

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

L. Casey Manning, Circuit Court Judge

EX PARTE: TARA DAWN SHURLING,

APPELLANT,

IN RE: STATE OF SOUTH CAROLINA,

RESPONDENT

V.

BEJAY HARLEY,

DEFENDANT

Appellate Case No. 2013-001298

APPENDIX FOR RESPONDENT'S MOTION TO DISMISS

J. HUGH RYAN, III
General Counsel, SCCID
P.O. Box 11433
Columbia, SC 29211

ATTORNEY FOR RESPONDENT

RECEIVED
DEC 11 2013
SC Court of Appeals

INDEX

INDEX.....i

INITIAL BRIEF OF APPELLANT DATED NOVEMBER 12, 2013..... 1

DESIGNATION OF MATTER TO BE INCLUDED
IN RECORD ON APPEAL DATED NOVEMBER 12, 2013 16

TRANSCRIPT OF DECEMBER 28, 2011 HEARING
BEFORE THE HONORABLE CLIFTON NEWMAN..... 18

FEBRUARY 12, 2013 LETTER OF JUDGE
NEWMAN’S LAW CLERK, SUTANIA A. RADLEIN..... 71

RECEIVED
DEC 11 2013
SC Court of Appeals

**STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ex Parte: Tara Dawn Shurling, Attorney, Appellant,

**In Re:
State of South Carolina, Respondent,**

v.

Bejay Harley, Defendant

Appellate Case No. 2013-001298

**Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Court of General Sessions
Trial Court Case No.: 2003-GS-40-6670**

INITIAL BRIEF OF APPELLANT

**TARA DAWN SHURLING
Attorney and Counselor at Law**

**3614 Landmark Drive, Suite A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 FAX
tdslaw@bellsouth.net**

ATTORNEY FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES3

STATEMENT OF THE ISSUES ON APPEAL.....4

STATEMENT OF THE CASE.....5

ARGUMENT.....10

CONCLUSION.....14

DESIGNATION OF MATTER.....16

TABLE OF AUTHORITIES

Cases

CASES

Bailey v. State, 309 S. C. 455, 464, 424 S.E.2nd 503, 508 (1992).....12

Ex Parte Brown, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (2011).....12

North Carolina v. Alford, 400 U.S. 25 (1970).....11

CONSTITUTIONAL PROVISIONS

U.S.C.A. Const. Amends, 6, 14.....13

STATUTES

S. C. Code Ann. § 17-3-50, (A)11, 13

S. C. Code Ann. § 17-3-50, (B)13, 14

S. C. Code Ann. § 17-3-50, (C)6, 11, 12, 13, 14

STATEMENT OF THE ISSUES ON APPEAL

I.

At the time Counsel completed her representation in this case, did S. C. Code Ann. § 17-3-50, (C) require advance approval of fees in excess of the statutory cap?

II.

Did the Chief Administrative Judge who signed the initial funding orders in this case err in concluding that any additional requests to exceed the caps set by his orders would have to be addressed specifically to him personally as opposed to the presiding judge pursuant to S. C. Code Ann. § 17-3-50, (C)?

III.

Did the Chief Administrative Judge who signed the initial funding orders in this case properly modify his previous Orders approving increased fee and expense caps pursuant to S. C. Code Ann. § 17-3-50(C) to remove the provisions authorizing the presiding judge to determine if any additional increases in the caps were warranted at the conclusion of the case?

IV.

Did the Chief Administrative Judge who signed the initial funding orders in this case err in revoking his previous Orders approving an increased fee cap pursuant to S. C. Code Ann. § 17-3-50, (C) where judge who presided over the guilty plea proceeding in this matter had already signed an order approving Counsel's total fees, including those in excess of the cap previously set by the Chief Administrative Judge in question, based upon the original Order approved and signed him?

V.

Did the presiding judge in this murder case err in revoking his previous orders approving Counsel's fees and expenses where the Orders of the Chief Administrative Judge in place at the time he signed his orders were proper and supported the authority of the presiding judge to make the final determination on fees and expenses in accordance with S. C. Code Ann. § 17-3-50, (C) and previous rulings of the Supreme Court of South Carolina?

VI.

At the time the presiding judge initially approved Counsel's billing requests for fees and expense, did he in fact have authority to do so pursuant to S. C. Code Ann. § 17-3-50 (C), independent of any previous Order from the Chief Administrative Judge?

VII.

Having authority to approve Counsel's fee and expense bills in excess of the caps set forth in S. C. Code Ann. § 17-3-50, (A) and (B) at the end of this case, did the presiding judge err in revoking that approval in the absence of any specific objections to the amount of time Counsel expended in this particular case or the expenses incurred in building a defense to the charges brought against her client?

STATEMENT OF THE CASE

Counsel was court-appointed in this case by Order dated March 30, 2009. By Order issued by Judge Clifton Newman, then Chief Administrative Judge for the Richland County Court of General Sessions, on December 1, 2011, the fee rate for court-appointed counsel in this murder case, Tara Dawn Shurling, was set at \$70.00 per hour for both out-of-court and in-court services. In addition, that Order set a cap of \$10,000.00 for attorney fees which could be submitted to SCCID¹ for payment without further approval of the Court. Counsel's fee rate and the fee cap in this matter were set by Judge Newman at a hearing held on May 23, 2011. ROA. _____, Transcript May 23, 2011 hearing. Counsel had also requested funding approval for a second chair for the upcoming trial of this complex murder case and had additionally asked for funding for three expert witnesses inasmuch as the State had announced its intent to produce between three and seven expert witnesses on the issue of proximate causation of death. Judge Newman denied Counsel's request for funding for a second chair for this trial and limited Counsel to funding for one expert witness. The fee rate and fee caps approved by Judge Newman were likewise lower than those requested by Counsel in her funding motions. See, ROA _____, Motions for Attorney Fees and Motions for Expenses. SCCID was represented at this hearing by its Director, Patton Adams and Deputy Director and Chief Counsel, Hugh Ryan. Despite having prevailed on the majority of the funding issues before the Court on that date, SCCID never provided Judge Newman with proposed orders documenting his ruling from the bench on that date. After this case resolved in a guilty plea on the morning a trial was set to begin, Counsel discovered that no orders had even been signed by Judge Newman concerning the matters ruled upon by him on May 23, 2011.

¹ South Carolina Commission on Indigent Defense.

Counsel then drafted proposed orders documenting the rulings made by Judge Newman at the May 23, 2011 proceeding as she understood them to be. In so doing, Counsel drafted proposed orders which not only reflected the rulings of Judge Newman from the bench but, also reflected the language found in S. C. Code Ann. § 17-3-50, (C) and previous rulings of the Supreme Court of South Carolina on the subject of attorney fee rates and caps. Counsel did not realize until much later that her proposed orders were inadvertently not sent to SCCID at the time they were forwarded to Judge Newman in November, 2011. Judge Newman adopted and filed the proposed orders as sent by Counsel on December 1, 2011. Counsel submitted her final requests for payment of fees and expenses to the presiding judge in this case, L. Casey Manning, for his approval. His orders approving both Counsel's total fees and total expenses were signed on December 5, 2011. After Judge Manning signed Orders approving her fees and expenses, Counsel submitted them to SCCID for payment. SCCID then raised objections to certain language in Judge Newman's Fee Order dated December 1, 2011. A hearing was held in this matter on December 28, 2011. SCCID was represented at this hearing by its Director, Patton Adams and Deputy Director and Chief Counsel, Hugh Ryan. ROA _____, Transcript of December 28, 2011 hearing.

During the December 28, 2011 hearing Judge Newman indicated that he intended to issue an Amended Order modifying the Order signed on December 1, 2011. He expressed the view that when he said any fees in excess of the cap authorized by him would be subject to "*further approval of the Court*" he meant that any increase in the cap would have to be approved by him personally and not the Court in the global sense of the phrase. He indicated that he would not have signed the orders in question had he noticed that they contained certain language which permitted the presiding judge to exceed the cap at the end of the case. Throughout this proceeding he also expressed concern that he really didn't know enough

about the case to making the decisions he was being called upon to make. ROA____, December 28, 2011 hearing. .He expressed his frustration with the system and his hope that an appeal in this matter might yield more guidance to the bench and bar concerning these matters. ROA_____, December 28, 2011 hearing.

At the conclusion of that proceeding, Counsel inquired as to whether the Court wished for her to draft the amended Order the Court had announced intentions to enter. Counsel's offer was declined by Judge Newman who noted that he and his law clerk had my original orders from when they were emailed to the Court and they could easily modify them. ROA_____, Dec. 28, 2011 hearing, pg._____. Thereafter, Counsel received a message from Judge Newman, through his law clerk, that he wanted her to draft an amended order for the Court after all. Counsel did so and forwarded a proposed order, with the corrections instructed by the court, on January 5, 2012. ROA, Ltr to Judge Newman dated January 5, 2012 and ROA, Proposed Order.

Counsel never received a signed copy of the amended order requested by the Court and provided by Counsel, or any other order purporting to modify the funding orders previously entered in this matter. On February 15, 2012 , Judge Newman orally advised Counsel that he had decided not to issue an Amended Order in this matter. On that date, Counsel had two PCR cases before Judge Newman in Richland County. During a break in those proceedings, Counsel approached Judge Newman, in the presence of his law clerk, and inquired about the status of his amended order in this billing matter. Counsel simply asked the status of the order and expressed her concern that the Court might have executed an order that she had not received for some reason. Judge Newman responded that *he wasn't going to issue an amended order*. He said he had decided that since his term as Chief Administrative Judge was over, he did not have the authority to rule on the issues any longer, and stated that he really didn't feel

like he knew enough about the case anyway. He said he had decided to just leave the matter to Judge Manning and Judge Cooper to decide. By letter dated February 21, 2012, Counsel advised SCCID of this development and expressed the position that this billing matter had then returned to the status it was in when her vouchers were submitted to SCCID for payment. Counsel provided both Judge Manning and Judge Newman a copy of this correspondence on that same date in order to document that she had advised SCCID and Judge Manning of her conversation with Judge Newman. Counsel affirmatively asked Judge Newman to contact SCCID if she had in any way misstated the conversation in question. Counsel heard no response from Judge Newman following that correspondence.

On March 13, 2012 Counsel wrote SCCID and requested payment on the Orders entered by Judge Manning in December, 2011. ROA _____, email dated March 13, 2012. That same date, Hugh Ryan emailed Counsel a Reply to her request for payment. ROA _____, Email dated March 13, 2012. On December 11, 2012 Counsel wrote Judge Newman a long letter and requested that he please issue an order documenting what he had advised Counsel of orally on February 15, 2012. Counsel explained that she was not getting paid anything on this case and that confusion apparently remained over the status of Judge Manning's Orders dated December 5, 2011. ROA _____ Ltr to Judge Newman dated December 11, 2012.

