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Exhibit D

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August 18, 2023

The Honorable Renee Elvis
Clerk of Court, Horry County
P.O. Box 677
Conway, SC 29528-5080

Re: *Jerome Jenkins, Jr. v. State of South Carolina*
Case No. 2022-CP-26-08071

FILED
HORRY COUNTY
2023 AUG 23 P 1:59
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

Dear Ms. Elvis:

Enclosed for filing please find Mr. Jenkins' Response to Respondent's Motion to Prohibit *Ex Parte* Funding Requests and Orders, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide additional information.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.

E. Charles Grose, Jr.

cc: The Honorable R. Kirk Griffin (via email and US Mail)
John L. Warren, III, Esquire (via email only)
Melody Jane Brown, Esquire (via email only)

THE STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Jerome Jenkins, Jr., SCDC# 6034,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No. 2022-CP-26-08071

RESPONSE TO RESPONDENT'S
MOTION TO PROHIBIT *EX PARTE*
FUNDING REQUESTS AND ORDERS

Applicant, Jerome Jenkins, Jr., responds to the State's motion for this Court to issue an order prohibiting *ex parte* funding requests and orders. Contrary to the State's argument, other circuit courts have held that the Uniform Post-Conviction Procedure Act ("PCR Act"), S.C. Code Ann. § 17-27-10, *et. seq.*, permits *ex parte* and *in camera* funding requests and authorization on behalf of indigent death-sentenced post-conviction relief ("PCR") applicants. *See* S.C. Code Ann. § 17-27-160 (incorporating funding provisions of S.C. Code Ann. § 16-3-26).

I. Introduction

South Carolina's statutes, case law, and longstanding procedure protect capital PCR applicants' rights to submit funding requests for attorneys' fees and investigator and expert services to the presiding judge through *ex parte* and *in camera* motions. The State's request to prohibit *ex parte* funding requests, contrary to this authority, relies on dicta in *Thames v. State*¹ and unpublished orders in *Sanders v. State*² and *Stanko v. State*.³ Reliance on these cases is inappropriate because the Supreme Court did not consider or rule on the statutory and constitutional issues

¹ *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1996).

² *Sanders v. State*, Appellate Case No. 2022-000351 (S.C. Sup. Ct. filed June 8, 2022).

³ *Stanko v. State*, Appellate Case No. 2015-000212 (S.C. Sup. Ct. filed Feb. 25, 2015).

central to this proceeding. Granting the State's request would prejudice Mr. Jenkins' position in this litigation by providing the Attorney General's Office with a windfall of information that they are not entitled to know at this stage.

II. Argument

A. *Ex parte* and *in camera* funding procedures are authorized by

The State mischaracterizes the legal significance of the dicta from *Thames*, *Sanders*, and *Stanko*, as these cases do not address—much less control—*ex parte* funding issues in capital PCR proceedings. Indeed, other South Carolina circuit courts have rejected the arguments advanced by the State. *See, e.g., Inmon v. State*, No. 2012-CP-39-00918 (Nov. 16, 2015) (denying state's motion to unseal and disclose *ex parte* funding motions and communications) (Exhibit A); *Bryant v. State*, No. 2016-43-00828 (denying state's motion from the bench) (Exhibit B).

1. Section 17-27-160 authorizes *ex parte* and *in camera* funding procedures by incorporating the *ex parte* funding procedures in Section 16-3-26.

South Carolina's capital PCR procedures are set forth in Section 17-27-160, which provides that counsel appointed in capital PCR cases “shall be compensated from the funding provided in § 16-3-26 in the same *manner* and rate as appointed trial counsel.” S.C. Code Ann. § 17-27-160(B) (emphasis added). Pursuant to Section 16-3-26(C)(1), the court evaluates whether “investigative, expert, or other services are reasonably necessary” in *ex parte* proceedings. Thus, by incorporating Section 16-3-26 into the capital PCR procedures, the General Assembly intended that requests for investigative expenses, experts, and other expenses be heard in *ex parte* proceedings.

Moreover, the plain language of Section 17-27-160 specifically excludes Section 16-3-26(I), which prohibits the appointment and compensation of out-of-state attorneys in capital trials. However, Section 17-27-160 *does not* exclude Section 16-3-26(C)(1)'s requirement that funding

requests be considered by the Court in *ex parte* proceedings. This is further evidence that the plain language of Section 17-27-160 expressly incorporates the *ex parte* provision of Section 16-3-26(C)(1). *See Ex parte Lexington County*, 314 S.C. 220, 225, 442 S.E.2d 589, 592 (1994) (“When terms which are contained in a statute are clear and unambiguous, the courts are required to apply them according to their literal meaning.”).

Additionally, *ex parte* funding requests must be heard *in camera* in order to protect the equal protection rights of indigent inmates on death row as compared to death-sentenced inmates with the means to retain investigators and experts. *Cf. Douglas v. People of State of Cal.*, 372 U.S. 353, 355 (1963) (“[T]here can be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has.’” (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956))). To require Mr. Jenkins to proceed in any other manner violates the plain meaning of Sections 16-3-26 and 17-27-160.

2. Dicta in *Thames* does not control.

Contrary to the State’s argument, footnote one of *Thames* does not support a finding that Mr. Jenkins is not entitled to *ex parte* and *in camera* funding proceedings. Footnote one of *Thames* states that although Sections 16-3-26(C) and 17-3-50(B) mandate *ex parte* proceedings for defendants, “[t]hese statutory provisions are . . . inapplicable to post-conviction relief proceedings.” *Thames v. State*, 325 S.C. 9, 11–12, 478 S.E.2d 682, 682–83 n.1 (1996). However, this footnote is *dicta*, as the non-capital applicant did not seek *ex parte* review of her request for expert services. In fact, neither *Thames* nor the State raised the *ex parte* issue on appeal. (*See Exhibit C* (briefs of parties in *Thames*)). But even if footnote one in *Thames* was not *dicta*, it is not controlling because of the General Assembly’s enactment of Section 17-27-160.

Importantly, the facts in *Thames* arose *prior to* the enactment of Section 17-27-160. *Thames* was submitted to the Supreme Court on May 15, 1996 and decided on December 2, 1996. Section 17-27-160 did not take effect until June 18, 1996. As discussed earlier, South Carolina has adopted this specific statutory procedure for capital PCR cases, and the General Assembly expressly incorporated the *ex parte* funding provision of 16-3-26(C)(1).

3. The unpublished orders in *Stanko v. State* and *Sanders v. State* do not control.

The State also relies on a footnote of an unpublished order from *Stanko v. State*, Appellate Case No. 2015-000212 (S.C. Sup. Ct. filed February 25, 2015), which states “the issue of *ex parte* proceedings in PCR matters, which is at the heart of the petition currently before this Court, was addressed in *Thames v. State* . . . and such proceedings were found to be improper.” (Mot. at Ex. 2 n.2). However, pursuant to South Carolina Appellate Court Rule 268(d)(2), this unpublished order has “no precedential value and should not be cited except in proceedings in which they are directly involved.” *Cf.* Rule 220(a), SCACR (stating that unpublished opinions “shall be of no precedential value”). Additionally, the unpublished order does not reach the merits of the issue. Rather, it remands the case to the circuit court for consideration of the State’s motion. Finally, *Stanko* cites footnote one from *Thames*, which, as previously discussed, is *dicta* and does not control.

Similarly, the State relies on an unpublished order from *Sanders v. State*, Appellate Case No. 2022-000351 (S.C. Sup. Ct. filed June 8, 2022). (Mot. at Ex. 3). *Sanders* was a non-capital case where a petitioner sought a petition for writ of habeas corpus in the Supreme Court of South Carolina’s original jurisdiction. (*Id.*). The petitioner sought *ex parte* funding from the Supreme Court and the State moved to strike the request as improper. (*Id.*). The Court denied the request for funding on the merits. (*Id.*). The Court—in *dicta* and without any discussion—cited to *Thames*

but then “den[ie]d the [State’s] motion to strike the *ex parte* motion as moot.” (*Id.* at 2). As noted above, *Thames* is itself dicta arising from facts that predated Section 17-27-160. And, again, this unpublished order has “no precedential value and should not be cited except in proceedings in which they are directly involved.” Rule 268(d)(2), SCACR.

4. Other capital PCR courts have found *ex parte* and *in camera* funding proceedings appropriate in capital PCR cases.

Other courts have declined to follow the dicta from *Thames* and *Stanko*⁴ and have interpreted Section 17-27-160 to clearly allow for *ex parte* funding proceedings in capital PCR cases. In *Inmon v. State*, 2012-CP-39-00918, a capital PCR action, the State made identical requests and arguments in support of unsealing funding proceedings. There, the State’s motion was based on the unpublished order in *Stanko* and the footnote from *Thames* that are discussed above. Observing that the State “relie[d] on an unpublished interlocutory Order of the Supreme Court that cites, in its footnote, another footnote, in a case that cites specific statutes as those statutes were, then, constituted and construed,” the *Inmon* court denied the State’s motion, finding that Section 17-27-160 incorporates all funding provisions of Section 16-3-26 (except Section 16-3-26(I)), including the provisions for funding investigative, expert and other services. Order, *Inmon v. State*, No. 2012-CP-39-00918 (Nov. 16, 2015), at 2, 6–7 (Exhibit A). Accordingly, the Court held that Mr. Inmon was permitted “to make applications in *ex parte* and in camera proceedings.”⁵ (*Id.* at 7).

Additionally, in *Bryant v. State*, Case No. 2016-CP-43-00828, a capital PCR case, the Honorable William H. Seals, Jr. denied the State’s motion made during a hearing on September 1, 2016,

⁴ *Sanders* was decided in 2022; however, it contains no discussion or analysis of *ex parte* funding in capital PCR proceedings and has *no* precedential value. Therefore, it would not have affected the result of the cases discussed below.

