THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Charleston County Capital PCR
The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case Number: 2009-133266
Capital PCR Case Number: 2012-CP-10-3216

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William O. Dickerson, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

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**Petition for Court to Review Assignment of PCR Judge**
**(Expedited Consideration Requested)**

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## I. Introduction

The Petitioner, William O. Dickerson, Jr., respectfully petitions this Court to review its order dated July 13, 2012 assigning the Honorable Edgar W. Dickson exclusive jurisdiction to preside over this capital post-conviction relief case (hereinafter "capital PCR case") and consider information that was previously unknown or unavailable to this Court. This petition invokes the Court's supervisory authority in capital PCR cases, including the assignment of judges. S.C. Code Ann. § 17-27-160; *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). This petition also invokes counsel's duty to provide information to this Court pursuant to *In re Stays of Execution in Capital Cases*.

Prior to filing this petition, Mr. Dickerson called this matter to Judge Dickson's attention and provided him an opportunity to rule. *See* Section II, *infra*. Counsel raised

this issue to Judge Dickson on April 17, 2013. The Attorney General's Office has not taken a position. To date, counsel have not received a ruling.

Counsel seek this Court's intervention because the handling of this case by the PCR court has left counsel unable to properly represent our death-sentenced client, and substantially deviates from normal capital litigation practices in this state. Among other issues, we have been committed to an expedited schedule of just 10 months from appointment to hearing date, despite the complexity of the case, have had our fact investigator removed, and have been denied all funding for experts. Additionally, we have had to litigate our client's being allowed to be present for hearings, and the court's *sua sponte* decision to unseal our funding motions. The court has also granted a wholesale privilege protection to at least 2100+ pages of documents, including 1100 pages of notes related to jury selection, when a central post-conviction claim is the Solicitor's improper removal of at least 2 African-American women from the venire panel. It is against this back drop, and our confusion as to why our case is being handled in such unusual fashion that we discovered what we perceive to be a conflict-of-interest. To wit, Judge Dickson's law clerk's aspirations to be employed as an assistant solicitor with the very office we are alleging misconduct (and whose office is actively participating in post-conviction litigation regarding their assertion of the privilege).

Mr. Dickerson respectfully requests this Court consider this petition and rule prior to June 17, 2013 when an evidentiary hearing is currently scheduled to begin.[1]

[1] On April 29, 2013, counsel submitted a motion to the PCR court asking that all pending motions be held in abeyance pending the outcome of this matter. The Attorney General, who asked that this issue be expedited before the PCR court, responded on April 30, 2013 and argued that an expedited hearing on the matter would address the concerns of the abeyance motion. The PCR court has not ruled on this issue.

## II. Factual and Procedural Background.

Beginning April 23, 2009, the Ninth Circuit Solicitor prosecuted Mr. Dickerson for murder, first-degree criminal sexual conduct, and kidnapping before the Honorable R. Markley Dennis and a jury. On April 30, 2012, a Charleston County jury convicted Mr. Dickerson of all charges. The State sought the death penalty. The penalty phase began on May 4, 2009. On May 7, 2009, the jurors found, as aggravating circumstances, the murder was committed while in the commission of a criminal sexual conduct, kidnapping, and physical torture. S.C. Code §16-30-20(C)(a)(1)(a), (b) and (i). The jurors recommended the death penalty for murder. Judge Dennis sentenced Mr. Dickerson to death for murder, thirty (30) years for first-degree criminal sexual conduct, and thirty (30) years for kidnapping.

On October 3, 2011, this Court affirmed Mr. Dickerson's convictions and sentences. *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2011). The Supreme Court of the United States denied *certiorari* on April 23, 2012. *Dickerson v. South Carolina*, 132 S.Ct. 1972 (2012).

On May 16, 2012, Mr. Dickerson filed a *pro se* PCR application pursuant to S.C. Code §17-27-160. On July 13, 2012, this Court granted a stay of execution and vested Judge Dickson with exclusive jurisdiction to preside over Mr. Dickerson's capital PCR. Judge Dickson appointed the undersigned counsel on August 17, 2013. Counsel amended the PCR application on October 16, 2012. The Court scheduled the evidentiary hearing for June 17, 2013.[2]

[2] Mr. Dickerson officially moved for a continuance on April 17, 2013.

Mr. Dickerson learned from the Internet that Judge Dickson's law clerk, Mr. Drew Evans, might have a conflict-of-interest. Mr. Evans' publically accessible Linked In profile represents, "I am specifically interested in civil litigation, real property, and criminal law and ***criminal prosecution in particular***, with clerking experiences in the Ninth Judicial Circuit Solicitor's Office in Charleston and the South Carolina Commission on Prosecution Coordination in Columbia" (emphasis added). By letter dated April 17, 2013, Mr. Dickerson called this matter to Judge Dickson's attention. Mr. Dickerson also expressed his concern that Mr. Evans "will be seeking future employment with Solicitor Wilson." *See* Appendix (hereinafter "App.") 1-5. By letter dated April 25, 2013, Judge Dickson requested a written motion. App. 55-57. On April 26, 2013, Mr. Dickerson served a written motion the following day.

In response to Mr. Dickerson's written motion, the Attorney General's Office contacted Solicitor Wilson. Solicitor Wilson confirmed that Mr. Evans, in fact, had contacted her about employment as an Assistant Solicitor. The Attorney General additionally contacted the Human Resources Division within her own office and learned that Mr. Evans had applied for openings in the Opinions Section and the Prosecution/State Grand Jury Section. The Attorney General contacted Judge Dickson and Mr. Dickerson's counsel in order to disclose this information. With Judge Dickson attending a funeral that day, the Attorney General contacted Mr. Dickerson's counsel. App. 58-60.

On May 1, 2013, the Attorney General responded to Mr. Dickerson's motion for Judge Dickson to withdraw and took "no position as determination of disqualification is a

decision particularly for the [PCR] judge." The Attorney General, nevertheless, pointed out:

> Under the ethical rules, law clerks are allowed not only to generally seek employment . . . but even to "*negotiate* for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially" as long as the clerk has advised the judge of same. Rule 407, SCACR, Rule 1.12(B) (emphasis added). See also Rule 506, SCACR, Cannon 5(C)(1) ("Before or during a clerkship or tenure as a staff attorney, a law clerk or staff attorney may seek employment and obtain employment to commence after the completion of that job; if any law firm, lawyer, or entity with whom a law clerk or staff attorney has been employed is seeking or has obtained future employment in any matter pending before the appointing judge, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing judge or justice, the Court, or his or her attorney supervisor, and they shall determine the extent of the law clerk's or staff attorney's performance of duties in connection with such matter.").

Presumably Cannon (C)(1) was adopted so the supervising judge could take appropriate action, including screening the law clerk from the matter and appropriate disclosure to the parties, to ensure there is not an appearance the judge lacks impartiality. *See* Rule 501, SCACR, Cannon 3(E)(1); *see also* Section III Introduction and (A), *infra*. To date, the PCR court has not disclosed whether he was aware that his law clerk was seeking employment with Solicitor Wilson or the Attorney General's Office. As discussed throughout Section III, *infra*, in addition to not disclosing this information to counsel, the PCR court has not taken any action to limit his law clerk's involvement in Mr. Dickerson's capital PCR case.

In order to further investigate the matter, Mr. Dickerson served subpoenas on the Attorney General, the Ninth Circuit Solicitor, and the Commission on April 9, 2013. On

May 1, 2013, the Attorney General moved to quash Mr. Dickerson's subpoena. On May 6, 2013, Mr. Dickerson responded to the Attorney General's motion to quash. On May 9, 2013, the Ninth Circuit Solicitor and the Commission responded to Mr. Dickerson's subpoenas. On May 13, 2013, Mr. Dickerson forwarded copies of these responses to Judge Dickson and the Attorney General. Also on May 13, 2013, Mr. Dickerson requested the Ninth Circuit Solicitor provide additional information.

The Ninth Circuit Solicitor's response not only confirms Mr. Evans' employment application but also reveals that Mr. Evans' efforts to seek employment have been ongoing since he completed his summer clerkship in the summer of 2011. *See* App. 135-69. Based on his Linked In profile, Mr. Evans competed his summer law clerk experience in August 2011. On September 13, 2013, Mr. Evans wrote a number of Ninth Circuit Solicitor's Office employees "that I have thrown my proverbial hat into the ring for an Assistant Solicitor's position in Charleston." App. 135-36. According to various emails, Mr. Evans wrote Solicitor Wilson in either November or December 2011 "letting her know [he] had a clerkship [with Judge Dickson] for the next year but was still very interested in being an Asst. Solicitor in Charleston." App. 138, 143.[3] Deputy Solicitor Jennifer Shealy suggested to Mr. Evans that he contact Solicitor Wilson again in May 2012. App. 142. On May 29, 2012, Mr. Evans wrote Solicitor Wilson, "telling her that once my Judicial Clerkship ends I am still very much interested in working in the 9th Circuit." App. 148.

Mr. Evans began his judicial clerkship with Judge Dickson in July 2012. This Court assigned Mr. Dickerson's capital PCR to Judge Dickson on July 13, 2012. App. 6-

[3] By letter dated May 13, 2013, Mr. Dickerson asked Solicitor Wilson to provide copies of Mr. Evan's employment application and letters to her.

7. In separate emails to Ms. Shealy and Assistant Solicitor Stephanie Linder dated October 30, 2013, Mr. Evans wrote:

> I'm still clerking form Judge Dickson in Orangeburg and it's going really well. We've had a couple of murder trial so far—murder seems to be somewhat of a pastime around here...
>
> We've also been assigned William Dickerson's Capital PCR case so we'll be down in Charleston next summer to hear that. I've been slowly reading through 10 volumes of transcript and it sounds like it was a fascinating case. I'll let you know when it gets closer and maybe I can stop by the office and speak to everyone.

Ms. Shealy responded, "I will forward your email to Scarlett" Wilson. App. 150-52.