On January 24, 2013 Counsel wrote Judge Manning a long letter explaining the current status of her payment requests. ROA _____, Letter to Judge Manning, copied to Judge Newman and Hugh Ryan, SCCID. On February 12, 2013, having heard nothing further from Judge Newman, Counsel sent an email to Judge Manning asking for assistance in getting a resolution in this matter. ROA _____, Email dated February 12, 2013 to Judge Manning and copied to Judge Newman and Hugh Ryan at SCCID. On February 12, 2013 Hugh Ryan

wrote the parties by email and indicated his view that Judge Newman had orally modified his original orders in this case and further expressing the desire to be heard at a hearing on this matter. ROA _____ Return Email from Hugh Ryan at SCCID dated February 12, 2013. Counsel received a letter from Judge Newman's Law Clerk dated February 12, 2013 in which the Law Clerk indicated that Judge Newman was aware of Counsel's concerns, but stated Judge Newman did not believe he has anything further to offer. ROA. _____, Letter dated February 12, 2013.

On February 26, 2013 the parties received an email from Judge Manning's law clerk indicating that Judge Manning declined to hold a hearing in this matter and asked that the parties submit proposed orders in lieu of a hearing. ROA. _____, Email from Adam Ribock, then law clerk to Judge Manning, dated February 26, 2013. On March 11, 2013 Hugh Ryan, on behalf of SCCID, submitted a Proposed Order to Judge Manning. ROA _____, Proposed Order of SCCID. On March 12, 2013 Counsel submitted her Proposed Order for the Payment of Fees and Expenses in this matter to Judge Manning, along with her Memorandum in Support. ROA _____, Proposed Order submitted by Counsel on March 12, 2013 and ROA _____, Memorandum in Support. Counsel submitted a Reply to the Proposed Order submitted by SCCID on March 14, 2013. ROA _____, Reply to SCCID Proposed Order.

By Order dated March 15, 2013, Judge Manning changed the rulings found in his orders dated December 5, 2011 and limited Counsel's authorization for payment of fees to \$10,000.00 and her reimbursement for all general expenses to \$750.00. ROA _____, Order dated March 15, 2013. Counsel subsequently filed a Motion to Reconsider on March 25, 2013. ROA _____, Motion to Reconsider dated March 25, 2013. On April 28, 2013 Judge Manning's law clerk advised the parties by email that "Judge Manning is prepared to rule on Ms. Shurling's Motion to Reconsider in the matter of Bejay Harley without a formal hearing.

Both sides may submit a proposed order for his consideration.”...ROA_____, Email from Judge Manning, April 28, 2013. On April 29, 2013 Counsel submitted her Proposed Order granting Reconsideration. ROA_____, Proposed Order submitted April 29, 2103. On May 6, 2013, Hugh Ryan submitted a Proposed Order denying Reconsideration. ROA_____, SCCID Proposed Order Denying Reconsideration. Said order was adopted by Judge Manning and was filed on May 23, 2013, ROA_____, Order Denying Reconsideration. The Appellant’s Notice of Appeal from the rulings below was filed on June 3, 2013.

ARGUMENT

Issues I – VII

The total fees claimed by Counsel in this matter totaled \$18,431.00. This case was set for trial three times and only resolved in a plea after the selection of a jury on the third trial date set in this matter. The case itself involved complex questions of proximate causation of death. Counsel was originally appointed to represent the Defendant in his Post-Conviction Relief action. As a result of her work in that collateral matter, the Defendant was granted a new trial. ROA, PCR Order. The Respondent ultimately decided not to appeal that ruling. Counsel herein was appointed to represent the Defendant due to the conflict of interest arising from the finding of ineffective assistance of counsel against the Richland County Public Defender’s Office which had previously represented the Defendant.

Prior to the scheduled retrial of this matter, Counsel became aware of the State’s intention to impeach the expert witness used by Counsel in the PCR matter based on personnel issues having nothing to do with the science behind his opinion as expressed during the PCR action. In addition, the prosecution advised Counsel of its intention to call at least two additional medical experts in addition to the original pathologist whose work had been the subject of the PCR action in this matter. Counsel was put on notice that the prosecution might

use all the pathologists currently working for the coroner's office as their witnesses if this matter went to trial.

As a result of Counsel's efforts in this matter, the Defendant was finally offered a last minute plea deal which resulted in him serving approximately three more months in prison and his being allowed to enter an *Alford*² plea. While this case did ultimately result in a guilty plea, Counsel had to prepare for three times before the State finally agreed to the resolution ultimately reached in this matter. Counsel would respectfully submit that the degree of her preparation in this matter in no small way contributed to the final outcome in this case. With this background in mind, she respectfully asserts that the total fees requested in this case were reasonable and supported by her time records as submitted to Judge Manning, as the presiding judge at the conclusion of this case. It is worthy of note that SCCID has never raised any specific objections to the time expended by Counsel in this case beyond their vague statements concerning the fact that Counsel had already had this case in a PCR and their belief that the fees were not appropriate where the case eventually ended in a plea. They have never raised any specific objection to any particular time expended in the preparation of a defense for this client.

S. C. Code Ann. § 17-3-50 (C) *did not* require advance approval of fees in excess of the statutory cap for fees at the time Judge Manning's Orders dated December 5, 2011, were signed. That provision states,

Payment in excess of the hourly rates and limits in subsection (A) or (B) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of that limit is appropriate because the services provided *were* reasonably and necessarily *incurred*. (Emphasis added).

² *North Carolina v. Alford*, 400 U. S. 25 (1970)

The language of that section requires that approval of fees in excess of the cap set forth therein be supported by a detailed order with findings as to why "the services *provided were* reasonably and necessarily *incurred.*" (Emphasis added) Thus, the relevant statutory provision clearly envisioned approval of total fees in excess of the cap of the conclusion of the case. It would be impossible for the Court to issue the required order finding that fees in excess of the cap provided by §17-3-50(A) *were reasonably and necessarily incurred* until after the conclusion of the case. The fact that this statutory provision is worded in the past tense gives credence to the fact that the legislature recognized as much in drafting this provision. This interpretation of S. C. Code Ann. § 17-3-50 (C) is consistent with the previous rulings of this Honorable Court in which the Court has found that an award of attorney fees in excess of the section 17-3-50 cap is "**within the sound discretion of the trial judge.**" *Ex Parte Brown*, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (2011), citing, *Bailey v. State*, 309 S. C. 455, 464, 424 S.E.2nd 503, 508 (1992).

Counsel is aware that SCCID has succeeded in getting a budget *proviso* added to this section which requires advance approval of any increase in fee rates or caps over those found in the statute itself. That *proviso* however, which applies to subsequent budget years, was not in place at the time Counsel was appointed in this case or when she originally submitted her bill to the presiding judge for approval.

Counsel has no desire to impose on this Honorable Court with lengthy arguments restating the positions she has taken in the lower court for the last nearly three years. Counsel therefore incorporates, and relies upon by reference, all the arguments and authorities presented by her in the numerous documents referenced herein all of which will be included in the Record on Appeal. Counsel would note that she had every reason to expect SCCID to prepare proposed orders for Judge Newman following the May 23, 2011 hearing inasmuch as they

prevailed upon Judge Newman to rule in their favor on virtually every issue addressed by the Court that day. It was only when the case was concluded, and about to be billed, that she discovered that they had not done so and Judge Newman's rulings from the bench had not been formalized by written Order. Then, and only then, did she presume to submit proposed Orders to Judge Newman to formalize his rulings so she could submit her bill in this case. Counsel's failure to send the proposed order to SCCID was a clerical oversight. The fact remains however, that the Orders sent to Judge Newman were in complete harmony with his rulings from the bench during that proceeding. While Judge Newman ultimately stated during the December 28, 2011 hearing, at the urging of SCCID, that he *meant* something beyond what he said on the record during that proceeding, he did not make any such requirements clear from the bench during the earlier hearing on these issues. Likewise, the proposed orders sent to Judge Newman were completely consistent with the language found in S. C. Code Ann. § 17-3-50 (C) and, as previously noted, were in compliance with the prior holdings of the Supreme Court of South Carolina on this subject.

As a practical matter, Judge Manning, as presiding judge in this case, had the authority to sign the orders he entered on December 5, 2011 approving payment of Counsel's fees and expenses. The orders signed by him in this case made the specific finding required by S. C. Code Ann. § 17-3-50 (C), in order to justify exceeding the fee rates and caps and expense caps set by S. C. Code Ann. § 17-3-50 (A) and (B). As found by Judge Manning in his December 5, 2011 Fee and Expense Orders, the time expended in this case, and the expenses incurred, were necessary to insure the Defendant received effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, in this most serious case.

CONCLUSION

The Appellant now respectfully asks this Court to find that, at the time this matter was submitted to the presiding judge for billing approval, §17-3-50(C) did not require the advance approval of fees in excess of the rates or statutory limits set by §17-3-50(A) or expenses in excess of the limits set forth in §17-3-50(B). Appellant seeks this Court's finding that, at the time this matter was submitted to Judge Manning for billing approval, the language of the Order entered by Judge Newman did not limit the trial judge's ultimate authority to decide whether the payment of her fees in excess of the statutory caps, as requested by Appellant at the conclusion of this case, was reasonable and necessary under the terms of §17-3-50(C).

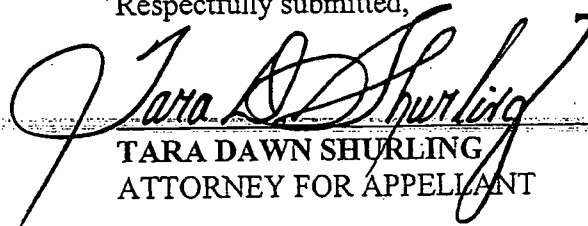
In addition, the Appellant asks this Court to find that §17-3-50 (C) permitted the trial judge to authorize the reimbursement of court-appointed Appellant for expenses in excess of the cap set by §17-3-50 (B), at the conclusion of the case where the trial judge found the expenses were reasonably and necessarily incurred. Likewise, Appellant seeks a ruling by this Court that nothing in the expense order signed by Judge Newman prohibited the trial judge from approving expenses, in excess of the limits pre-approved by that Order, at the conclusion of this case. Counsel notes that certain language found in §17-3-50 (B) suggests that expenses for certain professional services or experts should be approved in advance of retaining such individuals on behalf of the defense. The expenses in dispute however, do not involve the hiring of such expert witnesses or investigators. Those expenses in this case were in fact authorized by separate orders not the subject of this appeal. ROA _____, Expense Orders for Investigator and Expert Witness.

Appellant asks this Court to find that the total fees and expenses submitted for payment in this case were necessary and appropriate on the facts of this extremely complex

murder case and to direct SCCID to pay Appellant's bills as originally approved by the presiding judge, Judge Manning, on December 5, 2011. Counsel seeks this Court's finding that Judge Manning's original orders approving both her fees and expenses were entered within the authority of Judge Manning at the time they were signed and should not have been modified at a later date based upon the position advanced by Judge Newman during the December 28, 2011 hearing *well after the original orders were entered*.

Based upon all the reasons and authorities set forth herein, as well as those advanced by Counsel in all the documents referenced herein, Counsel asks that this Honorable Court not only to find that the orders entered by Judge Manning on December 5, 2011 were proper and within his authority to enter but, further that they should not have been changed based upon a position not taken by the former Chief Administrative Judge until well after the orders were signed and filed.