⁵ The State sought review of the *Inmon* Order by filing a petition for an extraordinary writ of certiorari in the South Carolina Supreme Court. Appellate Case No. 2015-002634. The Supreme

objecting to funding requests made *ex parte*. (Exhibit B at 17–20). Agent the State relied on *Thames*. Exhibit B, at 17-18. The State did not appeal this ruling. See *Bryan v. State*, Appellate Case No. 2019-000610.

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5. *Ex parte* funding does not violate the Code of Judicial Conduct.

Finally, the State attempts to cast *ex parte* funding procedures as violative of Canon 3(B)(7) of the Code of Judicial Conduct. That provision, however, *does* permit a judge to consider “*ex parte* communications when expressly authorized by law to do so.” Rule 501, SCACR, Canon 3(B)(7). Here, as detailed above, Section 17-27-160 expressly incorporates the *ex parte* funding procedure from Section 16-3-26. This is the quintessential type of *ex parte* communication that is “authorized by law.” Rule 501, SCACR, Canon 3(B)(7). In fact, the Commentary to Canon 3(B)(7) cites Section 16-3-26 and lists “the determination of fees and expenses for indigent capital defendants” as an example of “when an *ex parte* communication may be expressly authorized by law.” *Id.* cmt. (citing S.C. Code Ann. § 16-3-26).

B. Independent of these statutory provisions, Mr. Jenkins has due process and equal protection rights to seek funding in *ex parte* and *in camera* proceedings.

There is no constitutional requirement that a state create a system of post-conviction proceedings. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). However, “when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause” of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). If a person is denied

Court denied the State’s petition on March 26, 2016. The State has not appealed this ruling after Judge Macaulay issued the final order in the case. *Inmon v. State*, Appellate Case No. 2020-000881.

fundamental fairness or treated differently by the state simply because they are indigent, both due process and equal protection are implicated:

“Due process” emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. “Equal protection,” on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

Ross v. Moffitt, 417 U.S. 600, 609 (1974).

The Supreme Court of the United States has held that “the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each.” *Smith v. Bennett*, 365 U.S. 708, 714 (1961). These concerns are heightened in the capital PCR process. See *Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999) (“Access to equal justice is an even greater interest where the State seeks to impose the penalty of death.”); see also *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (holding that funding inequities are “exacerbated in capital case appointments where the attorney is charged with the awesome responsibility of defending a person’s life”).

“[F]undamental fairness entitles indigent defendants to ‘an adequate opportunity to present their claims fairly within the adversary system.’” *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quoting *Ross*, 417 U.S. at 612).⁶ This promise of “an adequate opportunity,” vanishes if the State—with its nearly unlimited resources⁷ to investigate Mr. Jenkins’ case—likewise has access to

⁶ *Ake* entitles a defendant to expert assistance when he “is able to make an *ex parte* threshold showing to the trial court” that such assistance is necessary. 470 U.S. at 82. *Ake* presumed the *ex parte* nature of the showing.

⁷ As the Supreme Court of South Carolina has noted, the State has “the entire array of state, county, and municipal law enforcement” at its disposal. *Bailey*, 309 S.C. at 460, 424 S.E.2d at 506.

privileged information *solely* because of Mr. Jenkins' indigency. As the Supreme Court of South Carolina:

[T]here is a substantial probability of prejudice which would result from a public hearing in at least two respects. First, public disclosure of the defendants' request for expert witness fees would telegraph to the prosecution the defendants' defense strategy. Second, the defendants would have to reveal their defenses only because they are indigent. Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection. *See Long v. Iowa*, 385 U.S. 192, 87 S. Ct. 362, 17 L. Ed.2d 290 (1966); *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956). The equal protection implications become obvious where a non-indigent capital defendant is under no obligation to disclose to the county or the public how much or to whom expenses are to be paid, while the indigent defendant is open to full public scrutiny. There would appear to be no reasonable alternatives to closure of the *ex parte* hearing which would protect these defendants' rights to a fair trial.

Ex Parte Lexington County, 314 S.C. at 228, 442 S.E.2d at 594.

Although *Lexington County* and *Ake* address the rights of defendants at trial to *ex parte* proceedings, equal protection and due process rights extend to post-conviction proceedings. *See Long v. District Court of Iowa, In and For Lee County, Fort Madison, Iowa*, 385 U.S. 192, 194 (1966) ("We specifically held in *Smith [v. Bennett]* that having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial consideration."); *Lane v. Brown*, 372 U.S. 477 (1963) (finding that the prevention of the right to appeal a denial of a writ of error *coram nobis* due to indigency violated equal protection). Indeed, the Supreme Court of the United States has expressly held that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny the prisoner equal protection of the laws." *Smith*, 365 U.S. at 709.

Put simply, granting the State access to privileged information about Mr. Jenkins' case and strategy—when it would have no such access if Mr. Jenkins was not indigent—would be a violation of Mr. Jenkins' due process and equal protection rights.

III. Conclusion

For the foregoing reasons, this Court should deny the State's motion to prohibit *ex parte* funding requests and orders.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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August 18, 2023

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THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Jerome Jenkins, Jr., SCDC# 6034,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No. 2022-CP-26-_____

Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina by email-ing at copy to counsel, at counsel's AIS email address, as reflected below:

Melody Jane Brown, Esquire
S.C. Attorney General's Office
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Columbia, SC 29211-1549
mbrown@scag.gov

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By s/E. Charles Grose, Jr.

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August 18, 2023
Greenwood, South Carolina

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Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF

Jerry Buck Inmon,

Applicant,

vs.

State of South Carolina,

Respondent.

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CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-39-00918
(Capital PCR Action)

ORDER DENYING MOTION
TO UNSEAL AND DISCLOSE

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This matter is before the Court on the State's motion, served on September 10, 2015, for the Court to issue an order unsealing *ex parte* funding motions, requests and orders already issued, disclosing to the State the content of all *ex parte* communications between the Court and counsel for the Applicant, Jerry Buck Inmon,¹ and providing the Attorney General's Office with notice and opportunity to be present and heard at any future *ex parte* funding requests or hearings. Mr. Inmon responded to this motion on September 25, 2015, and the State replied on October 2, 2015. By agreement of the parties, the hearing on the motion was held in Anderson County, October 23, 2015, at which the State was represented by J. Anthony Mabry, Assistant Attorney General, and the Applicant by Diana L. Holt, Esquire, and E. Charles Grose, Jr., Esquire.

The basis of the State's motion is an unpublished interlocutory Order of the Supreme Court of South Carolina denying, *inter alia*, the State's request for that "Court to review the circuit court's rulings on *ex parte* motions regarding funding of experts filed in this matter," where, in its second footnote, the Court stated:

¹ The applicant's last name is correctly spelled "Inmon," nevertheless, it is spelled "Inman" in prior proceedings and prior court documents in this case.

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J. A. Mabry

[fn. 2] "We note, however, that the issue of *ex parte* proceedings in PCR matters, which is at the heart of the petition currently before this Court, was addressed in *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1986) [*sic* - 1996] and such proceedings were found to be improper."

Stanko v. State, Appellate Case No. 2015-000212 (Filed February 25, 2015).

In *Thames v. State*, *supra*, the Supreme Court had affirmed the post-conviction relief judge's denial of the petitioner's motion to have a third expert to examine him and stated, again in a footnote, that as for the sections then providing for *ex parte* proceedings":

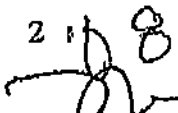
[fn. 1.] "S.C. Code Ann. § 16-3-26(C) and § 17-3-50(B) (Supp. 1995); *Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, in-applicable to post conviction relief proceedings."

Thames, 325 S.C. at 11, 478 S.E. 2d at 682, (emphasis supplied).

Inasmuch as the Respondent/Petitioner relies on an unpublished interlocutory Order of the Supreme Court that cites, in its footnote, another footnote, in a case that cites specific statutes as those statutes were, then, constituted and construed, the instant matter raises a purely legal question that can be resolved under the well-settled rules of statutory construction. The Court has carefully considered the statutes, pleadings, exhibits and other filings, and the able arguments of counsel, and, after a brief review of the procedural history and standard of review, the Court makes its findings of fact and conclusions of law.

Procedural History

On August 19, 2008, Mr. Immon pled guilty to first-degree burglary, kidnapping, first-degree criminal sexual conduct, and murder; thereafter, on April 22, 2009, the Honorable Edward W. Miller, Circuit Judge, sentenced Mr. Immon to death for murder,

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thirty (30) years imprisonment for first-degree burglary, and thirty years imprisonment for first-degree criminal sexual conduct, the sentences to run consecutively. Pursuant to S.C. Code Ann. § 16-3-1910, Judge Miller did not impose a sentence for kidnapping.

On December 28, 2011, the Supreme Court of South Carolina affirmed Mr. Inmon's convictions and sentences, *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011), and, on October 1, 2012, the Supreme Court of the United States denied Mr. Inmon's petition for writ of *certiorari* in *Inman v. South Carolina*, 133 S. Ct. 219, 184 L.Ed2d 112 (2012).

Mr. Inmon subsequently and timely filed this action for post-conviction relief. The Court appointed Ms. Holt and Mr. Grose to represent Mr. Inmon on November 18, 2012.

Standard of Review

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. A statute should be read as a whole. Further, [s]tatutes which are part of the same legislative scheme should be read together. Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning."

Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (internal quotations and citations omitted). "[W]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993). "[A]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably

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discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Nelson v. Ozmint*, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (citing *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010)).