On February 19, 2013, only eleven days after a significant motions hearing in Mr. Dickerson's case, Mr. Evans wrote Solicitor Wilson:

> I hope you are doing well. I'm writing to say hello and inquire into any Assistant Solicitor positions. I know you do not know if and when any positions will open up but I respectfully ask to be considered when they do.
>
> As you may remember, I clerked with you back in the Summer of 2011 and enjoyed my time there immensely. I am still very much interested in a career in criminal law and criminal prosecution in particular and know I'd love to begin my career in Charleston.
>
> As you probably know, Judge Dickson has been assigned to preside over William Dickerson's PCR application and we plan on being in Charleston in June for the hearing. I would appreciate the opportunity to stop by and speak to you if you have any time that week.

Mr. Evans "attached updated copies of my resume and list of references." App. 167-68. These documents have not been provided to Mr. Dickerson. On February 27, 2013, Mr. Evans wrote Ms. Shealy, "I got in touch with Scarlett [Wilson] and she said she might be looking for someone to start in Berkley County in the next few months and I said I'd

certainly be interested." He also reminded, "Judge Dickson and I will be in Charleston in June doing William Dickerson's PCR hearing so I'd like to stop by the office and say hey to everyone if y'all aren't too busy."[4] Ms. Shealy responded, "Absolutely come by. Also, I will remind Scarlett [Wilson] about your interest. App. 155-56.

Solicitor Wilson eventually scheduled an interview with Mr. Evans for Tuesday, April 30, 2013 at 1:00 p.m. App. 162-67.

## III. Discussion

> A judicial clerkship provides the fledgling lawyer insight into the law, the judicial process, and the legal practice. The association with law clerks is also valuable to the judge; in addition to relieving him of many clerical and administrative chores, law clerks may serve as sounding boards for ideas, often affording a different perspective, may perform research, and may aid in drafting memoranda, orders and opinions.

*Fredonia Broad. Corp., Inc. v. RCA Corp.*, 569 F.2d 251, 255-56 (5th Cir. 1978). "Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be." *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983). "The opportunity for a law clerk to influence the judge for whom he works is particularly prevalent in" cases where the law clerk's research into "relatively recent development[s] in the law" may influence the judge's decision. *Dobson v. Camden*, 502 F. Supp. 679, 680 (S.D. Tex. 1980).

Mr. Evans' interest in "criminal prosecution in particular" raises general concerns regarding impartiality and specific concerns based on the unique facts and circumstances

[4] Earlier in the day on February 27, 2013, Mr. Evans wrote the parties in the capital PCR case, "As to Mr. Dickerson's scheduling concerns, the Court has not yet ruled on that matter, unless and until further notice, Mr. Dickerson's PCR is still scheduled for the week of June 17, 2013." App. 35.

of this case. Another judge should be assigned to preside over Mr. Dickerson's capital PCR. *See* Rule 501, SCACR, Cannon 3(E) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."). *See also Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980) (recognizing that a law clerk may not "do that which is prohibited to the judge"). Mr. Dickerson will address the following: (a) general concerns about the PCR Court's impartiality; (b) specific concerns regarding the Ninth Circuit Solicitor's Office's involvement in Mr. Dickerson's capital PCR case; and (c) additional concerns based on the PCR Court's unusual rulings in Mr. Dickerson's case.

**A. General Concerns Regarding the PCR Court's Impartiality.**

Mr. Dickerson respectfully requests this Court review four general concerns regarding impartiality.

First, Mr. Dickerson is concerned that Mr. Evans' interest "in criminal prosecution in particular," his prior employment history, and his current employment applications with Solicitor Wilson and the Attorney General's Office were not disclosed to him. Mr. Dickerson learned about this information from the Internet and the Attorney General's subsequent disclosure. *Hall,* 695 F.2d at 180 ("magistrate and his law clerk failed fully to disclose the basis on which a reasonable person might 'harbor doubts about the magistrate's impartiality.'").

Second, Mr. Evans holds himself out to the public both as a law clerk for Judge Dickson and as having interest "in criminal prosecution in particular." The judge, himself, could not express favoritism towards the prosecution. Mr. Dickerson requests this Court to consider whether these representations promote "public confidence in the . .

. impartiality of the Judiciary" or shows favoritism or bias in favor of the prosecution. *See* Rule 506, SCACR, Cannons 1-3. *See also Hall*, 695 F.2d at 179 (Federal "statute requires the judge to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.").

Third, Mr. Dickerson requests this Court to determine whether Mr. Evans should have disqualified himself from this case. *See* Rule 506, SCACR, Cannon 2(E)(2). Mr. Evans represents on Linked In that he was employed as a law clerk for the Ninth Circuit Solicitor's Office for four months from May 2011 to August 2011. This Court heard oral arguments in Mr. Dickerson's case on May 24, 2011, during Mr. Evans' employment as a law clerk by Ninth Circuit Solicitor Scarlett Wilson. Although the Attorney General's Office assumed primary responsibility for Mr. Dickerson's case during the direct appeal and PCR, Solicitor Wilson's involvement is ongoing. She testified during her deposition on March 25, 2013 that she has been available as needed to the Attorney General's Office and that she attended the oral argument. App. 78-80. Solicitor Wilson is listed as counsel on the written opinion. At Solicitor Wilson's direction, her staff has participated in the PCR litigation **by actively asserting a work product privilege claim and litigating that matter before the PCR court**. App. 81-90, 100-07. The Attorney General's office has not taken a position on the privilege issue, so this aspect of the case is being wholly litigated by the Ninth Circuit Solicitor's Office.

Fourth, at the time this Court assigned Judge Dickson to preside over Mr. Dickerson's capital PCR, Mr. Evans was actively seeking employment as an Assistant Solicitor in the Ninth Circuit. He subsequently applied for two positions in the Attorney General's Office. None of these employment applications were disclosed until after Mr.

Dickerson moved for Judge Dickson to withdraw. Seeking employment creates a financial interest. *See* Rule 506, SCACR, Cannon 2(E)(3). *See also Hall, supra,* (judge disqualified based on law clerk's prior and subsequent employment); *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84 (S.D. Ala. 1980) (held that even though there was not even any suggestion of any actual impropriety by law clerk, the judge, or the parties, law clerk's continuing participation with judge in case in which his future employers were counsel presented a situation in which disqualification of judge was mandated). And additionally, counsel will be asking the PCR court to find that the Ninth Circuit Solicitor's Office—perhaps the future employer for Drew Evans'—engaged in misconduct by removing qualified jurors from the venire panel.

As will be discussed in more detail in Section III(C), *infra.* Mr. Dickerson, additionally, is concerned about the scheduling of the evidentiary hearing in relation to Mr. Evans' future employment. The evidentiary hearing is scheduled for the week of June 17, 2013. Testimony of witnesses not available that week is scheduled for June 24, 2013. Mr. Dickerson has repeatedly expressed concerns about this hearing date not providing him sufficient time to investigate and prepare. So far, the PCR court as considered this hearing date inflexible and "set in stone, so to speak." App. 17.

**B. Specific Concerns Regarding the Ninth Circuit Solicitor's Office Involvement in Mr. Dickerson's capital PCR Case.**

Mr. Dickerson requests this Court to review Mr. Evans' interest in "criminal prosecution in particular," his employment history, and employment applications based on the Ninth Circuit Solicitor's Office's involvement in Mr. Dickerson's capital PCR

case. These include (1) PCR allegations that the Solicitor's Office violated *Batson*[5] during Mr. Dickerson's capital jury trial, (2) the Solicitor's office assertion of work product privilege to over 2100 pages of its file and associated litigation, and (3) the PCR court's delegation of authority to Mr. Evans.

**1. *Batson* claim.**

Mr. Dickerson amended his PCR application on October 16, 2012. The amended allegations include:

> 11(a)(2) Defense Counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis when he raised his *Batson* challenge.
>
> 11(c)(3) Appellate Counsel rendered ineffective assistance of counsel by failing to present, for appellate review, defense counsel's *Batson* challenge.

In addition to pursuing these allegations based on the trial record, Mr. Dickerson is investigating whether the Ninth Circuit has engaged in a pattern and practice of violating *Batson*. *Miller-El v. Dretke*, 545 U.S. 231 (2005).[6] This Court has never had occasion to interpret *Miller-El*. In addition to Mr. Evans' potentially influencing the judge's decision, *see Dobson, supra*, he very likely has personal knowledge of some of the factual information that will be presented during the evidentiary hearing. In fact, the Ninth Circuit Solicitor's Office is asserting privilege over 2100 pages of documents,

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[5] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[6] During her deposition, Solicitor Wilson acknowledged that a trial judge in another case grated a *Batson* motion in case she prosecuted. App. 32-35. Complying with the prosecutor's obligation to provide information favorable to the accused, the Attorney General subsequently provided Mr. Dickerson with a transcript of this *Batson* hearing where the trial court, in fact, granted a *Batson* motion based on then Deputy Solicitor Wilson's pretextual explanations for her juror strikes.

including information relating to jury selection which is central to Mr. Dickerson's *Batson* claim.

According to Mr. Evans' Linked In profile, during his employment as a law clerk by Solicitor Wilson, he "observed a number of criminal trials for criminal sexual conduct, assault, drug offenses, homicide by child abuse, and murder." App. 4. Presumably, these trial observations included observing jury selection and discussing jury selection strategies with the prosecutors. As a result of these interactions, Mr. Evans might have personal knowledge of the pattern and practice for jury selection by the Ninth Circuit Solicitor's Office.

The Commission on Prosecution Coordination (hereinafter "Commission") employed Mr. Evans as a law clerk for eight months from September 2011 to April 2012. App. 4. The Commission's website lists Solicitor Wilson as a Commissioner. App. 61-62;[7] *see also* App. 116 (Commission letterhead listing Solicitor Wilson as Commissioner in April 2010). According to his Linked In profile, during his employment by the Commission, Mr. Evans "assisted with legal research for, preparation, and drafting of Prosecution CLE materials . . . and worked under a Federal Grant for Capital Litigation Training."

