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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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*On Petition for Writ of Certiorari to Court of Common Pleas*

*CAPITAL PCR ACTION*

APPEAL FROM PICKENS COUNTY
Honorable Alexander S. Macaulay, Circuit Court Judge

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Jerry Buck Inman, #5256
a/k/a Jerry Buck Inmon.....Respondent-Petitioner

v.

State of South Carolina.....Petitioner-Respondent.

Appellate Case No. 2020-000881

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# APPENDIX
# VOLUME 5 OF 10

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[1] State's Exhibits 1-11 were previously marked and entered into evidence on August 19, 2008. They are included under the exhibits listed for that date.

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[2] Court's Exhibit # 1 was previously marked and entered into evidence on August 19, 2008. It is included under the exhibits listed for that date.

[3] Defense Exhibits # 32-43 were included in the Record on Appeal and are included with the Record on Appeal in this Appendix.

[4] Court's Exhibit 3 was included in the Record on Appeal and is included with the Record on Appeal in this Appendix.

These requirements are actually higher than the qualifications required for lead counsel in a capital trial under S.C. Code §16-3-26(B)(1).[3]

Likewise, capital post-conviction applicants are entitled to greater discovery rights than defendants in capital trials. Discovery in capital trials is governed by the Rules of Criminal Procedure, which provide for *disclosure only* of specific enumerated items upon request by the defendant, Rule 5, SCRCrimP, unless the information is exculpatory and/or mitigating, *Brady v. Maryland*, 373 U.S. 83 (1963). Discovery in capital post-conviction proceedings, on the other hand, is governed by the Rules of Civil Procedure, which require disclosure of documentation not required to be disclosed under the Criminal Rules. The general rule of the civil rules of discovery is that only specific enumerated items may be *withheld*.

In light of this statutory scheme, this Court's assumption that the legislature intended to afford less protections to capital post-conviction applicants (as compared to other civil litigants or even as compared to defendants in capital trials) is completely contrary to the legislature's clear intent in passing the South Carolina Effective Death Penalty Act, which contains the heightened protections for capital post-conviction applicants.

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[3] S.C. Code §16-3-26(B)(1) provides, in pertinent part:

> Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases . . . .

**B. Regardless of whether *Thames* is the controlling statutory interpretation, the greater protections provided for capital PCR applicants are protected and enforceable by the Fourteenth Amendment requirements of due process and equal protection of the law and Mr. Inmon is entitled to proceed *ex parte* with his requests for expert and investigative services.**

The Supreme Court of the United States has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *see also Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991). In *Vitek*, the Supreme Court affirmed that Due Process Clause protection attached to rights under a Nebraska statute dealing with the transfer of state prisoners to a mental hospital. The Supreme Court pointed to parole and probation as examples of state-created rights to which there was no "constitutional or inherent right" but which had been accorded protection under the Due Process Clause. *Vitek*, 445 U.S. at 488.

Similarly in *Wolff v. McDonnell*, 418 U.S. 539. 557 (1974), the Supreme Court held that even though "the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison . . . . But the State having created the right to good time . . . , the prisoner's interest [as a result] has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty.'" *See also Hewitt v. Helms*, 459 U.S. 460 (1983) (right to be in the general prison population is a liberty interest under Pennsylvania law subject to due process protection).

In determining whether a state has created a liberty interest subject to protection under the Due Process Clause, the Court looks to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). "This has meant that to obtain a protectable right 'a person clearly must have more that an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it.'" *Greenholtz v. Inmates of Nebraska Penal*

*and Correctional Complex*, 442 U.S. 1, 7 (1979) (quoting *Roth*, 408 U.S. at 577). In *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), the Supreme Court explained that:

> [A] State creates a liberty interest by establishing "substantive predicates" to govern official decision making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

*Id.* at 462 (citation omitted); *see also Slezak v. Evatt*, 21 F.3d 590, 594 (4th Cir. 1994).

Here, Mr. Inmon has much more than an abstract need or desire for *ex parte* proceedings. The statutes give him a clear claim of entitlement thereto. Mr. Inmon maintains that the proper procedure is that set forth in S.C. Code §16-3-26. *See* Section II(A), *supra*. Assuming, however, that the applicable statute is S.C. Code §17-3-50(B), that section provides:

> Upon a finding in *ex parte proceedings* that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense . . . .

This statute, on its face, requires *ex parte* proceedings.

Furthermore, judicial pronouncements by the Supreme Courts of the United States and of South Carolina make it clear that the "nature" of the right to *ex parte* proceedings to seek expert and investigative services is such that it merits protection under the Due Process Clause. For example, in *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985), the Supreme Court held that due process entitles an indigent defendant to the appointment of an expert to assist in his defense whenever "the defendant is able to make an *ex parte* threshold showing to the trial court" of the need for assistance. Likewise, the South Carolina Supreme Court has declared that when the "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*," the state or

county "does not have standing to participate in the hearing." *Ex Parte Lexington County*, 314 S.C. 220, 226-27, 442 S.E.2d 589, 593 (1994).

In addition to cases protecting a right to seek assistance in *ex parte* proceedings specifically, the due process clause extends to state-created rights in connection with sentencing generally. In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the Supreme Court held that due process protections attached to state procedural law in connection with the imposition of punishment:

> Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion. . .

*Id.* at 346. Here, Mr. Inmon challenges the imposition of the death penalty in a procedure specifically created for and allowing that challenge. The methods used by this Court in allowing that challenge are, thus, not merely a matter of state law.

**C. Independent of the statutory provisions, Mr. Inmon is entitled as a matter of fundamental fairness and equal protection under the laws to seek funding in *ex parte* and *in camera* proceedings.**

While there is no constitutional requirement that a state create a system of direct appellate review, discretionary or as of right, *Ross v. Moffitt*, 417 U.S. 600 (1974), or state post-conviction proceedings, *Murray v. Giarratano*, 492 U.S. 1 (1989), "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause" of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

Due process and equal protection concerns may be implicated when a person is denied fundamental fairness by the state or treated differently than others based only on indigence:



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

*Ross*, 417 U.S. at 609. "Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." *Smith v. Bennett*, 365 U.S. at 714. These concerns are heightened in this capital post-conviction process. *See Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) ("Access to equal justice is an even greater interest where the State seeks to impose the penalty of death").

"[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (cites omitted).[4] This promise of "an adequate opportunity," however, vanishes if the state, with its nearly unlimited resources to investigate Applicant's case at all phases of litigation, *see Bailey v. State*, 309 S.C. 455, 460,424 S.E.2d 503, 506 (S.C. 1992),[5] likewise has access to privileged information only because of Mr. Inmon's indigency. As the South Carolina Supreme Court has explained:

> Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant

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[4] Under *Ake*, a defendant is entitled to expert assistance when he "is able to make an *ex parte* thresholding showing to the trial court" that such assistance is necessary. 470 U.S. at 82. *Ake* presumed the *ex parte* nature of this showing.

[5] In *Bailey*, the court contrasted the resource constraints faced by defense counsel with those of the "publicly compensated solicitor, who has at his disposal the entire array of state, county, and municipal law enforcement," as well as access to "dramatic technological advances" and other experts. 309 S.C. at 460, 424 S.E.2d at 506.

> and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

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

Although *Lexington County* and *Ake* address the rights of defendants at trial to *ex parte* proceedings, there is little question that equal protection and due process rights extend to post-conviction proceedings. *See Long v. District Court of Iowa, In and For Lee County, Fort Madison, Iowa*, 385 U.S. 192 (1966) (refusal to provide transcript of state habeas corpus proceeding denied equal protection of the laws); *Lane v. Brown*, 372 U.S. 477 (1963) (prevention of right to appeal a denial of a writ of error *coram nobis* due to indigency denied equal protection). Indeed, the United States Supreme Court has explicitly held that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny the prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. at 709.

In arguing that Mr. Inmon does not have a constitutional right to *ex parte* funding procedures in a capital PCR case, the Attorney General might argue "there is no constitutional right to post-conviction relief proceedings" or a due process "right to an appeal." South Carolina, however, allows a first appeal as of right and a separate "initial-review collateral proceeding." The Supreme Court of the United States has recognized "the right to effective assistance of counsel on appeal." *Evitts v. Lucey*, 469 U.S. 387, 397 (1985). *Martinez v. Ryan*, 556 U.S.1, 132 S.Ct. 2960 (2012) requires states to ensure effective assistance of post-conviction relief counsel in initial review collateral proceedings or lose the benefits of procedural bars in federal *habeas corpus* proceedings.

Because South Carolina chose to accord a right to *ex parte* proceedings to seek expert services in post-conviction proceedings challenging a death sentence, "due process protections

are necessary 'to insure the state-created right is not arbitrarily abrogated.'" *Vitek*, 445 U.S. at 488-89 (quoting *Wolff*, 418 U.S. at 557). The State has created a right to *ex parte* proceedings. Failure to grant Mr. Inmon those protections violates his rights to due process and equal protection.

**D. The Attorney General does not have a right to be heard on funding matters.**

"The requirements of due process are accorded to the criminal defendant," and "cannot be expanded to encompass the states of the union." *Ex parte Lexington County*, 314 S.C. at 226-27, 442 S.E.2d at 593 (citing *State of South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

The applicable statutes clearly provide that "[i]t is the judge who protects the interests of the public fisc," not the state. *United States v. Gonzales*, 150 F.3d 1246, 1257 (10th Cir. 1998). Allowing the State a voice in the amount and types of funding available to the defense would clearly violate due process when the state, as the Respondent in these proceedings, clearly has an interest in prohibiting Mr. Inmon's access to expert and investigative services that could lead to success in these proceedings. Due process is also violated because Mr. Inmon would not similarly be accorded the opportunity to be heard about the amounts and types of expert and investigative services sought by the State.

Allowing the State an opportunity to be heard with respect to the nature and types of services provided to Mr. Inmon would also violate equal protection because a non-indigent PCR applicant would not be similarly restricted by having the state heard in the process of obtaining defense experts and investigators.

Mr. Inmon's counsel, in order to obtain funding, must make a threshold showing to this Court that the expert, investigative, and other services are "reasonably necessary," S.C. Code §16-3-26(C), in order for Mr. Inmon to be adequately represented and to have a full and fair

hearing. Counsel cannot possibly make such a showing without making disclosures to this Court concerning the information available and the information sought to be obtained with experts and investigators. As the Texas Court of Criminal Appeals recognized

> In order to make a threshold showing [for funding for experts] . . . , the defendant necessarily has to explain his theories and describe with some specificity how an expert would assist him. . . . The problem with requiring this showing to be shared with the State at the pretrial stage is that it compels a defendant to disclose to the State his defensive theories or "work product."

*Williams v. State*, 958 S.W.2d 186, 193 (Tex. Crim. App. 1997). *See also Gonzales*, 150 F.3d at 1251 n.4 ("We have repeatedly emphasized that defendants must provide the district court with explicit detail showing why the requested services are 'necessary' to an adequate defense and what the defendant expected to find by using the services").

**IV. Even if this Court denies Mr. Inmon the right to proceed *ex parte* and *in camera* with funding requests, the State does not have standing to object to those requests.**

Mr. Inmon objects to and contests the State's standing or any alleged "right" asserted by the State to interfere in his requests for funding.

The State cites to Thames and an order in *Stanko v. State*. While both declare that funding requests in state post-conviction relief cases are not to be made *ex parte*, the State is not granted standing in either case to interpose objections or to attempt to derail legitimate and procedurally proper funding requests.

In *Thames*, the Court simply stated as follows, in a footnote:

> When a defendant requests expert services for a criminal trial, the request is determined by the judge in *ex parte* proceedings. S.C. Code Ann. § 16-3-26(C) and § 17-3-50(B) (Supp. 1995); *Ex parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.

> Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While § 17-3-50(A) mentions that the same hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word "defendant" throughout § 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

*Thames*, 325 S.C. at 12, 478 S.E.2d at 682, fn. 1.

The phrase "allowed to fully participate" does not automatically grant the State the right to interfere with, and interpose objections to, the Mr. Inmon's funding requests. In other words, where a capital post-conviction relief applicant submits a proper, constitutional, and statutory, request for funding, it is not within the State's authority to interfere with such a request. *See, e.g., Ake v. Oklahoma, supra.; Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994) (County, as the statutorily required funding agency for capital cases, had no authority to object to funding matters).

Similarly, the Court in the *Stanko* Order stated as follows, also in a footnote:

> We note, however, that the issue of *ex parte* proceedings in PCR matters, which is at the heart of the petition currently before this Court, was addressed in *Thames v. State*, *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1986) (sic),[6] and such proceedings were found to be improper.

*Stanko*, Order, supra. at p.1, fn. 2.

Thus, while the Court might require the State to receive notice of such funding requests, the two cases to which the State cites do not give the State automatic standing or any "right" to interpose objections and interfere with Petitioner's requests for funding.

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[6] The correct year of the decision in *Thames* is 1996.

Funding in this State for indigent defendants/petitioners is provided through the S.C. Office of Indigent Defense. *See* S.C. Code Ann. §16-3-26, §17-3-80, § 17-27-160. OID is routinely the party which intercedes with the court, if there is any objection to be made or position to be taken, concerning any funding requests.

While the principle of standing in a civil context is somewhat different, it is instructive in that standing requires the party to be in danger of sustaining a direct injury. *See, e.g., Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (S.C. 1999) ("Standing to sue is a fundamental requirement in instituting an action. A private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained. Moreover, the injury must be of a personal nature to the party bringing the action, not merely of a general nature which is common to all members of the public." *Id.*, 338 S.C. at 639-40, 528 S.E.2d at 649-50).

In Mr. Inmon's case the State is not injured in any way by authorizing OID to fund attorneys investigators and expert witnesses so that Mr. Inmon can fairly present his claim: the State will have every opportunity to cross-examine the witness accordingly and in due course; or to object to the admissibility of the witness' testimony if the State believes it has some procedural ground or other legal argument to sustain such an objection; however, the State has no right to prevent the Mr. Inmon from obtaining the necessary professional services of the expert in the first place.

**V. Interference with the Attorney-Client Relationship.**

Because the State's motion asks to be heard on matters pertaining to attorneys' fees, investigators, and expert witnesses, it appears that opposing counsel wants to litigate the number

of hours counsel and their investigators may spend on this case and whether investigative and expert assistance is needed.

It must be noted, though obvious, that the Attorney General's Office and its employees, including innumerable paralegal and support staff are, of course, employees paid by the State and, therefore, do not have to be concerned with such mundane matters as compensation. Nor does the State need to customarily concern itself with paying expert costs since the State has access to state-paid experts through the S.C. Law Enforcement Division (SLED) for virtually every conceivable type of expert – DNA, fingerprinting, firearms, etc. It is curious and befuddling to Mr. Inmon's counsel that the State might raise an objection to compensation for counsel because, without such compensation, counsel cannot move forward in any respect with this case. As the State is well aware, Mr. Inmon's counsel is not appointed *pro bono* in this case and the role of appointed counsel—such as whether to limit or restrict the number of hours necessary for counsel to do their job—is not left up to the prosecution arm of the State.[7]

The Supreme Court of the United States has held that funding for an indigent in a death penalty case is a matter of due process and also that denial of such funding violates the cruel and unusual punishment clause. *See Ake v. Oklahoma*, 470 U.S. 68 (1985) (Court reversed capital case, under Fifth and Eight Amendments, where state trial court denied funding for a forensic psychiatrist); U.S. Const. Amend. 5 and 14. Our own state Supreme Court concurs. *See Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); S.C. Const. Art. I §3.

[7] As this PCR Court knows, payment of experts, costs, and counsel, comes from a state fund monitored by the S.C. Office of Indigent Defense ("OID"). The fund is provided for by fines imposed on defendants who are convicted in criminal courts across the state. OID is scrupulous and very committed to monitoring this fund, and is provided with notice of each and every funding motion, such that OID intervenes when it deems it necessary concerning case-related costs.



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Recently, in *Hinton v. Alabama*, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014), the High Court reversed the defendant's conviction and death sentence where the trial attorney failed to request additional funding in order to replace an expert he knew to be inadequate because the attorney mistakenly believed that he had received all he could get under Alabama law. The Court found that this constituted deficient performance under the Sixth Amendment. *Id.* The result would be no different here, where Mr. Inmon's counsel seeks reasonable funding for an expert witness, if the Court granted the State the ability to interfere and denied the requested expert assistance. *Hinton* makes it abundantly clear that it is irrelevant whether the person seeking funding for expert assistance is a capital defendant at a jury trial or a capital petitioner in an ineffective assistance of counsel case.

There is a long history of court cases allowing an indigent petitioner expert assistance in proving claims of ineffective assistance of counsel. *See generally, Hinton v. Alabama, supra.; Sears v. Upton*, 561 U.S. 945, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith, 539 U.S. 510* (2003); *Ard v. Catoe*, 372 S.C. 318; 642 S.E.2d 590 (2007), *Rehearing denied by Ard v. Catoe*, 2007 S.C. LEXIS 157 (S.C., Apr. 4, 2007), U.S. Sup. Ct. cert. den. by, Motion granted by *Ozmint v. Ard*, 2007 U.S. LEXIS 10840 (U.S., Oct. 1, 2007); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

Again, in a case decided just this term, the Supreme Court reiterated the constitutional significance of providing a capital defendant with expert assistance in *Brumfield v. Cain*, 576 U.S. ___ (Case No. 13-1433, June 18, 2015). While procedurally complex and involving several significant issues, the Court reversed the death sentence in part because the state court denied funding for a defense expert to present mental health evidence on the issue of mental

retardation/intellectual disability for an *Atkins* claim.[8] *Id.*, Slip Opinion at p. 1. ("Without affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner's claim. That decision, we hold, was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U. S. C. §2254(d)(2). Petitioner was therefore entitled to have his *Atkins* claim considered on the merits in federal court.").

Thus, the Supreme Court continues to look with constitutional disfavor upon denials of legitimate funding requests for indigent defendants/petitioners.

On the other hand, to require Mr. Inmon to make such disclosures in the Attorney General's presence will impede the process. "Without an assurance that the information revealed . . . to the court will not be disclosed, a defendant and his or her counsel would be discouraged from fully disclosing the information to the court." *Gonzales*, 150 F.3d at 1259. Either counsel will not be able to make full disclosure to this Court and run the risk that necessary funding will be denied or counsel will be required to lay bare its privileged work-product and strategies in the presence of Respondents. Either of these options will violate due process. As the court in *Williams* found, forcing such a choice "is contrary to *Ake*'s concern that an indigent defendant who is entitled to expert assistance have 'meaningful access to justice,' and undermines the work product doctrine." *Id.*[9]

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[8] *Atkins* v. *Virginia*, 536 U. S. 304 (2002) (Court barred death penalty for defendant who was intellectually disabled/mentally retarded).

[9] *See also Ex Parte Moody*, 684 So.2d 114, 120 (Ala. 1996) (ex parte proceedings on the need for expert assistance required by the Fifth, Sixth, and Fourteenth Amendments, in part, because an indigent defendant should not have to disclose to the state information that a financially secure defendant would not have to disclose); *Brooks v. State*, 385 S.E.2d 81, 84 (Ga. 1989) (While exercising the right to obtain expert assistance, "the defendant also has the right to obtain that assistance without losing the opportunity to prepare the defense in secret. Otherwise,

Forcing counsel to disclose information that the State may not otherwise be entitled to may also harm Mr. Inmon. As the court in *Gonzales* recognized:

> [M]uch of the information disclosed to the court during the CJA [funding] process does not ultimately become part of the criminal trial. A defendant's request for investigative services to look into possible defenses, for example, will not always be fruitful for the defense. Likewise, a defendant's request for funds to interview potential witnesses does not always result in the defendant's use of those witnesses at trial. The danger in disclosing this type of information was manifest in *Marshall* [*v. United States*], 423 F.2d [1315] at 1319 [(10th Cir. 1970)], where the government learned of the existence of a witness who ultimately testified against the defendant only because the district court had erroneously allowed the government to attend the CJA hearing.

*Gonzales*, 150 F.3d at 1259-60.

Requiring Mr. Inmon's counsel to lay bare theories and strategies before the State will also violate equal protection. As the Tennessee Supreme Court held:

> The logic of requiring an *ex parte* hearing . . . is apparent. Indigent defendants who must seek state-funding to hire a psychiatric expert should not be required to reveal their theory of defense when their more affluent counterparts, with funds to hire experts, are not required to reveal their theory of defense, or the identity of experts who are consulted, but who may not, or do not, testify at trial.

*State v. Barnett*, 909 S.W.2d 423, 428 (Tenn. 1995).

Rule 26(B), SCRCP, provides:

> A party may discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or

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the defendant's 'fair opportunity to present his defense,' acknowledged in *Ake*, will be impaired"); *McGregor v. State*, 733 P.2d 416 (Okla. Crim. App. 1987) (to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants as nearly as possible, on a level of equality with non-indigent defendants).

> opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specifically employed.

Is it clear that the Attorney General does not have the right to this information because Rule 26 does not contemplate the disclosure of even the identity of expert witnesses, unless that expert is expected to testify at trial. Once a party identifies an expert as a witness expected to testify at trial, then the opposing party, can seek to obtain information about that expert's opinions through civil discovery, including depositions. Until the expert is identified as a testifying expert, that expert is a consulting expert and the information possessed by that expert and the opinions possessed by that expert are protected by attorney-client privilege and the attorney work-product doctrine. *See State v. Thompson*, 329 S.C. 72, 76, 495 S.E.2d 437, 439 (1998).

Adopting the Attorney General's argument, however, would require that Mr. Inmon disclose the identity of the expert "before the expert evaluates the defendant and before the defense determines" whether the expert will be used as a witness. *Barnett*, 909 S.W.2d at 429. Following this procedure may also require disclosure of information from consulting experts used only to assist in providing the information necessary to this Court to justify funding.

Furthermore, the Attorney General apparently views all requests for investigative, expert, and other services as not being protected by privilege or work-product. Under their interpretation, Mr. Inmon would have to disclose, in the presence of the Attorney General, the nature and purpose of investigative and other services. Again, under the position advanced by the Attorney General, the State would receive a windfall that the State would not otherwise receive. The State is not entitled to discover Mr. Inmon's investigative processes or strategies

under any circumstances. Requiring Mr. Inmon to make such disclosures is completely contrary to the discovery rules, in addition to due process and equal protection.

As the United States Court of Appeals for the Tenth Circuit said:

> Just as the grand jury process is the "classic example" of a government process that would be totally frustrated if conducted openly, so too would CJA [funding] proceedings be frustrated if conducted openly. The CJA process is the defendant's means of preparing a defense, and keeping that process closed will prevent the government from being "tipped off" as to the direction in which the defendant's trial strategy is heading.

*Gonzales*, 150 F.3d at 1259. The government is not entitled to this information, except to the extent authorized by the discovery rules.

Not allowing Mr. Inmon to proceed *ex parte* and *in camera* could even distort the process and give the government an unfair advantage. Mr. Inmon is still engaging in discovery and investigation.

Mr. Inmon may have additional claims to present in an amended application for post-conviction relief. *See* Rule 15(a), SCRCP (allowing liberal amendments of pleadings when justice so requires and does not prejudice any other party). Additional potential claims could involve claims that the state withheld exculpatory or impeachment evidence, *see Brady v. Maryland*, 373 U.S. 83, 86-87 (1963), or that the State knowingly used false evidence, *Napue v. Illinois*, 360 U.S. 264, 269, 271-72 (1959) (unanimous decision) (Warren, C.J.). Indeed, the South Carolina State Supreme Court has recognized prosecutorial misconduct as a ground for post conviction relief, notwithstanding the absence of a claim of ineffective assistance of counsel. *See Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) (setting aside applicant's guilty plea, and granting a new trial, because of prosecutor's *Brady* violation). Requiring disclosure of information concerning investigation into these activities could thwart the truth-



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seeking process by allowing the State notice in advance of Mr. Inmon's investigative efforts, which could result in activities to thwart Mr. Inmon's investigation.

Not allowing Mr. Inmon to proceed *ex parte* and *in camera* will violate due process by requiring a procedure that is fundamentally unfair. It also violates equal protection because the Attorey General's position treats Mr. Inmon differently from non-indigent, death-sentenced applicants who could afford to pay for investigative, expert, and other services out of their own funds. Indeed, denying him this right would impose a hardship on Mr. Inmon that the Court does not impose on the State of South Carolina, Mr. Inmon's adversary.[10] As a result, the position advanced by the Attorney General violates Mr. Inmon's equal protection rights in a manner sought to be avoided by the South Carolina Supreme Court's holding in *Ex Parte Lexington County*.

**VI. The Court should consider alternative methods of relief.**

If opposing counsel is truly concerned about the possibility of this Court being influenced by information contained in the ex parte funding requests, relief can be granted without the State getting access to otherwise undiscoverable information. The Court could allow Mr. Inmon to make general requests for funding without revealing protected information or identifying the experts requested. Copies of orders from then Circuit Court Judges John Kittredge and Wyatt T. Saunders, Jr. are attached. The Office of Indigent Defense could intervene—as it often does—if that agency has any questions or concerns. Alternatively, this Court could refer funding requests to another Circuit Court judge for consideration.

[10] Neither the Court nor South Carolina law has imposed a requirement of the State of South Carolina to apply to the court for leave to obtain investigative, expert and other services that the State believes is necessary to defend Mr. Inmon's application for post-conviction relief.



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## VII. Conclusion.

This Court should deny the State's motion to unseal and disclose Mr. Inmon's *ex parte* funding requests.

Respectfully Submitted,

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September 25, 2015



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| STATE OF SOUTH CAROLINA | ) | COURT OF COMMON PLEAS |
| | ) | THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF PICKENS | ) | |
| | ) | |
| | ) | Case Number: 2012-CP-39-00918 |
| JERRY INMAON, | ) | |
| | ) | |
| Applicant, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| STATE OF SOUTH CAROLINA , | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

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September 29, 2015
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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Oconee County

Honorable Gerald C. Smoak, Judge

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RUTH ANN THAMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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# PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER.

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The judge abused his discretion by refusing to authorize funds for a psychiatric evaluation by Dr. John DeWitt. This evaluation was reasonably necessary to the presentation of appellant's post-conviction claim given her burden of proof . . . . . 14

Petitioner was told on several occasions during the guilty plea that a life sentence was the maximum she could receive for pleading guilty to murder. A life sentence was mandatory, and counsel was ineffective for allowing petitioner to plead guilty thinking she would receive a twenty year sentence . . . . . 18

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## QUESTIONS PRESENTED

1.

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

2.

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



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## STATEMENT OF FACTS

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

A Blair[1] hearing was then held. Dr. Pravina Seth testified she was employed at the William S. Hall Institute. Seth received her medical degree in India prior to coming to work at the William S. Hall Institute. App.p. 3, lines 17 - p. 4, line 6.

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

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

Seth admitted petitioner needed treatment, and that she had

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

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

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

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

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

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



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

Sires told the judge that Dr. Martin would be furnishing the court with a supplemental report. Sires said he understood that Dr. Martin believed petitioner was under the influence of cocaine at the time of the stabbing. That, according to Sires, was why Dr. Martin opined she did not have the capacity to conform her actions. Sires then said: "Ms. Thames is aware, as well as Dr. Martin is aware, of course, that voluntary intoxication be it by drugs or alcohol is not a defense under the laws of this state and this is why it was reported as it was." App.p. 26, lines 7-10.

The written report **did not state** that voluntary intoxication was the reason Dr. Martin opined petitioner was unable to conform her actions to the requirement of the law. See App.p. 64-65. Sires told the judge petitioner was competent to stand trial, and that he was not setting forth an affirmative defense pursuant to S.C. Code §17-24-10.[2] App.p. 27, lines 2-21.

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

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

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

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

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

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

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

App.p. 45, lines 11-19.

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

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

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

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

> Sires: Ruth Ann, is there anything you would like to say?
>
> Court: Ms. Thames, anything further - -
>
> Thames: Yes, sir, the only thing I'd like to say to their family is that I didn't mean to kill him; I thought it was my uncle. I didn't mean to kill the man. I thought it was somebody else. He was a very good man. He was, and he was good to me. I was just - - That's all I can say.

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

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

Petitioner filed an application for post-conviction relief

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

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

At the hearing Hughes said the following:

> Your Honor, I have attached to the motion various medical records of Dr. DeWitt of his treatment of Ms. Thames after she - - after she was sent down to the Women's Correction Center. They indicate that she had psychotic symptoms. **She was taking a psychotropic drug, Haldol. His primary analysis of her is an atypical psychosis. The records also mention delusions and hallucinations.**
>
> Formerly - - prior to her sentencing, Your Honor, Ms. Thames was evaluated by two psychiatrists, a Dr. Martin, who was retained by Mr. Sires, who practices in Anderson, as well as Dr. Sheth, who works for the State in Columbia. They both found that she was delusional. I think that Dr. Martin found that she did not have criminal responsibility for her act when she killed Mr. Mathison but nonetheless, they both found that she met the standard for competency at the time of trial and that she - - that she was sane at the time the incident was committed. **From my conversations with Dr. DeWitt, he indicates to me that there may - - that he may come to a contrary conclusion, nonetheless he can't without doing a full evaluation of Ms. Thames. He can't reach that question now.**
>
> Your Honor, This is a tragic case where

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

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

The assistant attorney general opposed the motion. He stated there were two examinations done prior to the guilty plea -- "one by Dr. Seth; one by Dr. Martin." App.p. 78, lines 2-22. He argued that Dr. Martin "had some question about her ability to conform her actions at the time of the murder was committed due to her cocaine intoxication, which is not a defense." App.p. 79, lines 3-6. The assistant attorney general concluded: "I don't think a third [evaluation] is going to give us anymore insight than the two we have already had. . ." App.p. 79, lines 9-10. He added" "I think it would be a waste of the state's time and money to have another evaluation done." App.p. 79, lines 17-18.

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

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

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

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

> Q. All right. When - - you killed Mr. Mathison, were you experiencing hallucinations?
>
> A. Yes, sir. I thought he was my uncle when I killed Randall.
>
> Q. All right. Do - - do you have questions concerning your sanity at the time that you killed him?
>
> A. Yes, sir, because I would not harm Randall if I had known it was Randall. Randall was very good to me. I thought he was the man that abused me all of my life and that's - - and I was just trying to defend myself.
>
> Q. And is that how it happened, Ms. Thames?
>
> A. Yes, sir.

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

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

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

at the time because I had not made peace with God yet." App.p. 86, lines 2-9.

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

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

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

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

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

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

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

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

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

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

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

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

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

## ARGUMENT

1.

The judge abused his discretion by refusing to authorize funds for a psychiatric evaluation by Dr. John DeWitt. This evaluation was reasonably necessary to the presentation of appellant's post-conviction claim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

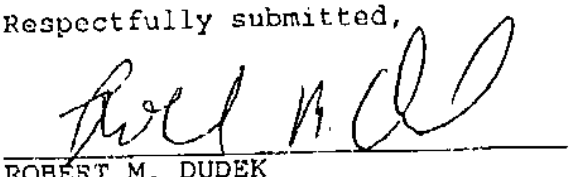
Counsel's advice that petitioner would receive a twenty year sentence induced her guilty plea. Petitioner thought a twenty year sentence would allow for her to be released prior to that time. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court granted a new trial, where, as here, Hinson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

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

## CONCLUSION

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

Respectfully submitted,



ROBERT M. DUDEK
Assistant Appellate Defender

ATTORNEY FOR PETITIONER.

This 26th day of March, 1996.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Oconee County

Honorable Gerald C. Smoak, Judge

---

RUTH ANN THAMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari, as well as a copy of the Appendix, in the above referenced case has been served upon Allen Bullard, Esquire of the Attorney General's Office, this 26th day of March, 1996.

ROBERT M. DUDEK
Assistant Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 26th day of March, 1996.

(L.S.)
Notary Public for South Carolina

My Commission Expires: APRIL 6, 2002

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

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S. C. SUPREME COURT

Appeal From Oconee County

Honorable Gerald C. Smoak, Circuit Court Judge

RUTH ANN THAMES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I

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

II

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

## STATEMENT OF FACTS

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

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

1. Ineffective assistance of counsel.

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

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

## ARGUMENT I

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

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

Authorization for the expenditure of funds for expert witnesses is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion. State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982); State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (1981).

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

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

S.C. 188, 417 S.E.2d 569 (1992). Res judicata is shown if the identities of the parties is the same as a prior litigation, the subject matter is the same as the prior litigation and there was a prior adjudication of the issue by a court of competent jurisdiction. Riedman Corporation v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992). The Petitioner fully litigated the issue of her mental competency before the court prior to her guilty plea. Thus, res judicata would act as a bar here.

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

## ARGUMENT II

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

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

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

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

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

agreement was a plea to murder in exchange for the State's agreement not to seek the death penalty. (App. p. 45, line 20 - p. 47, line 7). The trial court also commented that the plea agreement allowed her to remain eligible for parole in twenty (20) years but still subjected her to a life sentence. (App. p. 47, lines 9-20). The Petitioner indicated that she understood the agreement, did not need to discuss it any further with counsel and had not been promised anything else to induce her plea. (App. p. 47, line 21 - p. 48, line 23). She also indicated she understood she had a right to appeal her plea if she so desired. (App. p. 50, lines 3-6). Furthermore, the Petitioner signed a written plea agreement indicating her understanding that she would be eligible for parole in twenty (20) years, not that she would receive a twenty (20) year incarcerative term. (Supp. App. pp. 1-2). Counsel testified at the post-conviction relief hearing that he had informed the Petitioner that she would be eligible for parole in twenty (20) years. (App. p. 111, lines 6-10).

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

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

## CONCLUSION

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

Respectfully submitted,

CHARLES MOLONY CONDON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

TERESA NESBIT COSBY
Assistant Deputy Attorney General

ALLEN BULLARD
Assistant Attorney General

BY: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Columbia, South Carolina.
May 9, 1996.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Oconee County
Honorable Gerald C. Smoak, Judge

---

Ruth Ann Thames,

Petitioner,

v.

State of South Carolina,

Respondent.

---

CERTIFICATE OF SERVICE

---

Personally appeared before me, JEAN CLIFTON, who being first duly sworn, states:

1. That I am an employee of the Office of the Attorney General.

2. That regular communication by mail exists throughout the State of South Carolina, and that this is a proper circumstance of service by mail.

3. That on this day I served two copies of the Return to Petition for Writ of Certiorari in the above-captioned matter on the following persons by depositing same in the United States mail, postage prepaid:

Robert M. Dudek, Esquire
South Carolina Office
of Appellate Defense
1122 Lady Street, #940
Columbia, South Carolina 29201

DATED this 9th day of May, 1996.

JEAN CLIFTON

SWORN to before me this
9th day of May, 1996.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 5-16-02.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF SPARTANBURG | ) | |
| | ) | |
| John Babe Ray, Jr., | ) | |
| | ) | |
| Applicant, | ) | |
| | ) | |
| | ) | ORDER |
| v. | ) | |
| | ) | |
| | ) | |
| Michael Moore, Director, South Carolina Department of Corrections, and Charles Condon, S.C. Attorney General, Respondents. | ) | |

Applicant moves for reconsideration of this Court's prior order disallowing ex parte requests for expert, investigative and other services. The motion is denied in part and granted in part. The prior order is amended as set forth below.

**BACKGROUND**

John Babe Ray, Jr., is an indigent, death-sentenced inmate. After his direct appeal became final Ray v. State, 498 S.E.2d 640 (S.C.), cert. denied, 119 S.Ct. 240 (1998), Mr. Ray moved for a stay of execution to seek post-conviction relief. The South Carolina Supreme Court granted a motion for a stay of execution and appointed this Court to preside over post-conviction proceedings. Pursuant to In re Stays of Execution, 471 S.E.2d 140 (S.C.1996), this Court convened a hearing with respect to the appointment of

JK

counsel and appointed David P. Voisin and Edward W. Miller to represent applicant.[1] After the conclusion of that hearing, applicant's counsel indicated that they wished to discuss funding matters ex parte. Counsel for respondent, G. Robert DeLoach, III, objected to any ex parte proceedings with respect to finding, citing Thames v. State, 478 S.E.2d 682 (S.C. 1996). I then asked the parties to submit informal memoranda addressing the court's authority to consider a funding request ex parte. The parties' submissions resulted in this court denying applicant's request for ex parte proceedings pursuant to Thames v. State.

**DISCUSSION**

I continue in my finding disallowing ex parte communications. I do, however, find that the procedure outlined in State v. Row 955 P.2d 1082 (Idaho), cert. denied, 119 S.Ct. 415 (1998), provides a proper method for addressing the applicant's funding request. Therefore, applicant shall proceed as follows: (1) if applicant wishes to seek authorization to expend funds pursuant to S.C. Code Ann.§17-27-160, he may submit an application for funds under seal to the court; (2) applicant shall simultaneously with the filing of the funding request notify opposing counsel that a funding request

[1]This Court entered a written order on December 15, 1998.



JK

has been submitted to the court under seal; applicant, however, is not required to disclose to opposing counsel the nature or contents of his submission to the court; (3) the court will then review the request for funds and conduct any necessary proceedings; the court will then enter an appropriate order under seal; (4) respondents shall be notified that the court entered an order granting or denying a request for funding, but respondents shall receive no further information.

Since the State will receive notice that a funding request has been submitted, the procedure is not strictly ex parte.[2] This procedure will additionally preserve the record for proper appellate review. The procedure further addresses applicant's legitimate interest in preventing disclosure of material and information protected by the attorney/client and work-product privileges. And finally, the State is not unfairly prejudiced, for it may pursue authorized discovery in this civil matter.

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[2]In Ex parte Lexington County 442 S.E.2d 589, 593 (S.C. 1994), the Supreme Court defined ex parte as a "judicial proceeding...taken...for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." (quoting Black's Law Dictionary 297 (5th ed. 1983) (emphasis added).

**AND IT IS SO ORDERED.**

John W. Kittredge
Circuit Court Judge

Greenville, South Carolina
February 18, 1999

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2002 SEP 30 P 3:01

STATE OF SOUTH CAROLINA )
)
COUNTY OF ABBEVILLE )

IN THE COURT OF COMMON PLEAS

John Kennedy HUGHEY, #5055 )
)
Applicant, )
)
vs. )
GARY MAYNARD, )
Director, South Carolina )
Department of Corrections, )
and State of South Carolina )
)
Respondent. )

C/A No. 00-CP-01 - 212

ORDER GRANTING MOTION TO RECONSIDER ORDER DENYING REQUESTS TO CONDUCT ALL PROCEEDINGS WITH RESPECT TO APPLICANT' S REQUESTS FOR EXPERT, INVESTIGATIVE OR OTHER SERVICES EX PARTE

This matter comes before this Court by a "Motion to Reconsider Denial of Ex Parte Proceedings In Order To Seek Expert, Investigative, and other services and motion to assign another trial court to hear those matters" dated August 12, 2002. The motion has been supplemented by numerous affidavits. This Court held a conference telephone call on December 17, 2002 with counsel Charles Grose, Teresa Norris and Assistant Deputy Attorney General Donald J. Zelenka. At the conclusion of the telephone call, this Court entered an oral order granting reconsideration of its earlier order. This Order follows.

I.

This Court entered an Order dated July 26, 2002, denying an earlier Motion to Conduct All Proceedings With Respect to Applicant's Requests for Authorization for Expert,

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STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
Filed Dec 19 A.D. 2002
at 9:00 o'clock A M
Clerk of Court
2057

Investigative, and Other Services *Ex Parte* as required by S.C.§ Code 17-27-160 and S.C. Code § 16-3-26," dated March 15, 2002. An *ex parte* request had been made by appointed counsel for Mr. Hughey prior to March 15, 2002. Upon the request, the Court advised counsel of its intent to approve the request, but advised counsel that it would give notice of the order to the Respondents. Applicant's counsel objected and the matter was held in abeyance pending a motion by Applicant's counsel.

On March 15, 2002, counsel for Mr. Hughey made a motion asserting that in a state post-conviction relief action, he was entitled to submit all funding requests to the Circuit Court ex parte without notice to the Respondents' counsel. The Respondents' counsel responded by letter on April 11, 2002. On April 29, 2002, this Court convened a hearing in Greenwood County on this matter. The Applicant was present and represented by his counsel, Teresa L. Norris and E. Charles Grose. The Respondents were represented by Donald J. Zelenka of the Attorney General's Office. Argument was heard by counsel for both parties. On July 26, 2002, this Court entered a written order denying the motion.

II.

The Applicant, through counsel made a motion to reconsider. In the telephone conference call on December 17, 2002, this Court advised counsel that it had decided to reconsider its earlier order. This Court requests counsel for the Applicant to seek to submit requests for funding in a generic manner that would not disclose substantive issues or specific factual matters, such as the product of interviews with potential witnesses, interpretation of records and other privileged matters which should not be disclosed to a fact-finder in an ex parte setting. If counsel is unable to make the generic request for funding in a manner to show its reasonableness, this Court may



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request a modification by the Supreme Court of its exclusive assignment in this matter to allow for another judge to address these particular funding issues.

**AND IT IS SO ORDERED** this 18th day of December, 2002.

WYATT T. SAUNDERS
Presiding Judge

at Greenwood, South Carolina



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| **STATE OF SOUTH CAROLINA** ) | **IN THE COURT OF COMMON PLEAS** |
| ) | |
| **COUNTY OF PICKENS** ) | |
| **Jerry Buck Inman, #5226,** ) | **C/A No.: 2012-CP-39-918** |
| ) | **(Capital PCR Action)** |
| **Applicant,** ) | |
| **v.** ) | |
| ) | **REPLY TO MEMORANDUM IN RESPONSE TO MOTION TO UNSEAL EX PARTE FUNDING REQUESTS AND ORDERS** |
| **State of South Carolina,** ) | |
| ) | |
| **Respondent.** ) | |
| ) | |

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2015 OCT -7 A 10:28

Respondent, by and through the undersigned attorneys, hereby makes a Reply to the Memorandum in Response to the Motion to Unseal *Ex Parte* Funding Requests and Orders. Respondent asserts Applicant's legal arguments are without merit, and Respondent relies on its original Motion and the authority set forth therein.[1]

As a result, Respondent is entitled to an Order unsealing all *ex parte* funding requests, motions, or orders; ordering disclosure of the content of all prior communications between Applicant [or his PCR attorneys] and the Court; and directing Applicant and his attorneys to provide Respondent with notice and an opportunity to be heard at any such future hearings.

RESPONDENT SO REPLIES.

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1 Respondent also disagrees with Applicant's statement that Respondent has acquiesced to *ex parte* funding requests. Respondent raised an objection to being excluded from what Respondent believes was the one of the first status conferences or hearings conducted in this case. Respondent was participating in this status conference or hearing by telephone. Respondent was excluded from that conference, over its objection, and placed on telephone stand by. [Ms. Holt is aware of this fact as she objected to Respondent participating in the hearing]. Respondent is not aware of any hearings thus far in this matter being conducted on the record or in open court. Upon review of its file in this case, Respondent has not previously received notice of any *ex parte* funding requests, motions, hearings, or orders in this matter. Regardless, Respondent is entitled to the unsealing of any *ex parte* funding requests, motions, orders and *ex parte* discussions between Applicant and the Court, and notice of any future *ex parte* funding requests or hearings, based on Respondent's previous Motion and the authority cited therein.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

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Columbia, South Carolina 29211
(803) 734-6305

BY: _____
ANTHONY MABRY
ATTORNEYS FOR RESPONDENTS

October 2, 2015

| | |
|---|---|
| **STATE OF SOUTH CAROLINA** ) | **IN THE COURT OF COMMON PLEAS** |
| ) | |
| **COUNTY OF PICKENS** ) | |

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2015 OCT -7 A 10:28

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|---|---|
| **Jerry Buck Inman, #5226,** ) | **C/A No.: 2012-CP-39-918** |
| ) | **(Capital PCR Action)** |
| **Applicant,** ) | |
| **v.** ) | **CERTIFICATE OF SERVICE** |
| ) | |
| **State of South Carolina,** ) | |
| ) | |
| **Respondent.** ) | |
| ) | |

The undersigned certifies that a copy of ***Reply to Memorandum in Response to Motion to Unseal Ex Parte Funding Requests and Orders*** was served on Counsel for the Applicant by depositing same in the United States mail, postage prepaid, addressed as follows:

Diana L. Holt Esquire
Post Office Box 6454
Columbia, SC, 29260-6454

E. Charles Grose Jr., Esquire
404 Main Street
Greenwood, SC 29646

This 2nd day of October, 2015.

Anthony Mabry
Assistant Attorney General

2015 NOV 24 PM 12 44
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

| | |
|---|---|
| **STATE OF SOUTH CAROLINA** ) | **IN THE COURT OF COMMON PLEAS** |
| **COUNTY OF PICKENS** ) | |
| **Jerry Buck Inmon,** ) | **Case No. 2012-CP-39-00918** |
| Applicant, ) | **(Capital PCR Action)** |
| **vs.** ) | |
| ) | **ORDER DENYING MOTION** |
| ) | **TO UNSEAL AND DISCLOSE** |
| **State of South Carolina,** ) | |
| Respondent. ) | |

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

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

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

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

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

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

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

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

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

**Procedural History**

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

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

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

Mr. Inmon subsequently and timely filed this action for post-conviction relief. The Court appointed Ms. Holt and Mr. Grose to represent Mr. Inmon on November 19, 2012.

**Standard of Review**

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

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

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

**FINDINGS OF FACT**

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

> "SECTION 17-27-160 SO AS TO PROVIDE FOR THE MANNER IN WHICH DEFENDANTS SENTENCED TO DEATH MUST FILE APPLICATIONS FOR POST-CONVICTION RELIEF; ...TO FURTHER PROVIDE FOR THE APPOINTMENT AND COMPENSATION OF COUNSEL IN THESE PROCEEDINGS ... ."
>
> Title of Act No. 448, 1996 Acts 2709, effective date, June 18, 1996.

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

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

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

**Conclusions of Law**

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

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

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

conviction relief proceedings."

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

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

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

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

expressly excluded.[2] Section 17-27-160(B), therefore, requires this Court to look to § 16-3-26 for the procedure to follow in order to obtain investigative, expert or other services. Section 16-3-26(C)(1) provides:

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

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

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

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

motions, requests and orders already issued, disclosing to the State the content of all *ex parte* communications between the Court and Mr. Inmon's counsel, and providing the Office of the Attorney General with notice and opportunity to be present and heard at any future *ex parte* funding requests or hearings must be **DENIED.** Any further hearings on Applicant's *ex parte* expense requests should be conducted consistent with the mandates of the death penalty statutes as amended and incorporated by the "South Carolina Effective Death Penalty Act of 1996." [3]

AND, IT IS SO ORDERED.

Alexander S. Macaulay, Presiding Judge [4]

November 16, 2015
Walhalla, South Carolina

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2015 NOV 24 PM 12 44

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

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

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

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

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

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

2015 NOV 24 PM 12 44

CASE NO. 2012-CP-39-00918

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

**Jerry Buck Inmon, # 5226**
APPLICANT(S)

**State of South Carolina**
RESPONDENT(S)

| **Submitted by: The Court** | **Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

This order does not end the case.

Additional Information for the Clerk : State's Motion to Unseal and Disclosed *Ex parte* Funding Orders DENIED.

**INFORMATION FOR THE PUBLIC INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| | | $ |
| | | $ |
| | | $ |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

**Alexander S. Macaulay, Circuit Court Judge** | **Judge Code** 63 | **Date** 11/16/2015



**2071**

2015 NOV 24 PM 12 43
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

# Tenth Judicial Circuit Court

**Oconee County Courthouse**

ALEXANDER S. MACAULAY
Circuit Judge (Active Retired)

Post Office Drawer 428
Walhalla, SC 29691-0428

Telephone: (864) 718-1041
Facsimile: (864) 638-4267
amacaulayj@sccourts.org

November 16, 2015

Honorable Harold P. Welborn
Pickens County Clerk of Court
Post Office Box 215
Pickens, South Carolina 29671-0215

Re: Jerry Buck Inmon, #5226 v. State of South Carolina
2012-CP- 39-0091, Capital PCR Action

Dear Mr. Welborn:

Enclosed please find my Order Denying Motion to Unseal and Disclose, filed by the State in the above-referenced Capital PCR, together with my Form 4. By agreement of the parties, the hearing was held October 23, 2015, while I was presiding over a term of General Sessions Court in Anderson, and the Court Reporter was Renee Tollison.

I trust you will find the same in order, and I would appreciate your serving the Order and Form 4's on the parties. Necessarily, if there are any questions, please do not hesitate t advise me.

Thanking you for your attention to and consideration in this matter, I remain

Sincerely,

Alexander S. Macaulay

Enclosures.

| | |
|---|---|
| **STATE OF SOUTH CAROLINA** ) | |
| ) | **IN THE COURT OF COMMON PLEAS** |
| **COUNTY OF PICKENS** ) | |
| ) | |
| **Jerry Buck Inmon, #5226,** ) | |
| ***aka Jerry Buck Inman*** ) | |
| ) | **C/A No.: 2012-CP-39-918** |
| **Applicant,** ) | **(Capital PCR Action)** |
| **v.** ) | |
| ) | **RULE 59, SCRCP, MOTION TO ALTER OR** |
| **State of South Carolina,** ) | **AMEND OR TO RECONSIDER** |
| ) | |
| **Respondent.** ) | |
| ) | |

2015 DEC 14 PM 3 05
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Respondent, by and through the undersigned attorneys, hereby moves, pursuant to Rule 59, SCRCP, for this Honorable Court to Alter or Amend or Reconsider its Order Denying Respondent's Motion to Unseal and Disclose dated November 16, 2015, filed November 24, 2015, of which Respondent received written notice of entry of the Order on November 30, 2015.

Respondent moves this Court to Alter or Amend its Order Denying the Motion to Unseal or Disclose or to Reconsider its Order due to the fact Respondent believes this Honorable Court was unable to consider the fact that the arguments raised by Applicant in the favor of denying Respondent's Motion to Unseal and Disclose were similarly raised by capital PCR applicant Stephen C. Stanko in the interlocutory appeal in Stanko v. State, Appellate Case No. 1015-000212 (Filed February 25, 2015)(Unpublished Order), and the South Carolina Supreme Court rejected those arguments as unpersuasive. Id., *citing* Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996). Respondent is informed and believes this Honorable Court was unable to consider this fact because the Court was unable to access the appellate briefs in the Stanko interlocutory appeal due to the fact they were submitted by Respondent to this Court via e-mail in PDF format, and the

Court was unable to access the same in that format,[1] and, Respondent inadvertently failed to attach Stanko's Reply brief in the above described e-mail. As a result, Respondent is attaching to this Motion the briefs in the Stanko appeal for this Court's consideration in ruling on this Motion to Alter or Amend or Reconsider. (Attachments 1, 2, & 3). Respondent's intent is to seek compliance by the Court with the decision in Thames v. State, *supra*, and to protect the integrity of the fact finding process.[2]

Wherefore, for the above stated reasons, Respondent moves this Honorable Court to alter or amend or reconsider its Order Denying Respondent's Motion to Unseal and Disclose and issue an Order granting Respondent's Motion to Unseal and Disclose.

RESPONDENT SO MOVES.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

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1 This Honorable Court reported that it not have PDF access in an e-mail to collateral counsel and copied to Respondent on November 10, 2015.

2 Respondent is filing this Motion in order to give this Honorable Court the opportunity to alter or amend or reconsider its Order; however, Respondent will be required to file Notice of Appeal or Extraordinary Writ on December 30, 2015.

BY: _____
ANTHONY MABRY
ATTORNEYS FOR RESPONDENTS

December 10, 2015

2015 DEC 14 PM 3 05

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

# ATTACHMENT 1

DEATH PENALTY
RESOURCE & DEFENSE CENTER

February 3, 2015

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *Stanko v. State*, Capital PCR Case Number: 2014-CP-26-0035
Petition for Court Oversight of Capital PCR Action

Dear Mr. Shearouse,

Please find enclosed for filing, with proof of service, a Petition for Court Oversight of Capital PCR Action filed on behalf of Petitioner, Stephen C. Stanko.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Lindsey S. Vann

cc: Anthony Mabry
The Honorable Benjamin H. Culbertson
Stephen C. Stanko

900 Elmwood Avenue, Suite 101 • Columbia, SC 29201 • 803.765.1044 tel • 803.765.1143 fax
www.deathpenaltyresource.org

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

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Capital PCR Case Number: 2014-CP-26-00035

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STEPHEN C. STANKO, SK 6022 ..... *Petitioner*,

v.

STATE OF SOUTH CAROLINA ..... *Respondent*.

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**PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION**
**(Expedited Consideration Requested)**

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**Emily C. Paavola**
SC Bar No. 77855
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
(803) 765-1044

**Lindsey S. Vann**
SC Bar No. 101408
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(803) 765-1044

Counsel for Petitioner

## I. INTRODUCTION

Petitioner, Stephen C. Stanko, an indigent death-sentenced inmate, respectfully petitions this Court to exercise its supervisory authority and order the post-conviction relief ("PCR") court to authorize expert funding as provided for by statute and grant a continuance to allow undersigned counsel an opportunity to prepare for a merits hearing on Petitioner's PCR Application. This petition invokes the Court's supervisory authority in capital PCR cases. S.C. Code § 17-27-160; *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). This petition also invokes counsel's duty to provide information to this Court pursuant to *In re Stays of Execution in Capital Cases*.

Petitioner's PCR action was assigned by this Court to the Honorable Benjamin H. Culbertson in the Horry County Court of Common Pleas ("the PCR court"). Prior to filing this Petition, Petitioner filed (before the PCR court) multiple motions to reconsider funding denials, arguing Judge Culbertson's denials were based on a misinterpretation of the applicable statutory funding standard, and a motion for a continuance of the PCR hearing, which is currently scheduled for March 2, 2015. *See* Section II, *infra*. Respondent has taken no position on these motions, except for making a request that the funding motions and orders denying funding be unsealed.

Currently, undersigned counsel find themselves unable to prepare for the scheduled PCR hearing because the PCR Court (1) has denied funding for all expert assistance, despite counsel's demonstration that such assistance is reasonably necessary to the representation of Mr. Stanko; (2) has not ruled on counsel's motion to reconsider the funding denials; and (3) has not ruled on counsel's motion for a continuance. Petitioner, through undersigned counsel, therefore asks this Court to order the PCR court to rule on Petitioner's currently pending motions, to apply the appropriate standard for considering funding requests, and to grant a continuance to allow

undersigned counsel an opportunity to prepare for a hearing on Petitioner's pending PCR application. Petitioner respectfully requests this Court consider this Petition and rule prior to March 2, 2015 when an evidentiary hearing is currently scheduled to begin.

## II. PROCEDURAL BACKGROUND

Petitioner was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[1] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, this Court affirmed the conviction and sentence. *Id.* Petitioner subsequently moved for a stay of execution in order to pursue post-conviction relief. This Court issued a stay of execution and assigned the post-conviction relief proceedings to Judge Culberson. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013), *attached* as Exhibit A. Judge Culbertson appointed undersigned counsel to represent Petitioner on February 4, 2014. *See* Exhibit B.

On February 21, 2014, the PCR court entered a Scheduling Order, scheduling a merits hearing for December of 2014, and subsequently amended the Scheduling Order, sua sponte, to tentatively schedule a merits hearing for February of 2015. On September 25, 2014, the PCR court set a date certain for the merits hearing, scheduling the trial in this PCR proceeding to commence on March 2, 2015, and ordering the discovery be completed by January 31, 2015.[2]

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[1] Petitioner was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Petitioner was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Petitioner in connection with his Georgetown County proceedings.

[2] The PCR court's scheduling orders are attached as Exhibit C.

After being appointed, undersigned counsel immediately began reviewing the record and conducting an independent investigation.[3] On April 1, 2014, counsel filed Applicant's First *Ex Parte* Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion") pursuant to S.C. Code §§ 16-3-26(C)(1) and 17-27-160(B).[4] During the two months between their appointment and filing the First Funding Motion, undersigned counsel: (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors from Stanko's trial; (4) met with Stanko's sister and a friend; and (5) conducted preliminary interviews with Stanko's trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case, undersigned counsel moved for funding to aid in the investigation, development, and presentation of Stanko's claims.[5] Specifically, the First Funding Motion requested the PCR court authorize

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[3] The PCR court initially denied undersigned counsel's *Ex Parte* Motion to Authorize Attorney Fee Rates. Counsel was therefore forced to file a motion for reconsideration, asking the PCR court to authorize attorney rates and hours, which was not ultimately resolved until March 27, 2014.

[4] Respondent has moved to unseal the *ex parte* pleadings and orders and Petitioner has opposed that request. If this Court deems it necessary to review the *ex parte* pleadings and orders referenced in this Petition, Petitioner will be happy to provide them under seal.

[5] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

funding for a fact investigator, a mitigation investigator, and a forensic psychologist. In support of each of these funding requests, Petitioner provided specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant."[6] *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant").

On April 29, 2014, the PCR Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness . . . " because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist.[7] *See* Applicant's *Ex Parte* Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("First Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to

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First Funding Motion 6-7 (Apr. 1, 2014).

[6] The facts in support of Petitioner's requests were set forth in his *ex parte* funding motion in accordance with S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B).

[7] This motion was likewise filed *ex parte* as permitted by South Carolina law.

reconsider, counsel: (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and, (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. Counsel sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts. Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the PCR court denied all funding requested for a forensic psychologist. The court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel: (1) completed interviews with the remainder of Stanko's trial counsel; (2) continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's social history and records regarding trial counsel's preparations. On July 28, 2014, counsel presented the PCR court with additional facts supporting the need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested funding for the services of a licensed social worker and for a media expert. In support of these funding requests, Stanko presented the Court with specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Approximately two months later, on September 25, 2014, the PCR court denied the requested funds for a licensed social worker and a media expert, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *See* Order Denying Applicant's Second Motion To Authorize Funding for Expert Services (Sept. 25, 2014). The court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Petitioner filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In the Second Motion to Reconsider, Petitioner argued the PCR court misconstrued the funding standard set forth in S.C. Code § 16-3-26(C)(1) by finding the necessity of expert assistance cannot

be determined because Stanko could not present the Court with the conclusions the experts will reach. Petitioner argued the standard used by the Court is not only inconsistent with the relevant statutory language, but it is also at odds with capital post-conviction practice in this state; no other South Carolina Circuit Judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude.

On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the PCR court order Petitioner transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the PCR court sent counsel an email canceling the *ex parte* hearing, informing Petitioner the court would decide the Second Motion to Reconsider without oral arguments, and ordering Petitioner to file an *ex parte* brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Petitioner's Motion for Order of Transport.

On January 6, 2015, Petitioner filed a brief in support of his Second Motion to Reconsider. On the same day, based on the PCR court's denial of expert funding and failure to rule on Petitioner's Second Motion to Reconsider, Petitioner filed a Motion for Continuance and asked for a hearing on the continuance motion in the PCR court. *See* Exhibit D. In response, Respondent filed a Motion to Unseal *Ex Parte* Funding Requests and Orders Regarding the Same ("Motion to Unseal"). *See* Exhibit E. Petitioner filed a Return in Opposition to Respondent's Motion to Unseal on January 14, 2015. *See* Exhibit E. As of the filing of this Petition, the Circuit Court has not ruled on the Second Motion to Reconsider, the Motion for Continuance, or the State's Motion to Unseal. Petitioner, therefore, has no funding for expert assistance in preparation for a hearing on the merits of his PCR application, currently scheduled to begin on March 2, 2015.

## III. LEGAL BASIS FOR GRANTING EXPERT FUNDING AND CONTINUANCE

Expert assistance of a capital post-conviction relief applicant is authorized in South Carolina when such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B). The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

The South Carolina PCR statute explicitly authorizes a court to continue the hearing in this case when "good cause is shown to justify a continuance." S.C. Code § 17-27-160(C). Generally, a hearing on a capital PCR application "must be scheduled within one hundred eighty days from the date of the status conference" held after the filing of the State's return. *Id.* However, the statute

authorizes the PCR court to grant a continuance of the hearing beyond 180 days after the status conference where "good cause is shown." *Id.*

## IV. ARGUMENT

***Funding Standard***

Undersigned counsel are in an impossible (and unprecedented) bind. The PCR court has denied requests for funding for necessary expert assistance on the basis that Petitioner cannot provide the court with the conclusions the experts will reach. This is not only inconsistent with the relevant statutory language, but it is also at odds with more than twenty years of capital post-conviction practice in this state; no other judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude. The statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services prior to the court's authorization of funds. In counsel's experience, and in the experience of other practiced capital post-conviction attorneys in South Carolina, no court in the state has ever made authorization of funds for investigative and expert services contingent on a beneficial result obtaining or even on the services resulting in a claim being presented to the court. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 5; Holt Aff. ¶ 4.[8] Instead, courts have required counsel for PCR applicants to simply explain that further investigation or expert evaluation is needed in order to provide representation to the applicant. *See* Norris Aff. ¶ 7, Bloom Aff. ¶ 7.

[8] In addition to other affidavits supporting Petitioner's specific funding requests, with the Second Motion to Reconsider, Petitioner submitted three affidavits from experienced counsel, which are attached to this Petition. The affidavits are attached as Exhibit F.

The standard set forth in the PCR court's orders—requiring a favorable result for the applicant prior to authorizing expert funding—expects that counsel would be able to retain the services of an expert without being able to guarantee their services would be paid for. Essentially, an expert would have to agree to provide their services on the hope that their evaluation would give rise to a winning claim in a PCR action.[9] Such a system is unworkable and would leave capital post-conviction applicants without the service of experts because, generally, experts will not commence work on a case without an order from the court authorizing payment for their services. *See* Norris Aff. ¶ 8.

The PCR court's interpretation of the "reasonably necessary" requirement, therefore, impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). The right to the assistance of counsel when filing an application for post-conviction relief is hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *See Williams*, 618 F.2d at 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft

[9] An expert could not ethically state before doing an evaluation what the evaluation will yield. Any expert who did so would be subject to impeachment on that basis. Additionally, some experts, such as forensic psychologists, cannot ethically provide services under the PCR court's standard which effectively creates a contingent fee arrangement.

