

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

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

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SC Court of Appeals

Ex Parte: Tara Dawn Sharling, Appellant,

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

v.

Bejay Harley, Defendant

Appellate Case No. 2013-001293

RECORD ON APPEAL

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1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF RICHLAND
4

5 State of South Carolina

6 vs.

7 Marquez Prophet and Bejay Harley

8

9

10 Columbia, South Carolina

11 May 23, 2011

12 Before the Honorable Clifton Newman

13

14 APPEARANCES

15 For SCCID: Hugh Ryan

16 For the Defendants: Tara B. Shurling

17

18 Reported by: Michael C. Watkins (Karen Ambroziak)

19 Official Court Reporter

20

21

22

23

24

25

1 MS. SHURLING: This is my motion addressing the need
2 for a second chair, for general expenses and attorney's fees
3 has a shared in commonality in both cases to avoid Your
4 Honor having to listen to my arguments twice and protect my
5 right to have a record of this proceeding as well. I would
6 ask that at least with regard to my motion for funding for a
7 second chair, for reasonable general expenses and an
8 increase in attorney's fees that you allow me, please, sir,
9 to proceed with those motions with my record on those
10 motions on both the Harley and the Prophet matters at the
11 same time, then toward the end, Your Honor, we have an
12 outstanding motion for funding for an investigator in the
13 B.J. Harley matter and experts in the B.J. Harley matter.
14 Those two motions do not share common territory with Marquez
15 Prophet so I would propose to take those up at the end of
16 the proceeding so that there can be an appropriate flow to
17 the record in the Harley matter.

18 THE COURT: Okay.

19 MS. SHURLING: Thank you, Your Honor. As Your Honor
20 knows in both the B.J. Harley case and the Prophet case we
21 are dealing with charges filed in the 5th Circuit for
22 murder. B.J. Harley was charged with one count of murder,
23 he was originally tried and convicted of murder, that
24 judgment was set aside by the presiding Judge, then Judge
25 Reginald Lloyd, subsequent to which the client entered a

1 plea to voluntary manslaughter which was set aside by a
2 subsequent order of the Honorable Judge Keesley in a post
3 conviction relief action. The State initially indicated ,
4 they were going to appeal that decision and then abandoned
5 the appeal and we have had a standing order for a new trial
6 in that case for approximately two years. In the Prophet
7 matter there are five codefendants charged with murder and
8 attempted murder. Your Honor, in both cases I have
9 requested funding for a second chair for the defense of
10 these cases. I would state for the record that I waited
11 until very late in the process to make this request because
12 I had hopes that one or both of these matters might resolve
13 in a plea and there not be a jury trial, unfortunately we
14 are now rapidly approaching trial dates in both of these
15 matters. The Marquez Prophet case is scheduled for trial
16 the week of June 13th. I am not yet in possession of an
17 actual trial date for B.J. Harley, it was set for May 9th
18 and because of the surgery of an expert witness we were
19 unable to proceed at that time, it now appears that it will
20 go forward either the last week in July or the first week in
21 August. So although we don't have an exact trial date we do
22 know that it will be tried this summer and that that date is
23 also rapidly approaching. It is the position of the
24 defense, Your Honor, that it is a matter of both due process
25 of law and equal protection that the Court afford the

1 opportunity to have adequate funding to have at minimum a
2 second chair to represent him on these charges. In saying
3 that, I am painfully aware of the limited resources
4 available to the South Carolina Commission on Indigent
5 Defenses at this time to pay for lawyers in court appointed
6 matters. However, I am equally aware that there are two
7 primary factual situations that support my requests and
8 compel me as an officer of the Court to make this request on
9 behalf of my clients, Mr. Harley and Mr. Prophet. In the
10 public defender's office when they are getting ready to try
11 a murder case I have it upon information and believe and
12 will present testimony here today thereupon that they have a
13 minimum of two lawyers assigned to those cases. Two lawyers
14 who are equally familiar with the discovery materials, two
15 lawyers who take turns examining witnesses, two lawyers
16 prepared to make legal arguments on behalf of the defense.
17 In more recent cases, and in fact, in quite a few cases that
18 I have been personally familiar with they, in fact, have
19 three lawyers who are all familiar with the discovery
20 materials.

21 THE COURT: Now, Ms. Shurling, this is our -- we've
22 discussed the matter in chambers, we've had a hearing on the
23 record on the same issue, this hearing was continued for a
24 further hearing because Mr. Ryan and Mr. Adams were
25 unavailable at the last hearing.

1 MS. SHURLING: Yes, Your Honor.

2 THE COURT: So I'm hearing this argument at this point
3 for the third time, so unless it's for the benefit of
4 someone other than me you can summarize some of this so I
5 don't hear it in full for the third time.

6 MS. SHURLING: Thank you, Your Honor. It was not my
7 intent to waste the resources of the Court either. However,
8 since new parties have been brought into the proceeding that
9 were not privy to the original hearing and since the record
10 from this proceeding may, in fact, become necessary for
11 appellate review I thought it was Your Honor's intent that
12 we have a de novo proceeding at which all the legal
13 arguments would be preserved.

14 THE COURT: I think the previous record, which was in
15 court on the record, there's no need to repeat the same
16 thing again.

17 MS. SHURLING: Thank you, Your Honor. Then I would
18 simply reiterate one point that I'm not terribly sure I made
19 clear at the last proceeding and that is at least in both of
20 these cases my adversary legal counsel for the 5th Circuit
21 Solicitor's Office is Kathryn Luck Campbell, and that I have
22 it upon information and belief with Ms. Campbell, both Ms.
23 Joanna McDuffie and Nicole Simpson will be trying the case
24 and therefore I will be facing three adversaries on the
25 solicitor's side of the courtroom and that also presents a

1 problem. As Your Honor knows there has recently been great
2 strides made in trying to affect some degree of parity
3 between the public defender's resources and those of the
4 solicitor's office. Your Honor, I would ask at this time
5 that I be allowed to present testimony from
6 Ms. Fielding-Pringle from the public defender's office.

7 THE COURT: Okay.

8 The witness, ELIZABETH FIELDING-PRINGLE, was
9 first duly sworn and testified as follows, on:

10 THE CLERK: Please state your full name for the record.

11 THE WITNESS: Elizabeth Fielding-Pringle.

12 DIRECT EXAMINATION

13 BY MS. SHURLING:

14 Q Ms. Pringle, what is your position with the public
15 defender's office?

16 A I'm the chief public defender for Richland County.

17 Q And in that position do you try murder cases?

18 A I do.

19 Q In the past have you tried more than you do currently?

20 A Yes. I am down to about one a year at the most right
21 now.

22 Q In your current position is it your responsibility to
23 supervise other attorneys on the public defender staff that
24 are qualified to defend in murder cases?

25 A Yes.

1 Q And do you, in fact, regularly supervise attorneys
2 assigned to defend individuals charged with murder in the
3 5th Circuit?

4 A Yes.

5 Q Have you actively participated in the trial of a number
6 of murder cases in the last say 18 months?

7 A In one last fall and then one, I believe, the fall
8 before that with Mr. Strickler.

9 Q Internally within the solicitor's office in Richland
10 County, what is your policy concerning the number of
11 attorneys assigned to a murder case that's going to trial?

12 A In the public defender's office?

13 Q Yes.

14 A I would say that in practice it's not -- this is not
15 just unique to murder cases, but in practice we do have more
16 than one attorney. There is always a lead attorney on every
17 case, that attorney is assigned to represent a specific
18 individual, defendant, and that attorney if the case is
19 going to trial, will usually pretty much all of the time
20 select a second seat to assist in the trial of the case if
21 it goes to that appointment. Sometimes there would be one
22 additional second seat, sometimes we'll have a third.

23 Q So at minimum if a case is going to trial in a murder
24 case you would expect there to be two lawyers on your staff
25 prepared and participating for the defense?

1 A I would. That depends really on the attorney. There
2 have been times in the past Mr. Strickler used to try all of
3 his cases alone prior to in recent years. But yes, I would
4 99 percent of the time. That would be the decision of the
5 lead attorney, but we certainly suggest that they do that
6 and in practice they really always do.

7 Q And in practice when they have two attorneys assigned
8 to a case, you've already said there is a lead attorney and
9 there is a second seat to use a legal term of art; is that
10 correct?

11 A Yes. That is the term we use in the office.

12 Q Thank you. And in practice do both attorneys in your
13 experience examine witnesses?

14 A Usually, yes. That can vary. Usually, yes. In the
15 trial that I did last fall I did a good bit of the argument,
16 I don't think I did any witnesses, so that can vary. But in
17 -- generally, yes, both attorneys will conduct examinations
18 and present opening statements, closing arguments, both
19 would be involved.

20 Q And, in fact, in the trial that you referred to last
21 fall you were the third attorney on the defense team, were
22 you not?

23 A That's correct. It was Luke Shealey's case and Jim
24 May, they did all of the examinations, I believe, and I did
25 a good bit of the argument and motions, but I didn't

1 actually examine any witnesses.

2 Q But with regard to lead counsel and second chair, they
3 did alternate examining witnesses.

4 A Yes.

5 Q And they were both very familiar with the discovery
6 materials going into trial.

7 A All of us were, absolutely.

8 Q So in that case at least there were three of you who
9 were very familiar with the discovery materials, who were
10 present during the trial to aide in the defense of that
11 individual.

12 A Yes. If somebody is going to select second seat they
13 will be completely involved in the case, at least in terms
14 of having reviewed all of the discovery, presumably met with
15 the defendant and are very familiar with the case. That
16 would be the point of having them there.

17 Q And at least in the cases that you've participated in
18 as third seat, you have had involvement in the case to the
19 extent that you have made legal arguments, perhaps argued
20 motions, request to charge, that sort of thing, even if you
21 didn't examine witnesses?

22 A Yes. That's the only time I ever actually acted in
23 that capacity. I've never been in that role before, it was
24 sort of something that happened at the last minute. But any
25 time that I have second seated someone or really in any

1 other trial that I've participated, I've participated in
2 examining witnesses and presentation of arguments and
3 objections and so forth.

4 Q Are you aware of any cases within your office where
5 three attorneys actively participated for a defense team in
6 a case where you were not the third chair?

7 A Oh yes, definitely.

8 Q So there are as a practical matter instances where
9 three attorneys prepare and act on defense of the individual
10 even in cases where you're not there as the third chair.

11 A Sure. We had a trial that went a couple of weeks ago
12 where there were three attorneys on this case, that happens
13 with some frequency. It's certainly not as common as having
14 two, but we do that a good bit. Particularly when you have
15 a third seat we often do that to provide training and
16 exposure for that third seat so that they can get their feet
17 on the ground and do some work in a trial where they are
18 very heavily supervised and have quite a lot of assistance.
19 But sure, that happens with some frequency.

20 Q And is it fair to say there have been cases where the
21 third chair was a seasoned member of the public defender's
22 office that wasn't there for training purposes at all?

23 A I'm sure that's the case. I think to some extent any
24 time we have second and third they're there for exposure and
25 experience. But sure, we have situations where you have a

1 third seat who is very seasoned.

2 MS. SHURLING: Thank you. No further questions of this
3 witness, Your Honor.

4 THE COURT: All right. Thank you, you may step down.

5 MS. SHURLING: Your Honor, I would ask the Court to
6 allow Hugh Ryan the opportunity --

7 THE COURT: I didn't realize it was an adversarial
8 process. You are certainly welcome --

9 MR. RYAN: Your Honor, if I may approach to hand you
10 some materials. Your Honor, I have handed up to the Court
11 basically the 16-3-26, which is the capital trial
12 appointment statute and the Title 17 which is criminal
13 appointments, payments, the whole works as far as individual
14 appointments.

15 THE COURT: All right, I appreciate it.

16 MR. RYAN: And the book I've handed up is all of our
17 policies and several things by the Chief Justice.

18 Q. Ms. Pringle, isn't it true, though, what you're talking
19 about are appointments by the public defender office, right?
20 You're talking about trying cases within the public defender
21 office; is that correct?

22 A That is correct.

23 Q I mean, this is -- and isn't that a little bit
24 different than appointments by like private counsel from a
25 Rule 608 list or otherwise? I mean, it's a different

1 process is what I'm saying if you appoint a private bar
2 member versus the public defender office.

3 A I don't know exactly how to answer -- you know, I'm
4 just speaking to the practice within our office, if that
5 answers your question.

6 Q When you try cases with like codefendants with members
7 of the private bar involved, even in murder cases a lot of
8 times those private bar members try those cases by
9 themselves.

10 A A lot of times they do. You know, I think that varies,
11 sometimes you see folks with other members of their office.
12 So sometimes we will have codefendant cases with private
13 counsel and they'll have another associate or somebody from
14 their office. Is the second seat appointed? I don't know.

15 THE COURT: The Court will take judicial notice that
16 throughout the state lawyers try cases without the
17 assistance of co-counsel.

18 MR. RYAN: That's fine.

19 THE COURT: Particularly in public defender's offices
20 and court appointed counsel throughout the state.

21 MR. RYAN: That's all I have, Your Honor.

22 MS. SHURLING: May I briefly, Your Honor?

23 THE COURT: Yes.

24 REDIRECT EXAMINATION

25 BY MS. SHURLING:

1 Q Ms. Pringle, if there are say five people accused in a
2 homicide case, five codefendants, the public defender's
3 office as a matter of policy will keep one; is that correct?

4 A That is correct.

5 Q And the other four are appointed to members of the
6 private bar?

7 A In a homicide case, in a murder case, yes.

8 Q And so you can only address the benefits of the
9 representation that the one person that got lucky and got
10 the public officer's office would get, right?

11 A As far as the question is I can only address that, that
12 is our focus. Of course, that defendant is our primary
13 focus in that proceeding and so I would be familiar with
14 what our practice is with respect to the person that we
15 keep.

16 Q Sure. And I guess the point I'm trying to make and
17 perhaps inarticulately is that you are only responsible for
18 the defendant that you're keeping within the public defender
19 system, you have no control over what kind of representation
20 the people that are farmed out get.

21 A That's correct, yes.

22 MS. SHURLING: Thank you. No further questions.

23 THE COURT: Thank you. You may step down.

24 MR. RYAN: Your Honor, since I wasn't here for the
25 first hearing I'm not exactly sure of the procedure and

1 where we're going but I have some brief things to say about
2 the attorney's fees issues however we want to do this.

3 THE COURT: You'll get an opportunity.

4 MS. SHURLING: I was addressing the motion with regard
5 to request for funding for a second chair first. Your
6 Honor, I would have no additional witnesses. I would simply
7 make the argument that clearly, although as I've said
8 painfully aware of the limited resources of SCCID to pay
9 attorneys, I would submit there is an inherent equal
10 protection problem when an indigent who is represented by
11 the public defender's office in a murder case is going to
12 have, by testimony demonstrated here today, at minimum two
13 attorneys familiar with the discovery materials, two
14 attorneys able to aid and assist each other in picking up
15 discrepancies between trial testimony and previous
16 statements in the discovery, two attorneys taking turns
17 examining witnesses thereby cutting down on trial fatigue.
18 I can ask the Court to take general judicial notice of the
19 benefits of having a second attorney prepared to divide both
20 the responsibilities and burdens of trial prep and the
21 stressful burdens on trial counsel during a homicide trial.
22 It's clear from the testimony here today that if you're
23 represented by the public defender's office you're going to
24 have a minimum of two attorneys, sometimes three. And we
25 would submit that there is a clear problem which impacts the

1 equal protection clause of the United States Constitution
2 and general due process when a court appointed lawyer
3 representing someone equally situated does not have access
4 to equal resources in the defense of their client. As an
5 aside I would also reiterate the problem with the fact that
6 the solicitor's office is routinely using three prosecutors,
7 three prosecutors who are actively participating in the
8 trial making legal arguments, examining witnesses,
9 presenting motions. This is not three people with -- a
10 couple of them sitting there taking notes and just having a
11 learning experience, it is three participating prosecutors
12 dividing the burdens of trial among themselves and creating
13 a great disparity between the forces brought to bare for the
14 prosecution and the defense if the defense is limited to a
15 sole attorney. Thank you, Your Honor.

16 THE COURT: You're seeking an equal protection and due
17 process ruling limited to Richland County or something that
18 is to be applied in the State of South Carolina?

19 MS. SHURLING: Your Honor, I am making that argument
20 with regard to B.J. Harley and Marquez Prophet. I do so
21 mindful that Your Honor's ruling, of course, be subject to
22 appellate review and that any ruling by an appellate court
23 would have procedural implications statewide.

24 THE COURT: All right. Mr. Ryan?

25 MR. RYAN: Your Honor, on the two lawyer issue, Your

1 Honor, I handed up Title 17 -- Title 17, section 17-3-20
2 addressing appointment of counsel for indigents charged with
3 murder. Your Honor, clearly no references to two lawyers in
4 17-3-20. It says, "If a person charged with murder shall
5 after investigation be determined to be unable financially
6 to retain adequate legal counsel the Court shall appoint
7 such qualified experienced counsel to defend such defendants
8 in the trial of this action." Your Honor, that is
9 contrasted specifically by section 16-3-26, it deals with
10 capital cases. In 16-3-26B1, it states, "Whenever a person
11 is charged with murder and the death penalty is sought the
12 Court, upon determining that such person is unable to
13 financially retain adequate legal counsel, shall appoint two
14 attorneys to defend such person in the trial of the action."
15 So I think our legislature has made it clear to state the
16 difference between a murder case and a murder case in which
17 the death penalty is sought. They could have very easily
18 included two lawyers in the murder language but they chose
19 not to do that. Your Honor, obviously that would be a
20 wonderful luxury to have, we would like to be able to have
21 those resources. What is required constitutionally is
22 adequate legal representation and I think lawyers throughout
23 this state on a daily basis try murder cases with one lawyer
24 and very much provide adequate legal counsel. It would be,
25 again, a luxury to have more but unfortunately that's not

1 where we are, not right now.

2 THE COURT: All right. I respectfully deny the motion
3 to appoint a second chair on the murder case of Prophet or
4 Harley. I find that adequate legal counsel duties can be
5 performed by one lawyer and that Mr. Prophet and Mr. Harley
6 are fortunate to have Ms. Shurling as their counsel, she is
7 more than capable of providing that adequate legal counsel,
8 much more so than many other local counsel. I deny that
9 motion.

10 MS. SHURLING: Thank you. Your Honor, moving on to the
11 question of my request for enhancement of legal fees in both
12 of these homicide cases. As Your Honor is aware by statute
13 the schedule of compensation for court appointed lawyers in
14 non-capital matters is set at \$40 an hour out-of-court and
15 \$60 an hour in-court. I have it upon information and belief
16 that the circuit court routinely entertains and grants
17 throughout the state motions by the court appointed lawyers
18 in murder cases request for those fees to be increased to a
19 fee more in keeping with the experience of the defense
20 attorney and with the complexity and seriousness of the case
21 before the Court. Specifically the statute -- and I
22 apologize, Your Honor, I didn't bring my reading glasses or
23 I'd point you to the exact statute, but there is a provision
24 in the statutory provisions guiding funding for the South
25 Carolina Commission on Indigent Defense that clearly states

1 Your Honor has the authority to increase the statutory
2 out-of-court and in-court fees for an attorney if it's
3 deemed necessary to provide the defendant with reasonable
4 professional assistance of counsel. In both of these cases
5 I would argue that the increase of the fees set by statute
6 is necessary and appropriate. I'll address them one at a
7 time. In Marquez Prophet the defendant is facing a charge
8 of murder and a charge of attempted murder, there are four
9 codefendants in addition to my client. This is destined to
10 be a high profile case with allegations of gang involvement.
11 There's extensive discovery and any trial in this case is
12 likely to be complicated, protracted and difficult by
13 anyone's measure. With regard to me, I have 32 years
14 experience as a criminal defense attorney, I have previous
15 experience trying serious homicide cases in the State of
16 South Carolina, and although the fees requested by me in
17 this case would by no means put me in the position to make a
18 profit in this case, they would go a long way toward making
19 sure I did not finish the trial process with my small law
20 firm in the red as a consequence of honoring my commitments
21 to this court appointment. I have suggested that my hourly
22 rate for in-court be raised to \$100 an hour and that the
23 out-of-court rate be set at 80, acknowledging a \$20 an hour
24 differential between out-of-court and in-court, in the
25 statutory provision for \$40 and out-of-court and in-court.

1 I have asked that the fees in this particular matter be set
2 at 80 out and 100 in. I think given the complexity of the
3 upcoming trial in the Prophet matter, that certainly is a
4 reasonable and fair fee to ask. With regard to B.J. Harley,
5 Your Honor, this is a case involving extraordinary complex
6 medical issues. The case has already been tried once, it
7 was overturned by the Honorable Reggie Lloyd, Your Honor
8 knows what a conservative jurist judge he was and yet he
9 overturned the judgment of homicide, murder in that case.
10 There was a subsequent plea to voluntary manslaughter. I
11 was court appointed, Your Honor, in that very complicated
12 post conviction relief case, I would note that I represented
13 Mr. Harley for a long time in an extraordinarily complicated
14 PCR action and did not ask for an increase in my fees, I
15 humbly honored my court appointment in that post conviction
16 relief matter at a fee of \$40 an hour and \$60 an hour
17 in-court for the post conviction relief proceedings.
18 However, this case has been remanded for a new trial for
19 approximately two years now, it is a very complicated case.
20 At currently -- at the present date, rather, I am aware of
21 no fewer than three experts that will be utilized by the
22 State on the issue of proximate causation of death, two
23 board certified pathologists and one radiologist. This is
24 going to be a very complicated case involving a great deal
25 of medical science and for that reason the complexity of the

1 case, the age of the case, how long it's been since the
2 incident -- since witnesses have been interviewed and
3 evidence has been reviewed, all are going to combine
4 together to make this a very difficult case to try. With
5 regard to my own background and experience, Your Honor, I
6 would simply rely on what I've already said with regard to
7 the Marquez Prophet matter, Your Honor, I believe that my
8 background and my experience as an attorney certainly
9 justifies the fee that I have requested. Thank you, Your
10 Honor.

11 THE COURT: All right. Mr. Ryan.

12 MR. RYAN: Your Honor, briefly. I don't know whether
13 Ms. Shurling was randomly appointed to this case or she
14 volunteered to take this appointment, but I mean, if she
15 volunteered to take it that's a business decision she chose
16 knowing that the rates are lesser than what you get in the
17 private market. Secondly, and we can probably get you some
18 better information, I should have brought you some better
19 information today, I can get this to you very quickly, I
20 don't see it very commonly that it goes above the 60 to \$40
21 rate, and I see about every capital case that comes through
22 and I can't sit here and tell the Court that I see every
23 murder case that comes through. Where we did kind of draw a
24 line, though, and this is the ones I've kind of dealt with a
25 few months back and said, "Look, if it's over \$80 an hour

1 we're going to have to object to it." So those are the ones
2 that I've seen go through. Just some numbers I can give
3 you, in our capital cases an out-of-court rate is average
4 about \$91 and the in-court rate is about \$97 in a capital
5 case, so I think Ms. Shurling is definitely going above what
6 we would feel comfortable with, but like I said, I can't say
7 we haven't gone much above 80. Your Honor, obviously we
8 would always love to pay people more, it's just the nature
9 of demand and the resources. In North Carolina they had the
10 issue of bracketry, the rates kept creeping up so finally
11 the legislature capped the rate. We don't want to see a
12 rate cap in South Carolina because we feel like the cases
13 aren't cookie cutter cases and you need discretion to make
14 decisions. But if the rates keep creeping, I'll tell you it
15 can be a very real possibility that the legislature caps the
16 rates, it's already by statute that they set rates. I would
17 hate to see the discretion taken away because of rate
18 creeps, Your Honor.

19 THE COURT: Ms. Shurling?

20 MS. SHURLING: I would just note, Your Honor, that
21 while the legislature did many years ago set a rate of \$40
22 out-of-court and 60 in, they also sought to put very
23 specific language in there empowering the Court to within
24 its sound discretion increase those fees where the Court saw
25 fit to do so to provide the defendant with reasonable

1 professional assistance based both on the complexity of the
2 case and the experience and background of the attorney. So
3 what I'm asking Your Honor to do and is well within your
4 authority and I would submit what is in practice with what
5 is being done in a significant number of murder cases
6 throughout the State based on my conversations, I would just
7 say as an officer of the Court -- I would make as a proffer
8 as an officer of the Court that based upon my many
9 conversations with court appointed lawyers across the state
10 I have it upon information and believe that across the State
11 in most circuits many lawyers court appointed in homicide
12 cases are successfully requesting that their fees be
13 elevated to a rate higher than that provided by statute and
14 certainly consistent with at or near what I have requested
15 in this case. And I guess it is as good a place as any for
16 me to voice my longstanding belief that there is not
17 necessarily a sound reason in terms of due process and equal
18 protection to make a huge distinction between lawyers
19 representing clients in cases court appointed to in murder
20 cases and capital cases. While I certainly have enormous
21 respect for lawyers handling capital cases, and I've
22 counseled in many in my career, I do not find that the
23 burdens of that representation as a lawyer are necessarily
24 that much more onerous than representing someone who may
25 spend day for day of rest of their life in prison. It may

1 be emotionally more draining, and in fact, it is draining,
2 but in terms of taxing to your skills as a lawyer and as an
3 advocate I do not believe that it is that much more
4 demanding than any murder trial. Thank you, Your Honor.

5 THE COURT: I don't think you will get much agreement
6 among the members of the bar who handle capital cases on
7 that issue.

8 MS. SHURLING: Well, Your Honor, if I may respond to
9 that.

10 THE COURT: Yes, ma'am.

11 MS. SHURLING: I think that the correlation that Your
12 Honor is referring to is that doubtless in a capital case you
13 will spend many, many more hours because of the necessary
14 burden of preparing for a bifurcated proceeding, and then
15 the many hours a lawyer has to spend preparing mitigation
16 witnesses. So by definition there is a far greater time
17 investment in a capital case and so the cases are more
18 demanding on your time and practice but you're paid by the
19 hour, and so with regard to a per hour burden on the lawyer
20 and compensation I believe there's not that much of a
21 differential, Your Honor, that's more to my point. Thank
22 you.

23 THE COURT: Now, Ms. Shurling, the complexities
24 involving the case that you handled the PCR on, did you
25 address those complexities in the PCR matter?

1 MS. SHURLING: To a limited degree, Your Honor, far
2 more limited than there will be on retrial. For example, in
3 the post conviction relief case I had only to deal with --
4 concerning B.J. Harley I had only to deal with Clay Nichols
5 who was the pathologist who was originally used by the
6 prosecution in the original trial which ended in a judgment
7 that was overturned by Judge Lloyd. In this case I am
8 confronting multiple experts approaching the proximate
9 causation issue from different angles, and therefore that is
10 necessitating my prayer to bring in additional experts as
11 well and so it is significantly upping the ante with regards
12 to the complexity of the case and the burden for trial prep.

13 THE COURT: All right. Regarding this request seeking
14 an order for additional fees for appointed counsel in an
15 order dated by the Chief Justice in 2005, the Chief Justice
16 wrote that several concerns about the authority to order
17 attorney fees for appointed counsel in excess of the amount
18 provided by the statute have recently come to my attention.
19 Pursuant to code section payment of attorney fees in excess
20 of statutory amount is allowed if the circuit court
21 certifies in a written order with specific findings of fact
22 that payment in excess of the rates is necessary to provide
23 compensation adequate to ensure effective assistance of
24 counsel and because the statute does not provide for ex
25 parte proceedings to determine attorney's fees, hearings on

1 requests for additional fees should be held in open court
2 and that's what we are doing here today. Further, whether
3 additional fees are necessary to ensure effective assistance
4 of counsel should be determined with reference to the facts
5 of a particular case. Payment in excess of a statutory rate
6 should not be authorized for all appointed cases or for all
7 of a particular attorney's appointment cases. In this case
8 Ms. Shurling has requested for attorney fee approval of \$80
9 an hour for out-of-court services, \$100 per hour for
10 in-court services, and that she be allowed to bill up to
11 \$10,000 without further approval of the Court providing the
12 time records support the claimed expenditures. And that's
13 the request sought on the Prophet matter, or the request
14 sought under the B.J. Harley matter, let's see, is that the
15 same request?

16 MS. SHURLING: Yes, Your Honor.

17 THE COURT: It's requesting the same. Mr. Ryan,
18 your -- you indicate that what you have seen regarding
19 in-court and out-of-court -- tell me what -- the statutory
20 rate is \$40 per hour; is that right?

21 MR. RYAN: Yes, sir, 40 out-of-court, 60 in-court.

22 THE COURT: Forty out-of-court, 60 in-court. And what
23 you have seen in noncapital cases typically approved by the
24 Courts is what?

25 MR. RYAN: We've had -- we've raised an objection when

1 we got requests that was over \$80. Now, I can't speak for
2 what Ms. Shurling did and I'm not saying it hasn't been, I
3 don't see all of them, what I can do though, we just rely on
4 our data and I'll be glad to go straight back to the office
5 and get you an average on a murder case that is noncapital.

6 THE COURT: You say you raised an objection, how do you
7 do that? Do you contact the Judge?

8 MR. RYAN: Well, the lawyer typically sends us an order
9 and we say -- you know, I've seen somebody request \$100 an
10 hour and say, well, if it's not over 80 -- we won't object
11 if it is 80 or below, but if it's 100 maybe we ought to have
12 a hearing on it.

13 THE COURT: What's the in-court and out-of-court?

14 MR. RYAN: Typically it's 80 across the board. I can't
15 say there hasn't been anything higher that I recall.

16 THE COURT: And how about the total fees paid?

17 MR. RYAN: 10,000 for a murder case, that sounds in
18 ballpark, that doesn't shock you.

19 THE COURT: All right. Ms. Shurling?

20 MS. SHURLING: Your Honor, I would just bring to the
21 table that in the last murder case I tried, now U.S.
22 District Judge Michelle Childs authorized \$100 an hour for
23 in-court and out-of-court across the board, that bill has
24 not yet been submitted to SCCID. I would also note that I
25 believe under the legislative language before the Court as

1 controlling the circuit court has the authority to make that
2 determination, and while I certainly expect and respect the
3 Court's desire to take the feelings and even objections of
4 SCCID into account, I believe that the statute empowers the
5 Court to set the fees and if the Court has issued an order
6 that an attorney be paid I do not believe that SCCID has the
7 authority to veto that order.

8 MR. RYAN: Your Honor, we got off a little bit of the
9 subject. I agree with that statement that you have
10 discretion and we don't want to take that away. The problem
11 is that these other things have been heard on the front end,
12 this other case that is going to come along later, in this
13 case she's been working on for almost a year it seems like,
14 so that's why we tell people let's address it on the front
15 end. Of course we're going to do what Your Honor says, I'm
16 not disputing that one bit. We try to be consistent
17 throughout the state. It's not fair to pay some lawyer
18 something in Myrtle Beach and some lawyer in Greenville, we
19 don't get a bonus for this, the money goes back into the
20 system for the next defendant for the next lawyer.

21 THE COURT: Well, I have been almost floored by the
22 requests that I have received here in Richland County for
23 expert services, attorney's fee services, investigator
24 services compared to what I have seen throughout my almost
25 11 years on the bench in other parts of the State. I

1 commend the lawyers in Richland County who provide an
2 excellent service but, you know, I agree with Mr. Ryan to
3 the extent that as a State Circuit Court Judge due process
4 should not apply to one county, it should apply statewide
5 and resources should not be confined to the capital city
6 area.

7 MS. SHURLING: Your Honor, if I may -- and I
8 apologize --

9 THE COURT: If you may, or go ahead, whether you may or
10 not you -- go ahead.

11 MS. SHURLING: It was not my intention to interrupt
12 Your Honor. I just realized that Mr. Ryan brought up a
13 point that I did not address and that was whether or not I
14 volunteered for these cases.

15 THE COURT: Yes.

16 MS. SHURLING: I think Your Honor needs to know that
17 information one at a time. On B.J. Harley when the case was
18 reversed and remanded for a new trial, I made, I'm sorry, I
19 thought Mr. Strickler was still in here, I made Mr.
20 Strickler aware when the reversal happened, I told him that
21 I knew that they would have to conflict out and that I
22 wasn't asking for the case but if it had to be appointed to
23 somebody outside the court and outside the Public Defender's
24 Office and the Clerk of Court and the Presiding Chief
25 Administrative Judge wanted to give it to me, that I would

1 not object to taking it because I was already very familiar
2 with the case. With regard to the Marquez Prophet case, I
3 didn't have any involvement in getting that appointment
4 other than that I have received -- I had been asked by Judge
5 Michelle Childs to take an appointment in the State vs.
6 Anthony Hackshaw (phonetically) last fall and after I agreed
7 to take that one shortly thereafter I got a call from
8 someone, I'm sorry, I don't remember who, from the Clerk of
9 Court's office asking if I would be willing to take another
10 murder case, and that's how my involvement in that one came
11 about, Your Honor. Thank you.

12 THE COURT: All right. And based on everything I've
13 heard I'm approving the rate of \$80 in-court and
14 out-of-court for the Prophet case. I'm approving the rate
15 of \$80 in-court, \$70 out-of-court in the B.J. Harley case,
16 up to a maximum of \$10,000 on each case.

17 MS. SHURLING: Thank you, Your Honor. Yes, sir.

18 THE COURT: Is that it for this? Do we have more?

19 MS. SHURLING: Yes, sir, we have more.

20 THE COURT: All right.

21 MS. SHURLING: In both cases I have submitted a request
22 for the approval of general expenses to include but not
23 strictly limited to such things as postage, copying costs,
24 printing costs, paying bills for records that we might have
25 to request from various entities for such things as medical

1 records, prior criminal records of individuals and so forth.
2 Also with regard to fact witnesses the expenses related to
3 paying witness fees and expenses and appearance fees, Your
4 Honor, in addition to the county cost of service of
5 subpoenas. Those are among the many matters covered by my
6 motion for general expenses in both of these murder cases.
7 Because of both the complexity of the cases and the number
8 of charges and witnesses expected to be involved in each of
9 them I have set my request for general expenses I believe
10 reasonably for what reasonable expenses would be expected to
11 be in both of cases. The statute requires that we seek
12 approval of expenses in advance. The irony of that, Your
13 Honor, is that -- and you mentioned this in a previous
14 hearing, you said you're confronted all the time with
15 requests for expenses and the lawyer can't be specific
16 enough with you about what those expenses are going to be,
17 well, the problem is the lawyer is stuck between a rock and
18 a hard place. We are asked to have the approval for
19 expenses in advance of incurring the expenses, and yet we
20 often do not know until the case progresses what the full
21 burden of the expenses is going to be.