Training materials prepared by the Commission became an issue during the depositions of Solicitor Wilson, Chief Deputy Bruce DuRant, and former Assistant Solicitor Rutledge DuRant. The Ninth Circuit Solicitor's Office receives all of its capital litigation training through programs offered by the Commission and the Attorney General's Office. App. 64-68, 93-96. All three deponents testified about the South

[7] Found at http://www.prosecution.state.sc.us/Content/Solicitors.aspx (last viewed April 25, 2013).

Carolina Prosecutor's Deskbook. The Prosecutor's Deskbook is available electronically on the Solicitor's Office shared drive. All the lawyers in the Solicitor's Office have access to it. App. 68-70, 96-97, 109-110. Mr. Dickerson is informed and believes that the Commission is responsible for maintaining and distributing the Deskbook. *See* App. 111-116.[8] Mr. Dickerson is in the process of obtaining records from the Commission. The Commission acknowledged Mr. Dickerson's Freedom of Information Act request, agreed to provide the requested documents, but asked for more time to comply. On May 15, 2013, Ms. Amie Clifford of the Prosecution Coordination Commission provided a stack of documents to counsel. Counsel is currently in the process of reviewing those materials.

Mr. Dickerson is also informed and believes that the Prosecutor's Deskbook contains misleading interpretations of this Court's precedent to instruct prosecutors how to strike minority jurors without getting caught by the trial judge or defense counsel. Consider the following:

> "The explanation need not be clear, reasonably specific, or legitimate." App. 128.
>
> "The reason need not be persuasive or even plausible and may even be silly or superstitious." App. 128.
>
> "The State does not have to indicate whether the same standards used to strike black jurors were applied to white jurors who were seated, since the defense has the burden to prove that the State's allegedly neutral reasons were pretextual because they were not applied in a neutral manner." App. 131.

[8] These documents, App. 111-34, are from what appears to be the 2010 South Carolina Prosecutor's Deskbook. Mr. Dickerson will seek all available versions of the Prosecutor's Deskbook from the Commission.

Because of Mr. Evans' employment as a law clerk with Commission, he might be personally familiar with this pattern and practice evidence. He worked on prosecution capital litigation training. He might have worked on revisions to the Prosecutor's Deskbook. He probably interacted with the people responsible for the revisions.

In addition to potential familiarity with pattern and practice evidence, Mr. Evans may have formed opinions about the credibility of witnesses from the Solicitor's Office and the Commission who will likely be called to testify about these issues during Mr. Dickerson's evidentiary hearing.

**2. Ninth Circuit Solicitor's Assertion of Work Product Privilege.**

As pointed out in Subsection II(A), *supra*, the Ninth Solicitor's Office has actively participated in the PCR litigation, asserting a work product privilege.

Additional Factual Background

On November 19, 2012, Mr. Dickerson noticed the records custodian deposition of the Ninth Circuit Solicitor's Office. The notice required the Solicitor's Office "to produce a complete copy of the Ninth Circuit Solicitor's Office file or files" and included "any and all materials that relate to jury selection of the trial of William Dickerson." App. 22-25.

By email dated November 26, 2012, the Attorney General, not the Ninth Circuit Solicitor, informed the Court, "[W]e may have an assertion of privilege over ***several records*** that will not be initially released in discovery." App. 26 (emphasis added). The Attorney General requested a hearing on the State's motion "for dismissal of a claim" in the First Amended Application, Dickerson's motion "for partial relief on the sentence of kidnapping," and reviewing "the assertion of privilege and the documents over which

privilege is asserted." The Attorney General anticipated "the argument and review **would not take more than 30 minutes**" (emphasis added). Based on the prospect of reviewing "several records," the Court's law clerk thought "that shouldn't be a problem." App. 27. Mr. Dickerson, however, requested "the State bring the motion in written form, so Mr. Dickerson can have a fair opportunity to respond." App. 28. Neither the Attorney General nor the Solicitor's Office filed a formal motion.

The Ninth Circuit Solicitor designated Chief Deputy Solicitor Bruce DuRant, who was also one of the prosecutors at trial, to testify and produce a copy of the Solicitor's Office file. The deposition began with Mr. Dickerson's counsel confirming his understanding that the Solicitor's Office would be "asserting a privilege over some documents." App. 81. Mr. DuRant did not offer a privilege log. Having read Dickerson's Amended PCR application, which raises the *Batson* claim, Mr. DuRant assumed Mr. Dickerson's counsel would "be looking for our jury stuff and our witness interviews." App. 90. According to Mr. DuRant, in order to determine whether all *Brady* material had been provided, Judge Dickson would have to review the materials. App. 86. *But see Riddle v. Ozmint,* 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) ("The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching."). Regarding potential jurors, the Solicitor's Office "always runs rap sheets" on potential jurors, but those materials are not in the file because the "ordinary procedure is to shred rap sheets . . . after jury selection." Also, it is Solicitor Wilson's ordinary policy not to share those criminal histories with the defense. App. 87-89.

Mr. DuRant appeared in chambers in St. Matthews, South Carolina on December 17, 2012, at the time of the parties scheduled status conference, and "provided to the

Court a DVD containing documents . . . we claimed to be protected by the work product privilege." App. 29. Mr. DuRant did not provide the Court with a privilege log. He also did not provide a written motion or memorandum outlining Solicitor Wilson's position. Mr. Dickerson served his motion.

This issue was addressed on the record on December 19, 2012 at a hearing on Orangeburg, South Carolina. Mr. Dickerson requested that the Solicitor's Office be required to furnish a privilege log. The Court, accordingly, ordered the Solicitor's Office to prepare a privilege log, and requested the Attorney General prepare a proposed order. The written order was dated January 15, 2013.

By letter dated January 22, 2013, the State provided the Court with a three-page privilege log. App. 29. Mr. Dickerson served an additional motion to compel production of discovery at the February 8, 2013 hearing. He argued, among other thing, that the privilege log was not adequate and the Solicitor's Office waived any objection by not providing an adequate privilege log. The Attorney General did not take a position. The Ninth Circuit Solicitor did not send a representative to the hearing or file any pleading.

By email dated February 27, 2013, the Court's law clerk advised both sides and the Ninth Circuit Solicitor's Office, and without any parties' request:

> The Court has not yet ruled on the issues regarding Mr. Dickerson's Motion to Compel and the Ninth Circuit Solicitor's Office's assertion of privilege and privilege log. The Court would like to give the opportunity for the Solicitor's Office to appear and argue its assertions of privilege and respond to Mr. Dickerson's before it rules on the matter.

The Court's law clerk requested the parties and Solicitor to be available for a hearing on Thursday, March 14, 2013 at 3:00 p.m. The Solicitor's Office, however, still had not filed a written motion or requested a hearing.

At 9:08 a.m. on March 14, 2013, the PCR court's law clerk, without providing any explanation, cancelled the hearing. Later that day, at 1:05 p.m., court's law clerk wrote to give the Solicitor's Office "the option to either respond to Applicant's memorandum in opposition or provide an amended privilege." At 4:31 p.m. the same day, Mr. DuRant provided an amended privilege log. App. 42-47.

On April 4, 2013, the court's law clerk sent an email to advise the parties of the ruling on this issue:

> This letter is in reference to a hearing before Judge Dickson on February 8, 2013 in Dorchester County.
>
> After due deliberation, review of the memoranda, case law, exhibits and arguments of counsel, Judge Dickson is denying the Applicant's Motion to Compel Production of Discovery of the Solicitor's Files.
>
> Subsequent to the hearing in this matter, on March 14, 2012, the Court, pursuant to Rule 26(b)(5)(A) of the SC Rules of Civil Procedure, ordered the Ninth Circuit Solicitors Office to supplement its original Privilege Log with an Amended Privilege Log. The Amended Privilege Log was submitted to the Court the following day and the Court hereby finds that the Solicitor's Amended Privilege Log sufficiently conforms to the specificity requirements of the Rule.
>
> The Court also finds that the documents sought are work product in that they were clearly prepared "in anticipation of litigation." See *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010) (*citing Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir.1992)). The documents were all very clearly prepared to assist the Solicitor's Office in preparation for the Applicant's capital trial.

Additionally, the Court has made an in-camera inspection of the documents over which the Solicitor's Office is asserting work product privilege and is satisfied that nothing therein is discoverable. The Court hereby finds that all documents contained within the Solicitor's File that have not heretofore been disclosed are privileged work product and undiscoverable. See S.C. R. Civ. P. 26(b)(1). See also Note to Rule 26(b)(5) ( The rule applies to material otherwise discoverable, and does not require disclosure of information that is privileged. A motion challenging the claim of privilege or work product normally is decided by the court after an in camera inspection of the materials).

The Court now turns to whether Applicant has shown a "substantial need" for the privileged documents to be disclosed. See S.C. R. Civ. P. 26(b)(3); *See also, Tobaccoville*, 387 S.C. at 294. The Court finds this substantial need threshold has not been met by the Applicant. While not binding authority upon the Court, due to the relatively sparse litigation in attorney work product privilege in South Carolina jurisprudence, the Court finds some of the Fourth Circuit holdings on the matter persuasive. Additionally, the Federal Rule 26(b)(3) is nearly identical to SC Rule 26(b)(3). See S.C. R. Civ. P. 26(b)(3), note. The Fourth Circuit jurisprudence divides attorney work product into "fact work product" and "opinion work product." See *In re Doe*, 662 F.2d 1073 (4th Cir. 1981). "Fact work product" are those "documents prepared by the attorney which do not contain the mental impressions, conclusions or opinions of the attorney. [Conversely,] '[o]pinion work product' is work product that contains those fruits of the attorney's mental processes." *Id* at *n.*2.

