

**ORIGINAL**

STATE OF SOUTH CAROLINA  
In The Supreme Court

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

RECEIVED

NOV 29 2012

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THE STATE, S.C. Supreme Court  
Respondent,  
vs.  
STEVEN BARNES, Appellant.

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**FINAL BRIEF OF RESPONDENT**

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ATTORNEYS FOR RESPONDENT

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The record well supports that the trial judge did not abuse his discretion in denying appellant’s request to proceed *pro se* where the evidence demonstrated a long history of mental disturbances resulting in voluntary and involuntary mental health treatment, and appellant’s psychiatrist testified that appellant’s then existing mental illness and cognitive deficiencies would limit and/or interfere with appellant’s ability to effectively represent himself at trial. .... 13

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## APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by denying appellant's pre-trial request to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975), since this record shows appellant was capable of representing himself and he even exhibited an uncanny understanding of the rules of evidence prior to trial, and the court's refusal to allow appellant to represent himself, citing Indiana v. Edwards, 554 U.S. 164 (2008), was erroneous?

2.

Whether the court violated appellant's right to Due Process by relying on the pre-trial testimony of Dr. Price about appellant's ability to represent himself since appellant was evaluated by Dr. Price with the clear understanding that Dr. Price would exclusively be a penalty phase mitigation witness for him, particularly where one of appellant's two attorneys joined in appellant's objection to Dr. Price's pre-trial testimony under these circumstances?

3.

Whether the trial judge erred, in violation of appellant's rights under the Sixth, Eighth, and Fourteenth Amendments, by improperly limiting defense counsel's attempt to *voir dire* the jurors regarding their views on the death penalty, since this rendered appellant's trial fundamentally unfair?

4.

Whether the trial judge erred when he found Juror #54 unqualified to sit as a juror where she was a qualified juror under Wainwright v. Witt, 469 US. 412 (1985), since her views on the death penalty did not prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath?

5.

Whether the trial court erred by refusing to dismiss the indictments against appellant where the State's failure to comply with the Interstate Agreement on Detainers Act (IAD) rendered the indictments without force in effect?

(FBOA, pp. 1-2).

## RESPONDENT'S STATEMENT OF THE CASE

An Edgefield County Grand Jury indicted appellant, Steven Louis Barnes, in August 2005 for the kidnapping of Samuel J. Sturup. (R. p. 2363-64). The Grand Jury also subsequently indicted appellant in December 2005 for the murder of Samuel J. Sturup. (R. p. 2365-66). On December 13, 2005, the State noticed appellant of the intent to seek the death penalty. (R. p. 2348). Robert J. Harte, Esq., and David B. Tarr, Esq., represented appellant. The Honorable J. Cordell Maddox was originally vested with original jurisdiction over the case on October 31, 2005. However, on January 25, 2010, the Supreme Court of South Carolina rescinded the order appointing Judge Maddox and appointed the Honorable R. Knox McMahon to preside over the proceedings. (R. p. 2349).

Jury selection for appellant's trial began Monday, November 8, 2010. A jury was impaneled and sworn on Thursday, November 11, 2010. On Saturday, November 13, 2010, the jury returned a verdict of guilty as charged. (R. p. 1546, line 7 - p. 1549, line 1). Judge McMahon observed the mandatory twenty-four (24) hour break, pursuant to S.C. Code § 16-3-20 (B), before beginning the penalty phase on Monday, November 15, 2010. (R. p. 1551, line 9- p. 1552, line 3). On Wednesday, November 17, 2010, the jury returned a verdict finding two aggravating circumstances – kidnapping and physical torture – and recommended a sentence of death. (R. p. 2330, lines 2-19; pp. 2361-2362 [verdict forms]). Judge McMahon found “as an affirmative fact that the evidence of this case warrants the imposition of the death penalty and its imposition is not a result of prejudice, passion, or any other arbitrary factor.” (R. p. 2338, lines 16-24). Judge McMahon then sentenced appellant

to death for the murder of Samuel J. Sturup.<sup>1</sup> (R. p. 2338, line 25- p. 2339, line 15). This appeal follows.

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<sup>1</sup> In light of the conviction and sentence for murder, the judge did not impose a sentence for the kidnapping conviction. *See State v. Inman*, 395 S.C. 539, 544, 720 S.E.2d 31, 34 n. 1 (2011) (noting no sentence imposed on kidnapping conviction where defendant “sentenced for the related murder”); *Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (pursuant to S.C. Code § 16-3-910, sentence for kidnapping should be vacated where defendant also sentenced for murder). See also S.C. Code § 16-3-910 (one convicted of kidnapping “must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.”).

## RESPONDENT'S STATEMENT OF FACTS

On Labor Day, September 3, 2001, the following events occurred, beginning in Augusta, Georgia, and ending in a remote field in Edgefield, South Carolina, with the murder of sixteen year old Samuel J. Sturup. The evidence presented at trial demonstrated that appellant repeatedly beat and caused others to beat the victim over missing money; taunted the victim with death; took him across the state line in the trunk of an automobile; marched him out to an open field; ordered another to shoot victim first before ultimately firing a bullet to the back of victim's head and watching him die.

### *Events in Georgia*

On September 3, 2001, seventeen year old Richard Cave was at his home in Augusta, Georgia with his friend and classmate, eighteen year old Antonio Griffin, when he received a phone call from appellant. (R. p. 1146, lines 1-12). Cave testified he met twenty-three year old appellant through a friend and began hanging around appellant because of "females, money, and [a] car," and also because they would go to clubs together where appellant would pay. (R. p. 1142, line 4 - p. 1145, line 19).<sup>2</sup> Barnes told Cave and Griffin to come to the

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<sup>2</sup> In the penalty phase, several women (Norman, Thatcher, Butler, Lott, McCarty and Braswell) testified that Barnes ran an escort service and also sold drugs. The women also recounted multiple instances of beatings and abuse from Barnes; of Barnes directing them to inflict violence on each other; instances where Barnes used bats, a Taser, boots, and other objects to inflict serious injury; and instances of Barnes brandishing guns, a hatchet, and making threats against them and their families. (See R. p. 1862, line 13 - p. 1864, line 5; p. 1870, line 13-p. 1877, line 13; p. 1882, lines 19-24; p. 1884, lines 16-26; p. 1890, lines 3-25; p. 1893, line 1 - p. 1894, line 16; p. 1904, line 7 - p. 1906, line 21; p. 1911, line 3 - p. 1915, line 7; 1947, line 7 - p. 1950, line 22; p. 1965, lines 2-23; p. 1969, line 11 - p. 1970, line 10; p. 1984, line 10- p. 1990, line 20). (See also R. p. 1825, line 21 - p. 1826, line 6). He also used the fact the victim was murdered to threaten Braswell. (R. p. 1990, lines 17-24, "... he told me I was going to die the same way the 16-year-old died here in South Carolina, and he knew about my mom and my daughter and where

“Green House” on Cherry Street. (R. p. 1147, lines 3-10). Cave and Griffin testified that Cave’s stepfather dropped the two off at the house at approximately 10:00 p.m. (R. p. 1147, line 11-15; p. 1158, lines 23-25; p. 1253, lines 1-17). When the two arrived, appellant was in an argument with sixteen year old Samuel Sturrup over money. (R. p. 1149, lines 6-14). Neither Cave nor Griffin knew him by name at that time. (R. p. 1149, lines 15-25; p. 1253, line 21- p. 1255, line 20). Cave and Griffin both testified that appellant, a/k/a “Big Man,” was repeatedly asking victim, “Where’s [sic] the money was, where the cheese was?” while Victim responded he “didn’t have the money.” (R. p. 1150, lines 1-22; p. 1254, lines 15-22). Cave testified Barnes began hitting the victim with his “fist, a pole, and a shock absorber.” (R. p. 1150, lines 22-24). Cave testified that he saw Barnes’ brother, Willie Harris, at the house, (R. p. 1151, lines 20-24), and that one of appellant’s “girlfriends,” Charlene Thatcher, a/k/a “China,” was already at the house when Cave and Griffin arrived. (R. p. 1257, lines 8-24).

Thatcher later testified, after Cave and Griffin that Barnes had picked her up earlier that day and told her they were “going on a mission.” (R. p. 1317, lines 10-17). She testified Harris arrived with victim and Harris, victim and Barnes stayed outside while she stayed inside the house. She testified that Cave and Griffin arrived later. She also testified that she heard Barnes order Cave and Griffin to fight victim. (R. p. 1317, line 23 - p. 1318, line 24).

Cave testified that Barnes told him and Griffin to “jump on” victim. (R. p. 1153, line 4-7). Griffin testified that he was confused, but admitted to fighting victim: “I guess Sam thought we was going to jump on him for real, all of us together right there, and he swung  

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they stayed.”).

and hit me, we got to fighting. I admit it, me and him started fighting, but the fight didn't last long. They broke it up." (R. p. 1255, line 22 - p. 1256, line 4). Barnes then continued hitting victim in the face and chasing him, asking him where the money was, while victim continued to say he didn't have it. (R. p. 1256, lines 16-25).

Griffin testified that while Barnes asked victim about the money, victim mentioned Harris. Harris became angry, they argued, and ultimately Harris forced a gun into victim's mouth. (R. p. 1259, lines 11-24). Griffin testified Barnes stopped Harris from shooting. (R. p. 1260, lines 3-4).

Griffin and Cave both testified that victim at one point blamed Thatcher. (R. p. 1154, lines 9-16; p. 1257, lines 8-11). Griffin testified that Barnes called Thatcher from the house and "started beating her with a broom," causing her to fall back through a screen door. (R. p. 1257, lines 13-17). Griffin further testified that Barnes made Thatcher empty her purse, and told her that if Barnes was lying, to hit victim with the broom or he would begin to beat her again. (R. p. 1258, lines 2-18). Griffin testified that Thatcher got the broom and was "tapping on" victim, but Barnes ordered her to hit him harder. (R. p. 1258, lines 22-25). Thatcher testified that Barnes told her to hit victim "with a large metal object that looks like a wrench, but it's really large," and that she doesn't recall hitting victim with the broom; however, Thatcher testified that it was Harris who hit her with a broom and Harris had also tried to "shove it up my private area." (R. p. 1322, line 23 - p. 1323, line 12; p. 1352, line 22 - p. 1353, line 3).

Both Griffin and Thatcher testified that Harris eventually left and did not come back, and that they did not see him the rest of the night. (R. p. 1260, lines 10-14; p. 1323, lines 20-

25).

Barnes continued to ask about his money, and victim eventually changed his story to say that he had the money at his house. Griffin and Cave testified that he told Barnes the money was behind the toilet, and Thatcher testified that victim had claimed the money was under his bed. (R. p. 1154, line 19-20; p. 1261, lines 6-14; p. 1321, lines 10-15). Barnes stated they would go to victim's house and look for the money, and made threats about killing victim's family. (R. p. 1154, line 21-24; p. 1262, lines 4-8). Victim then returned to saying he did not have Barnes's money, and that he just wanted to stop the beating. (Tr. p. 1155, lines 3-12; p. 1262, lines 16-18).

Griffin and Thatcher testified that Barnes then decided he, Griffin, Cave, and Thatcher were "going for a walk," and made them walk out to the nearby train tracks, forcing victim to walk in front of them. (R. p. 1263, lines 2-6; p. 1264, lines 3-4; p. 1325, lines 13-20). When they stopped, Barnes handed Thatcher a gun and told her to shoot victim. Griffin testified that Barnes told Thatcher: "Bitch, if you don't kill him, I'm going to let him kill you, because one of you all got my money." Thatcher and Griffin both testified that she pleaded with Barnes to stop. (R. p. 1264, lines 3-14; p. 1325, line 21 - p. 1326, line 1). They also testified that Barnes then acted as if he was going to give victim the gun and let victim shoot Thatcher. Thatcher again pleaded and begged with Barnes, and Barnes started laughing and said he wasn't going to let victim shoot her. (R. p. 1264, lines 15-21; p. 1326, lines 14-21). Griffin testified Barnes asked Cave and himself if they wanted to shoot victim, again laughing. (R. p. 1264, lines 22-24).

Eventually, the four returned to the Green House. Thatcher testified that Barnes said,

“You’re going to kill him.” (R. p. 1327, lines 17-20). Thatcher also testified Barnes said “someone is going to die,” and told victim, “[y]ou’re going to die,” and asked him, “what do you want for your last meal?” (R. p. 1328, lines 10-24; p. 1329, lines 21-24).

Cave, Griffin, and Thatcher each testified that Barnes made a phone call, and shortly after, Julio and Alex Hunsberger, two brothers that Barnes knew, arrived. (R. p. 1156, lines 1-23; p. 1265, lines 13-25; p. 1329, lines 2-9). Victim said that he wanted to go home, and Barnes said he would take him home. (R. p. 1157, line 14-17). Griffin testified they were then told to get inside Barnes’ car, a white Caprice. (R. p. 1266, lines 12-17). (See also R. p. 1157, lines 18-23; p. 1330, lines 14-19). Thatcher testified that she saw Barnes tell victim to get in the Hunsbergers’ trunk. (R. p. 1330, lines 5-13). Barnes then got into the car with Cave, Griffin, and Thatcher, and drove behind the Hunsbergers as they led the way to South Carolina and the open field where victim would die. (R. p. 1331, line 16- p. 1332, line 20). (See also R. p. 1268, lines 15-17).