FINDINGS OF FACT

The Supreme Court in *State v. Thames*, *supra*, considered those statutes providing for indigent "requests for expert services" to be "determined in *ex parte* proceedings. S.C. Code Ann. § 16-3-26(C) and § 17-3-50(B) (Supp. 1995); *Ex parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994)." Thereafter, the General Assembly enacted the "South Carolina Effective Death Penalty Act of 1996," Section 6 of which Act adds:

"SECTION 17-27-160 SO AS TO PROVIDE FOR THE MANNER IN WHICH DEFENDANTS SENTENCED TO DEATH MUST FILE APPLICATIONS FOR POST-CONVICTION RELIEF; ...TO FURTHER PROVIDE FOR THE APPOINTMENT AND COMPENSATION OF COUNSEL IN THESE PROCEEDINGS"

Title of Act No. 448, 1996 Acts 2709, effective date, June 18, 1996.

"§17-27-160. Capital case post-conviction relief procedures." S.C. Code Ann. (2014), as enacted, expressly provides in Subsection "(B) ... Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed counsel, provided that section 16-3-26(I) shall not apply to counsel [attorneys to be licensed to practice in and residents of this State] appointed in post-conviction relief cases." *Ibid.* at 2713, S.C. Code Ann. (2014) (emphasis supplied).

Section 16-3-26 (C)(1) provides that: "Upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court

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shall authorize the defendant's attorney to obtain such services on behalf of the defendant, ... " S.C. Ann. (2003).

Conclusions of Law

"In 1969 South Carolina adopted as part of Title 17 (Criminal Procedure) of the South Carolina Code . . . the Uniform Post-Conviction Act," *Harvey v. South Carolina*, 310 F. Supp. 83, 84 (fn. 2), (D.S.C. 1970), currently codified at S.C. Code Ann. §§ 17-27-10, *et. seq.* The Uniform Post-Conviction Procedure Act replaced "all other common law, statutory or other remedies [previously] available for challenging the validity of the conviction or sentence." S.C. Code Ann. § 17-27-20(B). Ordinarily, under the "Uniform Post-Conviction Procedures Act," fees for appointed counsel and expenses for expert and investigative services are addressed under Chapter 3 of Titles 17 regarding Defense of Indigents. *See* S.C. Code Ann. § 17-3-50."

Effective June 18, 1996, our General Assembly adopted the "South Carolina Effective Death Penalty Act of 1996," which amended the "Uniform Post-Conviction Procedure Act."

" . . . to add section 17-27-130 so as to provide for circumstances when the attorney-client privilege is deemed waived in post-conviction proceedings or collateral relief procedures, and to provide for certain access of new counsel to the files of prior counsel in cases of defendants sentenced to death; to add section 17-27-150 so as to provide the conditions under which a party in capital and noncapital post-conviction relief proceedings is entitled to invoke the process of discovery; and to add section 17-27-160 so as to provide for the manner in which defendants sentenced to death must file applications for post-conviction relief, to provide for the assignment of judges to handle these applications, to further provide for the appointment and compensation of counsel in these proceedings, and to provide for other procedural matters including the certain time limitations in these capital post-

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conviction relief proceedings."

Title of Act No. 448, 1996 Acts 2709-2710, (emphasis supplied). By adopting this Act, the General Assembly sought to avail our state of the special federal *habeas corpus* provisions in capital cases contemplated by the "Anti-terrorism and Effective Death Penalty Act of 1996." 28 U.S.C.A. §§ 2261-2266.

To qualify for the special provisions under the federal act, a state must have "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C.A. § 2265. The Court therefore concludes that our General Assembly added S.C. Code Ann. § 17-27-160 with the intent to satisfy 28 U.S.C. § 2265.

Section 17-27-160(A) provides that: "If a defendant has been sentenced to death in South Carolina, he must file his application for post-conviction relief . . . ;" and Section 17-27-160(B) expressly provides that: "*Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel, . . .*" (Emphasis supplied). Considered in light of 28 U.S.C. § 2265, § 17-27-160 certainly contemplated counsel to be compensated for attorney fees and expenses in a "manner" that they can provide effective representation.

As contemplated by 28 U.S.C. § 2265, effective representation includes employing investigative and expert services. In fact, the plain terms of the statute support this conclusion. First, § 17-27-160 does not limit funding to attorney fees. Second, § 17-27-160(B) incorporates, by reference, all of § 16-3-26 except for subsection (I) that is

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expressly excluded.² Section 17-27-160(B), therefore, requires this Court to look to § 16-3-26 for the procedure to follow in order to obtain investigative, expert or other services.

Section 16-3-26(C)(1) provides:

"Upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment, from funds available to the office of indigent defense, of fees and expenses not to exceed twenty thousand dollars as the court shall deem appropriate. Payment of such fees and expenses may be ordered in cases where the defendant is an indigent represented by court-appointed, private counsel or the public defender." (Emphasis supplied).

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Thus, the procedure established by § 17-27-160's incorporation of § 16-3-26 for a capital post-conviction applicant to apply for these services is to proceed in an *ex parte* proceeding. Additionally, *ex parte* funding requests must be heard *in camera* in order to protect the equal protection rights of the indigent inmate on death row as compared to a death-sentenced inmate who had the means to employ investigators and experts. *Cf. Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994). To require Mr. Inmon to proceed in any other manner violates the plain meaning of §§ 16-3-26 and 17-27-160.

Because § 17-27-160 incorporates all funding provisions of § 16-3-26, including the provisions for funding investigative, expert and other services, the Court must allow Mr. Inmon to make applications in an *ex parte* and *in camera* proceedings. Accordingly, the States' Motion for the Court to issue an order unsealing Mr. Inmon's *ex parte* funding

² S.C. Code Ann. § 16-3-26(1) provides, "Notwithstanding another provision of law, only attorneys who are licensed to practice in this State and residents of this State may be appointed by the Court and compensated with funds appropriated to the Death Penalty Trial Fund in the Office of Indigent Defense. This proviso shall not pertain to any case in which counsel has been appointed on the effective date of this Act."

motions, requests and orders already issued, disclosing to the State the content of all *ex parte* communications between the Court and Mr. Inmon's counsel, and providing the Office of the Attorney General with notice and opportunity to be present and heard at any future *ex parte* funding requests or hearings must be **DENIED**. Any further hearings on Applicant's *ex parte* expense requests should be conducted consistent with the mandates of the death penalty statutes as amended and incorporated by the Effective Death Penalty Act of 1996.³

AND, IT IS SO ORDERED.

November 16, 2015
Walhalla, South Carolina


Alexander S. Macaulay, Presiding Judge⁴

³ Our Supreme Court succinctly held in *Ex parte Lexington County*:

"The equal protection implications become obvious where a non-indigent capital defendant is under no obligation to disclose to the county or the public how much or to whom expenses are to be paid, while the indigent defendant is open to public scrutiny. There would appear no reasonable alternatives to closure of the *ex parte* hearing which would protect these defendants' rights to a fair trial."

314 S.C. 220, 226, 442 S.E.2d 589, 593 (1994).

Indeed, both 28 U.S.C. §§ 2261-2266 and S.C. Ann §17-27-160 (2014) are intended to protect the rights of indigents.

⁴ Having decided this matter according to specific statutes of the applicable law, as now constituted, none having been addressed specifically by the Attorney General nor the Supreme Court decisions relied upon by the State, the writer is aware of the risk of being considered as "operating under the paternalistic belief" or "a paternalistic desire to protect" Applicant from procedural arguments to avoid this issue. See, *State v. Rivera*, 402 S.C. 225, 243-244, 741 S.E.2d 699, 703-704 (2013) (the issue of the "Victims Bill of Rights," S.C. Const. Art. I, § 24, to be "honored and protected by ... prosecutors and judges," S.C. Code Ann. § 16-3-659.1 (2003), was neither recognized nor addressed by the Attorney General or our esteemed Supreme Court). Nevertheless, this Court has complete confidence in our Judiciary and the Office of Indigent Defense.

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Exhibit B

State of South Carolina)
County of Sumter)

In The Court of Common Pleas
2016-CP-43-828

Stephen Corey Bryant,
Plaintiff,
vs.
State of South Carolina,
Defendant.

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Dillon, South Carolina
September 1, 2016

B E F O R E:

The Honorable William H. Seals, Jr.

A P P E A R A N C E S:

Mr. E. Charles Grose, Jr., Esquire
Ms. Diana L. Holt, Esquire
Attorneys for Plaintiff

Mr. Donald J. Zelenka, Esquire
Ms. Melody J. Brown, Esquire
Attorneys for Defendant

Hattie O. Gordon
Circuit Court Reporter

I N D E X

WITNESSESPAGE

(NO WITNESSES INTRODUCED DURING HEARING)

(NO EXHIBITS INTRODUCED DURING HEARING)

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1 THE COURT: Zelenka and Brown, have I got it right?

2 MRS. BROWN: That's right.

3 THE COURT: All right. I'm ready whenever you are.
4 Who would like to help me out with the schedule.

5 MRS. BROWN: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MRS. BROWN: The first matter, I have brought today
8 paper copies as you requested the records from prior
9 proceedings. This would include the plea at issue, the
10 first PCR, the first PCR appeal, federal habeas, which is,
11 you know, stay at the moment, and the success of
12 applications and I can hand that up at the of the
13 proceeding, if that would be okay with you.

14 THE COURT: That would be fine.

15 COURT REPORTER: Ask her to speak

16 MRS. BROWN: We requested the hearing today, Your
17 Honor - - -

18 THE COURT: The reporter asked that you speak up a
19 little bit. She's like me she's hard of hearing.

20 MRS. BROWN: We'll do. Your Honor, we're here today
21 from the Supreme Court's order of August 1st directive to
22 create a scheduling order. And we requested the hearing
23 because we had a couple of things we would request to be
24 built in to the order that you would issue.

