STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Orangeburg County

Honorable Maite Murphy, Circuit Court Judge

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EX PARTE: SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE,

RESPONDENT,

IN RE: THE STATE,

RESPONDENT,

V.

KENNETH HENRY EASTWOOD,

APPELLANT

APPELLATE CASE NO. 2024-000583

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# INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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Should this Court affirm the trial judge's jurisdictionally proper ruling that appellant, who was retained in this matter for a $15,000 fee, was not entitled to foist the expenses of her expert witnesses onto the taxpayers?

## STANDARD OF REVIEW

A determination of contempt "is within the sound discretion of the trial judge" and will not be reversed unless it is without evidentiary support or the court abused its discretion. Pratt v. South Carolina Dep't Soc. Servs., 283 S.C. 550, 551, 324 S.E.2d 97, 98 (Ct. App. 1984) (affirming family court's decision not to hold state agency in contempt for nonpayment of attorney or guardian ad litem fees).

## STATEMENT OF THE CASE

This appeal arises from the representation of Kenneth Henry Eastwood by appellant Ashley Cornwell ("appellant" or "Cornwell"). On December 16, 2019, Eastwood was arrested and charged with murder. Eastwood retained Cornwell to represent him and during the week of November 6, 2023, he was tried before the Honorable Maite Murphy and a jury convicted him. Prior to trial, Cornwell obtained two *ex parte* funding orders for expert witnesses that are the subject of this appeal. In December, over a month after the trial ended, when Cornwell sent the funding orders to the South Carolina Commission on Indigent Defense (the "Agency"), the Agency disputed payment because Cornwell was retained and not appointed. On December 19, 2023, Cornwell signed and submitted a Petition for Rule to Show Cause asking the circuit court to hold the Agency in contempt for refusing to pay the expert vouchers. R. ___ (Pet. R. Show Cause pages 1-3); Tr. 2, l. 6 – 22. On January 18, 2024, Judge Murphy held a virtual hearing on Cornwell's Rule to Show Cause. Tr. 1. Cornwell represented herself and Hervery B.O. Young represented the Agency. Tr. 1. On February 28, 2024, Judge Murphy denied Cornwell's Rule to Show Cause in a written Order, which is the Order now on appeal before this Court. R. __ (Order Denying Defendant's Rule to Show Cause). Cornwell's motion to reconsider was denied on March 25, 2024. R. ___ (Order Denying Motion to Reconsider). This appeal follows.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

The procedural history and facts of this case are not in dispute. After Eastwood was arrested, bond was denied and he remained in custody. Eastwood did not apply for the appointment of counsel. Between the date of arrest and February 24, 2020, Eastwood retained attorney James Falk to represent him in this case. R. ___ (Entry of Appearance by James K. Falk filed on Dec. 26, 2019). James Falk passed away and on May 18, 2023, the Honorable Heath P. Taylor filed an order appointing public defender Doug Mellard to represent Eastwood. R. ___ (Order of Appointment dated May 18, 2023).

*Cornwell is Retained and Seeks Funding for Experts*

Soon after appointment of the public defender, Eastwood retained Cornwell to represent him. She filed a Notice of Appearance on June 15, 2023, and the public defender ceased representing Eastwood. R. ___ (Notice of Appearance by Appellant). On September 19, 2023, Cornwell submitted an Ex Parte Motion for Funding for a False Confession Expert and a proposed Ex Parte Order for Funding for a False Confession Expert to the court. R. ___(Ex Parte Motion for Funding for a False Confession Expert). She submitted a similar ex parte motion and proposed order for a forensic pathologist on November 1, 2023. R. ___(Ex Parte Motion for Funding for a Forensic Pathologist Expert).

