

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Richland County

Honorable Mark H. Westbrook, Circuit Court Judge

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**RECEIVED**

MAY 24 2017

S.C. SUPREME COURT

ISRAEL WILDS,

APPELLANT,

V.

THE STATE,

RESPONDENT.

APPELLATE CASE NO. 2014-001191

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MOTION AND MEMORANDUM OF SOUTH CAROLINA  
COMMISSION ON INDIGENT DEFENSE OBJECTING TO  
EXPENSE REQUEST OF COUNSEL

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## I. Background

Attorney Tara Shurling was appointed as counsel for the petitioner in this post-conviction relief appeal on July 24, 2008 due to a conflict of interest with The South Carolina Commission on Indigent Defense (SCCID), Division of Appellate Defense.

SCCID received a copy of two letters (dated April 13(Exhibit A) and April 17, 2017 (Exhibit B))<sup>1</sup> submitted to this Court from Attorney Tara Shurling regarding payment of attorney's fees and expenses in this matter. SCCID informed the Court and Attorney Shurling by letter dated May 2, 2017 (Exhibit C) that the Agency had concerns about the amount of expenses Attorney Shurling was requesting reimbursement for and requested until May 10, 2017 to file a formal response. Attorney Shurling by letter dated May 9, 2017 (Exhibit D) informed the Court and SCCID that she conducted an audit of the expense report prepared by her staff after receiving the letter from SCCID indicating that SCCID had concerns about the expenses submitted. Attorney Shurling stated that unfortunately she did discover a few errors and entries that required clarification. By letter dated May 11, 2017 Ms. Shurling forwarded the amended invoices to SCCID. (Exhibit E, letter and amended invoices) On May 22, 2017 Attorney Shurling forwarded additional invoices to both SCCID and the Court (Exhibit F).

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<sup>1</sup> While it appears the Court has categorized Attorney Shurling's letter as a motion and this response as a return, SCCID respectfully submits this memorandum is a motion in response to a general request made by Attorney Shurling wherein counsel made no legal arguments. If this memorandum is considered a return SCCID may be prevented from submitting a reply to any original arguments made by counsel. Therefore, SCCID requests the opportunity to respond to any argument made by Attorney Shurling in regards to this memorandum.

Attorney Shurling is requesting \$5,848.00 in attorney's fees and \$2,293.80 in expenses, reduced from her original request of \$2,647.16 in expenses before her final audit.

SCCID asserts that Attorney Shurling should not be reimbursed for expenses in excess of \$500 statutory cap and that the Westlaw expenses sought are not reasonable.

## **II. Issues/Objections**

The issues/objections of SCCID are as follows:

1. Attorney Shurling seeks reimbursement for \$2,293.80 in expenses which exceeds the \$500 statutory cap as established by S.C. Code Ann. § 17-3-50, applicable State budget provisos, SCCID policies and the Order of the South Carolina Supreme Court regarding voucher processing dated September 29, 2006.
2. The \$2,293.80 in expenses requested includes \$1,359.44 for Westlaw Online Research charges which SCCID does not consider a reasonable request.

## **III. Law and Argument**

- A. **The expense request is not in compliance with S.C. Code Ann. § 17-3-50, budget provisos, SCCID policies and the South Carolina Supreme Court voucher processing order.**

### **1. S.C. Code Ann. § 17-3-50**

Attorney Shurling acknowledges in her letter of April 13, 2017 that her expenses are over the \$500 statutory cap for expenses in indigent cases. Attorney Shurling states that, "my in-house expenses totaled \$2647.16 which is over the \$500 cap".

The cap Attorney Shurling is referring to is established by S.C. Code Ann. § 17-3-50 and other authority. S.C. Code Ann. § 17-3-50 states:

**SECTION 17-3-50.** Determination of fees for appointed counsel and public defenders; maximum amounts; authorization to exceed maximum; payment for certain services.

(A) When private counsel is appointed pursuant to this chapter, he must be paid a reasonable fee to be determined on the basis of forty dollars an hour for time spent out of court and sixty dollars an hour for time spent in court. **The same hourly rates apply in post-conviction proceedings.** Compensation may not exceed three thousand five hundred dollars in a case in which one or more felonies is charged and one thousand dollars in a case in which only misdemeanors are charged. Compensation must be paid from funds available to the Office of Indigent Defense for the defense of indigents represented by court-appointed, private counsel. The same basis must be employed to determine the value of services provided by the office of the public defender for purposes of Section 17-3-40.

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

(C) **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 the limit is appropriate because the services provided were reasonably and necessarily incurred.

(D) Nothing in this section shall be construed to alter the provisions of Section 17-3-10 concerning those defendants who are entitled to legal representation.