25 First of all, setting that hearing date, we submit

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that's controlled by statute 17-27-160, Paragraph C. This would be the status conference after the return, in this case, after the order on the motion to dismiss. This would be hundred and eighty (180) days at the maximum of this time out of good caution for a continuing period. It would work out to, the week of February 27, 1977, initially. Your Honor, we are going to ask for four different things. (1) a date for discovery; (2) a date to resolve any discovery issues; (3) a status conference and date for motions for summary judgment, if any, (4) and then finally the actual hearing date scheduled in February. A few you considerations for Your Honor. Discovery of course, is automatic in these capital cases and I haven't filed the standard interrogatories or request yet because I thought it would be better to come to court today and see if we can just work something out. But the federal habeas is still pending so until we complete litigation here, other litigation is stalled. So I would submit to you that this should become a priority to complete this litigation as narrowly focused litigation, Your Honor. This is not a situation where we're going have investigation and new claims and that sort of thing, it's intellectual disability. And opposing counsel has been already investigating this matter and has been at least since January for purposes of the federal habeas and actually

1 used some fruits of that investigation for the amended
2 petition filed back in April of this year. And we're not
3 starting on a clean slate, we already have some
4 investigation there and, particularly, for discovery we're
5 requesting that all Atkins materials be turned over within
6 thirty (30) days. Now, this would be everything from the
7 federal habeas, everything from the plea which would
8 include mental health, mitigation, social history, and
9 specifically, Your Honor, and in the federal investigation
10 they have disclosed three IQ test, one of 79; one, 86; and,
11 one, 92. These are all standardized test recognize
12 instruments. We would like those test and when they were
13 given and information on those test. That's one reason
14 that we submitted it in the federal action and we would
15 submit here, probably it's going to support a motion for
16 summary judgment from us. That's why we're asking for
17 summary judgment date. But all of this has already been
18 disclosed, additional investigation. So what we would
19 suggest, Your Honor, if you would be so inclined, is
20 discovery due to us Monday, October 3rd. Motions related
21 to discovery filed no later than November 2nd. A status
22 conference for December 2nd. And if either party wishes to
23 file a motion for summary judgment the motion has to be
24 filed on that date, December 2nd. The responding party to
25 have thirty (30) days to respond. A status conference for

1 Monday, January 23rd and sort of as a catchall, Your Honor,
2 an evidentiary hearing tentatively scheduled to begin the
3 week of Monday, February 27th.

4 THE COURT: Anything further?

5 MRS. BROWN: No, sir, not at this time.

6 THE COURT: All right.

7 MRS. BROWN: Thank you, sir.

8 THE COURT: And Ms. Holt and Mr. Grose, is that
9 okay with you two?

10 MR. GROSE: I'm sorry?

11 THE COURT: Is that okay with you, everything that
12 you're hearing?

13 MR. GROSE: Not really.

14 THE COURT: what do you propose?

15 MR. GROSE: Well, it's just not a very realistic
16 time table and, you know, she is right, she hasn't sent us
17 any discovery motions, requesting to produced,
18 interrogatories, in this case and, of course, the Rules of
19 Civil Procedure apply and discovery would be ongoing. I'm
20 actually surprised that some of the materials that she's
21 talking about, they don't already have because some of
22 these materials were things that, what were obtained by the
23 State here in the original prosecution that have come to us
24 in those regards. So we will get with them and talk about
25 what we have and what's available now. But where we are

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1 and she's correct, that this is not happening in a vacuum
2 that there has been work that has been done on this
3 already. The work that has been done, much of that, that
4 was done in the federal habeas has already been turned over
5 to them as part of uphold we did in the federal habeas case
6 but what's important is, you know, an Atkins claim of
7 procedure is heavily investigative intensive some of which,
8 a lot of which has already been done but it is also
9 intensive with the use of the experts and while we have
10 been able to interview Dr. Donna Schwartz-Watts, now Dr.
11 Maddox, with regard to her testimony in the original
12 sentencing hearing and in the post conviction hearing and
13 while she has been able to review some additional
14 information and has given an affidavit which I believe you
15 have a copy of because it's attached to the pleadings with
16 the PCR application. If you don't I can get that for you.

17 THE COURT: I don't have a copy of anything.

18 MR. GROSE: Okay.

19 THE COURT: Except Justice Pleicones' order
20 appointing me to hear this case.

21 MR. GROSE: Well, I think she said that those
22 documents are here and, if not, I can get those for you.

23 THE COURT: Thank you.

24 MR. GROSE: But, essentially, what Dr. Maddox has
25 said is after reviewing additional information that she

1 believes that there should be a thorough assessment to
2 determine whether Mr. Bryant suffers from intellectual
3 disabilities. While we have had access to investigative
4 services in the federal case, we have not had access to
5 investigative services and one of the things that Mrs. Holt
6 and I, I mean, expert services, one of the things that Mrs.
7 Holt and I want to do is after this hearing is over, is
8 talk with you about what we need with regards to funding to
9 be able to move that forward. I have no problem within the
10 next thirty (30) days getting with them and, you know,
11 talking about what we have at this point. I can tell you
12 that just with the schedules of experts and things like
13 that and, you know, it's very unlikely that we're going to
14 be able to have reports to give to them, you know, within
15 thirty (30) days. The statutory time table of the hundred
16 and eighty (180) days is intended to be flexible. They
17 always come to court and ask for everything to be done in
18 an hundred and eighty (180) days but the reality is, is
19 that none of these cases even more focus one just on Atkins
20 has never been done in a hundred and eight (180) days. So
21 I think that under our three branches of government you
22 certainly have a lot of discretion and authority as far as
23 managing the schedule and I think that also includes that
24 it cannot be strictly dictated by statute as far as, you
25 know, that would be, you know, why I can set goals that

1 ultimately relies on what you determine is necessary for
 2 this case. So I would just submit to you that I think
 3 there could be an initial exchange of discovery with
 4 thirty (30) days but that's not going to the completion
 5 of the discovery. And the ---

6 THE COURT: When do you think the completion of
 7 discovery should be?

8 Well, that's going to be --- that's kind of difficult
 9 to say because -- because we're going to need -- that's
 10 going to depend on some of the experts. Mrs. Holt wants to
 11 address ---

12 MRS. HOLT: May I, Your Honor? I've done some
 13 several of these and so the reality of these cases is they
 14 usually require four experts. I don't know if the State is
 15 going to request an evaluation by DDSN or not. DDSN, of
 16 course, Your Honor, knows the body that determines and
 17 deals with people who suffer from intellectual disabilities
 18 whether there are in prison or out of prison. And so, I
 19 did the mitigation, investigation, for the federal habeas.
 20 I barely got the tip of the iceberg and it was just right
 21 there, there was enough right there to convince Judge
 22 Cooper that we should go forward. But there's so much work
 23 to be done and realistically, Your Honor, and I know the
 24 State will not be able to disagree, these cases, these
 25 Atkins cases take two to three years. It would be the

1 shortest one I've ever seen and that is with the judges
 2 pushing them and pushing them along. There just is not so
 3 much we can do, candidly. I can give you an example and in
 4 Mr. -- Elmore versus State that Atkins PCR took three
 5 years. They've just had a hearing in the matter of William
 6 Bell versus State from Anderson. That PCR initiated in
 7 2003 and it just got a ruling this year in favor of
 8 Bell. We're not on the William Bell spectrum of things by
 9 any means. But I think it's also important for, Your
 10 Honor, to know that if there is a finding of intellectual
 11 disability for Mr. Bryant, that we will not go back into
 12 federal court. We will resolve the case without going back
 13 to federal court. So there is no delaying that case. The
 14 judge, the federal judge in that case has said you guys do
 15 what you need to do, once the State, you know, take their
 16 full bite of the apple and they declined to -- they
 17 declined to hear the Atkins case preferring, that, Your
 18 Honor, the State get to determine the facts of it.

19 THE COURT: They have too much to do as you can
 20 see.

21 MR. GROSE: And just to add another example, we
 22 both worked on a pretrial case, State versus Benny Brown,
 23 and that crime happened in 2011 and it was late '15 when we
 24 -- no late '14, when we began the Atkins hearing in that
 25 case. Now, it was slowed down a little bit because we had

1 a change in elected solicitors. And so once, you know, one
2 lost on primary and another one was coming in, there was a
3 delay but with ---

4 (Whereupon, Mrs. Holt said something to the
5 record)

6 MR. GROSE: Right. And that's --
7 relatively minimally contested evidence but a lengthy
8 record that had been spread out over several hearing dates
9 and it took Judge Addy approximately thirteen (13) months
10 for the conclusion of the hearing to be able to go back and
11 review everything and get to a ruling. So there's just
12 lots of layers of things that make it complicated. The
13 ongoing investigation, the use of experts, the unknown as
14 to whether or not they're going to request the DDSN
15 evaluation and then having to work with their schedule and
16 things that have to be discovered.

17 THE COURT: Taking that into account, I have to get
18 a scheduling order in place to the Chief Justice within
19 sixty (60) days of the date of the order. Mrs. Brown who
20 has given me a proposal, why don't you give me a proposal?

21 MRS. HOLT: Your Honor, I think it's also -- just
22 so that you'll understand we're not just sitting here
23 twiddling our thumbs. We have two -- we have a capital PCR
24 that will start in November. We're under protection for
25 that. A capital PCR that is supposed to start the week of

1 Labor Day and I imagine they're going to try to get another
2 -- my last -- my third capital PCR murder in between those
3 so that's unheard of, three capital PCR in there. So I
4 didn't want you to, ---

5 THE COURT: I understand. Just give me some proposed dates.
6 Give me some proposed dates.

7 MR. GROSE: All right. I would like a year for the
8 experts to do their work and then we don't know what
9 they're going to do. The way a lot of these things are
10 handled, we do our work and we present a lot of stuff, and
11 then they do stuff and present to us and so I'm trying to
12 factor in the fact that they'll need some time. So I would
13 say a year for the experts and another hundred and eighty
14 (180) days after that for the hearing. And with the
15 understanding that there may be, I mean, the statute
16 contemplates that things may have to be amended.