#### *Events in South Carolina*

With the Hunsbergers driving in front, the two cars drove down a dirt road and into an open, grassy area, then down a narrow path into a bigger, open field. (R. p. 1161, lines 2-20; p. 1268, lines 15-25; p. 1332, lines 2-20). Neither Cave, Griffin, nor Thatcher knew where they were. (R. p. 1164, lines 13-17; p. 1268, line 25 - p. 1269, line 1; p. 1332, lines 5-7). Each testified that Barnes told them to get out the car, that Barnes got victim out of the trunk of the Hunsbergers’ car, and that Barnes told victim to walk in front of them. They continued walking, hopped a fence, and eventually Barnes had them stop. (R. p. 1163, line

4 - p. 1165, line 10; p. 1270, lines 10-20; p. 1333, lines 1-22). Thatcher testified that Barnes told victim, "Pick a place to die." (R. p. 1333, line 25).

Barnes told each of them that they had to shoot victim or they would be killed. (R. p. 1165, lines 13-25; p. 1336, lines 2-5). Cave, Griffin, and Thatcher each testified that Thatcher was given the gun first. (R. p. 1166, lines 1-2; p. 1270, lines 23-25; p. 1336, lines 6). Cave testified that Thatcher was crying, and that Barnes stood behind her with his arms around her, saying to shoot or she was going to die. (R. p. 1166, lines 5-22). Griffin also testified that Thatcher was crying and that Barnes came behind Thatcher and aimed for her. (R. p. 1271, lines 18-22). Griffin stated that victim then backed up again and Thatcher shot. (R. p. 1271, lines 23-25). Thatcher testified that Barnes had a gun to her back, one arm around her, and held her hand, making her shoot victim while she covered her eyes. (R. p. 1336, lines 12-22). Thatcher's shot was aimed to, and hit, the stomach. (R. p. 1336, lines 24-25). Cave testified that victim "grabbed his stomach and hit the ground." (R. p. 1167, line 5). Cave testified that he did shoot after Barnes had threatened him that if he didn't shoot, he would "end up like Sam." (R. p. 1167, lines 6-19). Cave testified that after he shot, he handed the gun to Griffin, who shot, then Barnes instructed them to go back to the car. (R. p. 1183, line 6 - p. 1184, line 5). He also testified that he heard four more shots after he left, and that Barnes was the last one to shoot, and was the last one back. (R. p. 1184, line 17- p. 1185, line 4).

Griffin testified that after Thatcher shot the gun, one of the Hunsbergers took the gun and shot, and victim fell to the ground. (R. p. 1271, line 23 - p. 1272, line 4). Griffin testified that Hunsberger then gave Griffin the gun, and Griffin shot at the ground. (R. p. 1272, lines

4-9). Griffin then handed Cave the gun, Cave shot next, and the other Hunsberger brother then shot with his own gun. (R. p. 1272, lines 11-12). Barnes then got the gun and told them to go back to the car. Griffin testified that he heard another shot and then turned and saw Barnes and Thatcher together come out of the woods. (R. p. 1272, lines 13-18).

Thatcher testified that after she shot, she passed Barnes the gun, and that Barnes shot victim in the head. (R. p. 1337, lines 4-20). She stated that she and Barnes were the last to leave because Barnes stayed and watched victim die. (R. p. 1338, lines 6-14).

Cave, Thatcher, and Griffin each testified they then went back to the Hunsbergers' trailer. (R. p. 1168, lines 4-16). Griffin testified that he asked in the car on the way to the trailer, how Barnes knew victim wasn't "going to get up, try to go ask for help or something," to which Barnes replied, "[e]verything's straight," he had "shot him in the head" and "he ain't going to get up." (R. p. 1273, p. 4-15). Cave testified that at the trailer, he also asked how Barnes knew victim wouldn't run to the nearest house, and Barnes told Cave "not to worry about it because he shot Sam in the head and watched him die." (R. p. 1168, line 17 - p. 1169, line 6). Griffin testified that Barnes asked "How do you all feel?" and when Griffin responded "all right," Barnes asked if Griffin could do it again, then just started laughing. (R. p. 1273, line 18 - p. 1274, line 5). Cave and Griffin both testified that Barnes directed that Griffin throw a bag with the guns into the water as they crossed the bridge back into Georgia. (R. p. 1170, lines 10-18; p. 1274, lines 13-21). The group then went back to the Green House, where Barnes had them stay the night. (R. p. 1171, lines 17-22; p. 1274, lines 22-23; p. 1341, lines 12-16).

The next morning, Barnes dropped each of them off. They each testified that Barnes

had their clothes collected and gave the clothes to Griffin for him to burn. Griffin stated that he followed Barnes' instructions and burned the clothes in his backyard. (R. p. 1172, line 17- p. 1173, line 3; p. 1275, lines 5-11; p. 1276, lines 3-7; p. 1341, lines 20-24). Cave and Griffin testified that Barnes told them to keep their mouths shut, or they would end up like victim, and that the police would have no reason to suspect anybody but Barnes, as he was the only one in the group who knew victim. (R. p. 1171, line 25 - p. 1172, line 16; p. 1275, lines 13-24). Thatcher testified that Barnes told her "many times" that he would kill her if she ever talked about it. (R. p. 1342, line 16 - p. 12343 line 1).

Mrs. Shirley Sturup testified that she last saw her son leaving their home with Harris. Victim stated he was going for a cookout. She became worried about her son when he did not timely return, and began looking for him, eventually filing a missing person report. She also went to appellant's home but appellant denied seeing the victim or knowing where he may be found. (R. p. 1373, line 23 - p. 1375, line 2; p. 1376, line 22 - p. 1380, line 7). Victim's whereabouts remained a mystery to victim's family for several months.

Griffin testified that at some point after the murder but before the discovery of the remains, appellant called with his own discovery. Appellant told Griffin that he had found bits of paper in the yard. (R. p. 1279, lines 3-7). Appellant concluded his dogs had likely torn the missing money and victim did not take the money after all. However, he said, "what's done is done." (R. p. 1279, lines 9-18).

#### *Discovery of the Remains*

In November of 2001, Grover Dais Jr. was cleaning his property and found what appeared to be a human skull. He called local law enforcement. (R. p. 1087, lines 16-21).

Investigators thereafter searched the property and found several other bones, as well as a pair of blue jean pants, a belt with the name "Samuel" inscribed, keys, a Bi-Lo card, a dollar bill and cigarette lighter. (R. p. 1107, line 1 - p. 1110, line 23). Information obtained from the Bi-Lo card led to a suspected identification. (R. p. 1113, line 8 - p. 1114, line 15).

Dr. Joel Sexton performed the autopsy on the remains. Eventually several bones were recovered: lower leg bones, an upper left leg bone, the femur, part of the left pelvis, part of the left shoulder bone, the skull, and some vertebral bodies from the neck and chest region, all from one skeleton. (R. p. 1207, lines 14-21). Dental records were used to confirm the identification. (Tr. p. 1209, line 6 - p. 1210, line 13). Appellant also stipulated the remains were that of victim Samuel Sturup. (R. p. 1210, line 14-18). Dr. Sexton further testified that specific details on the injuries or the victim's height or age were impossible to determine because bones "had been eaten on each end" and "gnawed away" by animals. (R. p. 1211, lines 12-22; p. 1212, lines 6-16). However, a gunshot wound to the back of the skull was visible along with the bullet. (R. p. 1212, lines 21-24). Further, there was enough tissue remaining to indicate clotting which allowed Dr. Sexton to opine the gunshot wound was received while the victim was still alive. (R. p. 1213, lines 2-7; p. 1219, lines 10-14; p. 1225, lines 2-7). From the angle of the wound, Dr. Sexton testified that the shooter had to be in a position higher than the victim. (R. p. 1220, lines 3-21). Dr. Sexton opined that the cause of death was the gunshot wound to the back of the head. (R. p. 1218, line 14 - p. 1219, line 17; p. 1224, line 8 - p. 1225, line 7).

## ARGUMENT

### I.

The record well supports that the trial judge did not abuse his discretion in denying appellant's request to proceed *pro se* where the evidence demonstrated a long history of mental disturbances resulting in voluntary and involuntary mental health treatment, and appellant's psychiatrist testified that appellant's then existing mental illness and cognitive deficiencies would limit and/or interfere with appellant's ability to effectively represent himself at trial.

#### Relevant Facts:

Judge McMahon held a hearing on Friday, November 5, 2010, to address pre-trial motions in anticipation of beginning capital *voir dire* proceedings on Monday, November 8, 2010. Defense counsel Robert J. Harte, Esq., and David B. Tarr, Esq., represented appellant. (R. p. 3, lines 12-20). Mr. Tarr announced that he had "about 13 motions" to be addressed, and also advised "at the end of these motions, our client's indicated he had a matter he wanted to address to the Court about some issues or issues at the Department of Corrections." (R. p. 3, lines 15-25). The trial judge agreed to hear from appellant at the conclusion of counsel's presentation. (R. p. 4, lines 1-5).

After ruling on multiple motions, the trial judge addressed appellant directly and inquired as to other motions. (R. p. 31, lines 13-19). The trial judge brought to his attention that the representatives of the State and their staff were present in the courtroom. (R. p. 31, lines 20-23). Appellant stated he had two motions. The first, a motion to represent himself, and the second, a motion on "ineffective assistance of counsel." (R. p. 32, lines 2-24).<sup>3</sup> Appellant wished for the second to be heard *ex parte* given the privileged nature of the

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<sup>3</sup> Counsel's reference at the November 5<sup>th</sup> hearing to appellant's motion concerning "issues at the Department of Corrections," remains unclear.

substance to be discussed. (R p. 32, line 24 - p. 33, line 1). Appellant stated he was “not doing this for no delay tactics” and anticipated “proceeding with the jury process Monday.” (R. p. 35, lines 19-21).

After requiring defense counsel to place their qualifications on the record, (R. p. 34, line 5 - p. 35. line 5), the trial judge again heard from appellant concerning his issues. Appellant argued “it’s a Kimler versus Morrison issue about, you know, certain pretrial matters, things not being investigated, witnesses, and things like that, of that nature,” and specifically mentioned that the Hunsbergers were not subpoenaed for trial. (R. p. 36, lines 15-23). Mr. Tarr immediately offered, “we think this is probably something that should be handled *ex parte*.” (R. p. 36, lines 24-25). Petitioner then joined in counsel’s request that the matter be handled *ex parte*. (R. p. 37, lines 1-3). The solicitor had no objection. (R. p. 37, lines 4-6). The trial judge agreed to have the matter heard *ex parte* and cleared the courtroom of solicitor’s office personnel. Further, he cautioned all security officers and clerk’s office personnel that they could not discuss the proceedings. (R. p. 37, line 11 - p. 38, line 3).

Appellant again asserted he had two motions – a motion to proceed *pro se* “and a second motion for a motion for ineffective assistance of counsel.” (R. p. 38, lines 10-17). The trial judge responded: “All right. Well, I’ve never heard exactly of a motion for ineffective assistance of counsel. The only time I’ve heard of the - - ,” at which point appellant interrupted and offered: “After trial, right?” (R. p. 38, lines 18-21). The trial judge noted that such complaints were generally made through a separate process and turned appellant’s attention back to the *pro se* representation motion. (R. p. 38, line 24- p. 39, line

8). Appellant then asked: “Would you like me to incorporate both things, both motions together?” (R. p. 39, lines 15-16). The trial judge again attempted to steer appellant back to the *pro se* issue: “Well the first thing I need to decide, Mr. Barnes, is whether or not I’m going to allow you to represent yourself.” (R. p. 39, lines 17-19). The clerk of court then placed appellant under oath. (R. p. 39, line 21 - p. 40, line 3).

Upon questioning, appellant advised the trial judge he was then thirty-two (32) years old, and had an eleventh-grade education. (R. p. 40, line 7 - p. 41, line 8). He advised the trial judge he was previously self-employed, “a co-owner of this little car wash” and also “sold cars.” (R. p. 41, lines 12-14). He also advised the trial judge he understood he was charged with kidnapping and murder, and could receive the death penalty, life or thirty (30) years imprisonment. (R. p. 41, line 18 - p. 42, line 11). He answered affirmatively that he had been in a South Carolina court before as a defendant. (R. p. 42, lines 12-19). In fact, he was in a jury trial before Judge McMahon on a charge of throwing bodily fluids while in pre-trial detention and was convicted and sentenced to fifteen years imprisonment. *State v. Barnes*, Unpublished Opinion No. 2010-UP-427 (S.C.Ct.App. filed October 11, 2010). (See also R. p. 1784, line 19 - p. 1785, line 23). Appellant acknowledged the prior litigation and stated to the trial judge, “I was in front of you also, if I’m not mistaken.” (R. p. 42, lines 19-20). The trial judge cautioned appellant, “we may know that, you and me may know that, but our record doesn’t know that ... if it’s not put on the record, then if it ever goes up on appeal, they don’t know you’ve been before the Court before.” (R. p. 42, line 21 - p. 43, line 4).