22 THE COURT: You're saying \$750 on each case?

23 MS. SHURLING: Sir?

24 THE COURT: You're seeking \$750?

25 MS. SHURLING: I believe 750, Your Honor, is the amount

1 requested for the witness related fees -- I mean, for
2 general expenses related to subpoenaing witnesses and paying
3 their appearances fees and related expenses. The total
4 amount expected -- requested for general expenses, Your
5 Honor, is \$1,750 per case. And that's to cover photocopies,
6 copies of records, mileage, Westlaw bills for doing research
7 related to the case, any related reasonable expenses with
8 regard to printing, research, postage, Your Honor. We build
9 up big postage bills in these cases often times.

10 THE COURT: Who do you sent letters to?

11 MS. SHURLING: Sir?

12 THE COURT: Who do you sends letters to?

13 MS. SHURLING: Well, in the course of a case like this
14 I often have sent as many as 100 letters to witnesses,
15 attorneys and the defendant himself.

16 THE COURT: Okay. What do you say about that,
17 Mr. Ryan?

18 MR. RYAN: Your Honor, I know this Court is begging me
19 to move along so I'll try to -- we've had an issue with Ms.
20 Shurling from time to time about expense issues. We are
21 only going to pay what our policies say we can pay. There
22 are certain amounts per page or per copy, we use the state
23 rate for mileage so we can't possibly list all that right
24 now, we'll be here until forever. We would just like to
25 have that it be expenses paid are in accordance with our

1 SCCID policies. We've had this issue with Ms. Shurling
2 about whether our policies apply or don't apply, we say the
3 statutes provide and they do apply. Again, we would argue
4 about that for the next hour. We just ask that -- we will
5 pay whatever expenses that are in accordance with our
6 policy.

7 THE COURT: All right.

8 MR. RYAN: We'll get them in, we'll check the mileage
9 rate, we'll check for whatever and see if it violates the
10 policy. The only problem I have with the motion she's
11 making is that she states in the -- this order expressly
12 authorizes payment of any expenses already incurred. I
13 don't know what has already been incurred, how much has
14 already been incurred. We have the power of up to \$500 to
15 pay without an order of the Court if something we consider
16 reasonable or not is a violation of the policy, but if it's
17 already exceeded the \$500 it should have been preapproved.
18 I don't know what we're talking about here.

19 MS. SHURLING: I can clarify that. I don't believe
20 that in either of these cases the nominal expenses that have
21 been incurred up to this point, I don't believe in either
22 case would break the \$500 limit that is subject to payment
23 without prior approval.

24 MR. RYAN: Okay. The last thing I have, Your Honor,
25 it's a little confusing in the order, it states in the last

1 paragraph before the therefore ordered paragraph that if
2 necessary to exceed the limits set for either category
3 expenses provided, the total expenses may not exceed \$1,750
4 without authorization from this Court. Counsel is
5 authorized to seek approval of any balance not covered by
6 this order upon completion of the case with the express
7 understanding that counsel assumes the risk that any such
8 balance will not be paid if not approved by the Court, it
9 kind of talks about prior approval and then it mentions that
10 upon completion. And I realize Ms. Shurling is saying she
11 may not get paid for it, but we always say let's address it
12 on the front end. If it's going to exceed the \$1,750 we
13 need to have it approved by the Court. Maybe I read that
14 wrong, it seems a little inconsistent.

15 MS. SHURLING: Your Honor, I'm happy to explain the
16 intent of that language if I may. Your Honor, with regard
17 to the first provision saying that any expense can be paid
18 out of any category, we simply have had countless situations
19 where let's say witness fees and expenses ended up being
20 \$765 and the cap for that was 750, but we had not spent all
21 of the \$1,000 for general expenses and that's why we have it
22 worded that way so that if there is a -- if you've gone
23 slightly over the amount set for a specific category but you
24 have money that you have not spent in another category
25 provided it doesn't go over the total of general expenses of

1 1,750 we ask that it be deemed approved, that was the reason
2 for that language to avoid burdening the Court with
3 subsequent requests for a slight overage in one category or
4 the other. And with regard to the last provision of the
5 rule, as Your Honor has noted it is often difficult to know
6 how your expenses are going to total out until a case is
7 over, and if I am in the middle of preparing for and trying
8 a case involving five codefendants I'm not necessarily going
9 to have time to run a daily total to make sure that I
10 haven't topped that 750 limit. The intent of the proposed
11 order is to say if at the end of the case the total of
12 general expenses is \$1,900, I want the approval of the Court
13 to resubmit that to the Presiding Judge for approval of the
14 150 that I went over the amount previously approved with the
15 understanding that should the Presiding Judge deem that that
16 slight overage was not warranted I may end up being stuck
17 paying for it, it may come out of my pocket, but that I am
18 not clairvoyant and I often in the midst of trial prep in
19 the trial of a case do not have the time or the resources to
20 keep up with on a daily basis whether or not I've hit a cap
21 for general expenses and that's the reason for that
22 language.

23 THE COURT: I approve up to \$500 for lay witness fees
24 and expenses, 750 for all other general expenses for a total
25 not to exceed \$1,250.

1 MS. SHURLING: Thank you, Your Honor. May I ask for
2 one point of clarification?

3 THE COURT: Yes.

4 MS. SHURLING: It is the policy of SCCID as I
5 understand it to not pay mileage for any mileage inside
6 Richland County or not more than 50 miles. It is, for
7 example, approximately 18 miles I believe from my office to
8 the jail where my client is incarcerated without bond, which
9 means I've got a 36-mile round trip.

10 THE COURT: So you bill for mileage to go, plus time to
11 go?

12 MS. SHURLING: To and from the jail?

13 THE COURT: Yes.

14 MS. SHURLING: I may. Thank you, Your Honor.

15 THE COURT: Well, no, that's a question, not an
16 endorsement of the concept.

17 MS. SHURLING: That's my question, Your Honor. My
18 client is not on bail, he is at the Bluff Road Detention
19 Center. In the days and weeks approaching trial I will be
20 making virtually, you know, three, four, sometimes more
21 trips to the jail every day and that adds up. And although
22 it doesn't technically -- it isn't more than 50 miles to
23 travel there I believe that it is unreasonable to expect a
24 court appointed attorney to pay for four or five 36 mile
25 round trips to the jail for three or four weeks in a row

1 getting ready for trial and I would ask that I be permitted
2 to bill -- and it's within Your Honor's discretion by
3 statute -- that I be permitted to bill round trip mileage
4 for trips to the detention center to meet with my client to
5 prepare for trial.

6 THE COURT: Well, my view is that if you're being paid
7 \$80 an hour to go there that should be sufficient. I don't
8 think you should collect gas mileage and \$80 an hour to go
9 see your client.

10 MS. SHURLING: Your Honor, perhaps I misunderstood you,
11 I thought 80 an hour was the rate I got for in-court.

12 THE COURT: In-court and out-of-court on one, and \$70
13 on the Harley. But I don't think that counsel should
14 receive \$80 per hour for going to the jail and visiting a
15 client plus whatever the mileage rate is, 30 cents, 40 cents
16 or 50 cents a mile.

17 MS. SHURLING: If it's Your Honor's ruling that I can
18 bill for the time driving out there and back then I'm fine
19 with that.

20 THE COURT: Well, I don't know what you bill for. I
21 don't scrutinize those bills to that extent, hopefully
22 Indigent Defense does.

23 MR. RYAN: Yes, sir. We do, Your Honor.

24 THE COURT: I think this entire matter sets a very
25 dangerous -- if the legislature wanted to scrutinize the

1 funding of Indigent Defense and were to receive a transcript
2 of these proceedings I don't think they would increase the
3 budget.

4 MS. SHURLING: I understand. Did I understand,
5 Mr. Ryan, you said I can bill for my time driving out there,
6 I just can't bill for the mileage? Is that correct?

7 MR. RYAN: Our policy specifically states mileage is
8 paid on extraordinary travel and reimbursed only for travel
9 for outside the appointed attorney's county upon approval,
10 so we don't pay mileage. We typically would have no travel
11 time.

12 MS. SHURLING: Then I'm fine with that, Your Honor. I
13 have no objection to that, I think that's reasonable.

14 THE COURT: What else do we have? We do have a
15 whole -- this is Monday morning in Richland County.

16 MS. SHURLING: Yes, sir, Your Honor.

17 THE COURT: What else do we have?

18 MS. SHURLING: I believe that those are the three
19 motions that both B.J. Harley and Marquez Prophet had in
20 common. Now, remaining, Your Honor, are issues regarding
21 only B.J. Harley. In the Marquez Prophet matter, Your Honor
22 has already issued an order approving my request for funding
23 for an investigator so I don't need to address investigator
24 services with regards to the Prophet matter. With regard to
25 B.J. Harley, I have requested reasonable fees for an

1 investigator to assist me in investigating the defense and
2 preparing for trial in that case. Your Honor, I am well
3 aware of SCDC's -- pardon me, SCCID's policies with regards
4 to an investigator. The investigator that I proposed to use
5 in this case is on their approved list and is someone that
6 they have regularly paid bills for in not only my cases but
7 in other cases, Dave McDougal. Your Honor, in an
8 in-chambers discussion --

9 THE COURT: All right. I'll approve that one to the
10 same level that I approved the others.

11 MS. SHURLING: Thank you, Your Honor.

12 THE COURT: All right.

13 MS. SHURLING: And lastly is the more difficult
14 question for expert witnesses for the B.J. Harley case, Your
15 Honor. In the B.J. Harley case at the original trial the
16 prosecution's sole medical expert was Clay Nicols, the
17 prospecting pathologist in that murder case. Mr. Nicols was
18 the only medical expert presented by the State in the post
19 conviction relief proceeding, as well. In the post
20 conviction relief matter I accordingly requested funding for
21 one expert, for B.J. Harley and was granted funding to hire
22 Dr. Stan Kessler who is a board certified forensic
23 pathologist and his testimony was received by the Court
24 during the post conviction relief proceeding. Now that
25 we're preparing for retrial I have been informed by lead

1 counsel for the prosecution, Luck Campbell, that she intends
2 in addition to Dr. Clay Nichols, to present testimony from a
3 board certified pathologist, a Dr. Wade from Greenville and
4 in addition, Your Honor, she intends to be present the
5 testimony of a radiologist whose name is provided in my
6 request for funding as well. I believe, Your Honor, that
7 this case involves some of the most complicated questions
8 concerning proximate causation of death that I have
9 encountered in my 32 years experience as both an appellate
10 and trial lawyer. Because of the complexity of the medical
11 issues involved and the plethora of testimony that the State
12 is intending to present on that issue, there is a grave
13 danger if the defense is limited to only one expert witness
14 in this case, I submit that there is a real danger of
15 violation of due process in the sense that a jury might
16 readily resolve questions concerning what view of the
17 proximate causation testimony to adopt --

18 THE COURT: Is this the one in which you said the State
19 had three experts or two experts and the defense had to have
20 the same number of experts that the State has because the
21 jury might believe because they have three and we only have
22 one that their three would be more credible than my one?

23 MS. SHURLING: Yes, that's kind of my argument.

24 THE COURT: Is this the same case?

25 MS. SHURLING: It's the same case, Your Honor. And my

1 argument is that the jury if confronted with highly complex
2 medical testimony is having difficulty resolving whose
3 opinion they believe, that there would be a natural tendency
4 to resolve the issue on the fact that, "Well, the State's
5 doctor has got two people that agree with him and
6 corroborate his view."

7 THE COURT: Well, I heard your argument on that and I
8 rejected that argument.

9 MS. SHURLING: It was not my recollection that Your
10 Honor had made a ruling on that.

11 THE COURT: Well, I'm ruling now. I reject the notion
12 that the State must -- that Indigent Defense must provide an
13 equal number of experts to the State's experts based on
14 numbers alone.

15 MS. SHURLING: And I don't believe that based on
16 numbers alone that that would always be a prudent decision.
17 However, Your Honor, on the facts of this case where we're
18 dealing with a victim where the record will reflect in the
19 post conviction relief order --

20 THE COURT: Yeah. But your request was not based on a
21 need for a specific expert, it was just based on, "I'm going
22 to find another expert to equal the number of experts that
23 the State has."

24 MS. SHURLING: No, sir, Your Honor, that isn't
25 accurate.

1 THE COURT: All right. What are you asking me now
2 without all of the rehashing the argument? What are you
3 asking me?

4 MS. SHURLING: I have asked to be allowed to use
5 Dr. Stan Kessler who was our expert in the post conviction
6 matter. I have asked to be allowed to use an associate of
7 his from the Medical University of South Carolina whose name
8 is provided in my motion who is also a board certified
9 pathologist to provide a second witness whose opinion would
10 corroborate that of Dr. Stan Kessler in the same way that
11 Dr. Wade's testimony would collaborate that of Clay Nichols.
12 I have indicated, Your Honor, because I was notified rather
13 late that the State intended to use three experts and not
14 two that with approval of the Court I intended to seek out
15 either a board certified radiologist who -- or another board
16 certified pathologist. So I specifically identified what
17 kind of expert --

18 THE COURT: Are you still pursuing that or have you
19 abandoned that?

20 MS. SHURLING: No, sir, I have not abandoned that. I
21 still believe that it would be necessary and prudent for me
22 to present three experts.

23 THE COURT: All right --

24 MS. SHURLING: At minimum two.

25 THE COURT: All right. Well, I'll take that under

1 advisement. I've heard you're position and I'm not going to
2 spend any more time on the issue.

3 MS. SHURLING: For the Court's convenience I have
4 provided you with three proposed orders, one approving only
5 Dr. Kessler, one approving Dr. Kessler and the second board
6 certified pathologist and one approving three so that Your
7 Honor has proposed orders for all three choices, and all
8 three proposed orders have been provided to SCCID as well.

9 THE COURT: All right. Anything that the department
10 wants to say on that issue?

11 MR. RYAN: Your Honor, nothing on than that issue. One
12 thing I can say on the -- I know you've ruled on the fee
13 amount but if we can still submit that data -- it may be
14 against us, it may be in her favor and it might even help us
15 and you may stand by your ruling, but we can still give you
16 the data on the murder cases, the average hourly and total
17 fee cap.

18 THE COURT: I'd love to have that, because this is one
19 request out of many that I receive here in Richland.

20 MR. RYAN: Okay.

21 THE COURT: No place else in the State.

22 MR. RYAN: So we'll pull that out and get that to you
23 as soon as we get back.

24 THE COURT: If you have anything on the number of
25 experts the State has three, we want three, the State has

1 two, we want two.

2 MR. RYAN: Your Honor, that's not an issue we face very
3 often. We don't have a way to -- you know, actually we
4 don't weigh too much on the -- I don't know the factual
5 issues of the case, Your Honor, we kind of leave that in
6 your discretion. It's obviously a demand on our resources.
7 Obviously I know there's a jury charge that says, you know,
8 one may have many witnesses, one may have few witnesses.

9 THE COURT: You don't determine credibility by counting
10 the number of witnesses.

11 MR. RYAN: One issue that was kind of raised a little
12 bit was providing an associate. I think a jury is going to
13 be pretty skeptical of an associate in the same practice I
14 guess is what she's talking about, I don't know what that
15 meant exactly, would have much of a different opinion from
16 their partner.

17 MS. SHURLING: Your Honor, if I gave the impression, I
18 meant they were associates in the same practice, that would
19 be error. They're associates only in the sense that they
20 are both professors. Dr. Kessler, I believe, is an
21 occasional guest professor at the Medical University of South
22 Carolina, the other expert is employed as a research
23 scientist in my understanding from MUSC, that's the only
24 connection.

25 THE COURT: Now, this is one defendant out of five

1 codefendants?

2 MS. SHURLING: No, sir, Your Honor. In B.J. Harley
3 there is only one defendant.

4 THE COURT: All right.

5 MS. SHURLING: And lastly, Your Honor, has Your Honor
6 ruled on my fees or are you now saying you're holding that
7 open?

8 THE COURT: I ruled on your fees.

9 MS. SHURLING: Thank you very much.

10 THE COURT: Unless you want to make more argument.

11 MS. SHURLING: Oh, no, sir, I don't. I heard you say
12 the State was going to allowed to submit additional
13 material.

14 THE COURT: Because this is one case, I received
15 similar requests in many cases, you're might have heard me
16 say that.

17 MS. SHURLING: Certainly. Thank you, Your Honor.

18 THE COURT: All right.

19 (End of the hearing.)

20

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1 I, the undersigned, Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate and complete transcript of the proceedings (reported
5 by Karen Ambroziak, edited by Michael Watkins) had and
6 evidence introduced in the trial of the captioned case,
7 relative to appeal, in the Court of General Sessions for
8 Richland County, South Carolina, on the 23rd day of May,
9 2011.

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

12

13

January 29, 2014

14

15


Michael C. Watkins
Court Reporter

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17

(Reported by Karen Ambrokiak, edited by Michael

18

Watkins)

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS

Indictment # 2003-40-6670

THE STATE OF SOUTH CAROLINA,

v.

ORDER FOR INVESTIGATIVE
SERVICES AND EXPENSES

BEJAY HARLEY,

Defendant.

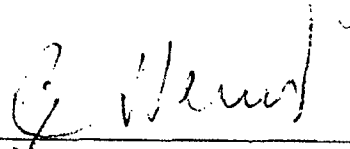
THIS MATTER comes before the Court upon the motion of Tara Dawn Shurling, attorney for the above-named Defendant. The Defendant in the above-captioned matter is an indigent represented by court-appointed counsel. Counsel has requested this Court's Order authorizing funds for the investigation of this murder case. Counsel has asserted that this request is appropriate on the facts of this case and that the expenditure of funds for these purposes is necessary to assure that Defendant receives effective assistance of counsel during his prosecution in General Sessions Court. See Ake v. Oklahoma, 470 U.S. 68, 76 (1985) ("This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.")

Counsel states as an officer of this Court that there are multiple matters crucial to the defense of her client which will require investigation. Investigation of these issues will require an investigator to spend some time reviewing discovery material in order to conduct a thorough and

productive investigation. Counsel further advises that it is her intent to hire Dave MacDougall, an investigator on the approved list for SCCID¹ and with whom she has prior experience. Counsel has consulted with Investigator MacDougall and confirmed that he has no conflicts which would prohibit him from taking this case, and that he is available to serve upon approval of funding by this Honorable Court. Counsel specifically requests approval of **\$2,000.00** for fees for investigative services and reasonable expenses incurred by said investigator in this case.

This Court finds that counsel has made a proper showing that it is necessary and appropriate under the terms of S.C. Code Ann. §17-3-50 (Supp.1999) to authorize access to funds up to, but not to exceed, **\$2,000.00** for the full investigation of this case. Counsel may not request payment for investigative services or expenses in excess of this limit without additional authorization by this Court.

IT IS SO ORDERED.



Clifton Newman
Chief Administrative Judge
Court of General Sessions
Fifth Judicial Circuit

This 23rd day of May, 2011.

~~none pro tempore~~

Date of Appointment (March 30, 2009)

¹ Counsel has provided this Court with copies of Investigator MacDougall's itemized time and expense records from another murder case for review. This Court has therefore had the opportunity to observe that the investigator in question keeps detailed records of time expended and expenses incurred and tasks performed. In addition Counsel has provided this Court with verification that those billing records were accepted by SCCID and were paid.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS

Indictment # 2003-40-6670

THE STATE OF SOUTH CAROLINA,

v.

BEJAY HARLEY,

Defendant.

EXPENSE ORDER FOR EXPERTS

2007 MAY 25 AM 9:48
JEANETTE W. McBRIDE
C.C.P. & C.S.

RICHLAND COUNTY
FILED

THIS MATTER comes before the Court upon the motion of Tara Dawn Spurlin attorney for the above-named Defendant. The Defendant in the above-captioned matter has been charged with murder and is an indigent, represented by court-appointed counsel.

Counsel for the Defendant has represented to this Court that in order to provide the Defendant with effective assistance of counsel in this matter, she requires the services of three medical experts. Counsel has been informed that the State will be using two pathologists and a radiologist in its prosecution of the Defendant. One of the State's medical experts is the forensic pathologist that was involved in the initial prosecution of the Defendant. In addition, the State intends to call a second pathologist, Dr. Michael E. Ward, and a radiologist, Dr. Douglas McConnell. Counsel believes it is imperative that the Defense retain medical experts to counter the testimony of the State's original forensic pathologist, as well as the State's supporting medical experts. Counsel is concerned that the factfinder's ability to weigh the evidence and testimony may be challenged by a tendency to favor the side with the most medical expert witnesses, inasmuch as this case involves a complicated medical diagnosis. Counsel argues that this indigent defendant will be prejudiced if he is not afforded three (3) medical experts to counter the opinions of the State's three (3) medical experts. She submits that because the

medical issues involved in this case are complex and highly technical, there is a heightened risk that a jury of lay persons might resolve the operative medical question by looking to the sheer number of experts presented by the State who agree with the prosecution's theory of the case.

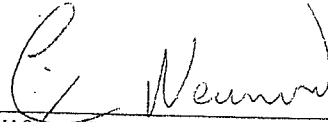
Counsel has reached an agreement for services with Dr. Stanton Kessler, the forensic pathologist previously retained by the Defendant in the Post-Conviction Relief action. Dr. Kessler was retained with funding authorized by this Court. Pursuant to that authorization, Dr. Kessler's bill for his services in the PCR action was subsequently paid by SCCID.¹

This Court finds Counsel's request for the services of a medical expert to be reasonable and necessary on the facts of this case. This Court does not however find that it is necessary or appropriate to provide the Defendant with as many medical experts as the State intends to utilize for the prosecution in order to afford him the opportunity to be fully heard in his defense. While mindful of the concerns voiced by Defense Counsel, this Court is also mindful of the limited resources available to pay for expenses in indigent cases. With that concern in mind, this Court believes that affording the Defendant one (1) medical expert to challenge the State's theory concerning the cause of death of the victim is sufficient to protect his right to be fully heard in his defense. Defense Counsel's objection to being granted funding for one (1) rather than three (3) experts is duly noted for the record. Counsel is authorized to submit a bill for the services of one (1) medical expert. It is expressly ordered, however, that counsel's bill for services addressed herein

¹ Copies of Dr. Kessler's bills from the Post-Conviction Relief action, as well as records demonstrating that the funding for his services was approved by the Court, have been provided to this Court for review. In addition, Counsel has provided this Court with records concerning the payment of Dr. Kessler by SCCID.

shall not exceed a total bill of three thousand ^{and} ~~five~~ hundred dollars ^(~~\$~~3,000.00) unless expressly authorized by subsequent Order of this Court.

IT IS SO ORDERED.



Clifton Newman
Chief Administrative Judge
Court of General Sessions
Fifth Judicial Circuit

This 24th day of May, 2011.

~~nunc pro tunc~~ ^{an}

Date of Appointment (March 30, 2009)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS

Indictment # 2003-40-6670

THE STATE OF SOUTH CAROLINA.

v.

BEJAY HARLEY.

Defendant.

**MOTION FOR FUNDING PURSUANT
TO SECTION 17-3-50, S.C. CODE ANN.**

Now comes the Defendant in the above-captioned criminal matter, acting by and through the undersigned court-appointed counsel, requesting an Order from this Honorable Court approving funding for investigation of this murder case and preparation of a defense. In the course of these proceedings, counsel anticipates incurring certain reasonable expenses in the representation of Defendant. These expenses are appropriate and necessary to assure that the Defendant receives effective assistance of counsel prior to and during his prosecution in General Sessions Court. Inasmuch as the South Carolina Commission on Indigent Defense requires that such expenses be approved in advance, the Defendant now presents for this Court's approval, proposed Orders approving funding for payment of said expenses. It is clearly understood that Counsel must keep detailed records of any and all expenses incurred in this case and must submit those records to SCCID along with her request for reimbursement. Counsel recognizes that payment of any expenses in excess of the limits of this Court in this case will necessarily have to be reviewed by the presiding judge as a prerequisite for counsel being reimbursed. Accordingly, counsel requests this Court's advance approval of expenses outlined in the attached Proposed Orders Authorizing Funds for Investigative Services, Attorney Fees and Other General Expenses.

Respectfully submitted

Tara Dawn Shurling
Attorney and Counselor at Law
3614 Landmark Drive, Suite A
Columbia, SC 29204
803-738-8622
803-734-1600 (Fax)
ATTORNEY FOR DEFENDANT

This 12th day of May, 2011
Columbia, South Carolina

TDSLAW

From: Newman, Clifton Law Clerk (Tonnya K. Kohn) [CNewmanLC@sccourts.org]
Sent: Friday, December 30, 2011 12:36 PM
To: Law Offices of Tara D. Shurling
Subject: Sate v. Bejay Harling

Ms. Shurling,

I was unable to find an electronic version of the Order to Pay Attorney's Fees in the above matter. Could you submit the proposed order incorporating the changes that Judge Newman ordered from the bench on Tuesday?

Thank you.

Tonnya Kennedy Kohn

Law Clerk to the Honorable Clifton Newman
1701 Main Street, Room 222
P.O. Box 192
Columbia, South Carolina 29202
Office: 803-576-1770
FAX: 803-576-1772

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

THE STATE OF SOUTH CAROLINA,

v.

BEJAY HARLEY,

Defendant.

IN THE COURT OF GENERAL SESSIONS

Indictment # 2003-40-6670

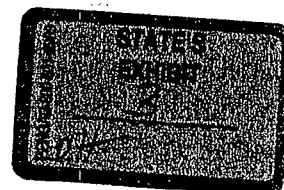
ORDER TO PAY ATTORNEY FEES

THIS MATTER comes before the Court upon the motion of Tara Dawn Shurling, attorney for the above-named Defendant. Mr. Harley is charged with one count of murder and has been declared indigent. Ms. Shurling was appointed to represent the Defendant.

It is reasonable and proper for the Court to award compensation for court-appointed attorneys in excess of the statutory limits and § 16-3-26(B) so specifies. Further this Court finds that in light of the facts of this case, the seriousness of the charge and the extensive experience of the attorney appointed in this matter, a fee in excess of the statutory limits is reasonable and appropriate. The United States Supreme Court has held that a criminal defendant is entitled to reasonably effective assistance of counsel, under the Sixth Amendment guarantee of a right to "counsel." See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). This Court finds that in-court fees of \$100.00 per hour are reasonable and hereby approves the hourly rate for all in-court time expended by counsel. In addition this Court authorizes Counsel's out-of-court time to be billed at a rate of \$80.00 per hour.¹

The presiding judge will ultimately review Counsel's time records and will determine whether the amount of time expended by Attorney Shurling on this case is supported by appropriate records. In light of the fee rate set by this Order, it is anticipated that Counsel's total

¹ This Court notes that the hourly fees set for non-capital cases provide a rate for in-court services of \$60.00 per hour and \$20.00 less per hour for out-of-court services which are set by statute at \$40.00 per hour



fees will exceed the statutory cap of \$3,500.00. Subject to final approval of Counsel's time records by the presiding judge, this Court hereby approves Counsel's fees exceeding the statutory cap. Counsel may submit to SCCID for payment a voucher for fees up to \$10,000.00 without further approval of the Court.

ACCORDINGLY,

1. Court-appointed counsel, Tara Dawn Shurling, is to be paid at a rate of \$100.00 per hour for in-court and \$80.00 per hour for out-of-court services in this case.
2. Attorney Shurling is to be allowed to bill SCCID for out-of-court and in-court legal services provided to this client beginning with the date of her appointment by the Court; March 30, 2009.
3. Attorney Shurling may bill SCCID for fees up to \$10,000.00 without further approval of the Court provided the presiding judge finds her time records to be adequate to support the time expenditures claimed.

IT IS SO ORDERED.

Clifton Newman
Chief Administrative Judge
Court of General Sessions
Fifth Judicial Circuit

This _____ day of _____, 2011.
nunc pro tunc
Date of Appointment (March 30, 2009)

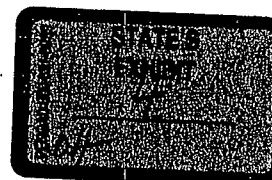
TO: All Circuit Court Judges
FROM: Chief Justice Jean Hoefer Toal
DATE: July 6, 2005

RE: Ordering Additional Attorney's Fees for Appointed Counsel.

Several concerns about the authority to order attorney's fees for appointed counsel in excess of the amount provided by statute have recently come to my attention. Pursuant to S.C. Code Ann. § 17-3-50(C) (2003), payment of attorney's fees in excess of the statutory amount is allowed if the circuit 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." Because § 17-3-50(C) does not provide for *ex parte* proceedings to determine attorney's fees, hearings on requests for additional fees should be held in open court.

Further, whether additional fees are necessary to ensure effective assistance of counsel should be determined with reference to the facts of a particular case. Payment in excess of the statutory rates should not be authorized for all appointment cases or for all of a particular attorney's appointment cases.

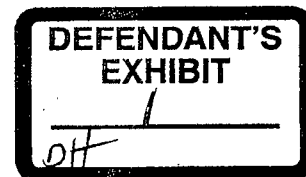
© 2000-2009 South Carolina Judicial Department



Newman, Clifton Law Clerk (Tonnya K. Kohn)

From: Law Offices of Tara D. Shurling <tdslaw@shurlinglaw.com>
Sent: Wednesday, December 14, 2011 5:22 PM
To: Hugh Ryan
Subject: Re: Bejay Harley

Importance: High



Hugh:

I received and reviewed your email about the payment request in this case yesterday. I was quite honestly shocked that you would question the Orders signed by Judge Newman and Judge Manning. I most certainly *did not* circumvent Judge Newman's ruling from the bench. Judge Newman did, *as the order reflects*, set a \$10,000.00 cap *without further approval* from the Court. The order signed by Judge Newman clearly required approval by the presiding judge for any fees *over* the pre-approved cap of \$10,000.00. That language is entirely consistent with South Carolina Law. S. C. Code Ann. § 17-3-50 (C) permits the Court to authorize fees in excess of the limits set by statute if the trial court finds "the services *provided were* reasonably and necessarily *incurred.*" (Emphasis added). Thus the statutory provision anticipates the Court finding *after the fact* that the services provided were necessary and reasonable. Judge Newman's Order merely set a cap for fees that could be paid without further court approval. There is nothing in § 17-3-50 (C) which requires *advance* approval of fees over the cap. I would note that neither counsel or the court are in the position to determine *up front* the extent of services which might ultimately be required in any given case.

At the hearing on my fees, Judge Newman *never* said I could not be paid fees totaling more than the cap set. *As your own email states*, "he clearly set a fee cap of \$10,000.00 without further approval of the Court." I got "further approval" of the fees in excess of the cap set by Judge Newman from the presiding judge, Judge Manning, in a detailed Order with the findings required by § 17-3-50.

I frankly am troubled by your accusation that the Order approved and signed by Judge Newman created some kind of "loophole". I was not instructed to serve SCCID with the proposed order I provided to Judge Newman nor does S.C. law require that I do so. The language of paragraph 4 is entirely consistent with Judge Newman's ruling from the bench, and importantly, reflects the language and requirements of § 17-3-50. Judge Newman said fees over the \$10,000.00 cap would require "further approval of the Court." He *did not* say further approval *by him*. Judge Newman quite obviously believed the proposed order I sent him was an accurate reflection of his intent and ruling from the bench *or else he would not have signed it*. I am certain you are fully aware of how careful and methodical Judge Newman is concerning all funding requests. I provided Judge Manning with very detailed time records for the time expended on this case. He, as presiding judge, considered and granted my request for "further approval" of fees in excess of the cap set by Judge Newman. *He had a copy of Judge Newman's Order before him when he did so*. Obviously Judge Manning thought the order I proposed was proper, in light of my records and Judge Newman's Order, *or else he would not have signed it*. Once again, Judge Manning read Judge Newman's Order and quite obviously did not feel the order approving fees over the cap set by that Order was improper.

I would urge you to reconsider your position in this matter before telling two circuit court judges that they were wrong to sign the Orders related to my fees issued in this case. Let me know by 2:00 p.m. tomorrow whether you intend to pursue your objections in this matter. If you don't reconsider this position I will forward copies of our emails to both Judge Newman and Judge Manning tomorrow afternoon along with a letter I have already drafted. I will ask that any hearing they may feel is necessary be held right away. I was appointed in this case

on March 30, 2009. I will object strenuously to further unnecessary delay in my payment for all the work I did in this case. I will expect to hear from you tomorrow.

Tara

----- Original Message -----

From: ~~Hugh Ryan~~

To: tdslaw@shurlinglaw.com

Cc: Patton Adams ; Lori Frost

Sent: Tuesday, December 13, 2011 4:08 PM

Subject: Bejay Harley

Tara,

We have concerns about the orders submitted to SCCID in the Harley matter. As my notes reflect from the hearing in May this matter was capped at \$10,000 without further approval of the Court as ordered by Judge Newman. That is reflected in paragraph three of the order signed by Judge Newman on December 1, 2011. However paragraph four was added that totally circumvents what was ordered by Judge Newman at the hearing in May. He clearly set a cap of \$10,000 without further approval of the Court. If we were aware of the "loophole" created by paragraph four at the time we would certainly have objected.

We were not presented; that I am aware of any proposed order that was drafted after the hearing in May until we received the order of Judge Newman dated December 1, 2011.

The order of Judge Manning should not have even been issued as it clearly circumvents the ruling of Judge Newman from the matter as it was addressed in court.

Based on these facts SCCID is objects to payment of the amount requested of \$18,431 and requests we contact Judge Newman's office so this matter can be addressed with him.

Hugh Ryan

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorneys and Counselors at Law
3614 Landmark Drive
Suite A
Columbia, South Carolina 29204

Christina Dixon Parnall
Associate Attorney

(803) 738-8622

Fax (803) 738-1600

E-Mail: tdshaw@shurlinglaw.com

December 19, 2011

VIA EMAIL AND U. S. MAIL

The Honorable Clifton Newman
Circuit Court Judge for the Fifth Circuit
P. O. Box 192
Columbia, SC 29202

The Honorable L. Casey Manning
Post Office Box 192
Columbia, SC 29202-0192

Re: State of South Carolina v. Bejay Harley

Dear Judge Newman and Judge Manning:

I have now received a copy of the letter sent to you by Hugh Ryan concerning the objections of SCCID concerning my payment request in this case. By now you have also received a copy of my response to the email I received last week from Hugh Ryan, and an email to both of you outlining my position as well. I will not needlessly repeat the positions expressed by me in that document. There are however some points that warrant direct comment.