Inasmuch as any material contained in the Solicitor's File can be deemed "fact work product," the Applicant has not shown a substantial need for the information therein. The factual findings contained in the Solicitor's work produce are available to the Applicant in the trial record, from Applicant's trial counsels' files, and discovery already provided by the State at trial, on direct appeal, and to date in his PCR action. Applicant's counsel contend that several of the witnesses whose interview notes are contained in the Solicitor's File were not disclosed to Applicant's trial

counsel. While some of the information contained in the Solicitor's notes on these interviews may indeed be factual work product, the Court is not convinced, without more than a mere assertion of non-disclosure by Applicant's counsel, that the factual information contained therein is otherwise unavailable to the Applicant. The Court is therefore declining to compel discovery of these witness interview notes.

The Court finds that the vast majority of the privileged information sought in the Solicitor's File is of the "opinion work product" nature. This type of work product has been historically more protected by courts. "[U]nlike ordinary work product, opinion work product cannot be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.... In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." *Id* at 1080 (quoting *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)). These include all of the Solicitor's notes on potential jurors. While Applicant has raised a Batson challenge in his PCR Application, the Court feels the public policy behind the doctrine overrides any compelled discovery and does not feel this case constitutes "rare and extraordinary circumstances" requiring disclosure of the Solicitor's File. Additionally, a Batson challenge was raised at trial, the Solicitor provided race-neutral reasons for striking each of the challenged jurors, and the Trial Court was satisfied with those responses. The issue was presumably preserved for appeal and not pursued thereafter. While any appellate review of Applicant's Batson challenge would likely have included an analysis of the race-neutral reasons given by the Solicitor for striking a juror, the Court is unaware of any case wherein a Batson challenge was raised, race neutral reasons for striking were given, and trial counsel was thereafter compelled to disclose their notes on those jurors.

Ms. Brown, Judge Dickson asks that you prepare the Order, attaching both the Privilege Log and Amended Privilege Log. When it has been prepared, please send a copy to opposing counsel and mail or hand deliver the Order to this office with a self-addressed, stamped envelope for its prompt return.

Discussion

This ruling by the PCR court completely ignores all of the arguments raised by Mr. Dickerson's counsel on this issue, and, in fact, substitutes its **own** argument for one never even advanced by either the Solicitors Office or the Attorney General's office.[9] To wit, "[T]he Court feels the public policy behind the doctrine overrides any compelled discovery." See *Roche v. Young Bros., Inc. of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998) (A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record).[10]

In this order, the court has ruled that thousands of pages of relevant and material evidence including both (1) juror notes and information, and (2) undisclosed witnesses--are due an unprecedented amount of protection from a capital client.[11] The scope of the PCR court's protection is astounding, especially given the *Batson* claim lodged against

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[9] Counsel have raised arguments in favor of disclosure on 12/10/12 (Privilege Memorandum), 2/7/13 (Motion to Compel), and 3/22/13 (letter stating our continued objection to the State's assertion of privilege and further stating amended privilege log is inadequate).

[10] To be clear, counsel have only received this proposed order by email and then reviewed the AG's proposed order. We have not received a signed copy. When we do, we intend to immediately file to reconsider.

[11] Counsel, to date, still have no idea how many pages of documents are really at issue. The privilege log only identifies 2179 pages of material, but that does not appear to include any of the documents that reside on the Solicitor's Network Drive which additionally includes documents related to "Bruce's Files, Emails, Evidence Chain Charts, Investigator Work File, Jury, Motions Responses, Penalty Phase, Pretrial Interview Notes, Pretrial Interview Notes (continued), Rutledge's File, Scarlett's Files, Telephone Info, Testimony, Dickerson Convictions, Marked Physical Evidence (Dickerson), Medical Examiner Issues, Prior Adult & Juv Criminal History, Qualified Panel, Tora Brawley Information, Trial Chart- Sentence Phase Witness Call List, Trial Chart—Sentence Phase Witnesses, Witness Order (Guilt), and WitnessRapSheets—Apr162009" over which the Solicitors office is additionally claiming work product privilege.

the Solicitor's Office and the obvious fact that the Solicitor's Office tracked information material to Mr. Dickerson's claim that it has determined to withhold simply because they believe they can. Neither the Solicitor's Office, nor Attorney General's office, advanced a single reason for withholding this material, yet the court substituted its own reasoning and judgment to deny a capital petitioner access to information that the United States Supreme Court (and other federal courts) have found probative and material of prosecutors' subjective intent when they illegally exclude otherwise qualified African-Americans from capital venires. Indeed, the PCR court granted a "wholesale" protection to the Solicitor's Office, including both fact and opinion work product finding that Mr. Dickerson has not shown a substantial need for **any** of it. This is astounding, especially since it is clear from the face of the Solicitor's privilege log that the state tracked exactly the information it purposefully withheld from trial defense counsel, and which constituted the basis of one of its peremptory strikes against an African-American woman and which Mr. Dickerson is currently challenging in his post-conviction relief proceeding. Mr. Dickerson is unable to obtain this information by any other means. The PCR court has declared even potential venire persons' criminal histories to be protected "opinion work product." The PCR court's ruling on this issue—in the absence of the Solicitor's office even advancing a single argument on the issue, has raised questions about the court's partiality.[12]

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[12] Compare this Court's ruling—without hearing any argument from the Solicitor's Office-- with *Sandberg v. Virginia Bankshares, Inc.* , 979 F.2d 332,335 (4th Cir. 1992), "The party asserting work product protection bears the burden of proof of establishing entitlement to it." In meeting this burden, a party may not rely on conclusory allegations or mere statements in briefs. Nor may the Court be expected to decipher the purpose behind the preparation of a document by merely reviewing documents submitted for in camera inspection. *Pete Rinaldi's Fast Foods v. Great*

In its order, the PCR court misapplied the legal standard that applies to this issue and has shown a disturbing amount of deference to the Solicitor's Office, going so far as to impute arguments to that office that the office did not, in fact, make on its own behalf. Notably, the Attorney General's Office has abstained from taking any position on the issue—as it expressly informed the judge at the February 8, 2013 hearing (and is indicated in the Proposed Order, n. 2). Yet, without hearing argument from the Solicitor's Office, or requiring even a memorandum on the issue—this Court has granted Solicitor Wilson's request (that she made through Deputy Solicitor Bruce Durant, but not in person) that these documents, *in toto*, not be produced (Deputy Solicitor Bruce Durant testified during his deposition that he would turn over the materials if it were up to him). Also disturbing is that the PCR court, in its order, appears to have pre-judged Mr. Dickerson's *Batson* claim without hearing any testimony or considering any evidence proffered at this point to support the claim.

In its Order, the court avowed that Mr. Dickerson has not shown a "substantial need" for the work product documents. Mr. Dickerson is currently under sentence of death, and has a substantial liberty interest in pursuing collateral challenges to his conviction and sentence as authorized by the South Carolina legislature and Congress. He has "substantial need" of relevant and material evidence in the Solicitor's possession to pursue his claims. Federal courts have consistently found "substantial need" present in less weighty circumstances. See *Braun v. Lorillard Inc.*, 84 F.3d 230 (7th Cir. 1996), *cert denied*, 519 U.S. 992 (1996) (Defendant made showing necessary to justify production of negative test results for presence of asbestos fibers in lung tissue of

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*American Ins.*, 123 F.R.D. 198, 203 (M.D.N.C. 1988). Failure to satisfy this burden will lead to denial of the motion. *Sandberg*, 979 F.2d at 356.

decedent where manufacturer could not conduct its own testing on the tissues that had been destroyed); *Casteneda v. Burger King Corp.*, 259 F.R.D. 194 (N.D.Cal. 2009) (Franchisor required to produce measurements of ramp slopes and counter heights where plaintiffs attempted in good faith to obtain the information on their own, but it was not available from any other source); *Huggins v. Federal Exp. Corp.*, 250 F.R.D. 404 (E.D. Mo. 2008) (photographs taken by defendant not protected by work product doctrine when injured passenger was unable to recreate the scene or otherwise obtain equivalent information); *Elkins v. District of Columbia*, 250 F.R.D. 20 (D.D.C.2008) (Court ordered production of documents sought in suit alleging that Fourth Amendment rights were infringed during an administrative search conducted by defendants. Although the documents were prepared in anticipation of litigation, recognizing the work product privilege would deprive the court of important evidence, and the plaintiff homeowners could not obtain the information by other means); *Simmons Foods, Inc. v. Willis*, 196 F.R.D. 610 (D. Kansas 2000) (Plaintiff required to produce fact work product documents because defendants had a substantial need for the documents to adequately support an affirmative defense of comparative negligence); *Harris v. Provident Life & Acc. Ins. Co.*, 198 F.R.D. 26 (N.D. N.Y. 2000) (Defendant insurer showed substantial need for medical reports about plaintiff insured. These reports were critical to the defense because they did not confirm that the insured had a latex allergy, as she contended, and the insurer needed the evaluation to effectively cross-examine the plaintiff's physicians). Indeed, counsel have been unable to identify a single case where this kind of information has properly been deemed "work product." In any event, the requested documents are relevant to Mr. Dickerson's claims, his liberty interest is at its apex, the Solicitor's Office

has not argued any reason not to produce the documents, and counsel have no other way to obtain the material—it is impossible to conceive what other conditions would have to be present for Mr. Dickerson to show "substantial need" for the documents.

The court's order also commits an error of law when it asserts that "[Dickerson's] arguments against the privilege are based almost exclusively on the presumption of favorable relevant evidence in the documents, and from this Court's review, there is no such favorable relevant evidence." This statement is burden-shifting, as it is axiomatic that the party seeking to raise the privilege must prove it is entitled to it. *See Hickman, supra.* But additionally, this is not the standard for granting discovery in this state. SCRCP, Rule 26(b)(1) reads:

> In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other intangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The court's ruling, instead, appears to limit discovery to a capital defendant of material that is "favorable." There is no legal authority for such a position.

