda* purposes, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983)(quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). This requires a two-part inquiry: (1) what were the circumstances surrounding the interrogation, and (2) given those circumstances, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). While he was being questioned by officers, Broadway stood alone at the foot of the driveway, surrounded by multiple uniformed officers. Their police vehicles were parked along the street at the foot of the driveway, blocking any exit path. Additionally, police seized and impounded Broadway's vehicle after questioning him. Thus, Broadway's only means of leaving from the scene of the interrogation was his vehicle, which was blocked in by police vehicles, and later seized by police. Furthermore, Broadway was told that questioning would cease if he needed to speak with an attorney. In response, Broadway requested an attorney, and the interrogating

officer completely disregarded the request and commenced with the interrogation. Under these circumstances, a reasonable person in Broadway's position would not feel free to terminate the interrogation and leave. The circumstances rendered the interrogation custodial for the purposes of this Court's analysis, triggering *Miranda* requirements.

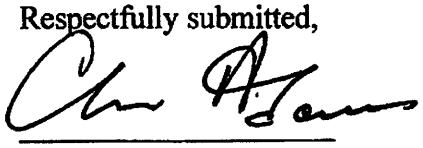
At the commencement of the interrogation, Broadway invoked his right to counsel, and the trial court erred by finding to the contrary. To invoke the right to counsel, an individual must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). Broadway explicitly and unequivocally asked the police to contact Chase Payne, a licensed attorney in this state. Rather than honoring that request for counsel, the investigating officer completely disregarded it, and then immediately commenced with soliciting Broadway's description of the night's events. Because the officer disregarded Broadway's request for counsel, Broadway's subsequent statement was obtained in violation of his rights under *Miranda*, and should not have been admitted at trial.

The erroneous admission of Broadway's statement was prejudicial to the defense in this case. In response to the officer's questioning, Broadway confessed to being involved in the collision, and to leaving the scene of the accident. Broadway admitted that the vehicle he struck was a moped, and his account of the collision directly corroborated the evidence from the scene. These admissions were critical to the State's case, and there is a reasonable probability that the exclusion of this evidence at trial – as is called for by *Miranda* – would have brought about a different result. For these reasons, the trial court's error was prejudicial to Broadway, calling for reversal of his conviction.

CONCLUSION

For the above stated reasons, the Petition for Rehearing and Rehearing En Banc should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the enclosed Appellant's Petition for Rehearing in the above-referenced case has been served upon Senior Assistant Attorney General David A. Spencer, at P.O. Box 11549, Columbia SC 29211-1549.

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