1968)). It is the state's duty to "ensure that a defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506.

The Supreme Court of the United States specifically recognized that the "right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to *research* and present a defendant's habeas claims." *McFarland*, 512 U.S. at 859 (emphasis added). Post-conviction counsel in capital cases "must continue an aggressive investigation of all aspects of the capital case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4). "[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation." *Id.* 10.15.1(E)(4) commentary. Thus, though counsel has no way of knowing at the outset of its post-conviction preparation what claims will ultimately be presented to the court, post-conviction counsel have a duty to investigate the case entirely and often require the assistance of experts to do so. *See id.* 4.1 commentary ("Analyzing and interpreting [evidence in a capital case] is impossible without consulting experts.")

The Supreme Court of the United States has also established that a state court reviewing a state prisoner's federal claims must provide the prisoner with an opportunity to present evidence relevant to the federal claims. *See Coleman v. Alabama*, 377 U.S. 129, 133 (1964). In order to meaningfully access and to provide a fair opportunity to present all relevant evidence, a court must provide adequate funding for investigative and expert services. The Supreme Court has specifically acknowledged that adequate factual development may be impossible without access to expert assistance. *See Panetti v. Quarterman*, 551 U.S. 930, 949–50 (2007) (petitioner, claiming incompetence to be executed in state post-conviction, was entitled to an "opportunity to make an adequate response to evidence solicited by the state court," including an opportunity to submit

psychiatric evidence); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (basic due process requirements included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination"); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (assistance of a psychiatrist was necessary to prepare an effective defense based on the defendant's mental condition).

Undersigned counsel presented facts demonstrating that expert services in this case are reasonably necessary to the PCR court. Nevertheless, the PCR court has consistently misinterpreted the standard for authorizing expert funding set forth in S.C. Code § 16-3-26(C)(1). Undersigned counsel are, therefore, unable to effectively prepare for Petitioner's impending PCR hearing. Because funding for reasonably necessary expert assistance is mandated by state and federal law, judicial economy demands that this Court exercise its supervisory authority in capital PCR cases and order the PCR court to rule on Petitioner's Second Motion to Reconsider applying the proper standard for authorization of expert funding. Without such an order from this Court, the procedures provided by the PCR court are likely to be so defective as to require further proceedings upon appeal and remand of Petitioner's case. Counsel, therefore, request this Court to correct the PCR court's misunderstanding of the statutory standard and order the court to rule on the Second Motion to Reconsider accordingly.

***Continuance***

Undersigned counsel have done everything in their power to attempt to prepare for Petitioner's PCR hearing now-scheduled for March 2, 2015. Nevertheless, a continuance is necessary because the PCR court has continually denied counsel's requests for the assistance of experts, which counsel has demonstrated in multiple funding motions to be reasonably necessary for the representation of Petitioner. S.C. Code § 16-3-26(C)(1). As described in detail above, the

PCR court has done so based on an improper reading of the capital case funding statute. Given the necessity of the assistance of the experts to effectively develop and present Petitioner's claims for relief, the Court's denials have prohibited counsel from preparing for a hearing. *See Williams*, 618 F.2d 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided").

As described above, early on in their investigation in Petitioner's case, counsel identified the need for expert assistance, contacted the experts able to provide the required assistance to determine their willingness and availability to assist on the case,[10] and asked the PCR court to authorize funding for their services. This was all completed in an attempt to prepare for the hearing date scheduled by the PCR court. Counsel then presented the court with specific and detailed reasons necessitating the assistance of a licensed social worker, a forensic psychologist, and a media expert. In spite of the demonstrated necessity of expert services, the PCR court denied two *ex parte* funding requests and a motion to reconsider and has not ruled on counsel's Second Motion to Reconsider, though it was submitted to the Court nearly four months ago. Moreover, although counsel requested an opportunity to be heard at an *ex parte* hearing as permitted by the PCR court's scheduling order, the court canceled the hearing and refused to hear argument on the funding denials. As a result, counsel's hands are tied and they cannot complete preparation for the hearing scheduled in less than one month.

The experts contacted by counsel, who have expressed a willingness to work on Stanko's case, cannot begin working on the case until the PCR court authorizes funding for their services.

---

[10] Dr. Arlene Andrews (licensed social worker), Dr. Susan Knight (forensic psychologist), and Professor Neil Vidmar (media expert) have been contacted by counsel, become somewhat familiar with the case, and have expressed their willingness and availability to work on the case.

*See* Andrews Aff. ¶ 8 (stating she cannot complete a social history without authorization of funds by the PCR court); Knight Aff. ¶ 4 (stating she cannot complete a mental health evaluation without authorization of funds by the PCR court and that it would be unethical for her to provide services where her payment was contingent upon assisting in developing a winning claim).[11] Even if the PCR court ruled immediately on the Second Motion to Reconsider, however, counsel could not effectively prepare for a hearing in March of 2015. The experts indicated the required preparation and evaluations in Stanko's case cannot be completed for six to nine months after the Court authorizes funding for their services. Andrews Aff. ¶ 9; Knight Aff. ¶ 6. That the experts cannot complete their services prior to the hearing date as scheduled cannot be held against Petitioner because counsel have worked as diligently as possible to prepare for a hearing, given the denial of funding for experts, and the PCR court has thus far denied Petitioner the expert assistance demonstrated to be reasonably necessary to prepare his defense in contradiction of the capital case funding statute. *See* S.C. Code §§ 16-3-26(C)(1).

Counsel, therefore, cannot prepare for a hearing without the Court's authorization of funding for expert assistance and additional time for the experts to complete their services. Furthermore, during the usual course of investigating and working with the experts in preparation for a hearing, it is likely counsel will uncover additional issues that must be investigated. This will require additional time to request records and investigate as necessary to develop and present Petitioner's claims for relief. Accordingly, Petitioner has shown good cause for a continuance, S.C. Code § 17-27-160(C), and requests this Court order the PCR court to continue the PCR hearing for nine months from the date it rules on the Second Motion to Reconsider. Without such

[11] Both Dr. Andrews and Dr. Knight's affidavits were attached to Petitioner's Motion for Continuance, which is attached to this Petition as Exhibit D.

a continuance, counsel will be unable to effectively prepare for Petitioner's PCR hearing, which will likely require further proceedings upon appeal of the PCR court's ultimate determination. *See Martinez*, 132 S. Ct. 1309 (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded).

## V. CONCLUSION

To allow undersigned counsel to effectively prepare for a hearing on the merits of Petitioner's PCR application and to avoid remand for further proceedings upon appeal of the PCR court's ultimate decision, this Court should order the PCR court to rule on Petitioner's Second Motion to Reconsider, applying the proper standard for authorization of expert funding, and order the PCR court to continue Petitioner's PCR hearing until counsel have an opportunity to prepare for the hearing with the assistance of reasonably necessary experts.

February 3, 2015

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

Counsel for Petitioner

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

---

Capital PCR Case Number: 2014-CP-26-00035

---

STEPHEN C. STANKO, SK 6022 ..... *Petitioner*,

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

---

**CERTIFICATE OF SERVICE**

---

The undersigned hereby certifies that a copy of the Petitioner's Petition for Court Oversight of Capital PCR Action was serve by first class United States mail, postage prepaid, this 3rd day of February, 2015, upon the following:

Anthony Mabry
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

Lindsey S. Vann

# Exhibit A

# The Supreme Court of South Carolina

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appellate Case No. 2010-154746

RECEIVED
NOV -7

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ORDER

---

Appellant was convicted of armed robbery and murder. He was sentenced to twenty years in prison for armed robbery and to death by lethal injection for murder. This Court affirmed his convictions and sentence. *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). The United States Supreme Court denied appellant's petition for a writ of certiorari. *Stanko v. South Carolina*, 2013 WL 3465786 (U.S.S.C. Oct. 7, 2013).

Appellant now seeks a stay of execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not oppose the motion.

The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases*.

The Honorable Benjamin H. Culbertson is hereby assigned to the PCR action appellant has filed. Judge Culbertson shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled.

Judge Culbertson shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge Culbertson shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits.

The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under *In re Stays of Execution in Capital Cases*, *supra*, Judge Culbertson is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

C.J.

FOR THE COURT

Columbia, South Carolina

November 7, 2013

cc:
Robert M. Pachak
John W. McIntosh
J. Anthony Mabry
Alan McCrory Wilson
Robert Michael Dudek
Donald J. Zelenka
John Gregory Hembree
Melanie Huggins-Ward
The Honorable Benjamin H. Culbertson

# Exhibit B

| | | |
|---|---|---|
| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF HORRY**<br><br>**Stephen C. Stanko, #6022**<br>**Plaintiff(s),**<br>**-vs-**<br>**State of South Carolina,**<br>**Defendant(s).** | )<br>)<br>)<br>)<br>)<br>)<br>) | **IN THE COURT OF** (*Select one.*)<br>☑ **COMMON PLEAS** ☐ **FAMILY COURT**<br>**15th JUDICIAL CIRCUIT**<br>**CASE NO.: 2014-CP-26-035**<br>**APPOINTMENT OF COUNSEL OR GAL**<br>(*Select one.*)<br>☑ **ORDER**<br>☐ **AMENDED ORDER** |

**TYPE OF CASE/PROCEEDING:** (*Check one.*)

| | | |
|---|---|---|
| ☑ Post-Conviction Relief (PCR)/habeas case | ☐ Adoption | ☐ Juvenile |
| ☐ SVP case | ☐ Custody and/or Visitation | ☐ Abuse and Neglect |
| ☐ Minor Name Change | ☐ Other: | |

It appears that **Stephen C. Stanko**, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (*Select only one.*)

☑ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____

☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

☐ court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

☐ Other:

FILED
2014 FEB 11 PM 2:55
HORRY COUNTY CLERK OF COURT

Therefore, it is ordered that **Emily C. Paavola**, hereby is appointed as (*Select one.*)

☐ counsel ☑ lead counsel (*if capital PCR case*) ☐ guardian ad litem

for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☑ (*If Death Penalty PCR Case*) It is further ordered that **Lindsey Vann**, Esquire, is hereby appointed as second counsel in this capital PCR case.

**(See attached affidavits of qualifications and consents to appointment of counsel.)**

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 4th DAY OF **February**, **2014**.

Benjamin H. Culbertson

☑ Circuit Judge ☐ Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

SCCA/267 (03/07)

# Exhibit C

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | CASE NUMBER: 2014-CP-26-035 |
| Stephen C. Stanko, #6022, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | SCHEDULING ORDER |
| | ) | |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to the Order of the South Carolina Supreme Court dated 11/7/2013 and Code of Laws of South Carolina 1976 §17-27-160(C), a status conference was convened in this case on 2/21/2014 at 9:30 a.m. in the chambers of the undersigned judge at the Horry County Judicial Center in Conway, South Carolina. Attorneys Emily C. Paavola and Lindsey S. Vann appeared on behalf of the petitioner and Assistant Attorney General Anthony Mabry appeared on behalf of the respondent.

Pursuant to the said status conference, the following schedule is hereby set in this case:

1. Petitioner shall file and serve his Initial Amended Application for Post-Conviction Relief, if any, by no later than **5/1/2014**. Should petitioner not file an Initial Amended Application for Post-Conviction Relief, petitioner shall be barred from filing any subsequent Amended Application for Post-Conviction Relief without prior order of the court authorizing such filing.

2. Respondent shall file and serve its Return to the Initial Amended Application for Post-Conviction Relief within 30 days of receipt of the amended application. Should Petitioner fail to file and serve an Initial Amended Application for Post-Conviction Relief, then Respondent shall file and serve its Return to the original application in this case by **5/31/2014**.

3. The parties shall commence discovery upon the filing of Respondent's Return to Petitioner's original or Amended Application for Post-Conviction Relief.

4. Petitioner shall file and serve his Final Amended Application for Post-Conviction Relief, if any, by **10/1/2014**.

5. Respondent shall file and serve its Return to Petitioner's Final Amended Applications for Post-Conviction Relief within 30 days of receipt of the amended application.

6. The parties shall complete discovery by **11/1/2014**. Any party desiring discovery shall serve discovery requests and/or notice of depositions within sufficient time to allow the opposing party to comply with the said discovery by **11/1/2014**.

7. Any and all pre-trial motions shall be filed with a supporting brief and simultaneously submitted to the undersigned judge and served on opposing counsel. Opposing counsel may file/submit/serve a brief in opposition to the motion within 14 days of receipt of the motion. All pre-trial motions subject to this section shall be decided on briefs without oral arguments unless a party requests a hearing for oral arguments at the time the party files/serves/submits his brief.

8. The merits hearing in this case shall be held on or before **12/1/2014**. A "day certain" hearing date shall be scheduled by the undersigned judge upon receipt of the circuit court's schedule for 7/1/2014 through 12/31/2014. The merits hearing in this case is continued beyond the 180-day scheduling requirements set forth in Code §17-27-160(C) for the following good causes:

   a. The Petitioner has an application for post-conviction relief in another capital case pending in another county.

   b. Experience of petitioner's attorneys has shown that a case of this magnitude cannot be investigated, researched and prepared for hearing within 180 days.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

February 21, 2014
Conway, SC

# State of South Carolina
# The Circuit Court of the Fifteenth Judicial Circuit

**Benjamin H. Culbertson**
**Resident Circuit Judge**

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

April 29, 2014
Via Email and U.S. Mail Delivery

Emily C. Paavola, Esquire
Lindsey Vann, Esquire
Death Penalty & Defense Center
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Email: Emily@deathpenaltyresource.org
Lindsey@deathpenaltyresource.org

Anthony Mabry, Asst. Attorney General
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Jimmy A. Richardson, Solicitor
Office of the Solicitor, 15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

Email: richj@horrycounty.org
psnowden@horrycounty.org

RE: *Stanko v. State* (Case No. 2014-CP-26-035)

Dear Ladies and Gentlemen:

Please find enclosed a copy of the Amended Scheduling Order dated 4/29/2014 in this case. By copy of this letter and enclosure, I am forwarding the original Scheduling Order to the clerk of court for filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc
Enclosure (a/s)
pc: Melanie Huggins-Ward, Clerk of Court

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | CASE NUMBER: 2014-CP-26-035 |
| Stephen C. Stanko, #6022, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | AMENDED SCHEDULING ORDER |
| | ) | |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to the Order of the South Carolina Supreme Court dated 11/7/2013, this case was assigned to the undersigned. As presiding judge, the undersigned issued a Scheduling Order in this case dated February 21, 2014. The court now deems, *sua sponte*, that the Scheduling Order dated February 21, 2014, does not provide adequate time for the parties to prepare for trial and, therefore, should be amended .

NOW, THEREFORE, the following amended schedule is hereby set in this case:

1. Petitioner shall file and serve his Initial Amended Application for Post-Conviction Relief, if any, by no later than **6/16/2014**. Should petitioner not file an Initial Amended Application for Post-Conviction Relief, petitioner shall be barred from filing any subsequent Amended Application for Post-Conviction Relief without prior order of the court authorizing such filing.

2. Respondent shall file and serve its Return to the Initial Amended Application for Post-Conviction Relief within 30 days of receipt of the amended application. Should Petitioner fail to file and serve an Initial Amended Application for Post-Conviction Relief, then Respondent shall file and serve its Return to the original application in this case by **7/16/2014**.

3. The parties shall commence discovery upon the filing of Respondent's Return to Petitioner's original or Amended Application for Post-Conviction Relief.

4. Petitioner shall file and serve his Final Amended Application for Post-Conviction Relief, if any, by **10/1/2014**.

5. Respondent shall file and serve its Return to Petitioner's Final Amended Applications for Post-Conviction Relief within 30 days of receipt of the amended application.

6. The parties shall complete discovery by **12/15/2014**. Any party desiring discovery shall serve discovery requests and/or notice of depositions within sufficient time to allow the opposing party to comply with the said discovery by **12/15/2014**.

7. Any and all pre-trial motions shall be filed with a supporting brief and simultaneously submitted to the undersigned judge and served on opposing counsel. Opposing counsel may file/submit/serve a brief in opposition to the motion within 14 days of receipt of the motion. All pre-trial motions subject to this section shall be decided on briefs without oral arguments unless a party requests a hearing for oral arguments at the time the party files/serves/submits his brief.

8. The merits hearing in this case shall be held on or before **2/28/2015**. A "day certain" hearing date shall be scheduled by the undersigned judge upon receipt of the circuit court's schedule for 1/1/2015 through 6/30/2015. The merits hearing in this case is continued beyond the 180-day scheduling requirements set forth in Code §17-27-160(C) for the following good causes:

   a. The Petitioner has an application for post-conviction relief in another capital case pending in another county.

   b. Experience of petitioner's attorneys has shown that a case of this magnitude cannot be investigated, researched and prepared for hearing within 180 days.

9. This court's Order For Date Certain Trial dated April 2, 2014, is hereby rescinded and rendered null and void.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

April 29, 2014
Georgetown, SC

# State of South Carolina
# The Circuit Court of the Fifteenth Judicial Circuit

**Benjamin H. Culbertson**
**Resident Circuit Judge**

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Email: bculbertsonj@sccourts.org

September 25, 2014

Via Email and U.S. Mail Delivery

Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
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Lindsey@deathpenaltyresource.org

Anthony Mabry, Asst. Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Email: amabry@scag.gov

Jimmy A. Richardson, Solicitor
Office of the Solicitor, 15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

Email: richj@horrycounty.org
psnowden@horrycounty.org

RE: *Stephen C. Stanko, #6022 v. State of South Carolina*
Case Number: 2014-CP-26-035

Dear Ladies and Gentlemen:

Please find enclosed a copy of the *Order For Date Certain Trial And Second Amended Scheduling Order* in the above referenced case. As you can see from the order, the trial of this case is set to commence on 3/2/2015 and the deadline for completing discovery is extended until 1/31/2015. All other mandates of the prior scheduling order remain in effect.

Under copy of this letter, I am forwarding the original order to the Clerk of Court for filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc
Enclosures (a/s)
pc: Hon. Larry B. Hyman, Administrative Judge for Common Pleas, 15th Judicial Circuit
Hon. Steven H. John, Circuit Court Judge
Hon. Melanie Huggins-Ward, Horry County Clerk of Court

Stephen C. Stanko, #6022
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | CASE NUMBER: 2014-CP-26-035 |
| | ) | |
| Stephen C. Stanko, #6022, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | ORDER FOR DATE CERTAIN TRIAL AND |
| | ) | SECOND AMENDED SCHEDULING ORDER |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to the Order of the South Carolina Supreme Court dated 11/7/2013, this case for post-conviction relief is assigned to the undersigned.

NOW, THEREFORE, as the presiding judge in this case, it is hereby

ORDERED, that the trial of this case is set to commence at **9:30 a.m.** on **March 2, 2015**, in the **Horry County Judicial Complex** in **Conway, SC**; it is further

ORDERED, that the parties shall complete discovery by **1/31/2015**; it is further

ORDERED, that the Amended Scheduling Order in this case dated 4/29/2014 is amended to reflect the scheduling changes set forth hereinabove; it is further

ORDERED, that all other mandates of the Amended Scheduling Order in this case dated 4/29/2014 not affected by this order shall remain the order of this court.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

September 25, 2014
Georgetown, SC

# Exhibit D

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | |
| ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF HORRY ) | FIFTEENTH JUDICIAL CIRCUIT |
| Stephen C. Stanko, #6022, ) | |
| ) | Case No. 2014-CP-26-035 |
| Applicant, ) | |
| ) | |
| vs. ) | |
| ) | |
| State of South Carolina, ) | |
| ) | |
| Respondent. ) | |
| ) | |

HORRY COUNTY
2015 JAN -8 PM 1:51
MELANIE HUGGINS-WARD
CLERK OF COURT

**APPLICANT'S MOTION FOR CONTINUANCE**

Applicant Stephen C. Stanko, through undersigned counsel, respectfully moves for a continuance of the PCR merits hearing because the Court's blanket denial of all funding requests for reasonably necessary expert assistance has crippled counsel's ability to provide applicant with adequate post-conviction representation.

This Court scheduled a hearing on the merits of Stanko's post-conviction relief claims to begin on March 2, 2015. The Court also set a deadline for the completion of discovery for January 31, 2015. Despite undersigned counsel's diligent work since being appointed, counsel will be unable to prepare for a hearing by March 2, 2015 because the Court has denied all funding requests for expert services. Without expert assistance, Stanko cannot effectively prepare for a hearing on his claims. Stanko, therefore, respectfully requests this Court continue the hearing in this case for nine months from the date the Court rules on Stanko's October 14, 2014 *Ex parte* Motion to Reconsider Denial of Funding for Expert and Investigative Services, and to adjust the deadline for

completing discovery accordingly.[1] Stanko further requests a hearing with oral argument on this motion as permitted by the Court's April 29, 2014 scheduling order.

The legal and factual bases for this motion are set forth below.

## I. PROCEDURAL HISTORY

Stanko was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[2] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Stanko subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013). This Court appointed undersigned counsel to represent Stanko on February 4, 2014.

On February 21, 2014, this Court entered a Scheduling Order in this post-conviction relief proceeding, scheduling a merits hearing for December of 2014. Scheduling Order (Feb. 21, 2014). The Court subsequently, on April 29, 2014, amended the Scheduling Order to tentatively schedule a merits hearing for February of 2015. Amended Scheduling Order (Apr. 29, 2014). On September 25, 2014, the Court set a date certain for the merits hearing, scheduling the trial in this post-conviction relief proceeding to commence on March 2, 2015 and ordering the discovery be

[1] Counsel request a nine month continuance because the experts they consulted indicate six to nine months is the minimum amount of time it will take to prepare for a hearing on Stanko's claims.

[2] Stanko was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Stanko in connection with his Georgetown County proceedings.

completed by January 31, 2015. Order for Date Certain Trial and Second Amended Scheduling Order (Sept. 25, 2014).

After being appointed, undersigned counsel immediately began reviewing the record and conducting an independent investigation. On April 1, 2014, counsel filed Applicant's First Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion") pursuant to S.C. Code §§ 16-3-26(C)(1) and 17-27-160(B). During the two months between their appointment and filing the First Funding Motion, undersigned counsel: (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors from Stanko's trial; (4) met with Stanko's sister and a friend; and (5) conducted preliminary interviews with Stanko's trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case, undersigned counsel moved for funding to aid in the investigation, development, and presentation of Stanko's claims.[3] Specifically, the First Funding Motion requested the Court authorize funding for a fact investigator, a mitigation investigator, and a forensic psychologist. In support of each of these funding requests, Stanko

[3] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

First Funding Motion 6-7 (Apr. 1, 2014).

provided specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant."[4] *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant").

On April 29, 2014, this Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness . . . " because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist.[5] *See* Applicant's *Ex Parte* Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("First Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to reconsider, counsel: (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and, (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. Counsel sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel

[4] The facts in support of Stanko's requests are set forth in his *ex parte* funding motion in accordance with S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B).

[5] This motion was likewise filed *ex parte* as permitted by South Carolina law.

could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts. Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the Court denied all funding requested for a forensic psychologist. The Court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The Court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel: (1) completed interviews with the remainder of Stanko's trial counsel; (2) continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's

social history and records regarding trial counsel's preparations. On July 28, 2014, counsel presented the Court with additional facts supporting their need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested funding for the services of a licensed social worker and for a media expert. In support of these funding requests, Stanko presented the Court with specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Approximately two months later, on September 25, 2014, the Court denied the requested funds for a licensed social worker and a media expert, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *See* Order Denying Applicant's Second Motion To Authorize Funding for Expert Services (Sept. 25, 2014). The Court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Stanko filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In the Second Motion to Reconsider, Stanko argued the Court misconstrued the funding standard set forth in S.C. Code § 16-3-26(C)(1) by finding the necessity of expert assistance cannot be determined because Stanko could not present the Court with the conclusions the experts will reach. Stanko argued the standard used by the Court is not only inconsistent with the relevant statutory language, but it is also at odds with capital post-conviction practice in this state; no other South Carolina Circuit Judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude.

The capital case funding statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services *prior to the court's authorization of funds*. The Court's interpretation of the "reasonably necessary" requirement impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). In light of the merits hearing scheduled for March 2, 2015, Stanko asked the Court to hold an *ex parte* hearing on the Second Motion to Reconsider as soon as possible.

On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the Court order Stanko transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the Court sent counsel an email canceling the *ex parte* hearing, informing Stanko the Court would decide the Second Motion to Reconsider without oral arguments, and ordering Stanko to file an *ex parte* brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Stanko's Motion for Order of Transport. The Court has, thus, not ruled on Stanko's Second Motion to Reconsider and, as of the filing of this motion, Stanko does not have funding for the assistance of any expert in preparing his application for post-conviction relief or for the hearing scheduled for March 2, 2015.

## II. LEGAL BASIS FOR GRANTING A CONTINUANCE.

The South Carolina post-conviction relief statute explicitly authorizes this Court to continue the hearing in this case when "good cause is shown to justify a continuance." S.C. Code § 17-27-160(C). The statute does not set a limit for the amount of time the Court can continue the hearing. The statute requires only that the Court find good cause for the continuance granted.

Expert assistance of a capital post-conviction relief applicant is authorized in South Carolina when such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B). The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

Counsel, therefore, cannot prepare for a hearing without the Court's authorization of funding for expert assistance and additional time for the experts to complete their services. Furthermore, during the usual course of investigating and working with the experts in preparation for a hearing, it is likely counsel will uncover additional issues that must be investigated. This will require additional time to request records and investigate as necessary to develop and present Stanko's claims for relief. Accordingly, Stanko has shown good cause for a continuance, S.C. Code § 17-27-160(C), and requests this Court continue the post-conviction relief hearing for nine months from the date it rules on the Second Motion to Reconsider and adjust the discovery deadline accordingly.

## CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel respectfully request this Court find good cause shown and continue the post-conviction relief hearing, currently scheduled for March 2, 2015, for nine months from the date it rules on Stanko's Second Motion to Reconsider and to adjust the discovery deadline accordingly. Counsel further requests this Court schedule a hearing for oral argument on this Motion for a Continuance as soon as practicable.

January 6, 2015

Respectfully submitted,

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Death Penalty Resource & Defense Center
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803-765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
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STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

AFFIDAVIT

Arlene Bowers Andrews, PhD, who appeared personally before me, affirms and states the following:

1. I, Arlene Andrews, am a Licensed Social Worker, have a PhD in psychology, and am a retired professor of social work.

2. I have been retained to evaluate and present a social history in approximately fifteen (15) capital cases at the trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on June 25, 2014 about evaluating and presenting Mr. Stanko's social history in his Horry County post-conviction relief proceedings.

4. I would typically not begin working on a capital case without a funding order from the Court authorizing payment for my services. However, I have worked with Ms. Paavola before, and she explained to me that Mr. Stanko's case was scheduled for hearing within a relatively short period of time and she was concerned about waiting to get started while the motion for funding remained pending. Therefore, I began working on Mr. Stanko's case prior to receiving an order from the Court authorizing funding for my services. I cannot, however, continue my social history evaluation or present my findings to the Court without an order authorizing payment for my services.

5. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client.

6. Since being contacted by Mr. Stanko's attorneys, I have reviewed the trial record to determine what social history evaluation had already been completed; I have reviewed social history records already collected by counsel and the mitigation investigator; I met and interviewed Mr. Stanko; and, I interviewed Mr. Stanko's brother.

7. Based on my preliminary evaluation, it is clear to me that a grossly inadequate social history was presented during Mr. Stanko's trial. My initial work has begun to reveal a compelling and mitigating social history story. Based on this initial review and my experience in other capital cases, I believe it is possible that an adequate investigation in Mr. Stanko's case could reveal mitigating evidence of physical abuse, sexual abuse, parental neglect and abandonment, and/or mental illness.

8. A significant amount of work remains to complete and present my social history evaluation. I must: (1) interview Mr. Stanko several more times; (2) interview Mr.

Stanko's two remaining living siblings and other family members; (3) interview Mr. Stanko's friends from childhood and leading up to his crimes; (4) review the social history records counsel are continuing to collect; (5) conduct any additional work that may develop as the investigation progresses; and (6) prepare my opinion for presentation to the Court. This is work that cannot be completed without authorization of funds from the Court.

9. The work that remains will take approximately six (6) to nine (9) months to complete once the Court authorizes funding. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. My social history evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation. Additionally, I am currently preparing for a hearing on a case in Aiken County, which will not allow me to continue my work on Mr. Stanko's case until February 15, 2015.

10. I believe Mr. Stanko's social history is likely to provide powerful mitigating evidence, but without the authorization of funds from the Court and a continuance of the hearing, I cannot complete the social history evaluation or aid counsel in their presentation of Mr. Stanko's social history at a hearing.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

Arlene Bowers Andrews
ARLENE BOWERS ANDREWS

Sworn to and subscribed before me
This 14th day of January, 2015

Jill A. Rider
Notary Public for the State of South Carolina
My commission expires: 6-19-14

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

AFFIDAVIT

Susan Knight, PhD, ABPP, who appeared personally before me, affirms and states the following:

1. I, Susan Knight, am a clinical psychologist with specialization and board-certification in forensic psychology. I am currently employed full-time in private practice conducting forensic psychological evaluations for various legal and organizational entities. I am also a Clinical Assistant Professor in Psychiatry and Behavioral Sciences at the Medical University of South Carolina, and hold adjunct professor positions at the Charleston School of Law and the Cornell Law School.

2. Over the course of my career, I have conducted hundreds of court-ordered forensic evaluations of criminal defendants, as well as many privately retained evaluations. These evaluations have primarily addressed the psycho-legal issues of legal competencies, mental state at the time of offense, and sentencing/mitigation considerations. Further, I have been retained for consultation and/or to conduct a mental health evaluation in approximately nine capital cases at the pre-trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on March 25, 2014 about conducting and presenting a mental health evaluation of Mr. Stanko for his Horry County post-conviction relief proceedings. I am available and willing to work on the case, but cannot begin doing so until the Court authorizes funding for my services.

4. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client. Further, per guidelines governing conduct for my profession, such contingent fees are considered a "threat to impartiality" and therefore "forensic practitioners strive to avoid providing professional services on the basis of contingent fees" (Specialty Guidelines for Forensic Psychology, 2013, p. 12). Therefore, in keeping with ethical practice standards, I would not be able to accept a case under such conditions.

5. In order to complete my evaluation, I must: (1) review the trial transcript; (2) conduct comprehensive interviews with Mr. Stanko on multiple occasions; (3) interview collateral sources, including Mr. Stanko's siblings, other family members, and friends from childhood and the time leading up to his crimes; (4) review the mental health and social history records counsel have collected; (5) conduct any additional work that may develop as the evaluation progresses; and (6) prepare my opinion for presentation to the Court, which would likely include an extensive and detailed report of my findings. This is work that cannot be completed without authorization of funds from the Court.

6. Once the Court authorizes funding for a mental health evaluation, the evaluation will take approximately six (6) months to complete. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. A mental health evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation.

7. Without the authorization of funds from the Court and a continuance of the hearing, I cannot complete a mental health evaluation or aid counsel in their presentation of Mr. Stanko's post-conviction claims.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

SUSAN KNIGHT

Sworn to and subscribed before me
This 5th day of JANUARY, 2015

Notary Public for the State of South Carolina
My commission expires: My Commission Expires
May 9, 2017

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | |
| ) | |
| COUNTY OF HORRY ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Stephen C. Stanko, #6022, ) | |
| ) | |
| Applicant, ) | Case No. 2014-CP-26-03 |
| ) | |
| vs. ) | **CERTIFICATE OF SERVICE** |
| ) | |
| State of South Carolina, ) | |
| ) | |
| Respondent. ) | |
| ) | |

HORRY COUNTY
2015 JAN -8 PM 1:51
MELANIE D. BURNS-WARD
CLERK OF COURT

The undersigned certifies that a copy of the Applicant's Motion for Continuance was mailed today by first class United States mail, postage prepaid, this 6th day of January, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

# Exhibit E

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | |
| COUNTY OF HORRY ) | FIFTEENTH JUDICIAL CIRCUIT |
| ) | |
| Stephen C. Stanko, #6022, ) | Case No. 2014-CP-26-035 |
| Applicant, ) | |
| ) | **MOTION TO UNSEAL EX PARTE FUNDING REQUESTS AND ORDERS REGARDING THE SAME** |
| vs. ) | |
| ) | |
| State of South Carolina, ) | |
| ) | |
| Respondent. ) | |
| ) | |

This is a capital post-conviction relief action in which the Applicant has moved for a continuance of the March 2, 2015 trial date based on this Court's alleged denial of all *ex parte* funding requests. Respondent, through the undersigned attorneys, moves this Court to issue an Order unsealing any and all *ex parte* funding requests and Orders regarding the same so that Respondent may adequately and properly respond to Applicant's continuance motion whether in writing or at a scheduled hearing on said motion. Respondent has no knowledge of these *ex parte* matters except for the limited information set forth in Applicant's Motion for Continuance. Respondent does not know the validity of Applicant's assertions in his Motion or the basis of this Court's denial of such alleged funding requests.

There is no statutory or a constitutional right to be heard on funding requests *ex parte*[1] and *in camera*[2] in this setting. Respondent acknowledges, however, the right of the Court to

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1 "A 'judicial proceeding ... taken ... for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.'" *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 297(5th ed. 1983)).

2 "An *in camera* proceeding ... is a 'trial or hearing held in a place not open to the public...'." *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law

determine that matters may be held *ex parte* under certain discrete circumstances as authorized under the Code of Judicial Conduct. Such circumstances, however, are exceptions to the rule and blanket exceptions are not contemplated. In support of this position, Respondent would respectfully show the Court:

1. There is no statutory right to *ex parte* proceedings regarding funding in capital post-conviction relief actions. PCR applicants typically argue there is a statutory right by virtue of Section 17-27-160, which they argue incorporates all the funding provisions of § 16-3-26, including the provisions for funding investigative, expert and other services. They are incorrect. There is no such express provision in the language of the statute. *Accord Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682 (1996).

The references to Section 16-3-26 are in the second paragraph in Section (B) of S.C. Code § 17-27-160. That provision addresses the appointment, qualification, and compensation of PCR counsel and the compensation of PCR appellate counsel. The first reference is tied specifically to counsel's compensation: "Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel...." S.C. Code § 17-27-160 (B). If that were not so, the provisions of S.C. § 17-3-50 (A) would apply resulting in reduced rates and caps as set therein.[3] There is no specific provision or reference to "investigative, expert, or other services" or the corresponding provision for same in the criminal trial as reflected

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Dictionary at 684 (5th ed. 1983)).

3 It is of no little note that payment of counsel fees are separate and apart from the provision of "investigative, expert, or other service," both in Section 16-3-26 and Section 17-3-50. This is also true of the federal funding provisions. See 18 U.S.C.A. § 3599. However, PCR applicants typically seek to combine the two in order to find statutory support for their position.. This is, of course, contrary to the standard references of the funding as two distinct concerns.

in S.C. Code § 16-3-26(C)(1).[4] The only other reference to Section 16-3-26 is Section 16-3-26 (I), to provide, *again as to the appointment of counsel*, that the prohibition of appointing non-licensed, non-resident attorneys at trial does not apply to the civil proceedings. *See* S.C. Code § 17-27-160 (B). *Ergo*, when read naturally, the reference to Section 16-3-26 in Section 17-27-160 involves the narrow question of counsel's compensation.[5]

To reach an opposite conclusion, one must accept that the whole of Section 16-3-26 is incorporated. This would include incorporation of the reference to the notice of intention to seek death and other specific trial related provisions – clearly not a requirement in post-conviction relief proceedings. Even the reference to the section applicants seek to incorporate, Section 16-3-26 (C)(1), only authorizes "investigative, expert, or other services are reasonably necessary for the representation *of the defendant whether in connection with issues relating to guilt or sentence....*" A "defendant," refers to a "criminal defendant," defined as "one who is accused in a criminal proceeding." Black's Law Dictionary (9th ed. 2009). Applicant is no longer a defendant. *See also* Black's Law Dictionary (9th ed. 2009) (defining defendant generally: "A person sued in a civil proceeding or accused in a criminal proceeding."). In fact, the language of Section 17-27-160 reflects that shift in position in providing that a "defendant" must file an application for relief, but

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4 Section 16-3-26(C)(1) provides for "ex parte proceedings" to determine "that investigative, expert, or other services are reasonably necessary for the representation of the defendant" at the criminal trial.

5 This is also consistent with the express goal of the act: "...to add Section 17-27-160 so as to provide for the manner in which defendants sentenced to death must file applications for post-conviction relief, to provide for the assignment of judges to handle these applications, *to further provide for the appointment and compensation of counsel in these proceedings,* and to provide for other procedural matters including the certain time limitations in these capital post-conviction relief proceedings." 1996 South Carolina Laws Act 448 (H.B. 4469).

after filing, refers to the individual bringing suit as "the applicant." S.C. Code § 17-27-160. *See also* S.C. Code §§ 17-27-40-80 (referencing applicant in non-capital post-conviction relief provisions as of the filing of the application). Further, counsel representing Applicant is not directly raising issues related to guilt or sentence.[6] Rather, the civil action challenging a presumptively valid state judgment is separate and distinct from the criminal proceeding. *See* Rule 71.1 (c), SCRCP ("An application filed under the [Post-Conviction Procedure] Act is an independent civil action which should be separately filed and indexed by the clerk of court."); S.C. Code § 17-27-20 (a)(6) ("... this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.").[7]

In interpreting the statute, "[t]he Court must give clear and unambiguous statutory terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *State v. Cribb*, 310 S.C. 518, 521, 426 S.E.2d 306, 308 (1992). *See also State v. Phillips*, 400 S.C. 460, 734 S.E.2d 650 (2012) (same); *State v. Sweat*, 386 S.C.

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6 PCR applicants' fallback position appears to be that they have been convicted, but these proceedings are merely a continuation of sentencing. To the contrary, Stanko is currently under a presumptively valid judgment. Guilt has been adjudicated and sentenced imposed. This action is filed to challenge the continued custody under this presumptively valid judgment. *See* S.C. Code § 17-27-20 (relief may be sought where a "person who has been convicted of, or sentenced for, a crime" seeks to have his conviction or sentence vacated on grounds other than an allegation of insufficient evidence).

7 Reliance on *Wade v. State*, 348 S.C. 255, 559 S.E.2d 843 (2002), to argue the case is quasi-criminal, (see Motion, p.10), is misplaced. Though the Supreme Court of South Carolina has referred to such as action as "hybrid," it is so only because the criminal conviction and sentence are at issue. The Court has said: "... while a PCR action is hybrid in nature, it generally remains subject to rules and statutes that apply in civil proceedings." *Sutton v. State*, 361 S.C. 644, 606 S.E.2d 779 (2004) (*overruled on other grounds by Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005) (holding "counsel is required to advise an applicant of the right to appellate review of the denial of PCR")).

U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction."). Again, Applicant is the party bringing the suit in this instance.[9] He bears the burden of proof. *See, e.g. Bennett v. State*, 371 S.C. 198, 638 S.E.2d 673 (2006) (*citing Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998); *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007) (*citing Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Though PCR applicant argue they are still entitled to the array of constitutional and statutory rights of a criminal defendant, they simply is not entitled to those same rights in a civil action as the action itself is definitively different in scope and measure. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) ("Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). *Cf. Fisher v. Baker*, 203 U.S. 174, 181 (1906) ("The proceeding is in habeas corpus, and is a civil, and not a criminal, proceeding."); *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883) ("The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process."). Simply, civil proceedings do not give rise to the constitutional rights afforded a criminal defendant. *See United States v. Baker*, 45 F.3d 837, 843 (4th Cir. 1995) ("the

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9 It is Applicant who is obligated to make the allegations to allow Respondent the opportunity to prepare a defense. Applicant would surely object if the State, in the criminal prosecution, told him only that additional allegations would be forthcoming in addition to the allegations of the indictment. Respondent has prepared both a return and a return to the final application. Respondent has no notice of any specific new claim.

constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a respondent in a commitment hearing" citing the civil nature of the proceedings). Even where a criminal trial right survives, the right is generally limited by the civil nature of the proceedings.

For example, the Fifth Amendment right against self-incrimination survives and can be invoked in any proceeding. However, an individual's failure to answer questions allows for an adverse inference in civil cases. *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976) (noting "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)."). *See also In re Care and Treatment of Canupp*, 380 S.C. 611, 671 S.E.2d 614 (Ct.App. 2008) ("...only a criminal defendant has the right to decline to take the witness stand altogether."). Consequently, the nature of the proceeding controls.

Though PCR applicants have relied upon *Ake v. Oklahoma*, 470 U.S. 68 (1985), the case resolved only that where "a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake* does not speak to collateral proceedings in the least. *See, e.g., Rosado v. Allen*, 482 F.Supp.2d 94, 113 (D.Mass. 2007) ("*Ake v. Oklahoma* ... concerned a defendant's right to have access to a psychiatrist assistant at *trial*, not on post-conviction relief.") (emphasis in original); (*Sanborn v. Commonwealth*, 975 S.W.2d 905, 909-910 (Ky. 1998) ("Ake v. Oklahoma, ... is not a post-conviction case.") (*overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009)); *McGahee v. State*, 885 So.2d 191, 229

(Ala.Crim.App. 2003) (*Ake* not applicable in civil proceeding challenging conviction). Thus, *Ake* is not dispositive. [10]

Whether funding for any particular expert is necessary, however, is not at issue in requests for *ex parte* and *in camera* proceedings. Rather, at issue is how the requests will be heard. Respondent submits for all the foregoing reasons, Applicant has no right to be heard *ex parte*. This position is consistent with funding provisions for federal actions, which, like our state rules, disfavor *ex parte* proceedings.[11]

3. Similarly, there is no right to closed proceedings in regard to funding requests in capital post-conviction relief proceedings. Again, PCR applicants rely on provisions for the criminal trial, so, again, the civil nature of the proceeding undercuts reliance on his reliance upon precedent interpreting same.[12]

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10 It should not be lost that the purpose of *Ake* was to determine when a state must provide access to funds for "psychiatric assistance" for an indigent criminal defendant at trial. *Ake*, 470 U.S. at 77. *Ake* does not resolve access to other experts in other circumstances. Further, the United States Supreme Court has summarily rejected arguments of "constitutional infirmity in the *trial court's* refusal to appoint various experts and investigators" where "the requests were accompanied by no showing as to their reasonableness." *Caldwell v. Mississippi*, 472 U.S. 320. 323 n. 1 (1985) (emphasis added). Thus, there appears to be no basis in *Ake* to argue for unlimited resources for various "experts" at all stages of the proceedings, direct and collateral.

11 "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). *No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.*" 18 U.S.C.A. § 3599 (f) (emphasis added). *See also United States v. Caro*, 442 F.Supp.2d 296, 297 n.1 (W.D.Va. 2006) (noting "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed.").

12 For example, see *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593

Applicant here is in no danger of having to "telegraph to the prosecution the defendants' defense strategy," as he is not the defendant and has no defense strategy. In this civil action, he is *required* to make sufficient allegations for Respondent to investigate and present a defense. *See* S.C. Code § 17-27-40. There is no right to keep known potential issues from Respondent and essentially shorten, (or in some cases eradicate), the opportunity for Respondent to investigate and respond fully. *See generally* S.C. Code § 17-27-130 ("Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation.").[13] He is also *required* to disclose in discovery those documents and things that would go to *either* a claim or defense. *See* Rule 26 (b)(1), SCRCP ("Parties may obtain discovery regarding any matter, not privileged, which is

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(1994), a case which refers to two capital defendants who had not yet stood trial, where the Court found Section 16-3-26(C) provides a "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*." 314 S.C. at 227, 442 S.E.2d at 593, which is clearly the procedure in the criminal trial to which the statute refers. However, as noted above, that section has not been expressly incorporated into the civil proceedings provided for capital PCR actions. But even that statutory funding provision does not allow the trial courts to "close the proceeding," rather, "the trial judge must treat this case like any other which presents the issue of whether it is appropriate to close the proceedings." *Id.* To close the proceedings, the court must find on the record that "there is a substantial probability of prejudice which would result from the publicity, and ... there are no reasonable alternatives to closure which would protect the defendant's right to a fair trial." *Id.* The Supreme Court of South Carolina in *Ex parte Lexington County* based its reasoning that closure for *ex parte* funding requests was warranted *in a criminal trial* on finding a defendant would not be required to disclose his *theory of the defense* but for the fact that he was indigent and had to request funds. 314 S.C. at 228, 442 S.E.2d at 594. That concern is not present here.

13 There is every indication that investigation authorized by discovery available to every other civil litigant would bear not only on funding, but also on preparation.

relevant *to the subject matter involved* in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...") (emphasis added). He is further required to disclose the names of witnesses and experts who have knowledge of claim or defense. Rule 26 (b)(4)(B).[14] In short, Applicant is required to go by the SCRCP. These full disclosure requirements stand in stark contrast to the defense cloak of secrecy for the criminal trial. The same concerns in *Ex parte Lexington County* are not present here.

4. Respondent recognizes, ethical rules allow *ex parte* communication in certain discrete circumstances. Rule 501, SCACR, Canon 3 (B) (7) (a), Code of Judicial Conduct, provides:

> Where circumstances require, ex parte communication for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

*See also* Rule 407, Rule 3.5 (a) and (b), Rules of Professional Conduct (prohibiting attorneys from ex parte discussions with a judge "unless authorized to do so by law or court order"). The Court may, pursuant to these provisions, allow *ex parte* communication.[15] The party communicating in

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14 No opinion from any consulting expert would be obtained through a mere funding request (in fact, the request presumes one has not yet been hired or an opinion rendered). However, such an opinion must be shared, not due to funding requests but under ordinary rules of discovery, if the expert is not merely "consulted informally, or consulted and not retained and specially employed." Rule 26 (b)(4)(B), SCRCP. See also Rule 33 (b)(6), SCRCP (standard interrogatories requiring disclosure of "names and addresses of any expert witnesses whom the party proposes to use as a witness").

15 Ex *parte* funding requests are neither provided for nor mandated. The better course, and

the absence of an opposing party has heightened ethical duties to provide the court with relevant information. Rule 407, SCACR, Rule 3.3 (d), Rules of Professional Conduct ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.). Such communication, however, is not favored as it is contrary to our adversarial system. Id., comments ("... in any ex parte proceeding ... there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision."). Notably, in Applicant's *ex parte* funding requests, it is unclear if a full recitation of background was

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the only course consistent with the rules and statutes in this jurisdiction, would be to disallow a blanket exception, but reserve the possibility to closed review of sensitive arguments and/or supporting documents. The PCR court could allow (with notice to opposing counsel) narrowly focused *ex parte* communication and review of such documents, much like the review of privileged materials. *Accord State v. Jeff*, 761 So.2d 574 (La.App. 1 Cir. 1999) ("The trial court should first determine, in camera, either on the face of the allegations of the motion or upon taking evidence at an ex parte hearing, whether the defendant would be prejudiced by a disclosure of his defense at a contradictory hearing. If so, then the hearing on expert funding should continue ex parte. If not, then the hearing should be held contradictorily with the District Attorney....") (*quoting State v. Touchet*, 642 So.2d 1213 (La. 1994)) (emphasis in original). Even where originally heard *ex parte*, such matters may be made public at the court's direction in compliment to the general rule that *ex parte* proceedings are disfavored and unnecessary. *See United States v. Caro*, 442 F.Supp.2d 296, 297 (W.D.Va. 2006) (on review of denial of funding request in a capital case: "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed."). *See also Sallie v. Humphrey*, 2011 WL 837168, *2 (M.D.Ga. 2011) ("*Ex parte* requests for payment of fees and expenses under § 3599(f) may not be considered unless Petitioner makes a proper showing of the need for confidentiality."); *Barnett v. Roper*, 2010 WL 1268030, *1 (E.D.Mo. 2010) (noting change from presumption of *ex parte* proceeding to showing need for *ex parte* proceeding in current federal statute).

provided to the PCR judge.[16] Applicant's case is not a new trial. Applicant has previously been represented by counsel, found guilty, and sentenced to death. In short, the case has a history that may not be ignored. Asking this Court for the ability to start completely fresh or simply "expert shop" most likely is unreasonable. *See Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682-683 (1996) (finding no abuse of discretion in denying funding request for another expert: "Petitioner had been examined by two experts prior to trial and the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to warrant the authorization of funds to pay an expert.").[17] For example, a request for a mental health expert in this case should be examined in light of investigation and testing already made. Applicant presented at trial well-credentialed psychiatrists, psychologists, and radiologists or neuro radiologists, who examined Applicant contemporaneous to the proceedings and reviewed multiple records and scans. It would be difficult to fault trial counsel for relying on such experts.

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16 Applicant's assumption, if made, that Respondent would attempt to deny him funding, confuses the purposes of the funding hearing and raises the significant danger that not all relevant facts are being provided to the trial judge tasked with evaluating the reasonableness of the request. The funding request is simply to show a reasonable necessity. Applicant need not disclose findings and opinions unless he intends to call the expert at the evidentiary hearing – a fact readily ascertainable by simply following the SCRCP. *See* Rule 26, SCRCP. Further, in this instance, the arguments and facts he wishes to present outside the presence of the opposing party would be presented *to the fact finder in this action*. Applicant's attempt to put this squarely in funding overlooks the ponderous consideration that the fact finder may be approached with arguments and theories indicating incomplete or incorrect facts in support of a funding request.

17 Even capital defendants at trial are not entitled to unlimited funding. *See, for example, Bailey v. Com.*, 259 Va. 723, 737, 529 S.E.2d 570, 578 (2000) ("We have consistently rejected the contention that defendants, even in capital murder cases, have an indiscriminate entitlement to the assistance of an investigator.") *See also State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009) (*citing* § 16-3-26 (C)(1) (2003); *State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("The matter of authorized funds to capital defendants lies within the sound discretion of the trial" and rest upon a finding "that investigative, expert, or other services are reasonably necessary").

*See Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) ("...counsel had received Dr. Killian's report concluding that Wilson was not mentally ill at the time of the offense. To be reasonably effective, counsel was not required to second-guess the contents of this report."). At any rate, these are the types of facts that the PCR court should have before deciding on funding requests.

For all the above argued reasons, Applicant has failed to show a need for *ex parte* or *in camera* proceedings or that these requests and the Order regarding the same remain sealed.

Furthermore, Applicant has waived any confidentiality by the filing of this Motion for a Continuance, with Applicant's assertion of the history of the funding requests and this Court's actions regarding the same, along with supporting Affidavits without a request that they be under seal. Applicant has made his requests and the Court's reasons for denial of the same, if true, relevant and discoverable.

WHEREFORE, Respondent submits, for all the foregoing reasons, this Court should issue an Order unsealing the *ex parte* funding requests and Orders regarding the same, in order that Respondent may properly respond the Motion for a Continuance, argue the same at the hearing on this Motion, make a proper record for the appellate court, and prepare for trial.

RESPONDENT SO MOVES.

Respectfully submitted,

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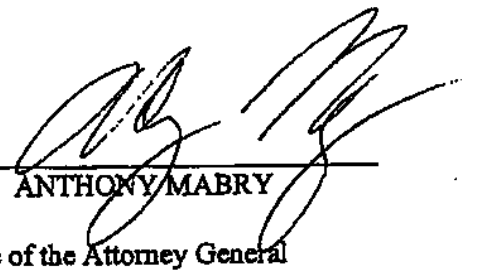
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

*ANTHONY MABRY
Assistant Attorney General

By: 
ANTHONY MABRY

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(803) 734-6305

ATTORNEYS FOR RESPONDENT

January 9, 2014.
Columbia, South Carolina.

*counsel of record

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | Case No. 2014-CP-26-035 |
| Stephen C. Stanko, #6022,<br>Applicant, | ) | **(Proof of Service)** |
| vs. | ) | |
| State of South Carolina,<br>Respondent. | ) | |

I, J. Anthony Mabry, certify that I have served Respondent's Motion to Unseal Ex Parte Funding Requests and Orders Regarding the Same on Applicant by depositing one copy to his counsel of record, postage prepaid, addressed as follows:

Emily Paavola
Lindsey Vann
Death Penalty Resource Center
900 Elmwood Avenue, Suite 101
Columbia SC 29201

This 9th day of January, 2015.

ANTHONY MABRY
Office of Attorney General
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(803) 734-6305

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY ) FIFTEENTH JUDICIAL CIRCUIT
)
Stephen C. Stanko, #6022, )
) Case No. 2014-CP-26-035
Applicant, )
)
vs. )
)
State of South Carolina, )
)
Respondent. )

**RETURN IN OPPOSITION TO RESPONDENT'S MOTION TO UNSEAL *EX PARTE* FUNDING REQUESTS AND ORDERS REGARDING THE SAME**

FILED
HORRY COUNTY
2015 JAN 16 PM 2:34
ELAINE HOGGINS-WARD
CLERK OF COURT

Undersigned counsel respectfully submit the following response in opposition to Respondent's Motion to Unseal *Ex Parte* Funding Requests and Orders Regarding the Same ("Motion to Unseal"). Respondent asks this Court to issue an order unsealing all *ex parte* funding requests and orders so that Respondent may respond to Applicant's motion for continuance. However, Respondent is not entitled to review the *ex parte* requests and orders, nor has Respondent presented any legitimate need for the documents to be unsealed. This Court should deny Respondent's motion for the reasons that follow.

## I. Applicant is Entitled to *Ex Parte* Proceedings

Contrary to Respondent's assertion, Applicant is entitled to *ex parte* proceedings for the consideration of his funding requests as a matter of state statute and federal constitutional principles.

### a. S.C. Code § 17-27-160 Expressly Authorizes *Ex Parte* Proceedings

The plain language of S.C. Code § 17-27-160 expressly authorizes *ex parte* communications in the context of capital post-conviction cases. Section 17-27-160 provides that counsel appointed in post-conviction cases "shall be compensated from the funding provided in

Section 16-3-26 in the same *manner* and rate as appointed trial counsel" (emphasis added). According to § 16-3-26(C)(1), the appropriate manner of payment for investigative and expert services is upon a finding by the court in *ex parte* proceedings that the services are reasonably necessary. Thus, there can be no question that requests for funding for investigative, expert and other services in post-conviction cases must be heard in *ex parte* proceedings in accordance with § 16-3-26(C)(1) as incorporated into § 17-27-160.

Moreover, § 17-27-160 specifically excludes subsection (I) of § 16-3-26, which prohibits the appointment and compensation of out-of-state attorneys in capital trials. There is no reference, however, to any exclusion of the requirement contained in § 16-3-26(C)(1) that funding requests be considered by the Court in *ex parte* proceedings. This is further evidence that the plain language of the statute clearly incorporates the *ex parte* provision of § 16-3-26(C)(1).[1] "When terms which are contained in a statute are clear and unambiguous, the courts are required to apply them according to their literal meaning." *Ex Parte Lexington County*, 314 S.C. 220, 225, 442 S.E.2d 589, 592 (1994). "The terms of a statute are to be given their plain and ordinary meaning without employing subtle or forced construction." *Id.* To the undersigned counsel's knowledge, no court since the enactment of § 17-27-160 has applied the statute to preclude an *ex parte* funding request in a capital, post-conviction proceeding.

The footnote in *Thames v. State*, 325 S.C. 9, 11, n.1, 478 S.E.2d 682, 682, n.1 (1996), is not applicable to this issue. The language in *Thames* is *dicta* in a non-capital case. The *Thames* Court held that a post-conviction relief judge did not abuse his discretion in denying a non-capital petitioner's request for payment of psychiatrist fees after she had already been examined by two

[1] If § 17-27-160 incorporated only § 16-3-26(B) as Respondent argues, there would be no need for the explicit exclusion of § 17-27-160(I) because it would not have been otherwise incorporated by § 17-27-160. The exclusion of subsection (I) thus indicates that the entirety of § 16-3-26 is incorporated into § 17-27-160.

psychiatrists prior to her guilty plea. *Id.* at 11, 478 S.E.2d at 683. Whether such a request should be conducted *ex parte* was not an issue raised by either party in the case. Furthermore, the footnote in *Thames* makes no reference to § 17-26-160 because *Thames* was decided before the statute which controls capital post-conviction proceedings was enacted. Rather, the footnote refers to the specific language of S.C. Code 1967 § 17-3-50(B), which is no longer in effect.

**b. *Ex Parte* Proceedings are Required by Due Process and Equal Protection**

Due Process and Equal Protection require that Applicant's funding requests and this Court's orders regarding those requests remain sealed. The Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (pointing to parole and probation as examples of state-created rights to which there was no "constitutional or inherent right" but which had been accorded protection under the Due Process Clause); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding prisoner's interest as a result of the State having created the right to good time credit "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty.'").

In determining whether a state has created a liberty interest subject to protection under the Due Process Clause, the Court looks to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). "This has meant that to obtain a protectable right 'a person clearly must have more than an abstract desire for it. . . . He must, instead, have a legitimate claim of entitlement to it." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quoting *Roth*, 408 U.S. at 577). In *Kentucky v. Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), the Supreme Court explained that:

> A State creates a liberty interest by establishing "substantive predicates" to govern official decision making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

*Id.* at 462 (citation omitted); *see also Slezak v. Evatt*, 21 F.3d 590, 594 (4th Cir. 1994).

Judicial pronouncements by the Supreme Courts of the United States and of South Carolina make clear that the nature of the right to *ex parte* proceedings to seek expert and investigative services is such that it merits protection under the Due Process Clause. *See Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (holding due process entitles an indigent defendant to the appointment of an expert to assist in his defense whenever "the defendant is able to make an *ex parte* threshold showing" of the need for assistance); *Ex Parte Lexington County*, 314 S.C. 220, 226-27, 442 S.E.2d 589, 593 (1994) (declaring that when the "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*," the state or county "does not have standing to participate in the hearing.").

Here, Applicant has much more than an abstract need or desire for his funding proceedings to remain *ex parte* and sealed. The South Carolina statutes give him a clear claim thereto. Applicant maintains that the proper procedure is that set forth in § 16-3-26(C)(1). That section, on its face, requires *ex parte* proceedings when applicants seeks "investigative, expert, or other services." Because South Carolina chose to accord the right to *ex parte* proceedings to seek expert services in post-conviction proceedings challenging a death sentence, "due process protections are necessary 'to insure the state-created right is not arbitrarily abrogated.'" *Vitek*, 445 U.S. at 488-89 (quoting *Wolff*, 418 U.S. at 557).

Due process and equal protection concerns are also implicated when a person is denied fundamental fairness by the state or treated differently than others based only on indigence:

> "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection" on the other hand, emphasizes disparity in treatment by

> a State between classes of individuals whose situations are arguably indistinguishable.

*Ross*, 417 U.S. at 609. These concerns are heightened in this capital post-conviction process. *See Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) ("Access to equal justice is an even greater interest where the State seeks to impose the penalty of death.").

"[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system."[2] *Ake*, 470 U.S. at 77 (citations omitted). This promise of "an adequate opportunity," however, vanishes if the state, with its nearly unlimited resources to investigate Applicant's case at all phases of litigation, *see Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (S.C. 1992), likewise has access to privileged information only because of Applicant's indigency.[3] As the South Carolina Supreme Court has explained:

> Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

*Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594. In the case of funding requests, *ex parte* procedures are needed to "simply level the playing field between petitioners able to purchase (and thereby not disclose to the opposing side) the usual litigation services – experts, investigators, subpoena-servers – and those forced to request payment of these services from the court." *In re Pruett*, 133 F.3d 275, 279 (4th Cir. 1997).

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[2] Under *Ake*, a defendant is entitled to expert assistance when he is "able to make an *ex parte* threshold showing to the trial court" that such assistance is necessary. 470 U.S. at 82. *Ake* presumes the *ex parte* nature of this showing.

[3] If Applicant were not indigent, he would have the resources to obtain investigative and expert funding without presenting any information about his case to the Court. Thus, the only reason Respondent is able to seek to unseal the information contained in the *ex parte* filings in this case is because Applicant is indigent and was required to present information to the Court in order for it to determine whether the services are reasonably necessary.

Although *Lexington County* and *Ake* address the rights of defendants at trial to *ex parte* proceedings, there is little question that equal protection and due process rights extend to post-conviction proceedings. *See Long v. District Court of Iowa*, 385 U.S. 192 (1966) (finding refusal to provide the transcript of a state habeas corpus proceeding denied equal protection of the laws); *Lane v. Brown*, 372 U.S. 477 (1963) (finding prevention of the right to appeal the denial of a writ of error *coram nobis* due to indigency denied equal protection). Indeed, the Supreme Court of the United States has explicitly held that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny the prisoner equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

Here, allowing the State access to information about Applicant's funding requests or granting the State a voice in the funding decision would violate Due Process as Respondent clearly has an interest in prohibiting Applicant access to expert and investigative services that could lead to success in these proceedings. Due Process would further be violated because Applicant will not be similarly accorded the opportunity to review the State's use of funding for expert and investigative services or the reasons for the State's decision to expend such funds. Moreover, allowing the State information about Applicant's funding requests would violate equal protection because non-indigent PCR applicants would not be similarly required to provide such information to the State.

**c. The State is Not Entitled to Information Within the Funding Requests and Orders Under the Rules of Discovery**

Respondent argues there is no danger of Applicant having to "telegraph to the prosecution the defendants' strategy" because he is required to provide Respondent with the information contained in the funding documents under the discovery rules. This assertion is inaccurate. By Respondent's own admission, the rules of discovery provide access to documents and things that

would go either to a claim or defense and the names of witnesses and experts who have knowledge of a claim or defense – not to strategic information about what expert or investigative services Applicant is considering before it is even known whether these services will bear fruit. Further, in order to apply for funding for investigative and expert services, Applicant may have disclosed to the Court information protected by the attorney-client and work-product privileges. Obviously, the rules of discovery do not entitle the State to such information. Likewise, the rules of discovery do not permit Applicant to know which expert and investigative services the State is contemplating before the hearing and how much funding Respondent plans to allocate to such services.