The court additionally errs when it asserts that the "factual findings contained in the Solicitor's work product are available to the Applicant in the trial record, from Applicant's trial counsels' files, and discovery already provided by the State at trial, on direct appeal, and to date in his PCR action." This is simply not accurate. Mr. Dickerson does not have access to all of the factual findings relative to his request for these

documents and in support of his *Batson* claim—**by its own admission**, the Solicitor's Office has not provided the criminal records of potential venire persons to defense counsel in this case. It is abundantly clear that the Solicitor in this case removed an African-American female juror based on her "criminal record." Mr. Dickerson has a due process right to the materials upon which the Solicitor exercised this peremptory challenge. But also, we know from a review of the privilege log that this information is in the Solicitor's possession and that it is information the Solicitor **deemed so relevant** that they created a spreadsheet to track the information.

As for interviews with potential witnesses, counsel are unaware of any other procedure by which Mr. Dickerson can obtain interviews with state witnesses conducted by the state other than to avail himself of the discovery procedures available to him through the South Carolina Rules of Civil Procedure which the court has denied him. Again, it is apparent from the privilege log that Mr. Durant produced that there are numerous witnesses interviewed by the Solicitor's Office that were not produced to defense counsel. Now, the court's ruling necessitates that PCR counsel track down these witnesses to interview since we are being denied the opportunity to determine their relevance otherwise. [13]

In its order the court further found that "the vast majority of the privileged information sought in the Solicitor's File is of the "opinion work product nature." This statement is almost certainly incorrect.[14] "Opinion work product" is a species of work

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[13] A task further complicated by the PCR court's removing Dickerson's fact investigator.

[14] See *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1b*, 230 F.R.D. 398, 406 (D.Md. 2005) ("The standard for testing the adequacy of a

product and only encompasses "mental impressions, conclusions, opinions, or legal theories." Rule 26(b)(3), SCRCP. Yet, the court found, by its own review and without hearing any argument from the Solicitor's office on the issue, that all of its notes on potential jurors consist of "opinion work product" regarding these jurors. It is a remarkable finding that these notes, compiled by three different attorneys and various staff members, tracking such information as criminal histories, constitutes protected "opinion work product." The court's ruling on this issue disregards the overarching principle that privilege claims are **narrowly construed**.

> The application of the privilege laws serves an important purpose in our legal system, but that application can also "remove otherwise pertinent information from the fact finder, thereby impeding the full and free discovery of the truth." *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 271 (E.D.Va.2004). Because of this adverse result, in the Fourth Circuit, work product and attorney-client privilege are construed "quite narrowly." *Id.* They are recognized "only to the very limited extent that ... excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* (quoting *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir.1998)).

*ePlus, Inc. v. Lawson Software, Inc.*, 280 F.R.D. 247 (E.D.Va., 2012). And see *Lindley v. Life Investors Ins. Co.*, 267 F.R.D. 382, 388 (N.D. Okla. 2010) ("However, because all privileges are "in derogation of the search for truth,' both [the attorney client privilege and the work product doctrine] are narrowly construed."). And see *Calvin Klein Trademark Trust v. Watchner*, 198 F.R.D. 53, 55 (S.D.N.Y.2000) (emphasis added).

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privilege log is whether, **as to each document**, it sets forth facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed.") (emphasis added).

In its order, the court holds that "public policy" trumps compelled discovery in this case and that this case does not constitute "rare and extraordinary circumstances" requiring disclosure of the Solicitor's File. It is important to note that the Solicitor has never argued that this material should be protected as a matter of "public policy." Neither has the Attorney General's Office. But in any event, the public policy which underlies work product doctrine is not, in any way, advanced by the court's ruling. Indeed, the law on this issue does not contemplate withholding discovery under circumstances like this.

The work product doctrine derives from the landmark case of *Hickman v. Taylor*, 29 U.S. 495 (1947), and is now codified in both federal and state rules. The work-product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *United States v. Adlman* (*Adlman II*), 134 F.3d 1194, 1196 (2d Cir. 1998) (citing *Hickman*, 329 U.S. at 510-11 (1947)). The policy underlying work-product production is "to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). And see *Nat'l Union Fire Ins. Co. v. Murray*, 967 F.2d 980, 985 (4th Cir. 1992) ("The immunity for this class of document is little more than an "anti-freeloader" rule designed to prohibit one adverse party from riding to court on the enterprise of the other.").[15] This issue is

[15] The Advisory Committee for the 1970 amendment that introduced the "substantial need" requirement noted, among other things, that each side to litigation "should be encouraged to prepare independently" and that "one side should not automatically have the benefit of the detailed preparatory work of the other side." Fed.R.Civ.P. 26, *Advisory Committee Notes, 1970 amend.*, reprinted in 48 F.R.D. 487,

not implicated in any way by the release of the documents at this stage in the litigation where Mr. Dickerson is not merely attempting to have the state conduct discovery on his behalf. Indeed, he is now challenging the improper exclusion of African-Americans from his venire and seeks evidence in the Solicitors possession relevant to the claim. See generally *Ullman v. United States,* 350 U.S. 422, 438-40 (1956) (Frankfurter, J.) ("Once the reason for the privilege ceases, the privilege ceases.")

Public policy, in fact, militates in favor of compelling the discovery of the Solicitor's juror notes—Solicitors do not have an interest in secreting their reasons for excluding African-American jurors from civic service. As the United States Supreme Court has long recognized, improperly excluding otherwise qualified jurors based on race inflicts a substantial injury on those jurors and the community as a whole. *Batson* "was designed 'to serve multiple ends,' "only one of which was to protect individual defendants from discrimination in the selection of jurors. *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam) (quoting *Brown v. Louisiana*, 447 U.S. 323, 329 (1980)). In removing these qualified jurors from the panel, the Solicitor excluded them from participating in an important civic duty.

> The very fact that [members of a particular race] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

*Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

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501 (1970). This policy is not implicated when a capital defendant seeks evidence regarding a prosecutor's decision to exclude qualified jurors from his trial.

It is because of this assault on the integrity of the judicial process that the United States Supreme Court has allowed a defendant standing to raise the equal protection rights of a juror excluded from service in violation of these principles. See *Powers v. Ohio*, 499 U.S. 400 (1991). And see *Carter v. Comm'n of Greene County*, 396 U.S. 320, 329 ("Defendants do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."). It is disturbing, and raises issues of impartiality, that the PCR court has offered such broad protection to a Solicitor's Office charged with improperly excluding African-Americans from the jury. Public policy demands transparency in reviewing the conduct of government actors, especially when they seek the death penalty.

In its order, the court then addressed Mr. Dickerson's *Batson* claim:

> Additionally, a Batson challenge was raised at trial, the Solicitor provided race-neutral reasons for striking each of the challenged jurors, and the Trial Court was satisfied with those responses. The issue was presumably preserved for appeal and not pursued thereafter. While any appellate review of Applicant's Batson challenge would likely have included an analysis of the race-neutral reasons given by the Solicitor for striking a juror, the Court is unaware of any case wherein a Batson challenge was raised, race neutral reasons for striking were given, and trial counsel was thereafter compelled to disclose their notes on those jurors.

This paragraph is disturbing because (1) the fact that a *Batson* claim was raised at trial, but not raised on appeal, is irrelevant to whether we are now entitled to discovery, and (2) it appears to prejudge Mr. Dickerson's PCR claim. This is deeply problematic since the court has not received any evidence, nor heard any argument, on the issue at this point. Mr. Dickerson is asserting both a trial court level error based on trial counsel's

failure to urge a comparative juror analysis during the trial, and also appellate counsel's failure to raise the issue on appeal. These two claims are being argued in the alternative—but whether trial counsel rendered ineffective assistance of counsel for failing to urge a comparative juror analysis, or appellate counsel rendered ineffective assistance of counsel for failing to raise the issue on appeal—the fact remains there is a substantial *Batson* violation in this case that counsel intends to prove. The court appears to have decided that Mr. Dickerson's post-conviction claim will fail because the trial court decided the Solicitors race-neutral reasons were satisfactory. The court also finds that the issue was "presumably preserved for appeal." That is an outstanding issue in this case and the court has not heard any evidence on it. The court seems to suggest—and it is not at all clear—that Mr. Dickerson's claim again fails because it was abandoned on appeal. In any event—counsel supplied the PCR court with abundant case law, including from the United States Supreme Court illustrating that juror notes are relevant and material in assessing *Batson* claims.[16]

The PCR court's decision to allow the Solicitor's Office to secrete this highly probative evidence, in a capital case, by substituting its own reasoning and allowing wholesale assertion of a qualified privilege to over 2100 documents swims against the

[16] Prosecutors' juror notes have been ordered disclosed in other cases where a claimant has raised a *Batson* challenge. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the issue was litigated in federal habeas proceedings and the court ordered the documents disclosed. See Petitioner's Brief, n. 9 (indicating that the prosecutors annotated the juror cards by hand with codes that indicated the race of each juror. And see *Love v. Jones*, 923 F.2d 816, 819 (11th Cir. 1991) (district court allowed discovery in support of petitioner's claim that prosecutor used peremptory strikes in racially discriminatory manner); *Diggs v. Vaughn*, 1991 WL 46319 (E.D.Pa., 1991) (prosecutor's notes disclosed to defense counsel); *Lockett v. Puckett*, 980 F.Supp.201, 220-21 (S.D. Miss. 1997) (prosecutor's notes revealed evidence supporting *Batson* claim). Discovery of notes was granted in *Holloway v. Horn*, 161 F.Supp.2d 452 (E.D.Pa. 2002), although the opinion just mentions that fact without much discussion of why discovery was granted.

tide in capital litigation generally, and directly conflicts with established U.S Supreme Court precedent that demands "heightened reliability" in capital cases. See *Turner v. Murray*, 476 U.S. 28 (1986); *Zant v. Stephens,* 462 U.S. 862 (1983); and *Woodson v. North Carolina*, 428 U.S. 280 (1976).

At the request of the court's law clerk, the Attorney General submitted a proposed order on April 9, 2013.