Respectfully submitted,


TARA DAWN SHURLING
ATTORNEY FOR APPELLANT

This 12th day of November, 2013.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Ex Parte: Tara Dawn Shurling, Attorney, Appellant,

In Re:
State of South Carolina, Respondent,

v.

Bejay Harley, Defendant

Appellate Case No. 2013-001298

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Court of General Sessions
Trial Court Case No.: 2003-GS-40-6670

DESIGNATION OF MATTER
TO BE INCLUDED IN RECORD ON APPEAL

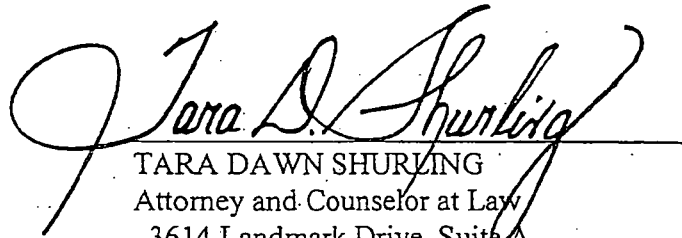
The Appellant proposes the following be included in the Record on Appeal:

1. Transcript of Hearing on May 23, 2011 before Judge Newman.
2. Motions for Attorney Fees and Motion for Expenses.
3. Transcript of December 28, 2011 hearing before Judge Newman.
4. Letter to Judge Newman dated January 5, 2012.
5. Proposed Amended Order sent to Judge Newman, January 5, 2012.
6. Email dated March 13, 2012 to SCCID.
7. Email dated March 13, 2012 from Hugh Ryan .
8. Letter to Judge Newman dated December 11, 2012.
9. Letter to Judge Manning dated January 24, 2013.
10. Email dated February 12, 2013 to Judge Manning.
11. Email dated February 12, 2013 from Hugh Ryan.
12. Letter from Judge Newman's Law Clerk dated February 12, 2013.
13. Email dated February 26, 2013 from Adam Ribock, then law clerk to Judge Manning.
14. Proposed order of SCCID on March 11, 2013.
15. Proposed order submitted by Counsel on March 12, 2013.
16. Memorandum in Support submitted on March 12, 2013.
17. Reply to SCCID proposed order submitted on March 14, 2013.
18. Order of Judge Manning dated March 15, 2013.

19. Motion to Reconsider dated March 25, 2013.
20. Email from Judge Manning dated April 28, 2013.
21. Proposed order granting reconsideration dated April 29, 2013.
22. SCCID proposed order denying reconsideration dated May 6, 2013.
23. Order Denying Reconsideration filed May 23, 2013.
24. Post-Conviction Relief Order.
25. Expense Orders for Investigator and Expert Witness.

I certify that this designation contains no matter which is irrelevant to this appeal.

November 12, 2013.



TARA DAWN SHURLING
Attorney and Counselor at Law
3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803) 738-8622
ATTORNEY FOR APPELLANT

State of South Carolina

Court of General Sessions

County of Richland

2003-GS-40-06670

The State of South Carolina :

-VS-

TRANSCRIPT OF RECORD

Bejay Harley :

December 28, 2011
Columbia, South Carolina

B E F O R E:

The Honorable Clifton Newman, Judge.

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

Patton Adams, Esquire
Hugh Ryan, Esquire
Attorneys for the State

Tara D. Shurling, Esquire
Attorney for the Defendant

Daphne D. Helms
Circuit Court Reporter

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>ID.</u>	<u>EV.</u>
S-1	12/14/11 order to pay attorneys fees		32
S-2	Judge Manning's 12/5/11 order		32
S-3	order to pay attorneys fees		32
S-4	July 6, 2005, memorandum from Chief Justice Toal		32
S-5	Judge Manning's order regarding expenses		32
S-6	order for general expenses		32
S-7	average fees for murder/manslaughter cases for the fiscal years 2008 through 2012		32
D-1	e-mail correspondence		26
D-2	letter to Judge Manning and Judge Newman from Tara Shurling dated 12/19/11		26

1 The Court: All right. All right. Mr. Ryan. Ms.
2 Shurling.

3 Mr. Ryan: I guess it's my objection, Your Honor, so
4 I'll start. Your Honor, just by way of a history in this
5 case, it's the State of South Carolina versus Bejay Harley.
6 Back in May, if Your Honor will remember, we had a hearing in
7 this matter, and at that time you made certain rulings. You
8 set a rate. You said there would be no second attorney in
9 the case. Ms. Shurling sought two attorneys.

10 You ruled there would be no mileage paid within the
11 county, and you made some rulings as to some experts. Ms.
12 Shurling wanted, I think, maybe three experts, and you
13 provided less than that and set a specific amount as to the
14 expert being paid.

15 Also, when we see the orders in this case -- I went back
16 through my notes. My notes reflected that you had set a
17 maximum fee of \$10,000. And then in December we received
18 some orders from Ms. Shurling's office, along with her hours
19 in the case, and the first order -- I'll hand these up to the
20 Court. I'm not sure if you have got a copy or not, Ms.
21 Shurling.

22 Ms. Shurling: He has it. I do---

23 Mr. Ryan: Do you have a copy, Your Honor, of the
24 orders?

25 The Court: Well, you can show me what you're -- to make

December 28, 2011 hearing

4

1 sure we're straight.

2 Mr. Ryan: Your Honor, if you look at the first order,
3 it's dated December the 1st, 2011, and the two most pertinent
4 paragraphs -- well, actually before the last four paragraphs
5 it states that, "Counsel may submit to the SCCID for payment
6 a voucher for fees up to \$10,000 without approval of the
7 Court." It says the same thing in paragraph three on the
8 last page.

9 Then on paragraph four it states that, Counsel may
10 submit to the presiding judge a request for payment of fees
11 in excess of the fee cap as set by this order at the
12 conclusion of our work in this case, and, Your Honor, you did
13 sign that order dated December 1st. Then, along with that,
14 we received an order dated December the 5th signed by Judge
15 Manning where he approved a total fee of \$18,431.

16 Your Honor, I would note -- and I mentioned this
17 previously in the letter -- the e-mail I sent to you and Ms.
18 Shurling, and it's also the last order in that stack I just
19 handed you. When -- before the initial May hearing in this
20 matter, Ms. Shurling had sent a series of proposed orders for
21 that case, and one of those orders was pretty similar to the
22 one that you signed dated December 1st, but in that order
23 there is no paragraph four allowing the presiding judge to
24 seek a cap. It just stopped with the \$10,000 without further
25 approval of the Court.

1 So when we received that order, Your Honor, allowing for
2 the total of \$18,000, we were saying: Wait a minute here.
3 We had a hearing about this. You set a fee of \$10,000
4 without further approval, and we're getting an order stating:
5 Pay \$18,000. So, Your Honor, we just -- I mean, for us, it's
6 just -- it seems to be a commonsense thing.

7 I mean, obviously you signed the order. You've always
8 told us to check behind you. That's our job to look behind
9 the Court, no disrespect to the Court. But we just looked at
10 that, and to us why would we even have had the first hearing
11 if it wasn't -- if we could just automatically go around it?
12 I used the word loophole, I think, and I think Ms. Shurling
13 is not happy with that word I used, but that's the word I
14 could think of.

15 It's like we had the hearing and set a cap, but yet why
16 did we have the hearing if you can just automatically go
17 around it? We never received any proposed orders. You know,
18 the first time we even saw these orders was when they were
19 already signed by the Court, Your Honor.

20 The Court: All right.

21 Mr. Ryan: So, Your Honor, I also direct your attention
22 to a memorandum of Chief Justice Toal dated July 6th, 2005.
23 Your Honor, this order was to all circuit court judges from
24 the chief justice dated July 6th, 2005, and it concerns the
25 order of additional attorneys fees.

December 28, 2011 hearing

6

1 Your Honor, I think the most pertinent part is the last
2 sentence of the first paragraph which states, "Because
3 17-3-50 does not provide for ex parte proceedings to
4 determine attorneys fees, hearings or requests for additional
5 fees should be held in open court." So, Your Honor, we left
6 the court in May thinking \$10,000. If additional fees are
7 necessary, we will be noticed about that. The Court could
8 re-address that issue.

9 And like I said, we received no proposed order. We were
10 notified of no hearing. We just received those orders and,
11 Your Honor, if you take Ms. Shurling's argument the way she
12 said, well, the presiding judge can just make that
13 determination after the fact, well, then why did she need to
14 come to you for that December 1st order? She had to come to
15 you for the December 1st order because she needed paragraph
16 four to allow Judge Manning to sign the \$18,000 order. And
17 so that's -- that's as far as that goes, Your Honor.

18 And maybe Ms. Shurling, when it's her turn to address
19 the Court, can actually address this issue. Actually this
20 morning when I was looking at the expense part of this order,
21 there was an order dated November 18th signed by Judge
22 Manning, but it actually had the wrong rates in here. It had
23 \$40 and \$60 an hour, and I don't know -- maybe Ms. Shurling
24 can explain that at the time.

25 Ms. Shurling: I can.

1 Mr. Ryan: This is -- I just saw this this morning, Your
2 Honor. I can present it to you.

3 Ms. Shurling: I'm familiar with it. It wasn't filed.

4 Mr. Ryan: Yeah. This was -- this was in this case, but
5 it doesn't even have -- like I said, it doesn't even have the
6 right fee amount. So I don't know if that was a mistake or
7 whatever it was, but it just shows the orders bouncing around
8 in this case. So that's the major issue, Your Honor, as far
9 as the attorneys fees.

10 Now, in addition to the -- and I don't even know if the
11 Court wants to address this because our argument is is that
12 you don't even get to Judge Manning's order because you
13 issued the first order, but let's say you found that other
14 fees may be authorized, which at this point we say it's too
15 late. It wasn't addressed beforehand. There's a cap.

16 It also comes to the issue of reasonableness of the fee.
17 Now, you set a cap of \$10,000. We also have to determine if
18 that amount was reasonable. We certainly don't think the
19 \$18,000 was reasonable, and I'm going to present to the Court
20 from our records -- we maintained the records as to average
21 fees in types of cases. May I approach, Your Honor?

22 Your Honor, this is from fiscal years '08 through 2012,
23 and now it's a little hard necessarily -- for example,
24 manslaughter, if you look on there, was that we only had two
25 cases. It's kind of up to an attorney how they put it in the

1 system when the attorney bills their record, their case. So
2 you had two manslaughter cases. Well, that was an average of
3 \$8100. The -- by far, the most number of cases was 197 cases
4 under the category of murder cases with an average fee of
5 only \$3,893, and that's what our data shows.

6 So, number one, you have the issue of no prior -- no --
7 exceeding the cap. Number two, the reasonableness of the fee
8 issue. And, number three, Your Honor -- and I just saw this
9 also this morning, and this wasn't really addressed in our
10 e-mails or letter about the issue of expenses. When I first
11 looked at the expenses, I didn't really -- I wasn't really
12 concerned about it because the total amount of expenses does
13 not exceed what you ordered. You ordered up to \$1,250 in
14 expenses, but you broke it down that the \$500 was for lay
15 witness fees and expenses and \$750 for other general
16 expenses. Do you need a copy of this?