The trial judge then continued his questioning, asking if appellant had been

represented by counsel. Appellant confirmed that he had consistently been represented by counsel. (R. p. 43, line 6- p. 44, line 6). Appellant stated he understood he would be required to abide by the rules of court, and stated he had a familiarity with the rules. (R. p. 44, line 7 - p. 45, line 6). When the trial judge advised that the attorneys may “know certain motions to make, certain positions” to take from their experience that appellant would not know, appellant stated:

... for the record, according to case law that I’m just discussing with my attorney, that I understand hybrid representation, you know what I mean, in South Carolina, you know, is not allowed, but due to the motion that I put in, they can assist me if I run into problems with like some big words. I want to make sure that the Clerk over there understands me.

(R. p. 45, lines 7-18).

The trial judge asked twice again if he understood, but appellant simply asserted he was “willing to make the motions” and asserted, “my rights is very important, too, and that’s why I come forth to bring it to you today for adjudication as for representing myself.” (R. p. 45, line 21 - p. 46, line 13). The trial judge asked if appellant “ever had to have any mental evaluations,” to which appellant replied:

... that taser incident was traumatic ... [a]nd that’s another thing, I’d like to put in a motion, you know, about the taser issue, by taking the position of representing myself, that really bothered me for some time.

I’m mentally sound through this trial. I don’t have any mental health issues, Your Honor, regarding this trial.

I have been through some type of mental health while I was younger. And like I say, specifically in the realm of this taser incident, I’ve been through some counseling. I got off of it at Lieber. I got off of it. I couldn’t – I healed myself slowly but surely, but I got better.

But I am mentally sound and I do know what’s going on with the proceedings. I know what today is, I know who the President is. I know that

the Republicans took over the Senate and the House and all that stuff like that.  
(R. p. 46, line 16 - p. 47, line 15).

Appellant denied mental health medication, but listed medication for other ailments.  
(R. p. 47, line 17 - p. 48, line 2). Appellant admitted to participating in trials in Georgia and the prior trial before Judge McMahon, and asserted a familiarity with courtroom procedure “enough to be able to defend myself.” (R. p. 48, lines 5-13). Appellant admitted discussion self-representation with counsel, and added that Mr. Tarr was “emotional about it.” (R. p. 48, lines 14-20). Appellant again asserted he was not making the motion in attempt to delay the proceedings and then requested that Mr. Harte remain as standby counsel. (R. p. 48, line 23 - p. 49, line 20). Mr. Harte suggested both counsel remain, and appellant asserted, “[a]ctually, that sounds good to me.” (R. p. 50, lines 2-8).

The trial judge then returned to questioning appellant about whether he understood he would be held to the rules of procedure, to which appellant initially replied, “I’ll try not to disrupt this court. I plan on following everything.” (R. p. 50, lines 17-18). The trial judge acknowledged appellant was “required to do that as a defendant,” and again returned to the question, “I’m taking about you’re required to comply with the rules of procedure at trial. Do you understand?” (R. p. 50, lines 19-21). Appellant then replied affirmatively. (R. p. 50, line 22). The trial judge then asked for examples of defenses available for a murder charge, to which appellant responded, “[a]nother person,” and briefly discussed the holding in *Holmes v. South Carolina*, 547 U.S. 319 (2006), describing the holding as, “the Supreme Court stated that the [South Carolina] standard that was used was arbitrary. They didn’t give

him basically the right to prepare a defense ....” (R. p. 50, line 23 - p. 51, line 21).<sup>4</sup> When asked if there were “forensics” to be addressed in his case, appellant responded there was “no evidence. None whatsoever in my case.” (R. p. 52, lines 1-4). When asked about other issues at trial, appellant requested clarification between the guilt phase and penalty phase, “ the penalty phase is once you get found guilty, right?” (R. p. 52, lines 9-14). He then asked about *voir dire*, asserted “[t]here’s an issue that I would like to - - Witherspoon? I would like to make sure that’s done, to make sure that none of the jury’s going to automatically vote for the death penalty.” (R. p. 52, lines 16-25). The trial judge refocused appellant on the guilty phase and asked again about defenses, cross-examination and impeachment, and appellant responded he would have points to make on the investigation but would not “say it out loud due to the fact” officers were in the courtroom, even though the proceeding was *ex parte* and the courtroom officers were instructed they could not talk about the proceedings. (R. p. 53, line 1 - p. 54, line 10). Appellant then responded correctly to questions on who had the burden of proof (the State), the standard of proof (beyond a

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<sup>4</sup> The Supreme Court in *Holmes* vacated the opinion affirming the conviction upon concluding:

... by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is “arbitrary” in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant’s right to have “ ‘a meaningful opportunity to present a complete defense.’ ”

547 U.S. at 331 (citations omitted).

reasonable doubt), and the right to testify. (R. p. 54, line 12 - p. 55, line 11). The trial judge then asked if he had thought about how self-representation would impact the trial or be received by the jury or witnesses from a tactical position, and the following occurred:

The defendant:           Tactically I would - - voir dire - - you know, I understand that on a regular trial, I believe that normally in South Carolina, to my understanding, and correct me if I'm wrong, that voir dire is normally done by you.

The Court:           That's correct.

The defendant:           And that's the same thing that applied to capital trials, too?

The Court:           Not capital trials, but the defense has an absolute right to question the juror and the juror cannot be sat unless the defense has exercised that right.

The defendant:           I plan on, if the Court will allow me, to ask the jury do they feel any type of way about me representing myself. If you allow those questions or you can proffer some thing that you might think that's necessary for somebody representing himself or whatever the case may be.

The Court:           Well, normally when I have a pro se defendant, I tell the jury that they should not hold the fact that an individual is presenting himself for him or against him, nor should they hold the fact that an individual is representing himself for or against the State of South Carolina.

The defendant:           And like I say, that sounds excellent, but at the same time, if there's anything additional that I would like for you to manifest to the jury, I will put it in writing. And also if you deny it, I will also put it in the record and object to it according to the rules and preserve it for appeal, if necessary.

(R. p. 55, line 23 - p. 57, line 2).

Appellant stated he understood that he was "giv[ing] up many of the traditional

benefits associated with a right to counsel,” but felt compelled to do so due to what he believed to be “ineffective assistance of counsel.” (R. p. 57, lines 3-18). The following exchange then occurred:

The Court: ... Do you feel like you understand and have an awareness of the dangers and disadvantages of self-representation?

The defendant: One more time?

The Court: Do you feel like you have an understanding and appreciation of the dangers and the disadvantages of self-representation?

The defendant: That all goes back to the compelling part why I said, the reason why I’m representing myself due to the grounds that - - of ineffective assistance of counsel....

(R. p. 57, line 20 - p. 58, line 6).

Appellant continued, “It’s a trust issue.” (R. p. 58, lines 13-14). Appellant then requested different counsel, specifically, “Karen Talbot or Target or something, or Greg Seigler” stating “I do have faith that they will assist me.” (R. p. 59, lines 8-10).

Appellant explained his complaints against counsel including a failure to subpoena the Hunsbergers, a failure to file a motion on selective prosecution, and a failure to make a challenge to the indictment under the Interstate Agreement on Detainers. (See R. p. 59, line 11- p. 72, line 2). Mr. Tarr added during appellant’s discussion of his issues that impeachment would be particularly important in this case and appellant should understand that “if he doesn’t know how to get it in, it’s not going to come in.” (R. p. 61, lines 10-24). The trial judge noted he could not help and appellant replied he understood. (R. p. 61, line 25 - p. 62, line 1). Mr. Tarr also added: “As far as him representing himself Monday and wanting all of his file, just the discovery alone is 5,833 pages and then you’ve got other

hundreds of pages of documents that we've got on our own, so you're talking close to 6,500 pages of documents that he needs to understand that he's got to be able to absorb within two days." (R. p. 72, lines 14-20). Appellant stated he understood and the trial judge noted, "I would suspect the defendant, this defendant knows as much about this case as anybody." (R. p. 72, line 22 - p. 73, line 13). Appellant then confirmed again his desire to waive his right to counsel represent himself. (R. p. 74, line 19 - p. 75, line 1). When asked if his decision was "[o]f his own free will and accord," appellant responded "[k]eeping in mind that the compelling part of it, why I am proceeding pro se." (R. p. 75, lines 2-7). The trial judge responded:

... It's not particularly compelling to me because I could have the two witnesses subpoenaed and the other motions could be placed on the record...

(R. p. 75, lines 8-12).

The trial judge also advised, "I think you are making a mistake, but you have the right to make a mistake," but also counseled against the decision. (R. p. 75, line 24- p. 76, line 14). The trial judge also urged additional consultation with counsel and took a short break to accommodate consultation. (R. p. 76, lines 15- 20; p. 77, line 21 - p. 78, line 5). When returning to the record, the trial judge asked if appellant had "been thinking about this for a while," to which appellant responded he had previously filed a motion in 2006, but that motion was not heard. (R. p. 78, line 6 - p. 79, line 11).

At the conclusion of the Friday proceedings, the trial judge did not rule on the motion but announced he would "hold this issue under advisement until Monday." (R. p. 79, lines 12-13; p. 80, lines 1-3). He directed counsel to provide discovery for appellant's review over the weekend "and see if his position is the same on Monday as it is now in regard to self-

representation with the volume of materials that you have.” (R. p. 79, lines 14-18). The trial judge also noted “there’s some other issues that I would like to look at,” as well. (R. p. 79, lines 18-19). The trial judge further noted that he “did not realize that his motion was coming,” and confirmed that trial counsel did not either. (R. p. 79, lines 20-25). The solicitor and his staff were then allowed to return, and the trial judge advised the prosecution that he heard appellant’s motion on *pro se* representation but took the matter under advisement until Monday. (R. p. 80, line 22 - p. 81, line 2). The trial judge then completed the hearing addressing other matters.

On Monday, November 8, 2010, the trial judge initially began proceedings with the jury and the call of the case. (See R. p. 93, lines 7-23). After completing some initial matters with the jury, the trial judge scheduled a time to revisit the self-representation issue. (R. p. 121, line 20 - p. 123, line 4). Mr. Harte noted for the record, in reference to assertions at the previous hearing, that he, in fact, filed a “motion with regard to the Interstate Agreement on Retainers” as referenced in the Friday proceedings. (R. p. 123, lines 5-9).

The solicitor, again, had no objection to the request the hearing be held *ex parte*. (R.p. 122, lines 8-22). And, prior to beginning the hearing, the trial judge ensured that all prosecution staff left the courtroom. (R.p. 124, lines 12-15). He also again advised the remaining officers that they could not repeat anything said during the proceedings. (R. p. 124, lines 16-19).<sup>5</sup>

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<sup>5</sup> In appellant’s recitation of facts in this argument, appellant strongly disapproves of the solicitor’s “failure” to cross-examine Dr. Price as the solicitor would later do when Dr. Price was presented in the penalty phase. FBOA, p. 16. The solicitor was absent by request of appellant, and did not participate in these *ex parte* proceedings.

In the hearing, Mr. Tarr indicated he had come across *Indiana v. Edwards*, 554 U.S. 164 (2008) over the weekend, and that the case allowed the court to insist on representation “for those who are competent enough to stand trial but may not have the competency to waive their right to counsel.” (R. p. 125, lines 4-9). Mr. Tarr stated:

I bring this up because a couple of the different experts that we’ve hired to evaluate Mr. Barnes for purposes of the sentence phase are of the opinion that he is very competent to stand trial, but he lacks the competency to waive his right to counsel and conduct the proceedings on his own.

(R. p. 125, lines 10-15).

Mr. Tarr requested permission to present Dr. David Price to testify. (R. p. 125, lines 16-18). Appellant objected under “doctor/client relationship and it’s privileged information.” (R. p. 125, lines 22-24). Appellant argued that Dr. Price’s testimony was only to be used for mitigation purposes and that he would not have cooperated if he had known it would be used in regard to his motion on self-representation. (R. p. 125, line 25 - p. 126, line 24; p. 127, line 14-p. 128, line 5; p. 133, lines 1-12 ). The trial judge inquired whether appellant was “asking [the judge] to make a decision without having adequate information,” to which he eventually replied:

Well, if I could explain, yes. Yes, if I could explain ....

(R. p. 126, line 25 - p. 127, line 13).

His explanation was “it’s due process; you’ve got the procedural parts or you can send me to Columbia” but the judge could not hear the defense expert in this context. (R. p. 127, line 14 - p. 42, line 5). The trial judge explained, however, that given appellant’s request to represent himself, and the *Edwards* ruling, the court must determine if appellant is competent to represent himself – a question that had not been “completely examined by

this Court.” (R. p. 129, lines 14-17). Dr. Price’s testimony would be limited to competency to conduct the trial proceedings. (R. p. 129, lines 17-21). Mr. Tarr asserted that neither he nor Mr. Harte were attempting to be “adversarial to” appellant, “but in order for the Court to make a ruling on this issue, the Court has to be aware of all relevant information....” (R. p. 129, line 22 - p. 130, line 2). Mr. Tarr underscored counsel was “not taking a position what should happen,” rather, he was only presenting the information for the court’s consideration. (R. p. 129, lines 1-4).

Appellant again raised due process and essentially offered that had he been sent for an evaluation, the doctor from that evaluation could testify, but it was improper to use his own mitigation expert. (R. p. 130, lines 8-14). The trial judge noted that he was not aware of the method of sending one for competency in regard to self-representation. (R. p. 130, lines 15-24). Mr. Harte noted “one of the problems” with *Edwards* was the lack of “standard by which to determine” competency in regard to self-representation. (R. p. 131, lines 1-15).