Neither motion stated that appellant had been retained. R. ___(Ex Parte Motion for Funding for a False Confession Expert), R. ___(Ex Parte Motion for Funding for a Forensic Pathologist Expert). Both motions stated in their first sentence that they were made "as authorized by South Carolina Code of Laws § 17-3-50(B) and (C)." Id. Section 17-3-50 is titled "Determination of fees **for appointed counsel** and public defenders; maximum amounts, authorization to exceed maximum; payment for certain services." S.C. Code Ann. § 17-3-50

(emphasis added). Cornwell does not dispute that she was never appointed to represent Eastwood. Br. App. at 2 ("Attorney Ashley Cornwell was retained on Eastwood's behalf. . . .").

No hearings were held on Cornwell's *ex parte* motions. Tr. 10, l. 11 – 15. Judge Murphy signed the funding order for the false confession expert on Oct. 13, 2023, and signed the funding order for the forensic pathologist expert on November 2, 2023. R.___ (Funding Orders). Eastwood was tried and convicted the week of November 6, 2023, only four days after issuance of the second funding order. R. ___ (Pet. R. Show Cause para. 4). Both experts testified for the defense.

*Cornwell Seeks Payment from the Agency for the Experts*

Cornwell did not send the funding orders to the Agency when they were signed or before Eastwood's trial. She waited until December 12, 2023, to send the orders to the Agency for payment. R. ___ (SCCID's Objection Letter dated December 20, 2023). The Agency contacted Cornwell regarding her submission on the same day. R. ___ (Pet. R. Show Cause para. 8). The Agency objected to the funding orders, told Cornwell they would not pay the vouchers she submitted, and said they would notify the court of their objections. R. ___ (Pet. R. Show Cause para. 8); R. ___ (SCCID's Objection Letter dated December 20, 2023).

Before the Agency could send its written objections to the court, on December 19, 2023, Cornwell signed and submitted a Petition for Rule to Show Cause asking the circuit court to hold the Agency in contempt for refusing to pay the expert vouchers. R. ___ (Pet. R. Show Cause pages 1-3); Tr. 2, l. 6 – 22. On December 20, 2023, the Agency submitted its letter to Judge Murphy detailing its objections to payment of the funding orders. R. ___ (SCCID's Objection Letter dated December 20, 2023). The Agency wrote, "It is the position of SCCID that the statutes, budget provisos and policies governing this agency do not authorize the use of the Defense of Indigent

Funds to pay attorney and/or expert fees or expenses in cases where the defendant has retained private counsel to represent him and is therefore not indigent." Id. The Agency cited its Voucher Payment Policy that requires attorneys to submit requests for payment within fifteen days and stated Cornwell failed to timely submit the funding orders. Id. The Agency pointed out that Cornwell's ex parte motions did not disclose that she was retained and that the statute she cited only applied to appointed counsel. Id. Citing the Supreme Court's September 29, 2006, Order regulating the payment of vouchers by the Agency, the Agency asked Judge Murphy to consider its letter notice of its objections and also asked for the funding orders to be rescinded. Id. See Order of the South Carolina Supreme Court dated Sept. 29, 2006 (hereinafter, the "2006 Voucher Order").

On January 18, 2024, Judge Murphy held a virtual hearing on Cornwell's Rule to Show Cause. Tr. 1. Cornwell represented herself and Hervery B.O. Young represented the Agency. Tr. 1. Cornwell argued that Eastwood was indigent and that Judge Murphy had made that finding. Tr. 2, l. 6 – 3, l. 16. She provided Eastwood's Affidavit of Indigency that he submitted to the Agency when he sought the services of Appellate Defense. Tr. 4, l. 22 – 5, l. 1. R. ___ (Affidavit of Indigency sent to court via email Jan. 18, 2024).

Eastwood's affidavit that Cornwell submitted the day of the hearing is a form affidavit. Id. It asks whether the defendant was represented by an appointed attorney or a retained attorney. Id. Eastwood checked the box for "retained counsel." Id. The form asks how much the defendant paid retained counsel. Id. The amount on the affidavit Cornwell submitted to Judge Murphy was scratched out. Id. In her post-hearing filing in the circuit court, she described the payment as "a deeply discounted fee" without stating the amount. R. ___ (Appellant's Response to SCCID's Objections to Funding Orders, p. 2). In its reply to Cornwell, the Agency gave Judge Murphy the

original affidavit submitted by Eastwood to Appellate Defense without the amount scratched out. R. ___ (SCCID Reply to Defendant's Response, Ex. A). Cornwell's "deeply discounted fee" was fifteen thousand dollars ($15,000.00). Id.