- The position taken by SCCID is frankly offensive. They appear to be accusing me of trying to sneak something by the Court without any logical basis for that claim. They admit that Judge Newman ruled *from the bench* that my fees were capped at \$10,000.00 "*without further approval of the Court.*" There would be no purpose in including the language "*without further approval of the Court*" if the intent of the Court was to set an absolute cap.
- I did send SCCID a copy of everything I had sent to Judge Newman after Judge Newman's law clerk advised that he wanted to have a hearing at which SCCID would have the opportunity to provide input. As you both

DEFENDANT'S
EXHIBIT

2

OH

The Honorable Clifton Newman
The Honorable L. Casey Manning
December 19, 2011
Page 2 of 4

can see, that proposed order drafted by me prior to the hearing called for a fee cap of \$10,000.00 "*without further approval of the Court.*" That order was never signed because the hourly fee I requested was denied.

- If Judge Newman had ordered an absolute fee cap of \$10,000.00, without provision for "*further approval of the Court*", I would have respectfully objected on the grounds that :
 - a. It is impossible to predict prior to the conclusion a case the full extent of services which may be required in any case;
 - b. The presiding judge is the judge in the best position to determine whether the time expended in a case was reasonable and necessary to provide effective assistance of counsel.
- Judge Newman carefully reviewed my proposed order and signed it. He clearly would not have done so if its language negated the intent of his ruling from the hearing held in this matter. As I said in my earlier letter, I know Judge Newman would not have signed that Order if it had not accurately reflected his ruling.
- I am at a loss as to how Mr. Ryan could in good faith say Judge Manning could not discern from reading Judge Newman's Order "*what occurred at the May 23, 2011 hearing.*" As Mr. Ryan notes in his letter four basic rulings were made by Judge Newman at that proceeding. There were:
 - 1. My request for funding for a second chair was *denied*.
 - 2. My request for funding for more than one expert witness was *denied*.
 - 3. My request for an hourly fee rate of \$100.00 in-court and \$80.00 out-of-court was *denied*.



The Honorable Clifton Newman
 The Honorable L. Casey Manning
 December 19, 2011
 Page 3 of 4

4. A fee rate of \$70.00 per hour for in-and out-of-court services was ordered by Judge Newman with a cap of \$10,000.00 on legal fees that could be submitted "*without further approval of the Court.*"

- In my fee request submitted to Judge Manning I *did not* submit a claim for fees for a second chair, I *did not* seek reimbursement for more than one expert witness, and I requested payment at the rate ordered by Judge Newman, *not* the rate denied by him. The only thing that "*occurred in the May 23rd hearing*" that was relevant to my submission to Judge Manning was the hourly rate approved by Judge Newman and the pre-approved fee cap which could not be exceeded *without further approval of the Court.* Thus, everything decided at the Mary 23rd hearing that had anything to do with my final fee submissions is reflected in writing in the Order approved and signed by Judge Newman.
- SCCID challenges my fee request as unreasonable without any knowledge of the case in question. They correctly note that this case ended in a plea without noting the fact that a plea agreement was only reached after a full two days of negotiations with the Solicitor's Office, meetings with the client, and meetings with Judge Manning *beginning on the morning trial was supposed to have begun.* I had unsuccessfully attempted to reach an agreement earlier. I had already sat through jury qualification when, at the urging of Judge Manning, I was able to engage the Solicitor's Office in further negotiations. Late on the second day, after being at the Courthouse for two days, I got final agreement to entry of an Alford plea to voluntary manslaughter and the plea was entered. I had spent weeks preparing this complex case for trial, and months before that developing our defense. While this case didn't ultimately go to trial, I spent just as much time on it as if it had, *because I had to be prepared to try it.* As of the date this trial was scheduled to begin, I had no hope this case would resolve in a plea. And, although the case didn't go to trial, I still spent two days at the Courthouse getting the plea agreement hammered out, and entering the plea. I seriously doubt my total fee request if out of line for a case which went to the brink of trial and took two days to plead.
- The objection raised by SCCID to my total fees apparently reflects their typical position that only capital cases warrant fees over a certain level. While I understand that attorney fee rates and caps in death penalty cases are set by statute at a higher rate than non-capital murder cases, that does not mean that non-capital murder cases will not often require work by the lawyer in excess of what one might expect in other felony cases. This was

The Honorable Clifton Newman
The Honorable L. Casey Manning
December 19, 2011
Page 4 of 4

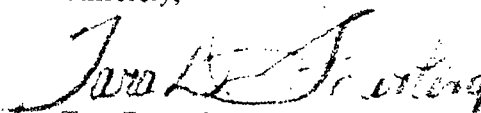
a very complicated case with difficult medical issues that required a lot of work to develop for trial. My client had no prior criminal record and was facing up to life in prison for killing a woman that competent medical evidence supported having died of natural causes. While I respect the work done by lawyers in death penalty cases, and I have been involved in many myself, I reject the notion that trying to keep a client from being wrongfully convicted of murder and sent to prison for 30 years to life is any less worthy of an expenditure of my very best efforts as an advocate.

I believe my fee request in this case is very reasonable, and strongly object to SCCID being allowed to needlessly delay payment as ordered by Judge Manning.

I am aware that the Court may, in its discretion, hold a hearing on the objections raised by SCCID. I sincerely hope you will not feel such a hearing is necessary. Tomorrow I will forward proposed orders for your signatures if you are inclined to order payment of my fees, as already ordered, without further hearing. If Your Honors feel a hearing is necessary I would ask that it be held as quickly as possible to avoid further delay of my payment. Alternatively, I would ask that SCCID be ordered to pay the pre-approved fees of \$10,000.00, and the expenses already approved, as an interim payment pending a hearing on the contested balance of my fees. I will forward a simple order for that purpose tomorrow.

I apologize for taking so much of your time during this busy time of year. Thank you very much.

Sincerely,



Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures

cc: Hugh Ryan, Deputy Director and General Counsel SCCID

TARA DAWN SHURLING, PA

Attorneys and Counselors at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

(803) 738-8622

Fax (803) 738-1600

E-Mail: tdslaw@shurlinglaw.com

Christina Dixon Parnall

Associate Attorney

January 5, 2012

The Honorable Clifton Newman
Circuit Court Judge for the Fifth Circuit
P. O. Box 192
Columbia, SC 29202

Re: State of South Carolina v. Bejay Harley – Warrant H 479537

Dear Judge Newman:

Attached is a copy of the Order to Pay Attorney Fees signed by Your Honor. I have also attached, per instructions received from your law clerk this morning, another copy of that Order with the modifications ordered by Your Honor at the hearing held on Wednesday, December 28, 2012. As I recall, you said that you were going to amend the previous order signed by you to delete Item 4 on page 2 of the order. In reviewing this order, I see that the last sentence of paragraph 1 on page 2 reads, "Any fees in excess of that cap may be submitted to the presiding judge for approval at the conclusion of this case." In light of your decision to delete Item 4 from the order, I assume you would also want to delete the last sentence of paragraph 1 on page 2 as well since that sentence is consistent with Item 4. I have also changed the caption to reflect that this is an Amended Order.

For the record, I object to the modification of your original order after the presiding judge, Judge Manning, has already approved my total fee request including the amount in excess of the \$10,000.00 cap approved by you in advance. I maintain my position that the presiding judge would have the authority to approve my fees in excess of the \$10,000.00 cap set by you both under the terms of the order signed by you and § 17-3-50.

Anticipating that Your Honor will sign the Amended Order, I plan to file a Motion to Reconsider outlining as succinctly as possible reasons why I submit this action by the Court is in error. I don't have any real expectation that Your Honor will reconsider your decision, and I certainly mean no disrespect in filing my request for reconsideration. My only goal is to make as good a record as possible for appeal. I note that neither the Rules of Criminal Procedure nor the statutes governing the payment of court-appointed lawyers provide much by way of procedure for the type of appeal I am going to have to pursue. I am not certain, for example, whether I need to file an appeal from your ruling before I find out what Judge Manning will do about his orders. Depending on his ruling it may _____ any appeal from your amended Order moot.

Please let me know if there are any other modifications you wish for me to make to this Order. I remain,

Respectfully yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosure

cc: The Honorable L. Casey Manning
T. Patton Adams, Executive Director of SCCID
Hugh Ryan, Deputy Director and General Counsel SCCID

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IN THE COURT OF GENERAL SESSIONS

Indictment # 2003-40-6670

THE STATE OF SOUTH CAROLINA,

v.

BEJAY HARLEY,

Defendant.

) AMENDED ORDER
) TO PAY ATTORNEY FEES

THIS MATTER comes before the Court upon the motion of Tara Dawn Shurling, attorney for the above-named Defendant. Counsel filed a Motion for Funding on May 12, 2011. A hearing on this matter was heard before this Court on May 23, 2011. Present at this hearing was Counsel for the Defendant, Tara Dawn Shurling, T. Patton Adams, IV, Executive Director of the South Carolina Commission on Indigent Defense, and Hugh Ryan, Deputy Director and General Counsel for the South Carolina Commission on Indigent Defense. The Representatives from SCCID were present at this hearing at the request of this Court to provide input concerning the position of SCCID on the issues before the Court.

Mr. Harley is charged with one count of murder and has been declared indigent. Ms. Shurling was appointed to represent the Defendant.

It is reasonable and proper for the Court to award compensation for court-appointed attorneys in excess of the statutory limits and § 16-3-26(B) so specifies. Further this Court finds that in light of the facts of this case, the seriousness of the charge and the extensive experience of the attorney appointed in this matter, a fee in excess of the statutory limits is reasonable and appropriate. The United States Supreme Court has held that a criminal defendant is entitled to reasonably effective assistance of counsel, under the Sixth Amendment guarantee of a right to "counsel." See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). At the May 23, 2011 hearing, this Court found that attorney fees of ~~\$70.00~~ per hour are reasonable and appropriate on the facts of this case and approved an hourly rate for all out-of-court and in-court time expended by counsel in this matter.

In light of the fee rate set by this Order, it is anticipated that Counsel's total fees will exceed the statutory cap of **\$3,500.00**. Subject to final approval of Counsel's time records by the

presiding judge, this Court hereby approves Counsel's fees exceeding the statutory cap. Counsel may submit to SCCID for payment a voucher for fees up to **\$10,000.00** without further approval of the Court.

ACCORDINGLY,

1. Court-appointed counsel, Tara Dawn Shurling, is to be paid at a rate of **\$70.00** per hour for in-court and **\$70.00** per hour for out-of-court services in this case.
2. Attorney Shurling is to be allowed to bill SCCID for out-of-court and in-court legal services provided to this client beginning with the date of her appointment by the Court; March 30, 2009.
3. Attorney Shurling may bill SCCID for fees up to \$10,000.00 without further approval of the Court provided the presiding judge finds her time records to be adequate to support the time expenditures claimed.

IT IS SO ORDERED.

Clifton Newman
Chief Administrative Judge
Court of General Sessions
Fifth Judicial Circuit

This _____ day of _____, 2011.

nunc pro tunc

Date of Appointment (March 30, 2009)

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorneys and Counselors at Law

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E-Mail: tdslaw@shurlinglaw.com

Christina Dixon Parnall

Associate Attorney

February 21, 2012

Mr. Hugh Ryan
Deputy Director and General Counsel SCCID
P.O. Box 11433
Columbia, S.C. 29211

RE: Billing Submissions for Bejay Harley.

Dear Mr. Ryan:

Last Wednesday I had two PCR cases before Judge Newman. At a break I approached Judge Newman, in front of his law clerk of course, and inquired about the status of his amended order in the Bejay Harley billing matter. I simply asked the status of the order and expressed my concern that he might have executed an order that I had not received for some reason.

Judge Newman responded that *he isn't going to issue an amended order*. He said he had decided that since his term as Chief Administrative Judge was over, he doesn't have the authority to rule on the issues any longer, and 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. It is my position that this billing matter now returns to the status it was in when my vouchers were submitted to SCCID for payment. Judge Manning has already issued orders for my fees and expenses. There was a serious question in my mind what would have happened if Judge Newman had amended his previous Orders on fees and expenses *after* Judge Manning had already issued orders approving my fees and expenses. Inasmuch as Judge Newman is not going to issue an amended order that is now a moot point.

I want it clearly understood that I *did not* make any effort to discuss the contested issues with Judge Newman. I only inquired as to the status of the amended order I had been expecting. Once he stated his position, I told him I would let everyone know, and I would contact Judge Manning. I'm sorry I didn't contact you sooner. I had an accident last Thursday, and I have been behind schedule ever since then. I'm fine, just badly bruised for the most part. Thankfully I wasn't seriously injured, but I've had to go to the doctor and get a CAT scan done.

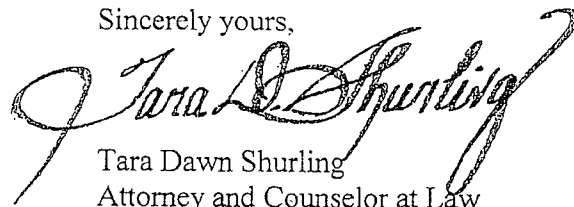
Since Judge Newman does not intend to amend the orders that were in place when Judge Manning approved my fees and expenses, I would ask that these vouchers be paid at once. If you intend to file

Mr. Hugh Ryan
February 21, 2012
Page 2 of 2

objections with Judge Manning concerning these vouchers I would ask that you please do so quickly so we can get this matter resolved. I have been waiting a very long time to get paid on this case. As I understand the memorandum issued by Chief Justice Toal on the subject of the payment of fees, and SCCID's Payment Policies, Judge Manning can decide on your objections *with or without holding a hearing or upon the submission of written materials*. I attach a copy of the Chief's memorandum, and a copy of your payment policies, with what I believe are the relevant portions highlighted. I have done this for Judge Manning's convenient reference. I certainly know you are familiar with these provisions.

I have copied Judge Newman and Judge Manning on this letter. I have been very careful to clearly state the information conveyed to me by Judge Newman. I feel confident he would agree this letter contains an accurate reflection of our very brief conversation last week. I will expect to hear from you soon. I obviously hope your office will simply decide to honor Judge Manning's previous Orders and will process the payment of my voucher quickly. If you intend to object to any portion of Judge Manning's payment authorizations, please don't delay doing so. I need to get paid on this case, and turn my attention to more pressing matters. Thanking you for your time, as always, I remain,

Sincerely yours,

A handwritten signature in black ink, reading "Tara Dawn Shurling". The signature is fluid and cursive, with a large, stylized initial "T".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

cc: The Honorable L. Casey Manning, Circuit Court Judge (w/enclosures)
The Honorable Clifton Newman, Circuit Court Judge
T. Patton Adams, Executive Director of SCCID

From: Law Offices of Tara D. Shurling [mailto:tdslaw@shurlinglaw.com]

Sent: Tuesday, March 13, 2012 1:30 PM

To: Hugh Ryan

Cc: Manning, L. Casey Law Clerk (Joy E. Middleton); Newman, Clifton Law Clerk (Tonnya K. Kohn); Newman, Clifton; Manning, L. Casey

Subject: Bejay Harley v. State of South Carolina

Importance: High

Hugh:

As you know from my earlier letter dated February 21, 2012, Judge Newman advised me on February 15, 2012 that he *does not* intend to amend his original order in this matter. As I told you in that letter, Judge Newman indicated that he was not going to amend his previous order a) because his term as Chief Administrative Judge had ended and b) because he really didn't feel like he knew enough about the case to issue a ruling. Inasmuch as Judge Newman has now declined to issue an amended order, this billing request now stands exactly as it was when I submitted it for payment on December 5, 2011. Judge Newman's original order is still valid and was in place when Judge Manning signed orders approving my fees and expenses. I realize not all my expenses were approved in advance, however, your office frequently pays expenses approved at the conclusion of a case as long as they are approved by court order.

According to your database, this submission remains "under review" by your office. Your office has had a copy of my voucher, billing records, and Judge Manning's Orders since this request was originally filed back in December. As noted above, you were advised on February 21, 2012 that Judge Newman is not going to amend his previous orders. To my knowledge, no objections have been filed by SCCID challenging Judge Manning's findings that both my fees and expenses were necessary and appropriate. Please advise me when I can expect you to submit this case to the comptroller for a check to be issued. I appreciate your attention in this matter. Thank you.

Tara Dawn Shurling

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B. McCoy

Suzanne Graham

From: "Hugh Ryan" <hryan@sccid.sc.gov>
To: "Law Offices of Tara D. Shurling" <tdslaw@shurlinglaw.com>
Cc: "Manning, L. Casey Law Clerk (Joy E. Middleton)" <CManningLC@sccourts.org>; "Newman, Clifton Law Clerk (Tonnya K. Kohn)" <CNewmanLC@sccourts.org>; "Newman, Clifton" <CNewmanJ@sccourts.org>; "Manning, L. Casey" <CManningJ@sccourts.org>; "Patton Adams" <PAdams@sccid.sc.gov>; "Lisa Campbell" <LBarfield@sccid.sc.gov>
Sent: Tuesday, March 13, 2012 3:14 PM
Subject: RE: Bejay Harley v. State of South Carolina

I will be sending a formal letter in the next few days however please note in my letter of December 15, 2011 to Judges Newman, Manning and yourself SCCID objected to both orders. Judge Newman in Court on December 28th expressly ruled that the Order he had signed was not his prior ruling and he was striking paragraph four from the Order. This was clearly ruled on in Court. Therefore it is the position of SCCID that a \$10,000 cap is in place in this matter. We feel strongly that when this matter is heard by Judge Manning with him having the benefit of reviewing the transcript of the December 28th hearing he will see there was a cap in place which would have prevented him from signing an order for fees above the \$10,000 cap. Judge Newman seemed to support this based on my recollection of the hearing however he stated he could not vacate Judge Manning's order.

TARA DAWN SHURLING, PA

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December 11, 2012

The Honorable Clifton Newman
Circuit Court Judge for the Fifth Circuit
P. O. Box 192
Columbia, SC 29202

Re: Marquez Prophet, Timothy Fisher and Bejay Harley.

Dear Judge Newman:

As Your Honor no doubt recalls, at the conclusion of another case, the *Bejay Harley* murder case, I submitted my final requests for payment of my fees and expenses to Judge Manning for his approval. His orders approving both my total fees and total expense were dated December 5, 2011; now over two years ago. I provided Judge Manning a copy of your Order approving fees in this case which was dated December 1, 2011. After Judge Manning signed Orders approving my fees and expenses, I submitted them to SCCID for payment. SCCID then raised objections to certain language in those orders. A hearing was held before you on December 28, 2011. Both Mr. Ryan and Mr. Adams were present at that proceeding. I am enclosing a copy of the transcript from that hearing for your convenient reference. I acknowledge that Your Honor indicated at one point during that hearing that you were going to "*modify the order deleting paragraph four, and we'll see where it goes from there.*" Hearing Tr. p. 37, ll. 8-10. After lengthy argument by me and SCCID, however Your Honor stated, "*You know, I think Judge Manning has – has gotten involved. He is involved. He's the presiding judge who ultimately should weigh and review the fees. I am going to leave my order as it is and let Judge Manning figure out his order. I don't know what else to do.*" Hearing Tr., p. 44 ll. 19-23. (emphasis added).

To my regret, I obviously didn't catch the import of your statements on page 44 when they were made. I am inclined to think I didn't hear you clearly. In any event, the record shows that I subsequently asked Your Honor if you were striking paragraph 4 of your previous order and you responded in the affirmative. Hearing Tr. p. 47, ll. 12-16. At the very end of the hearing I offered to resend my proposed fee order to you so that it would be easy for you to edit it as you wished for an Amended Order. You responded, "*I think we have it. It's a rather brief order.*" Hearing Tr. p. 32, ll. 1-6. Your Honor's law clerk did subsequently contact my office and ask that I draft a proposed order modifying your original Order in *Harley*. I agreed to do so with the understanding that I was *not* waiving my objection to the amended order. I sent a proposed amended order to Your Honor in early January, 2012. Copies of my transmittal letter and the order were sent to SCCID and to Judge Manning.

I never received an Amended Order from Your Honor. On February 15, 2012, I was before you for a term of PCR hearings. During a break, I approached you in the hall, in the presence of your law clerk, and inquired as to the status of your Amended Order in the *Harley* matter. At that time, I did not attempt to discuss any of the issues in dispute, I simply noted that I had never received an Amended Fee Order in the *Harley* case, and expressed my concern that an Order might have been issued that I somehow failed to receive. You then told me that you had decided you weren't going to amend your Order and that you;

A) had decided that you did not have the authority to amend your order after the end of your term as Chief Administrative Judge, and

B) that you had decided that you did not know enough about the case to be the one to decide what should be approved anyway, so you were going to leave it up to Judge Manning and Judge Cooper.

I subsequently notified SCCID of that conversation. I was very careful to say exactly what Your Honor had said to me, *and* I copied you, your clerk, and Judge Manning on my email. See, attached email dated March 13, 2012. I subsequently wrote SCCID and asserted that my vouchers should be paid as previously approved by Judge Manning back on December 5, 2011. As I pointed out to SCCID, Your Honor's original fee order was entered *before* Judge Manning signed his Orders. *Therefore, your December 1, 2011 Order was in place when he ruled on my requests.* He approved my fee and expense submissions on December 5, 2011. Once Your Honor indicated that you had decided *not to amend* your original orders, there was in my opinion no basis for SCCID to refuse to pay these vouchers. Under the policies of SCCID, and previous Orders of Chief Justice Toal, SCCID had the right to submit *specific objections to Judge Manning* concerning my fees and expenses on *other grounds* had they chosen to do so. They have not done so. Approximately ten (10) months ago they advised me that they had requested a hearing before Judge Manning once again asserting the position that Your Honor had changed your original order. This position overlooks several crucial points:

1. The transcript of the hearing held on December 28, 2011 is less than clear concerning your decision. It does, for example reflect that after hearing my express objections, Your Honor stated that you were going "*to leave your Order as it is.*" Hearing Tr. p. 44, ll. 19-23.
2. Your Honor ultimately told me on February 15, 2012, that you had decided *you were not going to amend your Order.* I then provided Your Honor with written confirmation that I had notified SCCID of that decision.
3. Even if SCCID was not willing to take my word for what I had been told by Your Honor, they were aware I had copied you on my correspondence to them, and therefore, could rightfully assume you would have notified them swiftly if I had incorrectly repeated what I had been told. Further, in the ten months since I relayed our conversation to SCCID, they have had more than ample time to verify the truth of my representations by contacting Your Honor directly. To my knowledge, they have not done so. If they have, I have not been made aware of it.
4. SCCID overlooks the fact that at the time Judge Manning approved my fees and expenses, *your original order was in place.* If Your Honor had issued an Amended Order, the issue before Judge Manning would have been to determine if and how that amendment would alter his orders approving my fee and expense requests which were signed while the original orders were in place. Since you ultimately did not issue an amended order, that question should be moot as it relates to the **Harley** case. Obviously, SCCID does not share that view.

As this issue applies to **Prophet** and **Fisher**, and any other case where the Chief Administrative Judge issues an order approving a fee cap in excess of the statutory limits, I would respectfully ask Your Honor to consider the following:

1. Throughout the transcript of the December 28, 2011 hearing Your Honor recognized the problems inherent in a Chief Administrative Judge, who may have very little knowledge about a case, having to make the final decision about what fees and expenses are truly warranted to provide the defendant reasonable, professional assistance of counsel.

2. The language of § 17-3-50 (C) *does not* require that fees in excess of the statutory cap be approved in advance. Although §17-3-50 (B) *does* require advance approval of expenses, SCCID routinely pays expenses approved at the end of a case by the presiding judge, and they have been doing so for a very long time. I am even aware of one case where a lawyer, retained by a family member of a defendant, got the defendant declared indigent *after or near the end of a trial* and got a court order approving payment of an expert by SCCID *after* that expert had long been hired and performed the services for which he was retained. I am advised that SCCID paid the voucher for the expert witness expenses in that case without objection. If called upon to do so, I can provide the Court dozens of other examples of where expenses in excess of the statutory limits were paid as long as the final request for payment was accompanied by an order from the presiding judge approving those expenses in advance. The obvious risk a lawyer takes in waiting until the conclusion of the case to seek approval of expenses in excess of the statutory cap is that, if the trial judge finds that the expenses were not reasonably incurred, the lawyer could get stuck paying for them out-of-pocket. As a practical matter, my expenses in each of these cases will not exceed the caps set by Your Honor by much, however, it is unfair for my small firm to have to absorb those costs if the trial judge finds that the expenses were in fact reasonably incurred.
3. If a court-appointed lawyer does get an Order setting a higher fee cap than that set by §17-3-50(A) approved and signed in advance by a current Chief Administrative Judge which provides that the cap set by the order can not be exceeded *"without further approval of the Court"*, and that limitation is interpreted to mean that the court-appointed lawyer can only get a subsequent modification of that cap *from the same judge*, several problems will arise. The most glaring are:
 - a. Any given case may last through the terms of more than one Chief Administrative Judge. Logically, a lawyer may not know that he needs to request a higher fee cap until the judge who signed the original fee order is no longer the Chief Administrative Judge in that circuit. Indeed, by the time the lawyer has reason to seek a higher fee cap, that judge may not even be in the same circuit. If the lawyer seeks an increased cap from the same judge, and he is no longer the Chief Administrative Judge by the time the lawyer knows the case will require more work than the original order covers, the lawyer would be left without recourse. I would respectfully assert that such an outcome was not intended by our laws and court rules addressing compensation for court-appointed lawyers.
 - b. During the hearing held on my fees in the *Harley* case, Your Honor expressed concern about the fact that a Chief Administrative Judge often doesn't have sufficient knowledge of the case to decide what is truly warranted in that case. In fact, § 17-3-50 (C) doesn't contain *any* language requiring *advance* approval of fees in excess of the statutory cap. In actuality § 17-3-50 (C) requires that an order approving fees above the statutory cap include specific findings that the services *provided* by counsel *were* necessary and appropriate given the totality of the facts and circumstances of a case. I would submit that the provisions of § 17-3-50 (C) are posed in the past tense for a practical reason. It is impossible to imagine how an order, with these required findings, could be issued until the case *is over* and the totality of the facts and circumstances of the case are fully known. See, *Bailey* case discussed *infra*.
 - c. *Even if* a case concludes while the same judge is sitting as the Chief Administrative Judge, that judge is still unlikely to know enough about a case to make the findings required under § 17-3-50 (C) unless, of course, he happens to be the presiding judge when the case is tried or ends in a plea. Ultimately, that factor was among the reasons you stated when you told me you had decided you were not going to issue an amended order after all. That conclusion didn't particularly surprise me given the fact that you had previously noted your concerns about being required to make decisions on fees and expenses when you didn't know enough about the case.

The question that remains open is whether the *current* Chief Administrative Judge can issue orders increasing fee or expense caps set by a *former* Chief Administrative Judge. While I feel strongly that §17-3-50(C), does not require advance approval of fees over the cap as long as the presiding judge approves the total fees at the end of the case, I have decided to request an increased cap in the *Fisher* case in advance because I am tired of fighting about this issue with SCCID and it is now obvious that my total fees in that case will ultimately exceed the cap set by Your Honor; although only slightly as it turns out. I am addressing those requests to the current Chief Administrative Judge; DeAndrea Benjamin. I believe I have no choice. Obviously, you can't take further action on these cases since you are no longer the Chief Administrative Judge. I will, of course, make Judge Benjamin, as the *current* Chief Administrative Judge, aware of your previous Orders and will advise her that you have at one point previously expressed to view that you are the only judge who can increase the caps set by you while you were the Chief Administrative Judge. I will courtesy copy Your Honor on the request, and SCCID as well. This is exactly the procedure I employed when I requested a higher expense cap for my investigator in the *Prophet* case. I basically left it for you and Judge Cooper to decide who should issue the new order I had requested. Judge Cooper signed the order. SCCID has now paid the bills from my investigator covered by Your Honor's Order. Another much smaller bill for investigator fees in excess of the cap previously set by you was also submitted to SCCID for payment; along with Judge Cooper's Order increasing the cap for investigator expenses. Although SCCID initially held up payment of that bill, they ultimately paid that bill as well.

If you think any requests I make for further approval of increased fee or expense caps in either the *Fisher* or *Prophet* cases should be addressed to you rather than the current Chief Administrative Judge, *please advise me as soon as possible*. I am essentially finished with the *Prophet* case and I believe I will make it under the cap set by you for fees but, my total expenses did add up to slightly higher than the caps set by you in some categories. In *Fisher*, I believe my fees will be slightly higher, not by much, than the cap set by your previous order. I am not sure where I stand on the expenses. If we are over on expenses, it should not be by very much.

It is of course, my hope that your ultimate decision not to amend your Order in the *Harley* matter reflects a change of heart on this issue, and that you now agree that either the current Chief Administrative Judge, or the presiding judge, can approve fees and expenses over caps originally set by another judge when he was the Chief Administrative Judge. Frankly, I am between a rock and a hard place. *Some judge* has to be able to address the needs of the court-appointed lawyer as they become apparent. Presumably, if the judge who signed, an initial order as Chief Administrative Judge *can't* issue further orders when his term as Chief Administrative Judge is over, then any orders that need to be approved before the case goes to Court (for either a trial or a plea) would have to be approved by either the current Chief Administrative Judge or the presiding judge at the end of the case. In doing some follow-up research on this issue, I have discovered that as far back as the Supreme Court's decision in the case of Bailey v. State, 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992), the Court found that an award of attorney fees in excess of the section 17-3-50 statutory cap is "*within the sound discretion of the trial judge*." That holding was recently noted by the Court in its more recent decision in Ex Parte Brown, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (2011). I am enclosing a copy of the *Brown* case for your convenient reference. That position is certainly consistent with your Honor's position that as the Chief Administrative Judge, you really didn't have enough knowledge about the case to make the final decision.

Finally, as I said much earlier in this lengthy letter, SCCID requested a hearing before Judge Manning on the *Harley* case approximately ten months ago. Since SCCID obviously doesn't believe what I have told them about our conversation concerning your decision not to issue an Amended Order, it would be helpful if Your Honor would please confirm *in writing* that, despite earlier indications to the contrary, you ultimately decided not to issue amended orders in the *Harley* case. I understand your position that you don't have the authority to issue *new orders* in this matter since you are no longer the Chief Administrative Judge. But, without at least an order simply verifying that you ultimately decided against issuing an amended order, we are left with the somewhat ambiguous hearing transcript, and nothing to document that you ultimately decided not to amend your previous orders. I don't believe there is any problem with you entering an Order clarifying your decision *not to issue an Amended Order* since the effect of that Order is to affirm the previous written order, not to alter it in any manner. I realize how busy you are so I have taken the liberty of attaching a simple draft proposed order for your convenience. I am sending this letter and my proposed order for Your Honor's consideration by U. S. Mail and email for your convenient editing as you may desire. Presumably, your order clarifying your intent with regard to the *Harley* case will also, I hope, settle any questions which might come up about the orders

you issued in the *Fisher* and *Prophet* matters since the orders have virtually identical language. I am, of course, sending SCCID, Judge Manning and Judge Benjamin copies of this request and the proposed orders as well.

I am sorry this letter is so lengthy. It was very difficult to address this situation succinctly and admittedly, brevity has never been among my talents. I apologize to you all for taking so much of your time with this issue. I can assure you I have better things to do with my time as well but, I really need to get paid in this case. I actually finished up this case *the end of 2010* but, I had to leave the file open because I was notified of a DNA hit on the State DNA database, matching someone other than my client, after the trial. I waited to be certain that development was not going to require further action on my part before submitting my final bill to Judge Manning. I thank you very much for your time and consideration. I remain,

Sincerely,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures

cc: The Honorable L. Casey Manning
The Honorable DeAndrea Benjamin
Hugh Ryan, Deputy Director and General Counsel SCCID

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) **Warrant #H479537**
 COUNTY OF RICHLAND) Indictment # 2003-GS-40-6670

THE STATE OF SOUTH CAROLINA,)
) **ORDER**
) **BEJAY HARLEY,**
) **Defendant.**
)

By Order issued by this Court 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 SCCID for payment without further approval of the Court. After this case resolved in a guilty plea on the morning a trial was set to begin, 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 this Court's 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.

During the December 28, 2011 hearing this Court indicated that it intended to issue an Amended Order modifying the Order signed on December 1, 2011. Since that time, this Court has had the opportunity to more fully consider the issues raised both by Attorney Shurling and SCCID during that proceeding. On February 15, 2012, this Court orally advised Attorney Shurling that it had decided not to issue an Amended Order in this matter. Attorney Shurling subsequently provided this Court with written confirmation that she had notified SCCID and Judge Manning of this decision. Accordingly, this Court's Order dated December 1, 2011, stands as issued on that date.¹

IT IS SO ORDERED.

 Clifton Newman
 Circuit Court Judge
 Fifth Judicial Circuit

This _____ day of _____, 2012.

¹ Inasmuch as I am no longer the Chief Administrative Judge for the Court of General Sessions in Richland County, it is the view of this Court that I would not have the authority to modify my previous written order dated December 1, 2011. This Order however, does not in any way amend my previous written order and is issued solely for the purpose of clarifying my decision not to amend my previous written Orders in this case.

LAW OFFICE OF



TARA DAWN SHURLING, PA

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E-Mail: tdslaw@shurlinglaw.com

January 24, 2013

CORRESPONDENCE SENT BY EMAIL
WITH HARD COPY TO FOLLOW BY U. S. MAIL
WITH ATTACHMENTS SENT BY U. S. MAIL ONLY

The Honorable L. Casey Manning
Circuit Court Judge for the Fifth Circuit
Post Office Box 192
Columbia, SC 29202-0192

Re: State of South Carolina v. Bejay Harley – 2003-GS-40-06670

Dear Judge Manning:

It has now been over a year since I submitted my voucher for payment in this complex murder case. As you may recall, this case did not plead out until the last minute before trial. It involved the anticipated participation of 7-8 medical experts and dealt with significant questions about the victim's cause of death.