Appellant again asserted he would not have cooperated if he had “known that he was going to try to use whatever my past reports” were in regard to this issue. (R. p. 133, lines 9-12). When asked about whether there were “past reports,” appellant conceded there were, and also explained that he did not specifically list them on Friday because of the phrasing of the question. (R. p. 133, line 20 - p. 134, line 11). He also admitted, contrary to his prior responses, that he was on medication for post-traumatic stress disorder. (R. p. 134, lines 1-3). The trial judge allowed counsel to call Dr. Price “for the limited purpose” of determining competency in regard to self-representation. (R. p. 134, lines 16-19).

Dr. Price, an expert in clinical psychology, forensic psychology, and forensic

neuropsychology, testified that he had personally evaluated appellant and “reviewed thousands of pages of records of... prior assessments and psychiatric treatment,” and consulted with a Tora Brawley, a neuro-psychologist, and psychiatrist Dr. Donna Schwartz-Watts. (R. p. 136, line 16 - p. 137, line 24). Dr. Price 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). Dr. Price also testified appellant “failed to finish high school,” has an IQ of 82, “which would be in the borderline range of intellectual functioning to the very low part of the low/average range of intellectual functioning. (R. p. 138, lines 14-23). Dr. Price testified:

I’ve diagnosed Mr. Barnes with a post-traumatic stress disorder, which is also the diagnosis that’s maintained by the South Carolina Department of Mental Health and which Dr. Schwartz-Watts agrees with me on.

I would also give him a diagnosis of cognitive disorder not otherwise specified which reflects the cognitive deficits as noted on those neuropsychological tests.

(R. p. 139, lines 1-8).

While Dr. Price did not question competency to stand trial, (R. p. 139, lines 9-12), he believed that appellant lacked the competency for self-representation for three distinct reasons: (1) his significant psychiatric history with “[t]he issues revolving around those psychiatric disorders, the psychiatric admissions and the post-traumatic stress disorder” demonstrating “conflict with authority as well as distrust and paranoia and feeling betrayed” which was reflected previously in his 2003 trial in Georgia where he twice fired counsel and threatened the third; (2) contact with other attorneys that “certainly indicates some difficulty

in cooperating with counsel, planning with counsel and that nature,” though the contact was “difficult” for Dr. Price to “evaluate” and may “mitigate[] that paranoia” ; (3) the cognitive issues where 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 memory problems. (R. p. 139, line 18- p. 141, line 13). Dr. Price continued that “those three things” lead to “a fourth problem and that’s problem in judgment and the ability to abstract about decisions.” (R. p. 141, lines 14-16). Dr. Price gave the following example:

... When I was talking with him yesterday about if you did this, he has not answer for such things as how would you prepare witnesses while you’re incarcerated, how would you research this, how would you read 6500 pages of discovery, and he was telling me he could be ready in four hours, which obviously would indicate some impairment.

(R. p. 141, lines 16-22).

The thought of review of that many pages within that limited time “has some grandiose elements in it. It also has some difficulty to comprehend how arduous a task that would be.” (R. p. 142, lines 7-9). The trial judge then asked appellant if appellant had questions for Dr. Price. (R. p. 142, lines 17-19). Petitioner asked three questions about the facts surrounding counsel in the Georgia proceedings, then began to address the trial judge, asserting “[n]obody knows this case like I do,” accused Dr. Price of misrepresenting facts, announced he felt betrayed, announced he was looking at a malpractice suit against Dr. Price, and stated “[w]hatever happened to me in the past don’t have nothing to do with right now.”

(R. p. 142, line 22 - p. 145, line 5). Appellant continued:

... Every question you asked Friday I answered. I can represent myself in this trial. It’s just to have this man right here, the man, he taking - - he asked me a question. It’s just like saying Man, you know, you going to eat a sandwich? And you say, Yeah, I’m going to eat a sandwich. And I come in the

courtroom and say, Yeah. I said, He say he going to eat a sandwich. I mean, the man, he manipulated me. I mean, he's getting on this stand and saying things that's totally what I didn't even say, took it all out of proportion for this hearing.

What questions can I say to this man? He done got these big degrees and this, that, and the third. Yes, he went through my medical history for the purpose of the penalty phase.

I just feel that this hearing's unfair. And whatever your decision is, I would like to file an interlocutory appeal to the appeal court of South Carolina because I feel that this hearing is unfair and it's not right, although I know what your decision will be, but I have no control over that, Your Honor.

(R. p. 145, lines 5-25).

Dr. Price commented:

Your Honor, that's one of the difficulties he just exhibited with him representing himself is the distractibility. He went from asking me a questions about the conflict of the attorneys to being distracted to talking to you about the records to being distracted to talking about sandwich eating to being distracted to come back and make another comment about malpractice suits and that type of thing. It's that distractibility which is part of the cognitive issue and part of the conflict issue.

(R. p. 146, lines 13-22).

Appellant also argued that he was not told this would happen, and even question Mr. Harte about his participation, to which Mr. Harte stated he "voiced an objection... some concerns about it." (R. p. 147, line 4 - p. 148, line 8).

The trial judge specifically questioned about appellant's ability to knowingly and intelligently waive his right to counsel. (R. p. 149, line 19 - p. 150, line 7). Dr. Price responded: "Well, I'm 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,” as “[r]elated to the PTSD is the paranoia and distrust and feeling like he’s going to be betrayed.” (R. p. 151, lines 2-7). The trial judge questioned Dr. Price whether the paranoia “would affect the knowledge of waiving” the right to counsel, to which Dr. Price responded, “I think it does affect the knowledge of waiving that right, particularly when compounded with being intellectualized.” (R. p. 151, lines 10-16). Dr. Price especially noted appellant’s discussion with him concerning contacting other attorneys as actually “heighten[ing]” the paranoia. (R. p. 151, lines 7-9). Appellant’s significant mental health condition(s), in Dr. Price’s opinion, also affected his ability to “waive that right intellectually.” (R. p. 151, lines 17-19). Dr. Price opined that appellant could not knowingly and intelligently waive his right to counsel. (R. p. 151, lines 20-22).

With due consideration that appellant had previously answered his questions during the 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. 154, line 22 - p. 155, line 3). The trial judge gave a detailed review of the testimony, and determined Dr. Price to be credible, noting his own observations of appellant’s interactions with counsel. (See R. p. 155, line 7 - p. 157, line 7). The trial judge 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).

The trial judge further found that both counsel and Dr. Price acted in appellant's best interest in this matter, and reaffirmed the appointment of counsel. (R. p. 158, line 21 -p. 159, line 6). Mr. Harte objected to the trial's judge's ruling. (R. p. 159, lines 18-20).<sup>6</sup>

On appeal, appellant argues the request was timely made, and the record shows appellant "intelligently" answered, and demonstrated an understanding of evidentiary rules and case law. (See FBOA, pp. 22-23). It appears appellant argues that intellectual limitations and appreciation of logistics considerations "were essentially all properly rejected by the trial judge on the Friday" before the Monday ruling. (FBOA, p. 24).

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<sup>6</sup> In his recitation of facts for this argument, appellant writes, "It is readily apparent... that his decision deeply troubled Counsel Harte." FBOA, p. 16. Respondent disagrees with this assessment for two reasons. First, counsel acknowledged that appellant wanted to object to the ruling, and given that their appointment as counsel of record immediately preceded, it would not be appropriate to engage in hybrid representation. (See R. p. 159, lines 12-19). Second, Mr. Harte argued, relying on Dr. Price's testimony, that appellant was not competent to decide whether to address the jury: "I would submit *and ask that Dr. Price's testimony be put in with this*, that he would not be competent to make this decision." (R. p. 1570, lines 4-10) (emphasis added). (See also R. p. 1502, lines 12-21).

Discussion:

Appellant's position primarily should fail because it depends upon a truncated view of the evidence. The trial judge viewed the totality of the evidence, and determined that given appellant's individual circumstances, appellant's request to proceed *pro se* should have been denied. There is no error.

It is well established that the Sixth Amendment allows an individual to waive his right to counsel and represent himself. *Faretta v. California*, 422 U.S. 806, 821 (1975) ("The Sixth Amendment, when naturally read, ... implies a right of self-representation."); *State v. Winkler*, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) ("An accused may waive the right to counsel and proceed *pro se*."). The waiver may well be to a defendant's detriment as a practical matter, but, if knowingly and voluntarily made, the request to proceed *pro se* must be allowed. *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997), quoting *Faretta*, 422 U.S. at 834 ("Although a defendant's decision to proceed *pro se* may be to the defendant's own detriment, it 'must be honored out of that respect for the individual which is the lifeblood of the law.'"). However, for a defendant who suffers from mental health issues, a state may insist on representation to ensure a fair trial, as confirmed by the United State Supreme Court in *Indiana v. Edwards*, 554 U.S. 164 (2008), where the Court found no constitutional bar to the denial of a request to proceed *pro se* in such limited circumstances.

In *Edwards*, the Court held 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." *Edwards*, 554 U.S. at 177-78. In so holding, the Court recognized that where "a defendant's lack of capacity

threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." 544 U.S. at 176-77. Thus, a state trial judge may "insist upon representation by counsel for those competent enough to stand trial under *Dusky*<sup>7</sup> but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Id.*, 544 U.S. at 178. *Cf. Godinez v. Moran*, 509 U.S. 389, 396 (1993), quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (defendant "may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently'" (emphasis added)). Moreover this highly personalized assessment is best left to presiding judge who "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant..." *Edwards*, 544 U.S. at 177. Thus, the Court in *Edwards* acknowledged that there are instances where the evidence of an accused mental health issues will give rise to a concern for basic fairness in the proceeding.

In coming to this conclusion, the Court acknowledged this limitation on the right to self-representation was necessary based on the broad affect mental illness may have in the legal process:

... Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in

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<sup>7</sup> *Dusky v. United States*, 362 U.S. 402, 402-403 (1960) (holding to find competency to stand trial, the trial judge must find the defendant demonstrates (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," along with (2) "a rational as well as factual understanding of the proceedings against him." See also *Drope v. Missouri*, 420 U.S. 162, 170 n.7 (1975) (acknowledging *Dusky* test).

different ways. ... In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel. See, e.g., N. Poythress, R. Bonnie, J. Monahan, R. Otto, & S. Hoge, *Adjudicative Competence: The MacArthur Studies* 103 (2002) ("Within each domain of adjudicative competence (competence to assist counsel; decisional competence) the data indicate that understanding, reasoning, and appreciation [of the charges against a defendant] are separable and somewhat independent aspects of functional legal ability"). See also *McKaskle*, 465 U.S., at 174, 104 S.Ct. 944 (describing trial tasks as including organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury).

*Edwards*, 554 U.S. at 175-76 (brackets in original).

In further support of this basic concept, the Court also cited with favor a portion of the *amicus* brief filed by The American Psychiatric Association, indicating: "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." *Id* at 176.

However, the Court, while announcing for these reasons that evaluation in this context is more complex than the test for competency to stand trial, declined to set out a "more specific standard." *Id* at 178. See also *Moran*, 509 U.S. at 398 ("we reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard"). The Court simply noted that "[t]he application of *Dusky*'s basic mental competence standard can help in part to avoid [... an unfair ... ] result. But given the different capacities needed to proceed to trial

without counsel, there is little reason to believe that *Dusky* alone is sufficient.” *Edwards*, 554 U.S. at 177. Thus, no particular test has been announced to guide a court in such an evaluation but that does not in and of itself expand the use of the limitation. The exception is restricted by the class it affects.

The Court was careful to limit the *Edwards* exception applicability to only cases involving “gray-area” defendants. *Edwards*, 544 U.S. at 172 (referencing a “mental condition that falls in a gray area between *Dusky*’s minimal constitutional requirement that measures a defendant’s ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose.”). The Supreme Court acknowledged empirical evidence indicated such situations where basic fairness has been questioned due to a *pro se* defendant’s mental state are “not common.” 554 U.S. at 178. *See also State v. Lane*, 669 S.E.2d 321, 322 (N.C. 2008) (only if trial court determines that defendant is “within the category of ‘borderline-competent’ (or ‘gray-area’) defendants” does the trial court then further consider if counsel is necessary). Again, the wisdom of the choice is not at issue. The evaluation of a defendant’s ability is directly tied to the defendant’s mental capacity, not his legal skills or lack of formal training. *Id. See People v. Davis*, \_\_\_ P.3d \_\_\_, 2012 WL 19373, \* 9 (Colo.App. 2012) (“We emphasize, as did ... *Edwards*, that this standard addresses defendant’s mental capacity, not his technical trial skills or legal knowledge.”). *Cf. Brewer, supra*.

In sum, *Edwards* stands only for the proposition that there is no constitutional prohibition against a state court insisting upon counsel for the accused. *Edwards*, 544 U.S. at 177-78. *See also United States v. Ferguson*, 560 F.3d 1060, 1070 n.6 (9<sup>th</sup> Cir. 2009) (“we

hold today... that *Edwards* does not *compel* a trial court to deny a defendant the exercise of his or her right to self-representation; it simply *permits* a trial court to require representation for a defendant who lacks mental competency to conduct trial proceedings”) (emphasis in original); *United States v. DeShazer*, 554 F.3d 1281, 1289-90 (10<sup>th</sup> Cir. 2009) (“after *Edwards* a state may deny a criminal defendant the right to represent himself when he suffers from a severe mental illness.”); *State v. Connor*, 973 A.2d 627, 650 (Conn. 2009) (“*Edwards* does not *mandate* the application of such a dual standard of competency for mentally ill defendants. In other words, *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 competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent”) (emphasis in original).