## II. Respondent Has No Legitimate Basis for Unsealing *Ex Parte* Funding Requests and Orders

Also contrary to Respondent's assertion that it must review the funding requests and orders to adequately respond to Applicant's Motion for Continuance, Respondent has no legitimate basis for unsealing the funding documents. The issue presented by Applicant's motion for a continuance is not whether or not Applicant is entitled to the funding requested. Rather, the issue is whether Applicant is entitled to a continuance given the fact that the Court has not ruled on Applicant's Second *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service ("Second Motion to Reconsider") filed on October 14, 2014. Applicant filed the Second Motion to Reconsider nearly five months before the scheduled hearing date in an attempt to obtain expert funding in time to adequately prepare for the hearing. As of the filing of this return, the Court has not ruled on Applicant's Second Motion to Reconsider and approximately six weeks remain for Applicant to prepare for the hearing. Even if the Court ruled on the Second Motion to Reconsider, Applicant would not have time to adequately prepare his post-conviction claims for a hearing. Applicant, therefore, requests a continuance.

The only reason Respondent would need to review the *ex parte* funding requests and orders would be to weigh in on whether or not Respondent believes Applicant is entitled to the funding requested. As discussed above, Respondent is not entitled to weigh in on the funding decision as a matter of state statute, Due Process, and Equal Protection. Respondent accordingly fails to demonstrate a legitimate basis for the unsealing of the *ex parte* funding motions and orders before this Court.

## CONCLUSION

For the reasons stated above, this Court should deny Respondent's Motion to Unseal and maintain the *ex parte* nature of the funding procedures adopted by the legislature in S.C. Code § 17-3-160(C)(1).

January 14, 2015

Respectfully submitted,

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| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF HORRY ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Stephen C. Stanko, #6022, )<br>)<br>Applicant, ) | Case No. 2014-CP-26-035 |
| vs. )<br>) | **CERTIFICATE OF SERVICE** |
| State of South Carolina, )<br>)<br>Respondent. ) | |

The undersigned certifies that a copy of the Applicant's Return in Opposition to Respondent's Motion to Unseal *Ex Parte* Funding Requests and Orders Regarding the Same was mailed today by first class United States mail, postage prepaid, this 14th day of January, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

FILED
HORRY COUNTY
2015 JAN 16 PM 2:35
MELANIE HUGGINS-WARD
CLERK OF COURT

# Exhibit F

STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

AFFIDAVIT

Jeffrey P. Bloom, who appeared personally before me, affirms and states the following:

1. I, Jeffrey P. Bloom, am a licensed member of the following Bars: S.C.; N.C.; and N.Y. Currently, I am engaged in the private practice of law and have been so since April 1999. From 1992-1999, I was the Chief Public Defender for Richland County, Columbia, S.C. (This was prior to the establishment by the Legislature of a Circuit Defender system). From 1985-1992, I was with the Horry County Public Defender Office, Conway, S.C., and during that time was the Chief Public Defender for that County from 1988-1992. I also serve in the honorary position of Assistant Clinical Professor of Neuropsychiatry and Behavioral Science with the University of South Carolina School of Medicine, and have so served in that capacity since 1998.

2. I have served as counsel of record in more than 50 capital cases. This includes more than 15 capital jury trials, as well as numerous cases in state capital post-conviction and appeals.

3. Counsel for Stephen C. Stanko have asked me to provide information concerning my experience in obtaining investigative and expert funding in capital post-conviction proceedings in South Carolina.

4. In the capital and non-capital cases I have worked on at the trial and post-conviction levels in South Carolina, I have obtained literally hundreds of orders authorizing funding for investigators and experts to aid in the development of trial or post-conviction claims. At no time was I able to guarantee or establish to the trial or PCR court in advance that the expert or investigator whose professional services I sought to retain through court approval per the statute, would be beneficial to the case or actually be used in the case. The purpose of obtaining approval and payment for such services is to in fact investigate the case, including factual investigation, mental health investigation, and similar avenues.

5. In my experience, I have never had a judge interpret the "reasonably necessary" standard of South Carolina Code § 16-3-26(C)(1) to require demonstration of a beneficial result in order to authorize funding for investigative or expert services. Nor have I known a judge to interpret the standard to require a showing that the information obtained through investigative or expert services will actually be used in the case in order to authorize funding.

6. For example, in both non-capital and capital cases in General Sessions Court and with PCR's in Common Pleas Court, I have had Circuit Court Judges authorize funding for an investigator to assist with the interviewing of witnesses and collection of records, without knowing in advance if I would actually use the witnesses or records in the case. Similarly, I have had Circuit Court Judges

authorize funding in both trial and PCR cases for mental health professionals and/or other experts in both non-capital and capital cases, without knowing in advance if the information or opinion by said professional or expert would be useful to the case.

7. In every capital PCR case I have litigated, I did not know in advance if an investigator or expert would uncover something beneficial for actual use in court. There is no way for an attorney to know what an investigator or expert will discover. The best an attorney can do is explain why he or she believes, based on his or her review and assessment of the facts of the case, that investigative or expert services are needed. It is not uncommon for PCR counsel to invoke trial counsel's failure to investigate as a reasonable basis for funding to conduct the very investigation that trial counsel failed to perform. In fact, this is PCR counsel's very role pursuant to applicable South Carolina and United States Supreme Court precedent in capital jurisprudence, as set forth below and herein.

8. PCR counsel is required to conduct an independent investigation into all issues relevant to guilt or punishment, as well as make an assessment about whether the applicant received ineffective of assistance of counsel at trial. If PCR counsel has reason to believe that trial counsel failed to investigate a potential area of mitigation or unreasonably curtailed their mitigation investigation, this may form the basis of a valid claim of ineffective assistance of counsel. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 40 (2009) (trial counsel "ignored pertinent avenues for investigation of which he should have been aware"); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel were deficient because they "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); *Council v. State*, 380 S.C. 159, 173, 670 S.E.2d 356, 363 (2009) ("Even the limited information obtained should have put counsel on notice that [defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence."). Accordingly, PCR counsel will often explain that trial counsel failed to investigate something as a reason to support a request for funding for expert and/or investigator assistance with exploring and investigating that particular issue.

9. My experience working with investigators and experts is that they will not conduct their investigation or evaluation without an order from the court authorizing funding for their services. Nor do I know of any investigator or expert who would provide their services on the chance they will receive payment if their services create a beneficial result for the client.

10. Finally, I would respectfully submit that denial of funding for expert and/or investigative assistance in a capital case could likely be construed as reversible error where the denial was based upon a trial court's interpretation that PCR counsel could not show in advance that the professional services sought would be beneficial to the case. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985) (Court reversed death sentence where trial court denied funding for independent psychiatrist).

I affirm, under the penalty of perjury, that the foregoing is true and correct.

JEFFREY P. BLOOM

Sworn to and subscribed before me
This 13th day of October, 2014

Notary Public for the State of South Carolina
My commission expires: 2/21/2024

STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

AFFIDAVIT

Diana Holt, who appeared personally before me, affirms and states the following:

1. I, Diana Holt, have been licensed to practice law in South Carolina since November of 1994. My practice is dedicated to representing indigent people sentenced to death or facing a possible death sentence at trial. I worked for non-profit agencies in Texas, South Carolina and Georgia from 1992, first as an intern, and from 1994 to 1998, when I entered private practice.

2. I have been court-appointed to serve as counsel of record in approximately ten death penalty cases at the trial level, none of which resulted in a death sentence. I am certified to serve as lead counsel in death penalty trials. I have served as counsel of record in approximately fifteen capital Post Conviction Relief actions. I have served as a mitigation investigator/counsel in more than ten capital cases, both pre-trial and at trial level post-conviction.

3. Counsel for Stephen C. Stanko have asked me to provide information concerning my experience in obtaining investigative and expert funding and my services as a mitigation investigator in trial level post-conviction proceedings in South Carolina.

DH 1 of 2

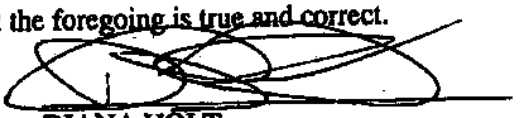
4. In the capital post-conviction cases I have worked on, I have never been denied funding for investigative or expert services because I did not know at the outset what the investigation and expert evaluation would uncover or if that information would ultimately form the basis of a successful claim for post-conviction relief.

5. In cases where I have been retained to serve as a mitigation investigator, funding for my services has always been authorized by the post-conviction court prior to my commencing an investigation. Payment for my services as a mitigation investigator has never been contingent on the information uncovered during my investigation being used in a claim for post-conviction relief or on a beneficial result being obtained for the client.

6. In my experience, there is no way to know at the outset of a mitigation investigation what the investigation will uncover. It is further impossible to know at the outset if the information to be uncovered during a mitigation investigation will be used in a claim for post-conviction relief.

7. When I serve as a mitigation investigator, my role is to compile a social history of the client by conducting interviews and collecting records relating to the client and his or her family. I present my findings to the attorneys appointed and experts retained on the case. To present a social history to a court, the typical practice in capital cases is to retain a testifying social worker who has experience in analyzing and presenting a social history.

I affirm, under the penalty of perjury, that the foregoing is true and correct.



DIANA HOLT

Sworn to and subscribed before me
This 13th day of October, 2014

Notary Public
Commission Expires: 2/21/2024

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2 of 2

STATE OF SOUTH CAROLINA )
) AFFIDAVIT
COUNTY OF RICHLAND )

Teresa L. Norris, who appeared personally before me, affirms and states the following:

1. I, Teresa L. Norris, worked at what is currently known as the Death Penalty Resource and Defense Center ("the Center"), from November 1994 until March 2006. I was the Senior Staff Attorney until April 1996 and thereafter served as Acting Director and then Director. As Director—and throughout my time at the Center—I attempted to monitor all capital post-conviction cases in the State of South Carolina. When I left the Center in 2006, I went into private practice where I continue to work almost exclusively on capital cases in South Carolina and other states.

2. I have served as counsel of record in approximately 42 capital cases in South Carolina, North Carolina, Mississippi, Texas, Virginia, the federal system, and the United States military system. My experience has included all stages of the proceedings from trial to clemency proceedings. I have served as counsel in at least twelve capital post-conviction proceedings in South Carolina. I have also served as a consultant, both pro bono and retained, in numerous other cases.

3. Counsel for Stephen C. Stanko have asked me to provide information concerning my experience in obtaining investigative and expert funding in capital post-conviction proceedings in South Carolina.

4. I do not recall ever being denied funding for a testifying social worker or for mental health experts. In virtually every case I have had, I have been allowed funding, at minimum, for a mitigation investigator, forensic psychiatrist, and a neuropsychologist. In a number of cases, I have also obtained funding for other additional mental health experts. I do not recall even hearing of a capital post-conviction relief case in South Carolina where the court did not authorize funding for at least one mental health expert when a request was submitted by defense counsel.

5. In every capital case, defense counsel requires assistance from investigators and experts to investigate, evaluate and prepare potential claims for relief. No attorney has the necessary skills and training to independently assess all potential areas of mitigation. That is, of course, precisely why funding for expert assistance is authorized and required to be disbursed prior to any evidentiary hearing or trial. The American Bar Association Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases (2003) have been cited with approval and repeatedly referenced as relevant guidelines by the Supreme Court of the United States, *see, e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams*, 529 U.S. at 396, and by the South Carolina Supreme Court, *see Council v. State*, 380 S.C. 159, 172-73, 670 S.E.2d

356, 363 (2008); *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007). Guideline 10.7(A) provides that "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The commentary to Guideline 10.7 explains that "[c]ounsel's duty to investigate and present mitigating evidence is now well established" and includes an obligation to investigate, among other things, medical history, family history, educational history and social history. Similarly, Guidelines 10.11(A) and (F) instruct that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty" and that counsel should carefully consider presenting expert testimony "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)."

6. Regardless of whether one views the Guidelines as binding, in my own practice, I have had post-conviction relief granted to clients by the South Carolina Supreme Court because, at least in part, prior counsel did not adequately investigate and present mitigation through lay witnesses and experts. *See, e.g., Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006); *Von Dohlen v. State*, 360 S.C.598, 602 S.E.2d 738 (2004). In each of those cases, I could not have predicted what my court-authorized investigators and experts would find, but I could and did establish that the investigators and experts were reasonable and necessary, which is all that is required under the statute in order to obtain court approval for the funding necessary.

7. There is no way for an attorney to know what an investigator or expert might uncover, or if that information will create a claim for post-conviction relief, until after the investigation or evaluation is complete. I have never had a court deny funding for an investigator or expert because I could not foresee what the investigator or expert would find but I could point to "red flags" that clearly indicated the need for the investigator or expert; nor has a court ever denied funding on the basis that it could not deem investigative or expert services reasonably necessary until a beneficial result was obtained.

8. In my experience, investigators and experts generally will not conduct an investigation or evaluation in a post-conviction case or even begin to do so without an order from the court authorizing funding for the investigator or expert's services.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

Teresa L. Norris
TERESA L. NORRIS

Sworn to and subscribed before me
This 9th day of October, 2014

Jill A. Ridler
Notary Public for the State of South Carolina
My commission expires: 6-19-16

# ATTACHMENT 2

STATE OF SOUTH CAROLINA
In The Supreme Court

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IN ITS ORIGINAL JURISDICTION

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HORRY COUNTY
Court of Common Pleas
The Honorable Benjamin H. Culbertson, Circuit Court Judge
Case No. 2014-CP-26--0035

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APPELLATE CASE NUMBER 2015-_____

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STEPHEN C. STANKO, ..... PETITIONER,

v.

STATE OF SOUTH CAROLINA, .....RESPONDENT.

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# RESPONSE TO PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION

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**ATTORNEYS FOR RESPONDENT**

The Respondent State of South Carolina makes a Response to the extraordinary "Petition for Court Oversight of Capital PCR Action" dated February 3, 2015. Petitioner seeks this Court's extraordinary supervisory authority of this capital post-conviction relief action pursuant to Section 17-27-160 (C) ("hearing must be scheduled within one-hundred and eighty days from the date of the status conference, unless good cause be shown") and *In re Stays of Execution*, 321 S.C. 544, 471 S.E.2d 140 (1996). The post-conviction relief application was initially filed January 6, 2014 and is set to be heard pursuant to the scheduling order of Judge Benjamin H. Culbertson, as amended, on March 2, 2015.

In the Petition, the Petitioner seeks to have this Court mandate the assigned post-conviction relief judge, the Honorable Benjamin H. Culbertson to perform certain acts which are within his judicial discretion. Petitioner requests the Court to direct that Judge Culbertson continue the state PCR case scheduled for March 2, 2015.[1] The Petitioner further seeks the Court to mandate Judge Culbertson to rule favorably on an unserved "*Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for Hearing" apparently made on October 14, 2014. [Respondent have no knowledge of the particulars of the funding motions or

1 The Petitioner, on January 8, 2015 had made an "Applicant's Motion for Continuance" requesting a continuance due to the Motion to Continue requesting Judge Culbertson to continue the case set for March 2, 2015 "because the Court's blanket denial of all funding requests for reasonably necessary expert assistance has crippled counsel's ability to provide applicant with adequate post-conviction representation." Applicant's Motion for Continuance, p. 1. Within the Applicant's January 8, 2015 motion, he requests a nine month continuance because the experts they consulted indicate six to nine months is the minimum time it will take to prepare for a hearing. Motion for Continuance, p. 2, ft. 1.

orders other than what Petitioner has set forth in the "Motion for Continuance" or this Petition.[2]].

In the Petition before this Court, Stanko asserts that the Respondent has taken no position on the motions in the lower court, except for making a request that the funding motions and orders denying the request be unsealed. Petition, p. 1. To be clear, the Respondent has been unable to respond or take a position to whether a continuance is appropriate or whether the hearing judge applied appropriate standards because Respondent has no knowledge of the basis of the requests or denials because they were done without service upon the State, without knowledge of the purpose, or basis of the reasoning in granting or denying requests. To be more clear, we still are unable to take a position because we have not been provided access to those motions and orders between counsel and Judge Culbertson except through the characterizations in Applicant's pleadings. The Petitioner's reliance on his unserved motions and unserved orders in this Petition again is troubling without being served with the documents.

Respondent respectfully requests this Court to either provide or require disclosure to the State of the *ex parte* requests and orders between Petitioner's counsel and the fact-finder in this action in order to allow the Respondent to take an informed position on the requests. Respondent submits this information is necessary and proper for an understanding of the basis of continuance requests and denials, particularly where Petitioner characterizes that the respective denials by Judge Culbertson involve a consideration of the merits of potential issues before the Court in their pleadings before this Court. Respondent does not know the validity of Applicant's assertions in his Motion or the basis of this Court's denial of such alleged funding requests because they do not know what the judge was advised and the particular reasons for his actions based upon the

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2 Respondent was provided by the Clerk with a Form 4 denial of an Order for Transport of the inmate but was not aware of the motion or purpose or requested date underlying the order or request for transporting the inmate.

information he received.

It is unclear why the Court should be called upon to intervene in the action at this time, particularly when the pleadings and orders have not been provided to the Court of Respondent These general requests concerning a continuance or appointment of experts are matters that generally fall within the hearing court's discretion under Section 17-27-160 (C) ("hearing must be scheduled within one-hundred and eighty days from the date of the status conference, unless good cause be shown") and *In re Stays of Execution*, 321 S.C. 544, 471 S.E.2d 140 (1996).

A.

On January 9, 2015, the day after receipt of the continuance motion in the lower court, Respondent made a "Motion to Unseal Ex Parte Funding Request and Orders Regarding Same" for the primary purpose to address the motion for continuance, but also because Respondent was not aware of the specific requests being made, granted or denied up to that point of time. This disclosure issue had not been addressed in the lower court.

In the Respondent's pending motion to unseal and disclose before the lower court and here, Respondent asserts the following salient points for this Court or the lower court to issue an Order unsealing to the extent to make available to Respondent any and all *ex parte* expert witness or investigative funding requests and Orders regarding the same. This request is supported so Respondent may adequately and properly respond to Applicant's current Petition before this Court and pending continuance motion.

B.

In order to respond to the Petition, Respondent should be allowed access to the underlying motions and orders that Petitioner's pleading addressed. First, there is no statutory or a

constitutional right to be heard on funding requests *ex parte*[3] and *in camera*[4] in this civil post-conviction relief settings. Respondent acknowledges, however, the right of the Court to determine that some matters may be held *ex parte* under certain discrete circumstances as authorized under the Code of Judicial Conduct.[5] Such circumstances, however, are exceptions to the rule and blanket exceptions are not contemplated. In support of this position, Respondent would respectfully show the Court:

1. There is no statutory right to *ex parte* proceedings regarding appointment and funding of expert witnesses or investigative witnesses and services in capital post-conviction relief actions. PCR applicants typically argue there is a statutory right by virtue of Section 17-27-160 for the non-disclosure of investigative and expert witness requests made to the fact-finder PCR judge, which they argue incorporates all the funding provisions of § 16-3-26, including the provisions for funding investigative, expert and other services. They are incorrect. There is no such express provision in the language of the statute. *Accord Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682 (1996). *Thames* addressed that such matters in PCR actions are not subject to being done *ex parte*.

The petitioner relies upon and references to Section 16-3-26 are in the second paragraph in Section (B) of S.C. Code § 17-27-160 to support non-disclosure of any funding requests or orders to the Respondent. However, that provision only addresses the appointment, qualification, and

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3 "A 'judicial proceeding ... taken ... for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.'" *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 297(5th ed. 1983)).

4 "An *in camera* proceeding ... is a 'trial or hearing held in a place not open to the public...'." *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 684 (5th ed. 1983)).

5 However, it also would suggest that discussions on or about the merits of an action or issues should not be done ex parte with the fact-finder.

compensation of PCR counsel and the compensation of PCR appellate counsel. The first reference is tied specifically to counsel's compensation: "Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel...." S.C. Code § 17-27-160 (B). If that were not so, the provisions of S.C. § 17-3-50 (A) would apply resulting in reduced rates and caps as set therein.[6] This speaks of counsel's compensation - a matter not at issue in these proceedings. Contrary to what Petitioner implies, there is no specific provision or reference to "investigative, expert, or other services" or the corresponding provision for same in the criminal trial as reflected in S.C. Code § 16-3-26(C)(1).[7] The only other reference to Section 16-3-26 is Section 16-3-26 (I), to provide, *again as to the appointment of counsel*, that the prohibition of appointing non-licensed, non-resident attorneys at trial does not apply to the civil proceedings. *See* S.C. Code § 17-27-160 (B). *Ergo*, when read naturally, the reference to Section 16-3-26 in Section 17-27-160 involves the narrow question of counsel's compensation.[8]

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6 It is of no little note that payment of counsel fees are separate and apart from the provision of "investigative, expert, or other service," both in Section 16-3-26 and Section 17-3-50. This is also true of the federal funding provisions. See 18 U.S.C.A. § 3599. However, PCR applicants typically seek to combine the two in order to find statutory support for their position. This is, of course, contrary to the standard references of the funding as two distinct concerns.

7 Section 16-3-26(C)(1) provides for "ex parte proceedings" to determine "that investigative, expert, or other services are reasonably necessary for the representation of the defendant" at the criminal capital trial.

8 This is also consistent with the express goal of the act: "...to add Section 17-27-160 so as to provide for the manner in which defendants sentenced to death must file applications for post-conviction relief, to provide for the assignment of judges to handle these applications, *to further provide for the appointment and compensation of counsel in these proceedings,* and to provide for other procedural matters including the certain time limitations in these capital post-conviction relief proceedings." 1996 South Carolina Laws Act 448 (H.B. 4469).

To reach an opposite conclusion, one must accept that the whole of Section 16-3-26 is incorporated into the PCR Act. This would include incorporation of the reference to the notice of intention to seek death and other specific trial related provisions – clearly not a requirement in post-conviction relief proceedings. Even the reference to the section applicants seek to incorporate, Section 16-3-26 (C)(1), only authorizes "investigative, expert, or other services are reasonably necessary for the representation *of the defendant whether in connection with issues relating to guilt or sentence*...." A "defendant," refers to a "criminal defendant," defined as "one who is accused in a criminal proceeding." Black's Law Dictionary (9th ed. 2009). Applicant is no longer a defendant. *See also* Black's Law Dictionary (9th ed. 2009) (defining defendant generally: "A person sued in a civil proceeding or accused in a criminal proceeding."). In fact, the language of Section 17-27-160 reflects that shift in position in providing that a "defendant" must file an application for relief, but after filing, refers to the individual bringing suit as "the applicant." S.C. Code § 17-27-160. *See also* S.C. Code §§ 17-27- 40 through 17-27-80 (referencing applicant in non-capital post-conviction relief provisions as of the filing of the application). Further, counsel representing an Applicant is not directly raising issues related to guilt or sentence.[9] Rather, the civil action challenging a presumptively valid state judgment is separate and distinct from the criminal proceeding. *See* Rule 71.1 (c), SCRCP ("An application filed under the [Post-Conviction Procedure] Act is an independent civil action which should be separately filed and indexed by the

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9 PCR applicants' fallback position appears to be that they have been convicted, but these proceedings are merely a continuation of sentencing. To the contrary, Stanko is currently under a presumptively valid judgment. Guilt has been adjudicated and sentenced imposed. This action is filed to challenge the continued custody under this presumptively valid judgment. *See* S.C. Code § 17-27-20 (relief may be sought where a "person who has been convicted of, or sentenced for, a crime" seeks to have his conviction or sentence vacated on grounds other than an allegation of insufficient evidence).

clerk of court."); S.C. Code § 17-27-20 (a)(6) ("... this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."). [10]

In interpreting the statute, "[t]he Court must give clear and unambiguous statutory terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *State v. Cribb*, 310 S.C. 518, 521, 426 S.E.2d 306, 308 (1992). *See also State v. Phillips*, 400 S.C. 460, 734 S.E.2d 650 (2012) (same); *State v. Sweat*, 386 S.C. 339, 688 S.E.2d 569 (2010) (same). Thus, the trial provisions referring expressly to a "defendant" cannot be applied in a civil post-conviction relief action. *See also Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682 n. 1 (1996) (noting "Section 16-3-26 (C) applies to the capital trial and not to post-conviction relief proceedings" noting that reference to "defendant" is reserved for a "defendant" in criminal proceedings, not an applicant for post-conviction relief). Consequently, the whole of Section 16-3-26 cannot apply.

In the absence of the incorporated provisions, the more general statutes are controlling for reimbursement for expenses. *See* S.C. Code § 17-3-50 ("Defense of Indigents, General Provisions, Determination of fees for appointed counsel and public defenders; maximum amounts; authorization to exceed maximum; payment for certain services."). If that is so, then *Thames v. State* is applicable and controlling. In *Thames*, the Supreme Court of South Carolina instructed the provision of *ex parte* proceedings in Section 17-3-50 (B) is reserved for funding requests made in

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10 Though the Supreme Court of South Carolina has referred to such as action as "hybrid," it is so only because the criminal conviction and sentence are at issue. The Court has said: "... while a PCR action is hybrid in nature, it generally remains subject to rules and statutes that apply in civil proceedings." *Sutton v. State*, 361 S.C. 644, 606 S.E.2d 779 (2004) (*overruled on other grounds by Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005) (holding "counsel is required to advise an applicant of the right to appellate review of the denial of PCR")).

preparation for the criminal trial. *Thames*, 325 S.C. at 11, 478 S.E.2d at 682 n. 1. 11 Consequently, Applicant has failed to show a statutory right to *ex parte* proceedings.[12]

2. There is no constitutional right to *ex parte* proceedings in capital post-conviction relief proceedings. As a first point, there is no constitutional right to post-conviction relief proceedings. *See, e.g., United States v. MacCollom*, 426 U.S. 317, 323 (1976) ("The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, see Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction."). Again, Applicant is the

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11 In *Thames*, the Court stated:

> When a defendant requests expert services for a criminal trial, the request is determined by the judge in ex parte proceedings. S.C.Code Ann. § 16-3-26(C) and § 17-3-50(B) (Supp.1995); Ex parte Lexington County, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.
>
> Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While § 17-3-50(A) mentions that the same hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word "defendant" throughout § 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

*Thames*, 325 S.C. at 11, 478 S.E.2d at 682 n. 1

12 Respondent has interpreted the previous motion requests for *ex parte* proceedings to refer specifically to "investigative" or other experts. The provisions for payment of counsel's fees, as discussed above, are treated separately from other expenses of the litigation. In fact, there is no provision at all for *ex parte* hearings on the authorization of counsel's fees. *See* Section 16-3-26; Section 17-3-50 (A) and (C). See also July 6, 2005 Order of the Chief Justice, Re: Ordering Additional Attorney's Fees for Appointed 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.").

party bringing the suit in this instance.[13] He bears the burden of proof. *See, e.g. Bennett v. State*, 371 S.C. 198, 638 S.E.2d 673 (2006) (*citing Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998); *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007) (*citing Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Though PCR applicant argue they are still entitled to the array of constitutional and statutory rights of a criminal defendant, they simply are not entitled to those same rights in a civil action as the action itself is definitively different in scope and measure. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) ("Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). *Cf. Fisher v. Baker*, 203 U.S. 174, 181 (1906) ("The proceeding is in habeas corpus, and is a civil, and not a criminal, proceeding."); *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883) ("The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process."). Simply, civil proceedings do not give rise to the constitutional rights afforded a criminal defendant. *See United States v. Baker*, 45 F.3d 837, 843 (4th Cir. 1995) ("the constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a

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13 It is Applicant who is obligated to make the allegations to allow Respondent the opportunity to prepare a defense. Applicant would surely object if the State, in the criminal prosecution, told him only that additional allegations would be forthcoming in addition to the allegations of the indictment. Respondent has prepared both a return and a return to the final application.

respondent in a commitment hearing" citing the civil nature of the proceedings). Even where a criminal trial right survives, the right is generally limited by the civil nature of the proceedings.

For example, the Fifth Amendment right against self-incrimination survives and can be invoked in any proceeding. However, an individual's failure to answer questions allows for an adverse inference in civil cases. *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976) (noting "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)."). *See also In re Care and Treatment of Canupp*, 380 S.C. 611, 671 S.E.2d 614 (Ct.App. 2008) ("...only a criminal defendant has the right to decline to take the witness stand altogether."). Consequently, the nature of the proceeding controls.

Though PCR applicants have relied upon *Ake v. Oklahoma*, 470 U.S. 68 (1985), the case resolved only that where "a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake* does not speak to collateral proceedings in the least. *See, e.g., Rosado v. Allen*, 482 F.Supp.2d 94, 113 (D.Mass. 2007) ("*Ake v. Oklahoma* ... concerned a defendant's right to have access to a psychiatrist assistant at *trial*, not on post-conviction relief.") (emphasis in original); (*Sanborn v. Commonwealth*, 975 S.W.2d 905, 909-910 (Ky. 1998) ("*Ake v. Oklahoma*, ... is not a post-conviction case.") (*overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009)); *McGahee v. State*, 885 So.2d 191, 229

(Ala.Crim.App. 2003) (*Ake* not applicable in civil proceeding challenging conviction). Thus, *Ake* is not dispositive.[14]

Whether funding for any particular expert is necessary or authorized, however, is not at issue in requests for *ex parte* and *in camera* proceedings. Rather, at issue is how the requests will be heard. Respondent submits for all the foregoing reasons, Applicant had no right to be heard *ex parte*. This position is consistent with funding provisions for federal actions, which, like our state rules, disfavor *ex parte* proceedings.[15]

3. Similarly, there is no right to closed proceedings in regard to funding requests in capital post-conviction relief proceedings. Again, PCR applicants rely on provisions for the criminal trial, so, again, the civil nature of the proceeding undercuts reliance on his reliance upon precedent interpreting same.[16]

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14 It should not be lost that the purpose of *Ake* was to determine when a state must provide access to funds for "psychiatric assistance" for an indigent criminal defendant at trial. *Ake*, 470 U.S. at 77. *Ake* does not resolve access to other experts in other circumstances. Further, the United States Supreme Court has summarily rejected arguments of "constitutional infirmity in the *trial court's* refusal to appoint various experts and investigators" where "the requests were accompanied by no showing as to their reasonableness." *Caldwell v. Mississippi*, 472 U.S. 320. 323 n. 1 (1985) (emphasis added). Thus, there appears to be no basis in *Ake* to argue for unlimited resources for various "experts" at all stages of the proceedings, direct and collateral.

15 "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). *No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.*" 18 U.S.C.A. § 3599 (f) (emphasis added). *See also United States v. Caro*, 442 F.Supp.2d 296, 297 n.1 (W.D.Va. 2006) (noting "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed.").

16 For example, see *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593

Applicant here is in no danger of having to "telegraph to the prosecution the defendants' defense strategy," as he is not the defendant and has no defense strategy. In this civil action, he is *required* to make sufficient allegations for Respondent to investigate and present a defense. *See* S.C. Code § 17-27-40.

There is no right to keep known potential issues from Respondent and essentially shorten, (or in some cases eradicate), the opportunity for Respondent to investigate and respond fully. *See generally* S.C. Code § 17-27-130 ("Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation.").[17] He is also *required* to disclose in discovery those documents and things that would go to *either* a claim or defense. *See* Rule 26 (b)(1), SCRCP ("Parties may obtain discovery

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(1994), a case which refers to two capital defendants who had not yet stood trial, where the Court found Section 16-3-26(C) provides a "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*." 314 S.C. at 227, 442 S.E.2d at 593, which is clearly the procedure in the criminal trial to which the statute refers. However, as noted above, that section has not been expressly incorporated into the civil proceedings provided for capital PCR actions. But even that statutory funding provision does not allow the trial courts to "close the proceeding," rather, "the trial judge must treat this case like any other which presents the issue of whether it is appropriate to close the proceedings." *Id.* To close the proceedings, the court must find on the record that "there is a substantial probability of prejudice which would result from the publicity, and ... there are no reasonable alternatives to closure which would protect the defendant's right to a fair trial." *Id.* The Supreme Court of South Carolina in *Ex parte Lexington County* based its reasoning that closure for *ex parte* funding requests was warranted *in a criminal trial* on finding a defendant would not be required to disclose his *theory of the defense* but for the fact that he was indigent and had to request funds. 314 S.C. at 228, 442 S.E.2d at 594. That concern is not present here.

17 There is every indication that investigation authorized by discovery available to every other civil litigant would bear not only on funding, but also on preparation.

regarding any matter, not privileged, which is relevant *to the subject matter involved* in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party…") (emphasis added). He is further required to disclose the names of witnesses and experts who have knowledge of claim or defense. Rule 26 (b)(4)(B).[18] In short, Applicant is required to go by the SCRCP. These full disclosure requirements stand in stark contrast to the defense cloak of secrecy for the criminal trial. The same concerns in *Ex parte Lexington County* are not present here.

4. Respondent recognizes, ethical rules allow *ex parte* communication in limited discrete circumstances. Rule 501, SCACR, Canon 3 (B) (7) (a), Code of Judicial Conduct, provides:

> Where circumstances require, ex parte communication for scheduling, administrative purposes or emergencies **that do not deal with substantive matters or issues on the merits** are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

*(emphasis added). See also* Rule 407, Rule 3.5 (a) and (b), Rules of Professional Conduct (prohibiting attorneys from ex parte discussions with a judge "unless authorized to do so by law or

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18 No opinion from any consulting expert would be obtained through a mere funding request (in fact, the request presumes one has not yet been hired or an opinion rendered). However, such an opinion must be shared, not due to funding requests but under ordinary rules of discovery, if the expert is not merely "consulted informally, or consulted and not retained and specially employed." Rule 26 (b)(4)(B), SCRCP. See also Rule 33 (b)(6), SCRCP (standard interrogatories requiring disclosure of "names and addresses of any expert witnesses whom the party proposes to use as a witness").

court order"). The Court may, pursuant to these provisions, allow *ex parte* communication.[19] The party communicating in the absence of an opposing party has heightened ethical duties to provide the court with relevant information. Rule 407, SCACR, Rule 3.3 (d), Rules of Professional Conduct ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.). Such communication, however, is not favored as it is contrary to our adversarial system. Id., comments ("... in any ex parte proceeding ... there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of

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19 Ex *parte* funding requests are neither provided for nor mandated. The better course, and the only course consistent with the rules and statutes in this jurisdiction, would be to disallow a blanket exception, but reserve the possibility to closed review of sensitive arguments and/or supporting documents. The PCR court could allow (with notice to opposing counsel) narrowly focused *ex parte* communication and review of such documents, much like the review of privileged materials. *Accord State v. Jeff*, 761 So.2d 574 (La.App. 1 Cir. 1999) ("The trial court should first determine, **in camera**, either on the face of the allegations of the motion or upon taking evidence at an **ex parte** hearing, whether the defendant would be prejudiced by a disclosure of his defense at a contradictory hearing. If so, then the hearing on expert funding should continue **ex parte**. If not, then the hearing should be held contradictorily with the District Attorney....") (*quoting State v. Touchet*, 642 So.2d 1213 (La. 1994)) (emphasis in original). Even where originally heard *ex parte*, such matters may be made public at the court's direction in compliment to the general rule that *ex parte* proceedings are disfavored and unnecessary. *See United States v. Caro*, 442 F.Supp.2d 296, 297 (W.D.Va. 2006) (on review of denial of funding request in a capital case: "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed."). *See also Sallie v. Humphrey*, 2011 WL 837168, *2 (M.D.Ga. 2011) ("*Ex parte* requests for payment of fees and expenses under § 3599(f) may not be considered unless Petitioner makes a proper showing of the need for confidentiality."); *Barnett v. Roper*, 2010 WL 1268030, *1 (E.D.Mo. 2010) (noting change from presumption of *ex parte* proceeding to showing need for *ex parte* proceeding in current federal statute).

material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.").

Notably, concerning Applicant's *ex parte* funding requests, it is unclear if a full recitation of background was provided to the PCR judge.[20] Applicant's case is not a new trial. Applicant has previously been represented by counsel, found guilty, and sentenced to death. In short, the case has a history that may not be ignored. Asking the court for the ability to start completely fresh or simply "expert shop" most likely is not necessary in a capital case or a non-capital case. *See Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682-683 (1996) (finding no abuse of discretion in denying funding request for another expert: "Petitioner had been examined by two experts prior to trial and the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to warrant the authorization of funds to pay an expert.").[21] For example, a request for a mental health expert in this case should be examined in

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20 Applicant's assumption, if made, that Respondent would attempt to deny him funding, confuses the purposes of the funding hearing and raises the significant danger that not all relevant facts are being provided to the trial judge tasked with evaluating the reasonableness of the request. The funding request is simply to show a reasonable necessity. Applicant need not disclose findings and opinions unless he intends to call the expert at the evidentiary hearing – a fact readily ascertainable by simply following the SCRCP. *See* Rule 26, SCRCP. Further, in this instance, the arguments and facts he wishes to present outside the presence of the opposing party would be presented *to the fact finder in this action*. Applicant's attempt to put this squarely in funding overlooks the ponderous consideration that the fact finder may be approached with arguments and theories indicating incomplete or incorrect facts in support of a funding request.

21 Even capital defendants at trial are not entitled to unlimited funding. *See, for example*, *Bailey v. Com.*, 259 Va. 723, 737, 529 S.E.2d 570, 578 (2000) ("We have consistently rejected the contention that defendants, even in capital murder cases, have an indiscriminate entitlement to the assistance of an investigator.") *See also State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009) (*citing* § 16-3-26 (C)(1) (2003); *State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("The matter of authorized funds to capital defendants lies within the sound discretion of the trial" and rest upon a finding "that investigative, expert, or other services are reasonably necessary").

light of investigation and testing already made. Applicant presented at trial well-credentialed psychiatrists, psychologists, and radiologists or neuro-radiologists, who examined Applicant contemporaneous to the proceedings and reviewed multiple records and scans. It would be difficult to fault trial counsel for relying on such experts. *See Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) ("...counsel had received Dr. Killian's report concluding that Wilson was not mentally ill at the time of the offense. To be reasonably effective, counsel was not required to second-guess the contents of this report."). Counsel had no duty to contact other experts when he thought those consulted were well qualified and counsel has no duty to ensure the trustworthiness of an expert's conclusions. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998). See *Philmore v. McNeil*, 575 F.3d 1251, 1263 (11th Cir 2009)(counsel has no duty to present all psychiatric evidence, and not calling one was reasonable where the opinion conflicted with Reasonable counsel need not "shop" for contrary expert opinions. *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995); *Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008), Moreover, counsel has no duty to pursue neurological experts when experts consulted indicated no additional testing was required, *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998), or found no evidence of brain damage. *Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998). At any rate, these are the types of facts that the PCR court should have before deciding on funding expert witness requests in the PCR setting.

Furthermore, Applicant has waived any confidentiality by the filing of this Petition before this Court and Motion for a Continuance, with Applicant's assertion of the history of the funding requests and this Court's actions regarding the same, along with supporting Affidavits without a request that they be under seal. Applicant has made his requests and the Court's reasons for denial of the same, if true, relevant and discoverable.

WHEREFORE, Respondent makes response to the Petition. Respondent submits, for all the foregoing reasons, this Court my issue an Order unsealing the *ex parte* funding requests and Orders regarding the same, in order that Respondent may properly respond to the merits of the Petition before this Court and the Motion for a Continuance before the hearing judge should this Court deem its supervisory authority of the stay of execution to empower this acts over the hearing judge's discretion.

Respectfully submitted,

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February 13, 2015
Columbia, South Carolina.

*counsel of record

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, certify that I have served Respondent's RESPONSE TO PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION by depositing one copy to his counsel of record, postage prepaid, addressed as follows:

Emily Paavola
Lindsey Vann
Death Penalty Resource Center
900 Elmwood Avenue, Suite 101
Columbia SC 29201

This 13th day of February, 2015.

DONALD J. ZELENKA
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ATTORNEY FOR RESPONDENT

# ATTACHMENT 3

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

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Capital PCR Case Number: 2014-CP-26-00035

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STEPHEN C. STANKO, SK 6022 ..... *Petitioner*,

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

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# PETITIONER'S REPLY REGARDING PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION (Expedited Consideration Requested)

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## I. INTRODUCTION.

Undersigned counsel were appointed to represent petitioner, Stephen C. Stanko, in his capital post-conviction relief proceedings on February 4, 2014. Counsel immediately began working on the case and requested that the PCR judge, the Honorable Benjamin H. Culbertson, authorize payment for attorneys' fees. Judge Culbertson initially denied that request, and did not ultimately agree to authorize counsel to receive payment for any work on the case until March 27, 2014. Counsel then requested funding for the assistance of expert services, first on April 1, 2014, and again on July 28, 2014. Judge Culbertson refused to approve funding for any testifying expert and also denied two subsequent motions to reconsider these denials, based on his erroneous reading of S.C. Code § 17-27-160, which authorizes a PCR court to grant funding when such funds are "reasonably necessary" for a PCR applicant to investigate and present his claims for post-conviction relief. Judge Culbertson has concluded that no expert services can be deemed reasonably necessary until after the services are performed and a beneficial result obtained. Counsel have repeatedly tried to explain to the PCR court that no reasonable, credible or ethical expert would agree to condition payment of their fees on a guarantee of a "beneficial result" before even beginning their work on this case.

On October 14, 2014, undersigned counsel filed a third motion to reconsider regarding the funding denials and requested that Judge Culbertson hold a hearing on all funding denials. Judge Culbertson refused to hold a hearing and has not ruled on this motion. Given that counsel cannot prepare petitioner's claims for post-conviction relief without the assistance of expert services, counsel filed – on January 6, 2015 – a motion for a continuance of the PCR hearing currently scheduled to begin on March 2, 2015. Judge Culbertson has not ruled on this motion. In response to the motion for a continuance, respondent moved to unseal all of petitioner's *ex parte* funding

requests, and petitioner filed a response in opposition. Judge Culbertson has not ruled on this matter either.

The parties are therefore scheduled to begin an evidentiary hearing on Petitioner's PCR claims on Monday, March 2, 2015, at which undersigned counsel cannot possibly effectively represent petitioner's interests. *See Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2012) (observing that just as a prisoner whose direct appeal counsel is ineffective is "denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims," a prisoner lacking the assistance of an "adequate attorney" in post-conviction proceedings "will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim."). In other words, undersigned counsel fully believe that if they are forced to go forward with an evidentiary hearing on March 2, 2015, without access to the tools, resources and time typically available to PCR applicants in this State for developing the factual bases of their claims, undersigned counsel's representation will be ineffective. *See Strickland v. Washington*, 466 U.S. 668 (1984).

This Court's has historically exercised supervisory authority over capital PCR cases. *See In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). This Court has also previously intervened via an extraordinary writ in cases involving novel questions of law where the interests of judicial economy weigh in favor of expedited relief. *See e.g., Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009); *Bennett v. State*, 380 S.C. 215, 669 S.E.2d 594 (2008); *Porter v. Jedziniak*, 334 S.C. 16, 512 S.E.2d 497 (1999); *In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998). Petitioner asks this Court to: (1) provide guidance to the PCR court on the proper interpretation of the statutory funding provision contained in S.C. Code § 17-27-160; (2) require a continuance of the PCR hearing to allow petitioner

adequate time to prepare for a hearing with the assistance of expert services; and, (3) provide any other relief the Court determines necessary in the interests of justice.

Petitioner is not asking this Court to review the underlying merits of each of petitioner's individual requests for expert services, nor does he believe that such a review is necessary since all of Judge Culbertson's funding denials turn on his consistent misinterpretation of the funding statute. However, petitioner has already stated that if this Court deems it necessary to review the *ex parte* funding pleadings and orders filed below, then those pleadings should be provided to the Court for its consideration under seal. *See* Petition for Court Oversight of Capital PCR Action at p.3 n.4. Respondent argues instead that this Court should require petitioner to disclose the *ex parte* pleadings *to the State* so that it can scrutinize the funding request and weigh in on whether the State agrees that petitioner actually requires the expert services. Respondent then argues at length that capital PCR applicants are not entitled to be heard on funding requests in *ex parte* proceedings. Respondent is incorrect.

## II. Capital PCR Applicants Are Entitled to Ex Parte Funding Proceedings.

Contrary to Respondent's assertion, capital PCR applicants are entitled to *ex parte* proceedings for the consideration of funding requests as a matter of state statute and federal constitutional principles.

### A. S.C. Code § 17-27-160 Expressly Authorizes *Ex Parte* Proceedings

The plain language of S.C. Code § 17-27-160 expressly authorizes *ex parte* communications in the context of capital post-conviction cases. Section 17-27-160 provides that counsel appointed in post-conviction cases "shall be compensated from the funding provided in Section 16-3-26 in the same *manner* and rate as appointed trial counsel" (emphasis added). According to § 16-3-26(C)(1), the appropriate manner of payment for investigative and expert

services is upon a finding by the court in *ex parte* proceedings that the services are reasonably necessary. Thus, there can be no question that requests for funding for investigative, expert and other services in post-conviction cases must be heard in *ex parte* proceedings in accordance with § 16-3-26(C)(1) as incorporated into § 17-27-160.

Moreover, § 17-27-160 specifically excludes subsection (I) of § 16-3-26, which prohibits the appointment and compensation of out-of-state attorneys in capital trials. There is no reference, however, to any exclusion of the requirement contained in § 16-3-26(C)(1) that funding requests be considered by the Court in *ex parte* proceedings. This is further evidence that the plain language of the statute clearly incorporates the *ex parte* provision of § 16-3-26(C)(1).[1] "When terms which are contained in a statute are clear and unambiguous, the courts are required to apply them according to their literal meaning." *Ex Parte Lexington County*, 314 S.C. 220, 225, 442 S.E.2d 589, 592 (1994). "The terms of a statute are to be given their plain and ordinary meaning without employing subtle or forced construction." *Id.* To the undersigned counsel's knowledge, no court since the enactment of § 17-27-160 has applied the statute to preclude an *ex parte* funding request in a capital, post-conviction proceeding.

The footnote in *Thames v. State*, 325 S.C. 9, 11, n.1, 478 S.E.2d 682, 682, n.1 (1996), on which respondent heavily relies, is not applicable to this issue. The language in *Thames* is *dicta* in a non-capital case. The *Thames* Court held that a post-conviction relief judge did not abuse his discretion in denying a non-capital petitioner's request for payment of psychiatrist fees after she had already been examined by two psychiatrists prior to her guilty plea. *Id.* at 11, 478 S.E.2d at

[1] If § 17-27-160 incorporated only § 16-3-26(B) as Respondent argues, there would be no need for the explicit exclusion of § 17-27-160(I) because it would not have been otherwise incorporated by § 17-27-160. The exclusion of subsection (I) thus indicates that the entirety of § 16-3-26 is incorporated into § 17-27-160.

683. Whether such a request should be conducted *ex parte* was not an issue raised by either party in the case. Furthermore, the footnote in *Thames* makes no reference to § 17-26-160 because *Thames* was decided before the statute which controls capital post-conviction proceedings was enacted. Rather, the footnote refers to the specific language of S.C. Code 1967 § 17-3-50(B), which is no longer in effect.

### B. *Ex Parte* Proceedings are Required by Due Process and Equal Protection

Due Process and Equal Protection require that ex parte funding pleadings in this case remain under seal. The Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (pointing to parole and probation as examples of state-created rights to which there was no "constitutional or inherent right" but which had been accorded protection under the Due Process Clause); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding prisoner's interest as a result of the State having created the right to good time credit "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty.'").

In determining whether a state has created a liberty interest subject to protection under the Due Process Clause, the Court looks to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). "This has meant that to obtain a protectable right 'a person clearly must have more than an abstract desire for it. . . . He must, instead, have a legitimate claim of entitlement to it." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quoting *Roth*, 408 U.S. at 577). In *Kentucky v. Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), the Supreme Court explained that:

> A State creates a liberty interest by establishing "substantive predicates" to govern official decision making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

*Id.* at 462 (citation omitted); *see also Slezak v. Evatt*, 21 F.3d 590, 594 (4th Cir. 1994).

Judicial pronouncements by the Supreme Court of the United States and this Court make clear that the nature of the right to *ex parte* proceedings to seek expert and investigative services is such that it merits protection under the Due Process Clause. *See Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (holding due process entitles an indigent defendant to the appointment of an expert to assist in his defense whenever "the defendant is able to make an *ex parte* threshold showing" of the need for assistance); *Ex Parte Lexington County*, 314 S.C. 220, 226-27, 442 S.E.2d 589, 593 (1994) (declaring that when the "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*," the state or county "does not have standing to participate in the hearing.").

Here, petitioner has much more than an abstract need or desire for his funding proceedings to remain *ex parte* and sealed. The South Carolina statutes give him a clear claim thereto. Petitioner maintains that the proper procedure is that set forth in § 16-3-26(C)(1). That section, on its face, requires *ex parte* proceedings when an applicant seeks "investigative, expert, or other services." Because South Carolina chose to accord the right to *ex parte* proceedings to seek expert services in post-conviction proceedings challenging a death sentence, "due process protections are necessary 'to insure the state-created right is not arbitrarily abrogated.'" *Vitek*, 445 U.S. at 488-89 (quoting *Wolff*, 418 U.S. at 557).

Due process and equal protection concerns are also implicated when a person is denied fundamental fairness by the state or treated differently than others based only on indigence:

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

*Ross*, 417 U.S. at 609. These concerns are heightened in this capital post-conviction process. *See Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) ("Access to equal justice is an even greater interest where the State seeks to impose the penalty of death.").

"[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system."[2] *Ake*, 470 U.S. at 77 (citations omitted). This promise of "an adequate opportunity," however, vanishes if the state, with its nearly unlimited resources to investigate petitioner's case at all phases of litigation, *see Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (S.C. 1992), likewise has access to privileged information only because of petitioner's indigency.[3] As this Court has explained:

> Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

*Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594. In the case of funding requests, *ex parte* procedures are needed to "simply level the playing field between petitioners able to purchase (and thereby not disclose to the opposing side) the usual litigation services – experts, investigators, subpoena-servers – and those forced to request payment of these services from the court." *In re Pruett*, 133 F.3d 275, 279 (4th Cir. 1997).

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[2] Under *Ake*, a defendant is entitled to expert assistance when he is "able to make an *ex parte* threshold showing to the trial court" that such assistance is necessary. 470 U.S. at 82. *Ake* presumes the *ex parte* nature of this showing.

[3] If petitioner were not indigent, he would have the resources to obtain investigative and expert funding without presenting any information about his case to the Court. Thus, the only reason Respondent is able to seek to unseal the information contained in the *ex parte* filings in this case is because petitioner is indigent and was required to present information to the PCR Court in order for it to determine whether the services are reasonably necessary.

Although *Lexington County* and *Ake* address the rights of defendants at trial to *ex parte* proceedings, there is little question that equal protection and due process rights extend to post-conviction proceedings. *See Long v. District Court of Iowa*, 385 U.S. 192 (1966) (finding refusal to provide the transcript of a state habeas corpus proceeding denied equal protection of the laws); *Lane v. Brown*, 372 U.S. 477 (1963) (finding prevention of the right to appeal the denial of a writ of error *coram nobis* due to indigency denied equal protection). Indeed, the Supreme Court of the United States has explicitly held that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny the prisoner equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

Here, allowing the State access to information about petitioner's funding requests or granting the State a voice in the funding decision would violate Due Process as Respondent clearly has an interest in prohibiting petitioner access to expert and investigative services that could lead to success in these proceedings. Due Process would further be violated because petitioner will not be similarly accorded the opportunity to review the State's use of funding for expert and investigative services or the reasons for the State's decision to expend such funds. Moreover, allowing the State information about petitioner's funding requests would violate equal protection because non-indigent PCR applicants would not be similarly required to provide such information to the State.

### C. The State is Not Entitled to Information Within the Funding Requests and Orders Under the Rules of Discovery.

Respondent argues there is no danger of petitioner having to "telegraph to the prosecution the defendants' strategy" because he is required to provide respondent with the information contained in the funding documents under the discovery rules. Response at 13. This assertion is inaccurate. By Respondent's own admission, the rules of discovery provide access to documents

and things that would go either to a claim or defense and the names of witnesses and experts who have knowledge of a claim or defense – not to strategic information about what expert or investigative services petitioner is considering before it is even known whether these services will bear fruit. Further, in order to apply for funding for investigative and expert services, petitioner may have disclosed to the Court information protected by the attorney-client and work-product privileges. Obviously, the rules of discovery do not entitle the State to such information. Likewise, the rules of discovery do not permit petitioner to know which expert and investigative services the State is contemplating before the hearing and how much funding Respondent plans to allocate to such services.

## CONCLUSION

In any event, the issue presented in the Petition for Court Oversight of this capital PCR action is not whether petitioner is entitled to the specific funding requested, nor is the question about whether capital PCR applicants are generally entitled to seek funding in *ex parte* proceedings (as they clearly are). Rather, the issue is whether this Court will intervene to address a series of problems that, if not addressed now, will inevitably lead to reversal at some point in the future of this litigation either in state or federal court. To avoid the unnecessary waste of judicial time and resources, petitioner believes this Court should grant his petition and address these problems now rather than later.

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

Counsel for Petitioner

February 18, 2015.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

---

Capital PCR Case Number: 2014-CP-26-00035

---

STEPHEN C. STANKO, SK 6022 ..... *Petitioner,*

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

---

CERTIFICATE OF SERVICE

---

The undersigned hereby certifies that a copy of Petitioner's Reply Regarding Petition for Court Oversight of Capital PCR Action was served by first class United States mail, postage prepaid, this 18th day of February 2015, upon the following:

Anthony Mabry
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

Jill A. Rider

Jill A. Rider

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF PICKENS | ) | |
| Jerry Buck Inman, #5226, | ) | |
| | ) | C/A No.: 2012-CP-39-918 |
| Applicant, | ) | (Capital PCR Action) |
| v. | ) | |
| | ) | **CERTIFICATE OF SERVICE** |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

I, Anthony Mabry, hereby certify that a true copy of the **Rule 59, SCRCP, Motion to Alter or Amend or to Reconsider** has been served upon opposing counsel, E. Charles Grose, Jr. and Diana L. Holt by depositing copies in the United States Mail to:

E. Charles Grose, Jr., Esquire
The Grose Law Firm
404 Main Street
Greenwood, SC 29646

Diana L. Holt, Esquire
Diana L. Holt, LLC
P. O. Box 6454
Columbia, SC 29260-6454

this 10th day of December, 2015.

ANTHONY MABRY
Assistant Attorney General

| | | |
|---|---|---|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE THIRTEENTH JUDICIAL |
| COUNTY OF PICKENS | ) | CIRCUIT |
| Jerry Buck Inmon, | ) | Case No. 2012-CP-39-00918 |
| Applicant, | ) | |
| vs. | ) | **Response to State's Rule 59, SCRCP Motion to Alter or Amend or to Reconsider** |
| State of South Carolina, | ) | |
| Respondent. | ) | |

The applicant, Jerry Inmon, responds to the State Rule 59, SCRCP Motion to Alter or Amend or to Reconsider. This Court fully considered and ruled upon the matters raised by the State in its motion and did not overlook or misapprehend any fact or point of law.

1) The State in its motion argues its "intent is to seek compliance by the Court with the decision in *State v. Thames*, [325 S.C. 9, 478 S.E.2d 682 (1996)] and to protect the integrity of the fact finding process." This Court not only addressed *Thames* in the written order but also explained why the footnote in *Thames* is not applicable. This Court, furthermore, explained why S.C. Code Ann. § 17-27-160 and the "Antiterrorism and Effective Death Penalty Act of 1996," 28 U.S.C. §§ 2261-2266, mandate this result. This Court's order protects the integrity of the fact-finding process.

2) The State's motion expresses concern that the Court was not able to access the pleadings pertaining to the Unpublished Order in *Stanko v. State* (Appellate Case No. 2015-000212, Feb. 25, 2015) by taking out of context a comment made by this Court in an email. At the conclusion of the hearing on this motion, the Court requested proposed orders from both parties. The State provided its proposed order in Word and PDF

formats, while Mr. Inmon provided his proposed order in PDF formant only. The Court merely requested Mr. Inmon provide a Word copy of his proposed order. While the Court adopted some provisions of Mr. Inmon's proposed order, the Court drafted its own order. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (Our Supreme Court "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law."). Thus, there is no reason whatsoever to suggest that the Court did not consider materials provided to the Court by email after the hearing.

3) The State acknowledges that it "failed to attach Stanko's reply brief in the above described email." A Rule 59(e), SCRCP is not an appropriate vehicle to raise a new matter. *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." (emphasis supplied by the Court)).

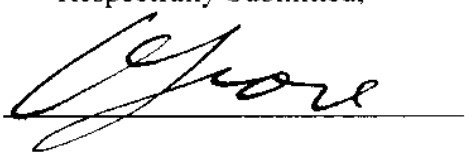
4) The State further contends that "the South Carolina Supreme Court rejected those arguments" raised by Mr. Stanko. The unpublished order in *Stanko v. State*, however, did not decide any of issues raised by either side, but rather remanded the matter to the trial court for consideration. This contention, therefore, is without merit.

**Conclusion**

This Court should deny the State's Rule 59, SCRCP motion.

(signature on next page)

Respectfully Submitted,

By 

Diana Holt
Diana Holt, LLC
Post Office Box 6454
Columbia, South Carolina 29260-6454
Phone: 803-782-1663
Email: DianaHolt@utexas.edu

E. Charles Grose, Jr.
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404 Main Street
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Phone: 864-538-4466
Email: Charles@groselawfirm.com

December 21, 2015

| | | |
|---|---|---|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF PICKENS | ) | FOR THE THIRTEENTH JUDICIAL CIRCUIT |
| | ) | |
| Jerry Buck Inmon, | ) | Case No. 2012-CP-39-00918 |
| Applicant, | ) | |
| | ) | |
| vs. | ) | **Response to State's Rule 59, SCRCP Motion to Alter or Amend or to Reconsider** |
| | ) | |
| State of South Carolina, | ) | |
| Respondent. | ) | |
| | ) | |

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

J. Anthony Mabry, Esquire
S.C. Attorney General's Office
PO Box 11549
S.C. Attorney General's Office
Columbia, SC 29211

By _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

December 22, 2015
Greenwood, South Carolina

STATE OF SOUTH CAROLINA 2016 JAN 14 PM 3 07

COUNTY OF PICKENS CLERK OF COURT PICKENS COUNTY SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Jerry Buck Inmon, #5226,
*a/k/a Jerry Buck Inman*

Applicant,

Vs.

State of South Carolina,

Respondent.

CASE NO.: 2012-CP-39-918
(Capital PCR Action)

ORDER DENYING AND DISMISSING RESPONDENT'S MOTION TO ALTER OR AMEND OR TO RECONSIDER

The Respondent, State of South Carolina, by its Assistant Attorney General, the Honorable Anthony Mabry, on December 10, 2015, filed its RULE 59, SCRCP, MOTION TO ALTER OR AMEND OR TO RECONSIDER, this Court's Order Denying Respondent's Motion to Unseal and Disclose, dated November 16, 2015, and filed November 24, 2015. Thereafter, on December 22, 2015, the Applicant's attorney, E. Charles Gross, Jr., Esquire, filed his Response to State's Rule 59, SCRCP, Motion to Alter or Amend or to Reconsider.

Inasmuch as Rule 59 expressly provides that "[t]he motion may in the discretion of the court be determined on briefs filed by the parties without oral argument," Rule 59(f), this Court waited to make that determination until the Respondent had adequate time to reply the Applicant's Response, in view of the intervening State Holidays, December 24th, 25th, 28th, and 31st, 2015. By Respondent's Rule 59 Motion, Fn. 2, p. 2, the Court was advised that if it did not

1.62

alter or amend or reconsider its Order, the Respondent/the State would be "required to file Notice of Appeal or Extraordinary Writ on December 30, 2015."[1]

The Respondent/the State has now forgone its Rule 59 Motion. Nevertheless, the Court has carefully and completely considered the filings that have been made by the parties and reviewed the record to include the findings of facts and conclusions of law based thereon in its Order Denying Motion to Unseal and Disclose of the Respondent/the State. The Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Plaintiff's Motion, pursuant to Rule 59, SCRCP, is **DENIED** and **DISMISSED**.

AND, IT IS SO ORDERED.

2016 JAN 4 PM 3:07
CLERK OF COURT
OCONEE COUNTY
SOUTH CAROLINA

ALEXANDER S. MACAULAY, Presiding Judge

Walhalla, South Carolina

January 2, 2016

[1] Contrary to FN. 3 of its PETITION FOR EXTRAORDINARY WRIT FOR CERTIORARI, dated December 29, 2015, pp. 3-4, that, "if the Court did not grant the Motion *by December 28, 2015*, Respondent/the State would be required to file a Notice of Appeal or Petition for Extraordinary Writ of Certiorari," by its Motion to Alter to Alter or Amend or Reconsider, dated December 10, 2015, in FN. 2, p. 2, it was stated that "Respondent will be required to file . . . *on December 30, 2015*." (Emphasis supplied).

2-52

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-39-00918

2016 JAN 4 PM 3 07

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

**Jerry Buck Inmon, # 5226**
**a/k/a Jerry Buck Inman**
APPLICANT(S)

**State of South Carolina**
RESPONDENT(S)

| **Submitted by: The Court** | **Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other: **See attached Order**

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

This order does not end the case.

Additional Information for the Clerk : State's Rule 59 Motion to Alter or Amend or Reconsider Denied and Dismissed.