**3. PCR Court's Delegation of Authority to the Law Clerk.**

Mr. Dickerson requests the Court consider these concerns in connection with the amount of responsibility for managing this case the PCR court has delegated to Mr. Evans. *See Simonson v. Gen. Motors Corp.*, 425 F. Supp. 574, 576 (E.D. Pa. 1976) (District Court took swift "precautions to avoid any appearances of impropriety"). Mr. Evans is responsible for all of the PCR court's communications with the parties. The PCR court typically takes matters under advisement before ruling. Mr. Evans notifies the parties of the PCR court's rulings and responds to the parties' inquiries. In his March 11, 2013 status report to this Court, Judge Dickson advised, "We have begun holding weekly status conferences by phone or email on Friday mornings to keep the Court and all parties apprised on any last-minute developments heading into the weekends." App. 39. Judge Dickson, however, personally attended just one of these status conferences, which was the first conference, convened on February 1, 2013. All other weekly status conferences have been conducted by Mr. Evans, handled by email with Mr. Evans, or cancelled. The last status conference occurred on March 15, 2013. *See* App. 50.

Mr. Evans has been involved in all of Mr. Dickerson's *ex parte* funding matters. In fact, investigative and expert funding were discussed during two of the weekly

telephone status conferences conducted by Mr. Evans in Judge Dickson's absence.

### C. Additional Concerns Based on the PCR Court's Unusual Rulings in Mr. Dickerson's Case.

Five troubling themes have been present since the beginning of this case. First, without telling the parties why, the PCR court has insisted that the June 17, 2013 evidentiary hearing date is not flexible. Second, the PCR court has refused to consider South Carolina's firmly established capital post-conviction relief procedures and other relevant legal precedent. Third, the PCR court has ruled on issues not raised by the parties, and these rulings always benefit the State. Fourth, the PCR court has shown an extraordinary amount of deference to the State, particularly during the Ninth Circuit Solicitor's Office's assertion of work product privilege to over 2100 pages of the State's file. *See* Section III(B), *supra*. Fifth, the PCR court has delayed or outright refused to rule on a number of issues.

In addition to the Solicitor's Office's assertion of privilege, these troubling themes have been apparent in the PCR court's adoption of a scheduling order, Mr. Dickerson's motion for the PCR court to supervise the waiver of the attorney-client privilege, the PCR court's considering excluding Mr. Dickerson from his own PCR proceedings, the removal of Mr. Dickerson's fact investigator, the complete denial of funding for forensic and mental health experts, and the *sua sponte* denial of the right to apply for investigative and expert services *ex parte* and *in camera*.

#### 1. Scheduling of Evidentiary Hearing.

By written order dated July 13, 2013, the Honorable Jean H. Toal, Chief Justice of the South Carolina Supreme Court, required the PCR Court to "issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the

hearing on the merits. ***The scheduling order may be amended as necessary***" (emphasis added). App. 6-7. The parties were not able to agree on the date for an evidentiary hearing. Mr. Dickerson's counsel informed the PCR court's law clerk, "The State wants Mr. Dickerson to agree to a hearing date in February. [We] cannot, in good faith, represent to Judge Dickson and the Supreme Court that we can be prepared by then." App. 8.

Both parties submitted proposed scheduling orders. The Attorney General suggested the evidentiary hearing begin on February 11, 2013. Mr. Dickerson suggested that the evidentiary hearing begin on August 26, 2013. Both parties' proposed scheduling orders provided for modification based on a showing of "good cause" by either party, as provided for by S.C. Code §17-27-160(C). App. 11-16.

The scheduling order adopted by the Court did not allow for modification based on a showing of good cause by either party. App. 19-21. Rather, the order provided, "This scheduling order is final and not subject to modification without leave of this Court." The court, either directly or indirectly though his law clerk, has repeatedly insisted that the date of the evidentiary hearing will not be changed. Consider the following:

> August 27, 2013 Email from law clerk: "Judge Dickson is going to include "hard" dates in the Order (for first status report, amended PCR application, etc.) and is advising you all that he is willing to change the dates before he signs the Order, but once the Order has been signed, the dates are ***set in stone, so to speak***." App. 17 (emphasis added).
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> August 28, 2013 Email from law clerk: "Please find attached Judge Dickson's proposed Scheduling Order. As I said yesterday, he is willing to move dates around at this point but once the Order is signed, he would like me to

stress that ***the dates therein are final***." App. 18 (emphasis added).

January 30, 2103 Following an in chambers status conference, PCR counsel placed on the record their understanding of the in chambers discussion that the June 17, 2013 hearing date was not flexible and Mr. Dickerson's presentation regarding the ordinary capital PCR proceedings and the need for more time in this case would not matter.

January 30, 2013 In the 120-day status report, the Court informed the Supreme Court and Court Administration that the evidentiary hearing is scheduled for June 17, 2012 and that there have been discussions about taking Mr. Bloom's testimony during the week of June 24, 2013, "although Mr. Dickerson's counsel have apparently not consented to this date." App. 33-34.

February 27, 2013 Email from law clerk: "As to Mr. Dickerson's scheduling concerns, the Court has not yet ruled on that matter but, unless or until further notice, Mr. Dickerson's PCR Hearing is still scheduled for the week of June 17, 2013." App. 35.

March 11, 2013 Court's 120-day status report: "The Petitioner filed a Motion for the Court to essentially reconsider the scheduled date of the PCR hearing—the week of June 17, 2013—as well, which the Court also has under advisement. As of now, however, the Hearing is set to go forward as scheduled." App. 39-40.

By letter dated January 23, 2013, Mr. Dickerson reiterated to the Court that the June 17, 2013 hearing dates was not reasonable and contrary to the procedures ordinarily followed in capital PCRs in South Carolina. App. 30-32. Pointing out that his case is an outlier, Mr. Dickerson challenged the adequacy of the PCR proceedings this Court is allowing in this case. He made arguments during a hearing convened on February 8, 2013 and filed three documents: Scheduling Concerns Memorandum, Appendix—

Scheduling Concerns Memorandum, and Scheduling Concerns Memorandum II with Appendix.

Mr. Dickerson formally moved for a continuance on April 17, 2013 and amended his motion on April 23, 2013. The Attorney General does not oppose Mr. Dickerson's request for a continuance. Noting that the statute allows continuances for "good cause," the Attorney General has pointed out that investigative and expert services are recognized reasons for granting continuances in capital PCRs. *See* email from Ms. Brown dated March 12, 2013, App. 41.

**2. Motion for Court to Supervise Waiver of Attorney-Client Privilege.**

On October 18, 2012, Mr. Dickerson filed his first amended application for post-conviction relief. The State served its return on November 16, 2012 and contended some of the allegations in the first amended application "require additional discovery," including "evidence . . . from trial and appellate counsel and/or trial and appellate counsel files." The return disclosed, "By letter dated October 31, 2012, counsel for Respondent contacted trial counsel and requested a meeting" with trial counsel. State's Return to Amended PCR Application, p. 32.

On November 26, 2012, Mr. Dickerson served the motion to supervise the waiver of the attorney-client privilege. At the status conference on December 17, 2012, Mr. Dickerson served a supplemental memorandum in support of the motion to supervise the waiver. The Court first heard arguments on the motion on December 19, 2012. At this hearing, Mr. Dickerson argued that the Court's supervision of the waiver should also include a protective order restricting the State's use of the information to the post-conviction relief action and barring any use of the information during any re-trial.

By written order dated January 17, 2013, the Court ordered Mr. Bloom and Mr. Carroll to respond to the State's letter. Both attorneys complied.

The Court convened an additional status conference on January 30, 2013, which included a discussion of the "depositions of Applicant's trial counsel, Jeff Bloom and Andrew Carroll." During the in chambers status conference, the Court ordered that the deposition of Mr. Carroll shall take place during February and the deposition of Mr. Bloom shall take place in April. By written order dated January 31, 2013, the Court scheduled an additional hearing that included the issues of "whether the Court will supervise Mr. Dickerson's waiver [of the] attorney client privilege and any issues thereof arising during the depositions of Mr. Dickerson's trial counsel."

The Court convened a hearing on February 8, 2008 and heard additional arguments on the motion to supervise the waiver. Mr. Dickerson renewed his request for the Court to issue a protective order limiting the use of trial counsel's confidential information. As an example of a protective order, PCR counsel pointed to the last paragraph of *United States v. Basham*, CR 4:02-992-JFA, 2012 WL 1130657 (D.S.C. Apr. 4, 2012). Counsel also pointed out that the South Carolina Rules of Civil Procedure contemplate an assertion of privilege during a deposition.

On February 27, 2013, the Court law clerk requested "that both sides submit Proposed Orders to the Court via email in Word format for both Motions." App. 35. Both parties submitted proposed orders. App. 36-37.

Mr. Carroll's took place on February 28, 2013. Mr. Bloom's deposition took place on April 23, 2013.

From February 27, 2013 to date the PCR court did not issue an ruling on this issue.

**3. Mr. Dickerson's Right to be Present.**

During a scheduling conference on January 30, 2013, PCR counsel requested Mr. Dickerson's presence at the hearing scheduled for February 8, 2013. The Attorney General requested the Court make a finding that Mr. Dickerson's presence is necessary for the hearing. The Court expanded the Attorney General's request for a finding for one particular hearing to include Mr. Dickerson's right to be present at **any** of his capital PCR proceedings. The Court declined to exclude Mr. Dickerson from the hearing scheduled for February 8, 2013, but at this hearing the Court would address "whether Mr. Dickerson must be present at any future motions hearings." Order dated January 31, 2013.

At the February 8, 2013 hearing, the Department of Corrections provided documentation establishing that the State regularly transports death-sentenced inmates to capital PCR hearings. The Court called for arguments. Mr. Dickerson suggested the State should argue first as the moving party. The Court reframed the dispute as Mr. Dickerson's motion to be present and shifted the burden to him.

On February 27, 2013, the Court's law clerk requested "that both sides submit Proposed Orders to the Court via email in Word format." App. 35. By email dated March 5, 2013, Mr. Dickerson submitted his proposed order to the Court. App. 36. By email dated March 8, 2013, the State submitted its proposed order to the Court. App. 37.