*The Trial Court Denies Cornwell's Rule to Show Cause*

On February 28, 2024, Judge Murphy denied Cornwell's Rule to Show Cause in a written Order, which is the Order now on appeal before this Court. R. __ (Order Denying Defendant's Rule to Show Cause). The circuit court first found that Eastwood was indigent at the time it granted Cornwell's *ex parte* funding requests. Id. Despite Eastwood's indigent status, the court agreed with the Agency's position that section 17-3-50 only authorizes payments for expenses for appointed counsel or public defenders. Id. As further support, the judge cited Rule 602(c), SCACR, which expressly states, "If counsel shall have been retained and partially paid for his services in either the trial or appeal stages, no reimbursement may be had from indigent funds." Rule 602(c), SCACR. The court ruled this language was "unambiguous." R. __ (Order Denying Defendant's Rule to Show Cause).

The trial court also found that Cornwell failed to follow both the Supreme Court's and the Agency's procedures for seeking payment. Id. Judge Murphy cited the 2006 Voucher Order's requirement that lawyers register their appointment with the Agency within fifteen days. Id. She cited the Agency's procedures requiring lawyers to send funding orders to the Agency within fifteen days after approval by the court. Id. Had Cornwell followed the Agency's procedures and the 2006 Voucher Order's procedures, she could have taken additional steps to try to comply with the law while attempting to obtain experts for Eastwood. Id. Finally, the court ruled the Agency was not in willful violation of her funding orders. Id.

Cornwell filed a motion to reconsider and, for the first time, confusingly claimed the trial court lacked jurisdiction to deny her Rule to Show Cause. R. ___ (Appellant's Motion and Memorandum to Reconsider). After the Agency's reply, Judge Murphy denied the motion in a written Order filed March 25, 2024. R. ___ (SCCID Reply to Defendant's Motion and Memorandum to Reconsider); R. ___ (Order Denying Motion to Reconsider). Cornwell then filed her notice of appeal with this Court.

## ARGUMENT

This Court should affirm the trial judge's jurisdictionally proper ruling that appellant, who was retained in this matter for a $15,000 fee, was not entitled to foist the expenses of her expert witnesses onto the taxpayers.

*Introduction*

Despite statutes, rules, an Order of the Supreme Court, and agency procedures of which appellant had actual, not constructive, notice; and despite a circuit judge's reversal of her own funding orders after being presented with the facts and the law by the Agency, appellant now asks this Court to supersede the Legislature and create a rule that would allow privately retained attorneys access to the coffers of the treasury by shifting their litigation expenses onto the taxpayers. On the micro level, this appeal is about an attorney who did not price expenses into her retainer and sought funds from the Agency without following established procedures. But on the macro level, this appeal is about whether a court—not the Legislature—can decide that privately retained attorneys can gobble the entire fee from criminal defense clients, render them indigent, and then shift the funding of expert witnesses onto the taxpayer while keeping the entire fee as income. If the Legislature wants to subsidize privately retained criminal defense attorneys, it is free to do so. But this Court cannot, especially on the facts of this case, create an unfunded mandate that could financially hamstring a state agency.

### 1. Appellant's Untimely Jurisdictional Argument is Frivolous

Respondent first will dispatch appellant's Issue One, which is frivolous, before moving into the meat of this appeal. Fundamentally, appellant ignores that this matter is before this Court

on her own appeal from the Rule to Show Cause that she submitted.[1] Cornwell's convoluted argument ignores this dispositive procedural point.