17 Ms. Shurling: (Shook head from side to side.)

18 Mr. Ryan: If I may approach, Your Honor?

19 The Court: Yes, sir.

20 Mr. Ryan: Your Honor, the first order is the order that
21 you initially issued regarding expenses. The second order
22 I'm handing you is the order of Judge Manning. Your Honor,
23 if you look on the initial order that you signed and was
24 filed on May 25th, 2011, you actually wrote in in your own
25 handwriting -- it looks like you scratched through some

1 amounts and put in other amounts, and you stated that \$500 --
2 in the last paragraph, \$500 for lay witness fees and expenses
3 and \$750 for all other general expenses incurred. Costs for
4 investigative expenses are addressed by a separate order.
5 Total expenses shall not exceed \$1,250 without prior
6 authorization from the Court.

7 Then there was a sentence that you actually lined
8 through, Your Honor. This is your copy. You lined through
9 the sentence that said, "Counsel may, if necessary, exceed
10 the limits set for either category of expenses provided the
11 total expenses claimed may not exceed \$1750 without
12 authorization from this Court." So you wanted -- it appears
13 you wanted it to be broken down 750, 500, that you couldn't
14 just mix and match that.

15 Then I have an order signed. I don't have the date when
16 it was signed on here, but the one from Judge Manning has
17 \$1,138.37 in expenses, and in that order it says, "Therefore,
18 as I reviewed counsel's expense records, the Court finds the
19 total expenses incurred were reasonable and necessary.
20 Therefore, expenses pre-approved in two separate categories
21 in the amount of \$500 and \$750 shall be combined under one
22 category because they do not exceed the \$1,250 pre-approved
23 total that are hereby approved."

24 Your Honor, Judge Manning's order totally -- that's not
25 what you ordered, Your Honor. You didn't -- you specifically

1 -- when you scratched through that, in my reading of your
2 order, you didn't allow for a total cumulative. So I don't
3 see how Judge Manning's order can usurp your order, Your
4 Honor. And, Your Honor, that's all we have at this time.
5 We'd just like to have a quick reply after Ms. Shurling
6 addresses the Court.

7 The Court: All right. Ms. Shurling?

8 Ms. Shurling: Thank you, Your Honor. He said a lot,
9 and it will take me a minute to organize my thoughts here.
10 First off, as Your Honor knows, any of the orders that were
11 presented to the Court were drafted as proposed orders by me.
12 I would note an answer to an initial question put by Mr. Ryan
13 which was: What was the point in putting a proposed fee cap
14 in the order setting the fee rate if it wasn't to be an
15 absolute cap? And the answer is very simple: In years gone
16 by, I have had many cases that have gone on for years and
17 years, and I have ended up needing to ask the Court for
18 permission to submit an interim bill because the case took so
19 long and the fees were adding up and my little firm needed
20 the money.

21 So what I began the habit of doing is at the same time
22 if it was a case where I felt fees in excess of the statutory
23 limit were necessary and warranted and I asked for a fee in
24 excess of the 40 or 60 amount, that I would at the same time
25 ask for a preliminary cap which I admittedly don't call it a

1 preliminary cap but a fee cap without further approval, an
2 amount that was approved without further approval of the
3 Court. I've done that so that if a situation arose where I
4 wanted to go to a chief administrative judge who may or may
5 not be the same one that signed the order on the fee rates
6 and say I've been representing this particular defendant for
7 two years and I need to get some of my fees, I could get a
8 very simple order signed authorizing me to submit a voucher
9 for interim payment of fees and I had a pre-approved cap, an
10 amount of fees that could be submitted without further
11 approval of the Court.

12 The language "without further approval of the Court"
13 would be purposeless and totally superfluous if it were not
14 intended to indicate what I believe is a fair reading of
15 17-3-50 which is that ultimately the amount of services that
16 were in the end necessary and appropriate to provide
17 effective assistance of counsel could exceed the statutory
18 cap or any cap with further approval of the Court. And,
19 specifically, as they note, 17-3-50(c) requires the issuance
20 of a very specific order that in a detailed fashion outlines
21 specific findings of fact, why payment of the fees in excess
22 of the rate is necessary to ensure effective assistance of
23 counsel.

24 So at the time I drafted the original motions in this
25 case, I was indeed asking for more than one expert. I was

December 28, 2011 hearing

12

1 asking, I believe, for an hourly fee rate of \$100 an hour,
2 and I was asking for authorization of funding for a second
3 chair. Your Honor denied my request for a second chair.
4 Your Honor denied my request for more than one expert, and
5 you denied my request for fees at the rate of \$100 an hour,
6 but you were gracious enough to set fees at \$70 an hour
7 across the board in this case.

8 At some point in the correspondence that's been issued
9 in connection with this objection, Mr. Ryan said that Judge
10 Manning could not tell from the order you signed what
11 happened at the May 23rd hearing. With all due respect,
12 that's ludicrous. I didn't submit a voucher for payment of
13 fees for a second chair. Your Honor denied me that request;
14 I didn't ask to be paid for one.

15 I didn't submit a voucher for fees at \$100 an hour; you
16 had denied that. I didn't submit a voucher for payment of
17 expenses for more than one expert; you told me I couldn't.
18 The only order I submitted was one for payment of fees at the
19 hourly rate that Your Honor had said I could be paid at and
20 setting the \$10,000 cap without further approval of the
21 Court.

22 Now, in an e-mail that was sent to me by Mr. Ryan that
23 Your Honor has a copy of, he specifically acknowledges --
24 today he says that you set a fee cap of \$10,000, period. In
25 his own e-mail he acknowledges that what Your Honor said

RECEIVED
DEC 11 2013

SC Court of Appeals

1 the May 23rd hearing was that you were setting a cap of
2 \$10,000 without further approval of the Court. I believe
3 that the order I drafted and sent to Your Honor was a very
4 simple and accurate statement of your rulings from the bench
5 on May 23rd.

6 Now, the only distinction -- the original proposed order
7 that I prepared to have with me at the time the motions were
8 being heard, of course, granted me \$100 an hour; I'm ever the
9 optimist. But it also said a cap of \$10,000, without further
10 approval of the Court. It did not have the language in item
11 four, which Mr. Ryan finds so objectionable, because at the
12 time I had not had a case come up where there was ever any
13 suggestion -- in all the years I've been practicing under
14 these statutes, it has always been the presiding judge that
15 has been the final arbiter of whether the services provided
16 by counsel were necessary and appropriate on the facts of a
17 particular case.

18 There had been in an unrelated case some discussion
19 about whether or not it would be the presiding judge that
20 would approve a final voucher. So at the time I realized
21 that we had never gotten a written order from the May 23rd
22 hearing, I went ahead and put item four in there which Your
23 Honor, I'm quite certain, would not have signed the order had
24 you not considered that language and approved it.

25 An additional matter: If you read 17-3-50, it speaks in

1 the past tense. It very specifically says that it's required
2 that the -- upon a request for payment in excess of caps that
3 the Court look to see whether the services provided, past
4 tense, were necessary, past tense.

5 So I would argue that clearly 17-3-50 envisions that
6 when the bill is reviewed at the conclusion of the case that
7 the person reviewing - the person with the black robe, of
8 course - reviewing the request for payment of fees be in the
9 position to tell at the conclusion of the case whether the
10 expenses -- whether the services provided were necessary and
11 appropriate on the facts of a given case.

12 Now, Your Honor has been on the bench long enough to
13 know that probably upwards of 90 percent of all cases plead.
14 In homicide cases particularly, there's often such clear
15 evidence of guilt that the only thing even an able advocate
16 can do is negotiate early on the best deal possible, and
17 cases plead out without the expenditure of a great deal of
18 time and effort by defense counsel.

19 That was not the case in this case. This was a middle-
20 aged man with no other criminal record who had spent in
21 excess of seven years, I believe closer to eight years, of
22 his life in prison. His conviction had been overturned. It
23 had been remanded for a trial. There was competent medical
24 evidence that the woman had, in fact, died of natural causes.

25 It rapidly developed into a battle of experts. The

1 reason I was requesting for more than one was that the State
2 had three or four experts that they intended to present on
3 the question. Once Your Honor denied my request for more
- 4 than one expert, I was able to beg a professor, a research
5 pathologist at the University of South Carolina, to agree to
6 do it pro bono. So I had two experts to prepare for trial.

7 This case had among the most complicated medical
8 causation evidence of any case I have ever worked on. It had
9 a strong question of actual innocence, and for many months,
10 indeed nearly two years - pardon me, Your Honor; my
11 antihistamines are drying me out - my effort at getting
12 anywhere close to a plea agreement had been in vain.

13 We were prepared for trial. We had met with Judge
14 Manning the week before trial was set to commence on Monday,
15 going over where we were on motions and various matters, and
16 he had in an appropriate judicial fashion encouraged the
17 solicitor's office to talk to me further about possible
18 pleas. Nothing came of that conversation, but I came Monday
19 morning.

20 We qualified the initial jury pool. Qualification took
21 place, and at that point Judge Manning made it very clear
22 that he was going to be very unhappy with everyone if we
23 didn't make a harder effort to work this case out. For two
24 solid days I went back and forth between Judge Manning with
25 Luck Campbell, just Luck Campbell, my client downstairs in

1 the holding area, until finally late in the second day we
2 were able to get an agreement from my client to enter an
3 Alford plea.

4 So the -- I would submit that the vast majority of these
5 so-called average cases are cases where all parties know
6 early on that it is going to be a plea and that it's just a
7 matter of what the plea is going to be. This is a case where
8 I had three nine-inch D-ring notebooks of trial preparation
9 that I had worked on and prepared. I had multiple experts,
10 investigators. This was a hard-fought case that would have
11 ended, I believe, in a trial that very well may have lasted
12 more than a week. I expected it to go more like a week and a
13 half.

14 The issue I believe in this case, Your Honor, is --
15 there are three actually. One is that as a preliminary
16 matter under 17-3-50 I came to the Court and requested fees
17 in excess of the \$40 and \$60-an-hour statutory rate. Your
18 Honor agreed to allow me to submit my bill at \$70 an hour.

19 I did present for the Court a preliminary cap, a pre-
20 approved cap, of \$10,000 without further approval of the
21 Court. I believe that that was consistent with the letter
22 and intent of 17-3-50. That order that Your Honor signed was
23 submitted to Judge Manning along with my request for the
24 total amount of fees submitted. So he was aware of every
25 word of the order that you had signed following the May 23

RECEIVED
DEC 11 2013
SC Court of Appeals

1 proceeding.

2 Now, what happened with regard to this other order that
3 was never filed with anyone, never sent to SCCID -- I have a
4 paralegal on my staff that does the initial preparation of
5 bills for me based on -- I keep my time on my time slips, and
6 she prepares the bills and she drafted it up and she had
7 finished this one and had it in a stack of others.