17 THE COURT: So you think, in total, a year and a
18 half.

19 MR. GROSE: Eighteen months for the hearing would
20 be, I think, a good try. Well, we'll just have to be in
21 constant communication with, Your Honor, about what's going
22 on and what needs to be done.

23 THE COURT: All right. Mrs. Brown, what do you say
24 to that?

25 MRS. BROWN: Your Honor, they're absolutely right,

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1 we always ask to go by the statute. The statute is there as
 2 a guidance. Now there is good cause shown
 3 (Whereupon, the court reporter had to stop the hearing due
 4 to training coming through town)

5 COURT REPORTER: Sorry about that.

6 THE COURT: All right. Go ahead.

7 MRS. BROWN: Thank you, Your Honor. There is a
 8 provision in the statute already for a continuance to be
 9 granted for good cause. But I do think that we should try
 10 to, at least, get here the statutory requirements. And if
 11 good cause should arise then the argument is made and, Your
 12 Honor, determines what amendments should be made, if any,
 13 to the scheduling orders. Your Honor, Mr. Grose mentioned
 14 today that testing was turned over in the federal habeas.
 15 It was only disclosed so I just wanted us all to get on the
 16 same page. I would like to have the test so I can get
 17 information from that and so forth. So I need the
 18 documentation for the disclosure of the information that's
 19 available. Your Honor, they're absolutely right that there
 20 has been incredible delay in capital cases. It is
 21 legendary. I'm not going to tell you it's not, otherwise.
 22 But in this case, we have two distinguishing features, (1)
 23 is that we have the federal court that has stay all the
 24 allegations, every action, and has required six (6) months
 25 for reporting. So we had to do a status report in six (6)

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1 months, end of January of next year. I would like to be
2 able to say, that you've gotten discovery and we're going
3 forward. As you may have picked up, we offered to go
4 forward in federal court and they wanted to return to state
5 court. So we have that six (6) month statutory period because
6 of the litigation in federal court that's stayed and is
7 waiting for us. The other thing, Your Honor, is that, we
8 can't by other cases that have had incredible delay for
9 various reasons. And the only thing that I can go by on
10 that, Your Honor, is the Rules of Professional Conduct we
11 have Rule 3.2, this is on Page 110 of South Carolina Rules
12 of Court Book and the comment and I think this applies
13 here. There's a time to request continuances but it's not
14 justification and this is a quote, "it's not justification
15 that similar conduct is often tolerated by the bench and
16 bar. The question is whether the lawyers asking in good
17 faith of continuances essentially and that's what we're
18 saying. Other cases may have had delays. Other cases may
19 have had issues. But we do have some distinguishing
20 features here and again the issue is narrow, the material
21 is already there, and we would like to get -- now, other
22 cases were mentioned, Your Honor, and I just don't think
23 it's relevant to get into the details of William Bell and
24 other things that had extraordinary things happened and
25 multiple changes in counsel, but my co-counsel here is

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1 familiar with that and if you're interested detail, m
2 sure that Mr. Zelenka could address it for

3 THE COURT: Any reply to that?

4 MR. GROSE: Yeah, well, I just wanted to clarify
5 something. The records where we've obtained the prior IQ
6 test from, are records that were available to both the
7 State and to the defense in the initial trial of the case.
8 There are in the materials that we have, consent forms
9 given to the South Carolina Law Enforcement Division and
10 Dr. Pam Crawford who was the state expert at the time by
11 Mr. Bryant to obtain the very records that we found those
12 in. And while those that come to us through counsel down
13 the line and it's a little bit hard to tell exactly how
14 they originally got it in their file. It appears that they
15 got them from the solicitor. So that's why I say that I'm
16 a little bit surprised that they don't have from the prior
17 PCR that the Attorney General's Office was involved in that
18 they don't have these materials. I take their word that
19 they don't, but I'm a little surprised and we'll work to
20 get that for you. The, as far as, making reference to
21 other cases all I know to go on is experience and, you
22 know, I have one that I've done myself. I've looked at
23 others that have been done on the Atkins issue and I can
24 just tell you that based on experience a six (6) month time
25 frame to have a hearing is not realistic and I don't think

that even with -- I just don't think you're going to find where that's been done before or find that that's really capable of being done. And we, you know, is an issue about eligibility for the death penalty and the three cases that we've mentioned, one has actually been released from incarceration. He's a free man now as a result of other issues. The other two, Mr. Bell and Mr. Brown, were both found to be intellectual disabled and not eligible for the death penalty. One of the problems that has already built into this case and nobody in this room has anything to do with it, is there was a very brief period where our Supreme Court experimented with giving the post conviction judges in a capital case, a year to do everything and get to the order. And Mr. Bryant's case was one of the ones that was, -- his was one of the ones that was on the fast track and while there was a continuance because of some issues about his lack of competency due to some other mental health issues that he has. It still, of all those cases, it proceeded through as quick as any of those cases where our Supreme Court did that and one of the reasons and this is in one of the, we filed two applications and Judge Cooper said that one could not go forward. The one that has been assigned to you is going forward, but there has been prior ineffective assistance of counsel, was why these claims were not explored including in that prior post conviction

1 and we think part of that was trying to rush to have prior
2 post conviction through to quickly. And so we don't want
3 to see Mr. Bryant keep getting hit with that, you know, the
4 same problem of everything being rushed to quickly and not
5 get a proper determination as to whether he is
6 eligible for the sentence that currently the law gives
7 him.

8 THE COURT: All right. I'll tell you what let me
9 take it under advisement and I'll draft the scheduling
10 order based on what you all have said. Anything else?

11 MRS. BROWN: Yes, Your Honor, one thing. We object
12 to an *ex parte* communication for funding request. We relied
13 on Thames versus State. Note one, which says that, that is
14 not applicable to these proceedings so it would not be
15 proper to hold any kind of discussion of fact finding that
16 you would necessarily need for funding request. I would
17 candor, Your Honor, this has been an issue that has not
18 been specifically addressed head on in a capital case.
19 The footnote in Thames speaks to the fact that there's a
20 difference between the criminal trial and civil proceedings
21 and, of course, a non-capital cases, the State is allowed
22 to not only be there for the discussion but participate in
23 the discussion and that's very clear in the Thames case.
24 We have had it arise as a secondary issue, an emergency
25 writ to the Supreme Court in capital cases, probably about

1 a year ago now and the Supreme Court expressed they had
2 already addressed that in Thames and that an exparte
3 communication was not appropriate and that's the Stanko
4 case. It was also raised as a freestanding claim and
5 recently, just a few months ago, in the case that Mr. Grose
6 is involved in as well and the Court didn't take so we did
7 not have a ruling on that one. So the only thing we can go
8 by, the language in the statute that doesn't seem to
9 incorporate the exparte communications that would be
10 available for criminal trial and the footnote in Thames.
11 Thames, the Supreme Court, states Supreme Court case that
12 specifically addresses exparte communications so it's not
13 available in post conviction relief.

14 THE COURT: Mr. Grose, you want to reply to that?

15 MR. GROSE: The only order that addresses this
16 issue head on is the order of Judge Alexander McCauley in
17 State versus, excuse me, Inman versus South Carolina which
18 is a case that me and Mr. Zelenka and Lee Mavery from the
19 Attorney General's Office are involved in. Judge McCauley
20 ruled that exparte does pertain or does apply in capital
21 post conviction proceedings. It's a very thorough order.
22 It's the only order that has analyzed the issues. Mr. Made
23 Mr. Mavery and Mr. Zelenka sought to appeal that order to
24 the South Carolina Supreme Court and they allowed it to
25 remain standing. And as Judge McCauley pointed out their

1 position is based on footnotes in Stanko, relying on a
2 footnote in Thames interpreting a statute that hadn't been
3 inactive when the issue arose in Thames because the capital
4 PCR statute hadn't even been inactive when the case in
5 controversy arose intense. It was inactive about the time
6 Thames was decided but the ruling that was being addressed
7 occurred before the statute and Thames is not a capital
8 case so it wouldn't be interpreting the capital provision
9 anyway. So that caused delay to some extent in the Indiana
10 case and, you know, this is one of those issues that I
11 didn't know that they were going to bring this up here
12 today because they didn't file -- I mean, they bring it up
13 in other cases but I thought Judge McCauley's order might
14 have put this issue to rest. We came here today hoping to
15 kinda give you a heads up about, you know, again talk about
16 the experts that we need in order to do this. This, if you
17 decide to take this issue under advisement which is your
18 discretion to do, then we're gonna want to get you a copy
19 of Judge McCauley's order to look at and then we're going
20 to have to schedule another time ---

21 THE COURT: I'm gonna deny the motion right now.

22 MR. GROSE: Okay. I'll sit down. Thank you.

23 THE COURT: Anything else?

24 MR. BROWN: No, Your Honor. We would just -- I
25 know you said you deny the motion but I do want to point

1 out that Judge Culbertson passed a rule of contrary and
2 Judge Cooper has ruled contrary to that, they do not allow
3 *ex parte* because you are the fact finder and that's the
4 essence of it and that's what's in Thames and I wanted that
5 clarified because it sounded like this was controlling when
6 there's actually more prescient to the contrary.

7 THE COURT: All right. Thank you much.

8 MR. BROWN: Thank you, Your Honor

9 THE COURT: Anything else?

10 MR. GROSE: No, sir.

11 THE COURT: All right. I'll take it under
12 advisement and issue an over. Hopefully, we can get it
13 done. Sounds good.