Cornwell appears to be claiming that because the Agency's objections to the funding orders did not have a caption or was not formally styled as a Rule 59(e) motion, this made the Agency's response untimely. Appellant raised no such objection in her Rule to Show Cause that was filed the day before the Agency's objections. She raised no such objection in the materials she gave to Judge Murphy at the hearing. She raised no such objection during the hearing. She raised no such objection in her written memorandum after the hearing. Her jurisdictional argument was raised for the first time in her motion to reconsider Judge Murphy's Order denying appellant's Rule to Show Cause. R. ___ (Appellant's Motion and Memorandum to Reconsider, p. 1-2). "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

The Agency followed the procedures set forth by the Supreme Court in the 2006 Voucher Order which controls how the Agency processes payment vouchers. Cornwell's brief concedes the 2006 Voucher Order is still in effect and applies to this matter. Br. App. at 3-4.

Under the 2006 Voucher Order, if the Agency has an objection to a payment request, it "shall notify the trial court and counsel of any objection and shall forward any necessary materials to the trial court in writing or electronically." 2006 Voucher Order, para. 5. Had the Supreme Court intended a formal motion under Rule 59, it would have said so. This provision of the

[1] It appears Cornwell never filed her Rule to Show Cause with the Orangeburg County Clerk of Court. It does not appear in the online public index nor could the Agency find a filed copy when it physically inspected the clerk's file. While not dispositive because Judge Murphy certainly received it and considered it, this point further undermines Cornwell's argument that the Agency's multiple writings were untimely and should not have been considered.

Voucher Order also states that the trial court may determine the matter with or without a hearing. Id.

If Cornwell's argument were correct, then a trial court could not decide the issue or hold a hearing unless a formal Rule 59 motion were filed. This tortured construction would make this provision of the Voucher Order a nullity and absurd. "Courts interpreting the South Carolina Rules of Civil Procedure apply the same rules of construction used to interpret statutes." James v. South Carolina Dep't Transp., 393 S.C. 440, 445, 711 S.E.2d 919, 922 (Ct. App. 2011). A maxim of statutory construction is that the specific controls over the general. Id. The Voucher Order is the specific rule that controls over Cornwell's assertion that the general Rule 59 applies. Cornwell's reading of the Voucher Order would create an absurd result—that the Supreme Court wrote a specific provision that lacks any force. See Duke Energy Corp. v. South Carolina Dep't Rev., 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). The Voucher Order controls, not Rule 59. It requires only a writing and the Agency transmitted its written objections to the trial court and to Cornwell eight days after learning of the funding orders' existence and one day after Cornwell filed her Rule to Show Cause.

Cornwell's argument elevates form over substance and ignores that Judge Murphy considered the Agency's timely submitted writing and scheduled a hearing. See Barnes v. State, 433 S.C. 399, 402-03, 859 S.E.2d 260, 261 (2021). In Barnes, a clerk of court rejected a PCR application because it was on the wrong form. Id. The Court first noted that clerks have no discretion to reject filings. Id. It then stated that a clerk cannot reject a pleading because of deficiencies in its form and such power is reserved for judges. Id. Appellant did not even ask Judge Murphy to reject the Agency's written objections as insufficient. The judge considered the

objections and held a hearing where appellant again failed to raise this timeliness and sufficiency argument.

Furthermore, the Agency could have filed a Rule 60 motion and contested the funding orders. Rule 60 allows courts to relieve a party from an order within a year if the order was void or based on the misconduct of another party. See Rule 60(b), SCRCP. As will be shown in the argument on the merits, the funding orders were not properly issued as a matter of law. Appellant's filings that obtained the funding orders made no mention that she was retained and not appointed. The *ex parte* nature of these orders meant that the Agency had no ability to help the trial court understand the deficiencies in appellant's filings. The point here is that the Agency's multiple written responses were timely and were properly construed as timely, especially remembering the fact that the judge was considering the Agency's responses to a Rule to Show Cause submitted by Cornwell. Appellant's late argument is a Hail Mary hoping this Court will seize on a procedural hypertechnicality. Judge Murphy properly rejected this last-ditch effort and so should this Court.