## 2. Budget Proviso 47.5<sup>2</sup>

Budget proviso 47.5<sup>3</sup> (Exhibit G) mirrors the language of 17-3-50(B) and (C) and states:

47.5. (INDEF: Civil Court Appointments) The funds appropriated under “Civil Court Appointments” shall be used for Civil Court Appointments including Termination of Parental Rights, Abuse and Neglect, Probate Court Commitments, Sexually Violent Predator Act, and Post Conviction Relief (PCR) to reimburse court appointed private attorneys and for other expenditures as specified in this provision. Civil Court Appointments funds may not be transferred or used for any other purpose.

A portion of the funds appropriated under “Civil Court Appointments” shall be used for “Termination of Parental Rights” cases and “Abuse and Neglect” cases to reimburse private attorneys who are appointed by the Family Court to serve as guardians ad litem, where volunteer appointments cannot be made and to represent guardians ad litem, children, or parents under the provisions of S.C. Code Sections 20-7-110 et seq., 20-7-1570 et seq., 20-7-1695 (A)(2) et seq., 20-7-7205 et seq., and 20-7-8705 (4)(a) et seq.; for “Probate Court Commitment” cases to reimburse private attorneys who are appointed by the Probate Court to represent indigent persons; and for “Sexual Violent Predator” cases to reimburse private attorneys who are appointed by the Circuit Court pursuant to Sections 44-48-10, et seq., to represent indigent persons. When private counsel is appointed pursuant to these provisions, counsel shall be reimbursed a reasonable fee to be determined on the basis of fifty dollars per hour or reimbursement may also be made on the basis of a set (flat) fee. The method of payment and the amount of the set fee will be determined by the Commission on Indigent Defense. Reimbursement shall not exceed two thousand dollars for any case under which such private attorney is appointed. Reimbursement in excess of the hourly rate and limit set forth herein is authorized only if the court certifies, in a written order with specific findings of fact, that reimbursement in excess of the rates or limit is necessary to provide reimbursement adequate to ensure effective assistance of counsel and reimbursement in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred. Upon a finding **in ex parte proceedings that investigative, expert, or other services are reasonable and necessary for the representation of the defendant, the court shall authorize the defendant’s attorney to obtain such services on behalf of the defendant and shall authorize the payment, from funds available to the Office of Indigent Defense, of**

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<sup>2</sup> Proviso 47.5 was included in H4800, FY 2008-2009 Appropriation Acts, thus applicable and the time of attorney Shurling’s appointment. Proviso 47.5 is now included in proviso 61.4 with some additions and deletions.

<sup>3</sup> Proviso 61.3 (formerly 47.3) specifically addresses reimbursement of attorney’s fees counsel appointed on an appeal due to a conflict on part of the Division of Appellate Defense. It does not address expense caps, only referring to the office of Appellate Defense continuing to provide printing and other support functions. SCCID is not aware of any such request in this case and asserts that the specific language in S.C. Code. Ann. § 17-3-50, proviso 47.5 an SCCID policy provide authority regarding expenses in PCR matters.

**fees and expenses not to exceed five hundred dollars as the court considers appropriate. Payment in excess of the five hundred dollar limit is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the limit is appropriate because the services provided were reasonable and necessarily incurred to provide adequate defense.** Payments shall be made from funds appropriated for this purpose from the Commission of Indigent Defense.

**Indigent defense vouchers authorized in this provision must be reviewed and paid pursuant to procedures and policies established by the Commission on Indigent Defense.** The commission shall provide a copy of the established procedures and policies to the Senate Finance Committee and the House Ways and Means Committee.

A portion of the funds appropriated under “Civil Court Appointments” may be used by the Commission on Indigent Defense to retain, on a contractual basis, the services of attorneys qualified to handle civil court appointments, to be reimbursed in accordance with applicable provisos and statutes.

The language of the statute and budget proviso establishes a \$500 cap and that expenses must be authorized in advance. The findings in an ex parte hearing that services are necessary and that the court shall authorize the defendant’s attorney to obtain such services clearly contemplates prior approval. The language of the statute and proviso also establishes prior approval is required when counsel seeks to exceed the \$500 expense limit. The language again talks about **authorization** based on a specific finding of facts. The word authorize means: to empower, to give a right or authority to act<sup>4</sup> The idea of giving permission, authority to act involves having something approved before it takes place.

SCCID assumes Attorney Shurling will assert, as she has in previous cases regarding this issue, that 17-3-50(C) provides that a court can after the fact find that expenses in excess of the statutory cap can be awarded. However, that analysis would lead to the absurd result that an attorney must have prior approval of expenses up to \$500 as established in S.C. Code Ann. 17-3-50(B), yet an amount beyond the \$500 can be

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<sup>4</sup> Black’s Law Dictionary, 5<sup>th</sup> Edition at p. 122.

approved after the fact under 17-3-50(C), even though it may involve considerably greater expenses.