From March 8, 2013 to date, the court did not issue a ruling on this matter.

**4. Removal of Mr. Dickerson's Fact Investigator.**

On October 4, 2012, the Court signed Mr. Dickerson's *Ex Parte* Funding Order Number 1. This order contained a number of general findings of fact and conclusions of law, which included PCR counsel's obligations under the *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, reprinted in 31 Hofstra L. Rev. 913 (2003). The Court found counsel's request for investigative services to be reasonable and necessary. The Court approved Diana Holt as an investigator and further found, "In addition to being a licensed attorney, Ms. Holt has extensive experience conducting both fact and mitigation investigations."

Mr. Dickerson's PCR counsel forwarded this order to the Office of Indigent Defense (hereinafter "OID"), at its request, on October 11, 2012. OID did not raise any issues regarding this funding order at that time. On or about February 6, 2013, Hugh Ryan, General Counsel for OID, notified Mr. Dickerson's counsel by telephone of OID's objections to (1) Ms. Holt being a fact investigator without being licensed by SLED, and (2) her hourly rate. Counsel and Mr. Ryan had an additional conversation on February 7, 2013.

During a hearing convened at the Dorchester Courthouse on February 8, 2013, counsel made passing reference to OID's objections and informed the Court to expect additional communications about this issue. By email dated February 11, 2013, counsel requested a meeting with the Court and OID to address these issues. Counsel "hope[d] this matter [could] be resolved quickly" because the legal team had "cancelled some necessary investigatory activities because of this dispute."

The Court convened an *in camera* hearing on March 6, 2013 at the Orangeburg County Courthouse. At this hearing, although OID opposed paying Ms. Holt for her services, OID did not seek her removal from Mr. Dickerson's case. Rather, OID suggested Ms. Holt stay on Mr. Dickerson's case in the more specialized rule of mitigation investigator.

By email dated March 8, 2013, the Court's law clerk requested Mr. Ryan prepare an order **removing** Ms. Holt from Mr. Dickerson's case. By email dated March 22, 2013, Mr. Ryan circulated a proposed order. Later that same day, Mr. Dickerson's counsel circulated an alternate proposed order. Counsel retained most, if not all, of OID's proposed language. The alternate order included the arguments that Mr. Dickerson's counsel made during the hearing. In an attempt to resolve the issue while still addressing OID's concerns, the alternate order would have provided:

> Ms. Holt may resume as an investigator for Mr. Dickerson if she obtains an investigator's license from SLED. Ms. Holt may serve as Mr. Dickerson's investigator if she chooses to do so without seeking payment from SCCID at this time, pending any appeal she may make to a higher court or independent lawsuit.

OID opposed, arguing it "would not agree to this alternative order as parts appear to exceed and expand upon what was actually considered and ruled upon by the Court." The Court's law clerk responded, "The Court will take the Applicant's proposed additions to the Order under consideration. However, because, like Mr. Ryan points out, this was not previously considered by the Court I am not sure whether it will be included."

Mr. Dickerson's counsel inquired, "Can you please point to the portions you believe were not considered by the Court?" Although OID did not respond, on March 25, 2013 the Court's law clerk advised:

> I do not believe the Court considered the language regarding Ms. Holt's reapplication for Mr. Dickerson's case upon receipt of a SLED investigator's license. Obviously the Court is not intending to direct Ms. Holt professionally or suggest that she proceed one way or another outside the scope of this case, nor do I think the language therein is necessarily in conflict with the Court's ruling--I simply cannot speak to whether the Court will include the suggested language in your proposed order.

On April 3, 2013, the Court signed OID's proposed order, which did not include any of Mr. Dickerson's suggestions.

On April 12, 2013, Mr. Dickerson moved to reconsider, raising six issues for the Court to consider. These issues included the Court not identifying a standard of review, not addressing controlling statutes and case law, and taking action that exceeded the relief requested by OID.

By email dated April 22, 2013, the Court's law clerk advised Mr. Dickerson and OID that the Court would clarify that Ms. Holt was not removed from the case and allowed her to work without compensation. The law clerk's email instructed counsel to "prepare the Amended Order incorporating only these clarifications." Because of the obligation to seek rulings on all issues, counsel inquired of the Court's law clerk, "[A]re we to understand that the Court has considered and rejected the other issues? And if so, could you please provide the reasoning so the order reflects His Honor's ruling?" The Court's law clerk never responded, so PCR counsel prepared and circulated a proposed order.

The proposed order acknowledged that the issues raised by Mr. Dickerson were considered by the Court and that the Court declined to grant the requested relief. On Friday, April 27, 2103, OID indicated it had some concerns with the proposed order as

drafted and offered, "We will attempt to resolve these matters with counsel. However if not resolved SCCID will present any concerns to the Court in writing." The law clerk responded, "If you cannot resolve the issues with Mr. Dickerson's Counsel, the Court will accept a 'redline' copy of the Proposed Order incorporating your proposed changes."

Counsel for Mr. Dickerson and OID had a preliminary conversation about this matter at the Capital Case Litigation Initiative on Monday, April 22, 2013 and recently discussed this issue on May 15, 2013.

This matter, accordingly, is still pending.

**5. Complete Denial of Expert Funding and Denial of Right to Proceed *Ex Parte* and *In Camera.***

On October 4, 2012, the Court signed Mr. Dickerson's *Ex Parte* Funding Order Number 1. This order contained a number of general findings of fact and conclusions of law. The order approved attorney fees, litigation expenses, fees for a fact investigator, and fees for a mitigation investigator.

On December 17, 2013, the Court convened a status conference in chambers at the Calhoun County Courthouse. Following the status conference, the Court excused representatives from the Attorney General's Office in order to discuss, *ex parte*, funding matters with Mr. Dickerson's counsel. The Attorney General did not object to this ex parte discussion.

On December 19, 2013, the Court convened a hearing at the Orangeburg County Courthouse. At the conclusion of the hearing, the Court met with Mr. Dickerson's counsel in chambers, *ex parte*, to discuss funding matters. The Attorney General did not object to this *ex parte* discussion. During this *ex parte* meeting, the Court informed PCR counsel that in the event the Court was not inclined to approve any of Mr. Dickerson's

funding requests, the Court would convene an *in camera* hearing to allow counsel to make a complete record.

During a hearing convened at the Dorchester Courthouse on February 8, 2013, counsel made passing reference to the OID's objections to one of Mr. Dickerson's investigators and informed the Court to expect additional communications about this issue.

On February 15, 2013, the date requested by the Court, Mr. Dickerson submitted proposed *Ex Parte* Funding Order 2. This proposed order requested approval of funding for experts to review the state's forensic evidence introduced during the guilt-innocence and penalty phases of Mr. Dickerson's trial. The proposed order also requested mental health experts to explore PCR counsel's belief that Mr. Dickerson suffers from post-traumatic stress disorder, a condition that trial counsel overlooked during their representation.[17] Counsel clearly have a duty to explore this issue. Failure to investigate and present evidence of this claim deprived the fact-finders of powerful mitigating evidence that may have resulted in a different outcome. *See Boyde v. California*, 494 U.S. 370, 382 (1990) (There is a "belief, long held in this society, that defendants who

[17] The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate. DMS-IV-TR, p. 463. William Dickerson grew up in a Westside Charleston, SC community plagued by extreme violence. Two of his cousins were murdered, as well as 5 close friends. Two other friends were shot and paralyzed. At age 13, William observed another friend repeatedly shot as he was standing there. One of his friends was nearly decapitated by having his throat slit, and was castrated. The victim's penis was placed in his mouth. At age 11, young William was committed to a psychiatric hospital.

commit criminal acts that are attributable to . . . emotional and mental problem[s] may be less culpable than defendants who have no such excuse."); *Bowie v. Branker,* 572 F.3d 112, 120 (4th Cir. 2008) ("In the scope of a capital sentencing hearing . . . petitioner need only demonstrate that but for counsel's errors, at least one juror might have recommended a life sentence"). Moreover, the Supreme Court of the United States has routinely held that counsel's failure to reasonably investigate and present evidence of a capital defendant's mental impairments deficient and prejudicial under *Strickland. See, e.g., Porter*, 130 S. Ct. at 454 (holding that the defendant was prejudiced by counsel's failure to present evidence of defendant's "brain abnormality, difficulty reading and writing, and limited schooling"); *Sears v. Upton*, 130 S. Ct. 3259, 3267 (2010) (finding counsel's failure to investigate and present mitigation evidence regarding the defendant's "significant mental and psychological impairments" prejudicial under *Strickland*); *Rompilla v. Beard*, 545 U.S. 374, 393 (holding that the defendant was prejudiced by counsel's failure to present evidence demonstrating that defendant suffered from "an extreme mental disturbance significantly impairing several of his cognitive functions"); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (explaining that counsel's failure to uncover and present mitigating evidence regarding defendant's "diminished mental capacities" at sentencing could not be justified as a tactical decision because counsel had not fulfilled their obligation to conduct a thorough investigation of defendant's mental health).

On March 1, 2013, the Court's law clerk conducted a status telephone conference with PCR counsel and the Attorney General's Office. At the end of the conference call, PCR counsel asked for an opportunity to discuss the status proposed *Ex Parte* Funding Order 2 with the Court, *ex parte*. The Attorney General did not object.

On March 6, 2013, after meeting with PCR counsel and representatives from OID in chambers, the Court convened an *in camera* at the Orangeburg County Courthouse. OID did not object to the *in camera* hearing. At the conclusion of the hearing with the OID on March 6, 2013, counsel asked the Court if that afternoon would be a good time to address the funding request, but the Court informed counsel that it did not have time to do so.

The Court's status report to Motte Talley dated March 11, 2013, acknowledged, "Additionally, I have taken up several *ex parte* funding matters with the Petitioner that I will have to decide." App. 39. The Attorney General was copied on this status report and did not object to the Court considering several *ex parte* funding matters.