Here, the trial judge carefully evaluated the medical testimony, and viewed appellant’s responses – both from the Friday and the Monday hearings – through the lens of the medical testimony. The medical testimony distinguished mere lack of knowledge or sophistication from cognitive disability and mental illness interfering with the ability to represent oneself. See *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”). Appellant suffered a long history of mental illness and treatment. Dr. Price testified to that history and the present effects of appellant’s post-

traumatic stress disorder and his cognitive disorder on his competency to represent himself.<sup>8</sup> There is little doubt that this is one of the handful of “gray area” cases as referenced in *Edwards* – there are diagnosed mental conditions, and those conditions carried consequences and conditions that negatively affected self-representation. There is also little doubt that the judge’s consideration of the facts was affected by the testimony. But, appellant’s assertion “that the trial judge was almost positive he was going to allow appellant to represent himself on the Friday before the Monday trial,” (FBOA, p. 22), is not on a firm factual foundation, if for no other reason, because the trial judge declined to rule on Friday. A firm conviction that the waiver was intelligent and knowing could have easily lead to a ruling on the record that day. It did not. Moreover, the trial judge had prime examples of appellant’s “distractability” in his exchanges with the court – a fact underscored and pointed out by Dr. Price – which the trial judge could only truly evaluate in terms of competency after being advised of the severe mental illness issues. (See R. p. 146, lines 13-22). Dr. Price also

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<sup>8</sup> Additionally, Dr. Watts testified during the penalty phase and expanded on the mental health issues, including reference to a prior diagnosis of psychosis (at age eighteen), and treatment with Haldol used “to organize ... thoughts.” (R. p. 2086, lines 11-18). Dr. Watts testimony also included the fact that appellant had “been seen by a number of psychiatrists ... and given many different diagnoses” including intermittent explosive disorder,” and had “been on different kinds of medications” including “mood stabilizers.” (R. p. 2087, lines 3-10). Dr. Watts also noted appellant was “grandiose” when she first met him, and fixated on an ear problem, making it difficult to speak with him. (R. p. 2101, lines 18-24). She also noted that he overstated his intellectual ability, and exhibited “hyper-religiosity.” (R. p. 2101, line 24 - p. 2102, line 21). Dr. Watts also noted appellant was “obsessed” and “focused” on having been Tasered in Edgefield, making communication difficult. (R. p. 2103, lines 1-5). In a subsequent September meeting before the November proceedings, appellant still exhibited “grandiose” tendencies, and his obsession had refocused on “the federal government.” (R. p. 2103, lines 6-21). This testimony is consist with the way the trial judge had to “refocus” appellant several times to respond properly in the hearing, and also consistent with Dr. Price’s view that appellant’s conditions made distraction a concern.

explicitly tied the “distractability” and paranoia to appellant’s diagnosed conditions. The Supreme Court in *Edwards* specifically catalogued this very type of limitation in crafting the limitation. *See Edwards*, 554 U.S. at 176 (“[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant’s ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.”) (brackets in original).

Further still, as the trial judge discovered, appellant did not fully advise the court of the extent of his condition, or his present diagnosis and treatment during the Friday hearing. (See R. p.133, line 20 - p. 134, line 11).<sup>9</sup> Even if one would say that trial judge was leaning toward granting the motion, the medical testimony would at least warrant reconsideration based on relevant, material previously unrepresented facts.

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<sup>9</sup> This is consistent with Dr. Watts’ repeated testimony that appellant tended to “minimize his symptoms.” (R. p. 2115, lines 12-21). Both Dr. Watts and psychopharmacologist, Dr. Alexander Morton, agreed that appellant was not a reliable source of information, with Dr. Morton describing appellant’s attempt at history “grossly incomplete.” (See R. p. 2115, lines 22-23; p. 2153, lines 5-8). In fact, Dr. Morton testified:

It’s not like he over-reported anything. He really minimized that to me, his reports. And I tried to rely on other people, their history, what they found.

I wondered if [appellant] was hallucinating at the time I was talking to him, because at times there was not a connection. And I don’t know if he was or not, but I wasn’t connected up. I was not getting some logical thinking back and forth as far as the usefulness of information I was trying to get. So certainly he didn’t over-report. I had to rely basically on medical records as well as judicial records.

(R. p. 2153, line 21 - p. 2154, line 6).

When viewing all the available evidence, the trial judge reasonably found that *Edwards* allowed, and, indeed, advocated by its facts and its very existence, that the motion should be denied to ensure a fair trial. His ruling, supported by the facts of record and authorized by case law, should be upheld. *See generally United States v. Johnson*, 610 F.3d 1138, 1145 (9<sup>th</sup> Cir. 2010) (noting “[b]ecause *Edwards* holds that the Constitution ‘permits’ interfering with a *Faretta* request for ‘gray area’ defendants, it suggests an abuse of discretion standard.”); *Ji v. State*, 316 S.W.3d 860, 862 (Tex. Ct. App. Dallas 2010) (“A trial judge’s decision not to allow a defendant to represent himself in court is a mixed question of law and fact, which we review for an abuse of discretion.”).

## II.

The trial judge did not abuse appellant's Due Process right by accepting and relying upon Dr. Price's testimony when Dr. Price had recently examined appellant and was able to give an informed opinion as to appellant's then existing mental state – an issue of utmost importance pursuant to *Indiana v. Edwards*, 554 U.S. 164 (2008).

### Relevant Facts:

As noted above, the motion to proceed *pro se* was addressed *in camera* and the solicitor was neither present, nor did he or his office participate. (See R. p.122, lines 8-22). Mr. Tarr, one of appellant's own attorneys, presented the court with the *Edwards* case, and requested permission to call defense witness Dr. Price. (R.p. 125, lines 4-15). Dr. Price would later be called in the mitigation case. (See R. p. 2180, lines 5-12). However, his testimony at the November 8<sup>th</sup> hearing was limited to appellant's competency to represent himself in the proceedings. (See R. p. 125, lines 4-18).

Appellant first objected to his defense counsel, Mr. Tarr, calling Dr. Price on an assertion of privilege.<sup>10</sup> (R. p. 125, line 19 - p. 126, line 3; p. 128, lines 2-5). Mr. Tarr argued:

... Dr. Price nor Mr. Harte nor I are trying to be adversarial to Mr. Barnes, but in order for the Court to make a ruling on this issue, the Court has to be aware of all relevant information, and so we're just bring that to the Court's attention. We're not taking a position what should happen, and that's the basis of what we're doing here today, ....

(R. p. 129, line 22 - p. 130, line 4).

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<sup>10</sup> "There is no physician-patient privilege in South Carolina." *Aakjer v. Spagnoli*, 291 S.C. 165, 173, 352 S.E.2d 503, 508 (Ct. App. 1987). Appellant could not rely on such a privilege as there is none.

Appellant then objected based on “due process,” in that, in appellant’s view:

... when he’s asking the Court to take this man for mitigation purposes only, you see what I’m saying, that’s for the penalty phase, because like I say, if you appoint a state official to conduct that review, then that’s a different story...

(R. p. 130, lines 8-13).

The trial judge rejected appellant’s argument:

... it leads me to believe when a defendant stands up and says, Well, I object to this testimony, then either, A, I make a decision without all the facts; and B, I question why a defendant would take that particular position in this matter unless his decision to represent himself and waive his attorney is fueled by something other than knowledge and intelligence. I don’t quite understand taking that position.

All I’m trying to do is, and I take it all the attorney’s trying to do is place the facts before the Court so that the Court can make an informed decision as to your right to represent yourself, which is not absolute.

(R. p. 132, lines 5-18).

Appellant then argued (again) that he would not have cooperated with Dr. Price had he known Dr. Price would testify against him at this proceeding. He asserted: “If I’d have known that he was going to try to use whatever my past reports, I would have never talked to him.” (R. p. 133, lines 9-12). The trial judge noted that appellant had not indicated any “past reports” in regard to mental state when he initially sought to proceed *pro se*: “Well, why didn’t you share that with me when I asked you Friday concerning prior mental state?” (R. p. 133, lines 20-25). Appellant only referenced his post-traumatic syndrome from a taser incident at Lieber, which he claimed was in response to the trial judge’s questions. Appellant

asserted:

I am competent to stand trial. Every thing that I told you Friday, I answered all your questions, and its on the record. I hope so. But I object to the doctor/client privilege.

(R. p. 134, lines 1-15).

Defense counsel then called Dr. Price, who testified at length about Petitioner's limitations and background which included, "16 different psychiatric diagnoses throughout his lifetime" and "six involuntary admissions, psychiatric admissions." (R. p. 138, lines 2-11). Dr. Price testified that he had "some cognitive concerns for Mr. Barnes," diagnosed him with post-traumatic stress disorder," and "cognitive disorder not otherwise specified which reflects the cognitive deficits as noted on [his] neuropsychological tests." (R. p. 138, line 12-p. 139, line 8). He had no concerns that appellant was competent to stand trial, but had definite and described concerns as to whether he could adequately represent himself due to his mental health issues, not the least of which was "distractability." (R. p. 139, line 18-p. 141, line 16; p. 146, lines 13-22).

The trial judge viewed the evidence in light of Dr. Price's testimony and with the understanding that the issues and concerns were not from mere lack of education or sophistication, but from a cloud of mental health concerns obscuring appellant's ability to make a knowing and intelligent waiver. (R. p.157, line 21 - p. 158, line 20).

Appellant argues in this appeal that the trial court "violated appellant's right to Due Process by relying on the pre-trial testimony," when appellant was not aware Dr. Price's testimony would used outside of the mitigation arena. (FBOA, p. 28).

Discussion:

Again, appellant's issue must fail as he essentially argues that if the trial judge had had less information about appellant's mental health diagnoses, and the effects of his conditions on his thought process, then he would have been able to convince the court to allowing him to proceed *pro se*. As a practical matter, this runs afoul of *Edwards* and basic concepts of due process.

"A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997), *citing* 21 Am.Jur.2d, Criminal Law § 640 (1981). In context of competency and the legal system, "[d]ue process prohibits the conviction of a person who is mentally incompetent." *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 595-96 (1992). Indeed, "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *State v. Finklea*, 388 S.C. 379, 383-84, 697 S.E.2d 543, 546 (2010), *quoting* *Drope v. Missouri*, 420 U.S. 162, 171 (1975). The essence of the Supreme Court's ruling in *Edwards* is to ensure a fair trial, *i.e.*, to *preserve* the right to due process. *Edwards*, 554 U.S. at 178-79 ("today's opinion, assuring trial judges the authority to deal appropriately with cases [...where competency is a concern...] may well alleviate those fair trial concerns."). Thus, appellant's attempts to prevent the testimony of the defense psychiatrist is the antithesis of ensuring due process and a fair trial. His argument is misguided.

To the extent appellant asserts that he would not have cooperated in regard to

mitigation had he known his cooperation with the psychiatrist would allow the psychiatrist to be called for the purposes of evaluating his representational competency, again, there was no “due process” argument made to the trial judge. At best, this argument appears to be more of authority or control over the presentation of information necessary to the trial judge’s decision. However, the record shows that appellant was represented by counsel and counsel (Mr. Tarr) called the defense witness. This is precisely the type of evidence that Mr. Tarr would need to present to fully protect the right to a fair trial under the *Edwards* opinion. As the Supreme Court found:

... insofar as a defendant’s lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution’s criminal law objectives\*177 , providing a fair trial. As Justice Brennan put it, “[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.” *Allen*, 397 U.S., at 350, 90 S.Ct. 1057 (concurring opinion). See *Martinez*, 528 U.S., at 162, 120 S.Ct. 684 (“Even at the trial level ... the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer”). See also *Sell v. United States*, 539 U.S. 166, 180, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) (“[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant’s trial is a fair one”).

*Edwards*, 554 U.S. at 176-77.

Appellant’s argument accusing the solicitor of failing to cross-examine Dr. Price is in conflict with the record that shows that neither the solicitor nor his staff were present or participated in any way. See generally *State v. Hitopoulus*, 279 S.C. 549, 551, 309 S.E.2d 747, 749 (1983) (“the attorney-client privilege extends to [defendant’s] communications to the psychiatrist employed by his attorney to aid in preparation of his defense”). Only

appellant's counsel presented the testimony. Thus, there is neither a privilege issue nor an issue concerning the court's receipt of that testimony. *See generally Koutsogiannis v. BB & T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005) ("In the attorney-client relationship, clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority."). Defense counsel is charged with protecting his client's constitutional rights. *See Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1309, 1317 (2012) ("Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged.").<sup>11</sup> It is difficult to imagine that a trial judge would have any basis for determining if a mental illness negatively affected competency to represent oneself absent such testimony. *See In re Rhome*, 260 P.3d 874, 881 (Wash. 2011) ("*Edwards* does not *require* trial courts to evaluate a defendant's mental health status in order to secure a valid waiver of counsel. Rather, *Edwards* held that a state court may take this into account, and strongly suggested such considerations are integral to a knowing and intelligent waiver.") (emphasis in original).