Your Honor signed Orders for payment of my fees and expenses on December 5, 2011. Judge Newman had previously signed orders in this case setting fee rates and caps on fees and expenses on December 1, 2011. Those orders, which were sent to you with my payment requests at the conclusion of my representation, provided for my final payment requests to be submitted to the trial judge for approval. Copies of those orders are enclosed with this letter. SCCID subsequently objected to payment of that voucher by letter dated, December 15, 2011, and a hearing was held before Judge Newman on December 28, 2011. During that long hearing, Judge Newman admittedly indicated at one point that he was going to amend his previous Orders to omit the provisions that the trial judge could decide any requests for fees or expenses in excess of the caps set by him. If you read the *entire record* of that proceeding however, you will see that at one point he said he was going to leave his Order alone, and at various points he expressed serious concern that he simply didn't know enough about the case to be making the final decision on the fees in this case. I may have sent Your Honor a copy of that hearing transcript before, but I enclose another for your convenient reference.

Subsequent to that hearing, Judge Newman requested that I draft an Order reflecting the changes he addressed during the December 28, 2011 hearing. I did so and provided a copy to both Judge Newman and SCCID on January 12, 2012. I expressly noted that by drafting the proposed amended order I was not waiving my objection to the order as amended. When I never received a signed copy of that Order, or any other amended Order for that matter, I asked Judge Newman, in the presence of his law clerk, if I had somehow missed getting a copy of his new Order. I was pleased when Judge Newman advised me that he had decided *not to issue an amended order* both because he was no longer the Chief Administrative Judge, and because he had decided he didn't know enough about the case to decide the issue of the final payment requests. He very specifically stated that he had decided to leave this issue up to you and Judge Cooper, who

The Honorable L. Casey Manning
 January 24, 2013
 Page 2 of 2 was Chief

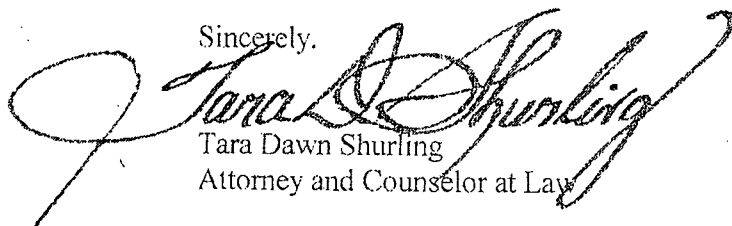
was Chief Administrative Judge at that time. I passed that information on to Hugh Ryan at SCCID. I have advised SCCID of that conversation on several subsequent occasions as well; each time courtesy copying both Your Honor *and* Judge Newman. I wanted to make it perfectly clear what Judge Newman had said to me and to be open with that communication so that SCCID would feel confident that Judge Newman would undoubtedly set it straight in a heart beat if I was misrepresenting his position. In one recent communication, I urged SCCID to contact Judge Newman if they questioned my word on this.

After Judge Newman told me he had decided *not* to amend his previous orders, I sent an email to SCCID advising them that, *in light of Judge Newman's decision not to issue amended orders*, I expected them to pay me based upon your Orders dated December 1, 2011. I told SCCID that I would have no choice but to file a Rule to Show Cause if they did not act on those Orders and pay me. As I have noted in recent correspondence concerning this matter, Your Honor clearly had the authority to decide if my fee requests should be paid. That fact was recently recognized by our Supreme Court in the *Brown* decision, a copy of which is enclosed, citing *Bailey v. State*, 309 S. C. 455, 464, 424 S.E.2nd 503, 508 (1992) for the principal that an award of attorney fees in excess of the section 17-3-50 cap is "**within the sound discretion of the trial judge.**"

On May 25, 2012, Hugh Ryan on behalf of SCCID, wrote Your Honor and Judge Newman requesting a hearing on this matter. No hearing has even been held. To my knowledge, SCCID has done nothing in the *eight (8) months* since then toward scheduling a hearing with you. To be candid with the Court, just last week I discussed this outstanding payment with Hugh Ryan, and he acknowledged that he needed to get a hearing set up in this payment dispute. As far as I know, SCCID still hasn't tried to setup a date for a hearing.

I have done everything in my power to resolve this dispute. I have written countless letters and emails on this issue, and *I have yet to be paid a dime in this case* in the well over a year since you signed Orders authorizing payment of my total fees and expenses. My total fees and expenses in this case are quite reasonable given the complexity of this case and how long I worked on it. I was court-appointed on March 30, 2009 and wasn't able to close out my file until October 27, 2011. Thanks to my hard work in this case, this client has been out of prison for nearly a year. I operate a very small practice, and I simply can't afford not to get paid for over a year on a case that consumed as much of my time as this one did. I am respectfully asking you to either direct SCCID to pay the vouchers in this case as directed by your previous orders *or* set a hearing in this matter as soon as possible. As always, I am copying Judge Newman on this correspondence. I will be most grateful for the assistance of you both in getting me paid for this case. Please believe that I am not trying to be difficult. I am sure Hugh Ryan is sick of this dispute too, but in fairness to me, he is on salary and is paid to deal with this mess. I am the one who has had to spend many hours trying to get paid for work I completed more than a year ago. And, I might add, under SCCID policy, *I am not* allowed to bill the hours I have had to spend trying to get paid. I have exhausted all efforts to get paid in this case without your help. I will hope to hear from you soon. For now, I remain,

Sincerely,



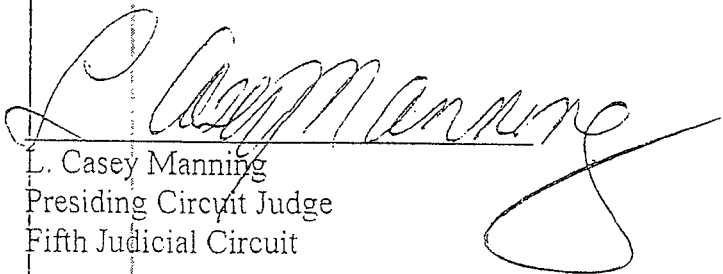
Tara Dawn Shurling
 Attorney and Counselor at Law

TDS/sg
 Enclosures

cc: The Honorable Clifton Newman

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	Warrant #H479537
COUNTY OF RICHLAND	)	Indictment # 2003-40-6670
THE STATE OF SOUTH CAROLINA,	)	
v.	)	ORDER
BEJAY HARLEY,	)	
Defendant.	)	

INASMUCH AS I have reviewed the time sheets kept by court-appointed counsel in the above-captioned matter and find that the services provided in this case were reasonable and that the time spent by counsel on this case was necessary to provide the Applicant with effective assistance of counsel, I hereby find that counsel should be paid for 261.1 hours out-of-court and 2.2 hours in-court. At a hearing held on May 23, 2011, Judge Clifton Newman, acting as Chief Administrative Judge, approved an hourly fee rate of \$70.00 per hour in this case for both in and out-of-court time pursuant to S.C. Code Ann. §17-3-50 (C) (2003). This case involved a charge of murder. The Defendant entered an *Alford* Plea to voluntary manslaughter on the day this case was scheduled to go to trial by jury. The discovery materials in this case were extensive and the charge involved complex issues concerning proximate causation which necessitated extensive medical research and the use of multiple expert witnesses by the State and the defense. The Defendant was in custody throughout trial counsel's representation. The Defendant had previously been convicted on this same charge. After that judgment was set aside by the trial judge, he entered a plea to voluntary manslaughter which was subsequently overturned in a Post-Conviction Relief action. Preparation of this case for trial required a review of all these previous proceedings by trial counsel. All these factors, justify the amount of time spent on this case by trial counsel. Payment is to be made by the SC Commission on Indigent Defense at the rate of \$70.00 per hour for both out-of-court and in-court time pursuant to previous order of this court for a total of \$18,431.00.


 L. Casey Manning
 Presiding Circuit Judge
 Fifth Judicial Circuit

This 5 day of Dec, 2011.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS

Indictment # 2003-40-6670

THE STATE OF SOUTH CAROLINA,

v.

BEJAY HARLEY,

Defendant.

ORDER TO PAY ATTORNEY FEES

THIS MATTER comes before the Court upon the motion of Tara Dawn Shurling, attorney for the above-named Defendant. Counsel filed a Motion for Funding on May 12, 2011. A hearing on this matter was heard before this Court on May 23, 2011. Present at this hearing was Counsel for the Defendant, Tara Dawn Shurling, T. Patton Adams, IV, Executive Director of the South Carolina Commission on Indigent Defense, and Hugh Ryan, Deputy Director and General Counsel for the South Carolina Commission on Indigent Defense. The Representatives from SCCID were present at this hearing at the request of this Court to provide input concerning the position of SCCID on the issues before the Court.

Mr. Harley is charged with one count of murder and has been declared indigent. Ms. Shurling was appointed to represent the Defendant.

It is reasonable and proper for the Court to award compensation for court-appointed attorneys in excess of the statutory limits and § 16-3-26(B) so specifies. Further this Court finds that in light of the facts of this case, the seriousness of the charge and the extensive experience of the attorney appointed in this matter, a fee in excess of the statutory limits is reasonable and appropriate. The United States Supreme Court has held that a criminal defendant is entitled to reasonably effective assistance of counsel, under the Sixth Amendment guarantee of a right to "counsel." See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). At the May 23, 2011 hearing, this Court found that attorney fees of \$70.00 per hour are reasonable and appropriate on the facts of this case and approved an hourly rate for all out-of-court and in-court time expended by counsel in this matter.

In light of the fee rate set by this Order, it is anticipated that Counsel's total fees will exceed the statutory cap of \$3,500.00. Subject to final approval of Counsel's time records by the

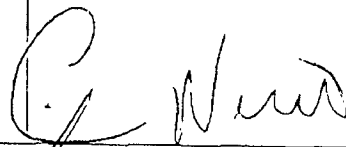
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presiding judge, this Court hereby approves Counsel's fees exceeding the statutory cap. Counsel may submit to SCCID for payment a voucher for fees up to **\$10,000.00** without further approval of the Court. Any fees in excess of that cap may be submitted to the presiding judge for approval at the conclusion of this case.

ACCORDINGLY,

1. Court-appointed counsel, Tara Dawn Shurling, is to be paid at a rate of **\$70.00** per hour for in-court and **\$70.00** per hour for out-of-court services in this case.
2. Attorney Shurling is to be allowed to bill SCCID for out-of-court and in-court legal services provided to this client beginning with the date of her appointment by the Court; March 30, 2009.
3. Attorney Shurling may bill SCCID for fees up to \$10,000.00 without further approval of the Court provided the presiding judge finds her time records to be adequate to support the time expenditures claimed.
4. Counsel may submit to the presiding judge a request for payment of fees in excess of the fee cap set by this Order at the conclusion of her work on this case. Approval of any fees claimed in excess of the cap set in this Order will be left to the discretion of the presiding judge who shall determine whether the amount of time expended on the case was necessary and appropriate and whether the time records kept by Counsel support the amount of time claimed by Counsel.

IT IS SO ORDERED.



Clifton Newman
Chief Administrative Judge
Court of General Sessions
Fifth Judicial Circuit

This 14 day of December, 2011.
nunc pro tunc
Date of Appointment (March 30, 2009)

From: TDSLAW [tdslaw@shurlinglaw.com]
Sent: Tuesday, February 12, 2013 3:55 PM
To: 'cmanningj@sccourts.org'
Cc: 'dbenjaminj@sccourts.org'; 'Newman, Clifton'; 'cmanninglc@sccourts.org'; 'Hugh Ryan'; 'dbenjaminlc@sccourts.org'; 'cnewmanlc@sccourts.org'
Subject: State v. Bejay Harley

Importance: High

Attachments: SCCID Voucher Payment Policy as Revised 11-19-2012.pdf; 9.29.06 S Ct Memorandum re SCCID.htm; 7.6.05 Memo from Chief Justice Jean Hoefer Toal.pdf
 Judge Manning,

I have yet to be paid any of my fees or expenses in this case. It has been well over a year since you signed orders approving my total fees and expenses in this case. I am aware that you previously advised me and SCCID, by email on January 3, 2012, that you would not hold any further hearings in this matter.

I agree that Your Honor *does not* have to have a hearing on SCCID objections to my payment requests. I believe Your Honor has the authority to review SCCID's objection to paying me based upon your previous orders with or without a hearing at your discretion. As I read both the payment policies of SCCID and the Chief Justice's memoranda on this subject, you could require both sides to submit their respective positions in writing and could then decide the matter based upon those written submissions.

Item e, pg 2, of the SCCID Voucher Payment Policy, a copy of which is attached, states:

Upon submission of the documentation the trial court may determine the matter *with or without* a hearing in its discretion. OID will then pay such amount as the trial court may authorize.

Item e, above, mirrors *Item 5 of the Memorandum issued by Chief Justice Toal on this subject on September 29, 2006. See, copy attached.*

By *previous* memorandum, dated July 6, 2005, the Chief Justice had indeed indicated that *because §17-3-50(c) does not provide for ex parte proceedings to determine attorney's fees, hearings on requests for additional fees should be held in open court. Copy attached.* Both the payment policies of SCCID, and the Chief's second memorandum dated *September 29, 2006*, call for SCCID to enter their objections *after* receiving a payment voucher from Court-appointed counsel. As previously quoted, *both specifically* provide that SCCID *shall pay such amount as may be authorized by the trial court.* And, once again, these provisions clearly state that the trial court may determine the matter *with or without a hearing* at the trial court's discretion. Likewise,

neither of these provisions requires advance approval of fee rates or caps. This interpretation of S. C. Code Ann. § 17-3-50 (C) is consistent with the previous rulings of our Supreme 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).

Based upon the Chief's *earlier* memorandum dated July 6, 2005, *I agree* that if Your Honor deems a hearing appropriate, *then* such a hearing must be held in open court. *Nevertheless, it remains clear that the decision about whether a hearing should be held is entirely left to the Court.* **That being said, it is beginning to look like I will never get paid in this case unless you have a hearing *or* issue an order directing them to pay me after reviewing their objections based upon written submissions without a hearing.**

Judge Newman at one point indicted that he was going to amend his original orders in this case. He did not ultimately issue any amended orders and he told me, in the presence of his law clerk, that he was not going to do so. The problem is that SCCID is relying on what he said he was going to do during a hearing on this issue and will not pay me. They have declined to even pay me the fees and expenses that were approved in advance by Judge Newman's Orders until the dispute over the balance of the fees and expense can be resolved.

I have asked Judge Newman to give me an order documenting what he told me about his decision not to amend his original orders. He has never gotten back in touch with me on this request. In the mean time, I am the one who is stuck in the middle of this mess. I have been trying my best to get paid for my work in this case for over a year now to no avail. The client has been out of prison for over a year now thanks to my hard work on this murder case and I still can't get paid. Please help me resolve this mess.

Please advise me what you feel should be done in this matter. That being said, I am beginning to think I will never get paid in this case unless a hearing is held. I do not want to have to take this matter before the Supreme Court to get it resolved, but I am frankly beginning to think that may be what it will take unless we can have a hearing and try to resolve this dispute.

As always, I am copying Judge Newman on this email, as well as Hugh Ryan. I am not trying to be difficult, but it is ridiculous that a lawyer should have to wait this long to get paid. I am contacting Judge Newman as well and have asked that he either issue an order documenting the fact that he changed his mind and is not going to amend his original orders in this case *or*, that he consider holding another hearing in this matter. Given the fact that he has already told me that he was not going to amend his original orders, and that he does not believe he has the authority to do so now that he is not longer the chief administrative judge, I am not certain what the purpose of such a hearing would be except perhaps to get it on the record that he ultimately decided not to amend his original orders

in this case. That however, might be necessary because Hugh Ryan repeatedly has referenced what I told him about what I was advised by Judge Newman as some sort of *ex parte* communication with the Judge. In truth what happened was simply that I approached Judge Newman in the hall at the courthouse and expressed my concern that I had not received a copy of the amended order he had indicated he intended to issue. I told him I was concerned that he might have signed an order and I had somehow not received a copy after it was filed. That is when he volunteered that he had changed his mind and wasn't going to issue an amended order. While the circumstances may not have been ideal, there was clearly no attempt on my part to discuss the merits of any aspect of this dispute with the Judge. I can't be held responsible for how Judge Newman chose to make me aware of his decision in this matter. I advised SCCID of this development as soon as it happened and copied Judge Newman on the communication so that there would be no doubt that I was accurately relaying what Judge Newman had said to me. I don't know what else I could do under the circumstances. Judge Newman has certainly never advised anyone that I was not telling the truth about that conversation; indeed, nor would he have any reason.

I am sorry to bother you both with this. I realize we all have far more important uses for our time, but I simply can't afford to keep waiting to get paid in this case. PLEASE have your law clerk contact me and advise me when we might be able to hold a hearing in this matter. I have spoken with Hugh Ryan and he and I are both free anytime tomorrow or Thursday if there is a time either day that would suit you to have a hearing. Thanks for your time.

Tara Dawn Shurling

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

(803)738-8622 Phone
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CONFIDENTIALITY

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TDSLAW

From: Hugh Ryan [hryan@sccid.sc.gov]
Sent: Tuesday, February 12, 2013 4:20 PM
To: TDSLAW; cmanningj@sccourts.org; Patton Adams
Cc: dbenjaminj@sccourts.org; 'Newman, Clifton'; cmanninglc@sccourts.org; dbenjaminlc@sccourts.org; cnewmanlc@sccourts.org
Subject: RE: State v. Bejay Harley
Judge Manning:

I will refrain from an argument of merits of this case and leave that to the court room and a hearing on the record. I would imagine the Court and other Circuit Judges involved in these issues probably have very little recollection of all that has gone on concerning this case and others involving Ms. Shurling as counsel.

Judge Newman made a clear ruling on the record in the Harley case for which there is a transcript. It is the opinion of SCCID that the subsequent order in the Harley case, issued by Judge Manning, conflicts with Judge Newman's ruling; therefore a hearing before Judge Manning would be necessary to address his order in light of Judge Newman's ruling. It is that simple.

SCCID looks forward to a hearing before Judge Manning and please have your office let us know of possible hearing dates.



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

TDSLAW

From: Manning, L. Casey Law Clerk (Adam Ribock) [CManningLC@sccourts.org]

Sent: Tuesday, February 26, 2013 10:40 AM

To: TDSLAW; Manning, L. Casey

Cc: 'Hugh Ryan'

Subject: RE: Bejay Harley Voucher

Judge Manning has stated he will not hold a hearing in this matter. Further, he invites each party to submit a written proposed order. Please let me know if you have any questions or concerns. Thank you.

*Adam Ribock
Law Clerk to The Honorable L. Casey Manning
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street, Room 214
Columbia, SC 29201
Office: (803) 576-1774
Fax: (803) 576-1744*



FILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	2003-GS-40-6670
	)	
The State of South Carolina	)	
	)	
v.	)	
	)	ORDER
<u>Bejay Harley</u>	)	

This matter comes before the Court upon the objections raised by the South Carolina Commission on Indigent Defense (hereafter SCCID) in correspondence to the Court dated December 15, 2011 (Attachment A), May 25, 2012 (Attachment B) and as argued in the December 28, 2011 hearing (Transcript -Attachment C) (Tr. 8, ll. 6-16) before Judge Newman regarding attorney fees and expense issues in this matter. The attachments, transcript and court exhibits of the December 28, 2011 hearing are hereby made a part of the record and this Order as they specifically pertain to the facts that are in dispute. The Court has determined that additional hearings are not necessary and it has received proposed orders from both parties.

SCCID specifically objected to this Court's Order of December 5, 2011 (Attachment D) awarding attorney's fees in the amount of \$18,431.00, and the Order for Expenses issued by this Court for \$1,138.37 (Attachment E). SCCID filed these objections with the Court as provided for under the September 29, 2006 Order of Chief Justice Toal which established procedures for the processing of indigent payment vouchers.

Attorney Tara Shurling and SCCID first appeared before Judge Newman on May 23, 2011 for a hearing regarding attorney fee, expert and expense requests of Ms. Shurling in this matter. Ms. Shurling made certain requests for expenses, experts, and attorney's fees. At the hearing Judge Newman made some very specific rulings concerning the requests made by Ms.

Shurling. Judge Newman denied her request for fees billed at the rate of \$100 in-court and \$80 out of court setting the rate at \$70 per hour. Judge Newman denied her request for a second attorney from her office and her requests for mileage within Richland County incurred handling matters in this case. He also denied her requests for 3 medical experts, instead authorizing fewer experts. (Tr. 11, l. 24 – p. 12, l. 7) On the issue of attorney fees, it was the position of SCCID that Judge Newman specifically ordered in the May hearing that Attorney Shurling could only bill up to \$10,000 without further approval of the Court. Judge Newman confirmed in the December 28, 2011 hearing this \$10,000 cap. (Tr. 34, ll. 20-22)

This resulting Order from the May 23, 2011 hearing with Judge Newman was signed by him December 1, 2011. (Attachment F). After receiving Judge Newman's Order and this Court's Order of December 5, 2011, SCCID filed a written objection on December 15, 2011 with this Court and Judge Newman. SCCID argued the Order of Judge Newman did not reflect Judge Newman's express ruling from the May 23, 2011 hearing. SCCID specifically objected that paragraph 4 of the Order was not the Court's ruling and that it was inconsistent with paragraph 3 of the Order which accurately reflected the Court's ruling. SCCID personnel also noted in their written objection, and as the transcript reflects, that SCCID had not received a copy of the proposed order from the May hearing before it was submitted to the Court several months later. (Tr. 5, ll. 17-19)

SCCID requested a hearing with Judge Newman to clarify the discrepancy from the ruling of the May 23, 2011 hearing and the December 1, 2011 Order as written. Judge Newman granted this request and the parties appeared before the Court on December 28, 2011. Judge Newman ruled at the December 28, 2011 hearing that the Order that was presented to him by

Attorney Shurling was not consistent with the ruling of the Court at the May 23, 2011 hearing.

Judge Newman specifically found:

[L]eaving the hearing, I issued an oral order placing a \$10,000 cap on the payment of fees without further approval of the Court. Now, fast forward to December when an order was submitted to me, I did not review notes from the May hearing. I looked at the order and assumed that the order was consistent with what was stated by the Court, but I see now upon it being pointed out by SCCID and the order itself that paragraphs three and four are inconsistent and inconsistent with what the Court ordered, and it's also inconsistent with any other order that I've signed the entire year because if an order is made by the Court without further approval, then that's the end of the order without any language allowing for a separate request to be made in excess of the order with the presiding judge as is reflected in paragraph four of this order. So I did not catch that language, and that was brought to my – timely brought to my attention by the department. So I am going to amend the order and delete paragraph four from this order. That would cause this order to be consistent with the proposed order that was submitted to me by Ms. Shurling as far as the amount being up to \$10,000 without further approval of the Court, provided the presiding judge finds the time records to be adequate to support the time and expenditures claimed. Then whatever disarray that may cause as to Judge Manning's order, then let that be. It will be addressed by Judge Manning. Mr. Shurling indicates that she would have appealed the order. I invite an appeal of this. (Tr. 34, l. 20 – p. 35, l. 23)

Judge Newman later continued:

And I appreciate the compliment about me being very careful in reviewing matters but I don't think I was careful enough in reviewing this, perhaps because it was submitted so much later, and I assumed that everything was consistent with specifically what was ordered. And I certainly understand Ms. Shurling was seeking to add the clarifications in order to pave the way for Judge Manning to sign the one that he did days later or –but it's inconsistent with what I ordered from the bench. So, therefore, I'm going to modify the order deleting paragraph four, and we'll see where it goes from there. (Tr. 36, l. 24 – p. 37, l. 7)

When this Court signed the December 5, 2011 Order of Attorney Shurling approving attorney fees in the amount of \$18,431.00, it was not aware of the prior circumstances as disclosed in the hearing of December 28, 2011. This Court signed the December 5, 2011 Order with the understanding that in accordance with paragraph 4 of Judge Newman's order that counsel could submit to the presiding judge a request for payment in excess of the fee cap set by his order. However after it was clarified and presented to this Court, this Court finds that Judge Newman had specifically ruled, consistent with paragraph three of his Order that:

Attorney Shurling may bill SCCID for fees up to \$10,000 without further approval of the Court provided the presiding judge finds her time records to be adequate to support the time expenditures claimed (emphasis added)

Judge Newman during the December 28, 2011 hearing further explained the procedure Ms. Shurling could have followed, but did not, in seeking further approval to exceed the \$10,000 cap:

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

Ms. Shurling: Then, Your Honor---

The Court: And the public defenders came back and said, "Well, Your Honor, we have these other character witnesses who we must have, and they're coming from far and near. We must have them. So please give us more approval." And I yielded, gave them more approval, under the reasonable professional assistance language that you quoted. So it's not at all unusual that once an order is approved setting a cap of a certain amount without further approval, further approval is often sought, but I have found in so many instances when I set a lower cap, somehow or another the expert's fees get -- they get lower and other things tend to happen. (Tr. 39, ll. 1-19)

This Court is not aware of Attorney Shurling requesting a hearing or filing a request to have the cap set by Judge Newman increased prior to submitting the proposed order to me for \$18,431 in attorney fees. This Court cannot issue an order that changes or overrules the ruling of Judge Newman from the May 23, 2011 hearing. If this Court could just automatically exceed the cap set by Judge Newman then the hearing of May 23, 2011 was a useless exercise. Judge Newman in the December 2011 hearing stated:

I can't vacate Judge Manning's order nor can he issue an order that doesn't follow my order. So he can look at that. (Tr. 47, ll. 6-8)

Therefore from the record of this matter it is clear to this Court that Judge Newman does not think this Court's order of December 5, 2011 complies with his Order.

In order to comply with the prior ruling of Judge Newman this Court's Order of December 5, 2011 (Attachment D) is vacated and the total attorney fees awarded to Attorney Shurling shall be \$10,000. This amount was the cap set by Judge Newman. This Court also finds based on the record of this case and data submitted at the December 2011 hearing that \$10,000 is a reasonable fee for this type of case. State's Exhibit 7 (Attachment G) made a part of the record at the December 28, 2011 hearing shows the average fees for the murder/manslaughter category of cases is actually less than \$10,000. This case concluded with the Defendant entering a Alford¹ plea. Judge Newman in setting the \$10,000 cap seemed to take into account Attorney Shurling's prior representation of the defendant when he considered what might be a reasonable fee cap. As Judge Newman stated:

The Court: Well, I certainly recall the May 23rd hearing because I refused to sign some requested orders which led up to Ms. Shurling

¹ North Carolina v. Alford, 400 U.S. 25 (1970)

request for a hearing, and we went into the hearing and it was discussed during the course of the hearing that Ms. Shurling had previously represented Mr. Harley on the P.C.R. matter. Is that right?

Ms. Shurling: Yes, sir, your Honor.

The Court: And, you know, there are—fees issues abound and the question was posed as to, well, if you represented him for two years or three years or whatever number of years on the P.C.R., then how much—how much new or why is—why are we starting it as if you—as if he's a stranger to you as a client? And all of that was addressed in court during the course of that hearing. But leaving the hearing, I issued an oral order placing a \$10,000 cap on the payment of fees without further approval of the Court. (Tr. 34, ll. 7 – 22)

SCCID also objected to the Order of this Court awarding Ms. Shurling expenses in the amount of \$1,138.37 (Tr. 8, l. 20 – l. 6, p. 10). Judge Newman issued an Order filed May 25, 2011 (Attachment H) authorizing certain expenses in this matter. However, in the order Judge Newman struck through what appeared to be the original requests of Ms. Shurling and in his handwriting wrote in specific amounts of expenses authorized by category. He authorized \$500 for lay witness fees and mileage reimbursement as well as expenses related to subpoena service. He further authorized an additional category of expenses not to exceed \$750. The Order further stated that total expenses shall not exceed \$1,250 without prior authorization from the Court. Judge Newman then specifically struck through language stating that counsel could exceed the limits for either category of expense. Ms. Shurling argues that because language remained in the Order that counsel was authorized to seek approval of any balance not covered by this order upon completion of the case (Tr. 45, ll. 12–21) that this Court had the authority to exceed the expense caps set by Judge Newman.

However, this Court finds this one sentence cannot be read in isolation. The Order of Judge Newman, when viewed in its entirety, set specific expense caps and specifically stated that

\$750 was the cap for general expenses. This Court cannot issue an Order that does not follow the Order of Judge Newman.

IT IS THEREFORE ORDERED that Attorney Shurling is authorized to receive \$10,000 in attorney's fees and a total of \$750 for expenses.

L. Casey Manning
Judge, Fifth Judicial Circuit

March ____, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
 FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)

CASE NO.: 2003-GS-40-6670

v.)

Order for Payment of Attorney Fees and Expenses.

BEJAY HARLEY,)
 Defendant.)
 _____)

THIS MATTER comes before the Court by way of objections asserted by SCCID to the payment of attorney fees and expenses authorized by this Court by Orders dated December 5, 2011. The parties were previously notified that no hearing would be held on these objections but rather, written submissions would be accepted by the Court. I have now thoroughly reviewed the memoranda submitted by both trial counsel, Tara Dawn Shurling and the South Carolina Commission on Indigent Defense. While I appreciate the positions set for by SCCID in this matter, I find that the total fees and expenses claimed by Counsel in this matter were reasonable and necessary to provide this Defendant with effective assistance of counsel in this murder case. Counsel's time and expense records as reviewed by the Court in issuing the Orders previously signed in this matter on December 5, 2011 are extremely detailed and well document both her time expended in this matter and the expenses reasonably incurred by her in the defense of this client. The Order previously signed in this matter sets for reasons why the fees in this case were well justified as is required by S.C. Code Ann. §17-3-50 (C). In addition to those factors, Counsel has advised this Court in her current memorandum that this case involved tremendously complicated medical issues which required that Counsel do extensive research and that she spend a tremendous amount of time studying the medical science involved in order to be prepared to properly cross-examine the State's experts. The State had announced that it intended to use a minimum of three expert witnesses and had advised Counsel of several other expert witnesses they might call as well. Counsel had been denied funding for even a second expert. She advises that, in light of that ruling, she had to convince a second expert to provide his services *pro bono* in this matter and had to prepare that witness for trial. In addition, Counsel had been advised that the State had attacked the credibility

of the Defendant's primary expert in another recent trial by raising a number of issues concerning this witness addressing collateral matters not related to the science that was the basis for his expert opinion. That information required Counsel to do research into the circumstances of the allegations used by the State for impeachment in that previous trial and to talk to lawyers involved in that case to determine how best to prepare for this impeachment on collateral matters in my client's upcoming trial. Although Counsel had spent a lot of time with her primary expert in preparation for trial, this announcement necessitated that she spend even more time with him questioning him about the events the State used for impeachment in the other unrelated trial and preparing him for cross-examination on those issues.

Although Counsel had handled the previous PCR for this client, she advises that she had never interviewed the witnesses in this case, she had not reviewed all the old discovery in years, and further notes that there was a good bit of new discovery as well, and she had not been to the scene of the alleged crime. Preparation for this trial also required that Counsel review the trial record from the earlier conviction set aside by Judge Lloyd in order to be prepared for any tactics the State might repeat in the retrial of this matter. This Court is advised that this case involved approximately five, six inch D-ring notebooks full of discovery materials which had to be reviewed by Counsel and reviewed with the client who was at the Alvin S. Glenn Detention Center while this matter was pending retrial. While Counsel had been able to get Judge G. Thomas Cooper, to set bond at \$30,000.00 in this murder case but, due to the poverty of the defendant and his family, the Defendant was in jail unable to make bond for nearly three years awaiting retrial. Ultimately the State offered the Defendant a deal for a plea which allowed him to max out his sentence on March 17, 2012.

Pursuant to my authority as trial judge in this case, I hereby approve the fees and expenses previously approved by Orders of this Court dated December 5, 2011 and direct SCCID to pay the sums approved therein as soon as possible. *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).

IT IS SO ORDERED.

L. Casey Manning
Presiding Circuit Court Judge
Fifth Judicial Circuit

This ____ day of _____, 2013.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
 FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)

CASE NO.: 2003-GS-40-6670

v.)

**Memorandum in Support of Request for
 Payment of Attorney Fees and Expenses.**

BEJAY HARLEY,)
 Defendant.)
 _____)

May 23, 2011 a hearing was held before Judge Clifton Newman concerning several funding requests I had submitted in the above captioned murder case. I had asked for the funding for a second lawyer in this complex murder case which I believed to be proceeding to trial by jury. I also requested that the fee rate for me, as lead counsel, be set at \$100.00 per hour. In addition to these two requests, I asked for funding for general expenses, witness fees and expenses and investigator expenses. Additionally, I requested additional funding for a second expert in the field of forensic pathology. I had been advised that the State intended to call a minimum of three experts and possibly as many as seven or eight. At this hearing both Patton Adams, the Director of the South Carolina Commission on Indigent Defense and Hugh Ryan, Chief Counsel for SCCID were present. During this hearing Judge Newman denied my request for a second chair, he denied the request for an additional expert and he reduced the rate I requested for Attorney fees to \$70.00 per hour for in-court and out-of-court services. In addition, he increased the fee cap set by S.C. Code Ann. §17-3-50(A) to \$10,000.00 without further approval of the Court. Judge Newman also reduced the amount of funding I requested for the investigative services in this matter and reduced the funding requested for all other expenses as well. SCCID did not object to the hourly rate set by Judge Newman.

At virtually the last minute, on the day trial was set to begin, the State finally made my client an offer that was too good for him to refuse and assume the risks associated with a trial. This was a very difficult decision for the client inasmuch as there was a very strong question of probable causation in this

case which may well have been decided in his favor at trial. The failure of the original public defender to utilize information concerning this defense, and to properly advise the client concerning it, were the reasons why this defendant had previously been granted a new trial in a PCR action. After my client entered this plea, I discovered that Judge Newman had never signed Orders reflecting some of his rulings from the May 23, 2011 hearing. He had crossed out the figures I suggested and edited those amounts by hand on the order for general expenses however, he had not signed an Order reflecting his rulings on the fee rates and caps set in this matter. I had apparently assumed that since SCCID had prevailed upon Judge Newman to deny most of my requests as advanced at that proceeding, they would have provided His Honor with proposed orders. Since they obviously had not, I then prepared a Proposed Order for Judge Newman which I believed reflected his rulings from the bench, the intent of §17-3-50(C) and South Carolina precedents on the issue of the final amount requested for attorney fees attorney fees. See, Ex Parte Brown, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (June 11, 2011), citing, *Bailey v. State*, 309 S. C. 455, 464, 424 S.E.2d 503, 508 (1992). Judge Newman signed that Order on **December 1, 2011** and made it effective to the date of my original appointment; March 30, 2009. I subsequently submitted my request for final payment of fees and expenses to Your Honor and you signed Orders directing payment of all my fees and expenses on **December 5, 2011**.