**2. The Trial Court Properly Refused to Create an Unfunded Mandate and Shift Appellant's Expenses onto the Treasury**

Cornwell's argument on the merits is based on (1) taking portions of the controlling statute out of context; and (2) dicta in a footnote in a PCR case from this Court. She ignores the trial court's finding that the appellate court rules unambiguously prohibit payment to retained counsel. She does not respond to the specific policy arguments raised by the Agency below, but relies on the general constitutional principles requiring states to provide indigent people with a defense. The Agency does not, of course, contest these principles that are the sole purpose of its existence. But the Agency does contest the stretching of these core principles to enrich privately retained attorneys. Finally, Cornwell fails to make any argument contesting the trial court's express finding

that she failed to follow the 2006 Voucher Order and the Agency's procedures when she sought payment. Her failure to contest this ground for denial of relief bars her appeal under the two-issue rule.

*a. Section 17-3-50 Does Not Apply to Retained Counsel*

By the titles of its sections, the Defense of Indigents Act does not apply to privately retained counsel. Section 17-3-50 is specifically titled "Determination of fees for **appointed counsel and public defenders** . . . ." S.C. Code Ann. § 17-3-50 (emphasis added). This section begins with the words, "When private counsel is appointed pursuant to this chapter. . ." S.C. Code Ann. § 17-3-50(A). Cornwell's argument fails because this section unambiguously applies only to attorneys who have been appointed by a court. It is undisputed that Cornwell was privately retained and never sought to be appointed to represent Eastwood.

Cornwell's argument relies on taking sections (B) and (C) out of context. She claims ambiguity because these provisions of the statute say "the defendant's attorney" and do not repeat the phrase "appointed counsel." Her attempt to have section 17-3-50 read as three separate and independent statutes fails because the entire provision must be read together. As our Supreme Court has explained, statutes

> "must be read as a whole and sections which are part of the same General statutory law must be construed together and each one given effect." S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). We therefore should not concentrate on isolated phrases within the statute. Id. Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose. State v. Sweat, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct.App.2008), affd. 386 S.C. 339, 688 S.E.2d 569 (2010).

CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011).

"The cardinal rule of statutory interpretation is to determine the intent of the legislature." Bass v. Isochem, 365 S.C. 454, 469, 617 S.E.2d 369, 377 (Ct. App. 2005). "The language must

also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Id. at 470, 617 S.E.2d at 377. "A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." Id. at 472, 617 S.E.2d at 378.

Section 17-3-50 must be read as a whole and construed together to give effect to the Legislature's intent. The statute addresses fees and expenses for private attorneys appointed to represent indigent defendants and public defenders and approved experts in their cases. The "defendant" referenced in the statute is the indigent defendant and the attorney the statute references is the private appointed attorney or the public defender.

Other sections of the Defense of Indigents Act support the Agency and the trial court's interpretation. Section 17-3-80 is titled, "Appropriation for expenses of **appointed** private counsel and public defenders; restrictions and limitations." S.C. Code Ann. § 17-3-80 (emphasis added). The text of the section provides, "This fund must be used to reimburse private-appointed counsel, public defenders, and assistant public defenders for necessary expenses . . . actually incurred in the representation of persons pursuant to this chapter, so long as expenses are approved by the trial judge." Id. Section 17-3-90 is titled "Vouchers for payment for services by private appointed counsel and for reimbursement of expenses; approval and submission for payment." S.C. Code Ann. § 17-3-90. This section's text begins with "Private, appointed counsel shall submit . . . and the public defender shall do likewise. . ." The Act sets the standard for indigency as a person who "is financially unable to employ counsel." S.C. Code § 17-3-30(A). Eastwood employed Cornwell for a fee of fifteen thousand dollars. See also S.C. Code § 17-3-20 ("unable financially to retain adequate counsel"); S.C. Code § 17-3-45(A) ("financially unable to employ counsel"); Rule 602(b)(3) ("a person is indigent if that person is financially unable to employ counsel").

The legislative intent and plain language of Chapter 3 of Title 17 are clear that defense of indigent funds is limited to cases where private counsel or the public defender is appointed. Cornwell cannot cherry pick isolated phrases to arrive at her desired interpretation. The trial court also correctly deferred to the Agency's interpretation of this statutory language, which the Agency is tasked with implementing. See Brown v. DHEC, 348 S.C. 507, 560 S.E.2d 410 (2002) (stating that "the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation.").