Appellant's reliance on cases indicating a promise by the court simply cannot be reconciled with this situation. For example, appellant cites to *Knox v. Collins*, 928 F.2d 657

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<sup>11</sup> There could be no credible issue on abandonment as counsel merely presented the testimony and did not advocate one way or the other. (R. p. 129, lines 1-4). *See generally Maples v. Thomas*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 912, 923 -24 (2012) ("We agree that, under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him."). "It is by now well-established that in a criminal trial, defense counsel has the authority to manage most aspects of the defense without first obtaining the consent of the defendant." *United States v. Chapman*, 593 F.3d 365, 367-68 (4<sup>th</sup> Cir. 2010). Moreover, the trial judge noted that both counsel and Dr. Price acted in appellant's best interest in this matter. (R. p. 158, line 21 - p. 159, line 2).

(1991), but that case essentially found “a breach of fundamental fairness” where there was detrimental reliance on a trial judge’s “promise to correct stated misconceptions” about parole eligibility in capital voir dire proceedings, and a failure of the trial judge to do so. 928 F.2d at 662. There is no like promise from the court here much less any detrimental reliance. The same distinguishing feature is present in the second case cited by appellant, *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001), where defense counsel tailored his closing based on specific phrases to be included in the jury instructions by the trial judge. Again, there is no like detrimental reliance here. These cases simply do not bear on the correctness of the pretrial proceedings in regard to receipt of evidence from Dr. Price.

Appellant also argues, essentially, that the trial judge had another avenue for discovery of the medical testimony – ordering a competency evaluation. (FBOA, p. 32). As a first point, as noted in the response to issue one, an *Edwards* issue may or may not be resolved by considering testimony and opinion on general competency to stand trial. *See Edwards*, 554 U.S. at 177 (“[t]he application of *Dusky*’s basic mental competence standard can help in part to avoid [... an unfair ... ] result. But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient.”). As a second point, the State did not compel any witness to testify or even suggest a witness testify. Defense counsel offered Dr. Price to opine on appellant’s competency to represent himself.<sup>12</sup> Appellant’s argument should be rejected.

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<sup>12</sup> Again, while appellant asserts there was disagreement between the trial attorneys on whether to call Dr. Price, there was no disagreement that the record supported appellant was not competent to represent himself. Mr. Harte argued, relying on Dr. Price’s testimony, that appellant was not competent to make a decision whether to address the jury: “I would submit *and ask that Dr. Price’s testimony be put in with this,*

### III.

The trial judge conducted a full and fair *voir dire* process. Appellant is incorrect that the judge unfairly limited the ability to explore a juror's understanding of murder where necessary even though providing a definition of murder was not necessary. The judge made an individual assessment of whether additional questions were necessary and both provided context and allowed the attorneys to provide context in discrete circumstances. At any rate, the process as a whole was sufficient.

#### Relevant Facts:

The record here shows a complete and fair jury *voir dire*. The judge followed a standard template of questioning the juror initially and allowing both the State and the defense to ask individual questions.<sup>13</sup> Moreover, counsel had available a five page, specific juror questionnaire which included standard information such as education, spouse's name, employment, prior exposure to crime questions, and, additionally, such varied items as

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that he would not be competent to make this decision.” ( R. p. 1570, lines 4-10) (emphasis added). (See also R. p. 1502, lines 12-21).

<sup>13</sup> Defense counsel actually moved pre-trial that “there be no judicial rehabilitation of potential jurors regarding the death/life qualification.” (R. p. 12, lines 22-25). The trial judge denied the motion:

I'm going to deny that motion since I have the ultimate responsibility to determine whether or not a particular juror is or is not qualified.

It's not my purpose to attempt to rehabilitate any juror. It's generally my purpose to understand what a juror may have said or to better understand what a juror may have said during the colloquy with the Court and the attorneys.

If you have - - certainly if you have an objection as to any particular juror when I do question them, Mr. Tarr, you may certainly put that on the record, but I think given the fact that it is my ultimate determination and responsibility, that I will deny that motion.

(R. p. 13, line 18 - p. 14, line 6).

requests for civic group membership, sources of news, magazines regularly read, bumper stickers displayed and favorite hobbies or pastimes. ( R. p. 2350-2354).<sup>14</sup>

In his brief to this court, appellant argues, in general, that “the trial court judge stifled counsel’s ability to determine juror attitudes toward the death penalty.” (FBOA, p. 50). He then lists the following examples: “did not allow questioning about what factors would be important in their decision-making, their understanding of “murder” in South Carolina law, or the kinds of evidence they thought would be important in rendering the death penalty.” Id.

Discussion:

This issue is procedurally barred. “Where counsel fails to exhaust all strikes, appellate review of juror qualification issues is barred.” *State v. Bixby*, 388 S.C. 528, 542, 698 S.E.2d 572, 580 (2010), citing *State v. Tucker*, 324 S.C. 155, 163, 478 S.E.2d 260, 264 (1996). Here, counsel used nine of appellant’s available ten strikes. (See R. p. 1018, line 1 - p. 1024, line 21). But even so, the issue is clearly without merit. First, because the argument is basically a general complaint, the bulk of the issue fails for lack of specificity. He necessarily fails in his burden of proof. See generally *State v. Finklea*, 388 S.C. 379, 386, 697 S.E.2d 543, 547 (2010) (“The appellant has the burden of showing that any alleged error deprived him of a fair trial.”). Second, as to the one specific argument – the failure to define murder – the record does not support that counsel was absolutely prohibited from referencing a definition or requesting the court define the offense where the questions indicated such

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<sup>14</sup> Appellant asserts the questionnaire used here “is three pages long and only captures general biographical information.” (FBOA, p. 51). That is incorrect. The actual questionnaire is reflected both in general form and the form returned by Juror #203 – the juror discussed in Issue IV of the instant brief – included in the Record on Appeal. (See R. p. 2350-2354; p. 2356-2360).

would be beneficial in determining the meaning of the juror's response.

As to defining murder, this Court has previously held that such a definition is not required, finding "such information is disseminated to jurors by way of jury instructions, not questioning on voir dire." *Bixby*, 388 S.C. at 543, 698 S.E.2d at 580. Even so, the trial judge here did not close the possibility of exploring a juror's understanding of murder if the need arose. In fact, the trial judge stated he would either define the term himself, or would allow a properly framed question defining the term. (R. p. 2448, line 9 - p. 2459, line 8).

And, as to the general sufficiency of the questioning, Respondent would note that no particular questions are generally required. "[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Sapp*, 366 S.C. 283, 290-291, 621 S.E.2d 883, 886 (2005), citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844 (1985). However, "[t]he scope of *voir dire* and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Stanko*, 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008); *State v. Bennett*, 369 S.C. 219, 226, 632 S.E.2d 281, 285 (2006); *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004); *State v. Tucker*, 334 S.C. 1, 10, 512 S.E.2d 99, 103 (1999); *State v. Hill*, 331 S.C. 94, 103, 501 S.E.2d 122, 127 (1998). See also *United States v. Jones*, 608 F.2d 1004, 1007 (4<sup>th</sup> Cir. 1979) ("It is well established that a trial court has broad discretion in conducting the voir dire of the jury and particularly in phrasing the questions to be asked."). "[W]hat is constitutionally mandated is the selection of a fair and impartial jury" and "[n]o particular formula of questions is mandated to achieve this goal." *State v. Bennett*, 369 S.C. at 227, 632

S.E.2d at 285, quoting *State v. Hill*, 361 S.C. at 310, 604 S.E.2d at 702-703. “To be constitutionally compelled, ... it is not enough that a question may be helpful. Rather, the trial court's failure to ask or allow a question must render the defendant's trial fundamentally unfair.” *MuMin v. Virginia*, 500 U.S. 415, 425 (1991). See also *State v. Wise*, 359 S.C. 14, 23-24, 596 S.E.2d 475, 479 (2004); *State v. Tucker*, 334 S.C. at 10, 512 S.E.2d at 103. Thus, “[t]o constitute reversible error, a limitation on questioning must render the trial ‘fundamentally unfair.’” *Hill*, 361 S.C. at 308-309, 604 S.E.2d at 702, citing *Morgan v. Illinois*, 504 U.S. 719, 730 (1992); *Stanko*, 376 S.C. at 576, 658 S.E.2d at 96.

“In our justice system, the trial judge has the discretion and the duty to monitor the *voir dire* so as to ensure that the jury selected measures up to the constitutional standard.” *State v. Hill*, 361 S.C. at 310, 604 S.E.2d at 702. In fact, this Court has recently cautioned against any attempt to “reduce[] to a question- and-answer sessions which obtain results in the manner of a catechism.” *State v. Dickerson*, 395 S.C. 101, 115, 716 S.E.2d 895, 903 (2011), quoting *Wainwright*, 469 U.S. at 424. Respondent suggests this holds true both for a defendant and the prosecution – rote questions made mandatory does nothing to ensure quality in the individual *voir dire*. Here, the trial judge properly allowed expansive questioning and disallowed only those questions tending to “stake out” particular jurors. See *Stanko*, 376 S.C. at 576, 658 S.E.2d at 96 (“Appellant was not entitled to ask potential jurors about their specific views of the insanity defense during *voir dire*. The trial court allowed Appellant to explore the issue of affirmative defenses during *voir dire*, and permitting either side to ask any more case-specific questions would have veered close to allowing the parties to stake out a jury”). He even allowed, though not necessary under our precedent, the

definition of legal terms by the court or a question in proper form (including murder), (see, for example, R. p. 249, lines 4-23; p. 833, lines 21-25), *Bixby, supra*, and questions on whether the jurors could holdfast to their beliefs in the face of a different majority view during deliberations, (see, for example, R. p. 214, line 21 - p. 215, line 14; p. 613, line 22 - p. 614, line 4), compared with *Bennett*, 369 S.C. at 226, 632 S.E.2d at 285 (not improper to “excluded the ‘will you go with the majority’ question from *voir dire*.”).

At any rate, any error would need to be predicated upon finding issue with the jurors who were seated. *Bixby*, 388 S.C. at 542, 698 S.E.2d at 580. The seated jurors<sup>15</sup> were questioned during the individual *voir dire* process in the same order as discussed herein.

The first seated juror question was juror #282, Shirley West. Defense counsel neither requested to define murder for the juror, nor objected to her qualification. (See R. p. 171, line 8 - p. 180, line 10). Only *after* Ms. West was questioned, on the next prospective juror, counsel for appellant, after exploring general grounds such as experience with court proceedings, employment and watching Fox News, defense counsel asked “what would be important to” the juror in making her decision. The solicitor’s objection was sustained. (See R. p. 187, lines 11-17). Defense counsel immediately followed with “what is your understanding of the term ‘murder’?” (R. p. 187, lines 19-20). The trial judge stopped counsel, finding that question could not be allowed as such a question is answered by a charge on the law by the Court and the jurors would be sworn to follow the law.” (R. p. 187, lines 21-23). The very next question returned to specific types of evidence: “What types of

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<sup>15</sup> The three alternates who were chosen were not called upon to sit on the jury for deliberations in either phase, and are not considered here. (See R. p. 2324, lines 8-10).

evidence that the defense could present to you would be important to you in making your decision in a case like this?" (R. p. 188, lines 3-6). The solicitor's objection was sustained.

(R. p. 188, lines 7-11). Counsel then asked the following question:

Ms. Koenig, if the judge told you that you were required to consider evidence presented by the defense in mitigation, such as any factors relating to Mr. Barnes, his background, education, intelligence, mental health issues, anything like that, if he told you that you needed to consider that as evidence, would you be able to do that?

(R. p. 189, lines 3-9).

The juror responded with a clear, "Oh, yes." (R. p. 189, line 10). The solicitor raised no objection to that question, and the judge did not limit defense counsel in asking this question. The solicitor then briefly questioned the juror, after which the juror was excused. Defense counsel then "object[ed] to not being able to instruct the jurors on the definition of murder in voir dire." (R. p. 192, lines 20-22). He argued the language in *Bixby* finding the question was not proper was then "currently under cert, ... cert being sought in the U.S. Supreme Court," and he asserted his belief that "it's a very strong issue." (R. p. 192, line 24 - p. 193, line 5). He argued there was a danger that in the minds of jurors "self defense, accident and things like that are murder." (R. p. 193, lines 6-11). He continued, "not being able to ask them what their understanding is of murder and we're getting jurors who are saying that they can consider both life or death, when in reality they would only consider life for accident or self defense or manslaughter." Thus, he concluded, the defense should be able to ask about the definition of murder. (R. p. 193, lines 11-19).

The solicitor relied on a long line of cases holding misconception on the law is not a proper area of juror questioning. (R. p. 193, line 21 - p. 195, line 24). He argued the

“elements of law are not to be debated in voir dire. They exist when the judge charges the jury on what the law is.” (R. p. 195, lines 21-24). The trial judge, relying on *State v. Bixby*, and *State v. Stanko*, reasoned that it matters not what misconceptions the jurors may have on the elements of a crime or a defense as “[t]hey take an oath to follow the law and to apply the law.” (R. p. 197, lines 7 - p. 198, line 15). The trial judge then asked the defense’s position on the qualification of the juror, to which the defense replied, “Qualified, Your Honor” without further or individual objection. (R. p. 198, lines 17-18).