**INFORMATION FOR THE PUBLIC INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| **Judgment in Favor of (List name(s) below)** | **Judgment Against (List name(s) below)** | **Judgment Amount To be Enrolled (List amount(s) below)** |
|---|---|---|
| | | $ |
| | | $ |
| | | $ |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

63 1/2/16

**STATE OF SOUTH CAROLINA** 2016 JAN 4 PM 3:07 **JUDGMENT IN A CIVIL CASE**

**COUNTY OF PICKENS** **CASE NO: 2012CP3900918**

IN THE COURT OF COMMON PLEAS

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

**Jerry Buck Inman** *vs.* **South Carolina State of**

***CHECK ONE:***

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** X☐ See attached order; ☐ Statement of Judgment by the Court:

Order from Judge Alexander S Macaulay

Pickens, South Carolina, this 4th Day of January 2016

*Court Reporter*

**PRESIDING JUDGE -**

1/4/2016 MB

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

US mail

✓ **Robert Michael Dudek** PO Box 11589 Columbia, SC 29211
✓ **Diana L. Holt** Diana Holt, LLC PO Box 6454 Columbia, SC 29260-6454
✓ **E Charles Grose Jr.** 404 Main Street Greenwood, SC 29646

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

emailed MB

✓ **Karen Christine Ratigan** PO Box 11549 Columbia, SC 29211

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Harold P. Welborn Jr.

Harold P Welborn, Jr. - Clerk of Court

MB

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA
In The Supreme Court

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IN ITS ORIGINAL JURISDICTION

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PICKENS COUNTY
Court of Common Pleas
The Honorable Alexander S. Macaulay, Circuit Court Judge
Case No. 2012-CP-39-918

---

APPELLATE CASE NUMBER 2015- _____

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JERRY BUCK INMAN,.....Respondent,

v.

STATE OF SOUTH CAROLINA,.....Petitioner

---

# PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI

---

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar # 5758

J. ANTHONY MABRY
Assistant Attorney General
S.C. Bar #11973
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-6305

**ATTORNEYS FOR PETITIONER**

## STATEMENT OF THE CASE

This is a capital post-conviction relief (PCR) action currently pending in the Circuit Court of Pickens County and scheduled for an evidentiary merits hearing in June of 2016. Respondent/Applicant filed his PCR application on June 21, 2012, and this Court appointed the Honorable Alexander Macaulay ("the PCR Court") to preside over this matter.[1]

This matter is before this Court by way of a Petition for Extraordinary Writ of Certiorari from the Order of the PCR Court denying Respondent's Motion to Unseal and Disclose *ex parte* funding motions, requests, and orders issued in this capital PCR action until this date and disclose to Respondent the content of all *ex parte* discussions between Applicant [or his attorneys] and the PCR Court; and to provide Respondent with notice and an opportunity to be present and heard at any future *ex parte* funding requests or hearings. (Order, attached). The basis of the State's Motion below was this Court's decision in Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996) and this Court's unpublished Order in Stanko v. State, Appellate Case No. 1015-000212 (Filed February 25, 2015). Respondent attached the Thames Opinion and the unpublished Order of this Court in Stanko v. State to its Motion before the PCR Court. (Motion, attached).

The Motion was filed September 10, 2015. A hearing on the Motion was held on October 23, 2015. Despite providing the PCR Court with this Court's Opinion in Thames and its unpublished Order in Stanko v State, the PCR Court denied the Motion to Unseal. The Order denying the Motion was issued November 16, 2015, filed November 24, 2015, and received by the State on November 30, 2015. The State filed a Rule 59 Motion to Alter or Amend *or* in the

---

1 Respondent/Applicant (Jerry Buck Inman) pled guilty to the murder, burglary, criminal sexual conduct, and kidnapping of Clemson University co-ed Tiffany Marie Souers before the Honorable Edward W. Miller. Inman was sentenced to death for Souers' murder. This Court affirmed Inman's convictions and sentences, including his death sentence, on December 28, 2011. State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011).

alternative to Reconsider on December 10, 2015. The PCR Court did not rule on Petitioner/Respondent's Motion to Alter or Amend or Reconsider. This Petition for Extraordinary Writ of Certiorari timely followed on December 29, 2015.[2]

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2 December 28, 2015 was a State holiday.

## REASONS WHY THE EXTRAORDINARY WRIT SHOULD BE GRANTED

The basis of the State's Motion below was this Court's decision in Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996) and this Court's unpublished Order in Stanko v. State, Appellate Case No. 1015-000212 (Filed February 25, 2015). As previously stated, Respondent attached the Thames Opinion and the unpublished Order of this Court in Stanko v. State to its Motion before the PCR Court.

A hearing on the State's Motion was held on October 23, 2015 before the PCR Court. At the hearing, Respondent argued in favor of its Motion to Unseal and entered as an exhibit its Motion with this Court's Opinion in Thames and this Court's Unpublished Order in the Stanko case attached. (Respondent's Ex. 1). The Applicant/Respondent argued against the Motion. Despite being provided with this Court's Opinion in Thames and this Court's Order in Stanko v. State, the PCR Court denied Respondent's Motion. (Order). In the Order, the PCR Court interpreted South Carolina law and the applicable statutes contrary to this Court's interpretation in both Thames and the Stanko appeal. (See Order).

On December 10, 2015, Petitioner/ the State filed a Rule 59 Motion to Alter or Amend *or* in the alternative to Reconsider. (Attached). With its Motion, the State provided the PCR Court with the appellate briefs from the Stanko appeal in order that the PCR Court could see the same arguments made by Respondent/Applicant to deny the Motion to Unseal were made by Stanko to this Court and rejected as unpersuasive. The PCR Court did not Rule on the Motion to Alter or Amend or in the alternative to Reconsider; and, as a result, Respondent was required to file this Petition for Extraordinary Writ of Certiorari today, December 29, 2015.[3]

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3 In its Motion to Alter or Amend *or* Reconsider, the State notified the PCR Court that it was giving the PCR Court the opportunity to correct its Order; however, if the Court did not grant the Motion

Based on the above authority, the PCR Court clearly erred. The PCR Court was required to follow this Court's interpretation of South Carolina law, not its' own, and grant Petitioner's/the State's Motion to Unseal. The denial of Petitioner's/the State's Motion has denied Petitioner a substantial right, as Petitioner is entitled to know of any *ex parte* motions, requests, meetings, orders, etc., where this is a civil action and the PCR Court is the fact finder. Petitioner is also entitled to know of any *ex parte* funding requests, motions, orders, etc. so that it may adequately prepare for the PCR merits hearing scheduled in June of 2016. Any appeal of this issue after the merits hearing would moot this issue. As a result, Petitioner asks this Court to grant certiorari and issue an Order directing the PCR Court to grant the Petitioner/the State's Motion to Unseal. *See* McGee v. Bruce Hosp. Sys, 312 S.C. 58, 439 S.E.2d 257 (1993)(wherein this court granted a writ of certiorari to consider whether certain matters were immune from discovery).

**ARGUMENT**

The PCR Court clearly erred. This is a post-conviction relief (PCR) action. In Thames v. State, *supra*, this Court stated as follows:

> FN1. When the defendant requests expert services for a criminal trial, the request is determined by the judge in ex parte proceedings. S.C. Code Ann. Section 16-3-26(C) and Section 17-3-50(B)(Supp. 1995). Ex parte Lexington County, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.
>
> Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While Section 17-3-50(A) mentions that the same hourly rate for appointed counsel shall apply to post-conviction proceedings, the use of the word, "defendant" throughout Section 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State

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by December 28, 2015, Petitioner/the State would be required to file a Notice of Appeal *or* Petition for Extraordinary Writ of Certiorari. *See* SCRCP, Rules 54, 58, 59, 72, 73 & 74.

was allowed to fully participate.

Thames v. State, 325 S.C. 9, 11, 478 S.E.2d 682, 682, n. 1 (1996).[4]

Subsequently, and even more recently, this Court addressed a similar argument in a capital post-conviction relief (PCR) case. Stanko v. State, Appellate Case No. 1015-000212 (**Filed February 25, 2015**)(*Unpublished Order*). There, this Court noted that "the issue of *ex parte* proceedings in PCR matters, which is at the heart of the petition currently before this Court, was addressed in Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1986) and such proceedings were found to be improper." Id., at n.1. This Court denied the Applicant's petition and the State's request before it and remanded the matter to the Circuit Court where the State had *a motion to unseal ex parte funding request and orders* pending stating: "The State currently has such a motion pending

---

4 Ethical rules allow ex parte communication in limited discrete circumstances. Rule 501, SCACR, Canon 3 (B) (7) (a). Code of Judicial Conduct, provides:

> Where circumstances require, ex parte communication for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(emphasis added). *See also* Rule 407, Rule 3.5 (a) and (b), Rules of Professional Conduct (prohibiting attorneys from ex parte discussions with a judge "unless authorized to do so by law or Court order"). The Court may, pursuant to these provisions, allow ex parte communication. The party communicating in the absence of an opposing party has heightened ethical duties to provide the court with relevant information. Rule 407, SCACR, Rule 3.3 (d). Rules of Professional Conduct ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.). Such communication, however, is not favored as it is contrary to our adversarial system. Id., comments ("... in any ex parte proceeding ... there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.").

before the circuit court, where it can be ably addressed." Id., at n. 1.[5] This entire Court then noted subsequently, in the above quoted footnote that such *ex parte* proceedings in a post-conviction relief (PCR) proceeding were improper citing Thames v. State, *supra*. Stanko v. State, Appellate Case No. 1015-000212 (Filed February 25, 2015) n. 2. As a result, this entire Court has made clear that it makes no difference whether this is a capital PCR or non-capital PCR action; *ex parte* funding requests or proceedings are improper in a PCR action.

As this Court has previously held, there is no statutory or a constitutional right to be heard on funding requests *ex parte*[6] and *in camera*[7] in civil post-conviction relief settings. Petitioner acknowledges, however, the right of the Court to determine that some matters may be held *ex parte* under certain discrete circumstances as authorized under the Code of Judicial Conduct.[8] Such circumstances, however, are exceptions to the rule and blanket exceptions are not contemplated. In support of this position, Petitioner would respectfully show the Court:

1. There is no statutory right to *ex parte* proceedings regarding appointment and funding of expert witnesses or investigative witnesses and services in capital post-conviction relief actions. PCR applicants typically argue there is a statutory right by virtue of Section 17-27-160 for the non-disclosure of investigative and expert witness requests made to the fact-finder PCR judge,

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5 On remand of the Stanko PCR case, in light of this Court's Order, Judge Culbertson issued an order unsealing *ex parte* funding motions or requests and orders.

6 "A 'judicial proceeding ... taken ... for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.'" Ex parte Lexington County, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 297(5th ed. 1983)).

7 "An *in camera* proceeding ... is a 'trial or hearing held in a place not open to the public...'." Ex parte Lexington County, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 684 (5th ed. 1983)).

8 However, it also would suggest that discussions on or about the merits of an action or issues should not be done *ex parte* with the fact-finder.

which they argue incorporates all the funding provisions of § 16-3-26, including the provisions for funding investigative, expert and other services. They are incorrect. There is no such express provision in the language of the statute. *Accord* Thames v. State, 325 S.C. 9, 11, 478 S.E.2d 682 (1996). *Thames* addressed that such matters in PCR actions are not subject to being done *ex parte*.

The Respondent/Applicant relies upon and references to Section 16-3-26 in the second paragraph in Section (B) of S.C. Code § 17-27-160 to support non-disclosure of any funding requests or orders to Petitioner/Respondent. However, that provision only addresses the appointment, qualification, and compensation of PCR counsel and the compensation of PCR appellate counsel. The first reference is tied specifically to counsel's compensation: "Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel...." S.C. Code § 17-27-160 (B). If that were not so, the provisions of S.C. § 17-3-50 (A) would apply resulting in reduced rates and caps as set therein.[9] This speaks of counsel's compensation - a matter not at issue in these proceedings. Contrary to what Respondent/Applicant implies, there is no specific provision or reference to "investigative, expert, or other services" or the corresponding provision for same in the criminal trial as reflected in S.C. Code § 16-3-26(C)(1).[10] The only other reference to Section 16-3-26 is Section 16-3-26 (I), to provide, *again as to the appointment of counsel*, that the prohibition of

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9 It is of no little note that payment of counsel fees are separate and apart from the provision of "investigative, expert, or other service," both in Section 16-3-26 and Section 17-3-50. This is also true of the federal funding provisions. See 18 U.S.C.A. § 3599. However, PCR applicants typically seek to combine the two in order to find statutory support for their position. This is, of course, contrary to the standard references of the funding as two distinct concerns.

10 Section 16-3-26(C)(1) provides for "ex parte proceedings" to determine "that investigative, expert, or other services are reasonably necessary for the representation of the defendant" at the criminal capital trial.

appointing non-licensed, non-resident attorneys at trial does not apply to the civil proceedings. *See* S.C. Code § 17-27-160 (B). *Ergo*, when read naturally, the reference to Section 16-3-26 in Section 17-27-160 involves the narrow question of counsel's compensation.[11]

To reach an opposite conclusion, one must accept that the whole of Section 16-3-26 is incorporated into the PCR Act. This would include incorporation of the reference to the notice of intention to seek death and other specific trial related provisions – clearly not a requirement in post-conviction relief proceedings. Even the reference to the section applicant seeks to incorporate, Section 16-3-26 (C)(1), only authorizes "investigative, expert, or other services are reasonably necessary for the representation *of the defendant whether in connection with issues relating to guilt or sentence*...." A "defendant," refers to a "criminal defendant," defined as "one who is accused in a criminal proceeding." Black's Law Dictionary (9th ed. 2009). Respondent/Applicant is no longer a defendant. *See also* Black's Law Dictionary (9th ed. 2009) (defining defendant generally: "A person sued in a civil proceeding or accused in a criminal proceeding."). In fact, the language of Section 17-27-160 reflects that shift in position in providing that a "defendant" must file an application for relief, but after filing, refers to the individual bringing suit as "the applicant." S.C. Code § 17-27-160. *See also* S.C. Code §§ 17-27-40 through 17-27-80 (referencing applicant in non-capital post-conviction relief provisions as of the filing of the application). Further, counsel representing a PCR applicant is not directly raising

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11 This is also consistent with the express goal of the act: "...to add Section 17-27-160 so as to provide for the manner in which defendants sentenced to death must file applications for post-conviction relief, to provide for the assignment of judges to handle these applications, *to further provide for the appointment and compensation of counsel in these proceedings,* and to provide for other procedural matters including the certain time limitations in these capital post-conviction relief proceedings." 1996 South Carolina Laws Act 448 (H.B. 4469).

issues related to guilt or sentence.[12] Rather, the civil action challenging a presumptively valid state judgment is separate and distinct from the criminal proceeding. *See* Rule 71.1 (c), SCRCP ("An application filed under the [Post-Conviction Procedure] Act is an independent civil action which should be separately filed and indexed by the clerk of court."); S.C. Code § 17-27-20 (a)(6) ("... this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.").[13]

In interpreting the statute, "[t]he Court must give clear and unambiguous statutory terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." State v. Cribb, 310 S.C. 518, 521, 426 S.E.2d 306, 308 (1992). *See also* State v. Phillips, 400 S.C. 460, 734 S.E.2d 650 (2012) (same); State v. Sweat, 386 S.C. 339, 688 S.E.2d 569 (2010) (same). Thus, the trial provisions referring expressly to a "defendant" cannot be applied in a civil post-conviction relief action. *See also* Thames v. State, 325 S.C. 9, 11, 478 S.E.2d 682, 682 n. 1 (1996) (noting "Section 16-3-26 (C) applies to the capital trial and not to post-conviction relief proceedings" noting that reference to "defendant" is reserved for a

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12 PCR applicants' fallback position appears to be that they have been convicted, but these proceedings are merely a continuation of sentencing. To the contrary, Inman is currently under a presumptively valid judgment. Guilt has been adjudicated and sentenced imposed. This action is filed to challenge the continued custody under this presumptively valid judgment. *See* S.C. Code § 17-27-20 (relief may be sought where a "person who has been convicted of, or sentenced for, a crime" seeks to have his conviction or sentence vacated on grounds other than an allegation of insufficient evidence).

13 Though this Court has referred to such as action as "hybrid," it is so only because the criminal conviction and sentence are at issue. The Court has said: "... while a PCR action is hybrid in nature, it generally remains subject to rules and statutes that apply in civil proceedings." Sutton v. State, 361 S.C. 644, 606 S.E.2d 779 (2004) (*overruled on other grounds by* Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005) (holding "counsel is required to advise an applicant of the right to appellate review of the denial of PCR")).

"defendant" in criminal proceedings, not an applicant for post-conviction relief). Consequently, the whole of Section 16-3-26 cannot apply.

In the absence of the incorporated provisions, the more general statutes are controlling for reimbursement for expenses. *See* S.C. Code § 17-3-50 ("Defense of Indigents, General Provisions, Determination of fees for appointed counsel and public defenders; maximum amounts; authorization to exceed maximum; payment for certain services."). If that is so, then Thames v. State is applicable and controlling. In Thames, this Court instructed the provision of *ex parte* proceedings in Section 17-3-50 (B) is reserved for funding requests made in preparation for the criminal trial. Thames, 325 S.C. at 11, 478 S.E.2d at 682 n. 1. 14 Consequently, Respondent/Applicant has failed to show a statutory right to *ex parte* proceedings.[15]

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14 In Thames, the Court stated:

> When a defendant requests expert services for a criminal trial, the request is determined by the judge in ex parte proceedings. S.C.Code Ann. § 16-3-26(C) and § 17-3-50(B) (Supp.1995); Ex parte Lexington County, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.
>
> Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While § 17-3-50(A) mentions that the same hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word "defendant" throughout § 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

Thames, 325 S.C. at 11, 478 S.E.2d at 682 n. 1

15 Petitioner has interpreted the previous motion requests for *ex parte* proceedings to refer specifically to "investigative" or other experts. The provisions for payment of counsel's fees, as discussed above, are treated separately from other expenses of the litigation. In fact, there is no provision at all for *ex parte* hearings on the authorization of counsel's fees. *See* Section 16-3-26; Section 17-3-50 (A) and (C). *See also* July 6, 2005 Order of the Chief Justice, Re: Ordering Additional Attorney's Fees for Appointed Counsel ("Because § 17-3-50 (C) does not provide for

2. There is no constitutional right to *ex parte* proceedings in capital post-conviction relief proceedings. As a first point, there is no constitutional right to post-conviction relief proceedings. *See, e.g.,* United States v. MacCollom, 426 U.S. 317, 323 (1976) ("The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, *see* Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction."). Again, Respondent/Applicant is the party bringing the suit in this instance.[16] He bears the burden of proof. *See, e.g.* Bennett v. State, 371 S.C. 198, 638 S.E.2d 673 (2006) (*citing* Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007) (*citing* Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Though PCR applicants argue they are still entitled to the array of constitutional and statutory rights of a criminal defendant, they simply are not entitled to those same rights in a civil action as the action itself is definitively different in scope and measure. *See* Murray v. Giarratano, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) ("Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). *Cf.* Fisher v. Baker, 203 U.S. 174, 181 (1906) ("The proceeding

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*ex parte* proceedings to determine attorney's fees, hearings on requests for additional fees should be held in open court.").

16 It is Respondent/Applicant who is obligated to make the allegations to allow Petitioner/the State the opportunity to prepare a defense. Respondent/Applicant would surely object if the State, in the criminal prosecution, told him only that additional allegations would be forthcoming in addition to the allegations of the indictment. Petitioner has prepared and filed a return to the PCR application.

is in habeas corpus, and is a civil, and not a criminal, proceeding."); Ex parte Tom Tong, 108 U.S. 556, 559-560 (1883)("The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process."). Simply, civil proceedings do not give rise to the constitutional rights afforded a criminal defendant. *See* United States v. Baker, 45 F.3d 837, 843 (4th Cir. 1995) ("the constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a respondent in a commitment hearing" citing the civil nature of the proceedings). Even where a criminal trial right survives, the right is generally limited by the civil nature of the proceedings.

For example, the Fifth Amendment right against self-incrimination survives and can be invoked in any proceeding. However, an individual's failure to answer questions allows for an adverse inference in civil cases. Baxter v. Palmigiano, 425 U.S. 308, 318-319 (1976) (noting "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)."). *See also* In re Care and Treatment of Canupp, 380 S.C. 611, 671 S.E.2d 614 (Ct.App. 2008) ("...only a criminal defendant has the right to decline to take the witness stand altogether."). Consequently, the nature of the proceeding controls.

Though PCR applicants have relied upon Ake v. Oklahoma, 470 U.S. 68 (1985), the case resolved only that where "a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant

access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake does not speak to collateral proceedings in the least. *See, e.g.,* Rosado v. Allen, 482 F.Supp.2d 94, 113 (D.Mass. 2007) ("Ake v. Oklahoma ... concerned a defendant's right to have access to a psychiatrist assistant at *trial*, not on post-conviction relief.") (emphasis in original); (Sanborn v. Commonwealth, 975 S.W.2d 905, 909-910 (Ky. 1998) ("Ake v. Oklahoma, ... is not a post-conviction case.") (*overruled on other grounds by* Leonard v. Com., 279 S.W.3d 151 (Ky. 2009)); McGahee v. State, 885 So.2d 191, 229 (Ala.Crim.App. 2003) (*Ake* not applicable in civil proceeding challenging conviction). Thus, Ake is not dispositive. [17]

Whether funding for any particular expert is necessary or authorized, however, is not at issue in requests for *ex parte* and *in camera* proceedings. Rather, at issue is how the requests will be heard. Petitioner/the State submits for all the foregoing reasons, Respondent/Applicant had no right to be heard *ex parte*. This position is consistent with funding provisions for federal actions, which, like our state rules, disfavor *ex parte* proceedings.[18]

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17 It should not be lost that the purpose of Ake was to determine when a state must provide access to funds for "psychiatric assistance" for an indigent criminal defendant at trial. Ake, 470 U.S. at 77. Ake does not resolve access to other experts in other circumstances. Further, the United States Supreme Court has summarily rejected arguments of "constitutional infirmity in the *trial court's* refusal to appoint various experts and investigators" where "the requests were accompanied by no showing as to their reasonableness." Caldwell v. Mississippi, 472 U.S. 320. 323 n. 1 (1985) (emphasis added). Thus, there appears to be no basis in Ake to argue for unlimited resources for various "experts" at all stages of the proceedings, direct and collateral.

18 "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). *No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.*" 18

3. Similarly, there is no right to closed proceedings in regard to funding requests in capital post-conviction relief proceedings. Again, PCR applicants rely on provisions for the criminal trial, so, again, the civil nature of the proceeding undercuts reliance on his reliance upon precedent interpreting same.[19]

Respondent/Applicant here is in no danger of having to "telegraph to the prosecution the defendants' defense strategy," as he is not the defendant and has no defense strategy. In this civil action, he is *required* to make sufficient allegations for Petitioner/the State to investigate and present a defense. *See* S.C. Code § 17-27-40.

There is no right to keep known potential issues from Petitioner/the State and essentially shorten, (or in some cases eradicate), the opportunity for Petitioner/the State to investigate and respond fully. *See generally* S.C. Code § 17-27-130 ("Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or

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U.S.C.A. § 3599 (f) (*emphasis added*). *See also* United States v. Caro, 442 F.Supp.2d 296, 297 n.1 (W.D.Va. 2006) (noting "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed.").

19 For example, *see* Ex parte Lexington County, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994), a case which refers to two capital defendants who had not yet stood trial, where the Court found Section 16-3-26(C) provides a "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*." 314 S.C. at 227, 442 S.E.2d at 593, which is clearly the procedure in the criminal trial to which the statute refers. However, as noted above, that section has not been expressly incorporated into the civil proceedings provided for capital PCR actions. But even that statutory funding provision does not allow the trial courts to "close the proceeding," rather, "the trial judge must treat this case like any other which presents the issue of whether it is appropriate to close the proceedings." Id. To close the proceedings, the court must find on the record that "there is a substantial probability of prejudice which would result from the publicity, and ... there are no reasonable alternatives to closure which would protect the defendant's right to a fair trial." *Id.* This Court in Ex parte Lexington County based its reasoning that closure for *ex parte* funding requests was warranted *in a criminal trial* on finding a defendant would not be required to disclose his *theory of the defense* but for the fact that he was indigent and had to request funds. 314 S.C. at 228, 442 S.E.2d at 594. That concern is not present here.

collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation.").[20] He is also *required* to disclose in discovery those documents and things that would go to *either* a claim or defense. *See* Rule 26 (b)(1), SCRCP ("Parties may obtain discovery regarding any matter, not privileged, which is relevant *to the subject matter involved* in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...") (emphasis added). He is further required to disclose the names of witnesses and experts who have knowledge of claim or defense. Rule 26 (b)(4)(B).[21] In short, Respondent/Applicant is required to go by the SCRCP. These full disclosure requirements stand in stark contrast to the defense cloak of secrecy for the criminal trial. The same concerns in Ex parte Lexington County are not present here.

4. Respondent recognizes, ethical rules allow *ex parte* communication in limited discrete circumstances. Rule 501, SCACR, Canon 3 (B) (7) (a), Code of Judicial Conduct, provides:

> Where circumstances require, ex parte communication for scheduling, administrative purposes or emergencies **that do not deal with substantive matters or issues on the merits** are authorized; provided:

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20 There is every indication that investigation authorized by discovery available to every other civil litigant would bear not only on funding, but also on preparation.

21 No opinion from any consulting expert would be obtained through a mere funding request (in fact, the request presumes one has not yet been hired or an opinion rendered). However, such an opinion must be shared, not due to funding requests but under ordinary rules of discovery, if the expert is not merely "consulted informally, or consulted and not retained and specially employed." Rule 26 (b)(4)(B), SCRCP. *See also* Rule 33 (b)(6), SCRCP (standard interrogatories requiring disclosure of "names and addresses of any expert witnesses whom the party proposes to use as a witness").

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

*(emphasis added). See also* Rule 407, Rule 3.5 (a) and (b), Rules of Professional Conduct (prohibiting attorneys from ex parte discussions with a judge "unless authorized to do so by law or court order"). The Court may, pursuant to these provisions, allow *ex parte* communication.[22] The party communicating in the absence of an opposing party has heightened ethical duties to provide the court with relevant information. Rule 407, SCACR, Rule 3.3 (d), Rules of Professional Conduct ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.). Such communication, however, is not favored as it is contrary to our adversarial

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22 Ex *parte* funding requests are neither provided for nor mandated. The better course, and the only course consistent with the rules and statutes in this jurisdiction, would be to disallow a blanket exception, but reserve the possibility to closed review of sensitive arguments and/or supporting documents. The PCR court could allow (with notice to opposing counsel) narrowly focused *ex parte* communication and review of such documents, much like the review of privileged materials. *Accord* State v. Jeff, 761 So.2d 574 (La.App. 1 Cir. 1999) ("The trial court should first determine, **in camera**, either on the face of the allegations of the motion or upon taking evidence at an **ex parte** hearing, whether the defendant would be prejudiced by a disclosure of his defense at a contradictory hearing. If so, then the hearing on expert funding should continue **ex parte**. If not, then the hearing should be held contradictorily with the District Attorney....") (*quoting* State v. Touchet, 642 So.2d 1213 (La. 1994)) (emphasis in original). Even where originally heard *ex parte*, such matters may be made public at the court's direction in compliment to the general rule that *ex parte* proceedings are disfavored and unnecessary. *See* United States v. Caro, 442 F.Supp.2d 296, 297 (W.D.Va. 2006) (on review of denial of funding request in a capital case: "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed."). *See also* Sallie v. Humphrey, 2011 WL 837168, *2 (M.D.Ga. 2011) ("*Ex parte* requests for payment of fees and expenses under § 3599(f) may not be considered unless Petitioner makes a proper showing of the need for confidentiality."); Barnett v. Roper, 2010 WL 1268030, *1 (E.D.Mo. 2010) (noting change from presumption of *ex parte* proceeding to showing need for *ex parte* proceeding in current federal statute).

system. Id., comments ("... in any ex parte proceeding ... there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.").

Notably, concerning Respondent's/Applicant's *ex parte* funding requests, it is unclear if a full recitation of background was provided to the PCR judge.[23] Respondent/Applicant's case is not a new trial. Respondent/Applicant has previously been represented by counsel, found guilty, and sentenced to death. In short, the case has a history that may not be ignored. Asking the court for the ability to start completely fresh or simply "expert shop" most likely is not necessary in a capital case or a non-capital case. *See* Thames v. State, 325 S.C. 9, 11, 478 S.E.2d 682, 682-683 (1996) (finding no abuse of discretion in denying funding request for another expert: "Petitioner had been examined by two experts prior to trial and the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to

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23 Respondent/Applicant's assumption, if made, that Petitioner/the State would attempt to deny him funding, confuses the purposes of the funding hearing and raises the significant danger that not all relevant facts are being provided to the PCR judge tasked with evaluating the reasonableness of the request. The funding request is simply to show a reasonable necessity. Respondent/Applicant need not disclose findings and opinions unless he intends to call the expert at the evidentiary hearing – a fact readily ascertainable by simply following the SCRCP. *See* Rule 26, SCRCP. Further, in this instance, the arguments and facts he wishes to present outside the presence of the opposing party would be presented *to the fact finder in this action.* Respondent/Applicant's attempt to put this squarely in funding overlooks the ponderous consideration that the fact finder may be approached with arguments and theories indicating incomplete or incorrect facts in support of a funding request.

warrant the authorization of funds to pay an expert.").[24] For example, a request for a mental health expert in this case should be examined in light of investigation and testing already made. Respondent/Applicant presented at sentencing well-credentialed experts, who examined Applicant contemporaneous to the proceedings and reviewed multiple records. *See* Inman, *supra.* It would be difficult to fault trial counsel for relying on such experts. *See* Wilson v. Greene, 155 F.3d 396, 403 (4th Cir. 1998) ("...counsel had received Dr. Killian's report concluding that Wilson was not mentally ill at the time of the offense. To be reasonably effective, counsel was not required to second-guess the contents of this report."). Counsel had no duty to contact other experts when he thought those consulted were well qualified and counsel has no duty to ensure the trustworthiness of an expert's conclusions. Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998). See Philmore v. McNeil, 575 F.3d 1251, 1263 (11th Cir 2009)(counsel has no duty to present all psychiatric evidence, and not calling one was reasonable where the opinion conflicted with Reasonable counsel need not "shop" for contrary expert opinions. Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995); Forsyth v. Ault, 537 F.3d 887, 892 (8th Cir. 2008). Moreover, counsel has no duty to pursue neurological experts when experts consulted indicated no additional testing was required, Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998), or found no evidence of brain damage. Wright v. Angelone, 151 F.3d 151, 163 (4th Cir. 1998). At any rate, these are the

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24 Even capital defendants at trial are not entitled to unlimited funding. *See, for example,* Bailey v. Com., 259 Va. 723, 737, 529 S.E.2d 570, 578 (2000) ("We have consistently rejected the contention that defendants, even in capital murder cases, have an indiscriminate entitlement to the assistance of an investigator.") *See also* State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) (*citing* § 16-3-26 (C)(1) (2003); State v. Matthews, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("The matter of authorized funds to capital defendants lies within the sound discretion of the trial" and rest upon a finding "that investigative, expert, or other services are reasonably necessary").

types of facts that the PCR court should have before deciding on funding expert witness requests in the PCR setting.

Furthermore, Respondent/Applicant has waived any confidentiality by the filing of his application before the PCR Court.

## CONCLUSION

WHEREFORE, Petitioner/the State makes this Petition for Extraordinary Writ of Certiorari, and Petitioner/the State submits, for all the foregoing reasons, this Court should grant certiorari, reverse the Order of the lower court, and issue an Order granting Petitioner/the State's Motion to Unseal.

Respectfully submitted,

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December 29, 2015
Columbia, South Carolina.

ATTORNEYS FOR PETITIONER

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# ATTACHMENT 1

2015 NOV 24 PM 12 44

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

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|---|---|
| **STATE OF SOUTH CAROLINA** ) | |
| ) | **IN THE COURT OF COMMON PLEAS** |
| **COUNTY OF PICKENS** ) | |
| ) | |
| **Jerry Buck Inmon,** ) | **Case No. 2012-CP-39-00918** |
| Applicant, ) | **(Capital PCR Action)** |
| ) | |
| **vs.** ) | |
| ) | **ORDER DENYING MOTION** |
| ) | **TO UNSEAL AND DISCLOSE** |
| **State of South Carolina,** ) | |
| Respondent. ) | |

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

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

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

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

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

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

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

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

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

**Procedural History**

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

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

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

Mr. Inmon subsequently and timely filed this action for post-conviction relief. The Court appointed Ms. Holt and Mr. Grose to represent Mr. Inmon on November 19, 2012.

**Standard of Review**

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

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

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

**FINDINGS OF FACT**

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

> "SECTION 17-27-160 SO AS TO PROVIDE FOR THE MANNER IN WHICH DEFENDANTS SENTENCED TO DEATH MUST FILE APPLICATIONS FOR POST-CONVICTION RELIEF; ...TO FURTHER PROVIDE FOR THE APPOINTMENT AND COMPENSATION OF COUNSEL IN THESE PROCEEDINGS ... ."
>
> Title of Act No. 448, 1996 Acts 2709, effective date, June 18, 1996.

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

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

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

**Conclusions of Law**

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

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

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

conviction relief proceedings."

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

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

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

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

expressly excluded.[2] Section 17-27-160(B), therefore, requires this Court to look to § 16-3-26 for the procedure to follow in order to obtain investigative, expert or other services. Section 16-3-26(C)(1) provides:

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

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

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

---

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

motions, requests and orders already issued, disclosing to the State the content of all *ex parte* communications between the Court and Mr. Inmon's counsel, and providing the Office of the Attorney General with notice and opportunity to be present and heard at any future *ex parte* funding requests or hearings must be **DENIED.** Any further hearings on Applicant's *ex parte* expense requests should be conducted consistent with the mandates of the death penalty statutes as amended and incorporated by the "South Carolina Effective Death Penalty Act of 1996." [3]

AND, IT IS SO ORDERED.

Alexander S. Macaulay, Presiding Judge [4]

November 16, 2015
Walhalla, South Carolina

2015 NOV 24 PM 12 44
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

---

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

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

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

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

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

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

2015 NOV 24 PM 12 44

CASE NO. 2012-CP-39-00918

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

**Jerry Buck Inmon, # 5226**
APPLICANT(S)

**State of South Carolina**
RESPONDENT(S)

| **Submitted by: The Court** | **Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

This order does not end the case.

Additional Information for the Clerk : State's Motion to Unseal and Disclosed *Ex parte* Funding Orders DENIED.

**INFORMATION FOR THE PUBLIC INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| | | $ |
| | | $ |
| | | $ |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

**Alexander S. Macaulay, Circuit Court Judge** | **63** Judge Code | **11/16/2015** Date

**For Clerk of Court Office Use Only**

This judgment was entered on the ____ day of ____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 day of Nov, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

E. Charles Grose, Jr. Esq. ✓ US Mail ✓ J. Anthony Mabry, AAG

Diana L. Holt, Esq. ✓

Robert M. Duder ✓ MB

ATTORNEY(S) FOR THE APPLICANT(S)

ATTORNEY(S) FOR THE RESPONDENT(S)

CLERK OF COURT

MB

**Court Reporter: Tollison**

# ATTACHMENT 2

| | | |
|---|---|---|
| **STATE OF SOUTH CAROLINA** | ) | |
| | ) | **IN THE COURT OF COMMON PLEAS** |
| **COUNTY OF PICKENS** | ) | |
| **Jerry Buck Inman, #5226,** | ) | |
| | ) | **C/A No.: 2012-CP-39-918** |
| **Applicant,** | ) | **(Capital PCR Action)** |
| **v.** | ) | |
| | ) | **MOTION TO UNSEAL AND DISCLOSE** |
| **State of South Carolina,** | ) | |
| | ) | |
| **Respondent.** | ) | |
| | ) | |

Respondent, by and through the undersigned attorneys, hereby moves this Honorable Court to issue an Order unsealing *ex parte* funding motions, requests, and orders issued until this date; ordering disclosure to Respondent the content of all *ex parte* discussions between Applicant [or his attorneys] and the Court; and, to provide Respondent with notice and an opportunity to be present and heard at any future *ex parte* funding requests or hearings. The basis of this Motion is the South Carolina Supreme Court's decision in Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996).

This is a PCR action. In Thames v. State, *supra*, the South Carolina Supreme Court stated as follows:

> FN1. When a defendant requests expert services for a criminal trial, the request is determined by the judge in ex parte proceedings. S.C. Code Ann. Section 16-3-26(C) and Section 17-3-50(B)(Supp. 1995). Ex parte Lexington County, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.
>
> Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While Section 17-3-50(A) mentions that the same hourly rate for appointed counsel shall apply to post-conviction proceedings, the use of the word, "defendant" throughout Section 17-3-50(B)

> indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

Thames v. State, 325 S.C. 9, 11, 478 S.E.2d 682, 682 n. 1 (1996). (Attachment 1). Subsequently, the South Carolina Supreme Court addressed a similar argument in a capital PCR case, State v. Stanko, Appellate Case No. 1015-000212 (Filed February 25, 2015) (Attachment 2). There, the Supreme Court noted in an unpublished Order, that "the issue of *ex parte* proceedings in PCR matters, which is at the heart of the petition currently before this Court, was addressed in Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1986) and **such proceedings were found to be improper.**" State v. Stanko, Appellate Case No. 1015-000212 (Filed February 25, 2015) (emphasis added) (attached). The Supreme Court denied the petition and the State's request before it [the Supreme Court] and remanded the matter to the Circuit Court where the State had *a motion to unseal ex parte funding requests and orders* pending before the Circuit Court stating: "The State currently has such a motion pending before the circuit court, where it can be ably addressed." State v. Stanko, Appellate Case No. 1015-000212 (Filed February 25, 2015) (emphasis added), n. 1 (attached). The entire Court then noted subsequently, in the above quoted footnote that such *ex parte* proceedings in a PCR proceeding were improper citing Thames v. State, *supra*. State v. Stanko, Appellate Case No. 1015-000212 (Filed February 25, 2015) n. 2 (attached). As a result, it makes no difference whether this is a capital PCR or non-capital PCR action; *ex parte* funding requests are improper in a PCR action.

As a result, Respondent is entitled to an Order unsealing all *ex parte* funding requests, motions, or orders; ordering disclosure of the content of all prior communications between Applicant [or his PCR attorneys] and the Court; and directing Applicant and his attorneys to

provide Respondent with notice and an opportunity to be heard at any such future hearings.

RESPONDENT SO MOVES.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: _____
ANTHONY MABRY
ATTORNEYS FOR RESPONDENTS

September 10, 2015

# ATTACHMENT 1

an election contest, irregularities that do not affect the result of the election will not be used to overturn it. *Greene v. S.C. Election Comm'n*, 314 S.C. 449, 445 S.E.2d 451 (1994). There is no evidence that had the ballot format been as Burgess wished, the result of the election would have been different. He admitted at the hearing before the Commission that he was unaware of any voter who would have voted differently. Accordingly, Burgess has failed to show reversible error.

Burgess's remaining arguments are without merit and are affirmed under Rule 220(b), SCACR.

**AFFIRMED.**

FINNEY, C.J., and TOAL, WALLER and BURNETT, JJ., concur.

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478 S.E.2d 682

**Ruth Ann THAMES, Petitioner,**

v.

**STATE of South Carolina, Respondent.**

**No. 24535.**

Supreme Court of South Carolina.

Submitted May 15, 1996.

Decided Dec. 2, 1996.

Postconviction relief petitioner filed motion seeking authorization for payment of psychiatrist fees to be used in support of her claim of mental incompetency at time of her guilty plea. The Circuit Court, Oconee County, Gerald C. Smoak, J., denied motion. On writ of certiorari, the Supreme Court held that postconviction relief judge acted within his discretion in denying petitioner's motion, given that petitioner had already been examined by two experts at time of her guilty plea.

Affirmed.

1. Costs ⇐302.4

Trial court acted within its discretion in denying postconviction relief petitioner's motion for payment of psychiatrist fees, which were to be used in support of petitioner's claim that she was mentally incompetent at time of her guilty plea, given that petitioner had already been examined by two experts at time of her plea; mere possibility that petitioner could find expert somewhere to support her claim of incompetency was insufficient to warrant authorization of funds to pay expert.

2. Costs ⇐302.2(2)

Postconviction relief judge properly conducted hearing on petitioner's motion for payment of expert witness fees at which counsel for state was allowed to fully participate, rather than holding ex parte hearing. Code 1976, §§ 16–3–26(C), 17–3–50(B).

3. Costs ⇐302.2(2)

When defendant requests expert services for criminal trial, request is determined by judge in ex parte proceedings. Code 1976, §§ 16–3–26(C), 17–3–50(B).

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Assistant Appellate Defender Robert M. Dudek, of S.C. Office of Appellate Defense, Columbia, for petitioner.

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Teresa Nesbitt Cosby, and Assistant Attorney General Allen Bullard, Columbia, for respondent.

PER CURIAM:

This matter is pending before the Court on a petition for a writ of certiorari seeking review of an order denying petitioner's application for post-conviction relief. We deny the petition as to Question 2, grant the petition as to Question 1, dispense with further briefing, and affirm the order of the post-conviction relief judge.

[1] Petitioner filed a motion seeking authorization for the payment of expert witness fees in connection with her post-



conviction relief action. Sh
relief judge erred in den

[2, 3] Petitioner had bee
prior to her guilty plea, on
counsel. Both had opined tl
time the crime was committe
the post-conviction relief he
that petitioner sought to be
to support her claim of ment
guilty plea. Petitioner con
who examined her prior to
time with her to adequately
post-conviction relief judge
been examined by two expe
there was no need to have a

In our opinion, the post-co
his discretion in denying
*Matthews*, 291 S.C. 339, 353
been examined by two exp
possibility that petitioner c
support her claim of incom
insufficient to warrant the
expert. *See Primeaux v. L*
(in habeas proceeding, no
who would testify that pre
inadequate).

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1. When a defendant requests
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*County*, 314 S.C. 220, 442 S.E
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Section 16–3–26(C), which is
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counsel shall apply to post-con
"defendant" throughout § 17–
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cordingly, the post-conviction r
ed a hearing on the motion at
to fully participate.

conviction relief action. She asserts that the post-conviction relief judge erred in denying her motion. We disagree.

[2, 3] Petitioner had been examined by two psychiatrists prior to her guilty plea, one of whom was retained by trial counsel. Both had opined that she was competent both at the time the crime was committed and at the time of her plea. At the post-conviction relief hearing, counsel for petitioner stated that petitioner sought to be examined by a third psychiatrist to support her claim of mental incompetency at the time of her guilty plea. Petitioner contended that the two psychiatrists who examined her prior to her plea had not spent sufficient time with her to adequately evaluate her mental state. The post-conviction relief judge ruled that since petitioner had been examined by two experts at the time of her guilty plea there was no need to have a third examination.[1]

In our opinion, the post-conviction relief judge did not abuse his discretion in denying petitioner's motion. *Cf. State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986). Petitioner had been examined by two experts prior to trial and the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to warrant the authorization of funds to pay an expert. *See Primeaux v. Leapley*, 502 N.W.2d 265 (S.D.1993) (in habeas proceeding, no error in failing to appoint expert who would testify that pretrial psychiatric examination was inadequate).

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1. When a defendant requests expert services for a criminal trial, the request is determined by the judge in *ex parte* proceedings. S.C.Code Ann. § 16–3–26(C) and § 17–3–50(B) (Supp.1995); *Ex parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.

Section 16–3–26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While § 17–3–50(A) mentions that the same hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word "defendant" throughout § 17–3–50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

Accordingly, the order of the post-conviction relief judge is affirmed.

AFFIRMED.

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479 S.E.2d 50

**The STATE, Respondent,**

v.

**Brad Christopher FOUST, Appellant.**

No. 24534.

Supreme Court of South Carolina.

Heard Oct. 3, 1996.

Decided Dec. 2, 1996.

Defendant was convicted of assault and battery with intent to kill and other offenses following trial in the Circuit Court, Florence County, Ralph King Anderson, Jr., J., and he appealed. The Supreme Court, Waller, J., overruling prior cases, held that conviction for assault and battery with intent to kill does not require showing of specific intent to kill, and is it sufficient if there is shown some general intent such as that heretofore applied in cases of murder.

Affirmed.

**1. Homicide ⇐87, 145**

Specific intent to kill need not be shown to convict for assault and battery with intent to kill; it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder, which may be shown by acts and conduct from which jury may naturally and reasonably infer intent; overruling *State v. Jones*, 133 S.C. 167, 130 S.E. 747; *State v. Pilgrim*, 320 S.C. 409, 465 S.E.2d 108; *State v. Scott*, 269 S.C. 438, 237 S.E.2d 886; *State v. Hilton*, 284 S.C. 245, 325 S.E.2d 575; *State v. Self*, 225 S.C. 267, 82 S.E.2d 63. Code 1976, § 16-3-620.



**2. Homicide ⇐310(1)**

In charging jury on law to kill, judges should give st

**3. Homicide ⇐310(1)**

Charge in prosecution f to kill, instructing jury that without finding of malice, wa

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Robert M. Pachak of Sc Defense, of Columbia, for ap

Attorney General Charles General John W. McIntosh, al Salley W. Elliott, Assis Callison Tiffin, Columbia, a Florence, for respondent.

WALLER, Justice:

Appellant, Brad Christoph first degree burglary, assau (ABIK), and possession of violent crime. He was resp twenty years, and five years sole issue on appeal is w refusing to charge the jury kill" before Foust could be c

F

On December 13, 1993, Je in the chest by Foust when s discovered him burglarizing introduced a letter written never intended to hurt Victin

In charging the jury, th follows: What is Assault Assault and Battery with

# ATTACHMENT 2

# The Supreme Court of South Carolina

Stephen C. Stanko, SK 6022, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-000212

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ORDER

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Counsel for petitioner have filed a "Petition for Court Oversight of Capital PCR Action" in which they essentially ask this Court to review the circuit court's rulings on *ex parte* motions regarding funding for experts filed in this matter. The State has filed a return in which it requests this Court issue an order unsealing the *ex parte* funding requests and orders so that it may properly respond to the merits of the petition before this Court.[1] The petition and the State's request are denied.[2]

C.J.

J.

J.

J.

J.

[1] The State currently has such a motion pending before the circuit court, where it can be ably addressed.

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

Columbia, South Carolina

February 25, 2015

cc:
Emily C. Paavola, Esquire
Lindsey Sterling Vann, Esquire
J. Anthony Mabry, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
Donald J. Zelenka, Esquire

**CERTIFICATE OF SERVICE**

**I Anthony Mabry,** hereby certify that I have served the Motion to Unseal and Disclose in the foregoing action by depositing copies of same in the United States Mail to E. Charles Grose, Jr., Esquire, The Grose Law Firm. LLC, 404 Main Street, Greenwood, SC 29646 and Diana Holt, Esquire, P. O. Box 6454, Columbia, South Carolina 29260-6454 this 10th day of September, 2015.

ANTHONY MABRY
Assistant Attorney General

# ATTACHMENT 3

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| STATE OF SOUTH CAROLINA | ) | COURT OF COMMON PLEAS<br>THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF PICKENS | ) | |
| | ) | Case Number: 2012-CP-39-00918 |
| JERRY INMON, | ) | |
| Applicant, | ) | |
| vs. | ) | Memorandum in Response to State's Motion to Unseal and Disclose |
| STATE OF SOUTH CAROLINA, | ) | |
| Respondent. | ) | |

To: The Honorable Alexander S. Macaulay, Presiding Judge by Special Assignment of the South Carolina Supreme Court

The applicant, Jerry Inmon,[1] responds to the State's motion for this Court to issue an order unsealing *ex parte* funding motions, requests, and orders already issued, disclosing to the government the content of all *ex parte* communications between the Court and Mr. Inmon's counsel, and providing the Attorney General's Office with notice an opportunity to be present and heard at any future *ex parte* funding requests or hearings.

## I. Introduction.

*Ex parte* and *in camera* motions to the presiding judge is the longstanding procedure in South Carolina for requesting and approving attorney fees, investigators, and expert services in capital post-conviction relief cases. Despite acquiescing to this procedure in Mr. Inmon's case for almost three years, the Attorney General's Office now asks this Court to unseal and disclose Mr. Inmon's funding requests and this Court's orders approving fees and expenses. In making this request the Attorney General's Office relies on dicta in *Thames v. State* and an unpublished

[1] The applicant's name is correctly spelled "Inmon."

order in *Stanko v. State*. These cases neither considered nor ruled on the statutory and constitutional issues presented in this pleading. The effect of granting the Attorney General's request would be to provide the prosecution arm of the state with a windfall of information that they are not entitled to know about at this stage of the litigation. By waiting until now to request this information, it appears the Attorney General's Office is more concerned with obtaining this information than it is with its duty to seek equal protection for all, including the poor, and the process followed by the Court.

## II. *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1996) and the Unpublished Order in *Stanko v. State* (Appellate Case No. 2015-000212, Feb. 25, 2015) do not control.

The State's relies on the *Thames* decision and the *Stanko* order is misplaced for the following reasons.

### A. Section 17-27-160 incorporates the *ex parte* and *in camera* funding procedures of §16-3-26.

South Carolina's capital post-conviction procedure is set forth in S.C. Code §17-27-160. This section authorizes counsel to be funded in the same "manner" as provided by S.C. Code §16-3-26. As §17-27-160 is a portion of the "Effective Death Penalty Act," the legislature certainly contemplated counsel to be funded in a "manner" that they can provide effective representation. In almost all cases of this seriousness, effective representation includes employing investigative and expert services. In fact, the plain terms of the statute support this conclusion. First, §17-27-160 does not limit funding to attorney fees. Second, §17-27-160 incorporates all of §16-3-26 by reference, except for subsection (I) that is expressly excluded.

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

> Upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to

> obtain such services on behalf of the defendant and shall order the payment, from funds available to the office of indigent defense, of fees and expenses not to exceed twenty thousand dollars as the court shall deem appropriate. Payment of such fees and expenses may be ordered in cases where the defendant is an indigent represented by court-appointed, private counsel or the public defender.

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

Because §17-27-160 incorporates all of the funding provisions of §16-3-26, including the provisions for funding investigative, expert and other services, this Court should allow Mr. Inmon to make applications in an *ex parte* and *in camera* proceedings.

**B. *Thames* does not control.**

Footnote one of *Thames* does not support a finding that Mr. Inmon is not entitled to *ex parte* and *in camera* proceedings.

The General Assembly has acted and authorized a capital post-conviction relief applicant to apply for investigative, expert and other services in an *ex parte* proceeding. The facts in *Thames* arose ***prior to*** the enactment of §17-27-160. *Thames* was submitted to the Supreme Court on May 15, 1996 and decided on December 2, 1996. Section 17-27-160 became effective on June 18, 1996. As discussed earlier, South Carolina has adopted a specific procedure for

capital post-conviction cases. Even if footnote one in *Thames* were not *dicta*, *Thames* would not control because the legislature has acted by authorizing a capital post-conviction applicant to apply for funding of investigative, expert, and other services in the same manner as provided by §16-3-26.

Footnote one of *Thames*. however, is *dicta*. In *Thames* the non-capital post-conviction applicant did not seek *ex parte* review of her request for expert services. Neither *Thames* nor the State raised the *ex parte* issue on appeal. The briefs in *Thames* are attached. Accordingly, a non-capital, post-conviction applicant's right to *ex parte* application for investigative, expert and other services has never been considered by the South Carolina Supreme Court in a contested, adversarial proceeding. Even if it had, these capital proceedings are controlled by a different statutory provision and treated differently than non-capital proceedings.

**C. The Unpublished Order in *Stanko v. State* does not control.**

The unpublished order in *Stanko v. State* does not control. Only published opinions have precedential value. Rule 220(a), SCACR. Additionally, the unpublished order does not reach the merits of the issue, but rather remands the case to the Circuit Court for consideration of the State's pending motion.

Thus, neither *Thames* nor the *Stanko* order controls the issue currently before the Court.

**III. PCR proceedings are criminal in nature, and Mr. Inmon is entitled under state law and the due process and equal protection requirements of the Fourteenth Amendment to proceed *ex parte* and *in camera* in making his request for expert and investigative services.**

Even if this were purely a civil proceeding, a person's rights to due process and equal protection in governmental actions are not suspended by such a characterization. *See. e.g.. M.L.B. v. S.L.J.*, 519 U.S. 102. 107 (1996) ("Mississippi may not deny M.L.B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her

unfit to remain a parent"); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process required procedural protections and an opportunity to be adequately heard prior to termination of welfare benefits).

Four important considerations will be reviewed below. First, a capital PCR proceeding is not purely a "civil proceeding" that must be treated in the same fashion as a civil trial between two private litigants. Post-conviction relief actions are essentially criminal in nature and state law provides for greater protections for PCR applicants than for other civil litigants. Indeed, state law provides greater protections for capital post-conviction relief applicants than for defendants in capital trials. Second, these state law provisions are protected and enforceable by the Fourteenth Amendment. Third, regardless of the state law protections, Mr. Inmon is entitled to *ex parte* proceedings under federal constitutional law. Fourth, the Attorney General does not have the right to be heard on funding matters.

**A. South Carolina law provides greater protections for capital PCR applicants than other civil litigants and even capital trial defendants and allows *ex parte* and *in camera* proceedings in order to seek expert and investigative services.**

While capital post-conviction relief proceedings are conducted in the Court of Common Pleas and "the processes of discovery available under the South Carolina Rules of Civil Procedure" are applicable, S.C. Code §17-27-150(B), the nature of the proceeding is to challenge the criminal conviction and sentence, S.C. Code §17-27-20(A). As is reflected by the routine involvement of the Office of the Attorney General and the Office of Appellate Defense, *see Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 746 (2000), the proceedings are essentially criminal in nature and are merely a continuation of, not a substitute for, criminal appeals. *See* Rule 71.1(b), SCRCP (an applicant may not bring a PCR action while a direct appeal is pending); *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) (issues that could have

been asserted at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel).

> While PCR action is considered a "civil case," it is, like its federal equivalent, categorized as such to differentiate it from criminal proceedings, which are intended to punish thus requiring special constitutional protections.

*Wade v. State*, 348 S.C. 255, 263, 559 S.E.2d 843, 846-47 (2002). Despite its categorization though, the proceedings are essentially criminal in nature. Indeed, the Uniform Post-Conviction Procedure Act is found in Title 17 of the Code, which is captioned "Criminal Procedures."

Regardless of the label, however, Mr. Inmon is entitled to due process and equal protection of the laws.

> While habeas corpus may, of course, be found to be a civil action for procedural purposes, it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee. . . . We shall not quibble as to whether in this context it be called a civil or criminal action. . . . The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels.

*Smith v. Bennett*, 365 U.S. 708, 712 (1961).

South Carolina law provides greater protections for PCR applicants than other civil litigants. Any person who has been convicted and sentenced for a crime who claims that the conviction or sentence was in violation of the United States Constitution or South Carolina law may institute state post-conviction relief proceedings. S.C. Code §17-27-20(a). A final judgment of a trial court in state post-conviction proceedings may be appealed, S.C. Code §17-27-100, and "shall be reviewed by the Supreme Court upon petition by either party for a writ of certiorari." S.C. Appellate Court Rule 227(a); *see also* S.C. Rule of Civil Procedure 71.1(f).

South Carolina law also provides that an applicant for state post-conviction relief is entitled to the appointment of counsel. Counsel must be appointed at the trial level when "the application presents questions of law or fact which will require a hearing." S.C. Code §17-27-60; *Whitehead v. State*, 310 S.C. 532, 426 S.E.2d 315 (1992); Rule 71.1(d), SCRCP. Counsel must also be appointed when the state moves for dismissal because an inmate failed to meet the statute of limitations and the PCR applicant raises an issue of material fact regarding the filing. *Gary v. State*, 347 S.C 627, 557 S.E.2d 662 (2001). Likewise, appellate counsel must be provided if the applicant is indigent and desires to appeal the denial of post-conviction relief by the trial court. S.C. Rule of Civil Procedure 71.1(g). The South Carolina Supreme Court also "mandates appellate counsel must brief all arguable issues, despite counsel's belief the appeal is frivolous." *Wade*, 348 S.C. at 263, 559 S.E.2d at 847. Clearly, as the Supreme Court has recognized, these are rights that do "not generally exist for plaintiffs in civil cases." *Id.*

South Carolina law actually affords greater protections to capital PCR applicants than to defendants in capital trials. For example, South Carolina law requires appointment of two lawyers in a capital post-conviction proceeding, at least one of whom is required to have special training or experience in capital PCR or federal habeas proceedings. S.C. Code §17-27-160(B).[2]

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[2] S.C. Code §17-27-160(B) provides, in pertinent part:

> If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in this action. At least one of the attorneys appointed to represent the applicant must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

These requirements are actually higher than the qualifications required for lead counsel in a capital trial under S.C. Code §16-3-26(B)(1).[3]

Likewise, capital post-conviction applicants are entitled to greater discovery rights than defendants in capital trials. Discovery in capital trials is governed by the Rules of Criminal Procedure, which provide for *disclosure only* of specific enumerated items upon request by the defendant, Rule 5, SCRCrimP, unless the information is exculpatory and/or mitigating, *Brady v. Maryland*, 373 U.S. 83 (1963). Discovery in capital post-conviction proceedings, on the other hand, is governed by the Rules of Civil Procedure, which require disclosure of documentation not required to be disclosed under the Criminal Rules. The general rule of the civil rules of discovery is that only specific enumerated items may be *withheld.*

In light of this statutory scheme, this Court's assumption that the legislature intended to afford less protections to capital post-conviction applicants (as compared to other civil litigants or even as compared to defendants in capital trials) is completely contrary to the legislature's clear intent in passing the South Carolina Effective Death Penalty Act, which contains the heightened protections for capital post-conviction applicants.

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[3] S.C. Code §16-3-26(B)(1) provides, in pertinent part:

> Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases . . . .

**B. Regardless of whether *Thames* is the controlling statutory interpretation, the greater protections provided for capital PCR applicants are protected and enforceable by the Fourteenth Amendment requirements of due process and equal protection of the law and Mr. Inmon is entitled to proceed *ex parte* with his requests for expert and investigative services.**

The Supreme Court of the United States has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *see also Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991). In *Vitek*, the Supreme Court affirmed that Due Process Clause protection attached to rights under a Nebraska statute dealing with the transfer of state prisoners to a mental hospital. The Supreme Court pointed to parole and probation as examples of state-created rights to which there was no "constitutional or inherent right" but which had been accorded protection under the Due Process Clause. *Vitek*, 445 U.S. at 488.

Similarly in *Wolff v. McDonnell*, 418 U.S. 539. 557 (1974), the Supreme Court held that even though "the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison . . . . But the State having created the right to good time . . . , the prisoner's interest [as a result] has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty.'" *See also Hewitt v. Helms*, 459 U.S. 460 (1983) (right to be in the general prison population is a liberty interest under Pennsylvania law subject to due process protection).

In determining whether a state has created a liberty interest subject to protection under the Due Process Clause, the Court looks to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). "This has meant that to obtain a protectable right 'a person clearly must have more that an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it.'" *Greenholtz v. Inmates of Nebraska Penal*

*and Correctional Complex*, 442 U.S. 1, 7 (1979) (quoting *Roth*, 408 U.S. at 577). In *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), the Supreme Court explained that:

> [A] State creates a liberty interest by establishing "substantive predicates" to govern official decision making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

*Id.* at 462 (citation omitted); *see also Slezak v. Evatt*, 21 F.3d 590, 594 (4th Cir. 1994).

Here, Mr. Inmon has much more than an abstract need or desire for *ex parte* proceedings. The statutes give him a clear claim of entitlement thereto. Mr. Inmon maintains that the proper procedure is that set forth in S.C. Code §16-3-26. *See* Section II(A), *supra*. Assuming, however, that the applicable statute is S.C. Code §17-3-50(B), that section provides:

> Upon a finding in *ex parte proceedings* that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense . . . .

This statute, on its face, requires *ex parte* proceedings.

Furthermore, judicial pronouncements by the Supreme Courts of the United States and of South Carolina make it clear that the "nature" of the right to *ex parte* proceedings to seek expert and investigative services is such that it merits protection under the Due Process Clause. For example, in *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985), the Supreme Court held that due process entitles an indigent defendant to the appointment of an expert to assist in his defense whenever "the defendant is able to make an *ex parte* threshold showing to the trial court" of the need for assistance. Likewise, the South Carolina Supreme Court has declared that when the "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*," the state or

county "does not have standing to participate in the hearing." *Ex Parte Lexington County*, 314 S.C. 220, 226-27, 442 S.E.2d 589, 593 (1994).

In addition to cases protecting a right to seek assistance in *ex parte* proceedings specifically, the due process clause extends to state-created rights in connection with sentencing generally. In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the Supreme Court held that due process protections attached to state procedural law in connection with the imposition of punishment:

> Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion. . .
>
> .

*Id.* at 346. Here, Mr. Inmon challenges the imposition of the death penalty in a procedure specifically created for and allowing that challenge. The methods used by this Court in allowing that challenge are, thus, not merely a matter of state law.

**C. Independent of the statutory provisions, Mr. Inmon is entitled as a matter of fundamental fairness and equal protection under the laws to seek funding in *ex parte* and *in camera* proceedings.**

While there is no constitutional requirement that a state create a system of direct appellate review, discretionary or as of right, *Ross v. Moffitt*, 417 U.S. 600 (1974), or state post-conviction proceedings, *Murray v. Giarratano*, 492 U.S. 1 (1989), "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause" of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

Due process and equal protection concerns may be implicated when a person is denied fundamental fairness by the state or treated differently than others based only on indigence:

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

*Ross*, 417 U.S. at 609. "Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." *Smith v. Bennett*, 365 U.S. at 714. These concerns are heightened in this capital post-conviction process. *See Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) ("Access to equal justice is an even greater interest where the State seeks to impose the penalty of death").

"[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (cites omitted).[4] This promise of "an adequate opportunity," however, vanishes if the state, with its nearly unlimited resources to investigate Applicant's case at all phases of litigation, *see Bailey v. State*, 309 S.C. 455, 460,424 S.E.2d 503, 506 (S.C. 1992),[5] likewise has access to privileged information only because of Mr. Inmon's indigency. As the South Carolina Supreme Court has explained:

> Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant

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[4] Under *Ake*, a defendant is entitled to expert assistance when he "is able to make an *ex parte* thresholding showing to the trial court" that such assistance is necessary. 470 U.S. at 82. *Ake* presumed the *ex parte* nature of this showing.