The deference described in Brown has existed in our jurisprudence for nearly two hundred years and exists for a very good reason. See Read Phosphate Co. v. S.C. Tax Comm'n, 169 S.C. 314, 168 S.E. 722, 728 (1933) citing Edwards' Lessee v. Darby, 25 U.S. 206 (1827). In Darby, the United States Supreme Court said, "In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect. The law was not only thus construed by the commissioners, but that construction seems to have received, very shortly after, the sanction of the legislature." Darby, 25 U.S. at 210. State agencies rely on their interpretation of a statute when they make reports and financial forecasts to the Legislature. They rely on existing interpretations when they seek funding. As will be addressed below, Cornwell's interpretation would result in a massive increase in the Agency's expenditures which would need to be dealt with immediately by the Legislature.

Cornwell fails to address the supporting language of our Court's appellate rules. The Legislature expressly gave the Supreme Court the authority to make rules necessary for the administration of the Defense of Indigents Act. S.C. Code Ann. § 17-3-110. The Supreme Court used this authority in Rule 602, SCACR. This rule provides for the appointment of public

defenders or private counsel but also specifically addresses cases where counsel has been retained. See Rule 602(c), SCACR. The rule states that, "If counsel shall have been retained and partially paid for his services in either trial or appeal stages, no reimbursement may be had from indigent funds." Id. The trial judge correctly found this rule's language was unambiguous and controlled the result here. The Rule's clarity is likely why Cornwell makes no effort to address it in her brief.

Rule 602(c)'s plain language also accords with the Agency's interpretation of section 17-3-50. If, as Cornwell argues, sections 17-3-50(B) and (C) allow privately retained attorneys to get funds for experts, then the statute and the rule conflict. But under the Agency and the trial judge's interpretation, no conflict exists. If section 17-3-50 only applies to appointed counsel, then Rule 602(c)'s prohibition of payment from indigent funds to privately retained attorneys makes perfect sense. The trial court correctly interpreted these statutes and upheld the Agency's refusal of payment in a retained case.

*b. This Court Should Not Create an Unfunded Mandate*

The funds appropriated by the General Assembly are intended to provide for indigent representation for those persons that are financially unable to retain counsel. See S.C. Code Ann. §§ 17-3-30, -45. The funds are not appropriated to supplement fees and costs for privately retained counsel. If this Court decides Cornwell's interpretation of the Defense of Indigents Act is correct, it will allow private lawyers to render their clients indigent with a large fee, keep that fee for themselves, and shift the payment of all expenses to the taxpayers. If South Carolina wants to create a gigantic subsidy benefiting for-profit criminal defense lawyers, such a decision should only be made by the Legislature.

People who are financially able to retain counsel assume the cost of that litigation. It is standard practice in any retainer agreement that issues of litigation costs are addressed and included

as part of the contract. Cornwell admitted that her retainer agreements "provide notice to the client that, in addition to the agreed upon legal fee, they are also responsible for all additional costs associated with resolving their case." R. ___ (Response to SCCID's Objections to Funding Orders, p. 3). The retainer agreement governs each parties' obligations to perform under the terms of that agreement. The Rules of Professional Conduct require attorneys to tell the client the expenses for which the client will be responsible. See Rule 1.5(b), Rules of Prof. Conduct, Rule 407 SCACR.

The taxpayers are not a party to that agreement. Because appellant's "discounted" fee of $15,000 failed to account for possible experts—in a murder case where the need for experts is extraordinarily likely—the state treasury should not then be required to provide funds already budgeted for the defense of persons who are truly financially unable to employ counsel. The Defense of Indigents Act is not an insurance policy for poorly conceived fee arrangements.