The next selected juror, juror # 75 (Thomas DeVilbiss), was questioned immediately thereafter. Defense counsel neither requested to define murder for the juror based on specific certain responses, nor objected to his qualification. (R. p. 200, line 20 - p. 207, line 2).

The next juror who was ultimately seated was juror # 152, Otis Key, questioned immediately following #75. Again, defense counsel neither requested to define murder for the juror based on specific and certain responses, or objection to his qualification based on insufficient *voir dire*. Defense counsel did express “a concern” with the fact the juror’s daughter was a correctional officer in McCormick. The trial judge noted there was no evidence the daughter knew appellant from McCormick (where appellant was then housed in anticipation of trial), and appellant had, in fact, been housed in Lieber prior to the transfer for trial. The trial judge found the juror qualified over defense counsel’s “concern.” (R. p. 208, line 22 - p. 217, line 6).

The next juror who was ultimately seated was # 97, Gayle Garry. However, *prior* to Ms. Gary’s individual *voir dire*, counsel questioned another jury (who was not seated), Mr. Steven Jordan, juror # 146. Mr. Jordan’s question is illustrative of the open nature of the

individual *voir dire* in two ways.

First, because defense counsel was given significant latitude in questioning Mr. Jordan on what, if any impact, law enforcement witnesses would have on his consideration of evidence, as Mr. Garry advised that he had family and friend connections to law enforcement. Respondent notes such questions were posed without objection from the State. (See R. p. 234, line 13 - p. 237, line 9). (See also R. p. 421, line 14 - p. 423, line 5). Defense counsel asked, again without objection, “if you were on the jury and you found that there was a murder that there was absolutely no excuse for, you could give meaningful consideration to a life sentence?” (R. p. 237, line 20 - p. 238, line 151). But upon hearing Mr. Garry’s response that, “if there was not excuse for it, could blooded, I couldn’t. ... If there are mitigating circumstances or situations, I mean yes...,” counsel did not request any additional questions. After prosecution concluded its questions, defense counsel argued the juror was not qualified because “[h]e said flat out if he found somebody committed murder in cold blood with no excuse” he “couldn’t vote for life.” (R. p. 240, line 16 - p. 241, line 1). The trial judge reminded counsel that he also “went on to say, depending on the mitigation.” (R. p. 241, lines 2-3). Still, defense counsel offered he wished to ask additional questions, which the trial judge allowed, without objection from the solicitor. (R. p. 241, lines 4-8). When asked whether “anything else matter,” if the murder was “no excuse in cold blood,” the trial judge stopped the questioning finding it inappropriate. When arguing that he was asking about mitigation, defense counsel also added the questioning was “without explaining to him what the definition of murder is.....” (R. p. 242, lines 10 - p. 244, line 8). The trial judge advised that he was not prohibiting an explanation of the offense, but defense counsel’s

questions about the jurors misconceptions of the offense:

I never said I would not explain the definition of murder. What I had said was you cannot question these jurors about their conception or misconception about the definition of murder.

If you want me to tell the jury murder in South Carolina is the unlawful killing of a human being by another with malice aforethought, express or implied, I will be glad to do that. That wasn't what I sustained the objection on.

My sustaining of the objection in that regard was on the fact that it was concerning what the jury thought murder was or what the jurors thought the definition was.

(R. p. 244, lines 9-21).

The trial judge also said he did not find a properly framed question from counsel to be improper in regard to understanding murder. (R. p. 244, line 25- p. 245, line 8). Ultimately, the trial judge defined murder for the juror before defense counsel resumed questioning. (R. p. 249, lines 4-23). Defense counsel then asked one question, whether the juror could consider a life sentence if he found appellant guilty of murder, and the juror responded, "I swear you all have got me confused now." The juror then expressed, upon questioning by the trial judge, that he would consider all the facts and circumstances of any case in determining an appropriate sentence. (R. p. 250, line 9 - p. 253, line 6). Defense counsel had no further questions, but advised the court that the factual scenario the juror referenced "was probably a voluntary manslaughter," and objected again based on their prior motion to prevent "judicial rehabilitation." He also objected in general to the juror:

Your Honor, this is a juror who is like best friends with Leon Lott, the Sheriff of Richland County; friends with the Edgefield County Sheriff; was friends with Jim Anders; is a member of the South Carolina Law Enforcement Association, has a bumper sticker on his car; was a constable for ten or 15 years.

He's clearly very law and order. He's got very rigid beliefs on when the death penalty is appropriate, which apparently is – appears to be in every case where there's a murder with aggravation.

(R. p. 254, lines 12-21).

The trial judge disagreed and offered defense counsel the opportunity to ask additional questions, but counsel decline stating, “I just don't know how I can do it without, you know, being accused of staking out....” (R. p. 254, line 22 - p. 255, line 6). The prosecution argued that the juror been faced with complex and confusing questions that essentially “rolled the two trials together,” but had, at bottom, “repeatedly answered that he could listen to the facts and circumstances in the guilt phase and the sentencing phase and follow the law and reach a verdict; not always death, not always life, but he would apply the facts and circumstances as he was asked.” (R. p. 255, line 17 - p. 256, line 9). The trial judge found the juror qualified. (R. p. 256, line 20 - p. 257, line 25). However, he was not ultimately seated as the defense exercised one of their strikes against him in selection. (R. p. 1019, lines 10-18).

Returning to Ms. Garry, juror #97, neither the court nor counsel pursued a definition of murder, and defense counsel made no objection to either the *voir dire* or Ms. Garry's qualification. (R. p. 298, line 22 - p. 307, line 3).

The next seated juror questioned was juror #111, Phillip Griffin. Again, neither the court nor counsel pursued a definition of murder, and defense counsel made no objection to either the *voir dire* or Mr. Griffin's qualification. (R. p. 309, line 2 - p. 315, line 14).

The next seated juror questioned was juror #33, Alexis Brunson. Again, neither the court nor counsel pursued a definition of murder, and defense counsel made no objection to

either the *voir dire* or Ms. Bruson's qualification. (R. p. 339, line 17 - p. 346, line 23).

The next seated juror questioned was juror # 222, Joseph Robbins. Again, neither the court nor counsel pursued a definition of murder, and defense counsel made no objection to either the *voir dire* or Mr. Robbin's qualification. (R. p. 415, line 10 - p. 428, line 9).

The next seated juror questioned was juror #212, Ronnie Posey. Again, neither the court nor counsel pursued a definition of murder, and defense counsel made no objection to either the *voir dire* or Mr. Posey's qualification. (R. p. 565, line 1 - p. 571, line 24).

The next seated juror questioned was juror #267, Randall Thrower. Again, neither the court nor counsel pursued a definition of murder, and defense counsel made no objection to either the *voir dire* or Mr. Thrower's qualification. (R. p. 603, line 12 - p. 616, line 21). Respondent notes that the trial judge did not engage in mere standard questions, but would expand on concepts if the need arose. For instance, during Mr. Thrower's questioning, the court defined the different types of evidence in order to effect a true measure of the juror's understanding of the questions being asked. (See R p. 609, lines 3-25).

The next seated juror questioned was juror #94, Sean Gamble. Again, neither the court nor counsel pursued a definition of murder, and defense counsel made no objection to either the *voir dire* or Mr. Gamble's qualification. (R. p. 651, line 20 - p. 665, line 15).

The last seated juror questioned was juror #37, Crystal Busbee. Again, neither the court nor counsel pursued a definition of murder, and defense counsel made no objection to either the *voir dire* or Mr. Busby's qualification. (R. p. 694, line 15 - p. 704, line 4).

Appellant's remaining general objections are just that – general objections. Though he argues that “[t]his Court has allowed particularized death-qualifying *voir dire* in other

cases,” he fails to identify what “case specific question” was denied. (See FBOA, p. 59). In contrast, the record well demonstrates the trial judge did not adhere to a simple script but expanded the questioning as necessary. Further, he allowed defense counsel ample opportunity to question and to argue within the process. In particular, Respondent notes the times, as cited above, that defense counsel was allowed – by the trial judge, and without any objection from the state – to make further inquiry on attitudes toward police officers. The record reflects a fair, full, and individual process as required in capital *voir dire* proceedings.

In sum, appellant can show neither error in the *voir dire* of the seated jurors, nor objection to the sufficiency of the individual *voir dire* of each of the seated jurors. See *Bennett*, 369 S.C. at 227, 632 S.E.2d at 286 (“Our review of the entire *voir dire* in this case reveals that Appellant had an impartial jury. As in *Hill*, the trial court extensively questioned each juror regarding the ability to be fair and impartial, and there is no evidence suggesting that any juror failed in these capacities. Because the evidence in the record supports only the conclusion that Appellant received a fair and impartial jury, and because there is no evidence suggesting that the trial court’s *voir dire* limitation rendered Appellant’s trial ‘fundamentally unfair,’ we affirm the trial court’s decision.”). Moreover, the issue lacks specificity and is not tailored to any issue with the seated jurors. Even so, the issue is not preserved for review as appellant failed to exhaust all available strikes. *Bixby, supra*.

#### IV.

The trial judge properly exercised his discretion in finding Juror #203 not qualified based on her responses and demeanor, and in particular her noted hesitation in regard to her ability to impose a sentence of death, indicating a belief that would prevent or substantially impair the performance of her duty as a juror in this death penalty case.

#### Relevant Facts:

During the trial judge's initial questioning, Karen Padgett, juror #203,<sup>16</sup> asked the judge to repeat only one question – "If the facts warranted, where a person's found guilty of murder, could you sentence a person to the death penalty?" (R. p. 793, line 24 - p. 794, line 1). The record indicates she responded she could. (R. p. 794, lines 2-5). The juror responded to defense counsel's question that she had not "thought about the death penalty much before being called in for jury duty. (R. p. 795, lines 20-22). The prosecution noted that she had hesitated in responding to the judge's question on a possible verdict of death. (R. p. 797, lines 7-9). She likewise hesitated on the prosecution's question:

If it absolutely came down to it, could you sign your name on a verdict form sentencing somebody to die?

A      If it absolutely came down to ?

(R. p. 797, lines 10-12).

She eventually answered, "I'm not sure. Because I don't know anything about this case, I'm not sure." (R. p. 798, lines 1-2). When asked again, she responded, "Not positively sure, but...." and her answer simply trails off. (R. p. 798, lines 8-15). Defense counsel questioned the juror again, at which point she responded she could give "meaningful

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<sup>16</sup> In appellant's Statement of Issues on Appeal, and his argument headings in the index, appellant references "Juror #54," however, his argument refers to the jury by name and the correct number (#203) in the body of the argument.

consideration to a death sentence as well as a life sentence.” (R. p. 800, lines 14-20). On additional questioning by the trial judge, the juror expressed some hesitation as to her understanding of “the process.” (R. p. 801, lines 1-4). The trial judge clarified, “[w]e don’t want a juror that’s committed one way or the other,” and asked if she could consider and impose either sentence as the evidence should warrant in her opinion. She responded she could. (R. p. 802, line 24- p. 805, line 9). Upon additional questioning by the prosecution, the juror responded affirmatively that her feelings would interfere with her ability to be an effective juror. (R. p. 805, line 21 - p. 806, line 3). For the defense, she responded affirmatively that she could sign her name to the form for a death sentence. (R. p. 806, lines 12-18). The trial judge stated, “Well, I guess, I’m a little confused, Ms. Padgett,” and briefly reviewed her back and forth responses. (R. p. 806, line 19 - p. 807, line 1). He asked plainly, “are you opposed to the death penalty,” to which the juror responded, “I haven’t, you know, really thought about it.” (R. p. 807, lines 1-4). Upon additional questioning by the trial judge, the juror confirmed that her hesitation was based on her beliefs that would hinder her ability to consider a sentence death, and would interfere with her ability to “perform [the] duties of a juror. (R. p. 807, line 5 - p. 808, line 16).

The defense argued she was qualified, but acknowledged the idea of signing a death verdict “causes her some problems and she doesn’t like it,” but she stated she could do it. (R. p. 809, lines 4-8). The prosecution noted the great hesitation:

... When the State questioned her about signing her name, there was considerable hesitation and struggling going on. She didn’t answer for a long time. Then, of course, she said if “it came down to it” when asked about signing her name and the question was repeated again about signing her name to sentence someone to death. There was another long hesitation and struggling going on within this girl’s mind. She said, “I don’t know if I could

do that.”

When you questioned her, she said - - or after you questioned after they questioned, you came back and asked her about signing her name and there was a long hesitation.

And finally, when you said on signing a death penalty would it interfere with your ability to serve as a juror ... she said “yes, sir.”

When Mr. Maye asked her about her feelings about signing her name, would it interfere with her ability to sign her name, she said, “I do.” There was no equivocation on “I do” and “yes, sir,” on her feelings interfering with her ability to serve as a juror.

(R. p. 809, line 11 - p. 810, line 14).

While her responses were back and forth to some extent, the prosecution argued, her responses were that her feelings would interfere with her ability to serve as a juror and sign on a verdict recommending death. (R. p. 811, lines 16-21).

The trial judge found the juror not qualified:

... Considering the entire colloquy, even going back to my initial questioning of Ms. Padgett, there was a very, very long pause when I asked her if she could return a sentence of death.

Not only that, her - - my observations of her demeanor, being within two feet, I guess, of her and looking down into her face, it appears somewhat of concern to her, somewhat of a pained, emotional expression on her face. She stared off momentarily, she hesitated a great deal of the time and then of course responded somewhat quietly, “I think yes.”