8 I checked my time. I went line item by line item and
9 checked my time and then signed the proposed order submission
10 to Judge Manning without noticing that she had prepared it at
11 the standard statutory rate of \$40 an hour and \$60 for in
12 court.

13 Once I realized she had done that in error, I wrote
14 Judge Manning, told him that it was a simple clerical error,
15 that I apologized for not catching it, and sent him a copy of
16 the order Your Honor had signed and told him that the order
17 he had signed at 40 and 60 would, you know, be clearly marked
18 void in my file and that it would not go anywhere but that I
19 needed an order that reflected the hourly rate that Your
20 Honor had approved and gave him a copy of the order approving
21 that fee.

22 I believe that based on Your Honor's order, consistent
23 with 17-3-50, that an amount of fees up to \$10,000 was
24 approved without further approval of the Court but that
25 consistent with the intent, I believe clear intent, of

1 17-3-50, at the conclusion of the case, the judge who was in
2 the best position to be very familiar with the facts of the
3 case, the tremendous volume of evidence in the case, the
4 witnesses -- because we'd gone over witness lists with the
5 judge and so forth, approved -- went over my hourly
6 submission, reviewed Your Honor's order, and signed an order
7 authorizing my fees. He did so signing an order that very
8 clearly set forth the required elements under 17-3-50(c)
9 setting forth specific findings of fact as to why the
10 services provided, past tense, were, past tense, necessary
11 and appropriate, given the totality of the circumstances in
12 this case, the facts and circumstances of this case.

13 I believe the only issue before Your Honor today is the
14 question of whether or not that \$10,000 cap that Your Honor
15 approved -- and I want to make this very clear. Your Honor
16 didn't -- we had a hearing on my fee request for \$100 an
17 hour. I'm the one that put in the proposed order a proposal
18 for a \$10,000 fee that was approved without further approval
19 of the Court for reasons I've noted earlier, but that order
20 did not and your ruling from the bench did not ever indicate
21 that it was a flat \$10,000 cap, that under no circumstances
22 could a submission be made to the Court demonstrating that
23 ultimately fees in excess of that proved to be necessary and
24 appropriate on the facts of the case as is allowed by
25 17-3-50.

1 Had Your Honor so ruled, I believe that when you got my
2 proposed order you most certainly, after reading it, wouldn't
3 have signed it. I know you well enough. You've refused to
4 sign quite a few of my orders. So I have no question that if
5 you had a problem with it you wouldn't have signed it, but
6 the fact remains that I believe that the order, as signed, is
7 totally and completely consistent with the words you uttered
8 from the bench on May 23rd and equally importantly is totally
9 and completely consistent with 17-3-50(c).

10 Having said that, I believe that SCCID is well-
11 intentioned but overlooks a very important point. Under the
12 memoranda that has been issued by the chief justice, their
13 own policies and procedures, they can wage objections to the
14 order signed by Judge Manning with Judge Manning and say:
15 Your Honor, you have signed an order authorizing total fees
16 of 18,000, whatever it is - I don't have my copy with me -
17 and we believe that those fees are excessive and not
18 appropriate, and we're requesting a hearing.

19 Their own policies and procedures and those that have
20 been endorsed by our chief -- they can file their objections
21 with Judge Manning, have a hearing on the total fees I
22 requested, but even then the procedures say that in the end
23 whatever the judge says that he finds to be necessary and
24 appropriate is what SCCID shall pay. So at the end of the
25 day, Your Honor's order is consistent with the hearing. It's

1 consistent with the statute.

2 I then submit that order to Judge Manning. Judge
3 Manning reviews my time slips. He reviews my submission. He
4 signs an order. They then have a right to file an objection
5 with Judge Manning and request a hearing on the
6 reasonableness of my fees at which time they can state their
7 position why they don't think it's reasonable, and Judge
8 Manning can rule on his order as is required by the policies
9 and procedures.

10 I would note on the question of expenses -- I didn't
11 know we were going to address this here today, but very
12 simply, Mr. Ryan conveniently quit reading. After the struck
13 sentence on page two, the next sentence says, "Counsel is
14 authorized to seek approval of any balance not covered by
15 this order upon the completion of this case with the express
16 understanding that counsel assumes the risk that any such
17 balance will not be paid if not approved by the Court."

18 My proposed order, which Your Honor modified, would have
19 allowed me to submit my total expense bill directly to SCCID
20 for payment as long as the total did not add up to more than
21 the 1,250 authorized by the Court. Your Honor struck that
22 language. Having struck that language, you left the language
23 that says that counsel is authorized to seek approval of any
24 balance not covered by this order upon the completion of this
25 case.

1 Now, what I did in my proposed order was say: I have
2 exceeded the cap set by Judge Newman in the two categories --
3 in one of the two -- I forget how it went, but the categories
4 didn't add up consistently with the amounts Your Honor set
5 for each category. But I noted that the total expenditure of
6 1,138.37 was less than the total fee pre-approved by the
7 Court, and I asked Judge Manning to approve payment of those
8 fees.

9 Now, the language Your Honor struck would have allowed
10 me to submit the bill for 1,138.37 directly to SCCID for
11 payment without Judge Manning's further approval. You struck
12 that language. I respect that; I honored it. And what I did
13 was then submit to Judge Manning, consistent with the next
14 sentence: Counsel is authorized to seek approval of any
15 balance not covered by this order upon completion of the
16 case.

17 Once again, I did note to Judge Manning that the
18 1,138.37 came in under the total amount authorized by Your
19 Honor, but I didn't hide anything. I made it very clear that
20 my categories were not consistent with the individual amounts
21 reflected in your order, and I asked that he approve -- that
22 he provide the additional approval of the Court directly
23 provided for on page two of your order to allow me to be paid
24 the little bit that went over the amount in each of the
25 categories.

1 Your Honor, once again, with all due respect, I know
2 what you said from the bench and I know you well enough in
3 habit to know that you're very careful about what you sign.
4 Had Your Honor refused my proposed order and said, "I'm not
5 signing this; I meant for it to be an absolute cap of
6 \$10,000," I would have appealed that ruling, very
7 respectfully, but I would have appealed it as being
8 inconsistent with the letter and intent of 17-3-50 on the
9 basis that a -- any chief administrative judge who is not
10 familiar with the case would not be in the position to know
11 in advance with certainty the amount of services that would
12 be required ultimately to provide the client the
13 constitutional protection of reasonable professional
14 assistance that he's entitled and that no judge could prelim
15 -- could in advance know how a case would develop.

16 I, for example, at the time we were doing this had no
17 idea the extent of the pathology prosecution that Luck
18 Campbell intended to present. At the time I came to you, I
19 thought she had three experts. By the time we were getting
20 ready to go to trial, she was rattling off the name of four
21 or five more experts that she might call.

22 So it would be my position that a judge in advance, and
23 indeed the defense lawyer, is never in the position to know
24 in the beginning what the needs of the case may develop into
25 as the case progresses and as you get more and more discovery

1 from the prosecution and know more and more about the details
2 of the case that the State intends to introduce against your
3 client.

4 Lastly, I have said and I don't want to put words in my
5 very worthy adversary's mouth, but I generally see a view
6 emerge that it's only somehow death penalty cases that ever
7 warrant these extensive fees of attorneys in trying murder
8 cases, and I've done death penalty work. I've done a lot of
9 it years ago. I got burned out and quit. But I've done a
10 lot of death penalty work, and with all due respect to those
11 people I respect very much that still do it, trying a murder
12 case where a defendant has a strong claim of actual innocence
13 in a case with a lot of evidence that is medically related
14 and highly complex, a case involving multiple experts, is not
15 one bit easier than trying a death penalty case. I've done
16 both; they aren't easier.

17 And the burden on my heart of defending a man who is in
18 his forties, has no prior criminal record, has already spent
19 eight years of his life in prison for killing a woman that
20 experts I respect tell me died of natural causes, the
21 prospect of him spending 30 years to life, day for day,
22 locked up in the penitentiary for a murder that wasn't a
23 murder is no more a burden on my heart or no more a burden on
24 me professionally - I mean no less, pardon me - is no less of
25 a burden on me professionally than the prospect of a case

1 where maybe my client split three peoples' throats wide open
2 with a knife. They've got a dozen witnesses. Everybody and
3 their brother knows he did it, that he bragged about it,
4 whatever bizarre facts death penalty cases often have, and
5 the only question is the appropriate penalty.

6 I submit that my burden as an advocate is no less when
7 I'm trying to keep a potentially innocent man from spending
8 up to the rest of his life behind bars than when in many, if
9 not most, death penalty cases where guilt is a virtual
10 foregone conclusion. It's just a question of whether or not
11 you're going to impose the death penalty, and I would submit
12 that that's why our legislature in their wisdom allowed under
13 17-3-50 for judges at the end of the case to say this was --
14 this was the one in a hundred.

15 I mean, you've got a 90 to 95 percent plea rate, and
16 most of those cases plea out without much preparation,
17 without a lot of work, but in those rare cases that almost go
18 to trial that go to the very eve of trial before they plead
19 or that go to trial, those cases are not significantly less
20 in terms of burden to the lawyer and the lawyer's practice
21 than a death penalty case.

22 And with that in mind, I certainly -- I don't believe
23 that it's appropriate for Your Honor to reach the ultimate
24 question on the fees. I believe that that is a question that
25 the representatives from the SCCID have the right to wage

RECEIVED
DEC 11 2013
SC Court of Appeals

1 their objection with Judge Manning and have a different
2 hearing on that before Judge Manning because he is the judge
3 that indeed found that my hours expended were reasonable,
4 necessary, and appropriate on the facts of this case.

5 I believe the only question before the Court,
6 respectfully, today is whether or not the order you signed
7 was consistent with your ruling, and indeed if -- if it was,
8 as I believe, not only consistent with your ruling but also
9 with South Carolina law, then contrary to what Mr. Ryan has
10 suggested, they're not without remedy. They have their right
11 under their own protocol and under the chief's memorandum --
12 they can wage their objection to my total fees with Judge
13 Manning, and they'll get a hearing, another day in court on
14 that. That's not the question before the Court today.

15 I believe that I have answered everything that they have
16 addressed. I would ask, Your Honor, that the record in this
17 matter include -- I would introduce copies -- I sent a
18 detailed e-mail memorandum to Hugh Ryan on December 14th,
19 2011, outlining my position in response to their objection
20 which I followed up with a letter to Your Honor's -- both
21 yourself and Judge Manning dated December 19th, 2011.

22 Since I did not submit those in memorandum form and
23 filed them with the court, I would move to introduce them as
24 my exhibits 1 and 2 so that they can be incorporated and be
25 part of this record.

1 The Court: Okay.

2 Mr. Ryan: That's fine, Judge.

3 (Defendant's exhibits 1 and 2 were received in
4 evidence.)

5 Ms. Shurling: Your Honor, one remaining point - I
6 apologize - I did neglect to address. Mr. Ryan pointed out
7 that 17-3-50 does not -- and the chief's memo points out does
8 not provide for ex parte proceedings to determine attorneys
9 fees and that hearings on requests for additional fees should
10 be held in open court. They were and they are, and I have
11 never had any discussion with Your Honor ex parte about this.