The Agency obviously agrees that the constitution requires state governments to provide indigent citizens with the basic tools for their defense. See Br. App. at 5 citing Ake v. Oklahoma, 470 U.S. 68 (1985). The Agency exists for this purpose. But our Supreme Court has recognized that there are limits. See Bailey v. State, 309 S.C. 455, 424 S.E.2d 503 (1992). Bailey dealt very carefully and specifically with statutory caps on fees for attorneys appointed in capital cases. Id. at 464-65, 424 S.E.2d at 508-09. The Court held that the statutory caps were not "absolute allowances in capital cases, but merely limitations upon the State's funds allocated for the Defense of Indigents." Id. Counties were required "to supplement as required in a given case." Id. The Court specifically declined to address the "issue of compensation for attorneys appointed to non-capital cases." Id.

Even with the Bailey Court's findings about "the awesome burden" on lawyers defending capital cases, it still declined to create an unfunded mandate on the Agency. Id. And Bailey dealt

only with **appointed** attorneys in **capital** cases. The Court was careful not to tread any farther than it needed. It declined to address compensation for appointed attorneys in non-capital cases. It recognized that government's resources are scarce and that Ake does not require the State "to provide unlimited funding." Id. at 459, 424 S.E.2d at 506. Contrast the Supreme Court's measured approach in Bailey with the sweeping policy decision Cornwell seeks from this Court. Cornwell asks this Court to judicially mandate payment of expert fees in cases where lawyers are retained. This Court should not engage in judicial activism to subsidize private lawyers when the Legislature has declined to do so.

Cornwell mistakenly relies on dicta in Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015). Reeves was a PCR case and did not deal with the issue before the Court here. Trial counsel in Reeves did almost nothing. He failed to recognize the need for an expert medical witness. Reeves at 377-78, 782 S.E.2d at 752-53. He did not consult with his client about consulting an expert. Id. The specific holdings of the case were that trial counsel (1) "should have discussed hiring a medical expert with" his client, and (2) "did not provide a legitimate trial strategy for failing to consult with an expert before trial or call a medical expert witness to testify at trial." Id. Trial counsel could recall almost nothing about the case except there was a "'question about money.'" Id. His file was destroyed. Id.

Cornwell's entire argument is premised not on the holding of Reeves—that trial counsel failed to even consult with an expert or his client about getting an expert—but dicta in a footnote. In footnote five of Reeves, this Court wrote, "if Reeves was indigent and could not afford to pay for an expert, the South Carolina Office on Indigent Defense could have provided funds needed to secure an expert." Reeves at n.5. While Reeves involves retained counsel, it does not stand for the principal that the Defense of Indigents Funds are available to retained counsel. The issue of

indigency was never raised in Reeves at the trial level (and thus not are part of the record) and only referenced in dicta during the appeal stage. Reeves did not weigh the factors to determine indigency and did not rule upon or even consider the effect of counsel being retained on the ability to access indigent funds. Had the Agency believed Reeves established a right for retained counsel to access indigent funds, the Agency would have sought review by the South Carolina Supreme Court. A massive transformation of how attorneys are paid in criminal cases cannot rest on dicta in a footnote on an issue that was not litigated.

Cornwell asks this Court to ignore the current law and require the Agency to pay costs without budgetary authorization from the Legislature. While some states have made provisions in their statutes for retained counsel to potentially access taxpayer funds, South Carolina is not one of them. Any decision to provide access to state funds for retained counsel is an issue for the General Assembly to address through their "power of the purse" in the annual appropriations acts or statutory changes.

Florida is an example of a state where the Legislature allows taxpayer funds to be used for costs when an attorney is retained. See Fla. Stat. Ann. § 27.52(5). Florida's provision is entitled "Indigent for costs." Id. It contains a comprehensive regulatory scheme that allows for application by the defendant and review by Florida's Justice Administrative Commission. Id. The commission is allowed "to contest any motion to declare a person indigent for costs." Id. at § 27.52(5)(b). The statute lists six specific criteria for a court to consider when allowing a defendant to be declared indigent for costs. Id. at § 27.52(d)(1-6). The sixth factor is the amount the defendant paid the attorney. Id. It contains "a presumption that the applicant is not indigent for costs if the amount of attorney's fees exceeds $5,000 for a noncapital case or $25,000 for a capital case in which the

state is seeking the death penalty." Id. Cornwell was paid three times the amount of the presumption in Florida—a far wealthier state than South Carolina.