SCCID refused to pay me based on your orders dated December 5, 2011 and requested a hearing before Judge Newman. On Wednesday, December 28, 2011 a hearing was held on the objections entered by SCCID to payment of my fees and expenses pursuant to orders signed by Your Honor on December 5, 2011. Specifically, SCCID took the position that Judge Newman's rulings from the bench during a hearing held before him on May 23, 2011 required further approval of the Court for any fees or expenses in excess of the fee and expense caps set by him and that further approval had to be obtained from Judge Newman himself not "the Court" in the broader sense of the term. Accordingly, it was their opinion that the written order signed by Judge Newman on December 1, 2011 allowing me to request payment of fees

in excess of the \$10,000.00 cap from the presiding judge at the conclusion of the case was inconsistent with Judge Newman's ruling from the bench and should not have been signed by Judge Newman.

At the hearing held on December 28, 2011, Judge Newman ruled that the Order he signed was not consistent with his ruling from the bench, and he announced his intent to enter an amended order deleting Item 4 from his previous order. At that proceeding, I asked for Judge Newman's ruling as to how that ruling affected Your Honor's Order issued while his previous order was in place, and he indicated that he was going to "leave that up to Judge Manning." Likewise, the expense order signed by Judge Newman allowed for payment of expenses in excess of the caps set in that order upon further approval of the Court. Once again, I asked Judge Newman for his ruling on how his new ruling affected the expense order signed by you on December 5, 2011. He once again indicated that he was "leaving that up to Judge Manning to decide." I specifically asked Judge Newman if he wanted me to draft the an amended order for him and he said no, that he had my original proposed order and he and his clerk would make the changes.

Subsequent to that hearing, Judge Newman apparently changed his mind and had his law clerk contact me by email and request that I draft an Order reflecting the changes he addressed during the December 28, 2011 hearing. I did so and provided a copy to both Judge Newman and SCCID on January 12, 2012. I expressly noted that by drafting the proposed amended order I was not waiving my objection to the order as amended. I never received a signed copy of that Order, or any other amended Order for that matter. During a subsequent term of PCR hearings before Judge Newman, I asked him, in the presence of his law clerk, if I had somehow missed getting a copy of his new Order. I was pleased when Judge Newman advised me that he had decided *not to issue an amended order* both because he was no longer the Chief Administrative Judge, and because he had decided he didn't know enough about the case to decide the issue of the final fee request. He very specifically stated that he had decided to leave this issue up to you and Judge Cooper, who was Chief Administrative Judge at that time. I passed that information on to Hugh Ryan at SCCID. I have advised SCCID of that conversation on several subsequent occasions as well; each time courtesy copying both Your Honor *and* Judge Newman. I wanted

to make it perfectly clear what Judge Newman had said to me and to be open with that communication so that SCCID would feel confident that Judge Newman would undoubtedly set it straight in a heart beat if I was misrepresenting his position. In several communications with SCCID I urged them to contact Judge Newman if they questioned my word on this.

After Judge Newman told me he had decided *not* to amend his previous order, I sent an email to SCCID advising them that, *in light of Judge Newman's decision not to issue amended orders*, I expected them to pay me based upon your Orders dated December 1, 2011. I told SCCID that I would have no choice but to file a Rule to Show Cause if they did not act on those Orders and pay me. As I have noted in correspondence concerning this matter, Your Honor clearly had the authority to decide if my fee requests should be paid.

After the December 28th hearing I stopped by your office and advised your law clerk that SCCID and I would apparently need to schedule a hearing with Your Honor to determine where we go from here. The following day I received an email from your law clerk advising me that Your Honor had declined to hold a hearing on these matters, and that you would not hear anything further regarding this matter. At that time, I assumed that email was copied to SCCID and I did not notice that it was not sent to them. I only recently noticed that it was not. Although SCCID claims to have sufficiently raised an objection to the reasonableness of my fees and expenses in this case at the December 28, 2011 hearing before Judge Newman, once he ruled that he was leaving the decision concerning your orders up to you, they did not, to my knowledge, submit any specific objections to my fees and expenses to Your Honor and they did not request a hearing before you on their position until approximately May of this year.

In drafting the Order signed by Judge Newman on December 1, 2011, I never considered his rulings concerning "*further approval of the Court*" to mean further approval was required from him specifically as opposed to "*the Court*" in the larger sense of the phrase. Based on my previous experience with court-appointed cases, it has always been the presiding judge who made the final decision concerning fee and expense requests at the end of the case. Since Judge Newman signed my proposed orders

regarding fees and expenses I had no idea he took issue with that interpretation of his ruling from the bench. I would never have submitted my fee and expense requests to Your Honor without addressing that matter further with Judge Newman had that not been the case.

More recently, I tried in vain to get Judge Newman to hold a hearing to clarify his position on the record. On February 12, 2013 I received a letter from Judge Newman indicating that he would not hear anything further regarding this case and addressing our attention to the transcript of the hearing he previously held in this matter. I can only assume that it has been so long since he dealt with this matter that he simply does not recollect his discussion with me subsequent to that hearing. In fairness to him, it has been a long time since he dealt with this case and I can only imagine how many cases he has handled since then. As a practical matter however, I do not believe it matters one way or the other.

Item e, pg 2, of the SCCID Voucher Payment Policy, a copy of which is attached, states: "Upon submission of the documentation the trial court may determine the matter *with or without* a hearing in its discretion. OID will then pay such amount as the trial court may authorize."

Item e, above, mirrors *Item 5 of the Memorandum issued by Chief Justice Toal on this subject on September 29, 2006. See, copy attached.*

By memorandum, dated July 6, 2005, the Chief Justice indicated that "*because §17-3-50(c) does not provide for ex parte proceedings to determine attorney's fees, hearings on requests for additional fees should be held in open court.*" *Copy attached.* Both the payment policies of SCCID, and the Chief's second memorandum dated *September 29, 2006*, call for SCCID to enter their objections *after* receiving a payment voucher from Court-appointed counsel. As previously quoted, *both specifically* provide that SCCID "*shall pay such amount as may be authorized by the trial court.*" And, once again, these provisions clearly state that the trial court may determine the matter *with or without a hearing* at the trial court's discretion. Thus Your Honor's decision to decide this matter based upon written submissions is clearly within your discretion.

Likewise, neither of the provisions addressed above require *advance* approval of fee rates or caps. This interpretation of S. C. Code Ann. § 17-3-50 (C) is consistent with the previous rulings of our Supreme 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). In addition, §17-3-50(C) allows for the payment of fees and expenses in excess of the caps set by §17-3-50 (A) and (B). Not only does § 17-3-50 (C) not contain *any* language requiring *advance* approval of fees in excess of the statutory cap, in actuality it requires that an order approving fees above the statutory cap include specific findings that the services *provided* by counsel *were* necessary and appropriate given the totality of the facts and circumstances of a case. I would submit that the provisions of § 17-3-50 (C) are posed in the past tense for a practical reason. It is impossible to imagine how an order, with these required findings, could be issued until the case *is over* and the totality of the facts and circumstances of the case are fully known. Further, consistent with the concerns articulated by Judge Newman during the December 28, 2011 hearing, the trial judge is in a far better position to know enough about the case to decide whether Counsel’s time and expenses accrued in a given case were reasonable and necessary.¹

In light of the above, I submit that Your Honor had the authority to approve my total fees and expenses in this at the end of the case without any prior Order raising the caps set by statute. That being the case, you had the authority to approve my total fees and expenses at the conclusion of this matter even if I had not gotten an earlier Order approving fees and expenses in excess of the statutory caps in advance. The proposed order I submitted to Judge Newman in December of 2011, was wholly consistent with the payment policies of SCCID, the memoranda previously issued by the Chief Justice on this subject and the cases previously decided by the Supreme Court as well. That Order was signed by Judge Newman and was in place at the time Your Honor signed your orders in this matter. Judge Newman never ended up signing amended Orders in this matter however, *even if he had*, he expressly left the decision about what to do concerning your orders dated December 5, 2011 up to you and Judge Cooper who was then the Chief Administrative Judge for the Court of General Sessions in Richland County.

¹ Apparently a budget proviso has been added to §17-3-50(C) for budget year 2012- 2013 which requires advance approval of fees and expenses in excess of the caps set by §17-3-50 (A) and (B). No such proviso was in place at the time Counsel was appointed in this matter or thereafter, at any time during her representation in this matter.

Further, as noted herein, there is ample authority in South Carolina for the position that the final decision as to the appropriate amount of fees and expenses to be awarded in any case is addressed to the discretion of the trial judge.

The current Chief Administrative Judge is the Honorable DeAndre Benjamin. In two other cases in which Judge Newman signed orders increasing the statutory cap for fees, Judge Benjamin recently approved fees in excess of the caps set by Judge Newman over the objections of SCCID. In hearings held on those matters, SCCID submitted the position articulated by Judge Newman during the December 28, 2011 hearing as the basis for arguing that the fee caps could not be increased by anyone other than Judge Newman and that any increase had to be sought in advance. That argument was rejected by Judge Benjamin and the fees caps were raised in both of those cases. In one of those cases, Judge Benjamin was in fact the trial judge and she approved the total fees requested, which exceeded the cap previously set by Judge Newman, at the end of the case. In that case, she disapproved \$180.12 in expenses on the basis of reasonableness not a finding that she did not have the authority to approve the expenses in question. In the remaining case, Judge Benjamin, acting as Chief Administrative Judge, increased the cap previously set by Judge Newman and expressly ordered that the increase would cover any time expended after the cap was exceeded but, before her order increasing the cap.² I advise Your Honor of Judge Benjamin's rulings in these matters solely because SCCID has consistently argued the rulings announced by Judge Newman at the December 28, 2011 hearing in this case in support of their position in other cases where Judge Newman signed Orders setting fee and expense caps.

As to the reasonableness of the fees and expenses in this case, I believe that my time records and expense records show that the totals claimed were reasonable and necessary to provide the client with effective assistance of counsel and a fair trial. This case involved complex issues concerning the questions of proximate causation of the death of my client's girlfriend. As previously noted, my efforts as his PCR lawyer had earlier resulted in him receiving a new trial. He was originally tried and convicted of murder but, that verdict was set aside when then circuit judge, Judge Reginald Lloyd, granted the client's post-trial motion for a new trial. The client was then advised to plead guilty to voluntary manslaughter without being advised of aspects of the case which cast doubt on the question of proximate causation of death. When the PCR was granted, I was appointed to represent the client

² I do not believe it was necessary to obtain an Order from Judge Benjamin in order to have the Trial Judge approve my final fees in that case however, I requested a hearing in that matter because SCCID has consistently argued that advance approval is required and I wanted to try and avoid a dispute down the line when my final bill was submitted for approval by the trial judge and was submitted to SCCID for payment.

since the Richland County Public Defender's Office handling had been found ineffective in this matter. I represented this client from March 9, 2009, shortly after the matter was remanded for a new trial, through December, 2011; very nearly three years. SCCID has repeatedly asserted that my fees in this case are not reasonable for a case involving a guilty plea. This assertion overlooks several critical factors. First, SCCID consistently overlooks the fact that this case did not plead out until the day the jury trial was scheduled to commence. Thus, I had done all the trial preparation before the State finally made my client the offer which he accepted. SCCID routinely challenges fees for preparing for trial as unreasonable if the client ends up entering a guilty plea. While there certainly are cases where the client makes it clear from the beginning that he does not want a trial, and directs Counsel to negotiate the best possible plea deal on his behalf, *this was not one of them*. Indeed, many cases do not plead out until the day of trial. Contrary to the apparent belief of SCCID, I can not come to court on the day of trial gambling on the State making a last minute offer my client will accept. Even the day we were about to begin his trial, this client refused to consider even the last minute deal offered which gave him an almost immediate max out date until the State finally agreed, at the last minute, to allow him to enter an *Alford* plea.

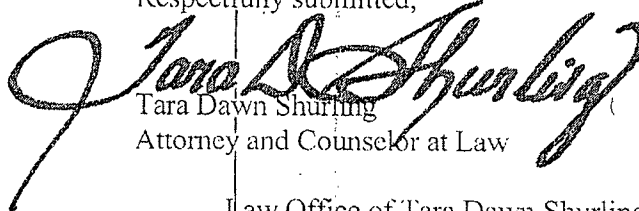
This case involved tremendously complicated medical issues which required that I do extensive research and that I spend a tremendous amount of time studying the medical science involved in order to be prepared to properly cross-examine the State's experts. The State intended to use a minimum of three expert witnesses and had advised me of several other expert witnesses they might call as well. I had been denied funding for even a second expert. I had to convince a second expert to provide his services *pro bono* in this matter and had to prepare that witness for trial. In addition, I had been advised that the State had attacked the credibility of my primary expert in another recent trial by raising a number of issues concerning this witness addressing collateral matters not related to the science that was the basis for his expert opinion. That information required me to do research into the circumstances of the allegations used by the State for impeachment in that previous trial and to talk to lawyers involved in that case to determine how best to prepare for this impeachment on collateral matters in my client's upcoming trial. Although I had spent a lot of time with my primary expert in preparation for trial, this announcement necessitated that I spend even more time with him questioning him about the events the State used for impeachment in the other unrelated trial and preparing him for cross-examination on those issues.

Although I had handled the previous PCR for this client, I had never interviewed the witnesses in this case, I had not reviewed all the old discovery in years, and there was a good bit of new discovery as well, and I had not

been to the scene of the alleged crime. Preparation for this trial also required that I review the trial record from the earlier conviction set aside by Judge Lloyd in order to be prepared for any tactics the State might repeat in the retrial of this matter. This case involved approximately five, six inch D-ring notebooks full of discovery materials which had to be reviewed by me and reviewed with the client who was at the Alvin S. Glenn Detention Center while this matter was pending retrial. I had been able to get Judge G. Thomas Cooper, to set bond at \$30,000.00 in this murder case but, due to the poverty of the defendant and his family, he sat in jail unable to make bond for nearly three years awaiting retrial. Ultimately, I like to think largely because the prosecution knew how thoroughly I was prepared to try this case, my client was offered a deal for a plea which allowed him to max out his sentence on March 17, 2012. Thus, my client has been out of custody for nearly a year and I still have not been paid for any of my time and expenses in this case. I would respectfully submit that such a delay is not in keeping with the intent of the law and is inconsistent with our Supreme Court's decision in *In Re Brown, supra*.

I now respectfully submit that my total fees and expenses, as previously approved by Your Honor on December 5, 2011, have been demonstrated to be reasonable and necessary as required by §17-3-50(C). For all the reasons set forth above, I pray that Your Honor will exercise your authority pursuant to §17-3-50 (C) well as, *Ex Parte Brown, supra*, and *Bailey v. State, supra*, and direct that SCCID pay both the fees and expenses previously approved by your orders dated December 5, 2011.

Respectfully submitted,


Tara Dawn Shurling
Attorney and Counselor at Law

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ATTORNEY FOR THE DEFENDANT

This 11 day of March, 2013

Appellant designated this document in her Designation of the Matter, however, she has not been able to locate her hardcopy of this pleading and her digital version was inadvertently “saved over” when she subsequently copied a portion thereof in the preparation of another pleading in this case. Opposing counsel advises that he does not have a copy in his file and Judge Manning’s current law clerk has been unable to locate the copy provided to the Court. This document is referenced once in the Procedural History, however its content is not referenced elsewhere in this brief.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	2003-GS-40-6670
	)	
The State of South Carolina	)	
	)	
v.	)	
	)	ORDER
Bejay Harley	)	

This matter comes before the Court upon the objections raised by the South Carolina Commission on Indigent Defense (hereafter SCCID) in correspondence to the Court dated December 15, 2011 (Attachment A), May 25, 2012 (Attachment B) and as argued in the December 28, 2011 hearing (Transcript -Attachment C) (Tr. 8, ll. 6-16) before Judge Newman regarding attorney fees and expense issues in this matter. The attachments, transcript and court exhibits of the December 28, 2011 hearing are hereby made a part of the record and this Order as they specifically pertain to the facts that are in dispute. The Court has determined that additional hearings are not necessary and it has received proposed orders from both parties.

SCCID specifically objected to this Court's Order of December 5, 2011 (Attachment D) awarding attorney's fees in the amount of \$18,431.00, and the Order for Expenses issued by this Court for \$1,138.37 (Attachment E). SCCID filed these objections with the Court as provided for under the September 29, 2006 Order of Chief Justice Toal which established procedures for the processing of indigent payment vouchers.

Attorney Tara Shurling and SCCID first appeared before Judge Newman on May 23, 2011 for a hearing regarding attorney fee, expert and expense requests of Ms. Shurling in this matter. Ms. Shurling made certain requests for expenses, experts, and attorney's fees. At the hearing Judge Newman made some very specific rulings concerning the requests made by Ms.

Shurling. Judge Newman denied her request for fees billed at the rate of \$100 in-court and \$80 out of court setting the rate at \$70 per hour. Judge Newman denied her request for a second attorney from her office and her requests for mileage within Richland County incurred handling matters in this case. He also denied her requests for 3 medical experts, instead authorizing fewer experts. (Tr. 11, l. 24 – p. 12, l. 7) On the issue of attorney fees, it was the position of SCCID that Judge Newman specifically ordered in the May hearing that Attorney Shurling could only bill up to \$10,000 without further approval of the Court. Judge Newman confirmed in the December 28, 2011 hearing this \$10,000 cap. (Tr. 34, ll. 20-22)

This resulting Order from the May 23, 2011 hearing with Judge Newman was signed by him December 1, 2011. (Attachment F). After receiving Judge Newman's Order and this Court's Order of December 5, 2011, SCCID filed a written objection on December 15, 2011 with this Court and Judge Newman. SCCID argued the Order of Judge Newman did not reflect Judge Newman's express ruling from the May 23, 2011 hearing. SCCID specifically objected that paragraph 4 of the Order was not the Court's ruling and that it was inconsistent with paragraph 3 of the Order which accurately reflected the Court's ruling. SCCID personnel also noted in their written objection, and as the transcript reflects, that SCCID had not received a copy of the proposed order from the May hearing before it was submitted to the Court several months later. (Tr. 5, ll. 17-19)

SCCID requested a hearing with Judge Newman to clarify the discrepancy from the ruling of the May 23, 2011 hearing and the December 1, 2011 Order as written. Judge Newman granted this request and the parties appeared before the Court on December 28, 2011. Judge Newman ruled at the December 28, 2011 hearing that the Order that was presented to him by

Attorney Shurling was not consistent with the ruling of the Court at the May 23, 2011 hearing.

Judge Newman specifically found:

[L]eaving the hearing, I issued an oral order placing a \$10,000 cap on the payment of fees without further approval of the Court. Now, fast forward to December when an order was submitted to me, I did not review notes from the May hearing. I looked at the order and assumed that the order was consistent with what was stated by the Court, but I see now upon it being pointed out by SCCID and the order itself that paragraphs three and four are inconsistent and inconsistent with what the Court ordered, and it's also inconsistent with any other order that I've signed the entire year because if an order is made by the Court without further approval, then that's the end of the order without any language allowing for a separate request to be made in excess of the order with the presiding judge as is reflected in paragraph four of this order. So I did not catch that language, and that was brought to my – timely brought to my attention by the department. So I am going to amend the order and delete paragraph four from this order. That would cause this order to be consistent with the proposed order that was submitted to me by Ms. Shurling as far as the amount being up to \$10,000 without further approval of the Court, provided the presiding judge finds the time records to be adequate to support the time and expenditures claimed. Then whatever disarray that may cause as to Judge Manning's order, then let that be. It will be addressed by Judge Manning. Mr. Shurling indicates that she would have appealed the order. I invite an appeal of this. (Tr. 34, l. 20 – p. 35, l. 23)

Judge Newman later continued:

And I appreciate the compliment about me being very careful in reviewing matters but I don't think I was careful enough in reviewing this, perhaps because it was submitted so much later, and I assumed that everything was consistent with specifically what was ordered. And I certainly understand Ms. Shurling was seeking to add the clarifications in order to pave the way for Judge Manning to sign the one that he did days later or –but it's inconsistent with what I ordered from the bench. So, therefore, I'm going to modify the order deleting paragraph four, and we'll see where it goes from there. (Tr. 36, l. 24 – p. 37, l. 7)

When this Court signed the December 5, 2011 Order of Attorney Shurling approving attorney fees in the amount of \$18,431.00, it was not aware of the prior circumstances as disclosed in the hearing of December 28, 2011. This Court signed the December 5, 2011 Order with the understanding that in accordance with paragraph 4 of Judge Newman's order that counsel could submit to the presiding judge a request for payment in excess of the fee cap set by his order. However after it was clarified and presented to this Court, this Court finds that Judge Newman had specifically ruled, consistent with paragraph three of his Order that:

Attorney Shurling may bill SCCID for fees up to \$10,000 without further approval of the Court provided the presiding judge finds her time records to be adequate to support the time expenditures claimed (emphasis added)

Judge Newman during the December 28, 2011 hearing further explained the procedure Ms. Shurling could have followed, but did not, in seeking further approval to exceed the \$10,000 cap:

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

Ms. Shurling: Then, Your Honor---

The Court: And the public defenders came back and said, "Well, Your Honor, we have these other character witnesses who we must have, and they're coming from far and near. We must have them. So please give us more approval." And I yielded, gave them more approval, under the reasonable professional assistance language that you quoted. So it's not at all unusual that once an order is approved setting a cap of a certain amount without further approval, further approval is often sought, but I have found in so many instances when I set a lower cap, somehow or another the expert's fees get -- they get lower and other things tend to happen. (Tr. 39, ll. 1-19)

This Court is not aware of Attorney Shurling requesting a hearing or filing a request to have the cap set by Judge Newman increased prior to submitting the proposed order to me for \$18,431 in attorney fees. This Court cannot issue an order that changes or overrules the ruling of Judge Newman from the May 23, 2011 hearing. If this Court could just automatically exceed the cap set by Judge Newman then the hearing of May 23, 2011 was a useless exercise. Judge Newman in the December 2011 hearing stated:

I can't vacate Judge Manning's order nor can he issue an order that doesn't follow my order. So he can look at that. (Tr. 47, ll. 6-8)

Therefore from the record of this matter it is clear to this Court that Judge Newman does not think this Court's order of December 5, 2011 complies with his Order.

In order to comply with the prior ruling of Judge Newman this Court's Order of December 5, 2011 (Attachment D) is vacated and the total attorney fees awarded to Attorney Shurling shall be \$10,000. This amount was the cap set by Judge Newman. This Court also finds based on the record of this case and data submitted at the December 2011 hearing that \$10,000 is a reasonable fee for this type of case. State's Exhibit 7 (Attachment G) made a part of the record at the December 28, 2011 hearing shows the average fees for the murder/manslaughter category of cases is actually less than \$10,000. This case concluded with the Defendant entering a Alford¹ plea. Judge Newman in setting the \$10,000 cap seemed to take into account Attorney Shurling's prior representation of the defendant when he considered what might be a reasonable fee cap. As Judge Newman stated:

The Court: Well, I certainly recall the May 23rd hearing because I refused to sign some requested orders which led up to Ms. Shurling

¹ North Carolina v. Alford, 400 U.S. 25 (1970)

request for a hearing, and we went into the hearing and it was discussed during the course of the hearing that Ms. Shurling had previously represented Mr. Harley on the P.C.R. matter. Is that right?

Ms. Shurling: Yes, sir, your Honor.

The Court: And, you know, there are—fees issues abound and the question was posed as to, well, if you represented him for two years or three years or whatever number of years on the P.C.R., then how much—how much new or why is—why are we starting it as if you—as if he's a stranger to you as a client? And all of that was addressed in court during the course of that hearing. But leaving the hearing, I issued an oral order placing a \$10,000 cap on the payment of fees without further approval of the Court. (Tr. 34, ll. 7 – 22)

SCCID also objected to the Order of this Court awarding Ms. Shurling expenses in the amount of \$1,138.37 (Tr. 8, l. 20 – l. 6, p. 10). Judge Newman issued an Order filed May 25, 2011 (Attachment H) authorizing certain expenses in this matter. However, in the order Judge Newman struck through what appeared to be the original requests of Ms. Shurling and in his handwriting wrote in specific amounts of expenses authorized by category. He authorized \$500 for lay witness fees and mileage reimbursement as well as expenses related to subpoena service. He further authorized an additional category of expenses not to exceed \$750. The Order further stated that total expenses shall not exceed \$1,250 without prior authorization from the Court. Judge Newman then specifically struck through language stating that counsel could exceed the limits for either category of expense. Ms. Shurling argues that because language remained in the Order that counsel was authorized to seek approval of any balance not covered by this order upon completion of the case (Tr. 45, ll. 12–21) that this Court had the authority to exceed the expense caps set by Judge Newman.

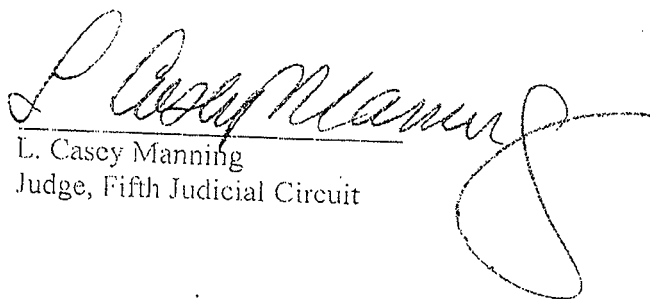
However, this Court finds this one sentence cannot be read in isolation. The Order of Judge Newman, when viewed in its entirety, set specific expense caps and specifically stated that

BOOK 247 OF 0430

\$750 was the cap for general expenses. This Court cannot issue an Order that does not follow the Order of Judge Newman.

IT IS THEREFORE ORDERED that Attorney Shurling is authorized to receive \$10,000 in attorney's fees and a total of \$750 for expenses.

March 15, 2013


L. Casey Manning
Judge, Fifth Judicial Circuit

BOOK 247 OF 0431

Attachment A



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

BOOK 247 OF 0432

1330 Lady Street, Suite 401
 Post Office Box 11433
 Columbia, South Carolina 29211-1433
 Telephone: (803) 734-1343
 Facsimile: (803) 734-1345
 E-Mail: executive@sccid.sc.gov

T. Patton Adams, Esq., Executive Director
 Hugh Ryan, Deputy Director and General Counsel
 Lisa A. Graves, Assistant Director

December 15, 2011

VIA FACSIMILE (803)-576-1772

The Honorable Clifton Newman
 P.O. Box 516
 Kingstree, South Carolina 29556

VIA FACSIMILE (803)-576-1744

The Honorable Casey L. Manning
 P.O. Box 192
 Columbia, South Carolina 29202

RE: Orders regarding payment of fees in State v. Bejay Harley

Dear Judges Newman and Manning:

Attorney Tara Shurling forwarded to Indigent Defense on December 5, 2011 an order dated December 1, 2011 signed by Judge Newman (see attached) and a subsequent order signed by Judge Manning on December 5, 2011 (see attached) concerning the payment of fees in the above referenced case. SCCID Executive Director Patton Adams and I have some serious concerns about this situation. SCCID specifically objects to the payment of attorney's fees in excess of \$10,000.

On May 23, 2011 Mr. Adams and I attended a hearing before Judge Newman regarding requests Ms. Shurling had made for expenses, to include experts, and attorney's fees. At the hearing Judge Newman made some very specific rulings concerning the requests made by Ms. Shurling. Judge Newman denied her request for fees billed at the rate of \$100 in-court and \$80 out of court setting the rate at \$70 per hour. Judge Newman denied her request for a second attorney from her office and her requests for mileage within Richland County incurred handling matters in this case. He also denied her requests for 3 medical experts instead authorizing fewer experts. Specifically on the issue of attorney fees Judge Newman specifically ordered a maximum fee of \$10,000 without further authorization.

After leaving the hearing on May 23rd it was clearly the understanding of both Mr. Adams and I that there was cap on attorney's fees of \$10,000. If more fees were sought it would have to be addressed by the Court just as the initial requests were. Since SCCID was notified of the initial hearing and attended the hearing SCCID assumed it would also be notified of any subsequent requests made to in anyway alter the ruling of

Judge Newman from the May 23rd hearing. SCCID never received any proposed order after the hearing until on December 5th (SCCID did receive some proposed orders before the hearing which is addressed in a subsequent paragraph) when we receive a signed order of Judge Newman that essentially changes the ruling of the Court handed down on May 23rd. In the Judge Newman Order of December 1st Ms. Shurling adds a last paragraph (enumerated as Paragraph (4)) that essentially negates the actual ruling of Judge Newman that is found in paragraph (3). Paragraph (3) specifically sets a cap of \$10,000 without further approval. Then the added paragraph four essentially negates or creates a "loophole" around this cap saying that "counsel may submit to the presiding judge a request for payment of fees in excess of the fee cap set by this Order at the conclusion of her work in this case."

SCCID would certainly have objected to this language if it had been discussed at the hearing or it had been sent to SCCID in the form of a proposed order following the hearing. Ms. Shurling in a response to an email sent to her stated she "was not instructed to serve SCCID with the proposed order I provided to Judge Newman nor does S.C. law require that I do so." In my years in the legal profession it just common courtesy and an expected practice by opposing counsel and members of the judiciary that proposed orders drafted by one party after a contested hearing should be served on opposing counsel. If that procedure had been followed we could have addressed this issue on the front end and not now after the horse is out the barn.

Actually SCCID did receive a proposed order prior to the hearing that was sent by Ms. Shurling's office in which was essentially the same order Judge Newman signed but ended with paragraph three setting the \$10,000 cap (see attached). SCCID submits this is further evidence it was the original intent that a firm cap of \$10,000 was to be in place and that any further request would require further authorization and SCCID would be notified just as we were for the May 23rd hearing.

As far as the Order of Judge Manning is concerned we are not aware of what information he was provided by Ms. Shurling. Certainly just by reading the Order of Judge Newman and the order presented to him it did not make him aware of what occurred in the May 23rd hearing. Obviously SCCID has no idea what information Ms. Shurling may have provided to him.

Therefore based on the foregoing please let this matter serve as an objection by this Office to payment of the voucher submitted in the amount of \$18,431 in accordance with the guidelines established by Chief Justice Toal in her Order of September 29, 2006 regarding voucher payment issues.

Paragraph five (5) of the Order states that:

If there is an objection by the Office of Indigent Defense to the reasonableness of the amount or the amount requested exceeds the hourly rate of 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 hearing, as may be appropriate, or upon the submission of written materials.

SCCID respectfully requests to be heard on this matter on soon as the matter can be scheduled before Judge Newman. Procedurally the matters involving the Order of Judge Newman must be addressed before the issue of the Order of Judge Manning should even be addressed. However SCCID would further object that once the threshold issue of the \$10,000 cap is addressed an additional hearing may be necessary if the Court allows the \$10,000 cap to be exceeded as \$18,431 is well above the typical fee even for a murder case, especially one that ends in a plea without days of trial.

SCCID looks forward to hearing from the Court as to when this matter might be heard.

Sincerely,



J. Hugh Ryan III

CC: Tara Shurling (via facisimile (803)-738-1600)

BOOK 247 OF 0435

Attachment B



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

BOOK 247 OF CASES

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T. Patton Adams, Esq., Executive Director
Hugh Ryan, Deputy Director and General Counsel
Lisa A. Graves, Assistant Director

May 25, 2012

VIA FACSIMILE (803)-576-1744
The Honorable Casey L. Manning
P.O. Box 192
Columbia, South Carolina 29202

VIA FACSIMILE (803)-576-1772
The Honorable Clifton Newman
P.O. Box 516
Kingstree, South Carolina 29556

Re: State v. Bejay Harley

Dear Judges Manning and Newman:

I have received a recent email from Attorney Shurling regarding outstanding issues in the above case wherein she asserts that if SCCID does not pay her in this case by next week she will file a Rule to Show Cause.

I will refrain from making long legal arguments as obviously this letter nor emails are the appropriate forum to litigate the outstanding issues in this matter. Therefore SCCID is requesting a hearing before Judge Manning to resolve this matter. SCCID will ask Judge Manning to rule on the objections of SCCID sent to the Court by letter dated December 15th. SCCID will respectfully request Judge Manning vacate the Order he signed on December 5, 2011 in light of the ruling of Judge Newman in open court on December 28, 2011 amending his Order of December 1st (see portion of attached transcript from December 28th hearing). SCCID strongly believes that when Judge Manning is presented with the facts of this case and the transcript of the December 28th hearing it will be apparent that Judge Newman's Order established a maximum fee of \$10,000 that could only be exceeded by further approval of the Court. SCCID submits that the transcript establishes that Judge Newman felt a \$10,000 cap was in place however he could not just vacate Judge Manning's Order exceeding the cap and the issue of what his ruling meant for Judge Manning's Order would need to be addressed by Judge Manning.

BOOK 247 OF 0437

SCCID looks forward to hearing from the Court as to when this matter might be heard and a final resolution reached.

Sincerely,

A handwritten signature in black ink, appearing to read "Hugh", with a stylized flourish extending to the right.

J. Hugh Ryan III

cc: Tara Shurling, Esq. (via facsimile 803-738-1600)

Attachment C

State of South Carolina

Court of General Sessions

County of Richland

2003-GS-40-06670

The State of South Carolina

-VS-

Bejay Harley

TRANSCRIPT OF RECORD

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

December 28, 2011 hearing

3

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

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.

December 28, 2011 hearing

5

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.

December 28, 2011 hearing

7

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

December 28, 2011 hearing

8

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

December 28, 2011 hearing

9

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

December 28, 2011 hearing

11

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

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 at

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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

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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

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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 23rd

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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.

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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.

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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

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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

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. I ,

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.

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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.

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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,

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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.)

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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.