14 (CONCLUSION OF THE HEARING ON SEPTEMBER 1, 2016)

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CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit Court for Dillon County, South Carolina, on the 1st day of September, 2016.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Lisa S. Carter

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Circuit Court Reporter

December 14, 2016

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Exhibit C

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Oconee County
Honorable Gerald C. Smoak, Judge

RUTH ANN THAMES,

v.

STATE OF SOUTH CAROLINA,

PETITIONER

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1122 Lady Street Suite 940
Columbia, S. C. 29201

ATTORNEY FOR PETITIONER.

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CONCLUSION

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QUESTIONS PRESENTED

1.

Did the post-conviction judge err in denying petitioner's motion to authorize payment for Dr. John DeWitt, since expert psychiatric testimony was reasonably necessary to prove petitioner's PCR claim, especially where one expert opined petitioner could not conform her actions to the requirements of the law before she pled guilty to murder?

2.

Was petitioner ineffectively represented when she pled guilty to a murder charge without understanding a life sentence was mandatory?

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STATEMENT OF FACTS

Petitioner was indicted by the Oconee County Grand Jury for the offense of murder. App.p. 2, lines 2-5. She appeared on August 9, 1993 before the Honorable H. Dean Hall. Petitioner was represented by N. Gruber Sires, Jr. The solicitor was Bryan White. App.p. 1. White informed the judge petitioner was "entered a plea of guilty to murder." App.p. 2.

A Blair¹ hearing was then held. Dr. Pravina Seth testified she was employed at the William S. Hall Institute. Seth received her medical degree in India prior to coming to work at the William S. Hall Institute. App.p. 3, lines 17 - p. 4, line 6.

Seth testified petitioner "complained about hearing voices and she had a difficult time to sleep at night seeing the victim coming and making threat to her." App.p. 7, lines 18-22. Seth opined petitioner was competent. She also said petitioner "was not suffering from any mental illness or defect." App.p. 9, lines 11-20.

Seth also offered her view that petitioner was responsible for her actions and "she was able to conform." App.p. 9, lines 21 - p. 10, line 7. Seth testified that petitioner's inability to sleep, her hearing voices, and seeing the victim threatening her did not "fit into any major mental illness and that is the reason I came to that diagnosis." App.p. 12, lines 14-25. Seth said that diagnosis was "psychosis NOS." App.p. 12, lines 9-13.

Seth admitted petitioner needed treatment, and that she had

¹ 275 S.C. 529, 273 S.E.2d 536 (1981).

also been diagnosed in the past as suffering from depression. App.p. 13, lines 1-25. Seth prescribed Haldol for petitioner's hallucinations. App.p. 14, lines 1-4.

Seth acknowledged she had been informed petitioner "had a flash back," and that she saw someone else in the place of the victim when the stabbing occurred. App.p. 15, lines 21-23. Seth said she considered the possibility of "a disassociative episode." App.p. 16, lines 1-13. However, Seth said: "we to the conclusion that that was not the case in her case." App.p. 16, lines 23-24.

Seth admitted she had not spoken to Dr. Martin, the forensic psychiatrist in Anderson, South Carolina, who also examined petitioner. App.p. 17, lines 10-17. Seth concluded: "she [petitioner] knew what she was doing when it happened. In her statement soon after the incident she changed her clothes, hide the weapon and she left." App.p. 17, lines 18-22. Seth said: "it was not like I just mentioned disassociative episode and complete amnesia." App.p. 18, lines 22-23.

Defense counsel Sires informed the court that he had "Thames examined by a private psychiatrist, Dr. Martin, who is a forensic psychiatrist in Anderson." App.p. 22, lines 17-21. Sires told the judge he expected to receive Dr. Martin's report "at any minute." App.p. 22, line 18 p. 23, line 20. The court took its lunch break while awaiting the arrival of Dr. Martin's report. App.p. 23, line 16 - p. 24, line 5.

After the lunch break, Sire had Dr. Martin's report. The

report stated petitioner was criminally responsible, but did not have the capacity to conform her conduct to the requirements of the law. App.p. 64-65. Dr. Martin recommended that petitioner "continue treatment with psychotropic medications, Haldol." App.p. 65.

Sires told the judge that Dr. Martin would be furnishing the court with a supplemental report. Sires said he understood that Dr. Martin believed petitioner was under the influence of cocaine at the time of the stabbing. That, according to Sires, was why Dr. Martin opined she did not have the capacity to conform her actions. Sires then said: "Ms. Thames is aware, as well as Dr. Martin aware, of course, that voluntary intoxication be it by drugs or alcohol is not a defense under the laws of this state and this is why it was reported as it was." App.p. 26, lines 7-11.

The written report did not state that voluntary intoxication was the reason Dr. Martin opined petitioner was unable to conform her actions to the requirement of the law. See App.p. 64-65. Sires told the judge petitioner was competent to stand trial, and that he was not setting forth an affirmative defense pursuant to S.C. Code §17-24-10.¹ App.p. 27, lines 2-21.

Petitioner told the judge that she was thirty-years-old, and had a ninth grade education. App.p. 33, lines 18-22. Petitioner worked for an escort service. She had been treated for alcohol

¹This is the statute defining insanity. S.C. Code § §17-24-20 - 17-24-30 defines guilty but mentally ill, and lists the verdict forms as guilty, not guilty, guilty but mentally ill, and not guilty by reason of insanity.

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abuse about three or four years before this incident. App.p. 34, lines 6-22.

Petitioner informed the judge she was treated in her "younger years" for mental illness at the Patrick B. Harris Center. App.p. 35, lines 11-16. She said: "I've been in and out of mental health all my life." App.p. 37, lines 6-8. At the time of the guilty plea, petitioner was taking Haldol and Cogentin. App.p. 38, lines 10-13.

The judge informed petitioner: "the maximum possible sentence for this offense is life imprisonment." App.p. 42, lines 1-2. The judge would later ask petitioner if she understood: "I could still sentence you to the maximum which is life imprisonment?" App.p. 47, lines 8-13.

The solicitor told the judge the victim was found "bound and tied to bed with multiple stab wounds." App.p. 50, line 23 p. 51, line 2. Thames described the stabbing death of her boyfriend as follows:

A. We went to supper and we come home and we were watching TV for a while and then he got up and started talking sex and all that. And he proceeded to go into the bedroom and so I come in there after and he liked to be tied up so he asked me to tie him up to the bedpost and I did. And he said something and I turned and looked and I seen one of my uncles laying there - - or I thought it was my uncle - - I just grabbed the butcher knife and I stabbed him and I didn't stop.

App.p. 45, lines 11-19.

Sires told the judge petitioner: "was severely sexually abused as a child by her uncle, and, this, of course, is what has been

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brought out earlier that she had a flashback of a remembrance of this occurring when this unfortunate incident happened." App.p. 55, lines 4-13.

The solicitor offered that "we did have a basis to go forward for the death penalty based on the murder being committed during the commission of physical torture and/or it was committed for herself or another for the purpose of receiving money or a thing of monetary value." App.p. 45, line 23 - p. 46, line 4. The solicitor said the state agreed not to pursue the death penalty in return for the murder plea. App.p. 46, lines 8-12.

The judge asked petitioner if she understood the plea was "taking it from a death penalty situation down to life imprisonment." Petitioner said she understood. App.p. 47, lines 18-20. Prior to sentencing petitioner to life imprisonment, the following occurred:

Sires: Ruth Ann, is there anything you would like to say?

Court: Ms. Thames, anything further - -

Thames: Yes, sir, the only thing I'd like to say to their family is that I didn't mean to kill him; I thought it was my uncle. I didn't mean to kill the man. I thought it was somebody else. He was a very good man. He was, and he was good to me. I was just - -
That's all I can say.

App.p. 58, line 22 - p. 59, line 7; p. 59, lines 17-22.

The judge also ordered that petitioner continue receiving appropriate medical and/or psychiatric care. App.p. 59, lines 17-22.

Petitioner filed an application for post-conviction relief

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dated June 9, 1994. App.p. 66-70. She alleged, intra alia, that she was ineffectively represented. App.p. 67. The state filed a Return dated October 5, 1994. App.p. 71-74.

An evidentiary hearing was convened on July 31, 1995 before the Gerald C. Smoak, Sr. Petitioner was now represented by Charles R. Hughes. App.p. 75. Petitioner filed a written motion asking for an order "appointing psychiatrist Dr. John DeWitt to conduct an independent evaluation on the above-named applicant." The motion also requested that the judge order Dr. DeWitt be reimbursed for his services "with funds from the office of indigent defense." App.p. 127.

At the hearing Hughes said the following:

Your Honor, I have attached to the motion various medical records of Dr. DeWitt of his treatment of Ms. Thames after she - - after she was sent down to the Women's Correction Center. They indicate that she had psychotic symptoms. She was taking a psychotropic drug, Haldol. His primary analysis of her is an atypical psychosis. The records also mention delusions and hallucinations.

Formerly - - prior to her sentencing, Your Honor, Ms. Thames was evaluated by two psychiatrists, a Dr. Martin, who was retained by Mr. Sires, who practices in Anderson, as well as Dr. Sheth, who works for the State in Columbia. They both found that she was delusional. I think that Dr. Martin found that she did not have criminal responsibility for her act when she killed Mr. Mathison but nonetheless, they both found that she met the standard for competency at the time of trial and that she - - that she was sane at the time the incident was committed. From my conversations with Dr. DeWitt, he indicates to me that there may - - that he may come to a contrary conclusion, nonetheless he can't without doing a full evaluation of Ms. Thames. He can't reach that question now.