12 I -- we had a hearing on May 23rd. The order that I
13 submitted to Your Honor is entirely consistent with your
14 ruling from the bench. They are now entitled to wage
15 whatever they -- objections they would like with Judge
16 Manning contesting his finding that my fees were reasonable
17 and necessary.

18 And I am aware that under the guidelines and procedures
19 that Judge Manning has the authority to hold a hearing, if he
20 chooses to do so, and if he does, it certainly will not be ex
21 parte. It will be a hearing at which SCCID would be notified
22 and have the opportunity to provide the Court with whatever
23 input they desire. Thank you.

24 The Court: All right. Mr. Ryan.

25 Mr. Ryan: Your Honor, briefly. First, also for the

1 record, I'd like to put in the record the -- your order of
2 December 1st, Judge Manning's order of December 5th, and also
3 the proposed order which I submitted up to you, Your Honor,
4 the memorandum of the chief justice, the average fee document
5 which I'll provide to Ms. Shurling, the order of Judge
6 Manning approving the expenses, the order of judge - we don't
7 need that one - the order of Your Honor on the initial issue
8 of expenses. I'd like to move that into the record, Your
9 Honor.

10 The Court: All right.

11 Ms. Shurling: Your Honor, I would have an objection on
12 the fee schedule that's being offered. It includes cases in
13 various categories of homicide. It does not indicate how
14 many of these cases were pleas, how many were trials. We
15 have so little data provided on this that I believe that its
16 relative value is de minimis in that it's potentially
17 misleading, and I would object on that ground.

18 The Court: Mr. Ryan?

19 Mr. Ryan: Your Honor, it's obviously an average, so
20 it's going to including pleas; it's going to include trials.
21 That's what an average is, Your Honor. So it's going to --
22 statistically it's going to take that kind of thing into
23 account, Your Honor.

24 Ms. Shurling: Your Honor, I would inquire as to whether
25 Mr. Ryan prepared the document himself, whether he totaled

1 the fees in the cases and averaged them himself and prepared
2 that document.

3 Mr. Ryan: Judge, it's prepared by our data processing
4 or our data individuals.

5 The Court: It's part of the records of the state
6 agency, isn't it?

7 Mr. Ryan: Yes, sir, Your Honor.

8 The Court: It's part of the -- it's admissible as such.

9 Court Reporter: I'll mark them at the end of the
10 hearing.

11 Mr. Ryan: Okay. Your Honor, just briefly. I know you
12 want to conclude this matter. Your Honor, we never said that
13 10,000 was -- we didn't -- we always said it was further
14 approval. I mean, she could have necessarily gone back and
15 said, "Okay. I'm at \$9,000. You know, I'm approaching this
16 cap." We could have re-addressed this issue, and that's the
17 feeling that both I and Mr. Adams had, and I thought the
18 Court felt that way the day we left here in May. We had a
19 cap in place.

20 We're not saying it was a blanket -- that's a
21 misconstruing of the issue, you know. She could have come
22 back, made a motion like the chief justice said, you know, to
23 request a hearing, be heard in open court. We could have
24 come back and said, Your Honor, we're going to exceed \$10,000
25 or we could have addressed this issue on the front end, not

1 on the back end. That's why we have these things on the
2 front end: To address this issue.

3 And Ms. Shurling talks a lot about 17-3-50, and we've
4 argued this point in front of several courts before. Your
5 Honor, I don't even think you really get to that issue
6 because you ruled it was \$10,000 without further approval,
7 and in a sense Judge Manning can't necessarily go around
8 that.

9 And even, let's say, if you do consider 17-3-50 --
10 again, we've argued this before. Ms. Shurling always hangs
11 her argument on that one part of that section that -- the one
12 part, and look at the whole thing. Obviously the Court is
13 well aware you review statutes in the totality of the statute
14 for -- to infer the meaning of the statute.

15 Throughout that statute, especially when it comes to
16 expenses and all, it talks about prior approval. It clearly
17 talks about prior approval of expenses when 500 -- \$500 are
18 left. And so, Your Honor, it talks about the word -- it
19 talks about authorization which is defined as to grant
20 authority or give permission. It uses the word "is" instead
21 of "was." So there's some present tense in there. And it
22 talks about ensuring effective assistance of counsel which
23 you can ensure effective assistance of counsel before the
24 matter. I mean, after the fact, counsel's representation is
25 already done.

1 So, again, I don't think that's really the issue, but if
2 it is, I think we've got a whole statute that talks about
3 prior approval of things. Your ruling made further fees --
4 approval of further fees necessary. Again, why do we come
5 here and set a cap if all you've got to do is just go around
6 that and go to another judge and increase this? We wasted
7 our time on May the 23rd, Your Honor.

8 Your Honor, so I don't think we even necessarily get to
9 Judge Manning's part because your ruling clearly affects what
10 Judge Manning could do in this case. And, Your Honor, the
11 death penalty fees, I can't really address that. I mean, our
12 data is what our data is. We won't try to make any
13 discrepancy. I mean, if a lawyer submits a fee in --
14 whatever kind of case it is, we look at it from each -- the
15 case as it stands upon itself, so I don't necessarily
16 understand that.

17 But, Your Honor -- and also the order of Judge Manning,
18 it was gotten ex parte because we -- we just got an order. I
19 mean, there was no notification of a hearing of the \$18,000
20 fee. So I guess what Ms. Shurling is saying now is we
21 request a hearing after the fact, but, you know, in our view
22 of things, before Judge Manning signed that fee for \$18,000
23 -- when you take an order to a judge and present it to the
24 judge and the other side is not notified or a hearing is not
25 granted, that's what I consider ex parte.

1 When the chief justice anticipates being heard in open
2 court -- if it was heard in open court, we certainly weren't
3 aware that Judge Manning was going to hear something on this.
4 So we respectfully submit that a \$10,000 cap was in place
5 without further approval. It could have been upped, but it
6 wasn't and it's after the fact now, that the fee is
7 reasonable to the ones in the data we presented to the Court,
8 and we certainly think on the expenses you made that clear.
9 I understand that next sentence she read causes a little bit
10 of confusion, but I think you made it pretty clear in your
11 order what the caps were for the expenses.

12 Ms. Shurling: Your Honor, may I -- may I briefly
13 respond, Your Honor, to one point?

14 The Court: Sure.

15 Ms. Shurling: I am trying to not be offended by what
16 borders on an accusation of an ethical violation. The
17 policies and procedures in place for judges who are asked to
18 approve hours, as Your Honor knows full well, allows a
19 circuit court judge to, in his discretion, seek input from
20 SCCID as to whether a fee request should be approved before
21 it is approved. Circuit court judges are not required to get
22 their opinion; you are permitted to.

23 The policies and procedures clearly say that you can
24 seek input from SCCID as to whether or not a request for fees
25 is reasonable and appropriate and should be approved, and if,

1 in fact, a circuit court judge chooses to do so and a hearing
2 is held, I have no qualms with the fact that the chief's
3 memorandum makes it very clear that in her view those cannot
4 be ex parte and that they are invited to come, and indeed the
5 whole purpose would be for them to present their input.
6 That's what the judge is asking for.

7 But I take issue with their position that any judge is
8 required to get their opinion on the matter. The policies
9 and procedures simply permit a judge in his wisdom, if he
10 thinks he needs it, to ask for their input. If a judge
11 doesn't ask for their input, then there is no hearing before
12 the fees are approved.

13 Even so, once the orders approving the fees is signed,
14 they're protected under their own policies and procedures and
15 other related rulings. They can wage an objection, and they
16 can ask Judge Manning to have a hearing before my fee is
17 paid. So they're not deprived of the opportunity to be
18 heard.

19 One just remaining issue, Your Honor. Never mind. I
20 think I've said enough. Thank you. Your Honor, may I be
21 looking at exhibits for just one minute?

22 The Court: Sure.

23 Ms. Shurling: Thank you.

24 (Pause in proceedings. State's exhibits 1 through 7
25 were received in evidence.)

1 The Court: All right. Well, I first find that the
2 request of the department for me to review the order that I
3 signed on December 1st is a timely request. I got calls and
4 e-mails and all that soon after this was submitted seeking to
5 have it reviewed, and we're here today for a hearing
6 concerning that, concerning the request.

7 A lot of interesting things have been said today, and
8 I've spent a rather interesting year of my life dealing with
9 these requests for payment of fees for indigent defendants,
10 unlike any of the previous nine and a half years that I've
11 spent on the bench. I don't know whether it's a Richland
12 County thing or a Richland, Charleston, Greenville or
13 statewide, but being in the third circuit quite a bit and
14 other parts of the state, I have never seen as much acrimony
15 and things going on with regard to attorney fee issues in
16 appointed cases as I have seen this past year and -- which
17 I've just come out of a 10-day trial on a case in which the
18 fees and requests for payments of experts have been just, in
19 my mind, astronomical -- you know, everything presented under
20 the guise of the defendant's rights to reasonable
21 professional assistance certainly which is a constitutional
22 right, but the limitations on those rights versus the ability
23 of the Court to fund what is sought in protection of those
24 rights I don't see how that can -- I don't see how the State
25 will be able to resolve that issue.

1 It's something that is seemingly out of control or soon
2 will be out of control. Ms. Shurling, did you submit an
3 order after the May 23rd hearing?

4 Ms. Shurling: I did not, Your Honor, and that was a
5 simple oversight on my part. I didn't realize we didn't have
6 a written order until later.

7 The Court: Well, certainly I recall the May 23rd
8 hearing because I refused to sign some requested orders which
9 led up to Ms. Shurling's request for a hearing, and we went
10 into the hearing and it was discussed during the course of
11 the hearing that Ms. Shurling had previously represented Mr.
12 Harley on the P.C.R. matter. Is that right?

13 Ms. Shurling: Yes, sir, Your Honor.

14 The Court: And, you know, there are -- fee issues
15 abound and the question was posed as to, well, if you
16 represented him for two years or three years or whatever
17 number of years on the P.C.R., then how much -- how much new
18 or why is -- why are we starting it as if you -- as if he's a
19 stranger to you as a client? And all of that was addressed
20 in court during the course of that hearing. But leaving the
21 hearing, I issued an oral order placing a \$10,000 cap on the
22 payment of fees without further approval of the Court.

23 Now, fast-forward to December when an order was
24 submitted to me, I did not review notes from the May hearing.
25 I looked at the order and assumed that the order was

1 consistent with what was stated by the Court, but I see now
2 upon it being pointed out by SCCID and the order itself that
3 paragraphs three and four are inconsistent and inconsistent
4 with what the Court ordered, and it's also inconsistent with
5 any other order that I've signed the entire year because if
6 an order is made by the Court without further approval, then
7 that's the end of the order without any language allowing for
8 a separate request to be made in excess of the order with the
9 presiding judge as is reflected in paragraph four of this
10 order.