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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

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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

December 28, 2011 hearing

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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?

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.

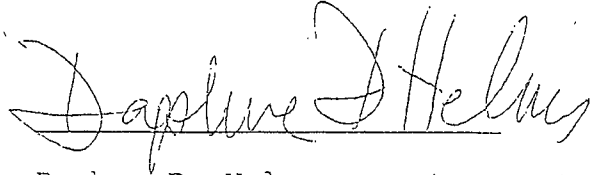
8 The Court: All right. Thank you all.

9 (Whereupon, the proceedings were concluded.)
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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, reading "Daphne D. Helms", written over a horizontal line.

Daphne D. Helms, court reporter

Attachment D

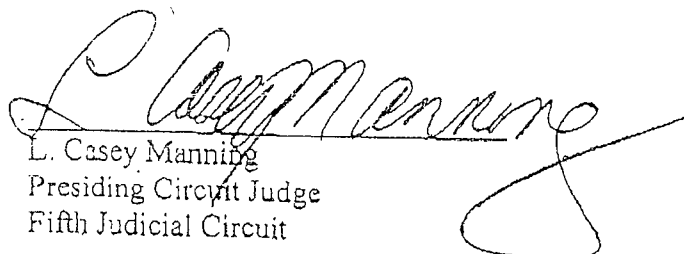
BOOK 247 OF 0493

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND) Warrant #H479537
Indictment # 2003-40-6670

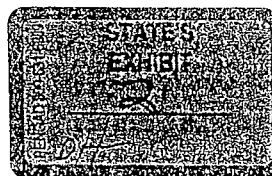
THE STATE OF SOUTH CAROLINA,)
v.)
BEJAY HARLEY,)
Defendant.)

ORDER

INASMUCH AS I have reviewed the time sheets kept by court-appointed counsel in the above-captioned matter and find that the services provided in this case were reasonable and that the time spent by counsel on this case was necessary to provide the Applicant with effective assistance of counsel, I hereby find that counsel should be paid for 261.1 hours out-of-court and 2.2 hours in-court. At a hearing held on May 23, 2011, Judge Clifton Newman, acting as Chief Administrative Judge, approved an hourly fee rate of \$70.00 per hour in this case for both in and out-of-court time pursuant to S.C. Code Ann. §17-3-50 (C) (2003). This case involved a charge of murder. The Defendant entered an *Alford* Plea to voluntary manslaughter on the day this case was scheduled to go to trial by jury. The discovery materials in this case were extensive and the charge involved complex issues concerning proximate causation which necessitated extensive medical research and the use of multiple expert witnesses by the State and the defense. The Defendant was in custody throughout trial counsel's representation. The Defendant had previously been convicted on this same charge. After that judgment was set aside by the trial judge, he entered a plea to voluntary manslaughter which was subsequently overturned in a Post-Conviction Relief action. Preparation of this case for trial required a review of all these previous proceedings by trial counsel. All these factors, justify the amount of time spent on this case by trial counsel. Payment is to be made by the SC Commission on Indigent Defense at the rate of \$70.00 per hour for both out-of-court and in-court time pursuant to previous order of this court for a total of \$18,431.00.


L. Casey Manning
Presiding Circuit Judge
Fifth Judicial Circuit

This 5 day of Dec., 2011.



Attachment E

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS

BOOK 247 OF 0495

STATE OF SOUTH CAROLINA,)

v.)

BEJAY HARLEY,)

DEFENDANT.)

ORDER

Warrant #H479537

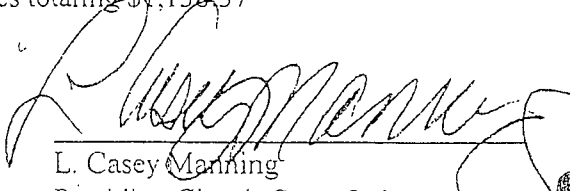
Indictment No. 2003-40-6670

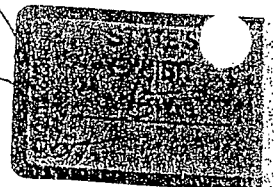
INASMUCH AS I have reviewed the expenses claimed by court-appointed counsel in this action and find that were necessary and appropriate to providing the Defendant with effective assistance of counsel, I find that said expenses should be paid by the South Carolina Commission on Indigent Defense pursuant to §17-3-50(B) and the rules of South Carolina Commission on Indigent Defense. I hereby order that counsel be paid for the following expenses:

Copies (3,620 @ .10 ea.)	362.00
Postage	15.00
Phone charges (collect calls from client)	3.80
WestLaw Online Research Charges	630.07
Copies (Richland Co. Clerk of Court)	10.00
Transcript	117.50
Total	\$ 1,138.37

By previous Order, the Honorable Clifton Newman pre-approved general expenses up to \$1,250.00 for this case. Expenses were authorized not to exceed \$500.00 for lay witness fees and mileage reimbursement as well as expenses related to subpoena service and \$750.00 for travel expense, copy and prints costs, postage, collect phone calls, Westlaw research fees and cost of obtaining various records including, but not limited to, medical records, phone records, SCDC records, criminal records of witnesses and records from the Clerks of Court regarding related matters. Having reviewed Counsel's expense records, the Court finds the total expenses incurred were reasonable and necessary. Therefore, expenses pre-approved in two separate categories in the amounts of \$500.00 and \$750.00 shall be combined under one category; and as they do not exceed the \$1,250.00 pre-approved total they are hereby approved. South Carolina Commission on Indigent Defense is directed to reimburse Counsel for general expenses totaling \$1,138.37

IT IS SO ORDERED.


 L. Casey Manning
 Presiding Circuit Court Judge
 Fifth Judicial Circuit



nunc pro tunc
 Date of Appointment 03/30/09

PAGE 247 OF 0496

Attachment F

BOOK 247 OF 0497

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF RICHLAND)

Indictment # 2003-40-6670

THE STATE OF SOUTH CAROLINA,

v.

BEJAY HARLEY,

Defendant.

ORDER TO PAY ATTORNEY FEES

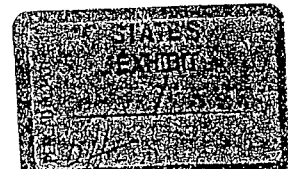
THIS MATTER comes before the Court upon the motion of Tara Dawn Shurling, attorney for the above-named Defendant. Counsel filed a Motion for Funding on May 12, 2011. A hearing on this matter was heard before this Court on May 23, 2011. Present at this hearing was Counsel for the Defendant, Tara Dawn Shurling, T. Patton Adams, IV, Executive Director of the South Carolina Commission on Indigent Defense, and Hugh Ryan, Deputy Director and General Counsel for the South Carolina Commission on Indigent Defense. The Representatives from SCCID were present at this hearing at the request of this Court to provide input concerning the position of SCCID on the issues before the Court.

Mr. Harley is charged with one count of murder and has been declared indigent. Ms. Shurling was appointed to represent the Defendant.

It is reasonable and proper for the Court to award compensation for court-appointed attorneys in excess of the statutory limits and § 16-3-26(B) so specifies. Further this Court finds that in light of the facts of this case, the seriousness of the charge and the extensive experience of the attorney appointed in this matter, a fee in excess of the statutory limits is reasonable and appropriate. The United States Supreme Court has held that a criminal defendant is entitled to reasonably effective assistance of counsel, under the Sixth Amendment guarantee of a right to "counsel." See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). At the May 23, 2011 hearing, this Court found that attorney fees of \$70.00 per hour are reasonable and appropriate on the facts of this case and approved an hourly rate for all out-of-court and in-court time expended by counsel in this matter.

In light of the fee rate set by this Order, it is anticipated that Counsel's total fees will exceed the statutory cap of \$3,500.00. Subject to final approval of Counsel's time records by the

W
#192



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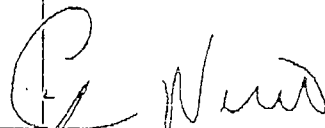
BOOK 247 OF 0498

presiding judge, this Court hereby approves Counsel's fees exceeding the statutory cap. Counsel may submit to SCCID for payment a voucher for fees up to \$10,000.00 without further approval of the Court. Any fees in excess of that cap may be submitted to the presiding judge for approval at the conclusion of this case.

ACCORDINGLY,

1. Court-appointed counsel, Tara Dawn Shurling, is to be paid at a rate of \$70.00 per hour for in-court and \$70.00 per hour for out-of-court services in this case.
2. Attorney Shurling is to be allowed to bill SCCID for out-of-court and in-court legal services provided to this client beginning with the date of her appointment by the Court; March 30, 2009.
3. Attorney Shurling may bill SCCID for fees up to \$10,000.00 without further approval of the Court provided the presiding judge finds her time records to be adequate to support the time expenditures claimed.
4. Counsel may submit to the presiding judge a request for payment of fees in excess of the fee cap set by this Order at the conclusion of her work on this case. Approval of any fees claimed in excess of the cap set in this Order will be left to the discretion of the presiding judge who shall determine whether the amount of time expended on the case was necessary and appropriate and whether the time records kept by Counsel support the amount of time claimed by Counsel.

IT IS SO ORDERED.


Clifton Newman
Chief Administrative Judge
Court of General Sessions
Fifth Judicial Circuit

This 14 day of December, 2011.
nunc pro tunc
Date of Appointment (March 30, 2009)

BOOK 247 OF 0499

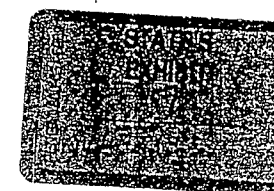
Attachment G

Average Fees for Murder/Manslaughter Cases Fiscal Years 2008 through 2012

Data Includes only cases where Fees were Paid and Final Vouchers were submitted.

		Data		
case_type	cdrDESC	Average Fees	Total Fees	Cases
Felony (Non-Capital)	Accessory After the Fact to Felony A,B,C or Murder	\$ 1,631.35	\$ 146,821.90	90
	Manslaughter/Involuntary	\$ 8,150.00	\$ 16,300.00	2
	Manslaughter/Voluntary-Traffic Related Only	\$ 277.00	\$ 277.00	1
	Murder	\$ 3,893.78	\$ 767,073.90	197
	Murder Homicide by child abuse, (20Y to Life)	\$ 4,163.26	\$ 29,142.80	7
	Murder/Killing by Stabbing or Thrusting	\$ 3,500.00	\$ 3,500.00	1
	Murder/Lynching-First Degree	\$ 1,475.25	\$ 5,901.00	4
Felony (Non-Capital) Total		\$ 3,208.66	\$ 969,016.60	302
Grand Total		\$ 3,208.66	\$ 969,016.60	302

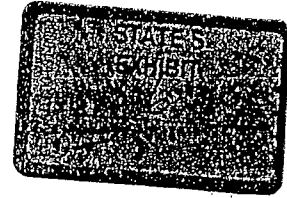
BOOK 247 OF 0500



BOOK 247 OF 0501

Attachment H

BOOK 247 OF 0502



STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

THE STATE OF SOUTH CAROLINA,

v.

BEJAY HARLEY,

Defendant.

IN THE COURT OF GENERAL SESSIONS

Indictment # 2003-40-6670

ORDER FOR GENERAL EXPENSES

2011 MAY 25 AM 9:48
 JEANETTE W. McBRIDE
 C.P. & G.S.

RICHLAND COUNTY
 FILED

THIS MATTER comes before the Court upon the motion of Tara Dawn Shurling, attorney for the above-named Defendant. The Defendant in the above-captioned matter is an indigent represented by court-appointed counsel, Tara Dawn Shurling. Counsel asserts that payment of these expenses is appropriate. See Ake v. Oklahoma, 470 U.S. 68, 76 (1985) ("This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.") By separate Order, this Court has approved expenses for the investigation of this case by a private investigator on the list of investigators approved by SCCID.

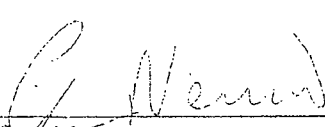
In addition to the cost of investigation, Counsel anticipates the need to subpoena fact witnesses. This Court therefore authorizes her to expend funds not to exceed ~~\$500.00~~ ^{\$500.00} for lay witness fees and mileage reimbursement as well as expenses related to subpoena service. Fees for expert witnesses are addressed by separate Order.

In addition to the expenses outlined above, counsel is authorized to receive reimbursement for travel expenses incurred during the representation of the this client, copy and printing costs, postage.

collect phone calls, Westlaw research fees and the cost of obtaining various records necessary for the preparation of the defense including, *but not limited to*, medical records, phone records, SCDC records, criminal records of witnesses and records from the Clerks of Court regarding related matters. Reimbursement for these expenses shall not exceed \$^{\$950.00}~~1,000.00~~ without additional authorization from this Court.

This Order expressly authorizes payment of any expenses already incurred by counsel prior to the date of this Order provided the total expenditure does not exceed the limits set herein; \$^{\$500.00}~~750.00~~ for lay witness fees and expenses and \$^{\$750.00}~~1,000.00~~ for all other general expenses incurred. Costs for investigative expenses are addressed by separate order. Total expenses shall not exceed \$^{\$1,250.00}~~1,750.00~~ without prior authorization from this Court. ~~Counsel may, if necessary, exceed the limits set for either category of expenses provided that the total expenses claimed may not exceed \$1,750.00 without authorization from this Court.~~ Counsel is authorized to seek approval of any balance not covered by this Order *upon the completion of this case* with the express understanding that Counsel assumes the risk that any such balance will not be paid if not approved by the Court.

IT IS THEREFORE ORDERED that Counsel be authorized to receive payment for expenses from the funds administered by the South Carolina Commission on Indigent Defense as set forth above.


Clifton Newman
Chief Administrative Judge
Court of General Sessions
Fifth Judicial Circuit

This 24 day of April, 2011.

~~MINOR PRO-TYPE~~
Date of Appointment (March 30, 2009)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
 FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)

CASE NO.: 2003-GS-40-6670

v.)

MOTION TO RECONSIDER

BEJAY HARLEY,)

Defendant.)

NOW COMES the undersigned Counsel asking that this Court reconsider its Order dated March 15, 2013, regarding the payment of attorney fee and expenses in this case. In support of this request, Counsel would show unto this Court the following:

1. While the quotes referenced in the Court's Order from the December 28, 2011 hearing are accurate, taken out of context they are misleading. Judge Newman also expressed his frustration with the system and clearly indicated that he did not feel he knew enough about the case to be deciding these issues. At one point during this same hearing he even stated that invited an appeal on this issue. *December 28, 2011 Hearing Tr. p. 35, l. 23 – p. 36, l. 13.*
2. The Proposed Order sent to Your Honor by SCCID, and adopted by the Court, ignores the fact that Judge Newman very clearly indicated that he was going to issue an *amended written order*. While he initially indicated that he and his law clerk would draft the amended order, he subsequently asked me to draft an amended order for him. Counsel did so, and provided that amended order to Judge Newman on January 5, 2012, while expressly reserving her objections to the changes in his original order. That order was never signed and filed, nor was any other order reflecting the changes Judge Newman addressed at the December 28, 2011 hearing.

3. Counsel is well aware of what Judge Newman said at the December 28, 2011 hearing with regard to the order he signed on December 1, 2011. The record of the May 23, 2011 hearing in fact shows that he set a \$10,000.00 cap for attorney fees *without further approval of the Court*. December 28, 2011 Hearing Tr. p. 12, l. 24 - p. 13, l. 2 and Tr. p.34, ll. 20-22. Nowhere in his ruling on that date did he state that the “*further approval*” would have to be obtained *from him* specifically as opposed to “*the Court*” in the broader sense of the phrase. In addition, his oral rulings on that date *did not* include any requirement that such “*further approval of the Court*” be obtained *in advance*.
4. Judge Newman, at the urging of SCCID, denied my request for more than one expert witness in this case despite the fact that the State had announced intentions to produce at least three, and possibly as many as seven or eight, experts on behalf of the State. Counsel’s request for a second lawyer to be appointed in this complex case was denied despite the fact that she demonstrated that the Richland County Public Defender’s Office routinely assigns at least two, and usually three, lawyers to a murder case that is going to trial. Likewise, my request for funding for general expenses was cut by Judge Newman. The fee rate Counsel requested for her attorney fees was denied by Judge Newman, although he did raise the fee rate from the statutory rates to a flat rate of \$70.00 per hour for in-court and out-of-court services. Despite the fact that their recommendations were adopted by Judge Newman on virtually every issue before the Court in the May 23, 2011 hearing, from that date until this case was completed, SCCID did nothing to follow up on the May 23, 2011 hearing. They did not inquire as to why an order had not been filed, nor did they provide Judge Newman with a proposed order. Counsel finally did so, seven months later, because no order reflecting the Court’s rulings had been filed, the case was concluded and Counsel needed an order so that she could bill SCCID and close out her file.

5. Nothing in the proposed order submitted to Judge Newman was in any way inconsistent with his *express* rulings from the bench on May 23, 2011. Since Judge Neman signed the proposed order as submitted by Counsel, she had no notice that any portion of that order was objectionable to him. Out of respect for Judge Newman Counsel does not question that in hind sight he concluded that the proposed order submitted by Counsel did not reflect *his intentions*. The operative point, however, is that *it did reflect the rulings he expressly stated on the record*. Counsel therefore, respectfully submits that Counsel submitted that signed order to Your Honor with her final fee and expense requests in good faith. That Order, which was signed adopted and signed by Judge Newman, was in place at the time this Court approved Counsel's fee and expense requests on December 5, 2011.
6. Not only was the language in the order submitted to Judge Newman *consistent* with his rulings at the May 23, 2011 hearing, but importantly, it was totally consistent with S. C. Code Ann. § 17-3-50(C) and South Carolina precedents on point.
7. Counsel does not dispute that SCCID was inadvertently not copied on her proposed order to Judge Newman in late November, 2011. This oversight is likely attributable to the fact that, at that time, she did not view SCCID as an adversary. *December 28, 2011 Hearing Tr. p. 32, l. 15 – p. 32, l. 18*. Nevertheless, the proposed order sent to Judge Newman was consistent with both His Honor's express rulings from the bench on May 23, 2011 and the law in this State at that time. As noted above, there were several matters that Judge Newman clearly ruled against Counsel on at that May 23, 2011 hearing. When Counsel finally submitted a proposed order to Judge Newman concerning the fee rates and fee cap he ordered at that proceeding, Counsel did not present orders for Judge Newman's consideration which were inconsistent with any of his plain rulings on that date.
8. With all due respect, Counsel submits that Judge Newman's position that any increases in the fee and expense caps would have to be approved by him does not represent a workable

policy on this issue which is likely to occur in many cases. In this particular case, Counsel admittedly managed to finish her work on this file about a month before Judge Newman's tenure as Chief Administrative Judge ended. In other cases, a court-appointed lawyer might not reach a fee or expense cap set by a Chief Administrative Judge until *after* that Circuit Judge is no longer the Chief Administrative Judge for that circuit. A Judge who first set a fee rate and a fee cap might not even be in the same circuit by the time a court-appointed lawyer reached the cap in question. The position taken by Judge Newman would leave the court-appointed lawyer with no recourse for getting a cap raised no matter how much the circumstances of the case warranted such an increase. SCCID has apparently recognized this dilemma in other cases, inasmuch as they have acknowledged that the *current* Chief Administrative Judge would have the authority to raise a fee or expense cap set by a previous Chief Administrative Judge. Where Counsel and SCCID differ in opinion is their belief that an increase in such a cap must be sought *in advance* of exceeding the cap. That position *is not* supported by the law in effect at the time Your Honor signed orders approving my total fees and expenses at the conclusion of this case. As previously argued, § 17-3-50 (C) clearly envisions requests for fees and expenses in excess of caps be evaluated *after* the services are rendered. Our Supreme Court has clearly stated that an award of attorney fees in excess of the § 17-3-50 cap is "**within the sound discretion of the trial judge.**" I am aware that a budget proviso for § 17-3-50 (C) was passed for budget year 2012-2013. That proviso does require advance approval of fees and expenses in excess of the statutory limits set by § 17-3-50 (A) and (B). That proviso however, *was not* in effect at any time during my representation in this case. Counsel's view that this proviso is inconsistent with §17-3-50(C) itself is irrelevant where the provision has no application to this case.

9. With regard to the reasonableness of the total fees requested, I would note the following in addition to the factors addressed in my original memorandum. A new trial was granted to this client by Order filed November 6, 2008. Counsel was court-appointed to represent him on remand to the Court of General Sessions in March 30, 2009. Representing this client in his PCR action certainly made Counsel generally familiar with this file. That prior experience with this case did not however, relieve her of the obligation to prepare this case for trial. The State planned to use at least two additional experts *who had not been involved in the first trial*. The State had indicated that they had interviewed several other experts who might be witnesses for the State. The discovery materials in this case were voluminous. As noted by Counsel during the December 28, 2011 hearing, she had three, nine inch D-ring notebooks of discovery materials in this case which was expected to take a week and a half to try. *December 28, 2011 Hearing Tr. p. 16, ll. 7 – 13*. SCCID focused their argument on the reasonableness of the fees in this case on the fact that the client ultimately pleaded pursuant to *Alford*. Left unanswered by them, is the question of how Counsel, as an Officer of the Court, could ethically not prepare for trial when up until the day the trial was scheduled to begin there was no indication the State would make a plea offer her client would accept.

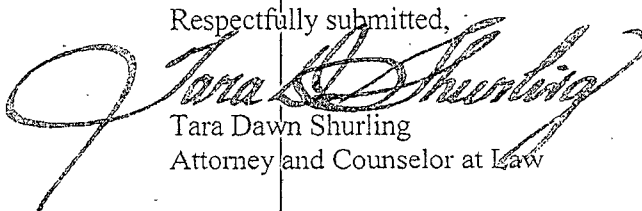
This case involved tremendously complicated medical issues concerning the proximate causation of the victim's death. Therefore, Counsel's preparation for this trial required that she not only be prepared to present the legal issues involved in this case but, also, that she have a working knowledge of the medical information that would come into play at trial and further, that she be prepared to assist her experts in presenting that complex medical information in a manner that could be understood by a jury. In addition, Counsel had to have a good enough command of this medical evidence that she could convincingly argue these critical matters to a jury in her closing argument. Counsel would

humbly suggest that the degree of her preparation in this matter contributed to the fact that the client was ultimately made an offer by the State that has resulted in him being released from prison more than a year ago.

For all the reasons set forth herein, and in the original memorandum dated March 12, 2013, Counsel respectfully submits that the Orders signed by the Court on December 5, 2011, were properly entered and were supported by the detailed time and expense records submitted by Counsel at the time these payment requests for fees and expenses were made. The time expended in this case, and the expenses incurred, were reasonable and necessary to provide this Defendant effective assistance of counsel in this complex murder case. During the time period when Counsel represented this court-appointed client, there was nothing in the law which required advance approval of increases of the cap set forth in S.C. Code Ann. §17-3-50(A). Even though §17-3-50(B) arguably envisioned advance approval of expenses, §17-3-50(C) clearly allowed the trial Judge to approve amounts in excess of the caps set by §17-3-50 (A) and (B) at the end of the case. The budget proviso passed for §17-3-50 for budget year 2012-2013 has no application to this case inasmuch as the entire span of Counsel's representation predated that provision. As previously submitted, our Supreme Court has expressly found that requests for payment of fees in excess of the rates and limits set by statute are addressed to the discretion of the trial judge. *See, Ex Parte Brown*, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (June 11, 2011), citing, *Bailey v. State*, 309 S. C. 455, 464, 424 S.E.2d 503, 508 (1992). Therefore, as the presiding judge, Your Honor had the authority to issue the Orders signed by the Court on December 28, 2011, even if Judge Newman had never issued an order raising the fee rate or the fee cap in this matter. Judge Newman's Order Dated December 1, 2011 was in place when the December 5, 2011 orders issued by Your Honor were signed. While SCCID was apparently not served with the proposed order submitted to Judge Newman, which became his Order dated December 1, 2011, SCCID was not technically an opposing party in litigation and therefore, failure to serve them should not be fatal to this Order

where the proposed Order was totally consistent with the rulings expressed by Judge Newman from the bench at the May 23, 2011 hearing and, most significantly, was consistent with the prior rulings of our Supreme Court on this subject. For all these reasons, Counsel now respectfully asks that this Court reconsider its decision as reflected in the Order filed on March 15, 2013 and attached hereto. Counsel asks for this Court's Order directing SCCID to pay Counsel's fees and expenses as approved by this Court's Orders dated December 5, 2011. Counsel would welcome the opportunity to provide the Court with a proposed order consistent with that ruling.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

Law Office of Tara Dawn Shurling
3614 Landmark Dr., Suite A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

ATTORNEY FOR THE DEFENDANT

This 25th day of March, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

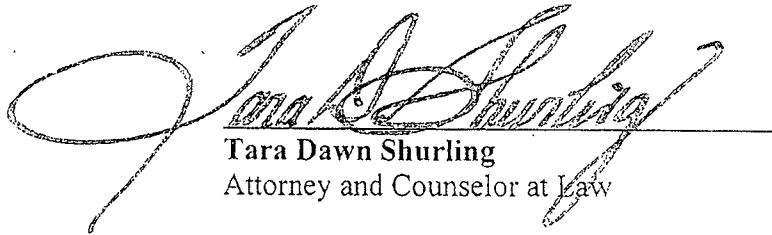
IN THE COURT OF GENERAL SESSIONS
FIFTH JUDICIAL CIRCUIT

2003-GS-40-6670

STATE OF SOUTH CAROLINA)
))
))
BEJAY HARLEY)
))
))
_____)

Certificate of Service

The undersigned attorney hereby certifies that one copy of the Motion to Reconsider Order dated March 15, 2013 in the above-entitled cause has been served upon the Honorable L. Casey Manning, presiding judge, by mail on this 25th day of March, 2013.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE ME this 25th day of

March, 2013

Shirianne Graham (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/2023

FILED
MAR 25 PM 4:15
CLERK OF COURT
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

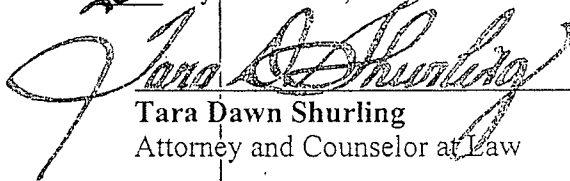
IN THE COURT OF GENERAL SESSIONS
 FIFTH JUDICIAL CIRCUIT

2003-GS-40-6670

STATE OF SOUTH CAROLINA)
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 BEJAY HARLEY)
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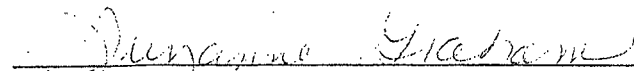
Certificate of Service

The undersigned attorney hereby certifies that one copy of the Motion to Reconsider Order dated March 15, 2013 in the above-entitled cause has been served upon Hugh Ryan, Deputy Director, SCCID, by mail on this 25th day of March, 2013.


 Tara Dawn Shurling
 Attorney and Counselor at Law

SWORN TO BEFORE ME this 25th day of

March, 2013

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/2023

CLARENCE W. McBRIDE
 C.C.P. & C.S.

MAR 25 PM 4:16

FILED
 RICHLAND COUNTY

TDSLAW

From: Manning, L. Casey Law Clerk (Adam Ribock) [CManningLC@sccourts.org]
Sent: Monday, April 29, 2013 11:50 AM
To: 'Hugh Ryan'; Law Offices of Tara D. Shurling (tdslaw@shurlinglaw.com)
Subject: Motion to Reconsider- Bejay Harley

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. Thank you.

*Adam Ribock
Law Clerk to The Honorable L. Casey Manning
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street, Room 214
Columbia, SC 29201
Office: (803) 576-1774
Fax: (803) 576-1744*

4/30/2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
 FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)

CASE NO.: 2003-GS-40-6670

v.)

BEJAY HARLEY,)

Defendant.)

**ORDER GRANTING
 MOTION TO RECONSIDER**

This matter comes before this Court by way of a Motion to Reconsider filed by court-appointed counsel for the Defendant, Tara Dawn Shurling, asking this Court to reconsider its Order dated March 15, 2013, regarding the payment of attorney fees and expenses in this case. In support of that request, Counsel has specifically asked this Court to consider the following factors:

1. While the quotes referenced in this Court's Order from the December 28, 2011 hearing are accurate, taken out of context they are misleading. While Judge Newman made the statements referenced in said order, he also expressed his frustration with the system and clearly indicated that he did not feel he knew enough about the case to be deciding these issues. At one point during this same hearing he even stated that invited an appeal on this issue. *December 28, 2011 Hearing Tr. p. 35, l. 23 – p. 36, l. 23.*
2. The Proposed Order sent to this Court by SCCID, and adopted by the Court, failed to take into account the fact that Judge Newman very clearly indicated that he was going to issue an *amended written order*. While Judge Newman initially indicated that he and his law clerk would draft the amended order, he subsequently asked Counsel to draft an amended order for him. Counsel did so, and provided that amended order to Judge Newman on January 5, 2012, while expressly reserving her objections to the changes in his original order. That order was never signed and filed, nor was any other order reflecting the changes Judge Newman addressed at the December 28, 2011 hearing.
3. The record of the May 23, 2011 hearing in fact shows that he set a \$10,000.00 cap for attorney fees *without further approval of the Court*. *December 28, 2011 Hearing Tr. p. 12, l. 24 - p. 13, l. 2 and Tr. p.34, ll. 20-22.* Nowhere in his ruling on that date did he state that the "*further approval*" would have to be obtained *from him* specifically as opposed to "*the Court*" in the broader sense of the phrase. In addition, his oral rulings on that date *did not* include any requirement that such "*further approval of the Court*" be obtained *in advance*.
4. During the May 23, 2011 hearing, Judge Newman, at the urging of SCCID, denied Counsel's request for more than one expert witness in this case despite the fact that the State had announced intentions to produce at least three, and possibly as many as seven or eight, experts on behalf of the State. Counsel's request for a second lawyer to be

appointed in this complex case was likewise denied despite the fact that she demonstrated that the Richland County Public Defender's Office routinely assigns at least two, and usually three, lawyers to a murder case that is going to trial. In addition, Counsel's request for funding for general expenses was cut by Judge Newman. The fee rate Counsel requested for her attorney fees was denied by Judge Newman, although he did raise the fee rate from the statutory rates to a flat rate of \$70.00 per hour for in-court and out-of-court services. Counsel did not submit a proposed Order to Judge Newman until many months after the May 23, 2011 proceeding. There is no indication that SCCID submitted a proposed order for Judge Newman's consideration following the May 23, 2011 hearing. Counsel apparently submitted her proposed Order to Judge Newman after her work on this file was completed and she needed to close her file and bill this matter to SCCID. The proposed order submitted by Counsel did not grant her funding on any item which had been expressly denied by Judge Newman.

5. Nothing in the proposed order submitted to Judge Newman was in any way inconsistent with his *express* rulings from the bench on May 23, 2011. Inasmuch as Judge Newman signed the proposed order as submitted by Counsel, she had no notice that any portion of that order was objectionable to him. Counsel has not questioned the fact that in hind sight Judge Newman obviously concluded that the proposed order submitted by Counsel did not reflect *his intentions*. She submits, however, that the operative point is that *the order in question did reflect the rulings expressly stated on the record*. Counsel therefore, has respectfully submitted that she submitted the Order signed by Judge Newman to this Court with her final fee and expense requests in good faith. That Order, which was signed adopted and signed by Judge Newman, was in place at the time this Court approved Counsel's fee and expense requests on December 5, 2011.
6. Counsel argues that the language in the order submitted to Judge Newman was not only *consistent* with his rulings at the May 23, 2011 hearing, but importantly, it was totally consistent with S. C. Code Ann. § 17-3-50(C) and South Carolina precedents on point.
7. Counsel has not disputed that SCCID was inadvertently not copied on her proposed order to Judge Newman in late November, 2011. Counsel has submitted that this oversight was likely attributable to the fact that, at that time, she did not view SCCID as an adversary. *December 28, 2011 Hearing Tr. p. 32, l. 15 – p. 32, l. 18*. Nevertheless, she submits that the proposed order sent to Judge Newman was consistent with both His Honor's express rulings from the bench on May 23, 2011 and the law in this State at that time. As noted above, there were several matters that Judge Newman clearly ruled against Counsel on at that May 23, 2011 hearing. When Counsel finally submitted a proposed order to Judge Newman concerning the fee rates and fee cap he ordered at that proceeding, Counsel did not present orders for Judge Newman's consideration which were inconsistent with any of his plain rulings on that date.
8. Counsel has respectfully submitted that Judge Newman's position that any increases in the fee and expense caps would have to be approved by him does not represent a workable policy on this issue which is likely to occur in many cases. Counsel has conceded that in this particular case, she admittedly managed to finish her work on this file about a month before Judge Newman's tenure as Chief Administrative Judge ended. She noted however that in other cases, a court-appointed lawyer might not reach a fee or expense cap set by a Chief Administrative Judge until *after* that Circuit Judge is no longer the Chief Administrative Judge for that circuit. A Judge who first set a fee rate and a fee cap might

not even be in the same circuit by the time a court-appointed lawyer reached the cap in question. It is Counsel's position that the position taken by Judge Newman would leave the court-appointed lawyer with no recourse for getting a cap raised no matter how much the circumstances of the case warranted such an increase. Counsel noted that SCCID has apparently recognized this dilemma in other cases, inasmuch as they have acknowledged that the *current* Chief Administrative Judge would have the authority to raise a fee or expense cap set by a previous Chief Administrative Judge. Where Counsel and SCCID differ in opinion is their belief that an increase in such a cap must be sought *in advance* of exceeding the cap. Counsel argues that the position held by SCCID *is not* supported by the law in effect at the time this Court signed orders approving her total fees and expenses at the conclusion of this case. Counsel argues that the plain language of § 17-3-50 (C) clearly envisions requests for fees and expenses in excess of caps be evaluated *after* the services are rendered. She asks this Court to note that our Supreme Court has clearly stated that an award of attorney fees in excess of the § 17-3-50 cap is "**within the sound discretion of the trial judge.**" See, *Ex Parte Brown*, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (June 11, 2011), citing, *Bailey v. State*, 309 S. C. 455, 464, 424 S.E.2d 503, 508 (1992).