Your Honor, This is a tragic case where

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Ms. Thames killed Mr. Mathison while she was experiencing a flashback, thinking that he was a relative of hers who grossly sexually abused her as a child. She tells me that she spent very little time with both Dr. Martin and Dr. Sheth when they made their evaluations and we question the validity of both of them.

App.p. 77, line 16 - p. 78, line 18. (emphasis added).

The assistant attorney general opposed the motion that there were two examinations done prior to the guilty verdict by Dr. Soth; one by Dr. Martin." App.p. 78, lines 2-4. He argued that Dr. Martin "had some question about her ability to perform her actions at the time of the murder was committed due to her cocaine intoxication, which is not a defense." App.p. 79, lines 3-6. The assistant attorney general concluded: "I don't think a third [evaluation] is going to give us anymore insight than the two we have already had. . ." App.p. 79, lines 9-10. He added "I think it would be a waste of the state's time and money to have another evaluation done." App.p. 79, lines 17-18.

Hughes called petitioner as a witnesses "in support of the motion." App.p. 79, line 24 - p. 80, line 1. Petitioner testified she was no longer taking the Haldol, but was taking "Elavil," which, she said: "is considered psychotic medication." App.p. 80, lines 18 - p. 81, line 24.

Potitioner remembered that Dr. Sheth "spent four to five hours with me in a thirty day period that I was there [at the state hospital]." App.p. 82, lines 16-19. Petitioner said "the rest of the times I had to catch her in the hallway and ask her questions and then she would deny me of what I had ask for because of her

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beliefs." App.p. 82, line 19 - p. 83, line 4.

Petitioner testified she has been treated by Dr. DeWitt since becoming incarcerated at the Women's Correctional Center. She said "when I was on Haldol [I was] seeing Dr. DeWitt two to three times a month." App.p. 83, lines 12-15. The following occurred on direct examination of petitioner:

Q. All right. When - - you killed Mathison, were you experiencing hallucinations?

A. Yes, sir. I thought he was my uncle when I killed Randall.

Q. All right. Do - - do you have questions concerning your sanity at the time that you killed him?

A. Yes, sir, because I would not harm Randall if I had known it was Randall. Randall was very good to me. I thought he was the man that abused me all of my life and that's - - and I was just trying to defend myself.

Q. And is that how it happened, Ms. Thomas?

A. Yes, sir.

App.p. 83, line 17 - p. 84, line 3.

On cross-examination, petitioner testified Defense Counsel Siras was constantly "threatening me with the death penalty; that ya'll were going for the death penalty and ya'll would win and that's all mostly that he talked about." Petitioner said: "he had me so scared that I had no choice but to plead guilty." App.p. 84, line 22 - p. 85, line 6.

Petitioner recalled: "the whole time I was in the county jail, I stayed very, very confused." App.p. 85, lines 10-13. "I've never been in serious trouble with the law. . . and I was scared of dying

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at the time because I had not made peace with God yet." App.p. 86, lines 7-9.

The judge denied petitioner's motion for the entry of service of Dr. DeWitt. The judge stated: "I feel from the fact that two psychiatrist were involved, we can't now get a third so if you would fix up an order denying App.p. 88, lines 3-7.

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Petitioner then testified she was aware the state could again attempt to seek the death penalty if her guilty plea was vacated. App.p. 85, lines 5-10. Petitioner also complained that the judge told her the maximum possible sentence for her was life imprisonment. Petitioner said she was not informed that a life sentence was mandatory. App.p. 90, lines 13-24. Petitioner said her attorney asked her: "hadn't you rather do a twenty year sentence than the death penalty?" App.p. 91, lines 7-10.

Petitioner testified she did not understand what she was doing when she stabbed the victim. She said: "I remembered stabbing Randall once because I thought he was my uncle and then when I finally came around, I was washing the blood off of myself and I realized what I had done and I got in the car and I went to Greenville County and tried to turn myself in." App.p. 92, lines 19 - p. 93, line 4. Petitioner confirmed she was alleging her attorney was ineffective for not having her sufficiently evaluated for her mental problems. App.p. 93, lines 7-10.

Petitioner again told the judge her encounters with Dr. Seth were brief. App.p. 94, lines 9-22. Petitioner stated Dr. Seth

spent a lot less than the four or five hours she claimed with her.
App.p. 95, lines 1-5.

Petitioner concluded that the victim "was the best thing that
ever happened to me." She "thought he was somebody else at the
time she stabbed him." App.p. 95, lines 4-17.

The state called Sires as a witness. Sires testified
petitioner: "was facing becoming a crispy critter. She was facing
the death penalty." App.p. 106, lines 18-20.

Sires said he discussed a defense based on petitioner's mental
illness with her. Sires recalled: "she said she was having these
flashbacks. We weren't able to find any good law on that and then
the psychiatrist, both of them said that she was oriented; that she
knew what she was doing. . . after the murder, she went and cooked
a pizza or something and sat in the kitchen for a while. It was a
strange set of facts." App.p. 106, line 23 - p. 107, line 8.
Sires testified he did not pressure or threaten petitioner to plead
guilty. He said he told her that she would be eligible for parole
after twenty years. App.p. 110, line 9 - p. 111, line 10.

In his closing summation, Hughes told the judge the
psychiatrists did not spend sufficient time with petitioner "to
analyze what her mental state was at the time." The judge stated
he was going to deny petitioner's application. App.p. 116, lines
3-18.

An order of dismissal dated September 26, 1995 was issued.
App.p. 118-125. This order stated that "neither the state
psychiatrist nor the applicant's psychiatrist found the applicant

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incompetent to plead guilty." App.p. 121. "Mere speculation that some psychiatrist, somewhere, may have found her incompetent to stand trial or plead guilty is not sufficient to show ineffective assistance." App.p. 122.

This order also stated that "in addition she [petitioner] claimed that counsel erroneously advised her that the plea agreement was for a twenty year sentence. She claimed that she did not realize she would receive a life sentence until she met with her sister outside the courtroom immediately after the plea. For reasons which have already been developed in the preceding paragraphs, this court finds this claim to be without merit." App.p. 124.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 227 of the SCACR.

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ARGUMENT

1.

The judge abused his discretion by refusing to authorize funds for a psychiatric evaluation by Dr. John Dewitt. This evaluation was reasonably necessary to the presentation of appeal of the conviction claim.

Petitioner had the burden of proof while attacking her guilty plea. As seen, one psychiatrist opined she was unable to conform her actions to the requirements of the law. In addition, petitioner, at both the guilty plea and post-conviction hearings, testified at the time of the crime she thought she was defending herself against the a sexual assault by her uncle.

Petitioner's assertion of mental illness was substantiated by her history of mental illness. She was being treated with Haldol for hallucinations, and other medications.

The evidence at the guilty plea and post-conviction hearing both directly implicate the verdict of guilty, but mentally ill, or the defense of insanity. See S.C. Code § § 17-24-10 - 17-24-40; State v. Wilson, 306 S.C. 496, 413 S.E.2d 19 (1991); State v. Rimmert, ___ S.C. ___, 446 S.E.2d 400 (1994); State v. Grimes, 292 S.C. 204, 355 S.E.2d 538 (1987); State v. Cook, 283 S.C. 594, 325 S.E.2d 323 (1985).

S.C. Code §17-24-20 states a defendant is guilty, but mentally ill if she had a capacity to distinguish right from wrong, but because of mental disease or defect she lacks sufficient capacity to conform her conduct to the requirements of the law.

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Petitioner's statements at her guilty plea indicated that she had thought the victim was her uncle.

This was also evidence that because of mental disease or defect she lacked the capacity to distinguish moral or legal right from wrong or to recognize her actions as being morally or legally wrong. S.C. Code §17-3-50 (B) states that:

Upon a finding in ex parte proceedings investigative, expert, or other services reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order payment from funds available to the Office of Indigent Defense, of fees and expenses not to exceed five hundred dollars as the court considers appropriate. (emphasis added).

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S.C. Code §17-3-50 (A) makes clear that this statute is also applicable to post-conviction relief actions.

Petitioner has shown that expert testimony was reasonably necessary to her representation on post-conviction relief. She had a history of sexual abuse and mental illness, as well as prior institutionalization. She was prescribed Haldol to control hallucinations.

The solicitor related that the victim was found tied to the bed, and stabbed. This was consistent with petitioner's version of what actually occurred.

Dr. Martin opined that petitioner was unable to conform her conduct to the requirements under the law. Petitioner was being treated by Dr. John DeWitt while being incarcerated, and PCR counsel informed the judge that Dr. DeWitt had reason to doubt the opinions of Sheth and Martin. Dr. Martin's report was incomplete,

at a minimum, based on what Sires told the judge. It is clear petitioner did not relate well to Dr. Sheth. When asked to divulge intimate details, that was hardly an incidental problem for petitioner.

Petitioner testified at the post-conviction hearing that the psychiatric evaluations of her prior to her guilty plea were inadequate. She made a strong showing that a psychiatric evaluation was reasonably necessary to her post-conviction relief claim. Petitioner could not carry her burden of proof without expert testimony on her mental capacity. Petitioner was indigent and S.C. Code §17-3-50 (B) states the judge shall authorize funds for expert services under these circumstances. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1995).

Courts have held the denial of funds to retain a psychiatric expert requires reversal. See Dunn v. Roberts, 963 F.2d 308 (10th Cir.1992); Cowley v. Strickland, 929 F.2d 640 (11th Cir.1991); Buttrum v. Black, 721 F.Supp. 1268 (N.D.Ga.1989), aff'd, 908 F.2d 695 (11th Cir.1990); Bailey v. Spears, 847 F.2d 695 (11th Cir.1988); People v. Kegley, 529 N.E.2d 1118 (Ill.App.2.Dist.1988). Harris v. State, 181 Ga.App. 358, 352 S.E.2d 226 (1986). State v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986). Williams v. Newgoma, 254 Ga.App. 714, 334 S.E.2d 171 (1985).