Also, without prior approval being required to exceed the statutory cap there would in essence be no statutory cap. If counsel could automatically exceed the cap, then an important step in the process of judges and SCCID being able to monitor and ensure limited resources are being properly and effectively expended would be by-passed. Courts generally give deference to an administrative agency's interpretation of its own statute. Brown v. DHEC, 349 S.C. 507, 560 S.E.2d 410 (2002).

### 3. SCCID Policy

The Legislature has specifically assigned SCCID the task of implementing various policies concerning the payment of vouchers. Budget proviso 47.5 (currently 61.4) specifically addresses the payment of civil appointment vouchers. This proviso states that “Indigent defense vouchers authorized in this provision **must be reviewed and paid pursuant to procedures and policies established by the Commission on Indigent Defense**”. (Exhibit G)

The Legislature has further provided in S.C. Code Ann. 17-3-310 (G) (2) that the Commission:

shall develop rules, policies, procedures, regulations, and standards as it considers necessary to carry out the provisions of the article and comply with state law or regulations and the rules of the Supreme Court, including the nature and scope of services to be provided, the clientele to be served, and the establishment of criteria to be used in the determination of indigency and qualifications for services for indigent legal representation

The Indigent Defense statute further provides in S.C. Code Ann. 17-3-340(I)(7) and (9) that duties of the Commission include:

(I) The commission shall approve and implement programs, services, rules, policies, procedures, regulations, and standards as may be necessary

or advisable to fulfill the purposes and provisions of this article in the delivery of indigent services. This includes, but is not limited to, standards for: ....

(7) providing and compensating experts, investigators, and other persons who provide services necessary for the effective representation of indigent persons

(9) compensation of attorneys appointed to represent indigent persons pursuant to this chapter

In response to these mandates SCCID has adopted specific policies for the payment of vouchers. On September 25, 2007 the newly formed Commission (The Indigent Defense Act of 2007 changed the composition and number of Commission members) formally adopted the SCCID Voucher Payment Policy. (Exhibit H) The voucher payment policy was placed on the SCCID website in the fall of 2007 and the entire S.C. Bar was notified of the policy and how to reference it. This policy in many instances just reaffirmed prior policies. Attorney Shurling and SCCID have on numerous occasions been involved with different courts regarding these policies and her requests for payment from indigent funds. The issue of expenses is referenced throughout the payment policy. Section III of the policy states:

### **III. Reimbursable Expenses for Appointed Counsel**

There is a \$500 limit on expenses in all civil and criminal cases, except capital cases, in which the limit is \$20,000. These limits may not be exceeded unless the court certifies, **prior to any expense being incurred**, in a written order with specific findings of fact that such excess is both reasonable and necessary to insure adequate representation in the particular case. (See Chief Justice Toal's Memo dated July 8, 2005) SCCID will not provide funds for payments in amounts in excess of the prior authorization. Claims for necessary expenses must be submitted with the order approving the expenditure, setting out the total amount allowed and copies of invoices documenting the claims. By submitting the voucher for payment, counsel

certifies that the services were performed and that the amount is fair and reasonable. Necessary expenses are those deemed to be reasonable and essential for a proper defense. The following are deemed to be necessary expenses, subject to limitations in Section IV.

Section IV then further provides that:

IV. FEES AND EXPENSES THAT WILL NOT BE PAID

a. Any expenses incurred which the court did not previously approve prior to being incurred.

Then Section VI once again reiterates the need to have expenses approved prior to being incurred as the section states:

All requests for expenses must be approved **prior** to being incurred. Failure to have expenses per approved will result in non-payment. Bills, statements, invoices or other documentation must be submitted to substantiate all requests for reimbursement of all expenses.

**4. S.C. Supreme Court Voucher Payment Order**

The South Carolina Supreme Court has provided further guidance regarding the payment of vouchers. By Order of the Court dated September 29, 2006 (Exhibit I) the Court established voucher processing procedures that provide:

2. Upon appointment and registration, counsel is hereby approved and entitled under S.C. Code Section § 17-3-50 to the payment of reasonable fees and costs based on the hourly rate and caps provided therein.

4. If there is no objection to the reasonableness of the request and the amount requested is within the hourly rates and statutory caps, then the Office of Indigent Defense is authorized to make payment of the requested amount without further action of the Court.

5. If there is an objection by the Office of Indigent Defense to the reasonableness of the amount or the amount requested exceeds the hourly rates or statutory caps provided by S.C. Code Sections § 17-3-50 (A) and (B), then the Office of Indigent Defense shall pay such amount as may be authorized by the trial court. The Office of Indigent Defense shall notify the trial court and counsel of any objection and shall forward any necessary materials to the trial court in writing or electronically. The trial court may determine the

matter with or without a hearing, as may be appropriate, or upon the submission of written materials.