[5] In *Bailey*, the court contrasted the resource constraints faced by defense counsel with those of the "publicly compensated solicitor, who has at his disposal the entire array of state, county, and municipal law enforcement," as well as access to "dramatic technological advances" and other experts. 309 S.C. at 460, 424 S.E.2d at 506.

> and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

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

Although *Lexington County* and *Ake* address the rights of defendants at trial to *ex parte* proceedings, there is little question that equal protection and due process rights extend to post-conviction proceedings. *See Long v. District Court of Iowa, In and For Lee County, Fort Madison, Iowa*, 385 U.S. 192 (1966) (refusal to provide transcript of state habeas corpus proceeding denied equal protection of the laws); *Lane v. Brown*, 372 U.S. 477 (1963) (prevention of right to appeal a denial of a writ of error *coram nobis* due to indigency denied equal protection). Indeed, the United States Supreme Court has explicitly held that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny the prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. at 709.

In arguing that Mr. Inmon does not have a constitutional right to *ex parte* funding procedures in a capital PCR case, the Attorney General might argue "there is no constitutional right to post-conviction relief proceedings" or a due process "right to an appeal." South Carolina, however, allows a first appeal as of right and a separate "initial-review collateral proceeding." The Supreme Court of the United States has recognized "the right to effective assistance of counsel on appeal." *Evitts v. Lucey*, 469 U.S. 387, 397 (1985). *Martinez v. Ryan*, 556 U.S.1, 132 S.Ct. 2960 (2012) requires states to ensure effective assistance of post-conviction relief counsel in initial review collateral proceedings or lose the benefits of procedural bars in federal *habeas corpus* proceedings.

Because South Carolina chose to accord a right to *ex parte* proceedings to seek expert services in post-conviction proceedings challenging a death sentence, "due process protections

are necessary 'to insure the state-created right is not arbitrarily abrogated.'" *Vitek*, 445 U.S. at 488-89 (quoting *Wolff*, 418 U.S. at 557). The State has created a right to *ex parte* proceedings. Failure to grant Mr. Inmon those protections violates his rights to due process and equal protection.

**D. The Attorney General does not have a right to be heard on funding matters.**

"The requirements of due process are accorded to the criminal defendant," and "cannot be expanded to encompass the states of the union." *Ex parte Lexington County*, 314 S.C. at 226-27, 442 S.E.2d at 593 (citing *State of South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

The applicable statutes clearly provide that "[i]t is the judge who protects the interests of the public fisc," not the state. *United States v. Gonzales*, 150 F.3d 1246, 1257 (10th Cir. 1998). Allowing the State a voice in the amount and types of funding available to the defense would clearly violate due process when the state, as the Respondent in these proceedings, clearly has an interest in prohibiting Mr. Inmon's access to expert and investigative services that could lead to success in these proceedings. Due process is also violated because Mr. Inmon would not similarly be accorded the opportunity to be heard about the amounts and types of expert and investigative services sought by the State.

Allowing the State an opportunity to be heard with respect to the nature and types of services provided to Mr. Inmon would also violate equal protection because a non-indigent PCR applicant would not be similarly restricted by having the state heard in the process of obtaining defense experts and investigators.

Mr. Inmon's counsel, in order to obtain funding, must make a threshold showing to this Court that the expert, investigative, and other services are "reasonably necessary," S.C. Code §16-3-26(C), in order for Mr. Inmon to be adequately represented and to have a full and fair

hearing. Counsel cannot possibly make such a showing without making disclosures to this Court concerning the information available and the information sought to be obtained with experts and investigators. As the Texas Court of Criminal Appeals recognized

> In order to make a threshold showing [for funding for experts] . . . , the defendant necessarily has to explain his theories and describe with some specificity how an expert would assist him. . . . The problem with requiring this showing to be shared with the State at the pretrial stage is that it compels a defendant to disclose to the State his defensive theories or "work product."

*Williams v. State*, 958 S.W.2d 186, 193 (Tex. Crim. App. 1997). *See also Gonzales*, 150 F.3d at 1251 n.4 ("We have repeatedly emphasized that defendants must provide the district court with explicit detail showing why the requested services are 'necessary' to an adequate defense and what the defendant expected to find by using the services").

**IV. Even if this Court denies Mr. Inmon the right to proceed *ex parte* and *in camera* with funding requests, the State does not have standing to object to those requests.**

Mr. Inmon objects to and contests the State's standing or any alleged "right" asserted by the State to interfere in his requests for funding.

The State cites to Thames and an order in *Stanko v. State.* While both declare that funding requests in state post-conviction relief cases are not to be made *ex parte*, the State is not granted standing in either case to interpose objections or to attempt to derail legitimate and procedurally proper funding requests.

In *Thames*, the Court simply stated as follows, in a footnote:

> When a defendant requests expert services for a criminal trial, the request is determined by the judge in *ex parte* proceedings. S.C. Code Ann. § 16-3-26(C) and § 17-3-50(B) (Supp. 1995); *Ex parte Lexington County.* 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.

> Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While § 17-3-50(A) mentions that the same hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word "defendant" throughout § 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

*Thames*, 325 S.C. at 12, 478 S.E.2d at 682, fn. 1.

The phrase "allowed to fully participate" does not automatically grant the State the right to interfere with, and interpose objections to, the Mr. Inmon's funding requests. In other words, where a capital post-conviction relief applicant submits a proper, constitutional, and statutory, request for funding, it is not within the State's authority to interfere with such a request. *See, e.g., Ake v. Oklahoma, supra.; Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994) (County, as the statutorily required funding agency for capital cases, had no authority to object to funding matters).

Similarly, the Court in the *Stanko* Order stated as follows, also in a footnote:

> We note, however, that the issue of *ex parte* proceedings in PCR matters, which is at the heart of the petition currently before this Court, was addressed in *Thames v. State*, *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1986) (sic),[6] and such proceedings were found to be improper.

*Stanko*, Order, supra. at p.1, fn. 2.

Thus, while the Court might require the State to receive notice of such funding requests, the two cases to which the State cites do not give the State automatic standing or any "right" to interpose objections and interfere with Petitioner's requests for funding.

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[6] The correct year of the decision in *Thames* is 1996.

Funding in this State for indigent defendants/petitioners is provided through the S.C. Office of Indigent Defense. *See* S.C. Code Ann. §16-3-26, §17-3-80, § 17-27-160. OID is routinely the party which intercedes with the court, if there is any objection to be made or position to be taken, concerning any funding requests.

While the principle of standing in a civil context is somewhat different, it is instructive in that standing requires the party to be in danger of sustaining a direct injury. *See, e.g., Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (S.C. 1999) ("Standing to sue is a fundamental requirement in instituting an action. A private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained. Moreover, the injury must be of a personal nature to the party bringing the action, not merely of a general nature which is common to all members of the public." *Id.*, 338 S.C. at 639-40, 528 S.E.2d at 649-50).

In Mr. Inmon's case the State is not injured in any way by authorizing OID to fund attorneys investigators and expert witnesses so that Mr. Inmon can fairly present his claim: the State will have every opportunity to cross-examine the witness accordingly and in due course; or to object to the admissibility of the witness' testimony if the State believes it has some procedural ground or other legal argument to sustain such an objection; however, the State has no right to prevent the Mr. Inmon from obtaining the necessary professional services of the expert in the first place.

**V. Interference with the Attorney-Client Relationship.**

Because the State's motion asks to be heard on matters pertaining to attorneys' fees, investigators, and expert witnesses, it appears that opposing counsel wants to litigate the number

of hours counsel and their investigators may spend on this case and whether investigative and expert assistance is needed.

It must be noted, though obvious, that the Attorney General's Office and its employees, including innumerable paralegal and support staff are, of course, employees paid by the State and, therefore, do not have to be concerned with such mundane matters as compensation. Nor does the State need to customarily concern itself with paying expert costs since the State has access to state-paid experts through the S.C. Law Enforcement Division (SLED) for virtually every conceivable type of expert – DNA, fingerprinting, firearms, etc. It is curious and befuddling to Mr. Inmon's counsel that the State might raise an objection to compensation for counsel because, without such compensation, counsel cannot move forward in any respect with this case. As the State is well aware, Mr. Inmon's counsel is not appointed *pro bono* in this case and the role of appointed counsel—such as whether to limit or restrict the number of hours necessary for counsel to do their job—is not left up to the prosecution arm of the State.[7]

The Supreme Court of the United States has held that funding for an indigent in a death penalty case is a matter of due process and also that denial of such funding violates the cruel and unusual punishment clause. *See Ake v. Oklahoma*, 470 U.S. 68 (1985) (Court reversed capital case, under Fifth and Eight Amendments, where state trial court denied funding for a forensic psychiatrist); U.S. Const. Amend. 5 and 14. Our own state Supreme Court concurs. *See Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); S.C. Const. Art. I §3.

[7] As this PCR Court knows, payment of experts, costs, and counsel, comes from a state fund monitored by the S.C. Office of Indigent Defense ("OID"). The fund is provided for by fines imposed on defendants who are convicted in criminal courts across the state. OID is scrupulous and very committed to monitoring this fund, and is provided with notice of each and every funding motion, such that OID intervenes when it deems it necessary concerning case-related costs.

Recently, in *Hinton v. Alabama*, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014), the High Court reversed the defendant's conviction and death sentence where the trial attorney failed to request additional funding in order to replace an expert he knew to be inadequate because the attorney mistakenly believed that he had received all he could get under Alabama law. The Court found that this constituted deficient performance under the Sixth Amendment. *Id.* The result would be no different here, where Mr. Inmon's counsel seeks reasonable funding for an expert witness, if the Court granted the State the ability to interfere and denied the requested expert assistance. *Hinton* makes it abundantly clear that it is irrelevant whether the person seeking funding for expert assistance is a capital defendant at a jury trial or a capital petitioner in an ineffective assistance of counsel case.

There is a long history of court cases allowing an indigent petitioner expert assistance in proving claims of ineffective assistance of counsel. *See generally, Hinton v. Alabama, supra.; Sears v. Upton,* 561 U.S. 945, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010); *Rompilla v. Beard,* 545 U.S. 374 (2005); *Wiggins v. Smith, 539 U.S. 510* (2003); *Ard v. Catoe*, 372 S.C. 318; 642 S.E.2d 590 (2007), *Rehearing denied by Ard v. Catoe.* 2007 S.C. LEXIS 157 (S.C., Apr. 4, 2007), U.S. Sup. Ct. cert. den. by, Motion granted by *Ozmint v. Ard,* 2007 U.S. LEXIS 10840 (U.S., Oct. 1, 2007); *Von Dohlen v. State.* 360 S.C. 598, 602 S.E.2d 738 (2004).

Again, in a case decided just this term, the Supreme Court reiterated the constitutional significance of providing a capital defendant with expert assistance in *Brumfield v. Cain,* 576 U.S. ___ (Case No. 13-1433, June 18, 2015). While procedurally complex and involving several significant issues, the Court reversed the death sentence in part because the state court denied funding for a defense expert to present mental health evidence on the issue of mental

retardation/intellectual disability for an *Atkins* claim.[8] *Id.*. Slip Opinion at p. 1. ("Without affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner's claim. That decision, we hold, was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U. S. C. §2254(d)(2). Petitioner was therefore entitled to have his *Atkins* claim considered on the merits in federal court.").

Thus, the Supreme Court continues to look with constitutional disfavor upon denials of legitimate funding requests for indigent defendants/petitioners.

On the other hand, to require Mr. Inmon to make such disclosures in the Attorney General's presence will impede the process. "Without an assurance that the information revealed . . . to the court will not be disclosed, a defendant and his or her counsel would be discouraged from fully disclosing the information to the court." *Gonzales*, 150 F.3d at 1259. Either counsel will not be able to make full disclosure to this Court and run the risk that necessary funding will be denied or counsel will be required to lay bare its privileged work-product and strategies in the presence of Respondents. Either of these options will violate due process. As the court in *Williams* found, forcing such a choice "is contrary to *Ake*'s concern that an indigent defendant who is entitled to expert assistance have 'meaningful access to justice,' and undermines the work product doctrine." *Id.*[9]

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[8] *Atkins* v. *Virginia*, 536 U. S. 304 (2002) (Court barred death penalty for defendant who was intellectually disabled/mentally retarded).

[9] *See also Ex Parte Moody*, 684 So.2d 114, 120 (Ala. 1996) (ex parte proceedings on the need for expert assistance required by the Fifth, Sixth, and Fourteenth Amendments, in part, because an indigent defendant should not have to disclose to the state information that a financially secure defendant would not have to disclose); *Brooks v. State*, 385 S.E.2d 81, 84 (Ga. 1989) (While exercising the right to obtain expert assistance, "the defendant also has the right to obtain that assistance without losing the opportunity to prepare the defense in secret. Otherwise,

Forcing counsel to disclose information that the State may not otherwise be entitled to may also harm Mr. Inmon. As the court in *Gonzales* recognized:

> [M]uch of the information disclosed to the court during the CJA [funding] process does not ultimately become part of the criminal trial. A defendant's request for investigative services to look into possible defenses, for example, will not always be fruitful for the defense. Likewise, a defendant's request for funds to interview potential witnesses does not always result in the defendant's use of those witnesses at trial. The danger in disclosing this type of information was manifest in *Marshall* [*v. United States*], 423 F.2d [1315] at 1319 [(10th Cir. 1970)], where the government learned of the existence of a witness who ultimately testified against the defendant only because the district court had erroneously allowed the government to attend the CJA hearing.

*Gonzales*, 150 F.3d at 1259-60.

Requiring Mr. Inmon's counsel to lay bare theories and strategies before the State will also violate equal protection. As the Tennessee Supreme Court held:

> The logic of requiring an *ex parte* hearing . . . is apparent. Indigent defendants who must seek state-funding to hire a psychiatric expert should not be required to reveal their theory of defense when their more affluent counterparts, with funds to hire experts, are not required to reveal their theory of defense, or the identity of experts who are consulted, but who may not, or do not, testify at trial.

*State v. Barnett*, 909 S.W.2d 423, 428 (Tenn. 1995).

Rule 26(B), SCRCP, provides:

> A party may discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or

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the defendant's 'fair opportunity to present his defense,' acknowledged in *Ake*, will be impaired"); *McGregor v. State*, 733 P.2d 416 (Okla. Crim. App. 1987) (to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants as nearly as possible, on a level of equality with non-indigent defendants).

> opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specifically employed.

Is it clear that the Attorney General does not have the right to this information because Rule 26 does not contemplate the disclosure of even the identity of expert witnesses, unless that expert is expected to testify at trial. Once a party identifies an expert as a witness expected to testify at trial, then the opposing party, can seek to obtain information about that expert's opinions through civil discovery, including depositions. Until the expert is identified as a testifying expert, that expert is a consulting expert and the information possessed by that expert and the opinions possessed by that expert are protected by attorney-client privilege and the attorney work-product doctrine. *See State v. Thompson*, 329 S.C. 72, 76, 495 S.E.2d 437, 439 (1998).

Adopting the Attorney General's argument, however, would require that Mr. Inmon disclose the identity of the expert "before the expert evaluates the defendant and before the defense determines" whether the expert will be used as a witness. *Barnett*, 909 S.W.2d at 429. Following this procedure may also require disclosure of information from consulting experts used only to assist in providing the information necessary to this Court to justify funding.

Furthermore, the Attorney General apparently views all requests for investigative, expert, and other services as not being protected by privilege or work-product. Under their interpretation, Mr. Inmon would have to disclose, in the presence of the Attorney General, the nature and purpose of investigative and other services. Again, under the position advanced by the Attorney General, the State would receive a windfall that the State would not otherwise receive. The State is not entitled to discover Mr. Inmon's investigative processes or strategies

under any circumstances. Requiring Mr. Inmon to make such disclosures is completely contrary to the discovery rules, in addition to due process and equal protection.

As the United States Court of Appeals for the Tenth Circuit said:

> Just as the grand jury process is the "classic example" of a government process that would be totally frustrated if conducted openly, so too would CJA [funding] proceedings be frustrated if conducted openly. The CJA process is the defendant's means of preparing a defense, and keeping that process closed will prevent the government from being "tipped off" as to the direction in which the defendant's trial strategy is heading.

*Gonzales*, 150 F.3d at 1259. The government is not entitled to this information, except to the extent authorized by the discovery rules.

Not allowing Mr. Inmon to proceed *ex parte* and *in camera* could even distort the process and give the government an unfair advantage. Mr. Inmon is still engaging in discovery and investigation.

Mr. Inmon may have additional claims to present in an amended application for post-conviction relief. *See* Rule 15(a), SCRCP (allowing liberal amendments of pleadings when justice so requires and does not prejudice any other party). Additional potential claims could involve claims that the state withheld exculpatory or impeachment evidence, *see Brady v. Maryland*, 373 U.S. 83, 86-87 (1963), or that the State knowingly used false evidence, *Napue v. Illinois*, 360 U.S. 264, 269, 271-72 (1959) (unanimous decision) (Warren, C.J.). Indeed, the South Carolina State Supreme Court has recognized prosecutorial misconduct as a ground for post conviction relief, notwithstanding the absence of a claim of ineffective assistance of counsel. *See Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) (setting aside applicant's guilty plea, and granting a new trial, because of prosecutor's *Brady* violation). Requiring disclosure of information concerning investigation into these activities could thwart the truth-

seeking process by allowing the State notice in advance of Mr. Inmon's investigative efforts, which could result in activities to thwart Mr. Inmon's investigation.

Not allowing Mr. Inmon to proceed *ex parte* and *in camera* will violate due process by requiring a procedure that is fundamentally unfair. It also violates equal protection because the Attorey General's position treats Mr. Inmon differently from non-indigent, death-sentenced applicants who could afford to pay for investigative, expert, and other services out of their own funds. Indeed, denying him this right would impose a hardship on Mr. Inmon that the Court does not impose on the State of South Carolina, Mr. Inmon's adversary.[10] As a result, the position advanced by the Attorney General violates Mr. Inmon's equal protection rights in a manner sought to be avoided by the South Carolina Supreme Court's holding in *Ex Parte Lexington County*.

**VI. The Court should consider alternative methods of relief.**

If opposing counsel is truly concerned about the possibility of this Court being influenced by information contained in the ex parte funding requests, relief can be granted without the State getting access to otherwise undiscoverable information. The Court could allow Mr. Inmon to make general requests for funding without revealing protected information or identifying the experts requested. Copies of orders from then Circuit Court Judges John Kittredge and Wyatt T. Saunders, Jr. are attached. The Office of Indigent Defense could intervene—as it often does—if that agency has any questions or concerns. Alternatively, this Court could refer funding requests to another Circuit Court judge for consideration.

[10] Neither the Court nor South Carolina law has imposed a requirement of the State of South Carolina to apply to the court for leave to obtain investigative, expert and other services that the State believes is necessary to defend Mr. Inmon's application for post-conviction relief.

## VII. Conclusion.

This Court should deny the State's motion to unseal and disclose Mr. Inmon's *ex parte* funding requests.

Respectfully Submitted,

By


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September 25, 2015

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| STATE OF SOUTH CAROLINA | ) | COURT OF COMMON PLEAS |
| | ) | THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF PICKENS | ) | |
| | ) | |
| | ) | Case Number: 2012-CP-39-00918 |
| JERRY INMAON, | ) | |
| | ) | |
| Applicant, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| STATE OF SOUTH CAROLINA , | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

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September 26, 2015
Greenwood, South Carolina

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Oconee County

Honorable Gerald C. Smoak, Judge

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RUTH ANN THAMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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# PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER.

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## QUESTIONS PRESENTED

1.

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

2.

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

## STATEMENT OF FACTS

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

A Blair[1] hearing was then held. Dr. Pravina Seth testified she was employed at the William S. Hall Institute. Seth received her medical degree in India prior to coming to work at the William S. Hall Institute. App.p. 3, lines 17 - p. 4, line 6.

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

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

Seth admitted petitioner needed treatment, and that she had

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

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

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

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

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

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

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

Sires told the judge that Dr. Martin would be furnishing the court with a supplemental report. Sires said he understood that Dr. Martin believed petitioner was under the influence of cocaine at the time of the stabbing. That, according to Sires, was why Dr. Martin opined she did not have the capacity to conform her actions. Sires then said: "Ms. Thames is aware, as well as Dr. Martin is aware, of course, that voluntary intoxication be it by drugs or alcohol is not a defense under the laws of this state and this is why it was reported as it was." App.p. 26, lines 7-10.

The written report did not state that voluntary intoxication was the reason Dr. Martin opined petitioner was unable to conform her actions to the requirement of the law. See App.p. 64-65. Sires told the judge petitioner was competent to stand trial, and that he was not setting forth an affirmative defense pursuant to S.C. Code §17-24-10.[2] App.p. 27, lines 2-21.

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

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

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

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

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

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

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

App.p. 45, lines 11-19.

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

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

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

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

> Sires: Ruth Ann, is there anything you would like to say?
>
> Court: Ms. Thames, anything further - -
>
> Thames: Yes, sir, the only thing I'd like to say to their family is that I didn't mean to kill him; I thought it was my uncle. I didn't mean to kill the man. I thought it was somebody else. He was a very good man. He was, and he was good to me. I was just - - That's all I can say.

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

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

Petitioner filed an application for post-conviction relief

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

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

At the hearing Hughes said the following:

> Your Honor, I have attached to the motion various medical records of Dr. DeWitt of his treatment of Ms. Thames after she - - after she was sent down to the Women's Correction Center. They indicate that she had psychotic symptoms. She was taking a psychotropic drug, Haldol. His primary analysis of her is an atypical psychosis. The records also mention delusions and hallucinations.
>
> Formerly - - prior to her sentencing, Your Honor, Ms. Thames was evaluated by two psychiatrists, a Dr. Martin, who was retained by Mr. Sires, who practices in Anderson, as well as Dr. Sheth, who works for the State in Columbia. They both found that she was delusional. I think that Dr. Martin found that she did not have criminal responsibility for her act when she killed Mr. Mathison but nonetheless, they both found that she met the standard for competency at the time of trial and that she - - that she was sane at the time the incident was committed. From my conversations with Dr. DeWitt, he indicates to me that there may - - that he may come to a contrary conclusion, nonetheless he can't without doing a full evaluation of Ms. Thames. He can't reach that question now.
>
> Your Honor, This is a tragic case where

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

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

The assistant attorney general opposed the motion. He stated there were two examinations done prior to the guilty plea -- "one by Dr. Seth; one by Dr. Martin." App.p. 78, lines 2-22. He argued that Dr. Martin "had some question about her ability to conform her actions at the time of the murder was committed due to her cocaine intoxication, which is not a defense." App.p. 79, lines 3-6. The assistant attorney general concluded: "I don't think a third [evaluation] is going to give us anymore insight than the two we have already had. . ." App.p. 79, lines 9-10. He added" "I think it would be a waste of the state's time and money to have another evaluation done." App.p. 79, lines 17-18.

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

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

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

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

> Q. All right. When - - you killed Mr. Mathison, were you experiencing hallucinations?
>
> A. Yes, sir. I thought he was my uncle when I killed Randall.
>
> Q. All right. Do - - do you have questions concerning your sanity at the time that you killed him?
>
> A. Yes, sir, because I would not harm Randall if I had known it was Randall. Randall was very good to me. I thought he was the man that abused me all of my life and that's - - and I was just trying to defend myself.
>
> Q. And is that how it happened, Ms. Thames?
>
> A. Yes, sir.

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

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

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

at the time because I had not made peace with God yet." App.p. 86, lines 2-9.

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

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

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

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

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

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

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

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

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

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

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

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

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

## ARGUMENT

1.

The judge abused his discretion by refusing to authorize funds for a psychiatric evaluation by Dr. John DeWitt. This evaluation was reasonably necessary to the presentation of appellant's post-conviction claim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

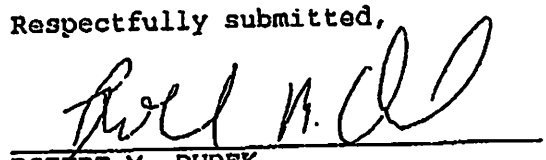
Counsel's advice that petitioner would receive a twenty year sentence induced her guilty plea. Petitioner thought a twenty year sentence would allow for her to be released prior to that time. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court granted a new trial, where, as here, Hinson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

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

## CONCLUSION

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

Respectfully submitted,



ROBERT M. DUDEK
Assistant Appellate Defender

ATTORNEY FOR PETITIONER.

This 26th day of March, 1996.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Oconee County

Honorable Gerald C. Smoak, Judge

---

RUTH ANN THAMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari, as well as a copy of the Appendix, in the above referenced case has been served upon Allen Bullard, Esquire of the Attorney General's Office, this 26th day of March, 1996.

ROBERT M. DUDEK
Assistant Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 26th day of March, 1996.

(L.S.)
Notary Public for South Carolina
My Commission Expires: APRIL 6, 2002

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
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S. C. SUPREME COURT

Appeal From Oconee County

Honorable Gerald C. Smoak, Circuit Court Judge

RUTH ANN THAMES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

# RETURN TO PETITION FOR WRIT OF CERTIORARI

CHARLES MOLONY CONDON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

TERESA NESBIT COSBY
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ATTORNEYS FOR RESPONDENT

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## QUESTIONS PRESENTED

I

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

II

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

## STATEMENT OF FACTS

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

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

1. Ineffective assistance of counsel.

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

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

## ARGUMENT I

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

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

Authorization for the expenditure of funds for expert witnesses is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion. State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982); State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (1981).

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

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

S.C. 188, 417 S.E.2d 569 (1992). Res judicata is shown if the identities of the parties is the same as a prior litigation, the subject matter is the same as the prior litigation and there was a prior adjudication of the issue by a court of competent jurisdiction. Riedman Corporation v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992). The Petitioner fully litigated the issue of her mental competency before the court prior to her guilty plea. Thus, res judicata would act as a bar here.

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

## ARGUMENT II

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

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

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

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

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

agreement was a plea to murder in exchange for the State's agreement not to seek the death penalty. (App. p. 45, line 20 - p. 47, line 7). The trial court also commented that the plea agreement allowed her to remain eligible for parole in twenty (20) years but still subjected her to a life sentence. (App. p. 47, lines 9-20). The Petitioner indicated that she understood the agreement, did not need to discuss it any further with counsel and had not been promised anything else to induce her plea. (App. p. 47, line 21 - p. 48, line 23). She also indicated she understood she had a right to appeal her plea if she so desired. (App. p. 50, lines 3-6). Furthermore, the Petitioner signed a written plea agreement indicating her understanding that she would be eligible for parole in twenty (20) years, not that she would receive a twenty (20) year incarcerative term. (Supp. App. pp. 1-2). Counsel testified at the post-conviction relief hearing that he had informed the Petitioner that she would be eligible for parole in twenty (20) years. (App. p. 111, lines 6-10).

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

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

## CONCLUSION

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

Respectfully submitted,

CHARLES MOLONY CONDON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

TERESA NESBIT COSBY
Assistant Deputy Attorney General

ALLEN BULLARD
Assistant Attorney General

BY: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
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Telephone: (803) 734-3737

Columbia, South Carolina.
May 9, 1996.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Oconee County
Honorable Gerald C. Smoak, Judge

---

Ruth Ann Thames,

Petitioner,

v.

State of South Carolina,

Respondent.

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CERTIFICATE OF SERVICE

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Personally appeared before me, JEAN CLIFTON, who being first duly sworn, states:

1. That I am an employee of the Office of the Attorney General.

2. That regular communication by mail exists throughout the State of South Carolina, and that this is a proper circumstance of service by mail.

3. That on this day I served two copies of the Return to Petition for Writ of Certiorari in the above-captioned matter on the following persons by depositing same in the United States mail, postage prepaid:

Robert M. Dudek, Esquire
South Carolina Office
of Appellate Defense
1122 Lady Street, #940
Columbia, South Carolina 29201

DATED this 9th day of May, 1996.

JEAN CLIFTON

SWORN to before me this
9th day of May, 1996.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 5-16-2010.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF SPARTANBURG | ) | |
| | ) | |
| John Babe Ray, Jr., | ) | |
| | ) | |
| Applicant, | ) | |
| | ) | |
| | ) | ORDER |
| v. | ) | |
| | ) | |
| | ) | |
| Michael Moore, Director, South Carolina Department of Corrections, and Charles Condon, S.C. Attorney General, Respondents. | ) | |

Applicant moves for reconsideration of this Court's prior order disallowing ex parte requests for expert, investigative and other services. The motion is denied in part and granted in part. The prior order is amended as set forth below.

**BACKGROUND**

John Babe Ray, Jr., is an indigent, death-sentenced inmate. After his direct appeal became final Ray v. State, 498 S.E.2d 640 (S.C.), cert. denied, 119 S.Ct. 240 (1998), Mr. Ray moved for a stay of execution to seek post-conviction relief. The South Carolina Supreme Court granted a motion for a stay of execution and appointed this Court to preside over post-conviction proceedings. Pursuant to In re Stays of Execution, 471 S.E.2d 140 (S.C.1996), this Court convened a hearing with respect to the appointment of

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counsel and appointed David P. Voisin and Edward W. Miller to represent applicant.[1] After the conclusion of that hearing, applicant's counsel indicated that they wished to discuss funding matters ex parte. Counsel for respondent, G. Robert DeLoach, III, objected to any ex parte proceedings with respect to finding, citing Thames v. State, 478 S.E.2d 682 (S.C. 1996). I then asked the parties to submit informal memoranda addressing the court's authority to consider a funding request ex parte. The parties' submissions resulted in this court denying applicant's request for ex parte proceedings pursuant to Thames v. State.

**DISCUSSION**

I continue in my finding disallowing ex parte communications. I do, however, find that the procedure outlined in State v. Row 955 P.2d 1082 (Idaho), cert. denied, 119 S.Ct. 415 (1998), provides a proper method for addressing the applicant's funding request. Therefore, applicant shall proceed as follows: (1) if applicant wishes to seek authorization to expend funds pursuant to S.C. Code Ann. §17-27-160, he may submit an application for funds under seal to the court; (2) applicant shall simultaneously with the filing of the funding request notify opposing counsel that a funding request

[1]This Court entered a written order on December 15, 1998.

has been submitted to the court under seal; applicant, however, is not required to disclose to opposing counsel the nature or contents of his submission to the court; (3) the court will then review the request for funds and conduct any necessary proceedings; the court will then enter an appropriate order under seal; (4) respondents shall be notified that the court entered an order granting or denying a request for funding, but respondents shall receive no further information.

Since the State will receive notice that a funding request has been submitted, the procedure is not strictly ex parte.[2] This procedure will additionally preserve the record for proper appellate review. The procedure further addresses applicant's legitimate interest in preventing disclosure of material and information protected by the attorney/client and work-product privileges. And finally, the State is not unfairly prejudiced, for it may pursue authorized discovery in this civil matter.

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[2]In Ex parte Lexington County 442 S.E.2d 589, 593 (S.C. 1994), the Supreme Court defined ex parte as a "judicial proceeding...taken...for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." (quoting Black's Law Dictionary 297 (5th ed. 1983) (emphasis added).

AND IT IS SO ORDERED.

John W. Kittredge
Circuit Court Judge

Greenville, South Carolina
February 18, 1999

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF ABBEVILLE | ) | IN THE COURT OF COMMON PLEAS |
| John Kennedy HUGHEY, #5055<br><br>Applicant,<br><br>vs.<br>GARY MAYNARD,<br>Director, South Carolina<br>Department of Corrections,<br>and State of South Carolina<br><br>Respondent. | ) | C/A No. 00-CP-01 - 212<br><br>ORDER GRANTING MOTION TO RECONSIDER ORDER DENYING REQUESTS TO CONDUCT ALL PROCEEDINGS WITH RESPECT TO APPLICANT' S REQUESTS FOR EXPERT, INVESTIGATIVE OR OTHER SERVICES EX PARTE |

This matter comes before this Court by a "Motion to Reconsider Denial of Ex Parte Proceedings In Order To Seek Expert, Investigative, and other services and motion to assign another trial court to hear those matters" dated August 12, 2002. The motion has been supplemented by numerous affidavits. This Court held a conference telephone call on December 17, 2002 with counsel Charles Grose, Teresa Norris and Assistant Deputy Attorney General Donald J. Zelenka. At the conclusion of the telephone call, this Court entered an oral order granting reconsideration of its earlier order. This Order follows.

I.

This Court entered an Order dated July 26, 2002, denying an earlier Motion to Conduct All Proceedings With Respect to Applicant's Requests for Authorization for Expert,

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STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
Filed Dec 19 A.D. 2002
at 9:00 o'clock AM
Clerk of Court

Investigative, and Other Services *Ex Parte* as required by S.C.§ Code 17-27-160 and S.C. Code § 16-3-26," dated March 15, 2002. An *ex parte* request had been made by appointed counsel for Mr. Hughey prior to March 15, 2002. Upon the request, the Court advised counsel of its intent to approve the request, but advised counsel that it would give notice of the order to the Respondents. Applicant's counsel objected and the matter was held in abeyance pending a motion by Applicant's counsel.

On March 15, 2002, counsel for Mr. Hughey made a motion asserting that in a state post-conviction relief action, he was entitled to submit all funding requests to the Circuit Court ex parte without notice to the Respondents' counsel. The Respondents' counsel responded by letter on April 11, 2002. On April 29, 2002, this Court convened a hearing in Greenwood County on this matter. The Applicant was present and represented by his counsel, Teresa L. Norris and E. Charles Grose. The Respondents were represented by Donald J. Zelenka of the Attorney General's Office. Argument was heard by counsel for both parties. On July 26, 2002, this Court entered a written order denying the motion.

II.

The Applicant, through counsel made a motion to reconsider. In the telephone conference call on December 17, 2002, this Court advised counsel that it had decided to reconsider its earlier order. This Court requests counsel for the Applicant to seek to submit requests for funding in a generic manner that would not disclose substantive issues or specific factual matters, such as the product of interviews with potential witnesses, interpretation of records and other privileged matters which should not be disclosed to a fact-finder in an ex parte setting. If counsel is unable to make the generic request for funding in a manner to show its reasonableness, this Court may



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request a modification by the Supreme Court of its exclusive assignment in this matter to allow for another judge to address these particular funding issues.

**AND IT IS SO ORDERED** this 18th day of December, 2002.

WYATT T. SAUNDERS
Presiding Judge

at Greenwood, South Carolina



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# ATTACHMENT 4

| | | |
|---|---|---|
| **STATE OF SOUTH CAROLINA** | ) | |
| | ) | **IN THE COURT OF COMMON PLEAS** |
| **COUNTY OF PICKENS** | ) | |
| **Jerry Buck Inman, #5226,** | ) | |
| | ) | **C/A No.: 2012-CP-39-918** |
| **Applicant,** | ) | **(Capital PCR Action)** |
| **v.** | ) | |
| | ) | **REPLY TO MEMORANDUM IN RESPONSE** |
| **State of South Carolina,** | ) | **TO MOTION TO UNSEAL EX PARTE** |
| | ) | **FUNDING REQUESTS AND ORDERS** |
| **Respondent.** | ) | |
| | ) | |

Respondent, by and through the undersigned attorneys, hereby makes a Reply to the Memorandum in Response to the Motion to Unseal *Ex Parte* Funding Requests and Orders. Respondent asserts Applicant's legal arguments are without merit, and Respondent relies on its original Motion and the authority set forth therein.[1]

As a result, Respondent is entitled to an Order unsealing all *ex parte* funding requests, motions, or orders; ordering disclosure of the content of all prior communications between Applicant [or his PCR attorneys] and the Court; and directing Applicant and his attorneys to provide Respondent with notice and an opportunity to be heard at any such future hearings.

RESPONDENT SO REPLIES.

---

1 Respondent also disagrees with Applicant's statement that Respondent has acquiesced to *ex parte* funding requests. Respondent raised an objection to being excluded from what Respondent believes was the one of the first status conferences or hearings conducted in this case. Respondent was participating in this status conference or hearing by telephone. Respondent was excluded from that conference, over its objection, and placed on telephone stand by. [Ms. Holt is aware of this fact as she objected to Respondent participating in the hearing]. Respondent is not aware of any hearings thus far in this matter being conducted on the record or in open court. Upon review of its file in this case, Respondent has not previously received notice of any *ex parte* funding requests, motions, hearings, or orders in this matter. Regardless, Respondent is entitled to the unsealing of any *ex parte* funding requests, motions, orders and *ex parte* discussions between Applicant and the Court, and notice of any future *ex parte* funding requests or hearings, based on Respondent's previous Motion and the authority cited therein.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: _____
ANTHONY MABRY
ATTORNEYS FOR RESPONDENTS

October 2, 2015

# ATTACHMENT 5

| | | |
|---|---|---|
| **STATE OF SOUTH CAROLINA** | ) | |
| | ) | **IN THE COURT OF COMMON PLEAS** |
| **COUNTY OF PICKENS** | ) | |
| | ) | |
| **Jerry Buck Inmon, #5226,** | ) | |
| ***aka Jerry Buck Inman*** | ) | |
| | ) | **C/A No.: 2012-CP-39-918** |
| **Applicant,** | ) | **(Capital PCR Action)** |
| **v.** | ) | |
| | ) | **RULE 59, SCRCP, MOTION TO ALTER OR** |
| **State of South Carolina,** | ) | **AMEND OR TO RECONSIDER** |
| | ) | |
| **Respondent.** | ) | |
| | ) | |

Respondent, by and through the undersigned attorneys, hereby moves, pursuant to Rule 59, SCRCP, for this Honorable Court to Alter or Amend or Reconsider its Order Denying Respondent's Motion to Unseal and Disclose dated November 16, 2015, filed November 24, 2015, of which Respondent received written notice of entry of the Order on November 30, 2015.

Respondent moves this Court to Alter or Amend its Order Denying the Motion to Unseal or Disclose or to Reconsider its Order due to the fact Respondent believes this Honorable Court was unable to consider the fact that the arguments raised by Applicant in the favor of denying Respondent's Motion to Unseal and Disclose were similarly raised by capital PCR applicant Stephen C. Stanko in the interlocutory appeal in Stanko v. State, Appellate Case No. 1015-000212 (Filed February 25, 2015)(Unpublished Order), and the South Carolina Supreme Court rejected those arguments as unpersuasive. Id., *citing* Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996). Respondent is informed and believes this Honorable Court was unable to consider this fact because the Court was unable to access the appellate briefs in the Stanko interlocutory appeal due to the fact they were submitted by Respondent to this Court via e-mail in PDF format, and the

Court was unable to access the same in that format,[1] and, Respondent inadvertently failed to attach Stanko's Reply brief in the above described e-mail. As a result, Respondent is attaching to this Motion the briefs in the Stanko appeal for this Court's consideration in ruling on this Motion to Alter or Amend or Reconsider. (Attachments 1, 2, & 3). Respondent's intent is to seek compliance by the Court with the decision in Thames v. State, *supra*, and to protect the integrity of the fact finding process.[2]

Wherefore, for the above stated reasons, Respondent moves this Honorable Court to alter or amend or reconsider its Order Denying Respondent's Motion to Unseal and Disclose and issue an Order granting Respondent's Motion to Unseal and Disclose.

RESPONDENT SO MOVES.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

1 This Honorable Court reported that it not have PDF access in an e-mail to collateral counsel and copied to Respondent on November 10, 2015.

2 Respondent is filing this Motion in order to give this Honorable Court the opportunity to alter or amend or reconsider its Order; however, Respondent will be required to file Notice of Appeal or Extraordinary Writ on December 30, 2015.

BY: _____
ANTHONY MABRY
ATTORNEYS FOR RESPONDENTS

December 10, 2015

# ATTACHMENT 1

DEATH PENALTY
RESOURCE & DEFENSE CENTER

February 3, 2015

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *Stanko v. State*, Capital PCR Case Number: 2014-CP-26-0035
Petition for Court Oversight of Capital PCR Action

Dear Mr. Shearouse,

Please find enclosed for filing, with proof of service, a Petition for Court Oversight of Capital PCR Action filed on behalf of Petitioner, Stephen C. Stanko.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Lindsey S. Vann

cc: Anthony Mabry
The Honorable Benjamin H. Culbertson
Stephen C. Stanko

900 Elmwood Avenue, Suite 101 • Columbia, SC 29201 • 803.765.1044 tel • 803.765.1143 fax
www.deathpenaltyresource.org

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

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Capital PCR Case Number: 2014-CP-26-00035

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STEPHEN C. STANKO, SK 6022 ..... *Petitioner*,

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

---

**PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION**
**(Expedited Consideration Requested)**

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Counsel for Petitioner

## I. INTRODUCTION

Petitioner, Stephen C. Stanko, an indigent death-sentenced inmate, respectfully petitions this Court to exercise its supervisory authority and order the post-conviction relief ("PCR") court to authorize expert funding as provided for by statute and grant a continuance to allow undersigned counsel an opportunity to prepare for a merits hearing on Petitioner's PCR Application. This petition invokes the Court's supervisory authority in capital PCR cases. S.C. Code § 17-27-160; *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). This petition also invokes counsel's duty to provide information to this Court pursuant to *In re Stays of Execution in Capital Cases*.

Petitioner's PCR action was assigned by this Court to the Honorable Benjamin H. Culbertson in the Horry County Court of Common Pleas ("the PCR court"). Prior to filing this Petition, Petitioner filed (before the PCR court) multiple motions to reconsider funding denials, arguing Judge Culbertson's denials were based on a misinterpretation of the applicable statutory funding standard, and a motion for a continuance of the PCR hearing, which is currently scheduled for March 2, 2015. *See* Section II, *infra*. Respondent has taken no position on these motions, except for making a request that the funding motions and orders denying funding be unsealed.

Currently, undersigned counsel find themselves unable to prepare for the scheduled PCR hearing because the PCR Court (1) has denied funding for all expert assistance, despite counsel's demonstration that such assistance is reasonably necessary to the representation of Mr. Stanko; (2) has not ruled on counsel's motion to reconsider the funding denials; and (3) has not ruled on counsel's motion for a continuance. Petitioner, through undersigned counsel, therefore asks this Court to order the PCR court to rule on Petitioner's currently pending motions, to apply the appropriate standard for considering funding requests, and to grant a continuance to allow

undersigned counsel an opportunity to prepare for a hearing on Petitioner's pending PCR application. Petitioner respectfully requests this Court consider this Petition and rule prior to March 2, 2015 when an evidentiary hearing is currently scheduled to begin.

## II. PROCEDURAL BACKGROUND

Petitioner was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[1] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, this Court affirmed the conviction and sentence. *Id.* Petitioner subsequently moved for a stay of execution in order to pursue post-conviction relief. This Court issued a stay of execution and assigned the post-conviction relief proceedings to Judge Culberson. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013), *attached* as Exhibit A. Judge Culbertson appointed undersigned counsel to represent Petitioner on February 4, 2014. *See* Exhibit B.

On February 21, 2014, the PCR court entered a Scheduling Order, scheduling a merits hearing for December of 2014, and subsequently amended the Scheduling Order, sua sponte, to tentatively schedule a merits hearing for February of 2015. On September 25, 2014, the PCR court set a date certain for the merits hearing, scheduling the trial in this PCR proceeding to commence on March 2, 2015, and ordering the discovery be completed by January 31, 2015.[2]

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[1] Petitioner was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Petitioner was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Petitioner in connection with his Georgetown County proceedings.

[2] The PCR court's scheduling orders are attached as Exhibit C.

After being appointed, undersigned counsel immediately began reviewing the record and conducting an independent investigation.[3] On April 1, 2014, counsel filed Applicant's First *Ex Parte* Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion") pursuant to S.C. Code §§ 16-3-26(C)(1) and 17-27-160(B).[4] During the two months between their appointment and filing the First Funding Motion, undersigned counsel: (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors from Stanko's trial; (4) met with Stanko's sister and a friend; and (5) conducted preliminary interviews with Stanko's trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case, undersigned counsel moved for funding to aid in the investigation, development, and presentation of Stanko's claims.[5] Specifically, the First Funding Motion requested the PCR court authorize

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[3] The PCR court initially denied undersigned counsel's *Ex Parte* Motion to Authorize Attorney Fee Rates. Counsel was therefore forced to file a motion for reconsideration, asking the PCR court to authorize attorney rates and hours, which was not ultimately resolved until March 27, 2014.

[4] Respondent has moved to unseal the *ex parte* pleadings and orders and Petitioner has opposed that request. If this Court deems it necessary to review the *ex parte* pleadings and orders referenced in this Petition, Petitioner will be happy to provide them under seal.

[5] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

funding for a fact investigator, a mitigation investigator, and a forensic psychologist. In support of each of these funding requests, Petitioner provided specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant."[6] *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant").

On April 29, 2014, the PCR Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness . . . " because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist.[7] *See* Applicant's *Ex Parte* Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("First Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to

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First Funding Motion 6-7 (Apr. 1, 2014).

[6] The facts in support of Petitioner's requests were set forth in his *ex parte* funding motion in accordance with S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B).

[7] This motion was likewise filed *ex parte* as permitted by South Carolina law.

reconsider, counsel: (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and, (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. Counsel sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts. Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the PCR court denied all funding requested for a forensic psychologist. The court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel: (1) completed interviews with the remainder of Stanko's trial counsel; (2) continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's social history and records regarding trial counsel's preparations. On July 28, 2014, counsel presented the PCR court with additional facts supporting the need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested funding for the services of a licensed social worker and for a media expert. In support of these funding requests, Stanko presented the Court with specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Approximately two months later, on September 25, 2014, the PCR court denied the requested funds for a licensed social worker and a media expert, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *See* Order Denying Applicant's Second Motion To Authorize Funding for Expert Services (Sept. 25, 2014). The court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Petitioner filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In the Second Motion to Reconsider, Petitioner argued the PCR court misconstrued the funding standard set forth in S.C. Code § 16-3-26(C)(1) by finding the necessity of expert assistance cannot

be determined because Stanko could not present the Court with the conclusions the experts will reach. Petitioner argued the standard used by the Court is not only inconsistent with the relevant statutory language, but it is also at odds with capital post-conviction practice in this state; no other South Carolina Circuit Judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude.

On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the PCR court order Petitioner transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the PCR court sent counsel an email canceling the *ex parte* hearing, informing Petitioner the court would decide the Second Motion to Reconsider without oral arguments, and ordering Petitioner to file an *ex parte* brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Petitioner's Motion for Order of Transport.

On January 6, 2015, Petitioner filed a brief in support of his Second Motion to Reconsider. On the same day, based on the PCR court's denial of expert funding and failure to rule on Petitioner's Second Motion to Reconsider, Petitioner filed a Motion for Continuance and asked for a hearing on the continuance motion in the PCR court. *See* Exhibit D. In response, Respondent filed a Motion to Unseal *Ex Parte* Funding Requests and Orders Regarding the Same ("Motion to Unseal"). *See* Exhibit E. Petitioner filed a Return in Opposition to Respondent's Motion to Unseal on January 14, 2015. *See* Exhibit E. As of the filing of this Petition, the Circuit Court has not ruled on the Second Motion to Reconsider, the Motion for Continuance, or the State's Motion to Unseal. Petitioner, therefore, has no funding for expert assistance in preparation for a hearing on the merits of his PCR application, currently scheduled to begin on March 2, 2015.

## III. LEGAL BASIS FOR GRANTING EXPERT FUNDING AND CONTINUANCE

Expert assistance of a capital post-conviction relief applicant is authorized in South Carolina when such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B). The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

The South Carolina PCR statute explicitly authorizes a court to continue the hearing in this case when "good cause is shown to justify a continuance." S.C. Code § 17-27-160(C). Generally, a hearing on a capital PCR application "must be scheduled within one hundred eighty days from the date of the status conference" held after the filing of the State's return. *Id.* However, the statute

authorizes the PCR court to grant a continuance of the hearing beyond 180 days after the status conference where "good cause is shown." *Id.*

## IV. ARGUMENT

***Funding Standard***

Undersigned counsel are in an impossible (and unprecedented) bind. The PCR court has denied requests for funding for necessary expert assistance on the basis that Petitioner cannot provide the court with the conclusions the experts will reach. This is not only inconsistent with the relevant statutory language, but it is also at odds with more than twenty years of capital post-conviction practice in this state; no other judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude. The statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services prior to the court's authorization of funds. In counsel's experience, and in the experience of other practiced capital post-conviction attorneys in South Carolina, no court in the state has ever made authorization of funds for investigative and expert services contingent on a beneficial result obtaining or even on the services resulting in a claim being presented to the court. *See* Norris Aff. ¶ 7; Bloom Aff. ¶ 5; Holt Aff. ¶ 4.[8] Instead, courts have required counsel for PCR applicants to simply explain that further investigation or expert evaluation is needed in order to provide representation to the applicant. *See* Norris Aff. ¶ 7, Bloom Aff. ¶ 7.

[8] In addition to other affidavits supporting Petitioner's specific funding requests, with the Second Motion to Reconsider, Petitioner submitted three affidavits from experienced counsel, which are attached to this Petition. The affidavits are attached as Exhibit F.

The standard set forth in the PCR court's orders—requiring a favorable result for the applicant prior to authorizing expert funding—expects that counsel would be able to retain the services of an expert without being able to guarantee their services would be paid for. Essentially, an expert would have to agree to provide their services on the hope that their evaluation would give rise to a winning claim in a PCR action.[9] Such a system is unworkable and would leave capital post-conviction applicants without the service of experts because, generally, experts will not commence work on a case without an order from the court authorizing payment for their services. *See* Norris Aff. ¶ 8.

The PCR court's interpretation of the "reasonably necessary" requirement, therefore, impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). The right to the assistance of counsel when filing an application for post-conviction relief is hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *See Williams*, 618 F.2d at 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft

[9] An expert could not ethically state before doing an evaluation what the evaluation will yield. Any expert who did so would be subject to impeachment on that basis. Additionally, some experts, such as forensic psychologists, cannot ethically provide services under the PCR court's standard which effectively creates a contingent fee arrangement.

1968)). It is the state's duty to "ensure that a defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Bailey*, 309 S.C. at 459, 424 S.E.2d at 506.

The Supreme Court of the United States specifically recognized that the "right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to *research* and present a defendant's habeas claims." *McFarland*, 512 U.S. at 859 (emphasis added). Post-conviction counsel in capital cases "must continue an aggressive investigation of all aspects of the capital case." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1(E)(4). "[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation." *Id.* 10.15.1(E)(4) commentary. Thus, though counsel has no way of knowing at the outset of its post-conviction preparation what claims will ultimately be presented to the court, post-conviction counsel have a duty to investigate the case entirely and often require the assistance of experts to do so. *See id.* 4.1 commentary ("Analyzing and interpreting [evidence in a capital case] is impossible without consulting experts.")

The Supreme Court of the United States has also established that a state court reviewing a state prisoner's federal claims must provide the prisoner with an opportunity to present evidence relevant to the federal claims. *See Coleman v. Alabama*, 377 U.S. 129, 133 (1964). In order to meaningfully access and to provide a fair opportunity to present all relevant evidence, a court must provide adequate funding for investigative and expert services. The Supreme Court has specifically acknowledged that adequate factual development may be impossible without access to expert assistance. *See Panetti v. Quarterman*, 551 U.S. 930, 949–50 (2007) (petitioner, claiming incompetence to be executed in state post-conviction, was entitled to an "opportunity to make an adequate response to evidence solicited by the state court," including an opportunity to submit

psychiatric evidence); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (basic due process requirements included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination"); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (assistance of a psychiatrist was necessary to prepare an effective defense based on the defendant's mental condition).

Undersigned counsel presented facts demonstrating that expert services in this case are reasonably necessary to the PCR court. Nevertheless, the PCR court has consistently misinterpreted the standard for authorizing expert funding set forth in S.C. Code § 16-3-26(C)(1). Undersigned counsel are, therefore, unable to effectively prepare for Petitioner's impending PCR hearing. Because funding for reasonably necessary expert assistance is mandated by state and federal law, judicial economy demands that this Court exercise its supervisory authority in capital PCR cases and order the PCR court to rule on Petitioner's Second Motion to Reconsider applying the proper standard for authorization of expert funding. Without such an order from this Court, the procedures provided by the PCR court are likely to be so defective as to require further proceedings upon appeal and remand of Petitioner's case. Counsel, therefore, request this Court to correct the PCR court's misunderstanding of the statutory standard and order the court to rule on the Second Motion to Reconsider accordingly.

***Continuance***

Undersigned counsel have done everything in their power to attempt to prepare for Petitioner's PCR hearing now-scheduled for March 2, 2015. Nevertheless, a continuance is necessary because the PCR court has continually denied counsel's requests for the assistance of experts, which counsel has demonstrated in multiple funding motions to be reasonably necessary for the representation of Petitioner. S.C. Code § 16-3-26(C)(1). As described in detail above, the

PCR court has done so based on an improper reading of the capital case funding statute. Given the necessity of the assistance of the experts to effectively develop and present Petitioner's claims for relief, the Court's denials have prohibited counsel from preparing for a hearing. *See Williams*, 618 F.2d 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided").

As described above, early on in their investigation in Petitioner's case, counsel identified the need for expert assistance, contacted the experts able to provide the required assistance to determine their willingness and availability to assist on the case,[10] and asked the PCR court to authorize funding for their services. This was all completed in an attempt to prepare for the hearing date scheduled by the PCR court. Counsel then presented the court with specific and detailed reasons necessitating the assistance of a licensed social worker, a forensic psychologist, and a media expert. In spite of the demonstrated necessity of expert services, the PCR court denied two *ex parte* funding requests and a motion to reconsider and has not ruled on counsel's Second Motion to Reconsider, though it was submitted to the Court nearly four months ago. Moreover, although counsel requested an opportunity to be heard at an *ex parte* hearing as permitted by the PCR court's scheduling order, the court canceled the hearing and refused to hear argument on the funding denials. As a result, counsel's hands are tied and they cannot complete preparation for the hearing scheduled in less than one month.

The experts contacted by counsel, who have expressed a willingness to work on Stanko's case, cannot begin working on the case until the PCR court authorizes funding for their services.

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[10] Dr. Arlene Andrews (licensed social worker), Dr. Susan Knight (forensic psychologist), and Professor Neil Vidmar (media expert) have been contacted by counsel, become somewhat familiar with the case, and have expressed their willingness and availability to work on the case.

*See* Andrews Aff. ¶ 8 (stating she cannot complete a social history without authorization of funds by the PCR court); Knight Aff. ¶ 4 (stating she cannot complete a mental health evaluation without authorization of funds by the PCR court and that it would be unethical for her to provide services where her payment was contingent upon assisting in developing a winning claim).[11] Even if the PCR court ruled immediately on the Second Motion to Reconsider, however, counsel could not effectively prepare for a hearing in March of 2015. The experts indicated the required preparation and evaluations in Stanko's case cannot be completed for six to nine months after the Court authorizes funding for their services. Andrews Aff. ¶ 9; Knight Aff. ¶ 6. That the experts cannot complete their services prior to the hearing date as scheduled cannot be held against Petitioner because counsel have worked as diligently as possible to prepare for a hearing, given the denial of funding for experts, and the PCR court has thus far denied Petitioner the expert assistance demonstrated to be reasonably necessary to prepare his defense in contradiction of the capital case funding statute. *See* S.C. Code §§ 16-3-26(C)(1).

Counsel, therefore, cannot prepare for a hearing without the Court's authorization of funding for expert assistance and additional time for the experts to complete their services. Furthermore, during the usual course of investigating and working with the experts in preparation for a hearing, it is likely counsel will uncover additional issues that must be investigated. This will require additional time to request records and investigate as necessary to develop and present Petitioner's claims for relief. Accordingly, Petitioner has shown good cause for a continuance, S.C. Code § 17-27-160(C), and requests this Court order the PCR court to continue the PCR hearing for nine months from the date it rules on the Second Motion to Reconsider. Without such

[11] Both Dr. Andrews and Dr. Knight's affidavits were attached to Petitioner's Motion for Continuance, which is attached to this Petition as Exhibit D.

a continuance, counsel will be unable to effectively prepare for Petitioner's PCR hearing, which will likely require further proceedings upon appeal of the PCR court's ultimate determination. *See Martinez*, 132 S. Ct. 1309 (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded).

## V. CONCLUSION

To allow undersigned counsel to effectively prepare for a hearing on the merits of Petitioner's PCR application and to avoid remand for further proceedings upon appeal of the PCR court's ultimate decision, this Court should order the PCR court to rule on Petitioner's Second Motion to Reconsider, applying the proper standard for authorization of expert funding, and order the PCR court to continue Petitioner's PCR hearing until counsel have an opportunity to prepare for the hearing with the assistance of reasonably necessary experts.

February 3, 2015

Respectfully submitted,

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803-765-1044

LINDSEY S. VANN
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Counsel for Petitioner

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

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Capital PCR Case Number: 2014-CP-26-00035

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STEPHEN C. STANKO, SK 6022.....*Petitioner*,

v.

STATE OF SOUTH CAROLINA.....*Respondent*.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a copy of the Petitioner's Petition for Court Oversight of Capital PCR Action was serve by first class United States mail, postage prepaid, this 3rd day of February, 2015, upon the following:

Anthony Mabry
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

Lindsey S. Vann

# Exhibit A

# The Supreme Court of South Carolina

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appellate Case No. 2010-154746

RECEIVED
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ORDER

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Appellant was convicted of armed robbery and murder. He was sentenced to twenty years in prison for armed robbery and to death by lethal injection for murder. This Court affirmed his convictions and sentence. *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). The United States Supreme Court denied appellant's petition for a writ of certiorari. *Stanko v. South Carolina*, 2013 WL 3465786 (U.S.S.C. Oct. 7, 2013).

Appellant now seeks a stay of execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not oppose the motion.

The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases*.

The Honorable Benjamin H. Culbertson is hereby assigned to the PCR action appellant has filed. Judge Culbertson shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled.

Judge Culbertson shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge Culbertson shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits.

The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under *In re Stays of Execution in Capital Cases, supra*, Judge Culbertson is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

C.J.

FOR THE COURT

Columbia, South Carolina

November 7, 2013

cc:
Robert M. Pachak
John W. McIntosh
J. Anthony Mabry
Alan McCrory Wilson
Robert Michael Dudek
Donald J. Zelenka
John Gregory Hembree
Melanie Huggins-Ward
The Honorable Benjamin H. Culbertson

# Exhibit B

| | |
|---|---|
| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF HORRY** | **IN THE COURT OF** *(Select one.)*<br>☑ **COMMON PLEAS** ☐ **FAMILY COURT**<br>**15th JUDICIAL CIRCUIT** |
| **Stephen C. Stanko, #6022**<br>**Plaintiff(s),**<br>**-vs-**<br>**State of South Carolina,**<br>**Defendant(s).** | **CASE NO.: 2014-CP-26-035**<br>**APPOINTMENT OF COUNSEL OR GAL**<br>*(Select one.)*<br>☑ **ORDER**<br>☐ **AMENDED ORDER** |

**TYPE OF CASE/PROCEEDING:** *(Check one.)*

| | | |
|---|---|---|
| ☑ Post-Conviction Relief (PCR)/habeas case | ☐ Adoption | ☐ Juvenile |
| ☐ SVP case | ☐ Custody and/or Visitation | ☐ Abuse and Neglect |
| ☐ Minor Name Change | ☐ Other: | |

It appears that Stephen C. Stanko, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: *(Select only one.)*

☑ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____

☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

☐ court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

☐ Other:

FILED
2014 FEB 11 PM 2:55
JANIE HILLIARD WARD
CLERK OF COURT

Therefore, it is ordered that Emily C. Paavola, hereby is appointed as *(Select one.)*

☐ counsel ☑ lead counsel *(if capital PCR case)* ☐ guardian ad litem

for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☑ *(If Death Penalty PCR Case)* It is further ordered that Lindsey Vann, Esquire, is hereby appointed as second counsel in this capital PCR case.

**(See attached affidavits of qualifications and consents to appointment of counsel.)**

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 4th DAY OF February, 2014.

Benjamin H. Culbertson

☑ Circuit Judge ☐ Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

SCCA/267 (03/07)

# Exhibit C

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | CASE NUMBER: 2014-CP-26-035 |
| Stephen C. Stanko, #6022, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | SCHEDULING ORDER |
| | ) | |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to the Order of the South Carolina Supreme Court dated 11/7/2013 and Code of Laws of South Carolina 1976 §17-27-160(C), a status conference was convened in this case on 2/21/2014 at 9:30 a.m. in the chambers of the undersigned judge at the Horry County Judicial Center in Conway, South Carolina. Attorneys Emily C. Paavola and Lindsey S. Vann appeared on behalf of the petitioner and Assistant Attorney General Anthony Mabry appeared on behalf of the respondent.

Pursuant to the said status conference, the following schedule is hereby set in this case:

1. Petitioner shall file and serve his Initial Amended Application for Post-Conviction Relief, if any, by no later than 5/1/2014. Should petitioner not file an Initial Amended Application for Post-Conviction Relief, petitioner shall be barred from filing any subsequent Amended Application for Post-Conviction Relief without prior order of the court authorizing such filing.

2. Respondent shall file and serve its Return to the Initial Amended Application for Post-Conviction Relief within 30 days of receipt of the amended application. Should Petitioner fail to file and serve an Initial Amended Application for Post-Conviction Relief, then Respondent shall file and serve its Return to the original application in this case by 5/31/2014.

3. The parties shall commence discovery upon the filing of Respondent's Return to Petitioner's original or Amended Application for Post-Conviction Relief.

4. Petitioner shall file and serve his Final Amended Application for Post-Conviction Relief, if any, by 10/1/2014.

5. Respondent shall file and serve its Return to Petitioner's Final Amended Applications for Post-Conviction Relief within 30 days of receipt of the amended application.

6. The parties shall complete discovery by 11/1/2014. Any party desiring discovery shall serve discovery requests and/or notice of depositions within sufficient time to allow the opposing party to comply with the said discovery by 11/1/2014.