Florida's statute shows the financial realities inherent in this issue and the need for consideration by a legislature of the economics involved. South Carolina has not done so. Our Legislature's failure to enact this kind of statute means this Court should not create one by judicial fiat. Without legislative study and consideration, there would be profound detrimental consequences to the indigent defense system. If retained counsel had unfettered access to funds for investigative, expert, or other services based upon the mere assertion of indigency after the client has paid what is often a substantial retainer fee, it would create a system ripe for exploitation wherein counsel can collect more in attorneys' fees by shifting the cost of experts and expenses to the State to cover the cost of a private contractual matter. The Legislature entrusted the Agency and the courts with the authority to protect these limited resources to ensure funds are available for their intended purpose. Cornwell's audacious argument would frustrate this legislative intent.

*c. The Two-Issue Rule Bars Cornwell's Appeal*

As a separate and independent ground for denying appellant's Rule to Show Cause, Judge Murphy found that Cornwell did not follow the Agency's procedures when she sought payment. R. ___ (Order Denying Defendant's Rule to Show Cause at p. 6). Appellant has not appealed this ruling. Her failure to appeal this separate and independent ground bars consideration of her arguments. See Atlantic Coast Builders v. Lewis, 398 S.C. 323, 328-30, 730 S.E.2d 282, 284-85 (2012).

"Under the two-issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." Id. (internal quotations omitted). In Lewis, the appellant appealed two

out of the three grounds on which liability was based. Id. Because Lewis failed to appeal the third ground, the Court held "our consideration of Lewis's arguments is barred by the two-issue rule." Id.

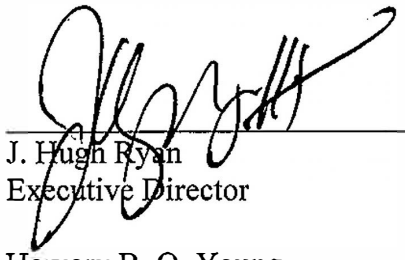
Judge Murphy correctly found that the 2006 Voucher Order and the Defense of Indigents Act gave the Agency the authority to create procedures for the payment of vouchers. R. ___ (Order Denying Defendant's Rule to Show Cause at p. 6). It has been a long-standing requirement (not since 2021 as alleged by appellant) as established by the 2006 Voucher Order that "upon appointment by the court in an indigent case or proceeding, counsel shall notify the office of Indigent Defense within 15 days of said appointment by registering the case online at the Indigent Defense's website…". The Agency's Voucher Payment Policy requires that "within 15 days of receiving notice of the appointment or assignment of any indigent defense case, counsel must register the case with SCCID online at www.sccid.sc.gov." In addition, the policy also requires "the appointed attorney must submit all Funding Orders approved by the Court to SCCID within 15 days of the date of the order."

Cornwell did not submit the funding orders to the Agency within fifteen days. Her failure prevented the Agency from contesting payment for experts in a retained case until after the services were rendered. Had Cornwell followed the Agency's procedures, she may have attempted to register the case, but questions could have been raised by the Agency regarding why she did not have an order of appointment. Cornwell could have sought a continuance of the trial until the matter of payment of the experts was decided by the trial court after objection by the Agency. The Agency's procedures exist to prevent situations like the one in which Cornwell found herself. The trial judge correctly found that her failure to follow the Agency's procedures prevented the relief

she sought. Now, on appeal, Cornwell's failure to appeal this finding bars consideration by this Court of her arguments. The decision below must be affirmed.

## CONCLUSION

For the foregoing reasons, the decision of the trial court should be affirmed.



J. Hugh Ryan
Executive Director

Hervery B. O. Young
Deputy Director and General Counsel

ATTORNEYS FOR RESPONDENT

This 4th day of November, 2024.