PCR counsel had hoped to address this matter following the hearing scheduled for March 14, 2013, but Court cancelled that hearing, without explanation.

On March 15, 2013 the Court's law clerk conducted a telephone status conference. Counsel reminded the Court's law clerk of the outstanding funding requests. The Attorney General did not object. App. 48-50.

By letter dated March 22, 2013, the Attorney General inadvertently requested a copy of the transcript of this hearing. After this matter was called to Attorney General's attention, she responded, "I certainly do not want a transcript from a hearing that was meant to be and authorized to be *ex parte*. Thank you for letting me know." By letter dated March 22, 2013, the Attorney General cancelled the request from this transcript. App. 51-53.

On April 3, 2013, counsel asked the Court's law clerk, via email, if he "had an opportunity to speak to the judge about our proposed funding order and approval of our

vouchers." The law clerk replied, "I do know he's been reviewing and we will try and let y'all know by the end of the week."

The Court denied **all** of Mr. Dickerson's funding requests for expert fees by written order dated April 4, 2013. The only funding approved by the Court is for one expert who has agreed to testify for Mr. Dickerson, seeking only reimbursement for travel and lodging and without seeking a fee. This order denied all funding for experts to review forensic evidence introduced by the State during the guilt-innocence and penalty phases of Mr. Dickerson's trial, and all funding for mental health experts. Prior to denying all of Mr. Dickerson's funding requests for expert fees, the Court did not convene an *in camera* hearing, as discussed on December 19, 2013, or ask PCR counsel for additional information.

The Court's order dated April 4, 2103 additionally ordered:

> This Order is not to be filed under seal. See *Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682 n. 1 (1996) (holding that the ex parte funding requirements of Section 16-3-26(C) do not apply to Post-Conviction Relief Proceedings). Applicant's Ex Parte Funding Order No. 1 is hereby amended insomuch it is inconsistent with *Thames*.

The PCR court then, has unsealed two funding requests in a capital case, *sua sponte,* in the absence of any motion or objection from the Attorney General or OID, and without providing Mr. Dickerson any notice or an opportunity to be heard.

## IV. Additional Argument for Substitution of PCR Judge.

Additional Background

Concerned about the PCR court's unprecedented handling of Mr. Dickerson's capital PCR, PCR counsel wondered if the PCR court had a conflict of interest of which counsel was unaware. Counsel have an obligation to provide effective assistance of

counsel to Mr. Dickerson.[18] The PCR court's handling of this case has thwarted our ability to do so. Repeated efforts to have the PCR court understand and appreciate our situation have been ignored. It is against this backdrop that we even began investigating the background of the parties in this matter. We would not have done so otherwise.

Counsel has brought this issue to the PCR court's attention at the earliest moment after knowledge of the facts demonstrating the basis for the motion. *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d. 1404, 1410 (5th Cir. 1994). *See also Apple v. Jewish Hosp. & Med.Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987). By letter dated April 17, 2013, counsel for Mr. Dickerson requested the Court "withdraw from presiding over this case

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[18] *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, Standard 4-1.2(c), in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) (due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make "extraordinary efforts on behalf of the accused. . . .").

*See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES Guideline 10.151(c) (rev. ed. 2003) ("Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious."); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 n.3 (1980) ("The lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits. . . ") (citing ABA CANONS OF PROFESSIONAL ETHICS, Canon 5 (1908)).

*See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. (3d ed. 1992) (recognizing that effective representation requires access to adequate "supporting services [including] secretaries[,] investigators[, and] . . . expert witnesses, as well as personnel skilled in social work and related disciplines.").

*See also Rogers v. Pearson*, 1:11CV1281 LMB/TCB, 2012 WL 3691085, at *13 n.5 (E.D. Va. Aug. 27, 2012) (holding that the defendant "made a sufficient showing of ineffective assistance of [post-conviction] counsel to excuse his procedural default under [*Martinez*]. Therefore, [defendant's] ineffective assistance of trial counsel claims will be considered on the merits"); *Jensen v. Hernandez*, 864 F. Supp.2d 869, 896 (E.D. Cal. 2012) (holding that the "failure of petitioner's appellate counsel to raise a clearly meritorious argument on appeal constitutes ineffective assistance of appellate counsel and establishes cause to excuse petitioner's procedural default" under *Martinez*).

[because] Mr. Dickerson attorneys have learned about the close connection between your law clerk, Mr. Drew Evans, and Ninth Circuit Solicitor Scarlett Wilson."

By email dated April 25, 2013, Mr. Dickerson's counsel inquired whether the Court received this letter. By email and letter dated April 25, 2013, the Court requested a formal, written motion.

Pursuant to the Court's letter dated April 25, 2013, Mr. Dickerson formally moved in writing for the Court to withdraw from presiding over this case. On April 29, 2013, counsel requested that all outstanding motions be held in abeyance pending the resolution of this issue.

Legal Analysis

On Friday, April 26, 2013, Senior Attorney General Melody Brown confirmed what counsel had suspected—that Drew Evans is actively seeking employment as a prosecutor. And we believe—though it is impossible for us to confirm—that the PCR court's inflexible timetable is related to the law clerk's employment with one of the adversaries in this case. We also suspect that the court's highly deferential treatment of the Ninth Circuit Solicitor's Office is the result of the law clerk attempting to secure employment with that very office. In any event, it is appropriate for the Court to recuse itself from this capital case. When the impartiality of a judge is in doubt, the appropriate remedy is to disqualify the judge from hearing further proceedings in the matter. *Caperton v. A.T. Massey Coal Co.,* 129 S.Ct. 2252 (2009). In *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 859 (1988), the Court noted that the federal judicial disqualification statute may be violated even if the judge is ignorant of the basis for disqualification, if those facts create an appearance of impropriety. A judge must

accept as true the factual allegations of a motion to disqualify. *Shaw v. State*, 276 S.C. 190, 277 S.E.2d 140 (1981).

A law clerk's actions are attributable to the judge and can constitute a basis for the judge's recusal. For example, the court in *Hall, supra*, held that a magistrate, in a sex discrimination case, erred in refusing to disqualify himself where his law clerk was a member of a plaintiff class in a suit. The court further pointed out that, after participating in pretrial proceedings and preparing memoranda for the magistrate during the trial, she accepted employment with the law firm representing the plaintiff class two days before the magistrate rendered his judgment against the defendant. Despite the magistrate's contention that his clerk was "little more than a scribe," the court pointed out that law clerks are not merely the errand runners of judges but, rather, are sounding boards for tentative opinions and are legal researchers who seek the authorities that affect decisions. The court ruled that the clerk is forbidden to do all that is prohibited by the judge. In this death penalty case, Mr. Evans has been actively seeking employment with two parties currently involved in the case, going so far as to participate in an interview with Solicitor Wilson, the party advancing a claim of privilege over at least 1100 pages of documents related to the *Batson* claim Mr. Dickerson is raising. And Mr. Evans has had extensive participation in this case, going so far as to hold status conferences with defense counsel over *ex parte* matters. In this case, there has clearly been no effort to restrict his participation in all aspects of it.

The court found in *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84 (S.D. Ala, 1980) that the judge's disqualification was mandated where his clerk, who worked on the case, accepted employment with the law firm representing the successful

party to the litigation. The court found that, if a judge were to announce his intention to leave the bench and return to practice with a firm, it would clearly be improper for him to sit as a judge in a trial in which his future firm appeared for one of the parties; if the law clerk's duty to avoid the appearance of impropriety is equivalent to the trial judge's duty, then a law clerk should not participate in litigation in which his future employer appears as counsel. And see *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (S.C. App. 2009) (11th Circuit solicitors office moved to be recused because deputy solicitor was law clerk to judge who presided over first trial and was present for attorney-client issues).

Capital cases necessitate the highest levels of reliability in their implementation. To date, counsel have been unable to properly prepare Mr. Dickerson's case because of the PCR court's inflexible time schedule, denial of all funding, and rulings which lack factual and legal bases. Additionally, there has been no sense of urgency on the PCR's court's part to rule on issues so they may be litigated in a manner consistent with this expedited schedule. For instance, at the PCR court's request, we submitted a funding order on February 15, 2013. The PCR court waited until April 4th to deny all of our funding requests. Until April 29, 2013, the PCR court still had not ruled on the privilege, the waiver of attorney-client privilege, or our fact investigator issues. Indeed, it still has not ruled on this issue that we now bring to this Court. It has steadfastly refused to consider our motion for a continuance, despite our repeated attempts to bring the matter to the court's attention. Instead, the PCR Court has insisted that counsel litigate our client's right to be present at his own post-conviction relief proceedings, and the matter of *ex parte* and *in camera* funding issues. In attempting to account for why this case has been handled in this manner, we found Mr. Evans' Linked In profile. Counsel believe

that his professional aspirations have had an effect on the handling of this case, and we now respectfully ask this Court to review the assignment of judge in this matter.

## V. Conclusion

Mr. Dickerson respectfully requests this Court grant the following relief:

1) Expedite consideration of this petition in consideration of the currently scheduled June 17, 2013 evidentiary hearing;
2) Because of the conflict-of-interest, relieve Judge Dickson of further responsibility of presiding over this capital PCR and assign another Circuit Court Judge to preside;
3) Review all of Judge Dickson's rulings to determine whether those rulings were tainted by the conflict-of-interest or, in the alternative, grant the assigned Circuit Court Judge that authority; and
4) Such other relief this Court deems just and appropriate.

IT IS SO MOVED.

Respectfully Submitted,

By _____

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May 17, 2013

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Charleston County Capital PCR
The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case Number: 2009-133266
Capital PCR Case Number: 2012-CP-10-3216

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William O. Dickerson, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

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**Certificate of Service**

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I certify that I have served a copy of this petition and associated appendix on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

The Honorable Edgar W. Dickson
P.O. Box 1949
Orangeburg, SC 29116-1949

Melody J. Brown, Esquire
Office of the Attorney General
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By _____

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May 17, 2013
Greenwood, South Carolina