11 So I did not catch that language, and that was brought
12 to my -- timely brought to my attention by the department.
13 So I am going to amend the order and delete paragraph four
14 from this order. That would cause this order to be
15 consistent with the proposed order that was submitted to me
16 by Ms. Shurling as far as the amount being up to \$10,000
17 without further approval of the Court, provided the presiding
18 judge finds the time records to be adequate to support the
19 time and expenditures claimed.

20 Then whatever disarray that that may cause as to Judge
21 Manning's order, then let that be. It will be addressed by
22 Judge Manning. Mr. Shurling indicates that she would have
23 appealed the order. I invite an appeal of this.

24 I have found this entire matter of judges or
25 administrative judges being requested to approve these

December 28, 2011 hearing

36

1 attorney fees to be -- I was about to use the word
2 distasteful. I don't know if I want to say that, but it
3 presents a lot of challenges because the judges are not --
4 not in a position in most instances to review and to know the
5 need for the orders that we're asked to sign in order to
6 protect the rights of the defendants to reasonable
7 professional assistance.

8 I think it needs to be -- the issue needs to be reviewed
9 -- I think that -- by the appellate courts. I think perhaps
10 other policies, procedures, guidelines should be drawn to --
11 such that judges are not just asked on the fly to sign and
12 approve things without the benefit of specific enough
13 information. Maybe there should be a need for a hearing in
14 advance of all these approvals because we're talking about
15 thousands of dollars of requests, at least here in Richland
16 County, and I don't even know that the presiding judge should
17 be the one to approve the fees.

18 I've heard Ms. Shurling's argument that the department
19 there, SCCID, should just comply with whatever the judge
20 says, that the judge is the final arbiter. Unfortunately in
21 many -- in too many instances, the judges are asked to
22 approve with little information and not enough knowledge and
23 time spent to be able to make sound decisions.

24 And I appreciate the compliment about me being very
25 careful in reviewing matters, but I don't think I was careful

RECEIVED

DEC 11 2013

SC Court of Appeals

1 enough in reviewing this, perhaps because it was submitted so
2 much later, and I assumed that everything was consistent with
3 specifically what was ordered. And I certainly understand
4 Ms. Shurling seeking to add the clarifications in order to
5 pave the way for Judge Manning to sign the one that he did
6 days later or -- but it's inconsistent with what I ordered
7 from the bench.

8 So, therefore, I'm going to modify the order deleting
9 paragraph four, and we'll see where it goes from there. Ms.
10 Shurling?

11 Ms. Shurling: Your Honor, may I request clarification?

12 The Court: Sure.

13 Ms. Shurling: When you said \$10,000 without further
14 approval of the Court, Mr. Ryan has just said that they did
15 not interpret that to mean an absolute cap, that they could
16 perceive me being able to come back to the Court. Is it your
17 ruling today that it was your intent that \$10,000 be the cap
18 without further approval by you, by -- I understood your
19 ruling to be a \$10,000 cap without further approval of the
20 Court, and I took "the court" to mean the court of general
21 sessions, the court, not -- not...

22 The Court: Well, it is the court of general sessions.
23 Presiding judges come and go. Chief administrative judges
24 come and go. But the -- the Court in this instance that
25 approved it was me. So, you know, one circuit judge can't

1 modify another circuit judge's order. That's one -- one
2 problem that now exists with the -- with me issuing an order
3 placing a cap of ten -- of \$10,000 without prior Court
4 approval and an after-the-fact order being submitted to Judge
5 Manning for \$18,000, so...

6 Ms. Shurling: Just so that I'm perfectly clear, it was
7 my understanding that Your Honor was ruling that there was a
8 \$10,000 cap unless I got further approval from the Court, and
9 I did not interpret the further approval of the Court to mean
10 Your Honor specifically because of the very problem that Your
11 Honor has just addressed from the bench, that as the chief
12 administrative judge you simply don't have enough information
13 about the case to know what a fair and reasonable cap would
14 be, and doing it in advance you often don't know how the case
15 is going to progress.

16 The Court: Yeah. Well, that's why---

17 Ms. Shurling: And because of that, that was my
18 interpretation. It was never my intent to countervene (sic)
19 Your Honor's ruling. I want to be perfectly clear on that.
20 I thought you meant that unless the court, in the global
21 sense, subsequently found that fees in excess of that were
22 warranted, and that's why I drafted the order the way I
23 drafted it. So---

24 The Court: Yeah. I sign---

25 Ms. Shurling: Just so it's clear.

1 The Court: I sign orders on a weekly basis, daily basis
2 here, and when the public defenders get the order, if they
3 say, "Well, Judge, we need more money," they'll come back and
4 say it. I approved an order, I believe, in the case I had
5 last week approving \$10,000 for travel for expert witnesses.
6 \$10,000.

7 Ms. Shurling: Then, Your Honor---

8 The Court: And the public defenders came back and said,
9 "Well, Your Honor, we have these other character witnesses
10 who we must have, and they're coming from far and near. We
11 must have them. So please give us more approval." And I
12 yielded, gave them more approval, under the reasonable
13 professional assistance language that you quoted.

14 So it's not at all unusual that once an order is
15 approved setting a cap of a certain amount without further
16 approval, further approval is often sought, but I have found
17 in so many instances when I set a lower cap, somehow or
18 another the expert's fees get -- they get lower and other
19 things tend to happen.

20 Ms. Shurling: Your Honor, I would like then to note for
21 the record my objection on two grounds: One, that I believe
22 that 17-3-50 does not require advance approval of fees that
23 are going to exceed either the statutory cap or a previously-
24 set cap.

25 The Court: Well, I don't know---

1 Ms. Shurling: It does for expenses.

2 The Court: ---that it says it, but it requires further
3 advance... So it's not uncommon that advance approval---

4 Ms. Shurling: Yes, sir, but---

5 The Court: Whichever way the statute contemplates it,
6 the statute contemplates it.

7 Ms. Shurling: Yes, sir.

8 The Court: I'm not the -- I don't spend all of my time
9 working with these fee petitions and can I get some more
10 money here, some more fees there, or the counter argument
11 that you've asked for this without approval. You know, you
12 all spend quite a bit of time figuring all that out.

13 Ms. Shurling: I understand, Your Honor. Just for the
14 record, number one, I don't believe the statute requires
15 advance approval and, number two, I believe that the -- for
16 the reasons Your Honor has even acknowledged from the bench
17 that the wording of the statutory provision requires that the
18 judge making the final decision about whether fees -- whether
19 services provided were reasonably necessary is to make
20 detailed -- detailed factual finding based on the
21 individualized facts of the case, a task that would, for the
22 record in my judgment, be impossible for a chief
23 administrative judge with as limited a familiarity...

24 Now, if the chief administrative judge were to happen to
25 try the case, be the judge presiding in the trial, then the

1 chief administrative judge would have reason to be the person
2 in -- the most familiar with the case and the best in the
3 position to make that determination. Where the chief
4 administrative judge making a preliminary ruling is not
5 ultimately the judge to try the case, then I would object on
6 the ground that His Honor respectfully isn't in the position
7 to be the one with the most knowledge of the case.

8 The Court: I would love to see the appellate courts
9 review this entire area and set some -- and set some
10 parameters and guidelines for judges throughout this state to
11 follow because I find little indication that the -- that in
12 my experience that the chief's directive is being adhered to.
13 I think it needs to be reviewed by the appellate courts.

14 Ms. Shurling: Your Honor, in light of your ruling, I
15 would have two requests. One is that I will move at this
16 time for this Court, i.e. Your Honor specifically, to approve
17 my request to exceed the previously-set cap based on the
18 individualized facts and circumstances of this case.

19 Toward that end, I would require an opportunity, a
20 hearing, at which I would have an opportunity to educate Your
21 Honor on the background of this case, the volume of discovery
22 involved, the number of experts, the hours and hours spent
23 dealing with this area of medical evidence so that I can get
24 Your Honor up to speed on why the hours expended in the case
25 were reasonable and appropriate. I think such a hearing

1 would obviously not be ex parte, and they would be required
2 to be available to participate.

3 That would be, number one. And, number two, I would
4 request that, given the delay in payment, that I be
5 authorized to submit an interim voucher at this time for the
6 \$10,000 that was pre-approved without further approval of the
7 Court and ask that that amount be paid, pending a hearing on
8 my request for payment of a balance in excess of the
9 originally-set cap.

10 The Court: All right. Mr. Ryan?

11 Mr. Ryan: Your Honor -- Your Honor, we certainly don't
12 think any amount should be paid. This matter is obviously in
13 dispute. The ruling is going to change -- I mean, you
14 modified the ruling. There's questions about what Judge
15 Manning may or may not do with it. So I think at this point
16 we've got a contested issue. Until all matters are resolved,
17 there's no payment made in the case because the amount could
18 be less than \$10,000.

19 Your Honor, after -- after -- I just want to make sure
20 I'm clear now. After this last bit here, the Court is saying
21 -- the bottom line up front, as we say in the army: You're
22 essentially saying that if Judge Manning goes above the cap,
23 that would in a sense be modifying or changing your order.
24 That's how I understand it, and I want to know if I'm correct
25 about that.

1 The Court: Well---

2 Mr. Ryan: We see it as a cap. A hearing should have
3 been held before this matter -- a hearing should have been
4 held before the cap was exceeded. If she felt it would be
5 more than that, she could have made a motion: \$10,000 is not
6 enough; I want to go up to 15. That didn't occur.

7 I don't think we ever get to Judge Manning's order. You
8 set a cap. That was an exercise -- if we can just go around
9 that, then -- and I want to make sure I understand how the
10 Court is ruling, that---

11 The Court: The language is pretty clear that Ms.
12 Shurling may bill SCCID for fees up to \$10,000.

13 Mr. Ryan: All right.

14 The Court: Without further approval of the Court,
15 providing -- provided the presiding judge finds the time and
16 records to be adequate to support the time expended. Now,
17 that presumes the presiding judge will review whatever time
18 was expended and all of that, but the cap for fees set by the
19 Court, by me, is up to \$10,000, without further approval of
20 the Court.

21 I haven't approved anything. I haven't been asked to
22 approve anything else. I had -- I've had no contact with
23 this case apparently since May other than receiving this
24 order in December from the May hearing.

25 Mr. Ryan: The Court viewed you were the Court. So to

1 exceed that cap, you would have had to have agreed to exceed
2 the cap.

3 The Court: Well, if the -- I think all attorney fee --
4 I think all attorney fee petitions are submitted to the chief
5 administrative judge for approval as far as saying -- well,
6 and I don't know this to be the case. That's why the fees
7 are set or ask -- the chief administrative judge is asked to
8 approve them. Now, once the work is done, then the bill is
9 submitted to the presiding judge.

10 Mr. Ryan: Yes, sir, and any rulings...

11 The Court: Yeah, and he reviews the time slips, he or
12 she, and in this case we have it where the work has been or
13 bills have been submitted in excess of the cap to the
14 presiding judge. Ms. Shurling says, well, we want to submit
15 them to you. You want me to -- the same bills, I would
16 imagine, to be submitted. To me to give -- you know, a lot
17 of these orders have this nunc pro tunc language on them, I
18 guess, to approve it after the fact. I don't know.