I got to the point that I felt that it would be appropriate for the attorneys to ask questions, which they certainly did.

I think she did equivocate at points in time. Then each time she was asked about the death penalty, regardless of who asked her, there was an extended pause on her behalf that I interpreted as struggling somewhat with the issue of the punishment of death.

Then beyond equivocation, as I recall, the Solicitor asked her about signing her name and then asked if she thought her feelings about the death

penalty would interfere with her abilities to serve as a juror. And she said, “I do.”

I came back and attempted to clarify some of her responses because I think some of her responses were inconsistent between our various questioning. And she clearly stated that she felt her feelings or her beliefs were such that it would interfere with her ability to perform her duties and follow her oath as a juror.

A juror may be excluded for cause if her views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and the oath.

When reviewing the qualifications or disqualifications of the prospective juror, the responses of the challenged juror must be examined in light of the entire colloquy and I would say the observations of the trial judge as to the juror’s demeanor and not only their responses.

I think she did equivocate. I think her views and her responses as a whole would impair her ability to act as an impartial juror. Therefore, considering the voir dire as a whole, I find that Ms. Padgett is not qualified.

(R. p. 812, line 9 - p. 814, line 3).

Appellate argues to this Court that the trial judge erred because the record supports that the juror was qualified. (FBOA, p. 66).<sup>f</sup>

Discussion:

“[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *State v. Sapp*, 366 S.C. 283, 290-291, 621 S.E.2d 883, 886 (2005), citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844 (1985). “The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him.” *Sapp*, 366 S.C. at 291, 621 S.E.2d at 887.

“The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported

by the evidence.” *State v. Evins*, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007). *See also State v. Longworth*, 313 S.C. 360, 365, 438 S.E.2d 219, 222 (1993); *State v. Bell*, 302 S.C. 18, 23, 393 S.E.2d 364, 367 (1990). “A juror’s disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have concluded the juror would not have been able to faithfully discharge his responsibilities as a juror under the law.” *State v. Woods*, 382 S.C. 153, 159, 676 S.E.2d 128, 131-132 (2009), *citing State v. Green*, 301 S.C. 347, 392 S.E.2d 157, *cert. denied* 498 U.S. 881 (1990).

“Deference must be paid to the trial court who sees and hears the juror.” *Evins*, 373 S.C. at 418, 645 S.E.2d at 911, *citing State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990). “There will be situations where a trial court is left with the definite impression a prospective juror would be unable to faithfully and impartially apply the law, and this is why deference must be paid to the trial court.” *Woods*, 382 S.C. at 159, 676 S.E.2d at 132, *citing Wainwright v. Witt*, 469 U.S. 412 (1985).

Appellant’s argument has two distinct flaws. First, he relies upon parsed statements that do not fully convey the facts before the trial judge as to this particular juror’s ability to follow the law. Second, his argument does not demonstrate an abuse of discretion; rather, his argument is more properly an argument for rehabilitation below, not reversal on appeal. The gist of the argument is that the juror was not committed to either sentence, but her responses can simply be understood to mean a life-leaning position. (See FBOA, p. 69). Even so, that position is not factually sustainable in view of not only the responses as a whole, but also the deference given the trial judge who actually observed (and at times duly noted) the hesitation and demeanor of the juror.

The instant passage from *State v. Gilbert* is instructive:

This Court will not consider only isolated statements made during voir dire but will examine the entire colloquy with the venireman in order to review his qualifications. Having done this, it is clear that the challenged juror was properly qualified. When questioned by the trial judge subsequent to confusing inquiries made by appellants' trial counsel, the juror stated that she would give due consideration to any mitigating factor that the court instructed her to consider.

277 S.C. 53, 56-57, 283 S.E.2d 179, 108-81 (1981).

Like the issue in *Gilbert*, when the whole of the answers are reviewed in the instant matter, the record supports the trial judge's determination that the juror was not qualified.

In capital *voir dire* proceeding, the parties and the prospective jurors will naturally engage in dialogue. Most all prospective jurors are being requested to answer broad questions about concepts and procedures that they know little or nothing about. It should be expected that many of the answers will demonstrate that disadvantage. *See, for example, State v. Bell*, 302 S.C. at 25, 393 S.E.2d at 368 ("The other two jurors initially misunderstood the bifurcation of the trial, but later, after clarification, responded that they could impose either the death penalty or a life sentence. The trial judge, therefore, did not abuse his discretion in qualifying the challenged jurors."); *State v. Green*, 301 S.C. at 354-55, 392 S.E.2d at 161 ("With regard to Mr. Brown, we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision."). A juror should not be disqualified by simply pointing to missteps in the dialogue. *Id.* However, where the juror repeatedly demonstrates he or she is unable to follow the law, even though some equivocation is present, the *voir dire*, as a whole is reviewed and deference to the trial judge is even more necessary. *Woods, supra*. And, this particular juror gave context

to her hesitation and inconsistency, admitted that she had not really thought about the death penalty. But of one thing she seemed sure – her beliefs would interfere with her ability to discharge her duty as a juror.

The vacillating responses at issue in the instant matter are highly similar to the responses this Court reviewed in *State v. Mercer*, 381 S.C. 149, 156-58, 672 S.E.2d 556, 560- 61 (2009). This Court conceded “it is possible to cherry-pick certain responses and perhaps conclude that Juror Doe is qualified,” but “a review of the totality of the responses reveals a potential juror vacillating and struggling with his strong convictions against the death penalty. 381 S.C. at 156-57, 672 S.E.2d at 560. This Court upheld the trial court’s decision as “well within its broad discretion.” 381 S.C. at 158, 672 S.E.2d at 560. *See also State v. Wood*, 362 S.C. 135, 141, 607 S.E.2d 57, 60 (2004) (“trial court’s disqualification of a prospective juror will not be disturbed where there is a reasonable basis ... [to] conclude[] that the juror would not have been able to faithfully discharge his responsibilities as a juror”); *State v. George*, 323 S.C. 496, 503, 476 S.E.2d 903, 908 (1996) (affirming ruling finding juror disqualified where juror “declared that she did not think she could sign a form recommending the death penalty”); *State v. Longworth*, 313 S.C. 360, 366, 438 S.E.2d 219, 222 (1993) (finding disqualification where juror first stated “he ‘probably could’ consider” but also that did not “think so”).

Likewise, here, the trial judge was well within his discretion to find the juror not qualified, particularly even where her responses indicated she could perform her duty in regard to a death sentence were encumbered by distinct hesitation and strain. The trial judge’s ruling should be upheld.

## V.

The trial judge appropriately refused to dismiss the indictments pursuant to delay under the Interstate Agreement on Detainers Act (IAD) where there was an existing and proper order allowing continuance of the complex capital matter beyond the statutorily set one hundred and eighty (180) days.

### Relevant Facts:

The State sought a continuance pursuant to the provisions of the act. Defense counsel conceded that the continuance was made, and timely made. However, he argued that the length of the continuance violated the spirit of the provisions.

Defense counsel argued that the initial offer of custody was dated February 12, 2005. (R. p. 161, lines 5-7). He conceded not only that the State sought and obtained a continuance by order dated May 27, 2005, but also that the defense requested and obtained a continuance in March of 2008. (R. p. 161, lines 7-20), but, counsel argued, only after the lapse of almost three years (May 2005 to March 2008). (R. p. 161, line 20 - p. 162, line 9). Defense counsel argued, "I agree that the Court can certainly toll the 180 days, but I disagree that that can be an indefinite tolling for an unreasonable amount of time, which is clearly what we have here." (R. p. 164, lines 17-20).

The prosecution, while explaining that it had complied with the terms of the IAD, noted that it also pressed for a hearing after the October 31, 2005 appointment of Judge Maddox. (R. p. 165, lines 13-22). The order by Judge Keesley reflects the continuance was granted on May 27, 2005. (R. p. 2345). Judge Keesley noted not only was appellant not entitled to bail because he was under a life sentence from convictions in the State of Georgia, but also that the instant matter was tried as a capital case which required special procedures, including the appointment of a single judge vested with jurisdiction which, at that point, had

not been done. (See R. p. 2345-2346).

The trial judge ruled:

I'm going to deny the motion on the interstate agreements on  
detainers. ...

(R. p. 166, lines 13-17).

On appeal, appellant, admitting again that he, too, requested and received a  
continuance, apparently argues the indictments should none the less be dismissed because  
he personally did not want counsel to move for a continuance. (FBOA, pp. 71-73).

Discussion:

Pursuant to Article III (a) of the IAD, resolution of the charges against a prisoner can  
be triggered by the prisoner filing a request for a "final disposition" of the case and that  
request for disposition must be honored by way of holding a trial within one hundred and  
eighty (180) days. *New York v. Hill*, 528 U.S. 110, 112 (2000). However, that provision is  
subject to continuance for good cause. *Id.* See also S.C. Code § 17-11-10. "[A]ny requested  
continuance may be granted only at or prior to the expiration of the 180 day period prescribed  
in the statute." *State v. Patterson*, 273 S.C. 361, 363, 256 S.E.2d 417, 418 (1979). If,  
however, a defendant makes a continuance request, his request "remove[s] his case from the  
scope of the automatic dismissal provisions of the statute." *State v. Allen*, 269 S.C. 233, 237  
S.E.2d 64 (1977). See also *State v. Finley*, 277 S.C. 548, 290 S.E.2d 808 (1982) ("a  
defendant cannot cause the delay in the trial and then expect dismissal of the charges because  
the case was not tried within" the mandated statutory period).

The Court of Appeals found in *State v. Tucker*, 376 S.C. 412, 416, 656 S.E.2d 403,  
405 (Ct. App. 2008), that "[n]umerous courts have held the rights created by the IAD are

statutory in nature and do not rise to the level of constitutionally guaranteed rights.” Further, the Court of Appeals in *Tucker* recognized the Third Circuit’s characterization of the IAD as “a set of procedural rules,” and its reasoning that “[t]he statutory right to dismissal due to an administrative violation of these rules is therefore ‘not “fundamental” even though its impact on a defendant may be great.’” *Id.*, quoting *United States v. Palmer*, 574 F.2d 164, 167 (3<sup>rd</sup> Cir. 1978).

The question here is whether Judge Keesley’s May 27, 2005 order granting a continuance satisfies the continuance provision of the IAD. Respondent submits appellant’s issue, to the extent that it presents a question of whether appellant is bound by counsel’s continuance, is actually a different issue than the one presented below and is thus procedurally barred. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal). However, to the extent the issue contests the legitimacy of the tolling based on Judge Keesley’s order, neither case law nor the record supports his position.

Without question, “the decision to grant a continuance is generally within the trial court’s discretion.” *Patterson*, 273 S.C. at 363, 256 S.E.2d at 418. The basis for the continuance is plainly recorded in the order. Judge Keesley noted the special procedures and special appointment of a presiding judge that are required in capital proceedings. ( R. p. 2345-46). Respondent would note that the very fact that appellant recognized a need for an additional continuance based expert issues in preparation for his case in mitigation, (see R. p. 161, lines 18-20), is implicit acknowledgment of the additional time and additional requirements of a capital proceeding. Again, this is not a question of constitutional

magnitude or the basis for a speedy trial motion; rather, it is a matter of compliance with procedural rules under the IAD. The State complied with those rules and obtained a continuance. The State actively sought to have the case heard from the time of appointment of a trial judge. (R. p. 165, lines 13-16). Thereafter, appellant, through counsel, sought a continuance. This record reflects that none of the procedural rules were violated, and, further, no unnecessary delay is evident. Appellant cannot show he is entitled to relief.

## CONCLUSION

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

Respectfully submitted,

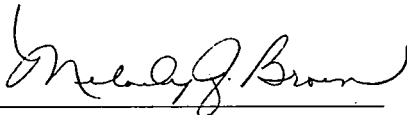
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ATTORNEYS FOR RESPONDENT

November 29, 2012.  
Columbia, South Carolina.

STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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THE STATE,

Respondent,

vs.

STEVEN BARNES,

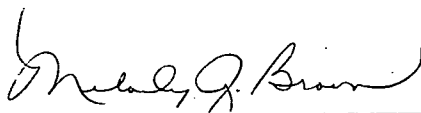
Appellant.

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled “Rè Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”

  
\_\_\_\_\_  
MELODY J. BROWN  
Senior Assistant Attorney General

November 29, 2012.

STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM EDGEFIELD COUNTY  
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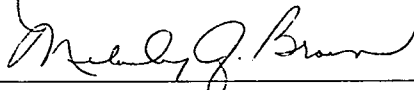
Appellant,

**PROOF OF SERVICE**

I, Melody J. Brown, certify that I have served the Final Brief of Respondent on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record as follows:

Robert M. Dudek, Chief Appellate Defender  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
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This 29th day of November, 2012.

  
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November 29, 2012

RECEIVED

NOV 29 2012

S.C. Supreme Court

Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
P. O. Box 11330  
Columbia, SC 29211

Re: *The State v. Steven Barnes*  
Appellate Case No. 2010-178247

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the *Final Brief of Respondent* in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley  
Legal Assistant to Melody J. Brown  
Senior Assistant Attorney General

/lbb  
Enclosures

cc: Robert M. Dudek, Esquire  
Donald V. Myers, Solicitor  
Sandi Wofford, Victims Assistance