As stated, the statute mandates that the judge shall authorize expert or other services reasonably necessary for the indigent's representation. See S.C. Code §17-3-50 (B). Cf. State v. Matthews, 291 S.C. 339, 353 S.E.2d 444, 448 (1986).

The record in this case discloses that expert psychiatric testimony was reasonably necessary for the petitioner's grounds at PCR to be fairly advanced. She had the burden of proof, and the judge abused his discretion by refusing to authorize an expert psychiatric evaluation pursuant to S.C. Code §17-3-50.

Petitioner respectfully requests that her case be remanded to the post-conviction court with an order authorizing expenses for an expert psychiatric evaluation pursuant to the statute.

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2.

Petitioner was told on several occasions during the guilty plea that a life sentence was the maximum she could receive for pleading guilty to murder. A life sentence was mandatory, and counsel was ineffective for allowing petitioner to plead guilty thinking she would receive a twenty year sentence.

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As seen, the judge during the guilty plea proceeding referred to a life sentence as the maximum petitioner could receive. In fact, a life sentence was mandatory pursuant to S.C. Code §16-3-20 (A). The statute provides that upon a guilty plea to murder the sentence is life imprisonment with parole eligibility in twenty years.

As seen, petitioner testified she was asked by defense counsel if she would rather do a twenty year sentence or receive the death penalty.³ App.p. 91, lines 7-10. Petitioner told the post-conviction judge she would not have pled guilty had she known she was going to receive a mandatory life sentence. App.p. 91, line 24 - p. 92, line 1.

Defense counsel acknowledged he discussed "twenty years with Ms. Thamos." App.p. 114, lines 19-20. Defense counsel maintained that the twenty year sentence discussed apparently referred to the time petitioner would have to serve before being eligible for parole. App.p. 114, line 21 - p. 115, line 3. Petitioner also

³The alleged basis for the death penalty is curious given this record. There is no indication the homicide occurred for monetary gain. Nor does physical torture in its ordinary meaning appear. App.p. 45, line 23 - p. 46, line 4.

testified she could not read or write, and only became aware that her parole eligibility was twenty years following her guilty plea. App.p. 88, line 23 - p. 89, line 12.

Counsel's advice that petitioner would receive a twenty year sentence induced her guilty plea. Petitioner thought a twenty year sentence would allow for her to be released prior to time. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court granted a new trial, where, as here, Hinson was given an incorrect sentencing advise which induced his plea. See, also, Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991).

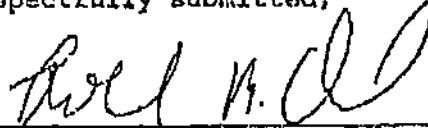
Petitioner's guilty plea should be vacated since she testified she would not have pled guilty had she known that murder carried a mandatory rather than a maximum sentence of life imprisonment. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

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CONCLUSION

By reason of the foregoing arguments, the writ should be granted in order to allow full briefing on these issues.

Respectfully submitted,



ROBERT M. DUDEK
Assistant Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of March, 1996.

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Oconee County

Honorable Gerald C. Smoak, Circuit Court Judge

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S. C. SUPREME COURT

RUTH ANN THAMES,

vs.

STATE OF SOUTH CAROLINA,

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HORRY COUNTY SC
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Respondent

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

I

Whether the PCR judge abused his discretion in denying the Petitioner's motion for a third psychiatric evaluation?

II

Whether there is probative evidence to support the lower court's finding that counsel did not promise the Petitioner she would receive a twenty year sentence for Murder?

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STATEMENT OF FACTS

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Petitioner was indicted at the May 1994 term of the Court of General Sessions for Oconee County for Murder. She was represented by N. Gruber Sires, Esquire. On August 9, 1993, the Petitioner pled guilty as charged. She was sentenced by the Honorable H. Dean Hall to confinement for a period of Life. The Petitioner did not appeal her conviction or sentence.

In her application, the Applicant alleged that she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.

The Respondent made its Return on September 23, 1994, requesting that an evidentiary hearing be held. A hearing was convened at the Oconee County Courthouse on July 31, 1995 before the Honorable Gerald C. Smoak. The Petitioner was present at the hearing and represented by Charles Hughes, Esquire. The Respondent was represented by Allen Bullard of the South Carolina Attorney General's Office. Following the hearing, Judge Smoak issued his Order of Dismissal dated September 26, 1995, denying and dismissing the application for post-conviction relief with prejudice.

The Petitioner filed a timely Notice of Intent to Appeal and Petition for Writ of Certiorari. This Return follows.

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ARGUMENT I

The PCB judge did not abuse his discretion in denying the Petitioner's motion for a third psychiatric evaluation.

The Petitioner argues that the lower court abused its discretion when it denied her motion for a third psychiatric evaluation to determine her mental competency at the time of her Murder and the time of her plea. The Respondent submits the Petitioner's argument is without merit.

Authorization for the expenditure of funds for expert witnesses is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion. State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986); State v. Yates, 200 S.C. 29, 310 S.E.2d 805 (1982); State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (1981).

Here, the Petitioner had been examined by two psychiatrists prior to her 1993 guilty plea, (App. p. 2, line 24 - p. 20, line 7). Both reached the conclusion that the Petitioner was competent at the time the crime was committed and at the time of her plea. The lower court considered the fact that the Petitioner had already had an opportunity to challenge her competency at a time much closer to the events in question. The record of the guilty plea and the post-conviction relief hearing support the lower court's ruling.

Furthermore, the Petitioner would be barred from raising the issue of her competency to enter her plea by the doctrine of res judicata. Res judicata bars a subsequent suit by the same parties on the same issues. Sub-Zero Freezer v. R.J. Clarkson Co., 308

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S.C. 180, 417 S.E.2d 569 (1992). Res judicata is shown if the identities of the parties is the same as a prior litigation, the subject matter is the same as the prior litigation and there was a prior adjudication of the issue by a court of competent jurisdiction. Riedman Corporation v. Greenville Steel Structures, Inc., 300 S.C. 467, 419 S.E.2d 217 (1992). The Petitioner fully litigated the issue of her mental competency before the court prior to her guilty plea. Thus, res judicata would act as a bar here.

For the foregoing reasons, this Court should affirm the lower court's denial of the Petitioner's motion for funds for a third psychiatric exam.

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ARGUMENT II

~~There is probative evidence to support the lower court's finding that counsel did not advise the Petitioner that she would receive a twenty year sentence for Murder.~~

The Petitioner claims counsel's advice that she would receive a twenty year sentence induced her guilty plea. The defendant submits that the Petitioner's claim is without merit.

The proper standard for review is whether there is "any evidence of probative value" to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Wicker v. State, ___ S.C. ___, 425 S.E.2d 25 (1992). The record supports Judge Smoak's conclusion that counsel properly advised the Petitioner of the sentence she could receive for Murder.

A defendant who pleads guilty upon advice of counsel may only attack the voluntary and intelligent character of the plea by showing the advice of counsel was not within the range of competence demanded of attorneys in criminal cases. Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). This Court has held that erroneous sentencing advice can constitute ineffective assistance. Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991).

Here, however, the Petitioner has failed to show she received any erroneous sentencing information. At her guilty plea proceeding she was advised by the trial court that the maximum sentence she was facing was life imprisonment. (App. p. 42, lines 1-5). The Solicitor related into the record that the plea

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agreement was a plea to murder in exchange for the State's agreement not to seek the death penalty. (App. p. 45, line 20 - p. 47, line 7). The trial court also commented that the plea agreement allowed her to remain eligible for parole in twenty (20) years but still subjected her to a life sentence. (App. p. 47, lines 9-20). The Petitioner indicated that she understood the agreement, did not need to discuss it any further with counsel and had not been promised anything else to induce her plea. (App. p. 47, line 21 - p. 48, line 23). She also indicated she understood she had a right to appeal her plea if she so desired. (App. p. 50, lines 3-6). Furthermore, the Petitioner signed a written plea agreement indicating her understanding that she would be eligible for parole in twenty (20) years, not that she would receive a twenty (20) year incarcerative term. (Supp. App. p. 111, line 10). Counsel testified at the post-conviction relief hearing that he had informed the Petitioner that she would be eligible for parole in twenty (20) years. (App. p. 111, lines 6-10).

None of the foregoing information is erroneous. The Petitioner was facing a possible death sentence. She entered into a written plea agreement which protected her from that penalty and allowed her to be eligible for parole in twenty (20) years. The court clearly indicated that she would receive a life sentence and never mentioned a twenty (20) year incarcerative sentence for murder. Since the information the Petitioner received from counsel was correct, counsel was not ineffective.

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As there is probative evidence supporting the findings of the lower court, those findings should be affirmed. Cherry v. State, supra.

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CONCLUSION

For all of the foregoing reasons, Respondent submits that the Petition should be denied and dismissed. If this Court sees fit to grant this Petition for writ of Certiorari, the Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

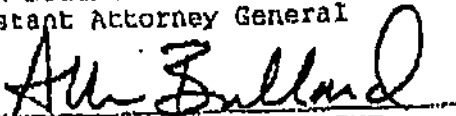
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May 9, 1996.

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Luzenski Allen Cottrell,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS FOR
THE FIFTEENTH JUDICIAL CIRCUIT

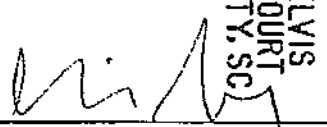
Case No. 2018-CP-26-05709

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Applicant's Reply to Respondent's Renewed Motion to Unseal *Ex Parte* Funding Requests and Orders was served by first class United States mail, postage prepaid, this 26th day of May 2023, upon the following:

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