19 You know, I think Judge Manning has -- has gotten
20 involved. He is involved. He's the presiding judge who
21 ultimately should weigh and review the fees. I'm going to
22 leave my order as it is and then let Judge Manning figure out
23 his order. I don't know what else to do.

24 Mr. Ryan: Your Honor, the second thing is on the
25 expenses, the ruling on the expenses. I mean, my argument is

1 that, as you've heard the -- you know, that it would be her
2 expense of \$288.37 over what I think you specifically said
3 the -- you've heard the argument already made. I don't need
4 to reargue it again that...

5 The Court: What do you say?

6 Ms. Shurling: Once again, Your Honor, on page two your
7 order specifically says, "Counsel is authorized to seek
8 approval of any balance not covered by this order upon the
9 completion of this case with the express"---

10 The Court: Including modifying the -- which you
11 interpret to mean modifying what I just...

12 Ms. Shurling: Which I, once again, interpreted to mean
13 that at the conclusion of the case the presiding judge when
14 reviewing my payment request -- that I could seek additional
15 authorization approval for expenses that in any way exceeded
16 the parameters of the previous order.

17 The Court: Including more -- paying more in the
18 categories that I have set caps on.

19 Ms. Shurling: Yes, sir, Your Honor, not exceeding the
20 total amount that you authorized but exceeding certain
21 categories.

22 The Court: All right. Well, what do you say, Mr. Ryan?

23 Mr. Ryan: Your Honor, I think obviously you know what
24 hopefully -- I think your intent seems to show that you set
25 specific caps, and you went so far as in your own writing to

1 strike through the amounts, put in specific amounts for some
2 very specific things, and the very thing she is attempting to
3 do is to merge the categories of witness fee -- witness
4 expenses and then general expenses. And you struck through,
5 "Counsel may, if necessary, exceed the limits set for either
6 category or expenses, provided the total expenses may not
7 exceed \$1,750 without authorization of this Court."

8 That's the very thing she's trying to do, and that's the
9 very thing you struck through. So the more specific issue
10 that addresses what she's doing, you struck through.

11 The Court: Your argument is the 1,138.37 should be
12 limited to 750?

13 Mr. Ryan: Yes, sir, so the -- right.

14 Ms. Shurling: No.

15 The Court: And the---

16 Mr. Ryan: Well, what -- there's a \$750 -- there's a
17 \$750 limit that you specifically wrote for general expenses.

18 The Court: Right.

19 Mr. Ryan: And there was a \$500 limit for lay witness
20 fees and expenses which I guess lay witness fees and
21 expenses -- everything on that list of 1,138.37 looks like
22 general expenses to me. So minus 750 would be \$388.37 over
23 your---

24 The Court: That's an order that's signed by Judge
25 Manning; right?

RECEIVED
DEC 11 2013
SC Court of Appeals

1 Mr. Ryan: No, sir. That's signed by -- well, yeah, by
2 Judge Manning. He signed the second one which usurps your
3 order, Your Honor.

4 The Court: Well, you'll have to -- you'll have to take
5 up his usurping and changing and all that up with him.
6 That's another -- because I can't -- I can't vacate Judge
7 Manning's order nor can he issue an order that doesn't follow
8 my order. So he has to look at that.

9 Mr. Ryan: Yes, sir.

10 The Court: I think he does and---

11 Mr. Ryan: Yes, sir.

12 Ms. Shurling: So I'm clear, Your Honor---

13 The Court: Yes.

14 Ms. Shurling: ---your order now is exactly the way it
15 was except you are striking paragraph four.

16 The Court: Yes.

17 Ms. Shurling: Okay. For the record, I adhere to my
18 earlier objections, and I'm not going to repeat them. But I
19 am now moving, because there is a -- who knows how an appeal
20 is going to shake out? That if Your Honor has ruled that the
21 fee cap of \$10,000 without further approval of the Court
22 should be interpreted as meaning without further approval of
23 you and only you, because that is a possibility, then I'm at
24 this time moving that the Court, i.e. you, Your Honor,
25 approve my request for fees in excess of the preliminary cap

1 set by Your Honor of \$10,000.

2 I don't believe that you can make the findings that are
3 required by 17-3-50 as to whether or not the services I
4 provided were necessary and appropriate without knowing a
5 whole lot more about this case. So I'm asking for a hearing
6 on that request.

7 The Court: How can I -- how would it be prior approval
8 if you've already billed it---

9 Ms. Shurling: And 17---

10 The Court: ---and explained it and...

11 Ms. Shurling: And 17-3-50 does not require prior
12 approval for fees. It does for expenses but not for fees.

13 The Court: Well, I don't know. I'd love to be through
14 with it and let someone else worry about it from here: The
15 appellate courts or Judge Manning or whomever. But what do
16 you think -- what's your response there, Mr. Ryan?

17 Mr. Ryan: Your Honor, I think -- I mean, again, I don't
18 think that -- there are two separate issues. 17-3-50, she
19 cites nine letters that seem to talk in the past tense. Our
20 position is prior approval exceeding the cap is necessary.
21 The cap is \$3500 for these type of cases. She came to you
22 and got the cap increased.

23 The Court: 3500 to 10,000.

24 Mr. Ryan: Exactly.

25 The Court: Okay.

1 Mr. Ryan: So let's forget 17-3-50 for a minute. You
2 gave the prior approval to increase the cap from \$3500 which
3 is what the legislature of this state has set, is what we
4 base budgets and all on, to \$10,000. Prior approval was
5 granted. If prior approval wasn't granted, why did she ask
6 you that? Why did she come to get you to prior approve --
7 why didn't she just bill it and then submit a bill for
8 \$18,000 and say, "Well, then, Judge Manning can do it at the
9 very end"?

10 No, she knew that \$3500 was the amount you had -- that
11 it was the state law. So she had to exceed that, came to you
12 to get the \$10,000 cap. If we can just go around that, we
13 wasted our time on May 23rd, Your Honor. So she got prior
14 approval to \$10,000. And I don't think 17-3-50 -- again,
15 that's not the issue in mind, but let's just say that is the
16 issue. The totality -- if you read the totality of that
17 statute, you're not going to prior approve just expenses. I
18 mean, anything above that statutory amount requires prior
19 approval, Your Honor, and we could have---

20 The Court: Well---

21 Mr. Ryan: ---solved all of this if we just had dealt
22 with it right then and there at the time. If she thought
23 these fees were going over \$10,000, come back and let's go --
24 let's get an authorization to exceed the cap.

25 Ms. Shurling: Your Honor, the statutory provision

1 expressly states that fees have to be approved in advance --
2 I mean, fees -- pardon me. Expenses have to be approved in
3 advance. Had it been the intent of the legislature to make
4 fees in excess of the cap have to be approved in advance, it
5 would have said so.

6 They took great care to say with specificity that
7 expenses in excess had to be approved in advance. They did
8 not say that with regard to fees and, in fact, they used
9 past-tense language that common sense would dictate because
10 you don't know 'til the case is over how involved it's going
11 to be and how it's going to develop and what the services
12 required of counsel are going to be.

13 We can't have it both ways, Your Honor. It's my
14 position that I believed Your Honor was saying a fee -- a cap
15 of \$10,000 unless -- without further approval of the Court
16 and that the judge in the position to give that further
17 approval would be the judge the most familiar with the case,
18 the presiding judge. That's what I believed. That's what I
19 put in the proposed order.

20 But if it's Your Honor's position that that prior -- I
21 mean, without the further approval of the Court necessary for
22 me to get paid for all the time I put in this case is
23 approval from you, then likewise under their own policies and
24 procedures I'm entitled to a hearing on whether or not my fee
25 request is reasonable and appropriate on the facts of this

1 case. And I can't help the fact that you weren't the judge
2 that was involved in getting ready this case for trial and
3 that you're not the one that's the most familiar with it. I
4 prefer for Judge Manning to do it because he knows more about
5 the case, but if it's your position that you're the judge
6 that should do it, then---

7 The Court: Well, my position is what I have stated in
8 my order, and I'm not issuing any other orders today. I'm
9 not reopening anything; I'm not doing anything. I've
10 clarified my order. The next step in this proceeding is for
11 Judge Manning.

12 Ms. Shurling: So your order will now state a cap of
13 \$10,000---

14 The Court: My order---

15 Ms. Shurling: ---without further approval of the Court.

16 The Court: It will say what I just said it will say
17 and---

18 Ms. Shurling: Yes, sir.

19 The Court: ---that's it, and I'm not entertaining
20 anything further to that.

21 Ms. Shurling: Just so the record notes my request for a
22 hearing on the fees in excess of that cap is denied. Thank
23 you.

24 The Court: The record clearly reflects that.

25 Ms. Shurling: Your Honor, when I sent the order to you,

1 I sent it electrically. I don't know whether you still have
2 it. If you do, that would make it easy for her to just
3 delete paragraph four. If not and you would like me to
4 resend it, please just let me know.

5 The Court: I think we have it. It's a rather brief
6 order. Okay.

7 Ms. Shurling: Thank you, Your Honor.

8 The Court: All right. Thank you all.

9 (Whereupon, the proceedings were concluded.)
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

RECEIVED

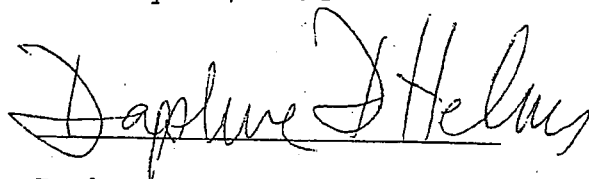
DEC 11 2013

SC Court of Appeals

I, the undersigned Daphne D. Helms, official court reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 28th of December, 2011.

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

January 19, 2012

A handwritten signature in cursive script that reads "Daphne D. Helms". The signature is written in dark ink and is positioned above the printed name.

Daphne D. Helms, court reporter



State of South Carolina
The Circuit Court of the Third Judicial Circuit

Clifton Newman
Judge

Post Office Box 516
Kingstree, SC 29556-0516
Phone: (843) 355-9321
Ext: 7302
Fax: (843) 355-1576
cnewmanj@sccourts.org

February 12, 2013

Via email tdslaw@shurlinglaw.com

Tara Dawn Shurling, Esquire
Law Office of Tara Dawn Shurling, PA
3614 Landmark Drive, Suite A
Columbia, South Carolina 29204

RE: State of South Carolina v. Bejay Harley (2003-GS-40-06670)

Dear Ms. Shurling,

Judge Newman indicates that he is aware of your concerns and those of the South Carolina Commission on Indigent Defense (SCCID), but does not believe that he has anything further to offer. His policy is to have a record made of all matters before him.

You will note that the law of this state is that the court speaks only through its records. *State v. Gaskins*, 263 S.C. 343, 346, 210 S.E.2d 590, 591 (1974). "Judicial records are not only necessary but indispensable, to the vitality of a court." *See Long v. McMillan*, 226 S.C. 598, 610, 86 S.E.2d 477, 482 (1955) (citation omitted).

The parties, therefore, will have to consult the transcript regarding any concerns involving his ruling.

Sincerely,

Sutania A. Radlein
Law Clerk