ALAN WILSON
ATTORNEY GENERAL

May 7, 2012

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: *The State vs. Dickerson, William O.*
Charleston County Capital Case

Dear Mr. Shearouse:

Please find enclosed for filing the original and six (6) copies of the State's *Return to Motion for a Stay of Execution and for the Appointment of a Post-Conviction Relief Judge*, along with a certificate of service for same.

Thank you for your assistance.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/arb

cc: Robert M. Dudek, Chief Appellate Defender

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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Jr., Circuit Court Judge

The State,

Respondent,

vs.

William O. Dickerson,

Appellant.

RETURN TO MOTION FOR A STAY OF EXECUTION AND FOR THE APPOINTMENT OF A POST-CONVICTION RELIEF JUDGE

Respondent, the State, hereby makes a Return to Appellant's Motion for a Stay of Execution and for the Appointment of a Post-Conviction Relief Judge. Appellant seeks a stay of execution in order to pursue state post-conviction relief remedies, and the appointment of a judge for such action. Respondent does not oppose the request for stay nor the request for appointment of a judge made pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). In support of this position, Respondent would respectfully show the following:

I.

On May 2, 2012, Appellant filed the instant motion, through appellate counsel, expressing his desire to pursue post-conviction relief. In his motion, he correctly asserts that his direct appeal process has been completed. The United States Supreme Court denied his petition for writ of certiorari on April 23, 2012.

II.

In the motion for stay and for appointment of a judge, Appellant asserts that he "will raise numerous grounds of ineffective assistance of counsel in an application for post conviction relief." (Motion, p. 2). He further asserts that he will raise "at a minimum, the following" allegations of ineffective assistance:

1.

> Whether defense counsel provided ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, by requesting the admission of the "execution impact evidence" of Johnette Watson on too broad a basis since the admission of testimony Watson would be hurt if petitioner was executed because he had formed a positive relationship with her was admissible but the irrelevant proffered evidence regarding other homicides affecting the family was not admissible and prevented this from being a successful appellate issue?

2.

> Whether defense counsel was ineffective in derogation of the Sixth Amendment to the United States Constitution, by conceding on appeal that the solicitor's actions in not having Dr. Schandl testify about the drugs in the decedent's body was **not a deliberate attempt** to mislead the jury, or that it constituted prosecutorial misconduct since it prevent[ed] the trier of fact from hearing exculpatory evidence about the amount of pain the decedent may have suffered?

3.

> Whether appellate counsel provided ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, by failing to raise trial counsel's issue on appeal that our court's proportionality review must also include murder cases, and murder cases with aggravating circumstances where the state chose not to seek the death penalty since the failure to raise this meritorious issue was prejudicial to petitioner?

(Motion, pp. 2-3).

Appellant also asserts that the claims "will likely be expanded, once appointed post-conviction relief counsel has had the opportunity to investigate." (Motion, p. 3).

III.

This Court has previously determined when a stay of execution is appropriate – where a capital defendant expresses *an intent* to pursue post-conviction relief. By order issued April 8, 1996, this Court stated:

> If the defendant desires a stay to pursue state post-conviction relief, the defendant must, within ten (10) days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues *intended to be raised in the application* for post-conviction relief [. If the general nature of the issues are appropriate for post-conviction relief], this Court will assign a circuit judge to the case and issue a stay of execution.

In Re Stays, 321 S.C. at 546 [bracketed portion not included in published order]. (emphasis added).

Ineffective assistance of counsel claims are of "the general nature of issues appropriate for post-conviction relief" actions. *Id. See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984); *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) (recognizing issues of ineffective assistance of counsel appropriate for an application for post-conviction relief).

Respondent notes, however, that the *actual* issues presented in the motion would not support relief as either the factual basis for finding deficient performance lacks support in the record, or the issues stem from direct appeal issues which this Court found resulted in no prejudice to Appellant. Therefore, Appellant cannot meet the *Strickland* test for relief which requires both deficient performance and prejudice.

Appellant's Proposed Issue 1

Appellant complains counsel erred in offering a basis for admissibility of evidence of Appellant's positive relationship with a cousin, Ms. Watson, that was too broad. (Motion, p. 2). He claims that this not only prevented presentation of admissible evidence, but also negatively

affected relief on appeal. (Motion, pp. 2-3). However, Appellant was allow to present testimony from Ms. Watson during the penalty phase, and specifically about her positive relationship with Appellant. Ms. Watson testified that Petitioner is her first cousin, a year younger than her, and was "like a brother" to her. (R. p. 4028). Moreover, she additionally testified that he never exhibited violence around her as they were growing up, and that he was protective of her. (R. pp. 4028-4029). When asked if "there [was] anything that you want to ask this jury or tell them" about Appellant, Watson addressed the jury as follows:

> He's basically a good person. He got mixed up in the wrong things and I, I beg that you have mercy on him.

(R. p. 4034).

The only evidence that was not admissible went specifically to the witness's emotional sensitivity based upon other loss in the family. Defense counsel argued " the death of William would exacerbate that." (R. p. 4079).