7. Any and all pre-trial motions shall be filed with a supporting brief and simultaneously submitted to the undersigned judge and served on opposing counsel. Opposing counsel may file/submit/serve a brief in opposition to the motion within 14 days of receipt of the motion. All pre-trial motions subject to this section shall be decided on briefs without oral arguments unless a party requests a hearing for oral arguments at the time the party files/serves/submits his brief.

8. The merits hearing in this case shall be held on or before 12/1/2014. A "day certain" hearing date shall be scheduled by the undersigned judge upon receipt of the circuit court's schedule for 7/1/2014 through 12/31/2014. The merits hearing in this case is continued beyond the 180-day scheduling requirements set forth in Code §17-27-160(C) for the following good causes:

   a. The Petitioner has an application for post-conviction relief in another capital case pending in another county.

   b. Experience of petitioner's attorneys has shown that a case of this magnitude cannot be investigated, researched and prepared for hearing within 180 days.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

February 21, 2014
Conway, SC

# State of South Carolina
# The Circuit Court of the Fifteenth Judicial Circuit

**Benjamin H. Culbertson**
**Resident Circuit Judge**

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401 Cleland St. (zip code 29440)
Georgetown, South Carolina
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Email: bculbertsonj@sccourts.org

April 29, 2014
Via Email and U.S. Mail Delivery

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Lindsey Vann, Esquire
Death Penalty & Defense Center
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Email: richj@horrycounty.org
psnowden@horrycounty.org

RE: *Stanko v. State* (Case No. 2014-CP-26-035)

Dear Ladies and Gentlemen:

Please find enclosed a copy of the Amended Scheduling Order dated 4/29/2014 in this case. By copy of this letter and enclosure, I am forwarding the original Scheduling Order to the clerk of court for filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc
Enclosure (a/s)
pc: Melanie Huggins-Ward, Clerk of Court

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | CASE NUMBER: 2014-CP-26-035 |
| Stephen C. Stanko, #6022, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | AMENDED SCHEDULING ORDER |
| | ) | |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to the Order of the South Carolina Supreme Court dated 11/7/2013, this case was assigned to the undersigned. As presiding judge, the undersigned issued a Scheduling Order in this case dated February 21, 2014. The court now deems, *sua sponte*, that the Scheduling Order dated February 21, 2014, does not provide adequate time for the parties to prepare for trial and, therefore, should be amended .

NOW, THEREFORE, the following amended schedule is hereby set in this case:

1. Petitioner shall file and serve his Initial Amended Application for Post-Conviction Relief, if any, by no later than 6/16/2014. Should petitioner not file an Initial Amended Application for Post-Conviction Relief, petitioner shall be barred from filing any subsequent Amended Application for Post-Conviction Relief without prior order of the court authorizing such filing.

2. Respondent shall file and serve its Return to the Initial Amended Application for Post-Conviction Relief within 30 days of receipt of the amended application. Should Petitioner fail to file and serve an Initial Amended Application for Post-Conviction Relief, then Respondent shall file and serve its Return to the original application in this case by 7/16/2014.

3. The parties shall commence discovery upon the filing of Respondent's Return to Petitioner's original or Amended Application for Post-Conviction Relief.

4. Petitioner shall file and serve his Final Amended Application for Post-Conviction Relief, if any, by 10/1/2014.

5. Respondent shall file and serve its Return to Petitioner's Final Amended Applications for Post-Conviction Relief within 30 days of receipt of the amended application.

6. The parties shall complete discovery by 12/15/2014. Any party desiring discovery shall serve discovery requests and/or notice of depositions within sufficient time to allow the opposing party to comply with the said discovery by 12/15/2014.

7. Any and all pre-trial motions shall be filed with a supporting brief and simultaneously submitted to the undersigned judge and served on opposing counsel. Opposing counsel may file/submit/serve a brief in opposition to the motion within 14 days of receipt of the motion. All pre-trial motions subject to this section shall be decided on briefs without oral arguments unless a party requests a hearing for oral arguments at the time the party files/serves/submits his brief.

8. The merits hearing in this case shall be held on or before 2/28/2015. A "day certain" hearing date shall be scheduled by the undersigned judge upon receipt of the circuit court's schedule for 1/1/2015 through 6/30/2015. The merits hearing in this case is continued beyond the 180-day scheduling requirements set forth in Code §17-27-160(C) for the following good causes:

   a. The Petitioner has an application for post-conviction relief in another capital case pending in another county.

   b. Experience of petitioner's attorneys has shown that a case of this magnitude cannot be investigated, researched and prepared for hearing within 180 days.

9. This court's Order For Date Certain Trial dated April 2, 2014, is hereby rescinded and rendered null and void.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

April 29, 2014
Georgetown, SC

# State of South Carolina
# The Circuit Court of the Fifteenth Judicial Circuit

**Benjamin H. Culbertson**
**Resident Circuit Judge**

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September 25, 2014

Via Email and U.S. Mail Delivery

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Lindsey S. Vann, Esquire
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Jimmy A. Richardson, Solicitor
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Conway, SC 29528

Email: richj@horrycounty.org
psnowden@horrycounty.org

RE: *Stephen C. Stanko, #6022 v. State of South Carolina*
Case Number: 2014-CP-26-035

Dear Ladies and Gentlemen:

Please find enclosed a copy of the *Order For Date Certain Trial And Second Amended Scheduling Order* in the above referenced case. As you can see from the order, the trial of this case is set to commence on 3/2/2015 and the deadline for completing discovery is extended until 1/31/2015. All other mandates of the prior scheduling order remain in effect.

Under copy of this letter, I am forwarding the original order to the Clerk of Court for filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc
Enclosures (a/s)
pc: Hon. Larry B. Hyman, Administrative Judge for Common Pleas, 15th Judicial Circuit
Hon. Steven H. John, Circuit Court Judge
Hon. Melanie Huggins-Ward, Horry County Clerk of Court

Stephen C. Stanko, #6022
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CASE NUMBER: 2014-CP-26-035 |
| Stephen C. Stanko, #6022,<br><br>Petitioner,<br><br>vs.<br><br>State of South Carolina,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | ORDER FOR DATE CERTAIN TRIAL AND SECOND AMENDED SCHEDULING ORDER |

Pursuant to the Order of the South Carolina Supreme Court dated 11/7/2013, this case for post-conviction relief is assigned to the undersigned.

NOW, THEREFORE, as the presiding judge in this case, it is hereby

ORDERED, that the trial of this case is set to commence at 9:30 a.m. on March 2, 2015, in the Horry County Judicial Complex in Conway, SC; it is further

ORDERED, that the parties shall complete discovery by 1/31/2015; it is further

ORDERED, that the Amended Scheduling Order in this case dated 4/29/2014 is amended to reflect the scheduling changes set forth hereinabove; it is further

ORDERED, that all other mandates of the Amended Scheduling Order in this case dated 4/29/2014 not affected by this order shall remain the order of this court.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

September 25, 2014
Georgetown, SC

# Exhibit D

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF HORRY | ) | FIFTEENTH JUDICIAL CIRCUIT |
| Stephen C. Stanko, #6022, | ) | |
| | ) | Case No. 2014-CP-26-035 |
| Applicant, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |

HORRY COUNTY
2015 JAN -8 PM 1:51
MELANIE HUGGINS-WARD
CLERK OF COURT

**APPLICANT'S MOTION FOR CONTINUANCE**

Applicant Stephen C. Stanko, through undersigned counsel, respectfully moves for a continuance of the PCR merits hearing because the Court's blanket denial of all funding requests for reasonably necessary expert assistance has crippled counsel's ability to provide applicant with adequate post-conviction representation.

This Court scheduled a hearing on the merits of Stanko's post-conviction relief claims to begin on March 2, 2015. The Court also set a deadline for the completion of discovery for January 31, 2015. Despite undersigned counsel's diligent work since being appointed, counsel will be unable to prepare for a hearing by March 2, 2015 because the Court has denied all funding requests for expert services. Without expert assistance, Stanko cannot effectively prepare for a hearing on his claims. Stanko, therefore, respectfully requests this Court continue the hearing in this case for nine months from the date the Court rules on Stanko's October 14, 2014 *Ex parte* Motion to Reconsider Denial of Funding for Expert and Investigative Services, and to adjust the deadline for

completing discovery accordingly.[1] Stanko further requests a hearing with oral argument on this motion as permitted by the Court's April 29, 2014 scheduling order.

The legal and factual bases for this motion are set forth below.

## I. PROCEDURAL HISTORY

Stanko was convicted and sentenced to death by an Horry County jury in connection with the April 8, 2005 murder and armed robbery of Henry Turner.[2] *State v. Stanko*, 402 S.C. 252, 258, 741 S.E.2d 708, 711 (2013). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Stanko subsequently moved for a stay of execution in order to pursue post-conviction relief. The Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. Order, *State v. Stanko*, No. 2010-154746 (S.C. Nov. 7, 2013). This Court appointed undersigned counsel to represent Stanko on February 4, 2014.

On February 21, 2014, this Court entered a Scheduling Order in this post-conviction relief proceeding, scheduling a merits hearing for December of 2014. Scheduling Order (Feb. 21, 2014). The Court subsequently, on April 29, 2014, amended the Scheduling Order to tentatively schedule a merits hearing for February of 2015. Amended Scheduling Order (Apr. 29, 2014). On September 25, 2014, the Court set a date certain for the merits hearing, scheduling the trial in this post-conviction relief proceeding to commence on March 2, 2015 and ordering the discovery be

[1] Counsel request a nine month continuance because the experts they consulted indicate six to nine months is the minimum amount of time it will take to prepare for a hearing on Stanko's claims.

[2] Stanko was also convicted of murder and other charges in Georgetown County in connection with the April 7, 2005 murder of Laura Ling and sexual assault of Ms. Ling's teenage daughter. Stanko was sentenced to death for the murder of Laura Ling on August 18, 2006. *See State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008). The Georgetown County convictions and sentence are currently the subject of a post-conviction relief proceeding in Georgetown County. Undersigned counsel do not represent Stanko in connection with his Georgetown County proceedings.

completed by January 31, 2015. Order for Date Certain Trial and Second Amended Scheduling Order (Sept. 25, 2014).

After being appointed, undersigned counsel immediately began reviewing the record and conducting an independent investigation. On April 1, 2014, counsel filed Applicant's First Motion to Authorize Funding for Expert and Investigative Services ("First Funding Motion") pursuant to S.C. Code §§ 16-3-26(C)(1) and 17-27-160(B). During the two months between their appointment and filing the First Funding Motion, undersigned counsel: (1) spent approximately 85 hours, combined, reviewing the records from Stanko's trials, the court exhibits, and trial counsel's files; (2) interviewed the client four times; (3) interviewed the jurors from Stanko's trial; (4) met with Stanko's sister and a friend; and (5) conducted preliminary interviews with Stanko's trial counsel and the mitigation investigator for the Georgetown County trial. After conducting this preliminary investigation and recognizing that a hearing then-scheduled for December created an expedited timeline for investigating a post-conviction capital case, undersigned counsel moved for funding to aid in the investigation, development, and presentation of Stanko's claims.[3] Specifically, the First Funding Motion requested the Court authorize funding for a fact investigator, a mitigation investigator, and a forensic psychologist. In support of each of these funding requests, Stanko

[3] In the First Funding Motion, counsel noted:

> [T]he scheduling order entered in this case is, in counsel's experience, extraordinarily short. Apart from this matter, Ms. Paavola has served as post-conviction counsel in seven capital post-conviction relief cases in South Carolina and has never previously been to hearing in such a short period of time. In order for counsel to have even a fighting chance of adequately preparing Mr. Stanko's claims for an evidentiary hearing under the current scheduling order, the immediate, competent, and adequately funded assistance of investigators and experts is essential.

First Funding Motion 6-7 (Apr. 1, 2014).

provided specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant."[4] *See* S.C. Code § 17-27-160(B) (incorporating the funding provisions of S.C. Code § 16-3-26 which provides that the court shall order the payment of fees and expenses "[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant").

On April 29, 2014, this Court granted funding for the requested mitigation investigator, but denied funding for a fact investigator and a forensic psychologist. The Court denied funding for a forensic psychologist "without more substantial indications that the Applicant suffers a mental illness . . . " because trial counsel presented testimony from seven experts in support of their insanity defense, and because the Court "assume[d] that none of the seven experts testifying on the Applicant's behalf during his criminal trial were of the opinion the Applicant suffered a mental illness other than being a psychopath." Order Authorizing Funding for Expert and Investigative Services (Apr. 29, 2014).

The next week, on May 8, 2014, counsel moved for reconsideration of the Court's denial of funding for the fact investigator and the forensic psychologist.[5] *See* Applicant's *Ex Parte* Motion to Reconsider Order Authorizing Funding for Expert and Investigative Services ("First Motion to Reconsider") (May 8, 2014). Between the filing of the first funding motion and the motion to reconsider, counsel: (1) completed their review of trial and appellate counsel and expert files; (2) interviewed the trial fact and mitigation investigators; (3) interviewed trial counsel Brana Williams; and, (4) interviewed Dr. Joseph Wu, who testified at Stanko's trials. Counsel sought reconsideration of the denial of funding for a forensic psychologist, stating that while counsel

[4] The facts in support of Stanko's requests are set forth in his *ex parte* funding motion in accordance with S.C. Code Ann. §§ 16-3-26(C), 17-27-160(B).

[5] This motion was likewise filed *ex parte* as permitted by South Carolina law.

could not point to a specific mental health diagnosis at this time, their inability to do so was due to the fact that they themselves are not mental health experts. Given the limited nature of trial counsel's mental health and mitigation investigation in preparation for trial, counsel asserted that funding for a forensic psychologist in Stanko's proceedings was neither duplicative nor without legal purpose and was necessary to complete the life history and mental health investigation trial counsel failed to conduct.

On June 3, 2014, the Court denied all funding requested for a forensic psychologist. The Court reasoned that "nothing before the court indicates that trial counsel's theory was incorrect or that a forensic psychologist will produce any evidence in support of Stanko's claims for post-conviction relief." Order Partially Granting Applicant's Motion to Reconsider 7 (June 3, 2014). The Court further stated that "the necessity of a forensic psychologist in this PCR action cannot be determined until the forensic psychologist completes a mental health examination of Sanko." *Id.* In denying funding for a forensic psychologist, the Court stated the standard for authorizing funds as follows:

> The statute does not authorize funding for services which cannot be deemed reasonably necessary to the applicant's representation until after the services are performed and a beneficial result obtained. In other words, the court cannot authorize funding for expert, investigative or other services simply to determine if the criminal trial counsel "missed something" without anything to support a finding that the "something" existed in the first place.

Order Partially Granting Applicant's Motion to Reconsider 8.

Despite the lack of funding for expert services, counsel continued to diligently investigate Stanko's case. Counsel: (1) completed interviews with the remainder of Stanko's trial counsel; (2) continued interviewing lay witnesses in conjunction with the mitigation investigator; (3) continued meeting with Stanko to develop a social history; (4) interviewed Stanko's sister and contacted his other siblings; and (5) analyzed and summarized information from records related to Stanko's

social history and records regarding trial counsel's preparations. On July 28, 2014, counsel presented the Court with additional facts supporting their need for expert funding in Applicant's *Ex Parte* Second Motion to Authorize Funding for Expert Services ("Second Funding Motion"). Specifically, counsel requested funding for the services of a licensed social worker and for a media expert. In support of these funding requests, Stanko presented the Court with specific and detailed reasons demonstrating the expert services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B).

Approximately two months later, on September 25, 2014, the Court denied the requested funds for a licensed social worker and a media expert, stating "the necessity of a licensed social worker and a media expert in this PCR action cannot be determined until after they have completed their investigations." *See* Order Denying Applicant's Second Motion To Authorize Funding for Expert Services (Sept. 25, 2014). The Court relied on the same standard for determining reasonable necessity as it did in the denial of the motion to reconsider funding for a forensic psychologist.

On October 14, 2014, Stanko filed an *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for a Hearing ("Second Motion to Reconsider"). In the Second Motion to Reconsider, Stanko argued the Court misconstrued the funding standard set forth in S.C. Code § 16-3-26(C)(1) by finding the necessity of expert assistance cannot be determined because Stanko could not present the Court with the conclusions the experts will reach. Stanko argued the standard used by the Court is not only inconsistent with the relevant statutory language, but it is also at odds with capital post-conviction practice in this state; no other South Carolina Circuit Judge has ever construed the statute to require conclusive proof of what an expert who has not yet been retained will conclude.

The capital case funding statute permits a court to authorize payment for investigative and expert services where they "are reasonably necessary for the representation of the" applicant. S.C. Code § 16-3-26(C)(1). Nothing in the statute requires the applicant to demonstrate a beneficial result from the investigative or expert services *prior to the court's authorization of funds.* The Court's interpretation of the "reasonably necessary" requirement impedes counsel's ability to provide adequate representation to Stanko as a PCR applicant. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). In light of the merits hearing scheduled for March 2, 2015, Stanko asked the Court to hold an *ex parte* hearing on the Second Motion to Reconsider as soon as possible.

On December 11, 2014, the Court sent undersigned counsel a letter scheduling an *ex parte* hearing on the Second Motion to Reconsider for January 6, 2015. Counsel then filed an *Ex Parte* Motion for Order of Transport, requesting the Court order Stanko transported to the hearing due to the importance of the funding decision to counsel's ability to prepare for the merits hearing in his case. On December 22, 2014, the Court sent counsel an email canceling the *ex parte* hearing, informing Stanko the Court would decide the Second Motion to Reconsider without oral arguments, and ordering Stanko to file an *ex parte* brief in support of the motion by January 6, 2015. On December 29, 2014, the Court denied Stanko's Motion for Order of Transport. The Court has, thus, not ruled on Stanko's Second Motion to Reconsider and, as of the filing of this motion, Stanko does not have funding for the assistance of any expert in preparing his application for post-conviction relief or for the hearing scheduled for March 2, 2015.

## II. LEGAL BASIS FOR GRANTING A CONTINUANCE.

The South Carolina post-conviction relief statute explicitly authorizes this Court to continue the hearing in this case when "good cause is shown to justify a continuance." S.C. Code § 17-27-160(C). The statute does not set a limit for the amount of time the Court can continue the hearing. The statute requires only that the Court find good cause for the continuance granted.

Expert assistance of a capital post-conviction relief applicant is authorized in South Carolina when such services are "reasonably necessary for the representation of the defendant." *See* S.C. Code §§ 16-3-26(C)(1), 17-27-160(B). The right to file an application for post-conviction relief, and the right to the assistance of counsel when doing so, are hollow in the absence of the concomitant right of an indigent applicant to receive funding for expert and investigative services where appropriate. *Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided") (citing ABA Standards, Providing Defense Services, commentary, 22-23 (App. Draft 1968)). The state is required to "provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Namely, it is the state's duty to "ensure that the defendant has . . . [funding for] the services of experts necessary to a meaningful defense." *Id.* This duty extends to the post-conviction context as well. Indeed, the United States Supreme Court specifically recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

## III. ARGUMENT

Undersigned counsel have done everything in their power to attempt to prepare for Stanko's post-conviction relief hearing now-scheduled for March 2, 2015. Nevertheless, a continuance is necessary because the Court has continually denied counsel's requests for the assistance of experts, which counsel has demonstrated in multiple funding motions to be reasonably necessary for the representation of Stanko. S.C. Code § 16-3-26(C)(1). The Court has done so based on an improper reading of the capital case funding statute, finding that the necessity of expert assistance can only be determined after the expert services have been completed and result in a favorable outcome for the applicant.[6] Given the necessity of the assistance of the experts to effectively develop and present Stanko's claims for relief, the Court's denials have prohibited counsel from preparing for a hearing. *See Williams*, 618 F.2d 1025 (explaining that "[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires . . . the services of a[n] . . . expert and no such services are provided").

As described above, early on in their investigation in Stanko's case, counsel identified the need for expert assistance, contacted the experts able to provide the required assistance to determine their willingness and availability to assist on the case,[7] and asked the Court to authorize funding for their services. This was all completed in an attempt to prepare for the hearing date scheduled by this Court. Counsel then presented the Court with specific and detailed reasons necessitating the assistance of a licensed social worker, a forensic psychologist, and a media

[6] Due to the Court's denial of funding requests based on this standard, it would be futile for Stanko to request the services of any other experts that might assist in preparing and presenting his claims for relief.

[7] Dr. Arlene Andrews (licensed social worker), Dr. Susan Knight (forensic psychologist), and Professor Neil Vidmar (media expert) have been contacted by counsel, become somewhat familiar with the case, and have expressed their willingness and availability to work on the case. *See* Andrews Aff. ¶¶ 3, 5, *attached*; Knight Aff. ¶ 3, *attached*.

expert. In spite of the demonstrated necessity of expert services, the Court denied two *ex parte* funding requests and a motion to reconsider and has not ruled on counsel's Second Motion to Reconsider, though it was submitted to the Court over two months ago. Moreover, although counsel requested an opportunity to be heard at an *ex parte* hearing as permitted by the Court's scheduling order, the Court has now canceled the hearing and refused to hear argument on the funding denials. As a result, counsel's hands are tied and they cannot complete preparation for the hearing scheduled in less than two months.

The experts contacted by counsel, who have expressed a willingness to work on Stanko's case, cannot begin working on the case until this Court authorizes funding for their services. *See* Andrews Aff. ¶ 8 (stating she cannot complete a social history without authorization of funds by this Court); Knight Aff. ¶ 4 (stating she cannot complete a mental health evaluation without authorization of funds by this Court and that it would be unethical for her to provide services where her payment was contingent upon assisting in developing a winning claim). Even if the Court ruled immediately on the Second Motion to Reconsider, however, counsel could not effectively prepare for a hearing in March of 2015. The experts indicated the required preparation and evaluations in Stanko's case cannot be completed for six to nine months after the Court authorizes funding for their services. Andrews Aff. ¶ 9; Knight Aff. ¶ 6. That the experts cannot complete their services prior to the hearing date as scheduled cannot be held against Stanko because counsel have worked as diligently as possible to prepare for a hearing, given the denial of funding for experts, and this Court has thus far denied Stanko the expert assistance demonstrated to be reasonably necessary to prepare his defense in contradiction of the capital case funding statute. *See* S.C. Code §§ 16-3-26(C)(1).

Counsel, therefore, cannot prepare for a hearing without the Court's authorization of funding for expert assistance and additional time for the experts to complete their services. Furthermore, during the usual course of investigating and working with the experts in preparation for a hearing, it is likely counsel will uncover additional issues that must be investigated. This will require additional time to request records and investigate as necessary to develop and present Stanko's claims for relief. Accordingly, Stanko has shown good cause for a continuance, S.C. Code § 17-27-160(C), and requests this Court continue the post-conviction relief hearing for nine months from the date it rules on the Second Motion to Reconsider and adjust the discovery deadline accordingly.

## CONCLUSION

Wherefore, based on the above statements of facts and arguments, undersigned counsel respectfully request this Court find good cause shown and continue the post-conviction relief hearing, currently scheduled for March 2, 2015, for nine months from the date it rules on Stanko's Second Motion to Reconsider and to adjust the discovery deadline accordingly. Counsel further requests this Court schedule a hearing for oral argument on this Motion for a Continuance as soon as practicable.

January 6, 2015

Respectfully submitted,

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STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

AFFIDAVIT

Arlene Bowers Andrews, PhD, who appeared personally before me, affirms and states the following:

1. I, Arlene Andrews, am a Licensed Social Worker, have a PhD in psychology, and am a retired professor of social work.

2. I have been retained to evaluate and present a social history in approximately fifteen (15) capital cases at the trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on June 25, 2014 about evaluating and presenting Mr. Stanko's social history in his Horry County post-conviction relief proceedings.

4. I would typically not begin working on a capital case without a funding order from the Court authorizing payment for my services. However, I have worked with Ms. Paavola before, and she explained to me that Mr. Stanko's case was scheduled for hearing within a relatively short period of time and she was concerned about waiting to get started while the motion for funding remained pending. Therefore, I began working on Mr. Stanko's case prior to receiving an order from the Court authorizing funding for my services. I cannot, however, continue my social history evaluation or present my findings to the Court without an order authorizing payment for my services.

5. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client.

6. Since being contacted by Mr. Stanko's attorneys, I have reviewed the trial record to determine what social history evaluation had already been completed; I have reviewed social history records already collected by counsel and the mitigation investigator; I met and interviewed Mr. Stanko; and, I interviewed Mr. Stanko's brother.

7. Based on my preliminary evaluation, it is clear to me that a grossly inadequate social history was presented during Mr. Stanko's trial. My initial work has begun to reveal a compelling and mitigating social history story. Based on this initial review and my experience in other capital cases, I believe it is possible that an adequate investigation in Mr. Stanko's case could reveal mitigating evidence of physical abuse, sexual abuse, parental neglect and abandonment, and/or mental illness.

8. A significant amount of work remains to complete and present my social history evaluation. I must: (1) interview Mr. Stanko several more times; (2) interview Mr.

Stanko's two remaining living siblings and other family members; (3) interview Mr. Stanko's friends from childhood and leading up to his crimes; (4) review the social history records counsel are continuing to collect; (5) conduct any additional work that may develop as the investigation progresses; and (6) prepare my opinion for presentation to the Court. This is work that cannot be completed without authorization of funds from the Court.

9. The work that remains will take approximately six (6) to nine (9) months to complete once the Court authorizes funding. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. My social history evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation. Additionally, I am currently preparing for a hearing on a case in Aiken County, which will not allow me to continue my work on Mr. Stanko's case until February 15, 2015.

10. I believe Mr. Stanko's social history is likely to provide powerful mitigating evidence, but without the authorization of funds from the Court and a continuance of the hearing, I cannot complete the social history evaluation or aid counsel in their presentation of Mr. Stanko's social history at a hearing.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

Arlene Bowers Andrews
ARLENE BOWERS ANDREWS

Sworn to and subscribed before me
This 14th day of January, 2015

Jill R. Rider
Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

AFFIDAVIT

Susan Knight, PhD, ABPP, who appeared personally before me, affirms and states the following:

1. I, Susan Knight, am a clinical psychologist with specialization and board-certification in forensic psychology. I am currently employed full-time in private practice conducting forensic psychological evaluations for various legal and organizational entities. I am also a Clinical Assistant Professor in Psychiatry and Behavioral Sciences at the Medical University of South Carolina, and hold adjunct professor positions at the Charleston School of Law and the Cornell Law School.

2. Over the course of my career, I have conducted hundreds of court-ordered forensic evaluations of criminal defendants, as well as many privately retained evaluations. These evaluations have primarily addressed the psycho-legal issues of legal competencies, mental state at the time of offense, and sentencing/mitigation considerations. Further, I have been retained for consultation and/or to conduct a mental health evaluation in approximately nine capital cases at the pre-trial and post-conviction levels in South Carolina.

3. Stephen Stanko's attorneys contacted me on March 25, 2014 about conducting and presenting a mental health evaluation of Mr. Stanko for his Horry County post-conviction relief proceedings. I am available and willing to work on the case, but cannot begin doing so until the Court authorizes funding for my services.

4. I have never been retained in a case where payment for my services was contingent on the information I uncovered and developed being used as the basis for a claim in a case or on a favorable outcome being obtained for the client. Further, per guidelines governing conduct for my profession, such contingent fees are considered a "threat to impartiality" and therefore "forensic practitioners strive to avoid providing professional services on the basis of contingent fees" (Specialty Guidelines for Forensic Psychology, 2013, p. 12). Therefore, in keeping with ethical practice standards, I would not be able to accept a case under such conditions.

5. In order to complete my evaluation, I must: (1) review the trial transcript; (2) conduct comprehensive interviews with Mr. Stanko on multiple occasions; (3) interview collateral sources, including Mr. Stanko's siblings, other family members, and friends from childhood and the time leading up to his crimes; (4) review the mental health and social history records counsel have collected; (5) conduct any additional work that may develop as the evaluation progresses; and (6) prepare my opinion for presentation to the Court, which would likely include an extensive and detailed report of my findings. This is work that cannot be completed without authorization of funds from the Court.

6. Once the Court authorizes funding for a mental health evaluation, the evaluation will take approximately six (6) months to complete. I have been informed by Mr. Stanko's counsel that a hearing in his case is scheduled to begin on March 2, 2015. A mental health evaluation cannot be completed by that time because, as of this date, the Court has not yet authorized funding for the evaluation.

7. Without the authorization of funds from the Court and a continuance of the hearing, I cannot complete a mental health evaluation or aid counsel in their presentation of Mr. Stanko's post-conviction claims.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

SUSAN KNIGHT

Sworn to and subscribed before me
This 5th day of January, 2015

Notary Public for the State of South Carolina
My commission expires: My Commission Expires May 9, 2017

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|---|---|
| STATE OF SOUTH CAROLINA ) | |
| ) | |
| COUNTY OF HORRY ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Stephen C. Stanko, #6022, ) | |
| ) | |
| Applicant, ) | Case No. 2014-CP-26-03 |
| ) | |
| vs. ) | |
| ) | CERTIFICATE OF SERVICE |
| State of South Carolina, ) | |
| ) | |
| Respondent. ) | |
| ) | |

HORRY COUNTY
2015 JAN -8 P 1:51
MELANIE CUNNINGHAM-WARD
CLERK OF COURT

The undersigned certifies that a copy of the Applicant's Motion for Continuance was mailed today by first class United States mail, postage prepaid, this 6th day of January, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

# Exhibit E

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | |
| COUNTY OF HORRY ) | FIFTEENTH JUDICIAL CIRCUIT |
| ) | |
| Stephen C. Stanko, #6022, ) | Case No. 2014-CP-26-035 |
| ) | |
| Applicant, ) | **MOTION TO UNSEAL EX PARTE FUNDING REQUESTS AND ORDERS REGARDING THE SAME** |
| ) | |
| vs. ) | |
| ) | |
| State of South Carolina, ) | |
| ) | |
| Respondent. ) | |
| ) | |

This is a capital post-conviction relief action in which the Applicant has moved for a continuance of the March 2, 2015 trial date based on this Court's alleged denial of all *ex parte* funding requests. Respondent, through the undersigned attorneys, moves this Court to issue an Order unsealing any and all *ex parte* funding requests and Orders regarding the same so that Respondent may adequately and properly respond to Applicant's continuance motion whether in writing or at a scheduled hearing on said motion. Respondent has no knowledge of these *ex parte* matters except for the limited information set forth in Applicant's Motion for Continuance. Respondent does not know the validity of Applicant's assertions in his Motion or the basis of this Court's denial of such alleged funding requests.

There is no statutory or a constitutional right to be heard on funding requests *ex parte*[1] and *in camera*[2] in this setting. Respondent acknowledges, however, the right of the Court to

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1 "A 'judicial proceeding ... taken ... for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.'" *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 297(5th ed. 1983)).

2 "An *in camera* proceeding ... is a 'trial or hearing held in a place not open to the public...'." *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law

determine that matters may be held *ex parte* under certain discrete circumstances as authorized under the Code of Judicial Conduct. Such circumstances, however, are exceptions to the rule and blanket exceptions are not contemplated. In support of this position, Respondent would respectfully show the Court:

1. There is no statutory right to *ex parte* proceedings regarding funding in capital post-conviction relief actions. PCR applicants typically argue there is a statutory right by virtue of Section 17-27-160, which they argue incorporates all the funding provisions of § 16-3-26, including the provisions for funding investigative, expert and other services. They are incorrect. There is no such express provision in the language of the statute. *Accord Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682 (1996).

The references to Section 16-3-26 are in the second paragraph in Section (B) of S.C. Code § 17-27-160. That provision addresses the appointment, qualification, and compensation of PCR counsel and the compensation of PCR appellate counsel. The first reference is tied specifically to counsel's compensation: "Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel...." S.C. Code § 17-27-160 (B). If that were not so, the provisions of S.C. § 17-3-50 (A) would apply resulting in reduced rates and caps as set therein.[3] There is no specific provision or reference to "investigative, expert, or other services" or the corresponding provision for same in the criminal trial as reflected

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Dictionary at 684 (5th ed. 1983)).

3 It is of no little note that payment of counsel fees are separate and apart from the provision of "investigative, expert, or other service," both in Section 16-3-26 and Section 17-3-50. This is also true of the federal funding provisions. See 18 U.S.C.A. § 3599. However, PCR applicants typically seek to combine the two in order to find statutory support for their position.. This is, of course, contrary to the standard references of the funding as two distinct concerns.

in S.C. Code § 16-3-26(C)(1).[4] The only other reference to Section 16-3-26 is Section 16-3-26 (I), to provide, *again as to the appointment of counsel*, that the prohibition of appointing non-licensed, non-resident attorneys at trial does not apply to the civil proceedings. *See* S.C. Code § 17-27-160 (B). *Ergo*, when read naturally, the reference to Section 16-3-26 in Section 17-27-160 involves the narrow question of counsel's compensation.[5]

To reach an opposite conclusion, one must accept that the whole of Section 16-3-26 is incorporated. This would include incorporation of the reference to the notice of intention to seek death and other specific trial related provisions – clearly not a requirement in post-conviction relief proceedings. Even the reference to the section applicants seek to incorporate, Section 16-3-26 (C)(1), only authorizes "investigative, expert, or other services are reasonably necessary for the representation *of the defendant whether in connection with issues relating to guilt or sentence....*" A "defendant," refers to a "criminal defendant," defined as "one who is accused in a criminal proceeding." Black's Law Dictionary (9th ed. 2009). Applicant is no longer a defendant. *See also* Black's Law Dictionary (9th ed. 2009) (defining defendant generally: "A person sued in a civil proceeding or accused in a criminal proceeding."). In fact, the language of Section 17-27-160 reflects that shift in position in providing that a "defendant" must file an application for relief, but

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4 Section 16-3-26(C)(1) provides for "ex parte proceedings" to determine "that investigative, expert, or other services are reasonably necessary for the representation of the defendant" at the criminal trial.

5 This is also consistent with the express goal of the act: "...to add Section 17-27-160 so as to provide for the manner in which defendants sentenced to death must file applications for post-conviction relief, to provide for the assignment of judges to handle these applications, *to further provide for the appointment and compensation of counsel in these proceedings*, and to provide for other procedural matters including the certain time limitations in these capital post-conviction relief proceedings." 1996 South Carolina Laws Act 448 (H.B. 4469).

after filing, refers to the individual bringing suit as "the applicant." S.C. Code § 17-27-160. *See also* S.C. Code §§ 17-27-40-80 (referencing applicant in non-capital post-conviction relief provisions as of the filing of the application). Further, counsel representing Applicant is not directly raising issues related to guilt or sentence.[6] Rather, the civil action challenging a presumptively valid state judgment is separate and distinct from the criminal proceeding. *See* Rule 71.1 (c), SCRCP ("An application filed under the [Post-Conviction Procedure] Act is an independent civil action which should be separately filed and indexed by the clerk of court."); S.C. Code § 17-27-20 (a)(6) ("... this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.").[7]

In interpreting the statute, "[t]he Court must give clear and unambiguous statutory terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *State v. Cribb*, 310 S.C. 518, 521, 426 S.E.2d 306, 308 (1992). *See also State v. Phillips*, 400 S.C. 460, 734 S.E.2d 650 (2012) (same); *State v. Sweat*, 386 S.C.

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6 PCR applicants' fallback position appears to be that they have been convicted, but these proceedings are merely a continuation of sentencing. To the contrary, Stanko is currently under a presumptively valid judgment. Guilt has been adjudicated and sentenced imposed. This action is filed to challenge the continued custody under this presumptively valid judgment. *See* S.C. Code § 17-27-20 (relief may be sought where a "person who has been convicted of, or sentenced for, a crime" seeks to have his conviction or sentence vacated on grounds other than an allegation of insufficient evidence).

7 Reliance on *Wade v. State*, 348 S.C. 255, 559 S.E.2d 843 (2002), to argue the case is quasi-criminal, (see Motion, p.10), is misplaced. Though the Supreme Court of South Carolina has referred to such as action as "hybrid," it is so only because the criminal conviction and sentence are at issue. The Court has said: "... while a PCR action is hybrid in nature, it generally remains subject to rules and statutes that apply in civil proceedings." *Sutton v. State*, 361 S.C. 644, 606 S.E.2d 779 (2004) (*overruled on other grounds by Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005) (holding "counsel is required to advise an applicant of the right to appellate review of the denial of PCR")).

339, 688 S.E.2d 569 (2010) (same). Thus, the trial provisions referring expressly to a "defendant" cannot be applied in a civil post-conviction relief action. *See also Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682 n. 1 (1996) (noting "Section 16-3-26 (C) applies to the capital trial and not to post-conviction relief proceedings" noting that reference to "defendant" is reserved for a "defendant" in criminal proceedings, not an applicant for post-conviction relief). Consequently, the whole of Section 16-3-26 cannot apply.

In the absence of the incorporated provisions, the more general statutes are controlling for reimbursement for expenses. *See* S.C. Code § 17-3-50 ("Defense of Indigents, General Provisions, Determination of fees for appointed counsel and public defenders; maximum amounts; authorization to exceed maximum; payment for certain services."). If that is so, then *Thames v. State* is applicable and controlling. In *Thames*, the Supreme Court of South Carolina instructed the provision of *ex parte* proceedings in Section 17-3-50 (B) is reserved for funding requests made in preparation for the criminal trial. *Thames*, 325 S.C. at 11, 478 S.E.2d at 682 n. 1. Consequently, Applicant has failed to show a statutory right to *ex parte* proceedings.[8]

2. There is no constitutional right to *ex parte* proceedings in capital post-conviction relief proceedings. As a first point, there is no constitutional right to post-conviction relief proceedings. *See, e.g., United States v. MacCollom*, 426 U.S. 317, 323 (1976) ("The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, see Griffin v. Illinois, 351

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8 Respondent has interpreted the previous motion requests for *ex parte* proceedings to refer specifically to "investigative" or other experts. The provisions for payment of counsel's fees, as discussed above, are treated separately from other expenses of the litigation. In fact, there is no provision at all for *ex parte* hearings on the authorization of counsel's fees. *See* Section 16-3-26; Section 17-3-50 (A) and (C). See also July 6, 2005 Order of the Chief Justice, Re: Ordering Additional Attorney's Fees for Appointed 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.").

U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction."). Again, Applicant is the party bringing the suit in this instance.[9] He bears the burden of proof. *See, e.g. Bennett v. State*, 371 S.C. 198, 638 S.E.2d 673 (2006) (*citing Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998); *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007) (*citing Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Though PCR applicant argue they are still entitled to the array of constitutional and statutory rights of a criminal defendant, they simply is not entitled to those same rights in a civil action as the action itself is definitively different in scope and measure. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) ("Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). *Cf. Fisher v. Baker*, 203 U.S. 174, 181 (1906) ("The proceeding is in habeas corpus, and is a civil, and not a criminal, proceeding."); *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883) ("The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process."). Simply, civil proceedings do not give rise to the constitutional rights afforded a criminal defendant. *See United States v. Baker*, 45 F.3d 837, 843 (4th Cir. 1995) ("the

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9 It is Applicant who is obligated to make the allegations to allow Respondent the opportunity to prepare a defense. Applicant would surely object if the State, in the criminal prosecution, told him only that additional allegations would be forthcoming in addition to the allegations of the indictment. Respondent has prepared both a return and a return to the final application. Respondent has no notice of any specific new claim.

constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a respondent in a commitment hearing" citing the civil nature of the proceedings). Even where a criminal trial right survives, the right is generally limited by the civil nature of the proceedings.

For example, the Fifth Amendment right against self-incrimination survives and can be invoked in any proceeding. However, an individual's failure to answer questions allows for an adverse inference in civil cases. *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976) (noting "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)."). *See also In re Care and Treatment of Canupp*, 380 S.C. 611, 671 S.E.2d 614 (Ct.App. 2008) ("...only a criminal defendant has the right to decline to take the witness stand altogether."). Consequently, the nature of the proceeding controls.

Though PCR applicants have relied upon *Ake v. Oklahoma*, 470 U.S. 68 (1985), the case resolved only that where "a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake* does not speak to collateral proceedings in the least. *See, e.g., Rosado v. Allen*, 482 F.Supp.2d 94, 113 (D.Mass. 2007) ("*Ake v. Oklahoma* ... concerned a defendant's right to have access to a psychiatrist assistant at *trial*, not on post-conviction relief.") (emphasis in original); (*Sanborn v. Commonwealth*, 975 S.W.2d 905, 909-910 (Ky. 1998) ("Ake v. Oklahoma, ... is not a post-conviction case.") (*overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009)); *McGahee v. State*, 885 So.2d 191, 229

(Ala.Crim.App. 2003) (*Ake* not applicable in civil proceeding challenging conviction). Thus, *Ake* is not dispositive.[10]

Whether funding for any particular expert is necessary, however, is not at issue in requests for *ex parte* and *in camera* proceedings. Rather, at issue is how the requests will be heard. Respondent submits for all the foregoing reasons, Applicant has no right to be heard *ex parte*. This position is consistent with funding provisions for federal actions, which, like our state rules, disfavor *ex parte* proceedings.[11]

3. Similarly, there is no right to closed proceedings in regard to funding requests in capital post-conviction relief proceedings. Again, PCR applicants rely on provisions for the criminal trial, so, again, the civil nature of the proceeding undercuts reliance on his reliance upon precedent interpreting same.[12]

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10 It should not be lost that the purpose of *Ake* was to determine when a state must provide access to funds for "psychiatric assistance" for an indigent criminal defendant at trial. *Ake*, 470 U.S. at 77. *Ake* does not resolve access to other experts in other circumstances. Further, the United States Supreme Court has summarily rejected arguments of "constitutional infirmity in the *trial court's* refusal to appoint various experts and investigators" where "the requests were accompanied by no showing as to their reasonableness." *Caldwell v. Mississippi*, 472 U.S. 320. 323 n. 1 (1985) (emphasis added). Thus, there appears to be no basis in *Ake* to argue for unlimited resources for various "experts" at all stages of the proceedings, direct and collateral.

11 "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). *No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.*" 18 U.S.C.A. § 3599 (f) (emphasis added). *See also United States v. Caro*, 442 F.Supp.2d 296, 297 n.1 (W.D.Va. 2006) (noting "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed.").

12 For example, see *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593

Applicant here is in no danger of having to "telegraph to the prosecution the defendants' defense strategy," as he is not the defendant and has no defense strategy. In this civil action, he is *required* to make sufficient allegations for Respondent to investigate and present a defense. *See* S.C. Code § 17-27-40. There is no right to keep known potential issues from Respondent and essentially shorten, (or in some cases eradicate), the opportunity for Respondent to investigate and respond fully. *See generally* S.C. Code § 17-27-130 ("Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation.").[13] He is also *required* to disclose in discovery those documents and things that would go to *either* a claim or defense. *See* Rule 26 (b)(1), SCRCP ("Parties may obtain discovery regarding any matter, not privileged, which is

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(1994), a case which refers to two capital defendants who had not yet stood trial, where the Court found Section 16-3-26(C) provides a "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*." 314 S.C. at 227, 442 S.E.2d at 593, which is clearly the procedure in the criminal trial to which the statute refers. However, as noted above, that section has not been expressly incorporated into the civil proceedings provided for capital PCR actions. But even that statutory funding provision does not allow the trial courts to "close the proceeding," rather, "the trial judge must treat this case like any other which presents the issue of whether it is appropriate to close the proceedings." *Id.* To close the proceedings, the court must find on the record that "there is a substantial probability of prejudice which would result from the publicity, and ... there are no reasonable alternatives to closure which would protect the defendant's right to a fair trial." *Id.* The Supreme Court of South Carolina in *Ex parte Lexington County* based its reasoning that closure for *ex parte* funding requests was warranted *in a criminal trial* on finding a defendant would not be required to disclose his *theory of the defense* but for the fact that he was indigent and had to request funds. 314 S.C. at 228, 442 S.E.2d at 594. That concern is not present here.

13 There is every indication that investigation authorized by discovery available to every other civil litigant would bear not only on funding, but also on preparation.

relevant *to the subject matter involved* in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party..." (emphasis added). He is further required to disclose the names of witnesses and experts who have knowledge of claim or defense. Rule 26 (b)(4)(B).[14] In short, Applicant is required to go by the SCRCP. These full disclosure requirements stand in stark contrast to the defense cloak of secrecy for the criminal trial. The same concerns in *Ex parte Lexington County* are not present here.

4. Respondent recognizes, ethical rules allow *ex parte* communication in certain discrete circumstances. Rule 501, SCACR, Canon 3 (B) (7) (a), Code of Judicial Conduct, provides:

> Where circumstances require, ex parte communication for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

*See also* Rule 407, Rule 3.5 (a) and (b), Rules of Professional Conduct (prohibiting attorneys from ex parte discussions with a judge "unless authorized to do so by law or court order"). The Court may, pursuant to these provisions, allow *ex parte* communication.[15] The party communicating in

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14 No opinion from any consulting expert would be obtained through a mere funding request (in fact, the request presumes one has not yet been hired or an opinion rendered). However, such an opinion must be shared, not due to funding requests but under ordinary rules of discovery, if the expert is not merely "consulted informally, or consulted and not retained and specially employed." Rule 26 (b)(4)(B), SCRCP. See also Rule 33 (b)(6), SCRCP (standard interrogatories requiring disclosure of "names and addresses of any expert witnesses whom the party proposes to use as a witness").

15 Ex *parte* funding requests are neither provided for nor mandated. The better course, and

the absence of an opposing party has heightened ethical duties to provide the court with relevant information. Rule 407, SCACR, Rule 3.3 (d), Rules of Professional Conduct ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.). Such communication, however, is not favored as it is contrary to our adversarial system. Id., comments ("... in any ex parte proceeding ... there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision."). Notably, in Applicant's *ex parte* funding requests, it is unclear if a full recitation of background was

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the only course consistent with the rules and statutes in this jurisdiction, would be to disallow a blanket exception, but reserve the possibility to closed review of sensitive arguments and/or supporting documents. The PCR court could allow (with notice to opposing counsel) narrowly focused *ex parte* communication and review of such documents, much like the review of privileged materials. *Accord State v. Jeff*, 761 So.2d 574 (La.App. 1 Cir. 1999) ("The trial court should first determine, in camera, either on the face of the allegations of the motion or upon taking evidence at an ex parte hearing, whether the defendant would be prejudiced by a disclosure of his defense at a contradictory hearing. If so, then the hearing on expert funding should continue ex parte. If not, then the hearing should be held contradictorily with the District Attorney....") (*quoting State v. Touchet*, 642 So.2d 1213 (La. 1994)) (emphasis in original). Even where originally heard *ex parte*, such matters may be made public at the court's direction in compliment to the general rule that *ex parte* proceedings are disfavored and unnecessary. *See United States v. Caro*, 442 F.Supp.2d 296, 297 (W.D.Va. 2006) (on review of denial of funding request in a capital case: "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed."). *See also Sallie v. Humphrey*, 2011 WL 837168, *2 (M.D.Ga. 2011) ("*Ex parte* requests for payment of fees and expenses under § 3599(f) may not be considered unless Petitioner makes a proper showing of the need for confidentiality."); *Barnett v. Roper*, 2010 WL 1268030, *1 (E.D.Mo. 2010) (noting change from presumption of *ex parte* proceeding to showing need for *ex parte* proceeding in current federal statute).

provided to the PCR judge.[16] Applicant's case is not a new trial. Applicant has previously been represented by counsel, found guilty, and sentenced to death. In short, the case has a history that may not be ignored. Asking this Court for the ability to start completely fresh or simply "expert shop" most likely is unreasonable. *See Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682-683 (1996) (finding no abuse of discretion in denying funding request for another expert: "Petitioner had been examined by two experts prior to trial and the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to warrant the authorization of funds to pay an expert.").[17] For example, a request for a mental health expert in this case should be examined in light of investigation and testing already made. Applicant presented at trial well-credentialed psychiatrists, psychologists, and radiologists or neuro radiologists, who examined Applicant contemporaneous to the proceedings and reviewed multiple records and scans. It would be difficult to fault trial counsel for relying on such experts.

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16 Applicant's assumption, if made, that Respondent would attempt to deny him funding, confuses the purposes of the funding hearing and raises the significant danger that not all relevant facts are being provided to the trial judge tasked with evaluating the reasonableness of the request. The funding request is simply to show a reasonable necessity. Applicant need not disclose findings and opinions unless he intends to call the expert at the evidentiary hearing – a fact readily ascertainable by simply following the SCRCP. *See* Rule 26, SCRCP. Further, in this instance, the arguments and facts he wishes to present outside the presence of the opposing party would be presented *to the fact finder in this action.* Applicant's attempt to put this squarely in funding overlooks the ponderous consideration that the fact finder may be approached with arguments and theories indicating incomplete or incorrect facts in support of a funding request.

17 Even capital defendants at trial are not entitled to unlimited funding. *See, for example, Bailey v. Com.*, 259 Va. 723, 737, 529 S.E.2d 570, 578 (2000) ("We have consistently rejected the contention that defendants, even in capital murder cases, have an indiscriminate entitlement to the assistance of an investigator.") *See also State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009) (*citing* § 16-3-26 (C)(1) (2003); *State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("The matter of authorized funds to capital defendants lies within the sound discretion of the trial" and rest upon a finding "that investigative, expert, or other services are reasonably necessary").

*See Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) ("...counsel had received Dr. Killian's report concluding that Wilson was not mentally ill at the time of the offense. To be reasonably effective, counsel was not required to second-guess the contents of this report."). At any rate, these are the types of facts that the PCR court should have before deciding on funding requests.

For all the above argued reasons, Applicant has failed to show a need for *ex parte* or *in camera* proceedings or that these requests and the Order regarding the same remain sealed.

Furthermore, Applicant has waived any confidentiality by the filing of this Motion for a Continuance, with Applicant's assertion of the history of the funding requests and this Court's actions regarding the same, along with supporting Affidavits without a request that they be under seal. Applicant has made his requests and the Court's reasons for denial of the same, if true, relevant and discoverable.

WHEREFORE, Respondent submits, for all the foregoing reasons, this Court should issue an Order unsealing the *ex parte* funding requests and Orders regarding the same, in order that Respondent may properly respond the Motion for a Continuance, argue the same at the hearing on this Motion, make a proper record for the appellate court, and prepare for trial.

RESPONDENT SO MOVES.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

January 9, 2014.
Columbia, South Carolina.

*counsel of record

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|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY ) | |
| ) | Case No. 2014-CP-26-035 |
| Stephen C. Stanko, #6022, ) | |
| ) | |
| Applicant, ) | (Proof of Service) |
| ) | |
| vs. ) | |
| ) | |
| State of South Carolina, ) | |
| ) | |
| Respondent. ) | |
| ) | |

I, J. Anthony Mabry, certify that I have served Respondent's Motion to Unseal Ex Parte Funding Requests and Orders Regarding the Same on Applicant by depositing one copy to his counsel of record, postage prepaid, addressed as follows:

Emily Paavola
Lindsey Vann
Death Penalty Resource Center
900 Elmwood Avenue, Suite 101
Columbia SC 29201

This 9th day of January, 2015.

ANTHONY MABRY
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY ) FIFTEENTH JUDICIAL CIRCUIT

FILED
HORRY COUNTY
2015 JAN 16 PM 2:34
MELANIE HIGGINS-WARD
CLERK OF COURT

Stephen C. Stanko, #6022, )
Applicant, ) Case No. 2014-CP-26-035
)
vs. )
)
State of South Carolina, ) **RETURN IN OPPOSITION TO RESPONDENT'S MOTION TO UNSEAL *EX PARTE* FUNDING REQUESTS AND ORDERS REGARDING THE SAME**
)
Respondent. )

Undersigned counsel respectfully submit the following response in opposition to Respondent's Motion to Unseal *Ex Parte* Funding Requests and Orders Regarding the Same ("Motion to Unseal"). Respondent asks this Court to issue an order unsealing all *ex parte* funding requests and orders so that Respondent may respond to Applicant's motion for continuance. However, Respondent is not entitled to review the *ex parte* requests and orders, nor has Respondent presented any legitimate need for the documents to be unsealed. This Court should deny Respondent's motion for the reasons that follow.

**I. Applicant is Entitled to *Ex Parte* Proceedings**

Contrary to Respondent's assertion, Applicant is entitled to *ex parte* proceedings for the consideration of his funding requests as a matter of state statute and federal constitutional principles.

**a. S.C. Code § 17-27-160 Expressly Authorizes *Ex Parte* Proceedings**

The plain language of S.C. Code § 17-27-160 expressly authorizes *ex parte* communications in the context of capital post-conviction cases. Section 17-27-160 provides that counsel appointed in post-conviction cases "shall be compensated from the funding provided in

Section 16-3-26 in the same *manner* and rate as appointed trial counsel" (emphasis added). According to § 16-3-26(C)(1), the appropriate manner of payment for investigative and expert services is upon a finding by the court in *ex parte* proceedings that the services are reasonably necessary. Thus, there can be no question that requests for funding for investigative, expert and other services in post-conviction cases must be heard in *ex parte* proceedings in accordance with § 16-3-26(C)(1) as incorporated into § 17-27-160.

Moreover, § 17-27-160 specifically excludes subsection (I) of § 16-3-26, which prohibits the appointment and compensation of out-of-state attorneys in capital trials. There is no reference, however, to any exclusion of the requirement contained in § 16-3-26(C)(1) that funding requests be considered by the Court in *ex parte* proceedings. This is further evidence that the plain language of the statute clearly incorporates the *ex parte* provision of § 16-3-26(C)(1).[1] "When terms which are contained in a statute are clear and unambiguous, the courts are required to apply them according to their literal meaning." *Ex Parte Lexington County*, 314 S.C. 220, 225, 442 S.E.2d 589, 592 (1994). "The terms of a statute are to be given their plain and ordinary meaning without employing subtle or forced construction." *Id.* To the undersigned counsel's knowledge, no court since the enactment of § 17-27-160 has applied the statute to preclude an *ex parte* funding request in a capital, post-conviction proceeding.

The footnote in *Thames v. State*, 325 S.C. 9, 11, n.1, 478 S.E.2d 682, 682, n.1 (1996), is not applicable to this issue. The language in *Thames* is *dicta* in a non-capital case. The *Thames* Court held that a post-conviction relief judge did not abuse his discretion in denying a non-capital petitioner's request for payment of psychiatrist fees after she had already been examined by two

[1] If § 17-27-160 incorporated only § 16-3-26(B) as Respondent argues, there would be no need for the explicit exclusion of § 17-27-160(I) because it would not have been otherwise incorporated by § 17-27-160. The exclusion of subsection (I) thus indicates that the entirety of § 16-3-26 is incorporated into § 17-27-160.

psychiatrists prior to her guilty plea. *Id.* at 11, 478 S.E.2d at 683. Whether such a request should be conducted *ex parte* was not an issue raised by either party in the case. Furthermore, the footnote in *Thames* makes no reference to § 17-26-160 because *Thames* was decided before the statute which controls capital post-conviction proceedings was enacted. Rather, the footnote refers to the specific language of S.C. Code 1967 § 17-3-50(B), which is no longer in effect.

**b. *Ex Parte* Proceedings are Required by Due Process and Equal Protection**

Due Process and Equal Protection require that Applicant's funding requests and this Court's orders regarding those requests remain sealed. The Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (pointing to parole and probation as examples of state-created rights to which there was no "constitutional or inherent right" but which had been accorded protection under the Due Process Clause); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding prisoner's interest as a result of the State having created the right to good time credit "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty.'").

In determining whether a state has created a liberty interest subject to protection under the Due Process Clause, the Court looks to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). "This has meant that to obtain a protectable right 'a person clearly must have more than an abstract desire for it. . . . He must, instead, have a legitimate claim of entitlement to it." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quoting *Roth*, 408 U.S. at 577). In *Kentucky v. Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), the Supreme Court explained that:

> A State creates a liberty interest by establishing "substantive predicates" to govern official decision making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

*Id.* at 462 (citation omitted); *see also Slezak v. Evatt*, 21 F.3d 590, 594 (4th Cir. 1994).

Judicial pronouncements by the Supreme Courts of the United States and of South Carolina make clear that the nature of the right to *ex parte* proceedings to seek expert and investigative services is such that it merits protection under the Due Process Clause. *See Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (holding due process entitles an indigent defendant to the appointment of an expert to assist in his defense whenever "the defendant is able to make an *ex parte* threshold showing" of the need for assistance); *Ex Parte Lexington County*, 314 S.C. 220, 226-27, 442 S.E.2d 589, 593 (1994) (declaring that when the "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*," the state or county "does not have standing to participate in the hearing.").

Here, Applicant has much more than an abstract need or desire for his funding proceedings to remain *ex parte* and sealed. The South Carolina statutes give him a clear claim thereto. Applicant maintains that the proper procedure is that set forth in § 16-3-26(C)(1). That section, on its face, requires *ex parte* proceedings when applicants seeks "investigative, expert, or other services." Because South Carolina chose to accord the right to *ex parte* proceedings to seek expert services in post-conviction proceedings challenging a death sentence, "due process protections are necessary 'to insure the state-created right is not arbitrarily abrogated.'" *Vitek*, 445 U.S. at 488-89 (quoting *Wolff*, 418 U.S. at 557).

Due process and equal protection concerns are also implicated when a person is denied fundamental fairness by the state or treated differently than others based only on indigence:

> "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection" on the other hand, emphasizes disparity in treatment by

> a State between classes of individuals whose situations are arguably indistinguishable.

*Ross*, 417 U.S. at 609. These concerns are heightened in this capital post-conviction process. *See Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) ("Access to equal justice is an even greater interest where the State seeks to impose the penalty of death.").

"[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system."[2] *Ake*, 470 U.S. at 77 (citations omitted). This promise of "an adequate opportunity," however, vanishes if the state, with its nearly unlimited resources to investigate Applicant's case at all phases of litigation, *see Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (S.C. 1992), likewise has access to privileged information only because of Applicant's indigency.[3] As the South Carolina Supreme Court has explained:

> Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

*Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594. In the case of funding requests, *ex parte* procedures are needed to "simply level the playing field between petitioners able to purchase (and thereby not disclose to the opposing side) the usual litigation services – experts, investigators, subpoena-servers – and those forced to request payment of these services from the court." *In re Pruett*, 133 F.3d 275, 279 (4th Cir. 1997).

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[2] Under *Ake*, a defendant is entitled to expert assistance when he is "able to make an *ex parte* threshold showing to the trial court" that such assistance is necessary. 470 U.S. at 82. *Ake* presumes the *ex parte* nature of this showing.

[3] If Applicant were not indigent, he would have the resources to obtain investigative and expert funding without presenting any information about his case to the Court. Thus, the only reason Respondent is able to seek to unseal the information contained in the *ex parte* filings in this case is because Applicant is indigent and was required to present information to the Court in order for it to determine whether the services are reasonably necessary.

Although *Lexington County* and *Ake* address the rights of defendants at trial to *ex parte* proceedings, there is little question that equal protection and due process rights extend to post-conviction proceedings. *See Long v. District Court of Iowa*, 385 U.S. 192 (1966) (finding refusal to provide the transcript of a state habeas corpus proceeding denied equal protection of the laws); *Lane v. Brown*, 372 U.S. 477 (1963) (finding prevention of the right to appeal the denial of a writ of error *coram nobis* due to indigency denied equal protection). Indeed, the Supreme Court of the United States has explicitly held that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny the prisoner equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

Here, allowing the State access to information about Applicant's funding requests or granting the State a voice in the funding decision would violate Due Process as Respondent clearly has an interest in prohibiting Applicant access to expert and investigative services that could lead to success in these proceedings. Due Process would further be violated because Applicant will not be similarly accorded the opportunity to review the State's use of funding for expert and investigative services or the reasons for the State's decision to expend such funds. Moreover, allowing the State information about Applicant's funding requests would violate equal protection because non-indigent PCR applicants would not be similarly required to provide such information to the State.

**c. The State is Not Entitled to Information Within the Funding Requests and Orders Under the Rules of Discovery**

Respondent argues there is no danger of Applicant having to "telegraph to the prosecution the defendants' strategy" because he is required to provide Respondent with the information contained in the funding documents under the discovery rules. This assertion is inaccurate. By Respondent's own admission, the rules of discovery provide access to documents and things that

would go either to a claim or defense and the names of witnesses and experts who have knowledge of a claim or defense – not to strategic information about what expert or investigative services Applicant is considering before it is even known whether these services will bear fruit. Further, in order to apply for funding for investigative and expert services, Applicant may have disclosed to the Court information protected by the attorney-client and work-product privileges. Obviously, the rules of discovery do not entitle the State to such information. Likewise, the rules of discovery do not permit Applicant to know which expert and investigative services the State is contemplating before the hearing and how much funding Respondent plans to allocate to such services.

## II. Respondent Has No Legitimate Basis for Unsealing *Ex Parte* Funding Requests and Orders

Also contrary to Respondent's assertion that it must review the funding requests and orders to adequately respond to Applicant's Motion for Continuance, Respondent has no legitimate basis for unsealing the funding documents. The issue presented by Applicant's motion for a continuance is not whether or not Applicant is entitled to the funding requested. Rather, the issue is whether Applicant is entitled to a continuance given the fact that the Court has not ruled on Applicant's Second *Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service ("Second Motion to Reconsider") filed on October 14, 2014. Applicant filed the Second Motion to Reconsider nearly five months before the scheduled hearing date in an attempt to obtain expert funding in time to adequately prepare for the hearing. As of the filing of this return, the Court has not ruled on Applicant's Second Motion to Reconsider and approximately six weeks remain for Applicant to prepare for the hearing. Even if the Court ruled on the Second Motion to Reconsider, Applicant would not have time to adequately prepare his post-conviction claims for a hearing. Applicant, therefore, requests a continuance.

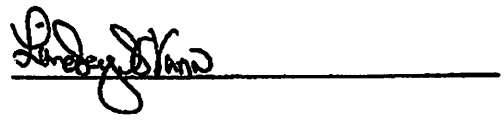
The only reason Respondent would need to review the *ex parte* funding requests and orders would be to weigh in on whether or not Respondent believes Applicant is entitled to the funding requested. As discussed above, Respondent is not entitled to weigh in on the funding decision as a matter of state statute, Due Process, and Equal Protection. Respondent accordingly fails to demonstrate a legitimate basis for the unsealing of the *ex parte* funding motions and orders before this Court.