9. Counsel has further recognized that a budget proviso for § 17-3-50 (C) was passed for budget year 2012-2013. She acknowledges that this proviso does require advance approval of fees and expenses in excess of the statutory limits set by § 17-3-50 (A) and (B). As Counsel has noted however, that proviso however, *was not* in effect at any time during her representation in this case.
10. With regard to the reasonableness of the total fees requested, Counsel has asked this Court to take into consideration the following factors in addition to those addressed in her original memorandum dated March 12, 2013. A new trial was granted to this client by Order filed November 6, 2008. Counsel was court-appointed to represent him on remand to the Court of General Sessions in March 30, 2009. Representing this client in his PCR action certainly made Counsel generally familiar with this file. That prior experience with this case did not, however, relieve her of the obligation to prepare this case for trial. The State planned to use at least two experts *who had not been involved in the first trial, in addition to the expert presented at the original trial*. Counsel has advised this Court that the State had indicated to her that they had interviewed several other experts who they might use at trial as witnesses for the State. Counsel advises this Court that the discovery materials in this case were voluminous. As noted by Counsel during the December 28, 2011 hearing, she had three, nine inch D-ring notebooks of discovery materials in this case which was expected to take a week and a half to try. *December 28, 2011 Hearing Tr. p. 16, ll. 7 – 13*. As noted by Counsel, SCCID focused their argument on the reasonableness of the fees in this case on the fact that the client ultimately entered an *Alford* plea in this case. Counsel asserts however that, as an Officer of the Court, she ethically could not fail to prepare for trial when up until the day the trial was scheduled to begin there was no indication the State would make a plea offer her client would accept.

Counsel has asked this Court to consider the fact that this case involved tremendously complicated medical issues concerning the proximate causation of the victim's death. Therefore, she argues, her preparation for this trial required that she not only be prepared to present the legal issues involved in this case but, also, that she have a working knowledge of the medical information that would come into play at trial and further, that she be prepared to assist her experts in presenting that complex medical

information in a manner that could be understood by a jury. In addition, as argued by Counsel, she had to have a good enough command of this medical evidence that she could convincingly argue these critical matters to a jury in her closing argument. Counsel asks this Court to take into account that the degree of her preparation in this matter no doubt contributed to the fact that the client was ultimately made an offer by the State that has resulted in him being released from prison more than a year ago.

This Court has now carefully reconsidered Counsel's position concerning her fee requests in this matter. While mindful of the positions taken by SCCID on the payment requests made by Counsel in this case, this Court now confirms that the Orders signed by this Court on December 28, 2011, were properly entered and were supported by the detailed time and expense records submitted by Counsel at the time these payment requests for fees and expenses were made. This Court finds that its original rulings with regard to the time expended in this case, and the expenses incurred, were proper inasmuch as both the time expended in this case and the expenses incurred were reasonable and necessary to provide this Defendant effective assistance of counsel in this complex murder case. As argued by Counsel, this case was scheduled for trial. This Court was directly privy to the fact that the plea negotiations which lead to the *Alford* plea in this case did not take place until immediately before the trial of this case was set to commence. Therefore, Counsel had clearly prepared this case for trial prior to the entry of the *Alford* plea in this matter.

As argued by Counsel, during the time period when Counsel represented this court-appointed client, there was nothing in the law which required advance approval of increases of the cap set forth in S.C. Code Ann. §17-3-50(A). Even though §17-3-50(B) arguably envisioned advance approval of expenses, at the time the December 5, 2011 orders were issued, §17-3-50(C) allowed the trial judge to approve amounts in excess of the caps set by §17-3-50 (A) and (B) at the end of the case. This Court finds that the budget proviso for §17-3-50 passed for budget year 2012-2013 has no application to this case inasmuch as the entire span of Counsel's representation predated that provision. As previously noted, our Supreme Court has expressly found that requests for payment of fees in excess of the rates and limits set by statute are addressed to the discretion of the trial judge. *See, Ex Parte Brown*, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (June 11, 2011), citing, *Bailey v. State*, 309 S. C. 455, 464, 424 S.E.2d 503, 508

(1992). Therefore, as the presiding judge, this Court had the authority to issue the Orders signed by the Court on December 5, 2011. Accordingly, Counsel's Motion to Reconsider is hereby granted. In so ruling, this Court would specifically note that Judge Newman stated during the December 28, 2011 proceeding that he was leaving it up to this Court to decide how to handle any issues concerning what should be done about this Court's December 5, 2011 orders in light of his findings at the December 28, 2011 proceeding. *December 28, 2011 Hearing Tr. p. 44, ll. 8 – 23*. In making this difficult decision, this Court has relied upon what it finds to be the law in place concerning the approval of fees and expenses in excess of the statutory caps *at the time the December 5, 2011 orders were issued*.

This Court's Order dated March 15, 2013 is hereby amended to direct SCCID to pay Counsel's fees and expenses *as approved by this Court's Orders dated December 5, 2011*. It is the understanding of the Court that Counsel has been paid the portion of her fees and expenses authorized by the March 15, 2013 Order. SCCID is now directed to pay Counsel the balance of the fees and expenses expressly approved by this Court's original Orders dated December 5, 2011.

IT IS SO ORDERED.

L. Casey Manning
Presiding Circuit Court Judge
Fifth Judicial Circuit

This ____ day of _____, 2013

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
THE STATE OF SOUTH CAROLINA,	)	CASE NO. : 2003-GS-40-6670
	)	
v.	)	
	)	ORDER DENYING MOTION TO
BEJAY HARLEY,	)	RECONSIDER
	)	
Defendant.	)	
	)	
_____	)	

This matter is before me on a Motion to Reconsider the Court's Order dated March 15, 2013, regarding attorney fees and costs, filed by Bejay Harley's attorney, Ms. Tara Shurling. After careful consideration, the Court is denying the Motion to Reconsider without oral argument.

IT IS SO ORDERED.

L. Casey Maning
Presiding Circuit Judge
Fifth Judicial Circuit

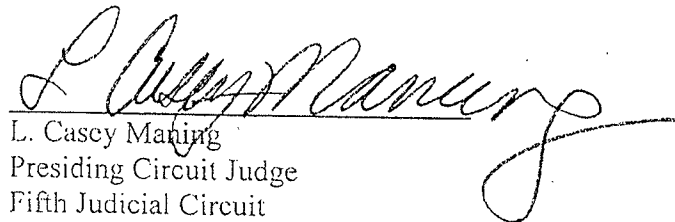
This ____ day of _____, 2013.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
THE STATE OF SOUTH CAROLINA,	)	CASE NO. : 2003-GS-40-6670
	)	
v.	)	
	)	ORDER DENYING MOTION TO
	)	RECONSIDER
BEJAY HARLEY,	)	
	)	
Defendant.	)	

This matter is before me on a Motion to Reconsider the Court's Order dated March 15, 2013, regarding attorney fees and costs, filed by Bejay Harley's attorney, Ms. Tara Shurling. After careful consideration, the Court is denying the Motion to Reconsider without oral argument.

IT IS SO ORDERED.

This 21 day of May 2013.


 L. Casey Mahing
 Presiding Circuit Judge
 Fifth Judicial Circuit

RICHLAND COUNTY
 FILED
 2013 MAY 23 AM 10:45
 J. W. McBRIDE
 C.C.P. & G.S.

STATE OF SOUTH CAROLINA)

THE STATE OF SOUTH CAROLINA)

V.)

BEJAY HARLEY,)

Defendant.)
_____)

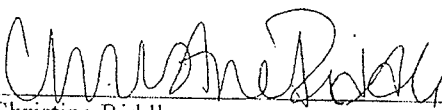
IN THE COURT OF GENERAL SESSIONS

CASE NO. : 2003-GS-40-6670

CERTIFICATE OF SERVICE

I, the undersigned, an employee of the South Carolina Commission on Indigent Defense, do hereby certify that on the 23 day of May, 2013 I did serve the foregoing Order Denying Motion to Reconsider by personally depositing the same in the U.S. Postal Service, with proper postage affixed, to the following addresses:

Tara Shurling
3614 Landmark Drive, Suite A
Columbia, SC 29204


Christine Riddle

South Carolina Commission on
Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29211
(803) 734-1343

May 23, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

BEJAY HARLEY, 310817,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 06-CP-40-3350

ORDER

BARBARA A. SCOTT
C.C.C. & G.S.

2008 NOV - 6 AM 10:52

FILED

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on June 8, 2006. The State filed its Return on February 9, 2007. An evidentiary hearing was convened on September 23, 2008. The Applicant was present and was represented by Tara Dawn Shurling, Esquire. The Respondent was represented by Brian T. Petrano, Assistant Attorney General.

I.
PROCEDURAL HISTORY

WPC
#1

The Applicant is incarcerated in the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. He was indicted by the Richland County Grand Jury at the September 17, 2003, term of court for murder (03-GS-40-6670). On January 4, 2005, the Applicant proceeded to trial by jury and was represented by Jason S. Chehoski, Esquire and Douglas S. Strickler, Esquire. The Applicant was found guilty as charged. The Honorable Reginald I. Lloyd, presiding circuit judge, granted the Applicant's motion for a new trial following his conviction.

On August 15, 2005, the Applicant again proceeded to trial by jury. He was represented in this proceeding by LaNelle DuRant, Esquire, and Jeanette Van Ginhoven, Esquire. On August

16, 2005, following jury selection and pre-trial motions, the Applicant pleaded guilty to the lesser-included offense of voluntary manslaughter. The Honorable Reginald I. Lloyd, presiding circuit judge, sentenced the Applicant to fifteen years imprisonment. The Applicant did not appeal this judgment or sentence.

II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; and
2. Involuntary guilty plea.

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution, were violated before and during his guilty plea.

WAL
#2
At the evidentiary hearing convened in this case, the Applicant more narrowly defined his allegations. This Court accepts those allegations as amendments to his Application for Post-Conviction Relief made pursuant to the evidence adduced at the hearing. See Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006); Rule 15(b), SCRCP. At the evidentiary hearing, the Applicant specifically alleged:

1. Plea counsel was ineffective for failing to hire an independent expert to review the forensic pathologist's autopsy findings.
2. The Applicant's pleas of guilty were not knowingly, intelligently, or voluntarily entered inasmuch as they were entered in reliance on plea counsel's assurances that there was no credible method by which to dispute the forensic pathologist's finding of death by homicide.
3. Plea counsel was ineffective for failing to advise the Applicant that there was evidence available which could be used to impeach the credibility of the pathologist for the State.

4. Plea counsel was ineffective for failing to inform the Applicant that highly prejudicial and improper evidence which was admitted at the first trial would not be heard by the jury at the second trial.
5. The Applicant's pleas of guilty were not knowingly, intelligently, or voluntarily entered inasmuch as they were entered with the belief that highly prejudicial evidence would be heard by the jury if he proceeded to trial again.
6. The Applicant is entitled to a new trial because there was an insufficient factual basis for the plea.

III. EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case, the Applicant presented his own testimony as well as testimony from forensic pathologist Dr. Stanton Kessler and from plea counsel LaNelle DuRant. The Respondent presented testimony from forensic pathologist Dr. Clay Nichols. In addition to this testimony, this Court has before it the exhibits introduced by the Applicant at the evidentiary hearing, a transcript of the Applicant's January and August 2005 trial and plea proceedings, a copy of the records of the Richland County Clerk of Court regarding the subject convictions, and a copy of the Applicant's records with the South Carolina Department of Corrections. What follows below are the findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.* (1985).

IV. FINDINGS OF FACT

For purposes of evaluating this action, this Court would note the following relevant facts. The deceased was the Applicant's girlfriend. On August 16, 2003, the deceased, the Applicant, the Applicant's sister Lashon Ervin, and the Applicant's brother-in-law Dennis Ervin went to a cookout at Daniel Ervin's¹ house. After several hours passed, the cookout ended when the

¹ Daniel Ervin is the brother of Dennis Ervin.

deceased and the Applicant had an altercation. The Applicant left Daniel's home alone. The deceased went to Lashon's and Dennis' house.

Later that evening, Lashon and the deceased were on Lashon's front porch talking when Lashon went inside for a few moments to use the restroom. When she returned, she found the Applicant with the deceased. The deceased was crying and told Lashon that she had been kicked in the head by the Applicant.² The Applicant then allegedly grabbed the deceased under her arms and dragged her down the steps. Lashon called the police, who responded along with EMS. The deceased refused medical treatment, and the police and medical personnel left the scene. The Applicant was not arrested and was allowed to leave. There were no further altercations between the deceased and the Applicant.

WPA #4
The deceased went to sleep on Lashon's couch. She did not respond to Dennis' and Lashon's prompts throughout the day, and EMS was eventually called in the afternoon. At that point in time, the EMS personnel attempted to resuscitate the deceased but could not do so. She was transported to a hospital where further resuscitative efforts were unsuccessful. An autopsy was conducted by Dr. Clay Nichols. Dr. Nichols found a subdural hematoma beneath the deceased's skull which, after discussing the case with police officials, he determined had been caused by blunt force trauma.³ He determined that the cause of death was a homicide.

At the Applicant's trial, cross-examination of Dr. Nichols was primarily limited to determining whether some other source, such as a hypothetical fall by the deceased, caused the blunt force trauma. Importantly, Dr. Nichols was not cross-examined regarding the fact that he may have incorrectly determined that the subdural hematoma was caused by blunt force trauma.

² The Applicant has consistently denied kicking the deceased in the head.

³ In his autopsy report, Dr. Nichols also determined that the deceased gallbladder suffered from mild autolysis. The relevance of this portion of the report will be discussed in more detail *infra*.

At the evidentiary hearing convened in the PCR case, Dr. Stanton Kessler⁴ testified that he had independently reviewed the autopsy report as well as portions of the deceased's brain which were preserved. He made several findings which were contrary to Dr. Nichols' findings. First, Dr. Kessler determined that the autopsy was improperly conducted because Dr. Nichols failed to completely shave the scalp of the deceased. He testified that in order to make a proper determination of blunt force trauma as the cause of a subdural hematoma of this type, there should be some evidence of an external injury.⁵ The autopsy report in this case notes no physical trauma to the deceased's head despite her reported claim that she had been kicked in the face. Second, Dr. Kessler found that the deceased suffered from a condition called an arteriovenous malformation ("AVM"). He testified that this condition causes random bleeding in the brain from those individuals who suffer from it, and that the bleeding caused by an AVM is unrelated to trauma. Third, Dr. Kessler noted that subdural hematomas caused by trauma to the head are almost always associated with some external injury to the head or structures surrounding the brain. Fourth, Dr. Kessler found that the deceased was also bleeding in much deeper portions of her brain. He determined that this bleeding was caused by the AVM, and that the bleeding from the AVM caused the subdural hematoma. These facts led Dr. Kessler to the conclusion that the deceased had died of natural causes.

V.
STANDARD OF REVIEW

⁴ Dr. Kessler's curriculum vita was introduced as an Applicant's Exhibit during the evidentiary hearing. His impressive credentials and experience speak for themselves. This Court also notes that he has served as an expert witness for the Fifth Circuit Solicitor's Office on previous occasions.

⁵ Dr. Nichols testified at trial that there was no evidence of an external injury, but that this fact did not trouble him. See January Tr. p. 446, line 10-p. 447, line 3. His testimony before this Court, given after he heard Dr. Kessler's testimony and conclusions, was consistent with his testimony given at the trial.

The Sixth Amendment guarantees every criminal defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In the context of a guilty plea, the operative question becomes whether a defendant, but for counsel's errors and omissions, would have exercised his right to trial. Hill v. Lockhart, 474 U.S. 52 (1985). Further, the Applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that he would have insisted on proceeding to trial on the matter instead of pleading guilty. Porter v. State, 368 S.C. 378, 629 S.E.2d 353 (2006). In other words, a defendant who pleads guilty on the advice of counsel may collaterally attack the voluntariness of his plea only by showing (1) that counsel was ineffective, and (2) that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997). A guilty plea, along with the resulting waiver of fundamental constitutional rights, is valid only if made voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 534 S.E.2d 623 (1999). In these Post-Conviction Relief proceedings, the Applicant has the burden of proof to establish that he is entitled to relief by a preponderance of the evidence. Rule 71.1(e), SCRCP.

VI. CONCLUSIONS OF LAW

The Applicant raises four substantive grounds for relief: (1) defense counsel was ineffective for failing to sufficiently investigate the validity of Dr. Nichols' conclusions; (2) defense counsel was ineffective for failing to advise the Applicant that several inadmissible and prejudicial statements could be excluded before the jury heard them if he proceeded to trial again; (3) that defense counsel failed to advise him that if he went to trial there was available evidence which could be used to impeach Dr. Nichols; and (4) there was not a factual basis for his plea of guilty to voluntary manslaughter. For the reasons that follow, this Court finds that the

Applicant is entitled to a new trial on the first three grounds, but finds that relief on the third ground should be denied.

A. Failure to Investigate Dr. Nichols' Findings

The Applicant alleges that defense counsel was ineffective for failing to review Dr. Nichols' autopsy report in detail. The Applicant further alleges that defense counsel should have hired an independent expert to review Dr. Nichols' findings. The Applicant argues that had defense counsel done so, he would not have pleaded guilty but would have insisted upon proceeding to trial. Consequently, the Applicant argues that he is entitled to a new trial. This Court agrees.

*1/20/02
#7*
The autopsy report contains an admitted error. Dr. Nichols found in his autopsy report that the "gallbladder demonstrates mild autolysis." The deceased did not have a gallbladder at the time of her death. It had been surgically removed in 1994. According to Dr. Kessler, Dr. Nichols would have had to actually see the gallbladder to make the determination that it was beginning to autolyze. The autopsy also noted that the gallbladder was free of gallstones. Dr. Kessler testified that such a determination would have required that Dr. Nichols physically examine the gallbladder and dissect it.

Defense counsel has admitted that, prior to trial, she had in her possession all of the medical records of the deceased. There is no indication that she caught this error. As discussed below, Dr. Nichols testified at the PCR hearing that the portion of the autopsy report dealing with the deceased's gallbladder was the result of a word processing mistake – the improper use of a template. That testimony is problematic, if not highly suspect. So, while the gallbladder issue had nothing to do with the actual cause of death; and, while, once explained to the jury, could conceivably have been discounted in its significance; it was a glaring error in a document

that virtually all people would presume to be one where accuracy is of the most extreme importance. Again, as discussed below, it would have been fodder for cross examination. More significantly, however, it raised red flags about the accuracy of the methodology of the autopsy and the conclusions in the report.

When combined with what the independent forensic pathologist has found and given in PCR testimony, it is troubling that the defense attorney did not question the autopsy more strenuously. Again, defense counsel's PCR testimony gives no indication that she was aware of this error prior to advising her client to plead guilty to voluntary manslaughter.⁶

WJL
#8

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citing Nance v. Ozmint, 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006) (footnote 8)). This includes the failure to obtain favorable expert witnesses where they would be available. Id.

The court had the benefit of observing both pathologists in the PCR hearing, and was far more impressed by the testimony of Dr. Kessler. In contrast, the testimony of Dr. Nichols did not project the same level of depth or explanation. Dr. Kessler's testimony clearly can be said to create reasonable doubt as to the cause of death.

Since the deceased died from a massive subdural hematoma, the lack of evidence of external trauma called upon defense counsel to review and have detailed expert evaluation of the medical records to determine whether there was any indication that the deceased suffered from any preexisting conditions that may have caused the hematoma. In addition, the examination of

⁶ A comprehensive review of the cross-examination of Dr. Nichols at the January trial reveals that the Applicant's former attorneys were apparently unaware of Dr. Nichols' mistake concerning the gallbladder inasmuch as the issue was never brought up during their cross-examination of this key witness.

the deceased's medical records would have led to the discovery of the major flaw in Dr. Nichols' autopsy report. The discovery of the flaw, in turn, should have led to the hiring of a private expert to review Dr. Nichols' findings.

Defense counsel did testify that she spoke by phone to an independent expert. Therefore, she recognized the need for such an evaluation. Without being too critical, the phone conversation was simply not enough in a case of this magnitude. There had to be a more thorough review. Inasmuch as defense counsel failed to take these necessary steps, she was ineffective.⁷

Exhibit #9
Had Dr. Kessler or someone of his professional caliber been engaged as an expert witness, such an endeavor would likely have been very fruitful for the Applicant's defense. Dr. Kessler essentially repudiated all of Dr. Nichols' findings. The Applicant had already proceeded to trial once without *any* substantive evidence disputing Dr. Nichols' conclusions. Based on the evidence before this Court, the Applicant was given no reason to hope his defense would be any stronger at his retrial. This Court is convinced, however, that had the Applicant been advised that he could convincingly challenge Dr. Nichols' findings, he would have proceeded to trial instead of pleading guilty to voluntary manslaughter. Therefore, the Applicant is entitled to a new trial.

This Court recognizes that hiring a private expert to review the findings of the State's expert witness is not required of defense counsel in all cases, nor should it be. The facts of this case, however, required it.⁸ Furthermore, it is clear that had the Applicant been apprised of his

⁷ Defense counsel did testify that she had a brief conversation on the phone regarding the evidence of external injuries with another forensic pathologist. The fact that defense counsel took this minor step to review the autopsy report and challenge Dr. Nichols' findings does not absolve her of the duties to take the more in-depth steps outlined above.

⁸ It should be noted that the blame does not fall squarely on defense counsel's shoulders, as the Applicant had previously been represented by two other members of the Public Defender's Office, including the Chief Public Defender, neither of whom apparently recognized the problems with Dr. Nichols' autopsy report. Nevertheless, the

ability to challenge not only the reliability of Dr. Nichols' methodology but also the validity of his conclusion of a homicide, he would not have pleaded guilty but would have instead proceeded to trial.⁹ Therefore, the Applicant is entitled to his requested relief on this ground.

B. Failure to Advise the Applicant that Evidence Existed to Impeach the Credibility of Dr. Nichols if the Applicant Elected to Take His Case to Trial a Second Time

Dr. Nichols testified at the PCR proceeding. When questioned about the obviously inapplicable reference to the gallbladder in the autopsy report, Dr. Nichols admitted that he had the deceased's medical records when he did the autopsy and his subsequent report – records which revealed that her gallbladder had been removed years before. He attempted to explain away the error by asserting that he and most pathologists use template forms for autopsy reports and explained that he simply failed to change this part of the "template" to fit the facts of this case based upon his actual observations during the prosecution.

*W/pe
#10*

PCR counsel effectively cross-examined Dr. Nichols concerning his assertion that the erroneous gallbladder information came from a standard template. PCR counsel suggested that such templates would refer to normal or "unremarkable" finding for a particular body part and questioned Dr. Nichols as to how and why any form text for an autopsy would have canned language for a particular abnormal condition of an organ. This line of questioning effectively demonstrated that the reliability of Dr. Nichols' professional opinion could have been attacked.

The Applicant was not advised that the error existed in the autopsy report or that it could have been used to his advantage in an effort to create reasonable doubt concerning Dr. Nichols' professional opinion concerning the cause of the deceased's death. The Applicant has testified

failure of those attorneys to discover the discrepancies in the report, and to consult with an independent expert, does not absolve defense counsel of her duty to do the same.

⁹ This Court would note that it does not, and need not, determine whether Dr. Nichols or Dr. Kessler came to the "correct" conclusion regarding the cause of the deceased's death. This Court simply finds that the Applicant was entitled to have a jury make that determination, and that he was improperly deprived of his ability to have the jury do so due to defense counsel's errors and omissions.

that had he known about this information, and the use to which it could have been put at a new trial, he would not have pleaded guilty. This is credible and supports the Applicant's entitlement to a new trial.

C. Failure to Advise the Applicant that Prejudicial Testimony Would not Be Heard by the Jury if He Proceeded to Trial Again

The Applicant alleges that defense counsel was ineffective for failing to advise him that very prejudicial statements made by witnesses testifying at his first trial would not be made in front of the jury if he proceeded to trial again. The Applicant further alleges that defense counsel failed to advise him that such matters could be addressed by a motion *in limine* out of the hearing of the jury prior to his second trial. The Applicant argues that had defense counsel advised him of his ability to prevent the jury from hearing these statements, he would not have pleaded guilty but would instead have proceeded to trial. Therefore, the Applicant argues that he is entitled to a new trial on this ground as well. This Court agrees.

On at least four occasions during the January trial, the Applicant's attorneys objected to testimony given by four of the State's witnesses about prior altercations between the Applicant and the deceased that were stricken by Judge Lloyd. See January Trial Tr. p. 217, lines 11-23 (Dennis Ervin); p. 244, lines 12-19 (Daniel Ervin); p. 376, lines 7-13 (Julie Courtney); p. 466, line 19-p. 467, line 23 (Investigator Joe Smith).¹⁰ Of particular import to this Court is the testimony of the deceased's mother on direct examination by the State:

Q: When did [the deceased] continue to see [the Applicant]?

A: Well, sometimes she would say she's not seeing him anymore because the way she would look, she would, you know, *he would beat her up all of the time*. She would have black—

Mr. Chehoski: Objection.

The Court: Sustained.

¹⁰ There are also multiple additional instances where objections were raised to prejudicial testimony and those objections were sustained by the trial court, but the trial court did not specifically instruct the jury to disregard the testimony.

January Trial Tr. p. 376, lines 7-13 (emphasis added). Defense counsel moved for a mistrial in response to this testimony, but Judge Lloyd elected to give the jury a curative instruction to disregard the testimony. See January Trial Tr. pp. 376-406.

In addition to the prejudicial and improper testimony which was struck by the trial court, the State also introduced evidence that the Applicant had assaulted the deceased on three prior occasions before the night of the incident at Lashon Ervin's home. At the outset of the Applicant's second trial, the parties and the presiding judge engaged in a long colloquy as to the admissibility of these prior incidents. See Plea Tr. p. 66-76. During the State's presentation of evidence during the Applicant's plea, it was revealed that Judge Lloyd would not have permitted the State to introduce evidence on two out of the three prior incidents which had been admitted in the January trial. Plea Tr. p. 86, line 22-p. 87, line 8.

Wife #12

It is unclear whether the Applicant understood the full import of Judge Lloyd's decision regarding the three prior incidents before he pleaded guilty. What is clear, however, is that the Applicant was not apprised of his ability to keep the jury from hearing the other statements which were objectionable and stricken during the January trial. Given the extremely prejudicial effect of this evidence, the attorney had a duty to make sure that the Applicant comprehended Judge Lloyd's ruling on the evidence of prior bad acts. It is entirely probable that the Applicant was still under the impression that the jury would hear that he had beat the deceased up "all the time." In short, the Applicant was apparently given no reason to believe that Judge Lloyd's ruling was going to be of any real benefit to him. Without adequate advice concerning his ability to attack certain evidence at a new trial, and the methods available for doing so, the Applicant had every reason to fear a new trial would have little chance of ending differently from the first.

Instead of taking steps to correct the Applicant's understandably mistaken impression of what would occur at the second trial, defense counsel failed to advise him that these matters could be resolved prior to the trial and out of the jury's hearing.¹¹ This was error on the part of defense counsel. Consequently, the Applicant is entitled to a new trial on this ground.

C. Insufficient Factual Basis for the Plea

The Applicant argues that he is entitled to a new trial because there was an insufficient factual basis for his plea. In particular, the Applicant directs this Court to the factual recitation of the plea where the State noted that he denied kicking the deceased in the head. See Plea Tr. p. 84, lines 20-24. He also argues that his action of slapping the deceased and dragging the deceased down the stairs at Lashon's house was, by all accounts, insufficient to cause the subdural hematoma. Therefore, he argues that there was an insufficient factual basis for the plea.

Before a guilty plea may be accepted, the court must be certain that the defendant understands the charges against him, the consequences of the plea, and that there is a factual basis for the plea. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 899 (1975). So long as there is a sufficient factual basis to support the crime for which the defendant was indicted, a defendant may plead guilty to any lesser-included offense. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000). A court may accept a plea of guilty to voluntary manslaughter as a lesser-included offense of murder even if there is no evidence of heat of passion or legal provocation. Id.

While this Court acknowledges that there is a proximate causation issue with the Applicant's plea of guilty, this Court finds that there was a sufficient factual basis for the Applicant's plea in the recitation put forth. In order for the court to determine otherwise would

¹¹ Defense counsel testified that she could not remember if she gave the Applicant this advice. The Applicant unambiguously testified that she did not.

WPC
#13

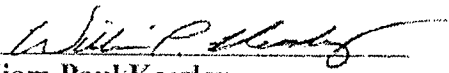
require the court to decide the proximate cause of death. That is inappropriate for the court to do in this proceeding. Consequently, the Applicant's requested relief on this ground is denied.

**VII.
CONCLUSION**

This Application for Post-Conviction Relief is hereby granted. The Applicant's conviction and sentence are vacated, and this matter is remanded to the Richland County Court of General Sessions for a new trial.

IT IS SO ORDERED.

This 29th day of October, 2008.
Lexington, South Carolina.



William Paul Keesley
Presiding Circuit Judge
Fifth Judicial Circuit

#14

The South Carolina Court of Appeals

Ex Parte: Tara Dawn Shurling, Appellant,

In Re:
State of South Carolina, Respondent,

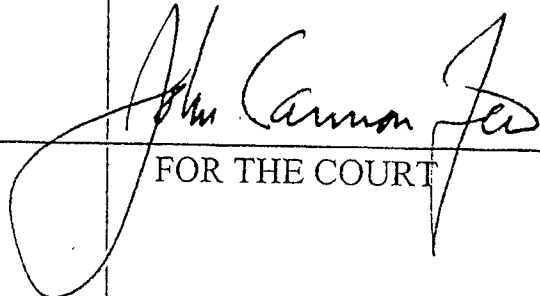
v.

Bejay Harley, Defendant.

Appellate Case No. 2013-001298

ORDER

Respondent has filed a motion to dismiss this appeal, alleging Appellant's initial brief fails to comply with various South Carolina Appellate Court Rules. Despite the shortcomings of Appellant's initial brief, we deny the motion to dismiss. However, Appellant will file an amended initial brief within fifteen days of this order containing only the following amendments: (1) references to the record as provided in Rule 208(b)(4), SCACR, and (2) a statement of the case that does not include contested matters, pursuant to Rule 208(b)(1)(C), SCACR. While this Court recognizes an appellate brief's argument section is usually divided by individual issue, Appellant is one of the most experienced attorneys that practices before this Court, and we decline to force Appellant to rewrite her initial brief. Finally, this Court recognizes this case has suffered extensive delay due to numerous extensions; therefore, if Appellant fails to submit an amended initial brief or otherwise comply with this order within fifteen days, this appeal will be dismissed.


FOR THE COURT

FILED
4/16/14

Columbia, South Carolina

cc:

Tara Dawn Shurling, Esquire
James Hugh Ryan, III, Esquire

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Voucher for Criminal, PCR, SVP Case**Client Name :** Bejay Harley**SCCID Number :** H-2009-03320**Voucher ID :** 44453**Case Name :** State of South Carolina v. Bejay Harley

☐ **This is an Interim voucher for expenses only.** All of the attorney fees associated with this case will be saved and transferred to a new voucher. The new voucher will be displayed below this one on your "My Cases" page.

Attorney Fees [View Tutorial](#)**Criminal, PCR, SVP Case Fees (Statutory Rate - \$40 out-of-court, \$60 in-court)**261.10 Hours at \$70.00 per hour for Out-of-Court Services. **\$18,277.00**002.20 Hours at \$70.00 per hour for In-Court Services. **\$154.00****Total Fees: \$18,431.00**

MAXIMUM FEE ALLOWED is \$3,500 in Felony cases, \$1,000 in Misdemeanor and PCR cases, and \$1,750 in SVP cases, unless otherwise approved by the court.

Attorney Expenses [View Tutorial](#)

NOTE Fax bills/orders to: **866-227-6713** or E-mail bills/orders to: **CC@SCCID.SC.GOV**
For questions, please call Jean Tinder or Lori Frost at 803-734-1343

Long Distance Telephone Calls **\$0.00**Psychiatric Examination * **\$0.00**Other Experts * Type: Add Another Expert **\$0.00**Translator * Language: Select a Language **\$0.00**Investigative Services * **\$0.00**Polygraph Examination * **\$0.00**Extraordinary Travel Expenses * **\$0.00**Advanced Payment for Expenses * **\$0.00**Transcript Copies * **\$117.50**Other Expenses (Explain) * **\$1020.87**

Copies 3,620 @ .10 ea = \$362.00; Postage \$15.00

Phone Charges (collect calls) \$3.80;

Westlaw Online Research \$630.07

Copies (Richland County Clerk of Court) \$10.00

* Requires pre approval from the court. Mail or FAX original or certified copy of order granting prior approval of court — order must state maximum expense allowable without subsequent order. Expenses must be approved prior to being incurred in order to be paid. Documentation (invoices, etc.) must be submitted showing that the services for which reimbursement is to be made, were actually incurred. All expenses are not reimbursable! Please read Guidelines and Regulations concerning payment of expenses.

NOTE Fax bills/orders to: **866-227-6713** or E-mail bills/orders to: **CC@SCCID.SC.GOV**
For questions, please call Jean Tinder or Lori Frost at 803-734-1343

Total Expenses: \$1,138.37Less amount paid by defendant or by any person on Defendant's behalf: **\$0.00**

Click to calculate total fees and expenses.