This Court held that the proffered "evidence no longer concerns Dickerson's character but rather borders on an opinion that Dickerson should not be executed in order to spare her family the suffering. Watson's [proffered] testimony thus strayed from relevant considerations into the realm of an opinion regarding which punishment the jury ought to recommend." *State v. Dickerson*, 395 S.C. 101, 123, 716 S.E.2d 895, 907 (2011), *reh'g denied* (Nov. 17, 2011), *cert. denied*, 11-8903, 2012 WL 568390 (U.S.S.C. Apr. 23, 2012). In sum, the relevant testimony was admitted. The testimony Appellant claims should have come in but for counsel's reliance on a broad term is simply inadmissible. The label does not affect the basic inadmissibility. Appellant cannot show *Strickland* deficient performance and prejudice.

Appellant's Proposed Issue 2

Appellant complains counsel inappropriately conceded the solicitor did not deliberately attempt to mislead the jury in regard to drugs in the victim's system. (Motion, p. 3). He claims he was denied the right to present exculpatory evidence. (Motion, p. 3). However, this assertion of deficient performance embraces an irrelevant and unproven point. This Court found that "the relevance of whether the *victim* had used cocaine within the two days prior to his death is dubious, at best, under the facts of this case." *Dickerson*, 395 S.C. at 116, 716 S.E.2d at 903-04 (emphasis in original). The blood test showed that Appellant did not have drugs in his system at the time of death. (R. p. 2962). The defense argued, however, the "blood test" only tests for presence of drugs at the time of death, where a urine test could show a "day or two before." (R. p. 2981). Moreover, the defense conceded that a confirmation test on the urine sample was not done, which could have, admittedly, returned a negative result. (R. pp. 2980-2981).

First, and contrary to Appellant's assertion, there is nothing exculpatory about the evidence. As this Court found, the evidence "does not challenge any of Dr. Schandl's findings regarding Roper's cause of death and would only have injected irrelevant considerations into the trial." 395 S.C. at 117, 716 S.E.2d at 904. Results from a confirmatory test, whether positive or negative, would still be irrelevant and would not be admissible.

As to any arguable "false impression," this Court found the fact of the victim's "drug use is irrelevant in this case. Therefore, this plainly is not a situation where the false impression created is at all prejudicial to the defendant." *Id.* There is no contest to the propriety or correctness of the blood test and the negative results for drugs at the time of death. Anything prior could not affect consideration of the cause of death. It is irrelevant. Again, Appellant has presented a proposed issue

that cannot afford relief.

Appellant's Proposed Issue 3

Appellant complains appellate counsel was ineffective in not raising an issue on appeal contesting the method of proportionality review. (Motion 3). Again, Appellant cannot show both deficient performance and prejudice. As a first point, this Court found no evidence "the sentence was the result of passion, prejudice, or any other arbitrary factor," and, further, that the facts of record supported the jury's determination:

> ...the gruesome nature of Dickerson's acts fits squarely within the aggravating circumstances for which the jury recommended the death penalty. Furthermore, there is no indication that the proceedings were tainted in any way or that the sentence was anything other than a rational response to the evidence presented.
>
> ... evidence exists to support the jury's finding that the State met its burden with respect to all three aggravating circumstances.

Dickerson, 395 S.C. at 123-124, 716 S.E.2d at 907.

Moreover, this Court found the "sentence ... neither excessive nor disproportionate in light of the results in similar cases" *i.e.* "capital cases where the State proceeded on the aggravating circumstances of kidnapping, criminal sexual conduct, torture, or any combination thereof...." *Id*, 716 S.E.2d at 908. Thus, the case was fairly and adequately reviewed.

As a second point, this Court noted that expanding the base of cases which may be considered in review would require overruling precedent. *Dickerson*, 395 S.C. at 125, 716 S.E.2d at 908 n. 8. Such action is unlikely. This Court has previously held to do so would necessitate dependence on "intolerable speculation by this Court" as in this jurisdiction "a jury is not required to state its reasons for failing to recommend a sentence of death." *State v. Copeland*, 278 S.C. 572,

591, 300 S.E.2d 63, 74 (1982). A number of factors could be at work such as the evidentiary facts may have been at issue, or the evidentiary facts may not have been at issue, but the jury, as it allowed to do in this State, may have exercised mercy. *Id.* The vast uncertainty of dispositive facts makes the suggestion of using a broader base in this non-weighing state an unworkable proposition. Thus, the claim of ineffective assistance of appellate counsel fails.

Proposed Issues in General

Even though the specific proposed issues lack merit, Appellant has asserted the intent to raise ineffective assistance of counsel claims which would support the *In re Stays* broad requirement. Therefore, Respondent does not oppose the stay to seek post-conviction relief.

IV.

Appellant also requests the appointment of a post-conviction relief judge. Respondent has no objection as this would follow the procedure already set out in this Court's precedent.

Conclusion

In light of the foregoing, Respondent does not oppose the granting of a stay to allow Appellant to seek post-conviction relief, nor does it oppose the assignment of a state post-conviction relief judge.

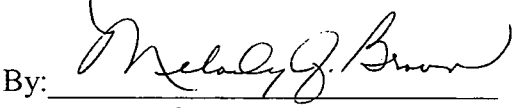
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

By: 
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ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

I, Melody J. Brown, certify that I have served Respondent's *Return to Motion for a Stay of Execution and for the Appointment of a Post-Conviction Relief Judge* on counsel for Appellant, by depositing one copy of same in the United States mail, postage prepaid, addressed as follows:

Robert M. Dudek, Chief Appellate Defender
South Carolina Office of Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

This 7th day of May, 2012.

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ATTORNEY FOR RESPONDENT