## CONCLUSION

For the reasons stated above, this Court should deny Respondent's Motion to Unseal and maintain the *ex parte* nature of the funding procedures adopted by the legislature in S.C. Code § 17-3-160(C)(1).

January 14, 2015

Respectfully submitted,



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| STATE OF SOUTH CAROLINA ) | |
| ) | |
| COUNTY OF HORRY ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Stephen C. Stanko, #6022, ) | |
| ) | |
| Applicant, ) | Case No. 2014-CP-26-035 |
| ) | |
| vs. ) | |
| ) | **CERTIFICATE OF SERVICE** |
| State of South Carolina, ) | |
| ) | |
| Respondent. ) | |
| ) | |

The undersigned certifies that a copy of the Applicant's Return in Opposition to Respondent's Motion to Unseal *Ex Parte* Funding Requests and Orders Regarding the Same was mailed today by first class United States mail, postage prepaid, this 14th day of January, 2015, upon the following:

Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

FILED
HORRY COUNTY
2015 JAN 16 PM 2:35
MELANIE HUGGINS-WARD
CLERK OF COURT

# Exhibit F

STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

AFFIDAVIT

Jeffrey P. Bloom, who appeared personally before me, affirms and states the following:

1. I, Jeffrey P. Bloom, am a licensed member of the following Bars: S.C.; N.C.; and N.Y. Currently, I am engaged in the private practice of law and have been so since April 1999. From 1992-1999, I was the Chief Public Defender for Richland County, Columbia, S.C. (This was prior to the establishment by the Legislature of a Circuit Defender system). From 1985-1992, I was with the Horry County Public Defender Office, Conway, S.C., and during that time was the Chief Public Defender for that County from 1988-1992. I also serve in the honorary position of Assistant Clinical Professor of Neuropsychiatry and Behavioral Science with the University of South Carolina School of Medicine, and have so served in that capacity since 1998.

2. I have served as counsel of record in more than 50 capital cases. This includes more than 15 capital jury trials, as well as numerous cases in state capital post-conviction and appeals.

3. Counsel for Stephen C. Stanko have asked me to provide information concerning my experience in obtaining investigative and expert funding in capital post-conviction proceedings in South Carolina.

4. In the capital and non-capital cases I have worked on at the trial and post-conviction levels in South Carolina, I have obtained literally hundreds of orders authorizing funding for investigators and experts to aid in the development of trial or post-conviction claims. At no time was I able to guarantee or establish to the trial or PCR court in advance that the expert or investigator whose professional services I sought to retain through court approval per the statute, would be beneficial to the case or actually be used in the case. The purpose of obtaining approval and payment for such services is to in fact investigate the case, including factual investigation, mental health investigation, and similar avenues.

5. In my experience, I have never had a judge interpret the "reasonably necessary" standard of South Carolina Code § 16-3-26(C)(1) to require demonstration of a beneficial result in order to authorize funding for investigative or expert services. Nor have I known a judge to interpret the standard to require a showing that the information obtained through investigative or expert services will actually be used in the case in order to authorize funding.

6. For example, in both non-capital and capital cases in General Sessions Court and with PCR's in Common Pleas Court, I have had Circuit Court Judges authorize funding for an investigator to assist with the interviewing of witnesses and collection of records, without knowing in advance if I would actually use the witnesses or records in the case. Similarly, I have had Circuit Court Judges

authorize funding in both trial and PCR cases for mental health professionals and/or other experts in both non-capital and capital cases, without knowing in advance if the information or opinion by said professional or expert would be useful to the case.

7. In every capital PCR case I have litigated, I did not know in advance if an investigator or expert would uncover something beneficial for actual use in court. There is no way for an attorney to know what an investigator or expert will discover. The best an attorney can do is explain why he or she believes, based on his or her review and assessment of the facts of the case, that investigative or expert services are needed. It is not uncommon for PCR counsel to invoke trial counsel's failure to investigate as a reasonable basis for funding to conduct the very investigation that trial counsel failed to perform. In fact, this is PCR counsel's very role pursuant to applicable South Carolina and United States Supreme Court precedent in capital jurisprudence, as set forth below and herein.

8. PCR counsel is required to conduct an independent investigation into all issues relevant to guilt or punishment, as well as make an assessment about whether the applicant received ineffective of assistance of counsel at trial. If PCR counsel has reason to believe that trial counsel failed to investigate a potential area of mitigation or unreasonably curtailed their mitigation investigation, this may form the basis of a valid claim of ineffective assistance of counsel. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 40 (2009) (trial counsel "ignored pertinent avenues for investigation of which he should have been aware"); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel were deficient because they "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); *Council v. State*, 380 S.C. 159, 173, 670 S.E.2d 356, 363 (2009) ("Even the limited information obtained should have put counsel on notice that [defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence."). Accordingly, PCR counsel will often explain that trial counsel failed to investigate something as a reason to support a request for funding for expert and/or investigator assistance with exploring and investigating that particular issue.

9. My experience working with investigators and experts is that they will not conduct their investigation or evaluation without an order from the court authorizing funding for their services. Nor do I know of any investigator or expert who would provide their services on the chance they will receive payment if their services create a beneficial result for the client.

10. Finally, I would respectfully submit that denial of funding for expert and/or investigative assistance in a capital case could likely be construed as reversible error where the denial was based upon a trial court's interpretation that PCR counsel could not show in advance that the professional services sought would be beneficial to the case. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985) (Court reversed death sentence where trial court denied funding for independent psychiatrist).

I affirm, under the penalty of perjury, that the foregoing is true and correct.

JEFFREY P. BLOOM

Sworn to and subscribed before me
This 13th day of October, 2014

Notary Public for the State of South Carolina
My commission expires: 2/21/2021

STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

AFFIDAVIT

Diana Holt, who appeared personally before me, affirms and states the following:

1. I, Diana Holt, have been licensed to practice law in South Carolina since November of 1994. My practice is dedicated to representing indigent people sentenced to death or facing a possible death sentence at trial. I worked for non-profit agencies in Texas, South Carolina and Georgia from 1992, first as an intern, and from 1994 to 1998, when I entered private practice.

2. I have been court-appointed to serve as counsel of record in approximately ten death penalty cases at the trial level, none of which resulted in a death sentence. I am certified to serve as lead counsel in death penalty trials. I have served as counsel of record in approximately fifteen capital Post Conviction Relief actions. I have served as a mitigation investigator/counsel in more than ten capital cases, both pre-trial and at trial level post-conviction.

3. Counsel for Stephen C. Stanko have asked me to provide information concerning my experience in obtaining investigative and expert funding and my services as a mitigation investigator in trial level post-conviction proceedings in South Carolina.

DH 1 of 2

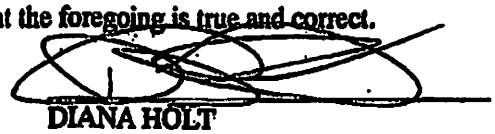
4. In the capital post-conviction cases I have worked on, I have never been denied funding for investigative or expert services because I did not know at the outset what the investigation and expert evaluation would uncover or if that information would ultimately form the basis of a successful claim for post-conviction relief.

5. In cases where I have been retained to serve as a mitigation investigator, funding for my services has always been authorized by the post-conviction court prior to my commencing an investigation. Payment for my services as a mitigation investigator has never been contingent on the information uncovered during my investigation being used in a claim for post-conviction relief or on a beneficial result being obtained for the client.

6. In my experience, there is no way to know at the outset of a mitigation investigation what the investigation will uncover. It is further impossible to know at the outset if the information to be uncovered during a mitigation investigation will be used in a claim for post-conviction relief.

7. When I serve as a mitigation investigator, my role is to compile a social history of the client by conducting interviews and collecting records relating to the client and his or her family. I present my findings to the attorneys appointed and experts retained on the case. To present a social history to a court, the typical practice in capital cases is to retain a testifying social worker who has experience in analyzing and presenting a social history.

I affirm, under the penalty of perjury, that the foregoing is true and correct.



DIANA HOLT

Sworn to and subscribed before me
This 13th day of October, 2014

Lindsay Yarn

Commission Expires: 2/21/2024

Dft
2 of 2

STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

AFFIDAVIT

Teresa L. Norris, who appeared personally before me, affirms and states the following:

1. I, Teresa L. Norris, worked at what is currently known as the Death Penalty Resource and Defense Center ("the Center"), from November 1994 until March 2006. I was the Senior Staff Attorney until April 1996 and thereafter served as Acting Director and then Director. As Director—and throughout my time at the Center—I attempted to monitor all capital post-conviction cases in the State of South Carolina. When I left the Center in 2006, I went into private practice where I continue to work almost exclusively on capital cases in South Carolina and other states.

2. I have served as counsel of record in approximately 42 capital cases in South Carolina, North Carolina, Mississippi, Texas, Virginia, the federal system, and the United States military system. My experience has included all stages of the proceedings from trial to clemency proceedings. I have served as counsel in at least twelve capital post-conviction proceedings in South Carolina. I have also served as a consultant, both pro bono and retained, in numerous other cases.

3. Counsel for Stephen C. Stanko have asked me to provide information concerning my experience in obtaining investigative and expert funding in capital post-conviction proceedings in South Carolina.

4. I do not recall ever being denied funding for a testifying social worker or for mental health experts. In virtually every case I have had, I have been allowed funding, at minimum, for a mitigation investigator, forensic psychiatrist, and a neuropsychologist. In a number of cases, I have also obtained funding for other additional mental health experts. I do not recall even hearing of a capital post-conviction relief case in South Carolina where the court did not authorize funding for at least one mental health expert when a request was submitted by defense counsel.

5. In every capital case, defense counsel requires assistance from investigators and experts to investigate, evaluate and prepare potential claims for relief. No attorney has the necessary skills and training to independently assess all potential areas of mitigation. That is, of course, precisely why funding for expert assistance is authorized and required to be disbursed prior to any evidentiary hearing or trial. The American Bar Association Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases (2003) have been cited with approval and repeatedly referenced as relevant guidelines by the Supreme Court of the United States, *see, e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams*, 529 U.S. at 396, and by the South Carolina Supreme Court, *see Council v. State*, 380 S.C. 159, 172-73, 670 S.E.2d

356, 363 (2008); *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007). Guideline 10.7(A) provides that "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The commentary to Guideline 10.7 explains that "[c]ounsel's duty to investigate and present mitigating evidence is now well established" and includes an obligation to investigate, among other things, medical history, family history, educational history and social history. Similarly, Guidelines 10.11(A) and (F) instruct that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty" and that counsel should carefully consider presenting expert testimony "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)."

6. Regardless of whether one views the Guidelines as binding, in my own practice, I have had post-conviction relief granted to clients by the South Carolina Supreme Court because, at least in part, prior counsel did not adequately investigate and present mitigation through lay witnesses and experts. *See, e.g., Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006); *Von Dohlen v. State*, 360 S.C.598, 602 S.E.2d 738 (2004). In each of those cases, I could not have predicted what my court-authorized investigators and experts would find, but I could and did establish that the investigators and experts were reasonable and necessary, which is all that is required under the statute in order to obtain court approval for the funding necessary.

7. There is no way for an attorney to know what an investigator or expert might uncover, or if that information will create a claim for post-conviction relief, until after the investigation or evaluation is complete. I have never had a court deny funding for an investigator or expert because I could not foresee what the investigator or expert would find but I could point to "red flags" that clearly indicated the need for the investigator or expert; nor has a court ever denied funding on the basis that it could not deem investigative or expert services reasonably necessary until a beneficial result was obtained.

8. In my experience, investigators and experts generally will not conduct an investigation or evaluation in a post-conviction case or even begin to do so without an order from the court authorizing funding for the investigator or expert's services.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

Teresa L. Norris
TERESA L. NORRIS

Sworn to and subscribed before me
This 9th day of October, 2014

Notary Public for the State of South Carolina
My commission expires: 6-19-16

# ATTACHMENT 2

STATE OF SOUTH CAROLINA
In The Supreme Court

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IN ITS ORIGINAL JURISDICTION

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HORRY COUNTY
Court of Common Pleas
The Honorable Benjamin H. Culbertson, Circuit Court Judge
Case No. 2014-CP-26--0035

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APPELLATE CASE NUMBER 2015-_____

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STEPHEN C. STANKO, ..... PETITIONER,

v.

STATE OF SOUTH CAROLINA, .....RESPONDENT.

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# RESPONSE TO PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION

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**ATTORNEYS FOR RESPONDENT**

The Respondent State of South Carolina makes a Response to the extraordinary "Petition for Court Oversight of Capital PCR Action" dated February 3, 2015. Petitioner seeks this Court's extraordinary supervisory authority of this capital post-conviction relief action pursuant to Section 17-27-160 (C) ("hearing must be scheduled within one-hundred and eighty days from the date of the status conference, unless good cause be shown") and *In re Stays of Execution*, 321 S.C. 544, 471 S.E.2d 140 (1996). The post-conviction relief application was initially filed January 6, 2014 and is set to be heard pursuant to the scheduling order of Judge Benjamin H. Culbertson, as amended, on March 2, 2015.

In the Petition, the Petitioner seeks to have this Court mandate the assigned post-conviction relief judge, the Honorable Benjamin H. Culbertson to perform certain acts which are within his judicial discretion. Petitioner requests the Court to direct that Judge Culbertson continue the state PCR case scheduled for March 2, 2015.[1] The Petitioner further seeks the Court to mandate Judge Culbertson to rule favorably on an unserved "*Ex Parte* Motion to Reconsider Denial of Funding for Expert and Investigative Service and Request for Hearing" apparently made on October 14, 2014. [Respondent have no knowledge of the particulars of the funding motions or

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1 The Petitioner, on January 8, 2015 had made an "Applicant's Motion for Continuance" requesting a continuance due to the Motion to Continue requesting Judge Culbertson to continue the case set for March 2, 2015 "because the Court's blanket denial of all funding requests for reasonably necessary expert assistance has crippled counsel's ability to provide applicant with adequate post-conviction representation." Applicant's Motion for Continuance, p. 1. Within the Applicant's January 8, 2015 motion, he requests a nine month continuance because the experts they consulted indicate six to nine months is the minimum time it will take to prepare for a hearing. Motion for Continuance, p. 2, ft. 1.

orders other than what Petitioner has set forth in the "Motion for Continuance" or this Petition.[2]].

In the Petition before this Court, Stanko asserts that the Respondent has taken no position on the motions in the lower court, except for making a request that the funding motions and orders denying the request be unsealed. Petition, p. 1. To be clear, the Respondent has been unable to respond or take a position to whether a continuance is appropriate or whether the hearing judge applied appropriate standards because Respondent has no knowledge of the basis of the requests or denials because they were done without service upon the State, without knowledge of the purpose, or basis of the reasoning in granting or denying requests. To be more clear, we still are unable to take a position because we have not been provided access to those motions and orders between counsel and Judge Culbertson except through the characterizations in Applicant's pleadings. The Petitioner's reliance on his unserved motions and unserved orders in this Petition again is troubling without being served with the documents.

Respondent respectfully requests this Court to either provide or require disclosure to the State of the *ex parte* requests and orders between Petitioner's counsel and the fact-finder in this action in order to allow the Respondent to take an informed position on the requests. Respondent submits this information is necessary and proper for an understanding of the basis of continuance requests and denials, particularly where Petitioner characterizes that the respective denials by Judge Culbertson involve a consideration of the merits of potential issues before the Court in their pleadings before this Court. Respondent does not know the validity of Applicant's assertions in his Motion or the basis of this Court's denial of such alleged funding requests because they do not know what the judge was advised and the particular reasons for his actions based upon the

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2 Respondent was provided by the Clerk with a Form 4 denial of an Order for Transport of the inmate but was not aware of the motion or purpose or requested date underlying the order or request for transporting the inmate.

information he received.

It is unclear why the Court should be called upon to intervene in the action at this time, particularly when the pleadings and orders have not been provided to the Court of Respondent These general requests concerning a continuance or appointment of experts are matters that generally fall within the hearing court's discretion under Section 17-27-160 (C) ("hearing must be scheduled within one-hundred and eighty days from the date of the status conference, unless good cause be shown") and *In re Stays of Execution*, 321 S.C. 544, 471 S.E.2d 140 (1996).

A.

On January 9, 2015, the day after receipt of the continuance motion in the lower court, Respondent made a "Motion to Unseal Ex Parte Funding Request and Orders Regarding Same" for the primary purpose to address the motion for continuance, but also because Respondent was not aware of the specific requests being made, granted or denied up to that point of time. This disclosure issue had not been addressed in the lower court.

In the Respondent's pending motion to unseal and disclose before the lower court and here, Respondent asserts the following salient points for this Court or the lower court to issue an Order unsealing to the extent to make available to Respondent any and all *ex parte* expert witness or investigative funding requests and Orders regarding the same. This request is supported so Respondent may adequately and properly respond to Applicant's current Petition before this Court and pending continuance motion.

B.

In order to respond to the Petition, Respondent should be allowed access to the underlying motions and orders that Petitioner's pleading addressed. First, there is no statutory or a

constitutional right to be heard on funding requests *ex parte*[3] and *in camera*[4] in this civil post-conviction relief settings. Respondent acknowledges, however, the right of the Court to determine that some matters may be held *ex parte* under certain discrete circumstances as authorized under the Code of Judicial Conduct.[5] Such circumstances, however, are exceptions to the rule and blanket exceptions are not contemplated. In support of this position, Respondent would respectfully show the Court:

1. There is no statutory right to *ex parte* proceedings regarding appointment and funding of expert witnesses or investigative witnesses and services in capital post-conviction relief actions. PCR applicants typically argue there is a statutory right by virtue of Section 17-27-160 for the non-disclosure of investigative and expert witness requests made to the fact-finder PCR judge, which they argue incorporates all the funding provisions of § 16-3-26, including the provisions for funding investigative, expert and other services. They are incorrect. There is no such express provision in the language of the statute. *Accord Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682 (1996). *Thames* addressed that such matters in PCR actions are not subject to being done *ex parte*.

The petitioner relies upon and references to Section 16-3-26 are in the second paragraph in Section (B) of S.C. Code § 17-27-160 to support non-disclosure of any funding requests or orders to the Respondent. However, that provision only addresses the appointment, qualification, and

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3 "A 'judicial proceeding ... taken ... for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.'" *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 297(5th ed. 1983)).

4 "An *in camera* proceeding ... is a 'trial or hearing held in a place not open to the public...'." *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994) (quoting Black's Law Dictionary at 684 (5th ed. 1983)).

5 However, it also would suggest that discussions on or about the merits of an action or issues should not be done ex parte with the fact-finder.

compensation of PCR counsel and the compensation of PCR appellate counsel. The first reference is tied specifically to counsel's compensation: "Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel...." S.C. Code § 17-27-160 (B). If that were not so, the provisions of S.C. § 17-3-50 (A) would apply resulting in reduced rates and caps as set therein.[6] This speaks of counsel's compensation - a matter not at issue in these proceedings. Contrary to what Petitioner implies, there is no specific provision or reference to "investigative, expert, or other services" or the corresponding provision for same in the criminal trial as reflected in S.C. Code § 16-3-26(C)(1).[7] The only other reference to Section 16-3-26 is Section 16-3-26 (I), to provide, *again as to the appointment of counsel*, that the prohibition of appointing non-licensed, non-resident attorneys at trial does not apply to the civil proceedings. *See* S.C. Code § 17-27-160 (B). *Ergo*, when read naturally, the reference to Section 16-3-26 in Section 17-27-160 involves the narrow question of counsel's compensation.[8]

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6 It is of no little note that payment of counsel fees are separate and apart from the provision of "investigative, expert, or other service," both in Section 16-3-26 and Section 17-3-50. This is also true of the federal funding provisions. See 18 U.S.C.A. § 3599. However, PCR applicants typically seek to combine the two in order to find statutory support for their position. This is, of course, contrary to the standard references of the funding as two distinct concerns.

7 Section 16-3-26(C)(1) provides for "ex parte proceedings" to determine "that investigative, expert, or other services are reasonably necessary for the representation of the defendant" at the criminal capital trial.

8 This is also consistent with the express goal of the act: "...to add Section 17-27-160 so as to provide for the manner in which defendants sentenced to death must file applications for post-conviction relief, to provide for the assignment of judges to handle these applications, *to further provide for the appointment and compensation of counsel in these proceedings*, and to provide for other procedural matters including the certain time limitations in these capital post-conviction relief proceedings." 1996 South Carolina Laws Act 448 (H.B. 4469).

To reach an opposite conclusion, one must accept that the whole of Section 16-3-26 is incorporated into the PCR Act. This would include incorporation of the reference to the notice of intention to seek death and other specific trial related provisions – clearly not a requirement in post-conviction relief proceedings. Even the reference to the section applicants seek to incorporate, Section 16-3-26 (C)(1), only authorizes "investigative, expert, or other services are reasonably necessary for the representation *of the defendant whether in connection with issues relating to guilt or sentence....*" A "defendant," refers to a "criminal defendant," defined as "one who is accused in a criminal proceeding." Black's Law Dictionary (9th ed. 2009). Applicant is no longer a defendant. *See also* Black's Law Dictionary (9th ed. 2009) (defining defendant generally: "A person sued in a civil proceeding or accused in a criminal proceeding."). In fact, the language of Section 17-27-160 reflects that shift in position in providing that a "defendant" must file an application for relief, but after filing, refers to the individual bringing suit as "the applicant." S.C. Code § 17-27-160. *See also* S.C. Code §§ 17-27- 40 through 17-27-80 (referencing applicant in non-capital post-conviction relief provisions as of the filing of the application). Further, counsel representing an Applicant is not directly raising issues related to guilt or sentence.[9] Rather, the civil action challenging a presumptively valid state judgment is separate and distinct from the criminal proceeding. *See* Rule 71.1 (c), SCRCP ("An application filed under the [Post-Conviction Procedure] Act is an independent civil action which should be separately filed and indexed by the

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9 PCR applicants' fallback position appears to be that they have been convicted, but these proceedings are merely a continuation of sentencing. To the contrary, Stanko is currently under a presumptively valid judgment. Guilt has been adjudicated and sentenced imposed. This action is filed to challenge the continued custody under this presumptively valid judgment. *See* S.C. Code § 17-27-20 (relief may be sought where a "person who has been convicted of, or sentenced for, a crime" seeks to have his conviction or sentence vacated on grounds other than an allegation of insufficient evidence).

clerk of court."); S.C. Code § 17-27-20 (a)(6) ("... this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."). [10]

In interpreting the statute, "[t]he Court must give clear and unambiguous statutory terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *State v. Cribb*, 310 S.C. 518, 521, 426 S.E.2d 306, 308 (1992). *See also State v. Phillips*, 400 S.C. 460, 734 S.E.2d 650 (2012) (same); *State v. Sweat*, 386 S.C. 339, 688 S.E.2d 569 (2010) (same). Thus, the trial provisions referring expressly to a "defendant" cannot be applied in a civil post-conviction relief action. *See also Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682 n. 1 (1996) (noting "Section 16-3-26 (C) applies to the capital trial and not to post-conviction relief proceedings" noting that reference to "defendant" is reserved for a "defendant" in criminal proceedings, not an applicant for post-conviction relief). Consequently, the whole of Section 16-3-26 cannot apply.

In the absence of the incorporated provisions, the more general statutes are controlling for reimbursement for expenses. *See* S.C. Code § 17-3-50 ("Defense of Indigents, General Provisions, Determination of fees for appointed counsel and public defenders; maximum amounts; authorization to exceed maximum; payment for certain services."). If that is so, then *Thames v. State* is applicable and controlling. In *Thames*, the Supreme Court of South Carolina instructed the provision of *ex parte* proceedings in Section 17-3-50 (B) is reserved for funding requests made in

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10 Though the Supreme Court of South Carolina has referred to such as action as "hybrid," it is so only because the criminal conviction and sentence are at issue. The Court has said: "... while a PCR action is hybrid in nature, it generally remains subject to rules and statutes that apply in civil proceedings." *Sutton v. State*, 361 S.C. 644, 606 S.E.2d 779 (2004) (*overruled on other grounds by Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005) (holding "counsel is required to advise an applicant of the right to appellate review of the denial of PCR")).

preparation for the criminal trial. *Thames*, 325 S.C. at 11, 478 S.E.2d at 682 n. 1. [11] Consequently, Applicant has failed to show a statutory right to *ex parte* proceedings.[12]

2. There is no constitutional right to *ex parte* proceedings in capital post-conviction relief proceedings. As a first point, there is no constitutional right to post-conviction relief proceedings. *See, e.g., United States v. MacCollom*, 426 U.S. 317, 323 (1976) ("The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, see Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction."). Again, Applicant is the

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11 In *Thames*, the Court stated:

> When a defendant requests expert services for a criminal trial, the request is determined by the judge in ex parte proceedings. S.C.Code Ann. § 16-3-26(C) and § 17-3-50(B) (Supp.1995); Ex parte Lexington County, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.
>
> Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While § 17-3-50(A) mentions that the same hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word "defendant" throughout § 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

*Thames*, 325 S.C. at 11, 478 S.E.2d at 682 n. 1

12 Respondent has interpreted the previous motion requests for *ex parte* proceedings to refer specifically to "investigative" or other experts. The provisions for payment of counsel's fees, as discussed above, are treated separately from other expenses of the litigation. In fact, there is no provision at all for *ex parte* hearings on the authorization of counsel's fees. *See* Section 16-3-26; Section 17-3-50 (A) and (C). See also July 6, 2005 Order of the Chief Justice, Re: Ordering Additional Attorney's Fees for Appointed 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.").

party bringing the suit in this instance.[13] He bears the burden of proof. *See, e.g. Bennett v. State*, 371 S.C. 198, 638 S.E.2d 673 (2006) (*citing Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998); *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007) (*citing Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Though PCR applicant argue they are still entitled to the array of constitutional and statutory rights of a criminal defendant, they simply are not entitled to those same rights in a civil action as the action itself is definitively different in scope and measure. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) ("Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). *Cf. Fisher v. Baker*, 203 U.S. 174, 181 (1906) ("The proceeding is in habeas corpus, and is a civil, and not a criminal, proceeding."); *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883) ("The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process."). Simply, civil proceedings do not give rise to the constitutional rights afforded a criminal defendant. *See United States v. Baker*, 45 F.3d 837, 843 (4th Cir. 1995) ("the constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a

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13 It is Applicant who is obligated to make the allegations to allow Respondent the opportunity to prepare a defense. Applicant would surely object if the State, in the criminal prosecution, told him only that additional allegations would be forthcoming in addition to the allegations of the indictment. Respondent has prepared both a return and a return to the final application.

respondent in a commitment hearing" citing the civil nature of the proceedings). Even where a criminal trial right survives, the right is generally limited by the civil nature of the proceedings.

For example, the Fifth Amendment right against self-incrimination survives and can be invoked in any proceeding. However, an individual's failure to answer questions allows for an adverse inference in civil cases. *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976) (noting "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)."). *See also In re Care and Treatment of Canupp*, 380 S.C. 611, 671 S.E.2d 614 (Ct.App. 2008) ("...only a criminal defendant has the right to decline to take the witness stand altogether."). Consequently, the nature of the proceeding controls.

Though PCR applicants have relied upon *Ake v. Oklahoma*, 470 U.S. 68 (1985), the case resolved only that where "a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake* does not speak to collateral proceedings in the least. *See, e.g., Rosado v. Allen*, 482 F.Supp.2d 94, 113 (D.Mass. 2007) ("*Ake v. Oklahoma* ... concerned a defendant's right to have access to a psychiatrist assistant at *trial*, not on post-conviction relief.") (emphasis in original); (*Sanborn v. Commonwealth*, 975 S.W.2d 905, 909-910 (Ky. 1998) ("*Ake v. Oklahoma*, ... is not a post-conviction case.") (*overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009)); *McGahee v. State*, 885 So.2d 191, 229

(Ala.Crim.App. 2003) (*Ake* not applicable in civil proceeding challenging conviction). Thus, *Ake* is not dispositive.[14]

Whether funding for any particular expert is necessary or authorized, however, is not at issue in requests for *ex parte* and *in camera* proceedings. Rather, at issue is how the requests will be heard. Respondent submits for all the foregoing reasons, Applicant had no right to be heard *ex parte*. This position is consistent with funding provisions for federal actions, which, like our state rules, disfavor *ex parte* proceedings.[15]

3. Similarly, there is no right to closed proceedings in regard to funding requests in capital post-conviction relief proceedings. Again, PCR applicants rely on provisions for the criminal trial, so, again, the civil nature of the proceeding undercuts reliance on his reliance upon precedent interpreting same.[16]

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14 It should not be lost that the purpose of *Ake* was to determine when a state must provide access to funds for "psychiatric assistance" for an indigent criminal defendant at trial. *Ake*, 470 U.S. at 77. *Ake* does not resolve access to other experts in other circumstances. Further, the United States Supreme Court has summarily rejected arguments of "constitutional infirmity in the *trial court's* refusal to appoint various experts and investigators" where "the requests were accompanied by no showing as to their reasonableness." *Caldwell v. Mississippi*, 472 U.S. 320. 323 n. 1 (1985) (emphasis added). Thus, there appears to be no basis in *Ake* to argue for unlimited resources for various "experts" at all stages of the proceedings, direct and collateral.

15 "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). *No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.*" 18 U.S.C.A. § 3599 (f) (emphasis added). *See also United States v. Caro*, 442 F.Supp.2d 296, 297 n.1 (W.D.Va. 2006) (noting "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed.").

16 For example, see *Ex parte Lexington County*, 314 S.C. 220, 227, 442 S.E.2d 589, 593

Applicant here is in no danger of having to "telegraph to the prosecution the defendants' defense strategy," as he is not the defendant and has no defense strategy. In this civil action, he is *required* to make sufficient allegations for Respondent to investigate and present a defense. *See* S.C. Code § 17-27-40.

There is no right to keep known potential issues from Respondent and essentially shorten, (or in some cases eradicate), the opportunity for Respondent to investigate and respond fully. *See generally* S.C. Code § 17-27-130 ("Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation.").[17] He is also *required* to disclose in discovery those documents and things that would go to *either* a claim or defense. *See* Rule 26 (b)(1), SCRCP ("Parties may obtain discovery

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(1994), a case which refers to two capital defendants who had not yet stood trial, where the Court found Section 16-3-26(C) provides a "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*." 314 S.C. at 227, 442 S.E.2d at 593, which is clearly the procedure in the criminal trial to which the statute refers. However, as noted above, that section has not been expressly incorporated into the civil proceedings provided for capital PCR actions. But even that statutory funding provision does not allow the trial courts to "close the proceeding," rather, "the trial judge must treat this case like any other which presents the issue of whether it is appropriate to close the proceedings." *Id.* To close the proceedings, the court must find on the record that "there is a substantial probability of prejudice which would result from the publicity, and ... there are no reasonable alternatives to closure which would protect the defendant's right to a fair trial." *Id.* The Supreme Court of South Carolina in *Ex parte Lexington County* based its reasoning that closure for *ex parte* funding requests was warranted *in a criminal trial* on finding a defendant would not be required to disclose his *theory of the defense* but for the fact that he was indigent and had to request funds. 314 S.C. at 228, 442 S.E.2d at 594. That concern is not present here.

17 There is every indication that investigation authorized by discovery available to every other civil litigant would bear not only on funding, but also on preparation.

regarding any matter, not privileged, which is relevant *to the subject matter involved* in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...") (emphasis added). He is further required to disclose the names of witnesses and experts who have knowledge of claim or defense. Rule 26 (b)(4)(B).[18] In short, Applicant is required to go by the SCRCP. These full disclosure requirements stand in stark contrast to the defense cloak of secrecy for the criminal trial. The same concerns in *Ex parte Lexington County* are not present here.

4. Respondent recognizes, ethical rules allow *ex parte* communication in limited discrete circumstances. Rule 501, SCACR, Canon 3 (B) (7) (a), Code of Judicial Conduct, provides:

> Where circumstances require, ex parte communication for scheduling, administrative purposes or emergencies **that do not deal with substantive matters or issues on the merits** are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

*(emphasis added). See also* Rule 407, Rule 3.5 (a) and (b), Rules of Professional Conduct (prohibiting attorneys from ex parte discussions with a judge "unless authorized to do so by law or

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18 No opinion from any consulting expert would be obtained through a mere funding request (in fact, the request presumes one has not yet been hired or an opinion rendered). However, such an opinion must be shared, not due to funding requests but under ordinary rules of discovery, if the expert is not merely "consulted informally, or consulted and not retained and specially employed." Rule 26 (b)(4)(B), SCRCP. See also Rule 33 (b)(6), SCRCP (standard interrogatories requiring disclosure of "names and addresses of any expert witnesses whom the party proposes to use as a witness").

court order"). The Court may, pursuant to these provisions, allow *ex parte* communication.[19] The party communicating in the absence of an opposing party has heightened ethical duties to provide the court with relevant information. Rule 407, SCACR, Rule 3.3 (d), Rules of Professional Conduct ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."). Such communication, however, is not favored as it is contrary to our adversarial system. Id., comments ("... in any ex parte proceeding ... there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of

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19 Ex *parte* funding requests are neither provided for nor mandated. The better course, and the only course consistent with the rules and statutes in this jurisdiction, would be to disallow a blanket exception, but reserve the possibility to closed review of sensitive arguments and/or supporting documents. The PCR court could allow (with notice to opposing counsel) narrowly focused *ex parte* communication and review of such documents, much like the review of privileged materials. *Accord State v. Jeff*, 761 So.2d 574 (La.App. 1 Cir. 1999) ("The trial court should first determine, in camera, either on the face of the allegations of the motion or upon taking evidence at an ex parte hearing, whether the defendant would be prejudiced by a disclosure of his defense at a contradictory hearing. If so, then the hearing on expert funding should continue ex parte. If not, then the hearing should be held contradictorily with the District Attorney....") (*quoting State v. Touchet*, 642 So.2d 1213 (La. 1994)) (emphasis in original). Even where originally heard *ex parte*, such matters may be made public at the court's direction in compliment to the general rule that *ex parte* proceedings are disfavored and unnecessary. *See United States v. Caro*, 442 F.Supp.2d 296, 297 (W.D.Va. 2006) (on review of denial of funding request in a capital case: "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed."). *See also Sallie v. Humphrey*, 2011 WL 837168, *2 (M.D.Ga. 2011) ("*Ex parte* requests for payment of fees and expenses under § 3599(f) may not be considered unless Petitioner makes a proper showing of the need for confidentiality."); *Barnett v. Roper*, 2010 WL 1268030, *1 (E.D.Mo. 2010) (noting change from presumption of *ex parte* proceeding to showing need for *ex parte* proceeding in current federal statute).

material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.").

Notably, concerning Applicant's *ex parte* funding requests, it is unclear if a full recitation of background was provided to the PCR judge.[20] Applicant's case is not a new trial. Applicant has previously been represented by counsel, found guilty, and sentenced to death. In short, the case has a history that may not be ignored. Asking the court for the ability to start completely fresh or simply "expert shop" most likely is not necessary in a capital case or a non-capital case. *See Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682-683 (1996) (finding no abuse of discretion in denying funding request for another expert: "Petitioner had been examined by two experts prior to trial and the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to warrant the authorization of funds to pay an expert.").[21] For example, a request for a mental health expert in this case should be examined in

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20 Applicant's assumption, if made, that Respondent would attempt to deny him funding, confuses the purposes of the funding hearing and raises the significant danger that not all relevant facts are being provided to the trial judge tasked with evaluating the reasonableness of the request. The funding request is simply to show a reasonable necessity. Applicant need not disclose findings and opinions unless he intends to call the expert at the evidentiary hearing – a fact readily ascertainable by simply following the SCRCP. *See* Rule 26, SCRCP. Further, in this instance, the arguments and facts he wishes to present outside the presence of the opposing party would be presented *to the fact finder in this action.* Applicant's attempt to put this squarely in funding overlooks the ponderous consideration that the fact finder may be approached with arguments and theories indicating incomplete or incorrect facts in support of a funding request.

21 Even capital defendants at trial are not entitled to unlimited funding. *See, for example, Bailey v. Com.*, 259 Va. 723, 737, 529 S.E.2d 570, 578 (2000) ("We have consistently rejected the contention that defendants, even in capital murder cases, have an indiscriminate entitlement to the assistance of an investigator.") *See also State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009) (*citing* § 16-3-26 (C)(1) (2003); *State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("The matter of authorized funds to capital defendants lies within the sound discretion of the trial" and rest upon a finding "that investigative, expert, or other services are reasonably necessary").

light of investigation and testing already made. Applicant presented at trial well-credentialed psychiatrists, psychologists, and radiologists or neuro-radiologists, who examined Applicant contemporaneous to the proceedings and reviewed multiple records and scans. It would be difficult to fault trial counsel for relying on such experts. *See Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) ("...counsel had received Dr. Killian's report concluding that Wilson was not mentally ill at the time of the offense. To be reasonably effective, counsel was not required to second-guess the contents of this report."). Counsel had no duty to contact other experts when he thought those consulted were well qualified and counsel has no duty to ensure the trustworthiness of an expert's conclusions. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998). See *Philmore v. McNeil*, 575 F.3d 1251, 1263 (11th Cir 2009)(counsel has no duty to present all psychiatric evidence, and not calling one was reasonable where the opinion conflicted with Reasonable counsel need not "shop" for contrary expert opinions. *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995); *Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008), Moreover, counsel has no duty to pursue neurological experts when experts consulted indicated no additional testing was required, *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998), or found no evidence of brain damage. *Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998). At any rate, these are the types of facts that the PCR court should have before deciding on funding expert witness requests in the PCR setting.

Furthermore, Applicant has waived any confidentiality by the filing of this Petition before this Court and Motion for a Continuance, with Applicant's assertion of the history of the funding requests and this Court's actions regarding the same, along with supporting Affidavits without a request that they be under seal. Applicant has made his requests and the Court's reasons for denial of the same, if true, relevant and discoverable.

WHEREFORE, Respondent makes response to the Petition. Respondent submits, for all the foregoing reasons, this Court my issue an Order unsealing the *ex parte* funding requests and Orders regarding the same, in order that Respondent may properly respond to the merits of the Petition before this Court and the Motion for a Continuance before the hearing judge should this Court deem its supervisory authority of the stay of execution to empower this acts over the hearing judge's discretion.

Respectfully submitted,

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February 13, 2015
Columbia, South Carolina.

*counsel of record

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, certify that I have served Respondent's RESPONSE TO PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION by depositing one copy to his counsel of record, postage prepaid, addressed as follows:

Emily Paavola
Lindsey Vann
Death Penalty Resource Center
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Columbia SC 29201

This 13th day of February, 2015.

DONALD J. ZELENKA
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ATTORNEY FOR RESPONDENT

# ATTACHMENT 3

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

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Capital PCR Case Number: 2014-CP-26-00035

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STEPHEN C. STANKO, SK 6022.....*Petitioner*,

v.

STATE OF SOUTH CAROLINA.....*Respondent*.

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# PETITIONER'S REPLY REGARDING PETITION FOR COURT OVERSIGHT OF CAPITAL PCR ACTION (Expedited Consideration Requested)

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## I. INTRODUCTION.

Undersigned counsel were appointed to represent petitioner, Stephen C. Stanko, in his capital post-conviction relief proceedings on February 4, 2014. Counsel immediately began working on the case and requested that the PCR judge, the Honorable Benjamin H. Culbertson, authorize payment for attorneys' fees. Judge Culbertson initially denied that request, and did not ultimately agree to authorize counsel to receive payment for any work on the case until March 27, 2014. Counsel then requested funding for the assistance of expert services, first on April 1, 2014, and again on July 28, 2014. Judge Culbertson refused to approve funding for any testifying expert and also denied two subsequent motions to reconsider these denials, based on his erroneous reading of S.C. Code § 17-27-160, which authorizes a PCR court to grant funding when such funds are "reasonably necessary" for a PCR applicant to investigate and present his claims for post-conviction relief. Judge Culbertson has concluded that no expert services can be deemed reasonably necessary until after the services are performed and a beneficial result obtained. Counsel have repeatedly tried to explain to the PCR court that no reasonable, credible or ethical expert would agree to condition payment of their fees on a guarantee of a "beneficial result" before even beginning their work on this case.

On October 14, 2014, undersigned counsel filed a third motion to reconsider regarding the funding denials and requested that Judge Culbertson hold a hearing on all funding denials. Judge Culbertson refused to hold a hearing and has not ruled on this motion. Given that counsel cannot prepare petitioner's claims for post-conviction relief without the assistance of expert services, counsel filed – on January 6, 2015 – a motion for a continuance of the PCR hearing currently scheduled to begin on March 2, 2015. Judge Culbertson has not ruled on this motion. In response to the motion for a continuance, respondent moved to unseal all of petitioner's *ex parte* funding

requests, and petitioner filed a response in opposition. Judge Culbertson has not ruled on this matter either.

The parties are therefore scheduled to begin an evidentiary hearing on Petitioner's PCR claims on Monday, March 2, 2015, at which undersigned counsel cannot possibly effectively represent petitioner's interests. *See Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2012) (observing that just as a prisoner whose direct appeal counsel is ineffective is "denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims," a prisoner lacking the assistance of an "adequate attorney" in post-conviction proceedings "will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim."). In other words, undersigned counsel fully believe that if they are forced to go forward with an evidentiary hearing on March 2, 2015, without access to the tools, resources and time typically available to PCR applicants in this State for developing the factual bases of their claims, undersigned counsel's representation will be ineffective. *See Strickland v. Washington*, 466 U.S. 668 (1984).

This Court's has historically exercised supervisory authority over capital PCR cases. *See In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). This Court has also previously intervened via an extraordinary writ in cases involving novel questions of law where the interests of judicial economy weigh in favor of expedited relief. *See e.g., Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009); *Bennett v. State*, 380 S.C. 215, 669 S.E.2d 594 (2008); *Porter v. Jedziniak*, 334 S.C. 16, 512 S.E.2d 497 (1999); *In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998). Petitioner asks this Court to: (1) provide guidance to the PCR court on the proper interpretation of the statutory funding provision contained in S.C. Code § 17-27-160; (2) require a continuance of the PCR hearing to allow petitioner

adequate time to prepare for a hearing with the assistance of expert services; and, (3) provide any other relief the Court determines necessary in the interests of justice.

Petitioner is not asking this Court to review the underlying merits of each of petitioner's individual requests for expert services, nor does he believe that such a review is necessary since all of Judge Culbertson's funding denials turn on his consistent misinterpretation of the funding statute. However, petitioner has already stated that if this Court deems it necessary to review the *ex parte* funding pleadings and orders filed below, then those pleadings should be provided to the Court for its consideration under seal. *See* Petition for Court Oversight of Capital PCR Action at p.3 n.4. Respondent argues instead that this Court should require petitioner to disclose the *ex parte* pleadings *to the State* so that it can scrutinize the funding request and weigh in on whether the State agrees that petitioner actually requires the expert services. Respondent then argues at length that capital PCR applicants are not entitled to be heard on funding requests in *ex parte* proceedings. Respondent is incorrect.

## II. Capital PCR Applicants Are Entitled to Ex Parte Funding Proceedings.

Contrary to Respondent's assertion, capital PCR applicants are entitled to *ex parte* proceedings for the consideration of funding requests as a matter of state statute and federal constitutional principles.

### A. S.C. Code § 17-27-160 Expressly Authorizes *Ex Parte* Proceedings

The plain language of S.C. Code § 17-27-160 expressly authorizes *ex parte* communications in the context of capital post-conviction cases. Section 17-27-160 provides that counsel appointed in post-conviction cases "shall be compensated from the funding provided in Section 16-3-26 in the same *manner* and rate as appointed trial counsel" (emphasis added). According to § 16-3-26(C)(1), the appropriate manner of payment for investigative and expert

services is upon a finding by the court in *ex parte* proceedings that the services are reasonably necessary. Thus, there can be no question that requests for funding for investigative, expert and other services in post-conviction cases must be heard in *ex parte* proceedings in accordance with § 16-3-26(C)(1) as incorporated into § 17-27-160.

Moreover, § 17-27-160 specifically excludes subsection (I) of § 16-3-26, which prohibits the appointment and compensation of out-of-state attorneys in capital trials. There is no reference, however, to any exclusion of the requirement contained in § 16-3-26(C)(1) that funding requests be considered by the Court in *ex parte* proceedings. This is further evidence that the plain language of the statute clearly incorporates the *ex parte* provision of § 16-3-26(C)(1).[1] "When terms which are contained in a statute are clear and unambiguous, the courts are required to apply them according to their literal meaning." *Ex Parte Lexington County*, 314 S.C. 220, 225, 442 S.E.2d 589, 592 (1994). "The terms of a statute are to be given their plain and ordinary meaning without employing subtle or forced construction." *Id.* To the undersigned counsel's knowledge, no court since the enactment of § 17-27-160 has applied the statute to preclude an *ex parte* funding request in a capital, post-conviction proceeding.

The footnote in *Thames v. State*, 325 S.C. 9, 11, n.1, 478 S.E.2d 682, 682, n.1 (1996), on which respondent heavily relies, is not applicable to this issue. The language in *Thames* is *dicta* in a non-capital case. The *Thames* Court held that a post-conviction relief judge did not abuse his discretion in denying a non-capital petitioner's request for payment of psychiatrist fees after she had already been examined by two psychiatrists prior to her guilty plea. *Id.* at 11, 478 S.E.2d at

[1] If § 17-27-160 incorporated only § 16-3-26(B) as Respondent argues, there would be no need for the explicit exclusion of § 17-27-160(I) because it would not have been otherwise incorporated by § 17-27-160. The exclusion of subsection (I) thus indicates that the entirety of § 16-3-26 is incorporated into § 17-27-160.

683. Whether such a request should be conducted *ex parte* was not an issue raised by either party in the case. Furthermore, the footnote in *Thames* makes no reference to § 17-26-160 because *Thames* was decided before the statute which controls capital post-conviction proceedings was enacted. Rather, the footnote refers to the specific language of S.C. Code 1967 § 17-3-50(B), which is no longer in effect.

*B.* ***Ex Parte* Proceedings are Required by Due Process and Equal Protection**

Due Process and Equal Protection require that ex parte funding pleadings in this case remain under seal. The Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (pointing to parole and probation as examples of state-created rights to which there was no "constitutional or inherent right" but which had been accorded protection under the Due Process Clause); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding prisoner's interest as a result of the State having created the right to good time credit "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty.'").

In determining whether a state has created a liberty interest subject to protection under the Due Process Clause, the Court looks to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). "This has meant that to obtain a protectable right 'a person clearly must have more than an abstract desire for it. . . . He must, instead, have a legitimate claim of entitlement to it." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quoting *Roth*, 408 U.S. at 577). In *Kentucky v. Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), the Supreme Court explained that:

> A State creates a liberty interest by establishing "substantive predicates" to govern official decision making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

*Id.* at 462 (citation omitted); *see also Slezak v. Evatt*, 21 F.3d 590, 594 (4th Cir. 1994).

Judicial pronouncements by the Supreme Court of the United States and this Court make clear that the nature of the right to *ex parte* proceedings to seek expert and investigative services is such that it merits protection under the Due Process Clause. *See Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (holding due process entitles an indigent defendant to the appointment of an expert to assist in his defense whenever "the defendant is able to make an *ex parte* threshold showing" of the need for assistance); *Ex Parte Lexington County*, 314 S.C. 220, 226-27, 442 S.E.2d 589, 593 (1994) (declaring that when the "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*," the state or county "does not have standing to participate in the hearing.").

Here, petitioner has much more than an abstract need or desire for his funding proceedings to remain *ex parte* and sealed. The South Carolina statutes give him a clear claim thereto. Petitioner maintains that the proper procedure is that set forth in § 16-3-26(C)(1). That section, on its face, requires *ex parte* proceedings when an applicant seeks "investigative, expert, or other services." Because South Carolina chose to accord the right to *ex parte* proceedings to seek expert services in post-conviction proceedings challenging a death sentence, "due process protections are necessary 'to insure the state-created right is not arbitrarily abrogated.'" *Vitek*, 445 U.S. at 488-89 (quoting *Wolff*, 418 U.S. at 557).

Due process and equal protection concerns are also implicated when a person is denied fundamental fairness by the state or treated differently than others based only on indigence:

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

*Ross*, 417 U.S. at 609. These concerns are heightened in this capital post-conviction process. *See Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) ("Access to equal justice is an even greater interest where the State seeks to impose the penalty of death.").

"[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system."[2] *Ake*, 470 U.S. at 77 (citations omitted). This promise of "an adequate opportunity," however, vanishes if the state, with its nearly unlimited resources to investigate petitioner's case at all phases of litigation, *see Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (S.C. 1992), likewise has access to privileged information only because of petitioner's indigency.[3] As this Court has explained:

> Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

*Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594. In the case of funding requests, *ex parte* procedures are needed to "simply level the playing field between petitioners able to purchase (and thereby not disclose to the opposing side) the usual litigation services – experts, investigators, subpoena-servers – and those forced to request payment of these services from the court." *In re Pruett*, 133 F.3d 275, 279 (4th Cir. 1997).

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[2] Under *Ake*, a defendant is entitled to expert assistance when he is "able to make an *ex parte* threshold showing to the trial court" that such assistance is necessary. 470 U.S. at 82. *Ake* presumes the *ex parte* nature of this showing.

[3] If petitioner were not indigent, he would have the resources to obtain investigative and expert funding without presenting any information about his case to the Court. Thus, the only reason Respondent is able to seek to unseal the information contained in the *ex parte* filings in this case is because petitioner is indigent and was required to present information to the PCR Court in order for it to determine whether the services are reasonably necessary.

Although *Lexington County* and *Ake* address the rights of defendants at trial to *ex parte* proceedings, there is little question that equal protection and due process rights extend to post-conviction proceedings. *See Long v. District Court of Iowa*, 385 U.S. 192 (1966) (finding refusal to provide the transcript of a state habeas corpus proceeding denied equal protection of the laws); *Lane v. Brown*, 372 U.S. 477 (1963) (finding prevention of the right to appeal the denial of a writ of error *coram nobis* due to indigency denied equal protection). Indeed, the Supreme Court of the United States has explicitly held that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny the prisoner equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

Here, allowing the State access to information about petitioner's funding requests or granting the State a voice in the funding decision would violate Due Process as Respondent clearly has an interest in prohibiting petitioner access to expert and investigative services that could lead to success in these proceedings. Due Process would further be violated because petitioner will not be similarly accorded the opportunity to review the State's use of funding for expert and investigative services or the reasons for the State's decision to expend such funds. Moreover, allowing the State information about petitioner's funding requests would violate equal protection because non-indigent PCR applicants would not be similarly required to provide such information to the State.

### C. The State is Not Entitled to Information Within the Funding Requests and Orders Under the Rules of Discovery.

Respondent argues there is no danger of petitioner having to "telegraph to the prosecution the defendants' strategy" because he is required to provide respondent with the information contained in the funding documents under the discovery rules. Response at 13. This assertion is inaccurate. By Respondent's own admission, the rules of discovery provide access to documents

and things that would go either to a claim or defense and the names of witnesses and experts who have knowledge of a claim or defense – not to strategic information about what expert or investigative services petitioner is considering before it is even known whether these services will bear fruit. Further, in order to apply for funding for investigative and expert services, petitioner may have disclosed to the Court information protected by the attorney-client and work-product privileges. Obviously, the rules of discovery do not entitle the State to such information. Likewise, the rules of discovery do not permit petitioner to know which expert and investigative services the State is contemplating before the hearing and how much funding Respondent plans to allocate to such services.

## CONCLUSION

In any event, the issue presented in the Petition for Court Oversight of this capital PCR action is not whether petitioner is entitled to the specific funding requested, nor is the question about whether capital PCR applicants are generally entitled to seek funding in *ex parte* proceedings (as they clearly are). Rather, the issue is whether this Court will intervene to address a series of problems that, if not addressed now, will inevitably lead to reversal at some point in the future of this litigation either in state or federal court. To avoid the unnecessary waste of judicial time and resources, petitioner believes this Court should grant his petition and address these problems now rather than later.

Respectfully submitted,

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Counsel for Petitioner

February 18, 2015.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

---

Capital PCR Case Number: 2014-CP-26-00035

---

STEPHEN C. STANKO, SK 6022 ..... *Petitioner,*

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

---

CERTIFICATE OF SERVICE

---

The undersigned hereby certifies that a copy of Petitioner's Reply Regarding Petition for Court Oversight of Capital PCR Action was served by first class United States mail, postage prepaid, this 18th day of February 2015, upon the following:

Anthony Mabry
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

Jill A. Rider

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF PICKENS | ) | |
| Jerry Buck Inman, #5226, | ) | |
| | ) | C/A No.: 2012-CP-39-918 |
| Applicant, | ) | (Capital PCR Action) |
| v. | ) | |
| | ) | **CERTIFICATE OF SERVICE** |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

I, Anthony Mabry, hereby certify that a true copy of the **Rule 59, SCRCP, Motion to Alter or Amend or to Reconsider** has been served upon opposing counsel, E. Charles Grose, Jr. and Diana L. Holt by depositing copies in the United States Mail to:

E. Charles Grose, Jr., Esquire
The Grose Law Firm
404 Main Street
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Diana L. Holt, Esquire
Diana L. Holt, LLC
P. O. Box 6454
Columbia, SC 29260-6454

this 10th day of December, 2015.

ANTHONY MABRY
Assistant Attorney General

# ATTACHMENT 6

| | | |
|---|---|---|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE THIRTEENTH JUDICIAL |
| COUNTY OF PICKENS | ) | CIRCUIT |
| | ) | |
| Jerry Buck Inmon, | ) | Case No. 2012-CP-39-00918 |
| Applicant, | ) | |
| | ) | |
| vs. | ) | **Response to State's Rule 59, SCRCP Motion to Alter or Amend or to Reconsider** |
| | ) | |
| State of South Carolina, | ) | |
| Respondent. | ) | |
| | ) | |

The applicant, Jerry Inmon, responds to the State Rule 59, SCRCP Motion to Alter or Amend or to Reconsider. This Court fully considered and ruled upon the matters raised by the State in its motion and did not overlook or misapprehend any fact or point of law.

1) The State in its motion argues its "intent is to seek compliance by the Court with the decision in *State v. Thames*, [325 S.C. 9, 478 S.E.2d 682 (1996)] and to protect the integrity of the fact finding process." This Court not only addressed *Thames* in the written order but also explained why the footnote in *Thames* is not applicable. This Court, furthermore, explained why S.C. Code Ann. § 17-27-160 and the "Antiterrorism and Effective Death Penalty Act of 1996," 28 U.S.C. §§ 2261-2266, mandate this result. This Court's order protects the integrity of the fact-finding process.

2) The State's motion expresses concern that the Court was not able to access the pleadings pertaining to the Unpublished Order in *Stanko v. State* (Appellate Case No. 2015-000212, Feb. 25, 2015) by taking out of context a comment made by this Court in an email. At the conclusion of the hearing on this motion, the Court requested proposed orders from both parties. The State provided its proposed order in Word and PDF

formats, while Mr. Inmon provided his proposed order in PDF formant only. The Court merely requested Mr. Inmon provide a Word copy of his proposed order. While the Court adopted some provisions of Mr. Inmon's proposed order, the Court drafted its own order. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (Our Supreme Court "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law."). Thus, there is no reason whatsoever to suggest that the Court did not consider materials provided to the Court by email after the hearing.

3) The State acknowledges that it "failed to attach Stanko's reply brief in the above described email." A Rule 59(e), SCRCP is not an appropriate vehicle to raise a new matter. *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." (emphasis supplied by the Court)).

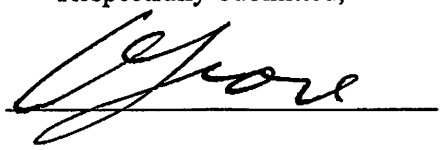
4) The State further contends that "the South Carolina Supreme Court rejected those arguments" raised by Mr. Stanko. The unpublished order in *Stanko v. State*, however, did not decide any of issues raised by either side, but rather remanded the matter to the trial court for consideration. This contention, therefore, is without merit.

**Conclusion**

This Court should deny the State's Rule 59, SCRCP motion.

(signature on next page)

Respectfully Submitted,

By 

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| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE THIRTEENTH JUDICIAL |
| COUNTY OF PICKENS | ) | CIRCUIT |
| | ) | |
| Jerry Buck Inmon, | ) | Case No. 2012-CP-39-00918 |
| Applicant, | ) | |
| | ) | |
| vs. | ) | **Response to State's Rule 59, SCRCP Motion to Alter or Amend or to Reconsider** |
| | ) | |
| State of South Carolina, | ) | |
| Respondent. | ) | |
| | ) | |

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

J. Anthony Mabry, Esquire
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By _____

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CERTIFICATE OF SERVICE

I, Anthony Mabry, certify that I have served Petitioner's PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI by depositing one copy to his counsel of record in the United States mail, postage prepaid, addressed as follows:

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This 29th day of December, 2015.

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ATTORNEY FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In The Supreme Court

---

In The Original Jurisdiction

---

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

---

Appellate Case No. 2015-002634

---

Jerry Buck Inmon.....Respondent.

v.

The State of South Carolina.....Petitioner.

---

**Response to State's Petition for this Court to Invoke its Original Jurisdiction and Issue and Extraordinary Writ of *Certiorari***

---

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## QUESTION PRESENTED FOR REVIEW

Should this Court invoke its original jurisdiction and issue and an extraordinary writ of *certiorari* to review the post-conviction court when the matter can be entertained in the Circuit Court and there is not an extraordinary reason, such as a question of significant public interest or an emergency, to justify this Court exercise its original jurisdiction?

## STATEMENT OF THE CASE

On August 19, 2008, the respondent, Jerry Buck Inmon[1] pleaded guilty to first-degree burglary, kidnapping, first-degree criminal sexual conduct, and murder. On April 22, 2009, the Honorable Edward W. Miller sentenced Mr. Inmon to death for murder, thirty years imprisonment for first-degree burglary, and thirty years imprisonment for first-degree criminal sexual conduct. The sentences are consecutive. Pursuant to S.C. Code § 16-3-1910, Judge Miller did not impose a sentence for kidnapping.

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

Mr. Inmon filed his application for post-conviction relief on June 21, 2012. By written order dated October 31, 2012, this Court appointed the Honorable Alexander S. Macaulay to preside.

On September 10 2015, the State moved the post-conviction court for an order unsealing *ex parte* funding motions, requests, and orders already issued, disclosing to the government the content of all *ex parte* communications between the Court and Mr. Inmon's counsel, and providing the Attorney General's Office with notice and opportunity to be present and heard at any future *ex parte* funding requests or hearings. Mr. Inmon responded to this motion on September 25, 2015, and the State replied on October 2, 2015. The post-conviction court convened a hearing on the State's motion on

[1] The respondent's last name is correctly spelled "Inmon." His last name is spelled "Inman" in prior proceedings and prior court documents in this case.

October 23, 2015. By written order dated November 16, 2015, the post-conviction court denied the State's motion (hereinafter "Order").

On December 10, 2015, the State filed a Rule 59(e), SCRCP motion.

On December 29, 2015, the State filed its petition for a writ of *certiorari* in this Court, pursuant to Rule 245, SCACR.

By written order dated January 2, 2016, the post-conviction court denied the State's Rule 59(e) motion.[2]

This response follows.

[2] Under this Court's procedures, the State's petition should have been dismissed until the court below ruled on the Rule 59(e) motion; however, "[r]emand in this case is unnecessary since the trial court properly found he had jurisdiction and has already ruled on the" motion. *Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 342 (1986). By separate petition, the State asks that the order denying its Rule 59(e) motion be considered in connection with the State's Petition. Mr. Inmon does not oppose this request.

## REASONS WHY THIS COURT SHOULD DENY THE STATE'S PETITION

This Court should deny the State's petition for a writ of *certiorari* for three reasons. First, the State's petition does not present an extraordinary reason for this Court to invoke its original jurisdiction. Second, by applying well-settled rules of statutory construction, the court below correctly concluded that footnote one in *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1996), citing to S. C. Code § 17-3-50(B), did not apply to S.C. Code § 17-27-160, which had not even been enacted when the case and controversy in *Thames* arose. Third, additional sustaining grounds support the decision of the court below.

### I. The State's petition does not present an extraordinary reason for this Court to invoke its original jurisdiction.

> Although Article V, § 5, of the South Carolina Constitution vests this Court with the authority to issue extraordinary writs and entertain actions in its original jurisdiction, this Court's primary function is to act as an appellate court to review appeals from the trial courts. In [former] Rule 229, SCACR, this Court has indicated it will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State. Only when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction.

*Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991).

Petitioning to invoke this Court's original jurisdiction is normally a two-part process. Pursuant to Rule 245(c), SCACR, the party seeking this Court to invoke its original jurisdiction files "a petition for original jurisdiction [and] a complaint setting forth the claim for relief." *See e.g. Mitchell v. Spartanburg Cty. Legislative Delegation*, 385 S.C. 621, 622, 685 S.E.2d 812, 813 (2009) ("Because . . . petition presents an issue of great public interest, we exercise our authority to review this matter in our original

jurisdiction."). The party opposing the petition for original jurisdiction has an opportunity to respond. If the petition for original jurisdiction is granted, then the respondent has an opportunity to respond to the complaint setting forth the claim for relief.

In this case, the State's petition does not allege a matter of great public interest in order to justify this Court invoking its original jurisdiction. Nor could the State allege such a reason. This Court rarely issues an extraordinary writ of *certiorari* during the pendency of a post-conviction relief case. In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), this Court issued an extraordinary writ of *certiorari* to clarify the procedure to be followed by trial and post-conviction courts to comply with the Eighth Amendment prohibition against executing people with Intellectual Disabilities as set forth in *Atkins v. Virginia,* 536 U.S. 304 (2002). *Franklin* did not review an individual case, but rather involved a petition by multiple litigants, at different stages of capital litigation, facing possible execution, seeking clarification of how our state would implement *Atkins*. *Franklin*, therefore, involved a matter of great public interest.