Calculate**Total Fees and Expenses Requested on this Voucher:****\$19,569.37**

Attorney: Tara Shurling**Defendant:** Bejay Harley**SCCID Number:** H-2009-03320

	Date	Activity for Bejay Harley	Out-of-Court Time	In-Court Time
1	04-02-09	Receive and review Order of Appointment dated 3/30/09, phone messages from RCPD's office re appointment.	0.10	0.00
2	04-13-09	Phone call from client	0.10	0.00
3	04-14-09	Conf w/ JAT re his meeting w/ Client @ ASGDC on my behalf.	0.20	0.00
4	06-25-09	Review phone message from client's brother in law re case.	0.10	0.00
5	07-08-09	Phone call from client's brother in law re case.	0.10	0.00
6	07-14-09	Draft letter to Luck Campbell with a plea offer from client.	0.60	0.00
7	07-15-09	Letter to Luck Campbell - final draft.	0.30	0.00
8	07-15-09	Review file	0.20	0.00
9	08-24-09	Review message from Dr. Kessler.	0.10	0.00
10	09-10-09	Receive and Review letter from client	0.30	0.00
11	10-21-09	Phone call from client.	0.10	0.00
12	10-22-09	call from client	0.10	0.00
13	10-22-09	Letter to Judge J. Michelle Childs.	0.40	0.00
14	10-22-09	Letter to Kathryn Luck Campbell, Assistant Solicitor.	0.30	0.00
15	10-22-09	Bond motion drafted and filed.	1.50	0.00
16	10-26-09	Conf. w/ JAT re his meeting w/ client @ ASGDC. TDS time only	0.20	0.00
17	10-29-09	Review phone message from Solicitor re victim, meeting on 11/4/09	0.10	0.00
18	11-04-09	Conference with Luck Campbell, Assistant Solicitor	0.80	0.00
19	11-08-09	Prep for bond hearing.	0.50	0.00
20	11-09-09	Preparation for hearing and waiting for hearing to start	1.00	0.00
21	11-09-09	Court Appearance for Bond Hearing	0.00	0.20
22	11-09-09	Motion review, review notes re client's background, & meeting with client	0.60	0.00
23	11-17-09	Letter to client	0.30	0.00
24	12-10-09	Letter to client	0.30	0.00
25	01-05-10	Review phone message from client.	0.10	0.00
26	01-07-10	Phone call from Dr. Kessler.	0.10	0.00
27	01-18-10	Letter to client	0.50	0.00
28	01-18-10	Ltr to Luck Campbell w/ Bond Order and questions re: plea and experts	0.50	0.00
29	03-10-10	Review phone message from client.	0.10	0.00
30	03-23-10	Letter to Solicitor Campbell.	0.40	0.00
31	03-29-10	Letter to Luck Campbell, Assistant Solicitor	0.40	0.00
32	05-13-10	Meeting w/ Dr. Kessler @ office.	1.20	0.00
33	05-20-10	Document review.	0.50	0.00
34	05-24-10	Call to Luck Campbell	0.10	0.00

SCCID Number: H-2009-03320

	Date	Activity for Bejay Harley	Out-of-Court Time	In-Court Time
1	04-02-09	Receive and review Order of Appointment dated 3/30/09, phone messages from RCPD's office re appointment.	0.10	0.00
2	04-13-09	Phone call from client	0.10	0.00
3	04-14-09	Conf w/ JAT re his meeting w/ Client @ ASGDC on my behalf.	0.20	0.00
4	06-25-09	Review phone message from client's brother in law re case.	0.10	0.00
5	07-08-09	Phone call from client's brother in law re case.	0.10	0.00
6	07-14-09	Draft letter to Luck Campbell with a plea offer from client.	0.60	0.00
7	07-15-09	Letter to Luck Campbell - final draft.	0.30	0.00
8	07-15-09	Review file	0.20	0.00
9	08-24-09	Review message from Dr. Kessler.	0.10	0.00
10	09-10-09	Receive and Review letter from client	0.30	0.00
11	10-21-09	Phone call from client.	0.10	0.00
12	10-22-09	call from client	0.10	0.00
13	10-22-09	Letter to Judge J. Michelle Childs.	0.40	0.00
14	10-22-09	Letter to Kathryn Luck Campbell, Assistant Solicitor.	0.30	0.00
15	10-22-09	Bond motion drafted and filed.	1.50	0.00
16	10-26-09	Conf. w/ JAT re his meeting w/ client @ ASGDC. TDS time only	0.20	0.00
17	10-29-09	Review phone message from Solicitor re victim, meeting on 11/4/09	0.10	0.00
18	11-04-09	Conference with Luck Campbell, Assistant Solicitor	0.80	0.00
19	11-08-09	Prep for bond hearing.	0.50	0.00
20	11-09-09	Preparation for hearing and waiting for hearing to start	1.00	0.00
21	11-09-09	Court Appearance for Bond Hearing	0.00	0.20
22	11-09-09	Motion review, review notes re client's background, & meeting with client	0.60	0.00
23	11-17-09	Letter to client	0.30	0.00
24	12-10-09	Letter to client	0.30	0.00
25	01-05-10	Review phone message from client.	0.10	0.00
26	01-07-10	Phone call from Dr. Kessler.	0.10	0.00
27	01-18-10	Letter to client	0.50	0.00
28	01-18-10	Ltr to Luck Campbell w/ Bond Order and questions re plea and experts	0.50	0.00
29	03-10-10	Review phone message from client.	0.10	0.00
30	03-23-10	Letter to Solicitor Campbell.	0.40	0.00
31	03-29-10	Letter to Luck Campbell, Assistant Solicitor	0.40	0.00
32	05-13-10	Meeting w/ Dr. Kessler @ office.	1.20	0.00
33	05-20-10	Document review.	0.50	0.00
34	05-24-10	Call to Luck Campbell	0.10	0.00

35	05-24-10	2nd call to Solicitor's office.	0.10	0.00
36	05-24-10	Review PCR notes.	0.50	0.00
37	05-28-10	Conference with client at ASGDC; 1/2 travel time (other 1/2 billed to another client file)	1.00	0.00
38	06-10-10	Review phone message from PD's office re my request to come in to review their file.	0.10	0.00
39	06-10-10	Letter to Doug Strickler, hand delivered, cc: Teresa Grissom. Copy also mailed.	0.30	0.00
40	06-10-10	Review phone message from L Campbell's Asst., they are not avail. for me to come in to review their file.	0.10	0.00
41	06-28-10	Receipt and review of letter from Douglas Strickler, Esq.	0.10	0.00
42	07-16-10	Conference w/ JAT re his meeting w/ client @ Alvin S. Glenn Detention Center, TDS time only	0.30	0.00
43	08-12-10	Email to Luck Campbell.	0.20	0.00
44	08-12-10	Phone call from Luck Campbell.	0.10	0.00
45	08-18-10	Research re potential speedy trial motion.	0.10	0.00
46	08-26-10	Preparation of Motion for a Speedy Trial or in the Alternative to Dismiss.	1.00	0.00
47	08-26-10	Conference w/ JAT re his meeting w/ client @ ASGDC TDS time only	0.30	0.00
48	08-26-10	Letter to Judge Cooper enclosing copy of Motion for Speedy Trial (Hand delivered)	0.40	0.00
49	08-31-10	Phone call from ASOL Campbell.	0.10	0.00
50	09-02-10	Notes re motion hearing.	0.10	0.00
51	09-07-10	Notes re status conference	0.10	0.00
52	09-10-10	Updating last action taken.	0.10	0.00
53	09-16-10	Phone call from client	0.10	0.00
54	09-22-10	Conference w/ JAT re JAT's conversation w/ ASOL Campbell. TDS time only	0.10	0.00
55	11-17-10	Letter to client	0.30	0.00
56	12-07-10	Preparation of Motion for Dismissal of Murder Charge with Certificate of Service (Motion served on L Campbell by hand delivery)	0.50	0.00
57	12-09-10	Letter to client	0.30	0.00
58	01-03-11	Letter to Clerk of Court, Richland County notifying them that Wally Fayssoux, Esq. will be co-counsel.	0.20	0.00
59	01-07-11	Email to Stacy Sheppard, Ct. Reporter re PCR transcript.	0.20	0.00
60	01-13-11	Email from Stacey Sheppard, Court Reporter re PCR transcript.	0.10	0.00
61	01-14-11	Conference with client at ASGDC	1.80	0.00
62	01-14-11	Phone Call from Solicitor's Office	0.10	0.00
63	01-14-11	Phone Call to Dana Outen	0.10	0.00
64	01-14-11	Review of message from Solicitor's office	0.10	0.00
65	01-31-11	Receipt of PCR transcript.	0.10	0.00
66	02-09-11	Review message from solicitor (2nd call of the day)	0.10	0.00
67	02-09-11	Phone conference w/ Luck Campbell.	0.10	0.00
68	02-24-11	Meeting w/ Dr. Kessler, file review, review Dr's previous report.	3.00	0.00
69	02-24-11	Review medical articles.	1.20	0.00
70	02-28-11	Email to lawyer for PD's office, invoking 5th until trial is over	0.10	0.00
71	03-31-11	Letter to Luck Campbell regarding any expert names, discovery still needed, and pleaing to ABHAN.	0.40	0.00
72	03-31-11	Letter to Clerk of Court.	0.30	0.00

10/27/2011

73	04-05-11	Revising Motions	0.30	0.00
74	04-05-11	Revising proposed Order for funding for expenses, drafting another, alternative version	0.30	0.00
75	04-05-11	TCW Dr Kessler and Dr. Carnavale	0.40	0.00
76	04-05-11	Email to and from Dr. Carnavale	0.20	0.00
77	04-05-11	File review for CVs and hourly rates for retained expert and Dr. Carnavale; making copies of all to provide State	0.70	0.00
78	04-05-11	Letter to Luck Campbell via hand delivery w/ copy of Dr. Kessler's report and cv.	0.30	0.00
79	04-11-11	Review of file notes from Public Defender's file.	1.20	0.00
80	04-11-11	Legal research on fifth amendment privilege and "stay" of action, civil cases paralleling criminal prosecution	1.80	0.00
81	04-11-11	File review and drafting of motion for expert; update file log.	1.30	0.00
82	04-13-11	preparation of necessary materials for Kessler (expert) to review prior to trial. Make copies and mail.	0.80	0.00
83	04-13-11	preparation of documents needing immediate review or revisions.	0.60	0.00
84	04-13-11	review of trial transcript	0.90	0.00
85	04-13-11	Email from Nicole Simpson, Asst. Solicitor.	0.10	0.00
86	04-13-11	Letter to Dr. Kessler.	0.30	0.00
87	04-17-11	Preparation for trial	3.50	0.00
88	04-18-11	Draft proposed orders	1.20	0.00
89	04-19-11	Preparation of new draft of proposed order for funding for general expenses, investigative services, expert witness fees, and for 2nd chair for defense.	2.50	0.00
90	04-19-11	Email to Luck Campbell at Solicitor's office regarding letter from Dr. Kessler's doctor and asking for continuance of trial date.	0.30	0.00
91	04-19-11	further drafting, revising, preparation of proposed orders	2.40	0.00
92	04-20-11	Research authority and edit proposed orders and Letter to Judge Newman	2.00	0.00
93	04-20-11	Review of discovery and previous interview notes for client interview. Determining new questions that need to be asked.	2.00	0.00
94	04-20-11	Phone call to Dana Outen, legal assistant at Solicitor's Office.	0.10	0.00
95	04-20-11	Phone call to Sharon Wilson, legal assistant at Solicitor's Office .	0.10	0.00
96	04-20-11	Edit and revise proposed orders; research additional authority for legal propositions; insert authority into order	4.00	0.00
97	04-20-11	Interview of client at ASGDC and preparation for trial.	1.30	0.00
98	04-20-11	Letter to Judge Clifton Newman with proposed orders (hand delivered)	0.50	0.00
99	04-21-11	Preparation for trial.	3.00	0.00
100	04-21-11	Email to Luck Campbell regarding the trial being continued and expert witnesses.	0.30	0.00
101	04-22-11	Review orders and letter going to judge	0.20	0.00
102	04-22-11	Preparation for trial.	3.00	0.00
103	04-27-11	Preparation of files for expense order hearing	0.20	0.00
104	04-28-11	Email from Paul Landis	0.10	0.00
105	05-02-11	Email to Dr. Kessler regarding possible conflicts for dates of trial.	0.20	0.00
106	05-03-11	Court appearance for hearing on expenses. Includes Preparation time, argument time, and wait at courthouse	1.40	0.00
107	05-05-11	Review message from Dr. Kessler re dates available for trial.	0.10	0.00
108	05-09-11	TCW Dr. Kessler regarding up and coming trial date and availability	0.20	0.00

10905-12-11	Letter to Judge Newman w enclosure via hand delivery. Copy of all also hand delivered to Hugh Ryan.	0.30	0.00
11005-20-11	TCW Dr. Kessler	0.20	0.00
11105-23-11	Court Appearance for Hearing on expense requests.	0.60	0.00
11205-23-11	Conference with Deputy Public Defender F. Pringle and waiting time	0.50	0.00
11305-26-11	Email to Dr. Stanton Kessler, M.D. regarding the trial being set the week of August 29, 2011 by Luck Campbell.	0.30	0.00
11405-26-11	Telephone conference w/ L. Campbell re trial date set for 8/29,; also re plea negotiations.	0.10	0.00
11505-26-11	Email to Dr. Kessler	0.30	0.00
11605-26-11	Conference with D MacDougall, PI re order & scheduling	0.30	0.00
11705-26-11	Telephone conference w/ L Campbell.	0.10	0.00
11805-26-11	Email from Dr. Kessler	0.10	0.00
11905-27-11	Email from Investigator	0.10	0.00
12006-02-11	Meeting with client at jail with investigator)	0.40	0.00
12106-08-11	Phone call from Dr. Kessler.	0.20	0.00
12206-22-11	Email from and to Paul Landis	0.20	0.00
12306-23-11	Email from Paul Landis and email to him regarding no offers on the table.	0.10	0.00
12407-07-11	Review message from expert, Dr. Kessler.	0.10	0.00
12507-11-11	Email to Luck Campbell regarding the scheduling of trial.	0.20	0.00
12607-12-11	preparation of letter to have client sign regarding warnings re jailhouse snitches and danger of having discovery at jail.	0.80	0.00
12707-12-11	Prep for CDP meeting with client at ASGDC w/o TDS	0.10	0.00
12807-12-11	research case law	0.40	0.00
12907-19-11	Email from Dr. Kessler w/ attachment (Dr. Carnavale's's letter to Dr. Kessler)	0.20	0.00
13007-22-11	Letter to judge-revise and draft Order	0.30	0.00
13107-25-11	Email to Luck Campbell	0.60	0.00
13207-28-11	Letter to Judge Newman	0.30	0.00
13308-01-11	phone call from client-collect	0.30	0.00
13408-02-11	TCW investigator and file review.	0.30	0.00
13508-08-11	Email to Luck Campbell regarding trial date.	0.10	0.00
13608-09-11	File review in prep for meeting w Investigator and new assignments for him	0.40	0.00
13708-09-11	Email received from Nicole Simpson, Assistant Solicitor regarding trial date.	0.10	0.00
13808-09-11	Email to Nicole Simpson regarding copying her on previous emails and arranging time to go over file.	0.10	0.00
13908-09-11	Meeting with investigator	1.10	0.00
14008-09-11	Review long witness interviews on audio, make notes.	7.00	0.00
14108-10-11	multiple phone calls with investigator regarding discovery reviewed.	0.60	0.00
14208-10-11	Review notes and docs from investigator	0.20	0.00
14308-10-11	Preparation for trial. Research review and discovery review.	3.10	0.00
14408-10-11	Preparation for trial and outlining possible motions in limine	4.20	0.00
14508-11-11	Preparation of trial notebooks.	3.50	0.00
14608-13-11	Preparation of trial notebooks.	4.80	0.00

10905-12-11	Letter to Judge Newman w enclosure via hand delivery, Copy of all also hand delivered to Hugh Ryan.	0.30	0.00
11005-20-11	TCW Dr. Kessler	0.20	0.00
11105-23-11	Court Appearance for Hearing on expense requests.	0.60	0.00
11205-23-11	Conference with Deputy Public Defender F. Pringle and waiting time	0.50	0.00
11305-26-11	Email to Dr. Stanton Kessler, M.D. regarding the trial being set the week of August 29, 2011 by Luck Campbell.	0.30	0.00
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11605-26-11	Conference with D MacDougall, PI re order & scheduling	0.30	0.00
11705-26-11	Telephone conference w/ L Campbell.	0.10	0.00
11805-26-11	Email from Dr. Kessler	0.10	0.00
11905-27-11	Email from Investigator	0.10	0.00
12006-02-11	Meeting with client at jail with investigator)	0.40	0.00
12106-08-11	Phone call from Dr. Kessler.	0.20	0.00
12206-22-11	Email from and to Paul Landis	0.20	0.00
12306-23-11	Email from Paul Landis and email to him regarding no offers on the table.	0.10	0.00
12407-07-11	Review message from expert, Dr. Kessler.	0.10	0.00
12507-11-11	Email to Luck Campbell regarding the scheduling of trial.	0.20	0.00
12607-12-11	preparation of letter to have client sign regarding warnings re jailhouse snitches and danger of having discovery at jail.	0.80	0.00
12707-12-11	Prep for CDP meeting with client at ASGDC w/o TDS	0.10	0.00
12807-12-11	research case law	0.40	0.00
12907-19-11	Email from Dr. Kessler w/ attachment (Dr. Carnavale's letter to Dr. Kessler)	0.20	0.00
13007-22-11	Letter to judge-revise and draft Order	0.30	0.00
13107-25-11	Email to Luck Campbell	0.60	0.00
13207-28-11	Letter to Judge Newman	0.30	0.00
13308-01-11	phone call from client-collect	0.30	0.00
13408-02-11	TCW investigator and file review.	0.30	0.00
13508-08-11	Email to Luck Campbell regarding trial date.	0.10	0.00
13608-09-11	File review in prep for meeting w Investigator and new assignments for him	0.40	0.00
13708-09-11	Email received from Nicole Simpson, Assistant Solicitor regarding trial date.	0.10	0.00
13808-09-11	Email to Nicole Simpson regarding copying her on previous emails and arranging time to go over file.	0.10	0.00
13908-09-11	Meeting with investigator	1.10	0.00
14008-09-11	Review long witness interviews on audio, make notes.	7.00	0.00
14108-10-11	multiple phone calls with investigator regarding discovery reviewed.	0.60	0.00
14208-10-11	Review notes and docs from investigator	0.20	0.00
14308-10-11	Preparation for trial. Research review and discovery review.	3.10	0.00
14408-10-11	Preparation for trial and outlining possible motions in limine	4.20	0.00
14508-11-11	Preparation of trial notebooks.	3.50	0.00
14608-13-11	Preparation of trial notebooks.	4.80	0.00

14708-14-11	Work on organizing and reviewing discovery.	4.50	0.00
14808-15-11	Notes and to do lists after meeting w/ expert	0.20	0.00
14908-15-11	Additional research after meeting w/ expert.	2.20	0.00
15008-15-11	review of witness statements and original trial testimony; legal memos	3.10	0.00
15108-15-11	Conference with expert - packing up file and material afterward	2.00	0.00
15208-15-11	Preparation of trial notebooks.	2.00	0.00
15308-16-11	TCW investigator, notes and log	0.40	0.00
15408-16-11	Preparation of trial notebooks.	6.50	0.00
15508-17-11	Research items for trial prep	0.60	0.00
15608-17-11	Preparation of trial notebooks.	7.80	0.00
15708-17-11	Review transcript from PCR - Expert's testimony	1.70	0.00
15808-18-11	Discovery review.	0.40	0.00
15908-18-11	Research for trial	2.80	0.00
16008-18-11	Draft Rule 5 and Brady motions and certs of service	1.00	0.00
16108-18-11	Preparation for trial-research and review	0.70	0.00
16208-18-11	revising renewed discovery motions, printing, organizing copies, certificates	1.50	0.00
16308-18-11	Preparation for trial	6.00	0.00
16408-18-11	Preparation of trial notebooks.	0.80	0.00
16508-19-11	legal memo regarding case research-trial prep	0.80	0.00
16608-19-11	Meeting with expert.	2.00	0.00
16708-19-11	reviewing, organizing medical research prior to meeting with expert, work on possible exhibits	4.40	0.00
16808-19-11	Reviewing research for trial. Rereading medical journal articles after meeting with Kessler.	3.30	0.00
16908-20-11	Trial prep, outlining issues for trial	5.00	0.00
17008-21-11	Organization of trial notebooks, reviewing portions of Discovery, marking items w need copies of as prob. exhibits.	6.10	0.00
17108-22-11	Conference with paralegal re instructions to be relayed to investigator	0.10	0.00
17208-22-11	Email rec'd from investigator re setting appt to interview witness.	0.10	0.00
17308-22-11	Email to investigator re witness interview appt, subpoena list, etc..	0.10	0.00
17408-22-11	Call to Investigator re his EMS interviews.	0.20	0.00
17508-22-11	Preparation for trial and preparing binders of trial transcript - tab and review portions likely to be needed for impeachment.	2.50	0.00
17608-22-11	Research in preparation of trial	0.80	0.00
17708-22-11	Review transcript from first trial and witness statements	7.00	0.00
17808-23-11	meeting with investigator	0.40	0.00
17908-23-11	meeting with Lashon & Dennis Ervin w/ investigator; viewing crime scene	2.00	0.00
18008-23-11	Preparation for trial-reviewing discovery, interview notes, investigator documents & reports and more research	5.90	0.00
18108-23-11	Email from Nicole Simpson wanting to schedule a time to come in and go over discovery.	0.10	0.00
18208-23-11	Email to Nicole Simpson regarding scheduling the time to come in and review discovery; also inquired about Dr. Nichols and Dr. Ward.	0.30	0.00
18308-23-11	meeting with investigator (post interview)	1.00	0.00

14708-14-11	Work on organizing and reviewing discovery.	4.50	0.00
14808-15-11	Notes and to do lists after meeting w/ expert	0.20	0.00
14908-15-11	Additional research after meeting w/ expert.	2.20	0.00
15008-15-11	review of witness statements and original trial testimony; legal memos	3.10	0.00
15108-15-11	Conference with expert - packing up file and material afterward	2.00	0.00
15208-15-11	Preparation of trial notebooks.	2.00	0.00
15308-16-11	TCW Investigator, notes and log	0.40	0.00
15408-16-11	Preparation of trial notebooks.	6.50	0.00
15508-17-11	Research items for trial prep	0.60	0.00
15608-17-11	Preparation of trial notebooks.	7.80	0.00
15708-17-11	Review transcript from PCR - Expert's testimony	1.70	0.00
15808-18-11	Discovery review.	0.40	0.00
15908-18-11	Research for trial	2.80	0.00
16008-18-11	Draft Rule 5 and Brady motions and certs of service	1.00	0.00
16108-18-11	Preparation for trial-research and review	0.70	0.00
16208-18-11	revising renewed discovery motions, printing, organizing copies, certificates	1.50	0.00
16308-18-11	Preparation for trial	6.00	0.00
16408-18-11	Preparation of trial notebooks.	0.80	0.00
16508-19-11	legal memo regarding case research-trial prep	0.80	0.00
16608-19-11	Meeting with expert.	2.00	0.00
16708-19-11	reviewing, organizing medical research prior to meeting with expert, work on possible exhibits	4.40	0.00
16808-19-11	Reviewing research for trial. Rereading medical journal articles after meeting with Kessler.	3.30	0.00
16908-20-11	Trial prep, outlining issues for trial	5.00	0.00
17008-21-11	Organization of trial notebooks, reviewing portions of Discovery, marking items w need copies of as prob. exhibits.	6.10	0.00
17108-22-11	Conference with paralegal re instructions to be relayed to investigator	0.10	0.00
17208-22-11	Email rec'd from investigator re setting appt to interview witness.	0.10	0.00
17308-22-11	Email to investigator re witness interview appt, subpoena list, etc..	0.10	0.00
17408-22-11	Call to Investigator re his EMS interviews.	0.20	0.00
17508-22-11	Preparation for trial and preparing binders of trial transcript - tab and review portions likely to be needed for impeachment.	2.50	0.00
17608-22-11	Research in preparation of trial	0.80	0.00
17708-22-11	Review transcript from first trial and witness statements	7.00	0.00
17808-23-11	meeting with investigator	0.40	0.00
17908-23-11	meeting with Lashon & Dennis Ervin w/ investigator; viewing crime scene	2.00	0.00
18008-23-11	Preparation for trial-reviewing discovery, interview notes, investigator documents & reports and more research	5.90	0.00
18108-23-11	Email from Nicole Simpson wanting to schedule a time to come in and go over discovery.	0.10	0.00
18208-23-11	Email to Nicole Simpson regarding scheduling the time to come in and review discovery; also inquired about Dr. Nichols and Dr. Ward.	0.30	0.00
18308-23-11	meeting with investigator (post interview)	1.00	0.00

18408-23-11	Evening work on trial notebooks, reviewing probable additional exhibits	3.00	0.00
18508-24-11	Email to Luck Campbell regarding discovery and witnesses.	0.40	0.00
18608-24-11	Review of email from Dave MacDougal regarding phone interview	0.10	0.00
18708-24-11	Reviewing transcripts, discovery, trial prep.; Studying original witness statements and more recent witness interviews in preparation for trial; comparing with trial testimony from first jury trial.	9.60	0.00
18808-25-11	Preparation for trial, notes on audio of witness statements, looking for poss. impeachment material - studying discovery.	9.50	0.00
18908-25-11	More preparation for trial after break for quick dinner, very long day.	6.10	0.00
19008-25-11	Letter to Palmetto Richland Health w/ attached subpoena.	0.40	0.00
19108-25-11	Preparation of subpoena, PMRH Pathology Department.	0.30	0.00
19208-25-11	Series of 3 emails re my efforts to interview Dr. Michael Ward.	0.50	0.00
19308-25-11	Email received and reviewed from Dave MacDougall, Private Investigator	0.10	0.00
19408-26-11	Email from Nicole Simpson with plea offer.	0.10	0.00
19508-26-11	Email from Dr. Kevin Carnevale with attached CV.	0.10	0.00
19608-26-11	Preparation for trial, including meeting w/ Solicitor and Judge at courthouse, meeting with investigator	10.40	0.00
19708-27-11	Receive and review of reports from David MacDougall on jury pool and witnesses.	0.40	0.00
19808-27-11	preparation for trial at office all day except meeting w/ client at jail.	7.90	0.00
19908-27-11	Meeting w/client at ASGDC	1.00	0.00
20008-28-11	Preparation for trial- - (including meeting w/ Dr. Kessler 3.0 hours) at office all day into evening	11.50	0.00
20108-29-11	Letter to Dr. Ed. Catalano, MD	0.40	0.00
20208-29-11	Letter to Ambulatory Services	0.40	0.00
20308-29-11	Letter to Palmetto Health Richland Medical Records	0.40	0.00
20408-29-11	Jury qualifications	0.00	1.50
20508-29-11	At courthouse-meeting with client	0.20	0.00
20608-29-11	at courthouse- second meeting with client	0.40	0.00
20708-29-11	Meetings with Solicitor, waiting for plea hearing; meetings with Judge waiting for Solicitor to make dec're: Alford; At courthouse all day, Back to office at 6 p.m.	5.50	0.00
20808-30-11	a.m. file review for plea, note to file, checking client's time served, packing for court	1.60	0.00
20908-30-11	phone calls to experts re plea agreement, log entries	0.40	0.00
21008-30-11	plea hearing	0.00	0.50
21108-30-11	2nd meeting w/ client after plea, meetings with family after plea; conf. w/ Judge.	1.60	0.00
21208-30-11	1st meeting with Client.	0.40	0.00
21308-30-11	Waiting for plea hearing, file review while waiting	2.50	0.00
21408-31-11	phone call with Expert	0.10	0.00
21508-31-11	Collect call from client. 3:36 p.m.	0.10	0.00
21608-31-11	Phone call from client	0.20	0.00
21708-31-11	Letter to client	0.40	0.00
21808-31-11	Letter to Dr. Kevin Carnevale	0.50	0.00
21909-13-11	Letter to client regarding his credit for time served.	0.30	0.00
22009-14-11	Call to SCDC Records re time credit on client's SCDC records is incorrect.	0.10	0.00
22109-14-11	Rec'd by email from RCCC client's Sentencing Sheet dated 8/30/11.	0.10	0.00

18408-23-11	Evening work on trial notebooks, reviewing probable additional exhibits	3.00	0.00
18508-24-11	Email to Luck Campbell regarding discovery and witnesses.	0.40	0.00
18608-24-11	Review of email from Dave MacDougal regarding phone interview	0.10	0.00
18708-24-11	Reviewing transcripts, discovery, trial prep.; Studying original witness statements and more recent witness interviews in preparation for trial; comparing with trial testimony from first jury trial.	9.60	0.00
18808-25-11	Preparation for trial, notes on audio of witness statements, looking for poss. impeachment material - studying discovery.	9.50	0.00
18908-25-11	More preparation for trial after break for quick dinner, very long day.	6.10	0.00
19008-25-11	Letter to Palmetto Richland Health w/ attached subpoena.	0.40	0.00
19108-25-11	Preparation of subpoena, PMRH Pathology Department.	0.30	0.00
19208-25-11	Series of 3 emails re my efforts to interview Dr. Michael Ward.	0.50	0.00
19308-25-11	Email received and reviewed from Dave MacDougall, Private Investigator	0.10	0.00
19408-26-11	Email from Nicole Simpson with plea offer.	0.10	0.00
19508-26-11	Email from Dr. Kevin Carnevale with attached CV.	0.10	0.00
19608-26-11	Preparation for trial, including meeting w/ Solicitor and Judge at courthouse, meeting with Investigator	10.40	0.00
19708-27-11	Receive and review of reports from David MacDougall on jury pool and witnesses.	0.40	0.00
19808-27-11	preparation for trial at office all day except meeting w/ client at jail.	7.90	0.00
19908-27-11	Meeting w/client at ASGDC	1.00	0.00
20008-28-11	Preparation for trial- - (including meeting w/ Dr. Kessler 3.0 hours) at office all day into evening	11.50	0.00
20108-29-11	Letter to Dr. Ed. Catalano, MD	0.40	0.00
20208-29-11	Letter to Ambulatory Services	0.40	0.00
20308-29-11	Letter to Palmetto Health Richland Medical Records	0.40	0.00
20408-29-11	Jury qualifications	0.00	1.50
20508-29-11	At courthouse-meeting with client	0.20	0.00
20608-29-11	at courthouse- second meeting with client	0.40	0.00
20708-29-11	Meetings with Solicitor, waiting for plea hearing; meetings with Judge waiting for Solicitor to make dec re; Alford; At courthouse all day, Back to office at 6 p.m.	5.50	0.00
20808-30-11	a.m. file review for plea, note to file, checking client's time served, packing for court	1.60	0.00
20908-30-11	phone calls to experts re plea agreement, log entries	0.40	0.00
21008-30-11	plea hearing	0.00	0.50
21108-30-11	2nd meeting w/ client after plea, meetings with family after plea; conf. w/ Judge.	1.60	0.00
21208-30-11	1st meeting with Client.	0.40	0.00
21308-30-11	Waiting for plea hearing, file review while waiting	2.50	0.00
21408-31-11	phone call with Expert	0.10	0.00
21508-31-11	Collect call from client. 3:36 p.m.	0.10	0.00
21608-31-11	Phone call from client	0.20	0.00
21708-31-11	Letter to client	0.40	0.00
21808-31-11	Letter to Dr. Kevin Carnevale	0.50	0.00
21909-13-11	Letter to client regarding his credit for time served.	0.30	0.00
22009-14-11	Call to SCDC Records re time credit on client's SCDC records is incorrect.	0.10	0.00
22109-14-11	Rec'd by email from RCCC client's Sentencing Sheet dated 8/30/11.	0.10	0.00

South Carolina Commission on Indigent Defense

233

22209-15-11	Call from SCDC Records re correcting time credit on client's SCDC records	0.10	0.00
22309-15-11	2nd call from SCDC Records re correcting time credit on client's SCDC records	0.10	0.00
22409-22-11	Research Harley's updated SCDC status, update log	0.10	0.00
22509-28-11	Receive and Review letter from client.	0.10	0.00
22610-27-11	Letter to client re SCDC has updated release date, right to file PCR, etc.	0.60	0.00
Hours Total		261.10	2.20

RECEIVED

2011/10/27

2011/10/27

STATE OF SOUTH CAROLINA
In the Court of Appeals

234

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

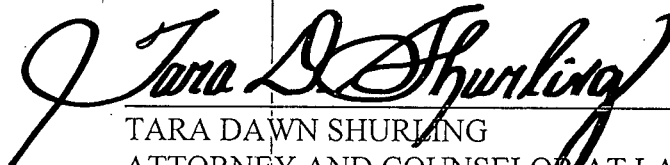
RECEIVED

NOV 20 2014

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that certificate that this Record on Appeal contains all material proposed to be included by any of the parties. In the Initial Brief of Appellant she cites to the billing records submitted to the lower court and to SCCID. Through a clerical oversight the SCCID Voucher, and Counsel's time records submitted with that voucher, were inadvertently left off Appellant's Designation of the matter. Appellant's Record on Appeal was sent to opposing counsel for his review on October 23, 2014 and he subsequently approved it as containing all the matter contained in his designation of the matter. He did not cite to the billing records omitted from Appellant's Designation of the Matter in his Final Brief which was filed on November 12, 2014. In preparing her own Final Brief, Appellant discovered this oversight and contacted opposing counsel and asked if he would have any objection to her adding this material, clearly cited in Appellant's Brief, to the end of the Record on Appeal. By return email, opposing counsel said he would consent to the documents in question being added to the Record on Appeal provided that it did not change the pagination of the portions of the Record on Appeal cited in Respondent's Final Brief. The SCCID voucher, and accompanying time records, have been added to the end of the material originally included in the draft Record on Appeal and have been added to the Index to the Record on Appeal. The inclusion of this material in this manner has not changed the pagination of the portions of the Record on Appeal cited by Respondent in any way.



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ATTORNEY AND COUNSELOR AT LAW
S. C. Bar No. 5099

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Columbia, SC 29204
(803) 738-8622
(803) 738-1600 FAX

ATTORNEY/APPELLANT.

This 14th day of November, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Ex Parte: Tara Dawn Shurling, Attorney, Appellant,

In Re:
State of South Carolina, Respondent,

v.

Bejay Harley, Defendant

Appellate Case No. 2013-001298

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Attorney/Appellant's Record on Appeal in the above-entitled case has been served upon opposing counsel, J. Hugh Ryan, III, General Counsel, by depositing in the U.S. Mail, postage prepaid, this 23rd day of October, 2014 addressed to the following:

J. HUGH RYAN, III
General Counsel
S. C. Commission on Indigent Defense
Post Office Box 11433
1330 Lady Street, Suite 401
Columbia, SC 29211-1433

Sharon McCollister

Sharon McCollister
Paralegal to Tara Dawn Shurling, Attorney/Appellant

SWORN TO BEFORE me this 23rd day
of October, 2014.

Suzanne Graham
Notary Public for South Carolina

My Commission Expires: 2/28/24

RECEIVED

OCT 27 2014

SC Court of Appeals

ORIGINAL