Based on this authority, SCCID believes it is authorized to pay up to \$500 in expenses without any action of the court as that is the statutory cap set by 17-3-50(B).<sup>5</sup> However, the language is clear that SCCID can object not only if the amount requested exceeds the statutory cap but also if the request is not deemed reasonable. As will be discussed, SCCID has concerns about the reasonableness of the expense request in addition to the expense request exceeding the \$500 cap without prior approval as established by statute, proviso and SCCID policy.

**B. The requested expenses are not reasonable, specifically with regards to the Westlaw charges.**

S.C. Code Section 17-3-50, Budget proviso 47.5 and the September 2006 Order of the Supreme Court apply a reasonableness standard regarding reimbursement for expenses. Based on the information submitted, SCCID has concerns about the reasonableness of the Westlaw charges requested in the amount of \$1359.44.

This is not the first case in which SCCID has had concerns about a request for payment of Westlaw expenses submitted by Attorney Shurling. In the case of State of South Carolina v. Marquez Q. Prophet (2011-GS-40-849, 2011-GS-40-886) (Hearing Transcript attached as Exhibit J) SCCID objected to a request for payment of such expenses in a hearing before the Honorable Deandra G. Benjamin. As in the Prophet case, SCCID has concerns as to why the Agency is being requested to reimburse counsel for such significant Westlaw charges. In the current matter, SCCID is being asked to

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<sup>5</sup> The language of 17-3-50 appears more restrictive in requiring a court order for any amount of expenses.

reimburse \$198 (originally \$495.40 prior to Attorney Shurling auditing the invoices) in Westlaw charges for searches dated December 19, 2012, charges of \$229 (for searches dated October 30, 2013) and charges of \$317 (November 5, 2013 searches). SCCID considers these very significant expenses when Attorney Shurling noted in the Prophet hearing that the monthly Westlaw flat fee for her office was around \$580 per month. Tr. 38, lines 20-21.

SCCID assumes Attorney Shurling's position may be similar to the explanation provided in the Prophet hearing that almost all of the time spent on Westlaw for a given month on was on a specific case. Tr. 38, line 18 – Tr. 40, line 1. In the Prophet hearing Judge Benjamin denied any additional expenses to include the Westlaw request as she ruled:

the explanation given to the Court today is just not being clear as to the billing system. I do have the bills before me, but it is for about 90 percent of what you submitted to the Court, 85 or 90 percent of the monthly billing fee for your office. So maybe there needs to be in the future some – it just is not clear. For that reason, I am not going to – I am going to deny the motion as to the additional expenses in Prophet. Tr. 60, line 2-18.

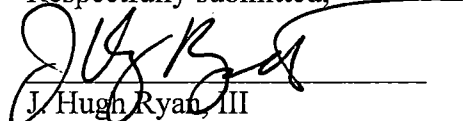
In the present case, the fee of \$317 for one day of research (November 5, 2013) means that over 50% of Attorney Shurling's office searches for the month of November 2013 took place on one day, in one case, resulting in over 50% of her monthly Westlaw flat fee being applied to an indigent case. Ms. Shurling in her letter dated May 11, 2017 again addressed how she chooses to bill SCCID based on the "plan special rate" or "standard rate". Regardless of which rate is applied it is the position of SCCID that it is not reasonable to use indigent funds to cover Westlaw charges that are such a significant portion of a standard flat monthly fee. It appears because of very limited Westlaw

searches being done in a given month, indigent funds are being requested to cover a large percentage of the office's monthly fee that would not have occurred if numerous searches had been done in other cases, such as any privately retained cases. The total Westlaw reimbursement is unreasonable and is subsidizing what is often a regular office expense. Also research tools such as Casemaker (Fastcase) are available to members of the S.C. Bar, which if utilized could assist in preserving limited resources for indigent services.

**CONCLUSION**

For the reasons enumerated in this memorandum, the Agency respectfully requests that the amount of expenses reimbursed not exceed \$500. Should the Court allow counsel to exceed \$500, the Westlaw fees should be removed or greatly reduced as the amount sought is not reasonable.

Respectfully submitted,



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STATE OF SOUTH CAROLINA

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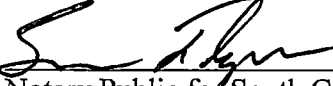
RESPONDENT.

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Motion and Memorandum of South Carolina on Indigent Defense Objecting to Expense Request of Counsel in the above referenced case has been served upon Tara D. Shurling, Esquire, at 3614 Landmark Drive, Suite A, Columbia, SC 29204, this 24th day of May, 2017.

  
\_\_\_\_\_  
J. Hugh Ryan, III  
General Counsel SCCID

SUBSCRIBED AND SWORN TO before me  
this 24th day of May, 2017.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022.