In *Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782 (2004), this Court issued an extraordinary writ of *certiorari* to determine whether a capital post-conviction relief proceeding should be stayed indefinitely until Mr. Council regained his mental competency to assist his post-conviction counsel. Without this Court's intervention, the post-conviction court's order would have evaded review, indefinitely, until the Mr. Council regained his mental competency.

In *Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009), this Court granted extraordinary writ of *certiorari* to provide guidance to the bench and bar regarding the

waiver of the attorney-client privilege, under S.C. Code § 17–27–130, as a matter of great public interest.

The issue presented in the State's petition for an extraordinary writ of *certiorari* does not present an extraordinary reason, such as a question of significant public interest or an emergency, for this Court to exercise its original jurisdiction. It does not involve clarifying the procedure to implement a new rule established by the Supreme Court of the United States. Judge Macaulay actively oversees this case and the case was within six months of an evidentiary hearing when the State sought this action before this Court.[3] No emergency exists such as the need to prevent irreparable harm that could result from an unauthorized disclosure of information protected by the attorney-client privilege like what was involved in *Binney*.

Not only is this matter capable of being entertained in the trial courts, Judge Macaulay has already addressed this matter in his written order dated November 16, 2016. As discussed in Section II, *infra*, Judge Macaulay's statutory interpretation is correct. Our state's Circuit Court Judges are very experienced with addressing funding requests by indigent litigants in the criminal justice system. Thus, no reason exists to question the competence or integrity of our judges. If the Attorney General's Office wants to challenge the post-conviction judge's order, it will have that opportunity through the ordinary appellate process after the final ruling on the merits of Mr. Inmon's application for post-conviction relief.

---

[3] Mr. Inmon's status reports, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), have reported about Judge Macaulay's management of this case. For example, 60-day status reports dated October 14, 2015 and December 16, 2015, respectively, reported Judge Macaulay convening status conferences on August 28, 2015 and November 23, 2015.

This Court should deny the State's petition to invoke its original jurisdiction.

## II. By applying well-settled rules of statutory construction, the court below correctly concluded that footnote one in *Thames v. State*, citing to S. C. Code § 17-3-50(B), did not apply to S.C. Code § 17-27-160, which had not even been enacted when the case and controversy in *Thames* arose.

By applying well-settled rules of statutory construction, the court below correctly concluded that footnote one in *Thames v. State*, citing to S. C. Code § 17-3-50(B), did not apply to S.C. Code § 17-27-160, which had not even been enacted when the case and controversy in *Thames* arose.

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

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

> to add section 17–27–130 so as to provide for circumstances when the attorney–client privilege is deemed waived in post–conviction proceedings or collateral relief procedures, and to provide for certain access of new counsel to the files of prior counsel in cases of defendants sentenced to death; to add section 17–27–150 so as to provide the conditions under which a party in capital and

> noncapital post–conviction relief proceedings is entitled to invoke the process of discovery; and to add section 17–27–160 so as to provide for the manner in which defendants sentenced to death must file applications for post–conviction relief, to provide for the assignment of judges to handle these applications, to further provide for the appointment and compensation of counsel in these proceedings, and to provide for other procedural matters including the certain time limitations in these capital post–conviction relief proceedings.

1996 ACT 448, Preamble (emphasis added). By adopting this Act, the General Assembly sought to avail our state of the special federal *habeas corpus* provisions in capital cases contemplated by the "Antiterrorism and Effective Death Penalty Act of 1996." 28 U.S.C. §§ 2261-2266.

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

Section 17-27-160 authorizes counsel to be funded in the same "manner" as provided by S.C. Code § 16-3-26. Considered in light of 28 U.S.C. § 2265, § 17-27-160 certainly contemplated counsel to be compensated for attorney fees and expenses in a "manner" that they can provide effective representation. As contemplated by 28 U.S.C. § 2265, effective representation includes employing investigative and expert services. In fact, the plain terms of the statute support this conclusion. First, § 17-27-160 does not limit funding to attorney fees. Second, § 17-27-160 incorporates all of § 16-3-26 by

reference, except for subsection (I) that is expressly excluded.[4] Section 17-27-160, therefore, requires this Court to look to § 16-3-26 for the procedure to follow in order to obtain investigative, expert or other services. Section 16-3-26(C)(1) provides:

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

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

The State, however, relies on footnote 1 is *Thames v. State*, citing to § 17-3-50(B), and the Unpublished Order in *Stanko v. State* (Appellate Case No. 2015-000212, Feb. 25, 2015). *Thames* does not control for two reasons. First, the facts in *Thames* arose prior to the enactment of § 17-27-160. *Thames* was argued in this Court on May 15,

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

1996 and decided on December 2, 1996. Section 17-27-160 became effective on June 18, 1996. Second, *Thames* was not a capital case. The unpublished order in *Stanko v. State*, likewise, does not apply. Only published opinions have precedential value. Rule 220(a), SCACR. Additionally, by the plain terms of the unpublished order, this Court did not reach the merits of the issue, but rather remanded the case to the Circuit Court for consideration of the State's pending motion. Neither *Thames* nor the order in *Stanko* considered the statutory interpretation issue currently before this Court. Thus, neither *Thames* nor the *Stanko* order controls the issue currently before the Court. The rules of statutory construction, furthermore, resolve any inconsistency that might exist between § 17-3-50 and § 17-27-160. The more recently adopted § 17-27-160, which is specific to capital post-conviction relief cases, controls over § 17-3-50. Additionally, by adopting § 17-27-160, the General Assembly intended to provide a capital post-conviction relief applicant the special protections contemplated by 28 U.S.C. § 2265. Thus, neither § 17-27-160 nor 28 U.S.C. § 2265 were relevant to the issue before this Court in *Thames*.

Because § 17-27-160 incorporates all of the funding provisions of § 16-3-26, including the provisions for funding investigative, expert and other services, the court below correctly allowed Mr. Inmon to make applications in an *ex parte* and *in camera* proceedings and denied the State's motion for that court to issue an order unsealing Mr. Inmon's *ex parte* funding motions, requests, and orders already issued, disclosing to the government the content of all *ex parte* communications between the Court and Mr. Inmon's counsel, and providing the Attorney General's Office with notice an opportunity to be present and heard at any future *ex parte* funding requests or hearings.

This Court should deny the State's petition to invoke its original jurisdiction.

## III. Additional sustaining grounds support the decision of the court below.

In addition to matters of statutory construction, in his memorandum below in opposition to the State's motion to unseal and disclose his funding requests, Mr. Inmon raised additional arguments. These included (1) footnote 1 in *Thames* is merely *dicta*, (2) due process,[5] (3) equal protection,[6] (4) lack of standing of the Attorney General's Office to object to Mr. Inmon's funding requests, and (5) the potential for interference with the attorney-client relationship. *See* Ex. 4 of State's Petition. Each of these arguments is an additional ground to sustain the court below. Although not forming the basis of the decision, the court below eluded to two of these grounds.

First, referring to this Court's opinion in *Ex parte Lexington County,* in footnote 3 at p. 8 of its order, the court below observed:

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

(citing 314 S.C. at 228, 442 S.E.2d at 594). The court below then pointed out that "both 28 U.S.C. §§ 2261-2266 and §17-27-160 are intended to protect the [due process and equal protections] rights of indigents." Order, p. 8.

Second, in footnote 4, also at p. 8 of its order, the court below confirms its "complete confidence in our Judiciary and the Office of Indigent Defense" (hereinafter "OID"). Reference to OID pertains to the Attorney General's lack of standing to object to funding requests of indigents in the criminal justice system and the potential for

[5] U.S. Const. Am. V and XIV; S.C. Const. Art. I, § 3.

[6] U.S. Const. Am. XIV; S.C. Const. Art. I, § 3.

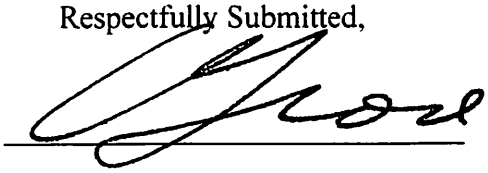
interference with the attorney-client relationship. Even before, but especially since the "Indigent Defense Act of 2007," 2007 ACT 108, OID has been a resource to the Judiciary regarding funding in indigent cases. *See e.g. Ex Parte Shurling*, 408 S.C. 309, 759 S.E.2d 714 (2014), where OID's General Counsel appeared before this Court on matters pertaining to attorney's fees and expenses. Independent from the Attorney General's Office, OID can provide information to the Judiciary and, at the same time, allow the Judiciary to "safeguard the rights of litigants." *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

This Court should deny the State's petition to invoke its original jurisdiction.

## CONCLUSION

This Court, therefore, should dismiss the State's petition for this Court to invoke its original jurisdiction and issue an extraordinary writ of *certiorari*.

Respectfully Submitted,

By 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January 27, 2016

***Attorneys for Respondent Jerry Buck Inmon***

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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In The Original Jurisdiction

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APPEAL FROM PICKENS COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

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Appellate Case No. 2015-002634

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Jerry Buck Inmon.....Respondent.

v.

The State of South Carolina.....Petitioner.

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**Certificate of Service**

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I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

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January 27, 2016
Greenwood, South Carolina

STATE OF SOUTH CAROLINA
In The Supreme Court

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IN ITS ORIGINAL JURISDICTION

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PICKENS COUNTY
Court of Common Pleas
The Honorable Alexander S. Macaulay, Circuit Court Judge
Case No. 2012-CP-39-918

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APPELLATE CASE NUMBER 2015-002634

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JERRY BUCK INMAN,.....Respondent,

v.

STATE OF SOUTH CAROLINA,.....Petitioner

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# REPLY TO RETURN TO PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

This is a capital PCR case currently pending before the Honorable Alexander Macaulay ("the PCR Court") in the Court of Common Pleas for Pickens County and scheduled for a merits hearing in June of 2016. Respondent/Applicant, Jerry Buck Inman, aka Inmon, (hereinafter "Inman") filed his PCR application on June 21, 2012,[1] This matter is before this Court by way of a Petition for Extraordinary Writ of Certiorari from the Order of the PCR Court denying Petitioner/Respondent's ("the State's") Motion to Unseal and Disclose *ex parte* matters. [2]

## REASONS WHY THE EXTRAORDINARY WRIT SHOULD BE GRANTED

The basis of the State's Motion to Unseal *Ex Parte* matters below was this Court's decision in Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996) and this Court's unpublished Order in Stanko v. State, Appellate Case No. 1015-000212 (Filed February 25, 2015). Respondent attached the Thames Opinion and the unpublished Order in Stanko v. State to its Motion below.

Inman's arguments to this Court in his Return to the Petition for Extraordinary Writ of Certiorari are the same arguments made by capital PCR applicant Stephen C. Stanko to this Court in that appeal and rejected by this Court as unpersuasive. (See Petitioner's Reply Regarding Petition for Court Oversight of Capital PCR Action / Stephen C. Stanko, Petitioner). Stanko v. State, Appellate Case No. 1015-000212 (Filed February 25, 2015)(*Unpublished).*

Based on the above authority, the PCR Court clearly erred. The PCR Court was required to

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1 Inman pled guilty to the murder, burglary 1st degree, criminal sexual conduct 1st degree, and kidnapping of Clemson University co-ed Tiffany M. Souers before the Honorable Edward W. Miller. Inman was sentenced to death for Souers' murder. This Court affirmed Inman's convictions and sentences, including his death sentence, on December 28, 2011. State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011).

2 The State filed a Rule 59 Motion to Alter or Amend *or* in the alternative to Reconsider on December 10, 2015 which was denied by the PCR Court after the State timely filed this Petition for Extraordinary Writ of Certiorari on December 29, 2015.

follow this Court's interpretation of South Carolina law, not its' own, and grant the State's Motion to Unseal. The denial of the State's Motion has denied the State a substantial right, as the State is entitled to know of any *ex parte* motions, requests, meetings, orders, etc., where *this is a civil action* and the PCR Court is the fact finder. The State is also entitled to know of any *ex parte* funding requests, motions, orders, etc. so it may adequately prepare for the PCR merits hearing scheduled in June of 2016. Any appeal of this issue after the merits hearing would moot this issue. As a result, this Court should grant certiorari and issue an Order directing the PCR Court to grant the State's Motion to Unseal. *See* McGee v. Bruce Hosp. Sys, 312 S.C. 58, 439 S.E.2d 257 (1993)(wherein this court granted a writ of certiorari to consider whether certain matters were immune from discovery).

In Thames , *supra*, this Court stated as follows:

> FN1. When the defendant requests expert services for a criminal trial, the request is determined by the judge in ex parte proceedings. S.C. Code Ann. Section 16-3-26(C) and Section 17-3-50(B)(Supp. 1995). Ex parte Lexington County, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings.
>
> Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While Section 17-3-50(A) mentions that the same hourly rate for appointed counsel shall apply to post-conviction proceedings, the use of the word, "defendant" throughout Section 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

Thames , 325 S.C. at 11, 478 S.E.2d at 682, n. 1.

Subsequently, and more recently, this Court addressed a similar argument in a capital PCR case. Stanko v. State, Appellate Case No. 1015-000212 **(Filed February 25, 2015)**(*Unpublished*

*Order*). There, this Court noted that "the issue of *ex parte* proceedings in PCR matters, which is at the heart of the petition currently before this Court, was addressed in Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1986) and such proceedings were found to be improper." Id., at n.1. This Court denied Stanko's petition and the State's request before it and remanded the matter to the Circuit Court where the State had *a motion to unseal ex parte funding requests and orders* pending stating: "The State currently has such a motion pending before the circuit court, where it can be ably addressed." Id., at n. 1.[3] This entire Court then noted subsequently, in the above quoted footnote that such *ex parte* proceedings in a post-conviction relief (PCR) proceeding were improper citing Thames, *supra*. Stanko v. State, Appellate Case No. 1015-000212 (Filed February 25, 2015) n. 2.

As a result, this entire Court has made clear that it makes no difference whether this is a capital PCR or non-capital PCR action; *ex parte* funding requests or proceedings are improper in a PCR action. Respondent is simply seeking to have this Court's previous holdings followed in this case in the Circuit Court of Common Pleas.

In support of this position, the State would respectfully show the Court there is no statutory right to *ex parte* proceedings regarding appointment and funding of expert witnesses or investigative witnesses and services in capital PCR actions. Inman argues there is a statutory right by virtue of Section 17-27-160 for the non-disclosure of investigative and expert witness requests made to the fact-finder PCR judge, which they argue incorporates all the funding provisions of § 16-3-26, including the provisions for funding investigative, expert and other services. They are incorrect. There is no such express provision in the language of the statute. *Accord* Thames, 325

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[3] On remand of the Stanko PCR case, in light of this Court's Order, Judge Culbertson issued an order unsealing *ex parte* funding motions or requests and orders.

S.C. at 11, 478 S.E.2d 682. Thames addressed that such matters in PCR actions are not subject to being done *ex parte*.

Inman relies upon and references to Section 16-3-26 in the second paragraph in Section (B) of S.C. Code § 17-27-160 to support non-disclosure of any funding requests or orders to the State. However, that provision only addresses the appointment, qualification, and compensation of PCR counsel and the compensation of PCR appellate counsel. The first reference is tied specifically to counsel's compensation: "Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel...." S.C. Code § 17-27-160 (B). If that were not so, the provisions of S.C. § 17-3-50 (A) would apply resulting in reduced rates and caps as set therein.[4] This speaks of counsel's compensation - a matter not at issue in these proceedings. Contrary to what Inman implies, there is no specific provision or reference to "investigative, expert, or other services" or the corresponding provision for same in the criminal trial as reflected in S.C. Code § 16-3-26(C)(1).[5] The only other reference to Section 16-3-26 is Section 16-3-26 (I), to provide, *again as to the appointment of counsel*, that the prohibition of appointing non-licensed, non-resident attorneys at trial does not apply to the civil proceedings. *See*

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4 It is of no little note that payment of counsel' fees are separate and apart from the provision of "investigative, expert, or other service," both in Section 16-3-26 and Section 17-3-50. This is also true of the federal funding provisions. See 18 U.S.C.A. § 3599. However, PCR applicants typically seek to combine the two in order to find statutory support for their position. This is, of course, contrary to the standard references of the funding as two distinct concerns.

5 Section 16-3-26(C)(1) provides for "ex parte proceedings" to determine "that investigative, expert, or other services are reasonably necessary for the representation of the defendant" at the criminal capital trial.

S.C. Code § 17-27-160 (B). *Ergo*, when read naturally, the reference to Section 16-3-26 in Section 17-27-160 involves the narrow question of counsel's compensation.[6]

To reach an opposite conclusion, one must accept that the whole of Section 16-3-26 is incorporated into the PCR Act. This would include incorporation of the reference to the notice of intention to seek death and other specific trial related provisions – clearly not a requirement in post-conviction relief proceedings. Even the reference to the section Inman seeks to incorporate, Section 16-3-26 (C)(1), only authorizes "investigative, expert, or other services are reasonably necessary for the representation *of the defendant whether in connection with issues relating to guilt or sentence*...." A "defendant," refers to a "criminal defendant," defined as "one who is accused in a criminal proceeding." Black's Law Dictionary (9th ed. 2009). Inman is no longer a defendant. *See also* Black's Law Dictionary (defining defendant generally: "A person sued in a civil proceeding or accused in a criminal proceeding."). In fact, the language of Section 17-27-160 reflects that shift in position in providing that a "defendant" must file an application for relief, but after filing, refers to the individual bringing suit as "the applicant." S.C. Code § 17-27-160. *See also* S.C. Code §§ 17-27-40 through 17-27-80 (referencing applicant in non-capital post-conviction relief provisions as of the filing of the application). Further, counsel representing a PCR applicant is not directly raising issues related to guilt or sentence.[7] Rather, the civil action

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6This is also consistent with the express goal of the act: "...to add Section 17-27-160 so as to provide for the manner in which defendants sentenced to death must file applications for post-conviction relief, to provide for the assignment of judges to handle these applications, *to further provide for the appointment and compensation of counsel in these proceedings,* and to provide for other procedural matters including the certain time limitations in these capital post-conviction relief proceedings." 1996 South Carolina Laws Act 448 (H.B. 4469).

7 Inman's fallback position appears to be he has been convicted, but these proceedings are merely a continuation of sentencing. To the contrary, Inman is currently under a presumptively valid

challenging a presumptively valid state judgment is separate and distinct from the criminal proceeding. *See* Rule 71.1 (c), SCRCP ("An application filed under the [Post-Conviction Procedure] Act is an independent civil action which should be separately filed and indexed by the clerk of court."); S.C. Code § 17-27-20 (a)(6) ("... this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.").[8]

In interpreting the statute, "[t]he Court must give clear and unambiguous statutory terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." State v. Cribb, 310 S.C. 518, 521, 426 S.E.2d 306, 308 (1992). *See also* State v. Phillips, 400 S.C. 460, 734 S.E.2d 650 (2012) (same); State v. Sweat, 386 S.C. 339, 688 S.E.2d 569 (2010) (same). Thus, the trial provisions referring expressly to a "defendant" cannot be applied in a civil post-conviction relief action. *See also* Thames, 325 S.C. at 11, 478 S.E.2d at 682 n. 1 (noting "Section 16-3-26 (C) applies to the capital trial and not to post-conviction relief proceedings" noting that reference to "defendant" is reserved for a "defendant" in criminal proceedings, not an applicant for post-conviction relief). Consequently, the whole of Section 16-3-26 cannot apply.

In the absence of the incorporated provisions, the more general statutes are controlling for reimbursement for expenses. *See* S.C. Code § 17-3-50 ("Defense of Indigents, General Provisions, Determination of fees for appointed counsel and public defenders; maximum amounts;

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judgment. Guilt has been adjudicated and sentence imposed. This action is filed to challenge the continued custody under this presumptively valid judgment. *See* S.C. Code § 17-27-20 (relief may be sought where a "person who has been convicted of, or sentenced for, a crime" seeks to have his conviction or sentence vacated on grounds other than an allegation of insufficient evidence).

8 Though this Court has referred to such as action as "hybrid," it is so only because the criminal conviction and sentence are at issue. The Court has said: "... while a PCR action is hybrid in nature, it generally remains subject to rules and statutes that apply in civil proceedings." Sutton v. State, 361 S.C. 644, 606 S.E.2d 779 (2004) (*overruled on other grounds by* Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005).

authorization to exceed maximum; payment for certain services."). If that is so, then Thames is applicable and controlling. In Thames, this Court instructed the provision of *ex parte* proceedings in Section 17-3-50 (B) is reserved for funding requests made in preparation for the criminal trial. Id., 325 S.C. at 11, 478 S.E.2d at 682 n. 1. Consequently, Inman has failed to show a statutory right to *ex parte* proceedings.[9]

Further, there is no constitutional right to *ex parte* proceedings in capital PCR cases. As a first point, there is no constitutional right to PCR proceedings. *See, e.g.,* United States v. MacCollom, 426 U.S. 317, 323 (1976) ("The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, *see* Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction."). Again, Inman is the party bringing the suit in this instance.[10] He bears the burden of proof. *See* Bennett v. State, 371 S.C. 198, 638 S.E.2d 673 (2006)(*citing* Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Though Inman argues he is still entitled to the array of constitutional and statutory rights of a criminal defendant, he simply is not entitled to those same rights in a civil action as the action itself is definitively different in scope and measure. *See* Murray v. Giarratano, 492 U.S. 1, 10 (1989) ("State collateral proceedings are

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9 The State has interpreted the previous motion requests for *ex parte* proceedings to refer specifically to "investigative" or other experts. The provisions for payment of counsel's fees, as discussed above, are treated separately from other expenses of the litigation. In fact, there is no provision at all for *ex parte* hearings on the authorization of counsel's fees. *See* Section 16-3-26; Section 17-3-50 (A) and (C). *See also* July 6, 2005 Order of the Chief Justice, Re: Ordering Additional Attorney's Fees for Appointed 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.").

10 It is Inman who is obligated to make the allegations to allow the State the opportunity to prepare a defense. Inman would surely object if the State, in the criminal case, told him only that additional allegations would be forthcoming in addition to the allegations of the indictment.

not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987)("Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). *Cf.* Fisher v. Baker, 203 U.S. 174, 181 (1906)("The proceeding is in habeas corpus, and is a civil, and not a criminal, proceeding."); Ex parte Tom Tong, 108 U.S. 556, 559-560 (1883)("The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process."). Simply, civil proceedings do not give rise to the constitutional rights afforded a criminal defendant. *See* United States v. Baker, 45 F.3d 837, 843 (4th Cir. 1995) ("the constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a respondent in a commitment hearing" citing the civil nature of the proceedings). Even where a criminal trial right survives, the right is generally limited by the civil nature of the proceedings.

For example, the 5th Amendment right against self-incrimination survives and can be invoked in any proceeding. However, an individual's failure to answer questions allows for an adverse inference in civil cases. Baxter v. Palmigiano, 425 U.S. 308, 318-319 (1976)(noting "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)."). *See* In re Care and Treatment of Canupp, 380 S.C. 611, 671 S.E.2d 614 (Ct.App. 2008)("...only a criminal defendant has the right

to decline to take the witness stand altogether."). Consequently, the nature of the proceeding controls.

Though Inman has relied upon Ake v. Oklahoma, 470 U.S. 68 (1985), the case resolved only that where "a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake does not speak to collateral proceedings at all. *See* Rosado v. Allen, 482 F.Supp.2d 94, 113 (D.Mass. 2007)("Ake v. Oklahoma ... concerned a defendant's right to have access to a psychiatrist assistant at *trial*, not on post-conviction relief.")(emphasis in original); Sanborn v. Commonwealth, 975 S.W.2d 905, 909-910 (Ky. 1998)("Ake v. Oklahoma, ... is not a post-conviction case.")(*overruled on other grounds by* Leonard v. Com., 279 S.W.3d 151 (Ky. 2009)); McGahee v. State, 885 So.2d 191, 229 (Ala.Crim.App. 2003)(*Ake* not applicable in civil proceeding challenging conviction). Thus, Ake is not dispositive. [11]

Whether funding for any particular expert is necessary or authorized, however, is not at issue in requests for *ex parte* and *in camera* proceedings. Rather, at issue is how the requests will be heard. The State submits for all the foregoing reasons, Inman had no right to be heard *ex parte*.

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11 It should not be lost the purpose of Ake was to determine when a state must provide access to funds for "psychiatric assistance" for an indigent criminal defendant at trial. Ake, 470 U.S. at 77. Ake does not resolve access to other experts in other circumstances. Further, Supreme Court has summarily rejected arguments of "constitutional infirmity in the *trial court's* refusal to appoint various experts and investigators" where "the requests were accompanied by no showing as to their reasonableness." Caldwell v. Mississippi, 472 U.S. 320. 323 n. 1 (1985)(emphasis added). Thus, there appears to be no basis in Ake to argue for unlimited resources for various "experts" at all stages of the proceedings, direct and collateral.

This position is consistent with funding provisions for federal actions, which, like our state rules, disfavor *ex parte* proceedings.[12]

Similarly, there is no right to closed proceedings in regard to funding requests in capital PCR proceedings. Again, Inman relies on provisions for the criminal trial, so, again, the civil nature of the proceeding undercuts reliance on his reliance upon precedent interpreting same.[13] Here is in no danger of having to "telegraph to the prosecution the defendants' defense strategy," as he is not the defendant and has no defense strategy. In this civil action, he is *required* to make sufficient allegations for the State to investigate and present a defense. *See* S.C. Code § 17-27-40. There is no right to keep known potential issues from the State and essentially shorten, (or in some

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12 "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). *No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.*" 18 U.S.C.A. § 3599 (f) (*emphasis added*). *See also* United States v. Caro, 442 F.Supp.2d 296, 297 n.1 (W.D.Va. 2006) (noting "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed.").

13 For example, *see* Ex parte Lexington County, 314 S.C. 220, 227, 442 S.E.2d 589, 593 (1994), a case which refers to two capital defendants who had not yet stood trial, where the Court found Section 16-3-26(C) provides a "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*." 314 S.C. at 227, 442 S.E.2d at 593, which is clearly the procedure in the criminal trial to which the statute refers. However, as noted above, that section has not been expressly incorporated into the civil proceedings provided for capital PCR actions. But even that statutory funding provision does not allow the trial courts to "close the proceeding," rather, "the trial judge must treat this case like any other which presents the issue of whether it is appropriate to close the proceedings." Id. To close the proceedings, the court must find on the record that "there is a substantial probability of prejudice which would result from the publicity, and ... there are no reasonable alternatives to closure which would protect the defendant's right to a fair trial." Id. This Court in Ex parte Lexington County based its reasoning that closure for *ex parte* funding requests was warranted *in a criminal trial* on finding a defendant would not be required to disclose his *theory of the defense* but for the fact that he was indigent and had to request funds. 314 S.C. at 228, 442 S.E.2d at 594. That concern is not present here.

cases eradicate), the opportunity the State to investigate and respond fully. *See generally* S.C. Code § 17-27-130 ("Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation.").[14] He is also *required* to disclose in discovery those documents and things that would go to *either* a claim or defense. *See* Rule 26 (b)(1), SCRCP ("Parties may obtain discovery regarding any matter, not privileged, which is relevant *to the subject matter involved* in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...")(emphasis added). He is further required to disclose the names of witnesses and experts who have knowledge of claim or defense. Rule 26 (b)(4)(B).[15] In short, Inman is required to comply with the SCRCP. These full disclosure requirements stand in stark contrast to the defense cloak of secrecy for the criminal trial. The same concerns in Ex parte Lexington County are not present here.

The State recognizes, ethical rules allow *ex parte* communication in limited discrete circumstances. Rule 501, SCACR, Canon 3 (B) (7) (a), Code of Judicial Conduct, provides:

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14 There is every indication that investigation authorized by discovery available to every other civil litigant would bear not only on funding, but also on preparation.

15 No opinion from any consulting expert would be obtained through a mere funding request (in fact, the request presumes one has not yet been hired or an opinion rendered). However, such an opinion must be shared, not due to funding requests but under ordinary rules of discovery, if the expert is not merely "consulted informally, or consulted and not retained and specially employed." Rule 26 (b)(4)(B), SCRCP. *See also* Rule 33 (b)(6), SCRCP (standard interrogatories requiring disclosure of "names and addresses of any expert witnesses whom the party proposes to use as a witness").

> Where circumstances require, ex parte communication for scheduling, administrative purposes or emergencies **that do not deal with substantive matters or issues on the merits** are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

*(emphasis added). See also* Rule 407, Rule 3.5 (a) and (b), Rules of Professional Conduct (prohibiting attorneys from ex parte discussions with a judge "unless authorized to do so by law or court order"). The Court may, pursuant to these provisions, allow *ex parte* communication.[16] The party communicating in the absence of an opposing party has heightened ethical duties to provide the court with relevant information. Rule 407, SCACR, Rule 3.3 (d), Rules of Professional Conduct ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known

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16 E*x parte* funding requests are neither provided for nor mandated. The better course, and the only course consistent with the rules and statutes in this jurisdiction, would be to disallow a blanket exception, but reserve the possibility to closed review of sensitive arguments and/or supporting documents. The PCR court could allow (with notice to opposing counsel) narrowly focused *ex parte* communication and review of such documents, much like the review of privileged materials. *Accord* State v. Jeff, 761 So.2d 574 (La.App. 1 Cir. 1999)("The trial court should first determine, **in camera**, either on the face of the allegations of the motion or upon taking evidence at an **ex parte** hearing, whether the defendant would be prejudiced by a disclosure of his defense at a contradictory hearing. If so, then the hearing on expert funding should continue **ex parte**. If not, then the hearing should be held contradictorily with the District Attorney....") (*quoting* State v. Touchet, 642 So.2d 1213 (La. 1994))(emphasis in original). Even where originally heard *ex parte*, such matters may be made public at the court's direction in compliment to the general rule that *ex parte* proceedings are disfavored and unnecessary. *See* United States v. Caro, 442 F.Supp.2d 296, 297 (W.D.Va. 2006)(on review of denial of funding request in a capital case: "While this matter was handled by the magistrate judge on an ex parte basis, in light of my disposition of the motion, ex parte consideration is not necessary and the present opinion and order will not be sealed."). *See also* Sallie v. Humphrey, 2011 WL 837168, *2 (M.D.Ga. 2011) ("*Ex parte* requests for payment of fees and expenses under § 3599(f) may not be considered unless Petitioner makes a proper showing of the need for confidentiality."); Barnett v. Roper, 2010 WL 1268030, *1 (E.D.Mo. 2010)(noting change from presumption of *ex parte* proceeding to showing need for *ex parte* proceeding in current federal statute).

to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.). Such communication, however, is not favored as it is contrary to our adversarial system. Id., comments ("... in any ex parte proceeding ... there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.").

Notably, concerning Inman's *ex parte* funding requests, it is unclear if a full recitation of background was provided to the PCR judge.[17] Inman's case is not a new trial. Inman has previously been represented by counsel, found guilty, and sentenced to death. In short, the case has a history that may not be ignored. Asking the court for the ability to start completely fresh or simply "expert shop" most likely is not necessary in a capital case or a non-capital case. *See* Thames v. State, 325 S.C. 9, 11, 478 S.E.2d 682, 682-683 (1996)(finding no abuse of discretion in denying funding request for another expert: "Petitioner had been examined by two experts prior to trial and the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to warrant the authorization of funds to pay an

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17 Inman's assumption the State would attempt to deny him funding, confuses the purposes of the funding hearing and raises the significant danger that not all relevant facts are being provided to the PCR judge tasked with evaluating the reasonableness of the request. The funding request is simply to show a reasonable necessity. Inman need not disclose findings and opinions unless he intends to call the expert at the evidentiary hearing – a fact readily ascertainable by simply following the SCRCP. *See* Rule 26, SCRCP. Further, in this instance, the arguments and facts he wishes to present outside the presence of the opposing party would be presented *to the fact finder in this action.* Inman's attempt to put this squarely in funding overlooks the ponderous consideration that the fact finder may be approached with arguments and theories indicating incomplete or incorrect facts in support of a funding request.

expert.").[18] For example, a request for a mental health expert in this case should be examined in light of investigation and testing already made. Inman presented at sentencing well-credentialed experts, who examined Inman prior to the proceedings and reviewed multiple records. *See* Inman, *supra*. It would be difficult to fault trial counsel for relying on such experts. *See* Wilson v. Greene, 155 F.3d 396, 403 (4th Cir. 1998)(counsel received expert's report concluding client was not mentally ill at time of offense. To be reasonably effective, counsel was not required to 2nd-guess the contents of this report).[19] At any rate, these are the types of facts the PCR court should have before deciding on funding expert witness requests in PCR actions.

Furthermore, Inman has waived any confidentiality by the filing of his application before the PCR Court.

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18 Even capital defendants at trial are not entitled to unlimited funding. *See, for example*, Bailey v. Com., 259 Va. 723, 737, 529 S.E.2d 570, 578 (2000)("We have consistently rejected the contention that defendants, even in capital murder cases, have an indiscriminate entitlement to the assistance of an investigator."). *See also* State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) (*citing* § 16-3-26 (C)(1) (2003); State v. Matthews, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("The matter of authorized funds to capital defendants lies within the sound discretion of the trial" and rest upon a finding "that investigative, expert, or other services are reasonably necessary").

19 Counsel had no duty to contact other experts when he thought those consulted were well qualified and had no duty to ensure the trustworthiness of an expert's conclusions. Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998). *See* Philmore v. McNeil, 575 F.3d 1251, 1263 (11th Cir 2009)(counsel has no duty to present all psychiatric evidence, and not calling one was reasonable where the opinion conflicted with another. Reasonable counsel need not "shop" for contrary expert opinions); Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995); Forsyth v. Ault, 537 F.3d 887, 892 (8th Cir. 2008). Moreover, counsel has no duty to pursue neurological experts when experts consulted indicated no additional testing was required, Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998), or found no evidence of brain damage. Wright v. Angelone, 151 F.3d 151, 163 (4th Cir. 1998).

## CONCLUSION

WHEREFORE, the State submits for all the foregoing reasons, this Court should grant certiorari, reverse the Order of the lower court, and issue an Order granting the State's Motion to Unseal.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

*J. ANTHONY MABRY
Assistant Attorney General

By:_____
ANTHONY MABRY

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ATTORNEYS FOR PETITIONER

February 3, 2016

*counsel of record

CERTIFICATE OF SERVICE

I, Anthony Mabry, certify that I have served Petitioner's REPLY TO RETURN TO PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI by depositing one copy to his counsel of record in the United States mail, postage prepaid, addressed as follows:

Diana L. Holt, Esquire
Diana L. Holt, LLC
P. O. Box 6454
Columbia, SC 29260-6454

E. Charles Grose, Jr., Esquire
The Grose Law Firm
404 Main Street
Greenwood, SC 29646

This 3rd day of February, 2016.

ANTHONY MABRY
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(803) 734-6305

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
In The Supreme Court

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IN ITS ORIGINAL JURISDICTION

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PICKENS COUNTY
Court of Common Pleas
The Honorable Alexander S. Macaulay, Circuit Court Judge
Case No. 2012-CP-39-918

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APPELLATE CASE NUMBER 2015-002634

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JERRY BUCK INMAN, ..... Respondent,

v.

STATE OF SOUTH CAROLINA, .....Petitioner

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**MOTION TO EXPEDITE PETITION FOR EXTRAORDINARY WRIT DUE TO CONCLUSION OF POSTCONVICTION HEARING JUDGE OF LACK OF JURISDICTION TO RESOLVE PROCEEDINGS PENDING BEFORE IT.**

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The State of South Carolina, respectfully makes a motion to expedite consideration of the State's Pending Petition for Extraordinary Writ of Certiorari dated December 29, 2015 pursuant to SCACR Rule 245 and In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) and this Court's in The State v. Jerry Buck Inman, Appellate Case No, 2009-135566 dated October 31, 2012 which assigned Judge Macaulay, entered the Stay and obligated Applicant's counsel to report to the Clerk of the Supreme Court every 60 days of the status and for Judge

Macaulay to report every 120 days of the status.[1] Respondent requests expedited consideration of the Petition or alternately to direct the Court of Common Pleas to hold a hearing on the merits of the pending motion and an evidentiary hearing pursuant to In Re Stays. On March 8, 2016, Judge Macaualy entered an Order concluding that he has no jurisdiction to act on any matters until the pending Petition is resolved.

A.

The pending Petition for an Extraordinary Writ only concerns the applicability of the decision and orders of this Court in Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996) and this Court's unpublished Order in Stanko v. State, Appellate Case No. 1015-000212 (Filed February 25, 2015) on the manner and authority of capital litigants in post-conviction relief cases to have *ex parte* proceedings concerning expert witness, investigative and attorney fees with the assigned capital PCR judge who will be the fact-finder in the litigation and to seal all orders concerning these matters from opposing counsel. The capital litigant, Jerry Buck Inman made a Return to the petition on January 27, 2016. The State made a Reply to the Return on February 3, 2016. The Petition is ripe for consideration. The expedited request is made because the PCR Court believes and held in a written Order filed March 8, 2016 that it lacks jurisdiction to act on any pending

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1 **The Respondent's counsel have not received copies of any report made between Judge Macaulay and this Court and the October 31, 2012 Order does not specifically require the Court to advise counsel. However, Applicant's counsel has sought to comply with the 60 day notice with responses to the Clerk received Jan. 9, 2015, April 23, 2015, June 17, 2015, and October 19, 2015.**

The Court in In Re Stays stated in its pertinent part in In Re Stays:

The stay will remain in effect until the judge issues a final order or judgment in the post-conviction relief action if:

(1) The defendant timely files an application for post-conviction relief within sixty (60) days of the date of the order regarding counsel; and

**(2) The defendant files with the Clerk of this Court a letter setting forth the status of the post-conviction relief matter every sixty (60) days. A copy of this letter shall be served on opposing counsel. If the Court determines that this letter fails to show that the defendant is diligently pursuing the post-conviction relief action, the Court may issue an order dissolving the stay or setting forth additional requirements the defendant must meet to maintain the stay.**

In re Stays of Execution in Capital Cases, 321 S.C. 544, 546, 471 S.E.2d 140, 141 (1996).

matters while the petition is pending and has stayed further proceedings in the 2012 pending action.

B.

**JUDGE MACAULAY HAS OPINED THAT HE LACKS JURISDICTION TO ADDRESS ANY PENDING MOTIONS UNTIL THE PETITION IS ADDRESSED AND STAYED FURTHER PROCEEDINGS.**

The request to expedite the Petition before this Court evolves from an Order filed March 8, 2016 staying any further proceedings from a scheduled general motion hearing held on March 3, 2016 in Oconee County before the Honorable Alexander S. Macaulay. On March 8, 2016, Judge Macaulay filed a written order concluding that "until the matters addressed in the State's Petition for an Extraordinary Writ of Certiorari are resolved , the Court cannot proceed without prejudice to the rights of the parties." Inmon v. State, 2012-CP-39-00918 Order , filed March 8, 2016 (Macaulay, Judge, dated March 4, 2016) (Stay of Proceedings pending Writ of Cert). (Copy attached).

The purpose of the March 3, 2016 hearing was set to set a specific date for the evidentiary hearing, and hear argument on the State of South Carolina's Motion to Compel Discovery dated January 7, 2016, filed January 11, 2016 (attached as Exhibit 2) requesting certain items and a privilege log in compliance with the State's earlier motion to produce and/or provide a privilege log[2] and a Motion to Compel (the filing of An Amended Application) dated January 26, 2016, filed February 3, 2016 because an amend application had not been received by January 4, 2016.[3]

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2 Mr. Inman's counsel on March 1, 2016 provide through Dropbox of 27 separately scanned files dated February 29, 2016 and March 1, 2016 consisting of 12, 224 pages of materials purporting to be from trial counsel's files including blackened redacted pages. Counsel for Mr. Inman emailed that "there was more to come" *Email March 1, 2016 at 11:29 am.*

3 The motion to compel the filing of the amended application arose from a telephone status hearing held on August 28, 2015. During the conference call, Judge Macaulay set January 4, 2016 to file the amended application for a hearing to be tentatively set in June 2016. At the time of the January 26, 2016 filing no amended application had been filed. *Respondents have only received the original application for post-conviction relief filed June 21, 2012 by*

The March 3, 2016 hearing was scheduled by Judge Macaulay on February 2, 2016 after receipt of the motion to compel the filing of the amended application and was intended to cover these matters as well as to determine the PCR Court's jurisdiction pending the resolution of the Supreme Court's resolution of the State's Petition for Extraordinary Writ of Certiorari.[4]

At the outset of the March 3, 2016 hearing at the Oconee County Courthouse, the Court addressed the issue of jurisdiction on whether the State filing its Petition for an Extraordinary Writ of Certiorari in the South Carolina Supreme Court divested this Court of jurisdiction. Diana Holt and Charles Grose represented the Applicant. Donald J. Zelenka and Sherrie Butterbaugh appeared for the State. The State argued this Court maintained jurisdiction to address the pending matters (which did not include attorneys fees, investigative fees or expert witness expenses upon information and belief). The Respondent State asserted that they had not filed a "notice of appeal" pursuant to Rule 201 (or SCACR Rule 243 [Post-conviction relief certiorari appellate proceedings]) and therefore under the appellate rules jurisdiction was not divested by the filing of the extraordinary writ of certiorari in the original jurisdiction pursuant to SCACR Rule 245. The Respondent further stated they did not seek a stay under Rule 241 and therefore was no automatic stay of proceedings in this Court. Counsel for Inman disagreed asserting the filing of the Extraordinary Writ by the State was sufficient to remove jurisdiction of the pending matters.

The State was directed by Judge Macaulay to the language of Rule 245, SCACR, which provides, in part, "The Supreme Court will not entertain matters in its original jurisdiction when

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*appellate counsel Robert Dudek.* Counsel for Inman advised below-signed counsel on March 1, 2016 that they were getting to it.

4 The State advised the lower court of its motion on January 26, 2016 and sought an order to compel. On the same date, counsel for Inman inquired whether the act of the extraordinary writ had "removed jurisdiction in the matter." On the same date, the State responded that it had filed an extraordinary writ of certiorari in the original jurisdiction of the Supreme Court and did not file a notice of appeal and the Supreme Court had not granted the extraordinary writ. In setting the time for the hearing on February 2, 2016 for March 3, 2016, Judge Macaulay confirmed that5 necessarily the first order would be to determine this court's jurisdiction pending the resolution of the State's Petition. *Email February 2, 2016 1:41 PM.*

the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties," and citing the reference within the State's petition for extraordinary writ of certiorari, at p. 4, contended the PCR Court's order, dated November 16, 2015 denying the State's motion to unseal Mr. Inman' s *ex parte* funding requests and orders,

> denied [the State] a substantial right, and [the State] is entitled to know of any *ex parte* motions, requests, meetings, orders, etc., where this is a civil action and the PCR Court is the fact finder. [The State] is also entitled to know of any *ex parte* funding requests, motions, orders, etc. so that it may adequately prepare for the PCR hearing scheduled in June of 2016. Any appeal of this issue after the merits hearing would moot this issue.

*Petition for Extraordinary Writ*, p. 4. Judge Macaulay emphasized at the hearing that the PCR Court is obligated to "safeguard the rights of litigants," [State v. Langford, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012)], and may not act in a manner that could cause "material prejudice to the rights of the parties", including the State as well as the Applicant. He orally concluded that based on the representation in the State's petition and Rule 245, SCACR, that that the State's filing its Petition for an Extraordinary Writ of Certiorari in the South Carolina Supreme Court divested this Court of jurisdiction. Judge Macaulay suggested to the parties a petition to expedite the resolution of the pending Petition before this Court.

On March 3, 2016, Judge Macaulay entered a written Form 4, filed March 7, 2016 that "Court does not have jurisdiction pursuant to SCACR Rule 245 (a), the material rights of the parties are involved" directed counsel Charles Grose to prepare formal order.[5]

On March 8, 2016, Judge Macaulay filed a written order concluding that "until the matters addressed in the State's Petition for an Extraordinary Writ of Certiorari are resolved , the Court

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5 Counsel Grose prepared a proposed order for the Judge Macaulay's review on March 4, 2016. The State made suggestions to counsel and the Court the same date. The State, upon request then suggested a proposed order. Judge Macaulay advised that he would review the orders and then prepare his own.

cannot proceed without prejudice to the rights of the parties." Inmon v. State, 2012-CP-39-00918 Order , filed March 8, 2016 (Macaulay, Judge, dated March 4, 2016) (Stay of Proceedings pending Writ of Cert). (Copy attached). In the Order Judge Macaulay opined that Ex Parte Lexington County, 314 S.C. 220, 442 S.E.2d 589 (1994)[6] controlled and it was constrained to "safeguard the rights of litigants and may not act in a manner that would cause material prejudice to the rights of the parties, citing State v. Langford, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

C.

The State submits that the Petition for Extraordinary Writ of Certiorari in the Court's original jurisdiction does not divest the Court of Common Pleas to act on any appropriate matters including issues related to motion to compel discovery (unrelated to the sealed order issue), enforcement of its oral order to require an amended application pursuant to SCRP, Rule 71.1 (d) or the setting of a date of a specific evidentiary hearing date which were the matters pending before the Court. To the contrary under S.C. Code Section 17-27-160 and In Re: Stays, these matters remain within the PCR court's authority and jurisdiction pursuant to the Court's October 31, 2012 order.

The State specifically raised before this Court its concerns about the *ex parte* matters by an extraordinary writ of certiorari and not an appeal from the order denying the state's motion to unseal the orders under Thames and Stanko. Respondent submits that a petition in the original jurisdiction cannot automatically deprive a lower court of its jurisdiction unless and until writ has been granted and jurisdiction assumed.[7] The extraordinary writ is not an appellate remedy, but one

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6 Contrary to the statement in Judge Macaulay's March 8, 2016 Order, Ex Parte Lexington County did not involve capital or non-capital state post-conviction relief actions. To the contrary, it involve two capital defendants awaiting capital trials in the Court of General Sessions and ex parte proceedings related to the trial defense in those cases. A similar assertion was rejected in Thames and Stanko.

7 See Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 375 S.C. 423, 653 S.E.2d 274 (S.C. 2007) (.Judgment creditor

which lies in the original constitutional authority of the Supreme Court in exceptional circumstances. Here, the attempt to have consistency in the manner all capital PCR (and non-capital) cases are handled in light of Thames and Stanko and the numerous pending capital PCR actions in the Court of Common Pleas reflects a matter of great public interest concerning the handling of collateral cases involving death sentences with a consistent procedure and similar consistency with non-capital collateral actions for all litigants.

The State intentionally did not file a notice of appeal pursuant to SCACR Rule 203 from any order of Judge Macaulay prior to the filing of the petition for an extraordinary writ. Because no notice of appeal was filed, SCAR Rule 205 was inapplicable which holds that the filing of a notice of appeal vests exclusive jurisdiction in the appellate court, but noting even under that circumstance "nothing in the rules shall prohibit the lower court from proceeding with matters not affected by the appeal."[8] Arguably even if the State had filed a notice of appeal, the lower court could still had addressed the discovery and amended application issues, as well as setting a hearing date.

Further, the State did not seek a stay (or supersedeas) pursuant to SCACR Rule 241 because no notice of appeal was filed nor supercedeas pursuant to Rule 241 sought.[9] Since they

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is entitled to enforce judgment during appeal of denial for motion for relief from judgment unless appellate court grants extraordinary relief to judgment debtor).

8 See e.g. Grosshuesch v. Cramer, 377 S.C. 12, 31 n. 7, 659 S.E.2d 112, 122 n. 7 (2008) (where the Court noted that the trial court properly ruled on a second discovery matter involving a deposition after the parties had filed appeals from the trial court's first order because the first order dealt with the subject of initial discovery responses); Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (S.C. 2009) (Notice of appeal from order of contempt issued against newspaper in defamation suit for newspaper's refusal to comply with discovery order did not deprive trial court of jurisdiction to rule on newspaper's motion for summary judgment, where issue on summary judgment whether newspaper acted with actual malice was unaffected by appeal from contempt order).

9 SCACR Rule 241 states in pertinent part:

> a) General Rule. As a general rule, **the service of a notice of appeal** in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or

was no notice of appeal filed, there is no automatic stay of the lower court proceedings not lack of jurisdiction to proceed.

Respondent respectfully submits that to accept the PCR Court's interpretation that the mere filing of a petition for an extraordinary writ divests the lower court of jurisdiction automatically and effective stays any further proceedings is a misreading of the hearing court's inherent power to act. Under his same logic, the possibility exists that any such filing, styled as an extraordinary writ could be read to prevent further proceedings in similar civil litigation and the numerous possibilities in pro se litigation evidenced in Key v. Currie, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) scenarios.

## CONCLUSION

Respondent State of South Carolina, the Petitioner herein respectfully requests this Court to expedite the pending Petition for Extraordinary Writ.

Alternately, Respondent requests this Court, pursuant to In Re Stays and the October 31, 2012 Order in The State v. Inman, to "determine" whether "the defendant is diligently pursuing the post-conviction relief action, the Court may issue an order dissolving the stay or setting forth additional requirements the defendant must meet to maintain the stay [of execution]." In re Stays of Execution in Capital Cases, 321 S.C. 544, 546, 471 S.E.2d 140, 141 (1996). This action, as reflected in the Pickens County Docket Sheet has been pending since June 21, 2012 without any amended application being filed or firm hearing date.

Respectfully submitted,

ALAN WILSON
Attorney General

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judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

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ATTORNEYS FOR PETITIONER

March 10, 2016

ATTACHMENTS

1. Inmon v. State, 2012-CP-39-00918 Order , filed March 8, 2016 (Macaulay, Judge, dated March 4, 2016) (Stay of Proceedings pending Writ of Cert).
2. State of South Carolina's Motion to Compel Discovery dated January 7, 2016, filed January 11, 2016.
3. Motion to Compel (the filing of An Amended Application) dated January 26, 2016, filed February 3, 2016.
4. Pickens County Docket Sheet – Inman v. State, 2012-CP-39-00918 dated March 10, 2016
5. The State v. Jerry Buck Inman, Appellate Case No, 2009-135566 (S.C.S.Ct dated October 31, 2012

1. Inmon v. State, 2012-CP-39-00918 Order , filed March 8, 2016 (Macaulay, Judge, dated March 4, 2016) (Stay of Proceedings pending Writ of Cert).

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-39-00918

**Jerry Buck Inmon, # 5226**
**a/k/a Jerry Buck Inman**
APPLICANT(S)

**State of South Carolina**
RESPONDENT(S)

| **Submitted by: The Court** | **Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other: **See attached Order**

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

2016 MAR 8 AM 11 33

CLERK OF COURT PICKENS, SC

**IT IS ORDERED AND ADJUDGED:** ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

This order does not end the case.
Additional Information for the Clerk : Stay of Proceeding pending Writ of Cert

**INFORMATION FOR THE PUBLIC INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| | | $ |
| | | $ |
| | | $ |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

**Alexander S. Macaulay, Circuit Court Judge** — **Judge Code** 63 — **Date** 3/4/16

SCRCP Form 4C (10/2011)

| | | |
|---|---|---|
| THE STATE OF SOUTH CAROLINA<br>COUNTY OF PICKENS<br><br>Jerry Buck Inmon,<br>Applicant,<br><br>vs.<br><br>State of South Carolina,<br>Respondent. | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE THIRTEENTH JUDICIAL CIRCUIT<br><br>Case No. 2012-CP-39-00918<br><br>**Order** |

2016 MAR 8 AM 11 33
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

This Court convened a hearing on March 3, 2016, concerning all pending motions, including, *inter alia*, Respondent's Motion to Compel the filing of an Amended Application, Motion to Compel Discovery, and to determine an evidentiary hearing date. At the hearing the Applicant, Jerry Buck Inmon, was represented by Diana L. Holt, Esquire, and E. Charles Grose, Jr., Esquire, and the State was represented by Donald J. Zelenka, Senior Assistant Deputy Attorney General, and Sherrie A. Butterbaugh, Assistant Attorney General.

As a threshold issue, this Court had to determine whether it could continue to consider such matters "in the first instance, without material prejudice to the rights of the parties," by reason of the State's filing in the Original Jurisdiction of the Supreme Court, pursuant to SCACR Rule 245:

> ". . . a Petition for Extraordinary Writ of *Certiorari* from the Order of the PCR Court denying Respondent's Motion to Unseal and Disclosed *ex parte* funding motions, requests, and orders issued in this capital PCR action until this date and disclosed to Respondent the content of all ex parte discussions between Applicant [or his attorneys] and the PCR Court; and to provide Respondent with notice and an opportunity to be present and heard at any future ex parte funding requests or hearings."

Respondent's Petition for Extraordinary Writ of Certiorari, dated December 29, 2015, ("Petition"), at p. 1.

The State argued this Court retained jurisdiction. Mr. Inmon disagreed. The Respondent asserted that they had not filed a notice of appeal pursuant to Rule 201 (or SCACR Rule 243 [Post-conviction relief certiorari proceedings]) and, therefore, under the appellate rules, jurisdiction was not divested by the filing of the extraordinary writ of certiorari in the original jurisdiction pursuant to SCACR Rule 245. The Respondent further stated they did not seek a stay under Rule 241 and therefore was no automatic stay of proceedings in this Court.

The Court directed the Respondent to Rule 245, SCACR, which expressly provides, in pertinent part, that:

> (a) **When Appropriate**. The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.

(Emphasis supplied).

By its Petition, the State succinctly states the material effect of this Court's Order, dated November 16 2015, denying the State's Motion to unseal Mr. Inmon' s *ex parte* funding requests and orders.

> The denial of Petitioner's/State's Motion has denied Petitioner a substantial right, as Petitioner is entitled to know of any *ex parte* motions, requests, meetings, orders, etc., where this is a civil action and the PCR Court is the fact finder. Petitioner is also entitled to know of any *ex parte* funding requests, motions, orders, etc. so that it may adequately prepare for the PCR hearing scheduled in June of 2016. Any appeal of this issue after the merits hearing would moot this issue.

Petition at p.4 (emphasis supplied).

Moreover, as has been recognized in Non-capital PCRs, not a Capital PCR brought pursuant to S.C. Code Ann. § 17-27-160 (2014), as here:

> ". . . it would appear that there is a substantial probability of prejudice which would result from a public hearing in at least two respects . . . disclosure of . . . defendants' defense strategy . . . [that would] violate the

guarantee of equal protection. "

*Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994). This Court is obligated to "safeguard the rights of litigants," *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012), and may not act in a manner that could cause "material prejudice to the rights of the parties."

Based on the foregoing, the representations of the parties and Rule 245, SCACR, the Court finds and concludes that until the matters addressed in the State's Petition for an Extraordinary Writ of *Certiorari* to the South Carolina Supreme Court are resolved, this Court cannot proceed without prejudice to the rights of the parties.[1]

IT IS SO ORDERED.

ALEXANDER S. MACAULAY
Presiding Circuit Court Judge

March 4, 2016

Walhalla, South Carolina

2016 MAR 8 AM 11 33
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

[1] The Court is advised that as of this date no Order had been entered concerning the pending Extraordinary Ordinary Writ of Certiorari in the Supreme Court of South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

# JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP3900918

**Jerry Buck Inman *vs.* South Carolina State of**

***CHECK ONE:***

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** X☐ See attached order; ☐ Statement of Judgment by the Court:

2016 MAR 8 AM 11 33

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

*Court Reporter:*

**PRESIDING JUDGE -**

A copy mailed first class this 8th, March 2016 to attorneys of record or to parties (when appearing pro se) as follows:

US Mail MB

✓ **Robert Michael Dudek** PO Box 11589 Columbia, SC 29211

✓ **Donald J. Zelenka** PO Box 11549 Columbia, SC 29211-1549

✓ **Diana L. Holt** Diana Holt, LLC PO Box 6454 Columbia, SC 29260-6454

**E Charles Grose Jr.** 404 Main Street Greenwood, SC 29646

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Harold P Welborn, Jr. - Clerk of Court

MB

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

2016 MAR 8 AM 11 33
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

# State of South Carolina
## Tenth Judicial Circuit Court
Oconee County
Courthouse

ALEXANDER S. MACAULAY
Circuit Judge (Active/Retired)

Post Office Drawer 428
Walhalla, SC 29691-0428

Telephone: (864) 718-1041
Facsimile: (864) 638-4267
amacaulayj@sccourts.org

March 4, 2016

Honorable Harold P. Welborn
Pickens County Clerk of Court
Post Office Box 215
Pickens, South Carolina 29671-0215

Re: Jerry Buck Inmon, #5226 v. State of South Carolina
2012-CP-39-0091, Capital PCR

Dear Mr. Welborn:

Enclosed please find my Order in the above-referenced Capital PCR, together with my FORM 4. By agreement of the parties, the hearing was held in Oconee CPNJ, March 3, 2016, and the Court Reporter was Renee Tollison.

I trust you find the same in order, and I would appreciate your filing and serving this Order and Form 4's on the Parties. Necessarily, should you have any questions, please do not hesitate to advise me.

Thanking you for your attention to and consideration in this matter, I remain,

Sincerely,

Enclosures

Alexander S. Macaulay

2. State of South Carolina's Motion to Compel Discovery dated January 7, 2016, filed January 11, 2016.

| | | |
|---|---|---|
| **STATE OF SOUTH CAROLINA** | ) | |
| | ) | **IN THE COURT OF COMMON PLEAS** |
| **COUNTY OF PICKENS** | ) | |
| | ) | |
| **Jerry Buck Inmon, #5226,** | ) | |
| ***aka Jerry Buck Inman*** | ) | |
| | ) | **C/A No.: 2012-CP-39-918** |
| **Applicant,** | ) | **(Capital PCR Action)** |
| **v.** | ) | |
| | ) | **MOTION TO COMPEL** |
| **State of South Carolina,** | ) | **DISCOVERY** |
| | ) | |
| **Respondent.** | ) | |
| | ) | |

2016 JAN 11 PM 4 48

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Respondent, by and through the undersigned attorneys, hereby moves, pursuant to the South Carolina Rules of Civil Procedure, for an Order of this Court compelling Applicant to fully comply with Respondent's discovery requests for the following reasons:

1. Applicant has failed to file Supplemental Responses to Respondent's Request for Production of Documents and Things;
2. Applicant has not provided Respondent with any documents or things requested in its Request for Production of Documents and Things in his Supplemental Discovery Responses;
3. Applicant has not provided Respondent with any witness' statements or affidavits in possession of Applicant in his Supplemental discovery responses;
4. Applicant has not provided Respondent with copies of any documents or records *contained in trial counsel's file* [in Applicant's possession] **that relate to the claims asserted in the Applicant's PCR application, or which will be asserted** in any amended PCR application, *whether helpful or detrimental to Applicant's claims*;
5. Applicant has not provided Respondent with a privilege log in his Supplemental

discovery responses listing any documents, records, notes, etc. over which he claims attorney-client privilege, attorney work-product privilege, or any other privilege.

For the above stated reasons, Respondent requests this Court issue an Order compelling Applicant to **fully comply** with discovery and provide Respondent with Supplemental Responses to Respondents Requests for Production of Documents and Things, provide Respondent with copies of any statements or affidavits of witnesses in possession of Applicant; provide Respondent with any documents and things requested in its Request for Production of Documents and Things; provide Respondent with copies of any documents, notes, or records from trial counsel's file in possession of Applicant ***that relate to the claims*** **asserted in Applicant's PCR application or will be asserted in any amended PCR application**, and provide Respondent with a privilege log appropriately listing those documents, records, notes, etc., in possession of Applicant over which he claims he is privileged from producing.

RESPONDENT SO MOVES.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: _____
ANTHONY MABRY
ATTORNEYS FOR RESPONDENTS

January 7, 2016

STATE OF SOUTH CAROLINA )
COUNTY OF Pickens ) 2016 JAN 11 PM 1 48
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
Jerry Buck Inmate #225 ) Plaintiff,
vs.
State of South Carolina ) Defendant.

IN THE COURT OF COMMON PLEAS
13th JUDICIAL CIRCUIT
CASE NO.: 2012-CP-39-918

**MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| E. Charles Grose, Bar No. | Anthony Mabry, Bar No 11973 |
| Address: 404 Main St, Greenwood SC 29646 | Address: P.O. Box 11549 Columbia SC 29211 |
| Phone: Fax | Phone: 803-734-0305 Fax 803-734-4035 |
| E-mail: Other: | E-mail: Other: |

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ January 7, 2016
Signature of Attorney for ☐ Plaintiff/☐ Defendant Date submitted

**SECTION III: Motion Fee**

☐ PAID – AMOUNT: $
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☒ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE CODE _____
Date: _____, 20

**CLERK'S VERIFICATION**

Collected by: BFox Date Filed: _____, 20___

☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $

SCCA 233 (11/2003)

3. Motion to Compel (the filing of An Amended Application) dated January 26, 2016, filed February 3, 2016.

STATE OF SOUTH CAROLINA )
COUNTY OF PICKENS )

Jerry Buck Inmon
Plaintiff, )

vs. )

State of South Carolina )
Defendant. )

IN THE COURT OF COMMON PLEAS
13th JUDICIAL CIRCUIT

CASE NO.: 2012-CP-39-918

**MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| E. Charles Grose, Jr., Bar No. | Anthony Mabry, Bar No 11973 |
| Address: 404 Main St., Greenwood, SC 29646 | Address: P.O. Box 11549 Columbia, SC 29211 |
| Phone: Fax | Phone: (803) 734-6305 Fax (803) 734-4035 |
| E-mail: Other: | E-mail: amabry@scag.gov Other: |

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ Jan. 26, 2016
Signature of Attorney for ☐ Plaintiff/☒ Defendant Date submitted

**SECTION III: Motion Fee**

☐ PAID – AMOUNT: $ _____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____
Date: _____, 20____

**CLERK'S VERIFICATION**

Collected by: _____ Date Filed: _____, 20____

☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

2500