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## STATEMENT OF ISSUES ON APPEAL

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3. The judge committed reversible error at sentencing by refusing to allow the defense to cross-examine the Solicitor and his Deputy on the issue of prosecutorial misconduct, as the Solicitor's intent was directly relevant to that issue.

## STATEMENT OF THE CASE

On August 19, 2008, Jerry Buck Inman pleaded guilty in Pickens County, before Judge Edward W. Miller, on indictments charging him with murder, first-degree burglary, first-degree criminal sexual conduct and kidnapping. The State was seeking the death penalty.

The victim, Tiffany Souers, a Clemson University student living off-campus, was raped and strangled sometime after midnight on May 26, 2006. The apparent randomness of this violence within the relatively insular university community, as well as the initial inability of police to apprehend the perpetrator, generated an enormous amount of publicity, both local and national.

Inman, an out-of-state drifter with prior rape convictions in Florida and North Carolina in the mid-1980s, was apprehended in Tennessee June 6, 2006. He promptly confessed not just to the rape and murder of Ms. Souers, but to burglary, kidnapping, armed robbery, and attempted rape in Alabama on May 23 and burglary, kidnapping, armed robbery and rape in Tennessee on May 22.

On September 8 through 11, 2008, the State presented its case in aggravation. Midway through the defense case in mitigation, the judge granted the defense a continuance after the Solicitor threatened a key mitigation witness with a baseless criminal prosecution. On April 20 through 22, 2009, the defense presented its evidence in mitigation.

The judge sentenced Inman to death for murder and consecutive sentences of thirty years for first-degree burglary and first-degree criminal sexual conduct. Inman and his undersigned counsel appeal his guilty plea and death sentence and ask the Supreme Court to vacate both.

## ARGUMENT

1.

The judge committed reversible error by accepting Inman's guilty plea, despite defense counsel insistence that the judge's refusal to allow jury sentencing was preserved for review by the Supreme Court on direct appeal, because the defense position rendered the plea conditional and thus invalid under South Carolina law.

Prior to the guilty plea, defense counsel informed the judge that Inman planned on pleading guilty but was request in a jury sentencing. September 2007 R. p. 801, lines 9 – 10; R. p. 813, line 9 – p. 814, line 4. The Solicitor pointed out that this procedure was not an option in South Carolina. R. p. 817, lines 14 – 17.

> There have been three cases in which a judge did actually what they are asking you to do. And our Supreme Court has reversed that on all three occasions. Because they are asking you to accept a conditional guilty plea.

R. p. 823, lines 6 – 11.

The judge ruled, "I believe it is an argument that perhaps is best addressed by a Court that . . might have the final say in a matter like this." R. p. 830, lines 14 – 19. Nevertheless, he was "constrained by the existing case law in South Carolina and the statutes to deny your motion." R. p. 830, lines 20 – 21.

At the guilty plea, defense counsel reminded the judge that "the defendant sought to enter a guilty plea, as he is doing today, and then proceed to a jury trial sentencing" and maintained, "That issue has been preserved for review." R. p. 931, line 13 – 24. "[W]e

believe it is part of this case, no matter what," he insisted. R. p. 931, line 24 – p. 932, line 2. "[T]hat's been part of my explanation to him about where we go." R. p. 932, lines 2 – 3.

The judge directed his response to Inman:

> Well, I want to tell you, Mr. Inman, that in South Carolina we do not have conditional guilty pleas. And the law is very clear about that. Whether or not this issue is preserved for appeal is not something I will address and I have no control over it. . . . I can tell you that the law is very clear. There are no conditional pleas. And if you enter a plea of guilty, you can't do it on a condition. . . [Y]ou can't hold something out in abeyance by entering this guilty plea. Do you understand that?

R. p. 932, lines 5 – 22.

Inman said he did. R. p. 932, line 23.

Before the judge accepted the guilty plea, defense counsel renewed his motion for jury sentencing "to make sure it is preserved." R. p. 952, line 20 – p. 953, line 13. The judge again addressed Inman:

> Now again, Mr. Inman, let me tell you that the law in South Carolina is clear that there are no conditional guilty pleas . . . and whether or not that issue is preserved for appeal is not for me to decide. . . . *An appellate court will make that determination*: the Supreme Court of the State of South Carolina.

R. p. 953, line 43 – p. 954, line 1 (emphasis added).

At this point, the Solicitor voiced his legitimate concern that Inman's legal strategy "borders on making this a conditional plea" and asked the judge to obtain a specific waiver of "the right to be tried by a jury in the sentencing phase" from Inman. R. p. 823, lines 3 – 14. Defense counsel objected, "Every defendant that appears in court still has the right to

appeal his guilty plea." R. p. 823, lines 15 – 22. "[T]hat's absolutely correct," the judge agreed. R. p. 823, lines 23. He again turned to Inman:

> Mr. Inman, I direct this to you. Because in the end, you get advice from your attorneys. But this decision is yours. . . . [T]he law is clear in South Carolina that you cannot enter a conditional guilty plea, which means you cannot plead guilty and reserve some issue with respect with the guilt phase for the appellate courts to rule on.

R. p. 824, lines 4 – 10.

Defense counsel reiterated, "I have advised him that I believe this issue is preserved and will survive the guilty plea." R. p. 824, lines 15 – 18. Once more, the judge addressed Inman:

> Mr. Inman, I want to tell you that we disagree on that . . . and, of course, I am not the final word on this issue because *the Supreme Court will be the final word*. But I believe that you are giving up that right.

R. p. 824, lines 17 – 22 (emphasis added).

Counsel objected, "I don't think you can give him an opinion about what an appellate court might do with that issue." R. p. 824, line 24 – p. 825, line 5.

Because of the general uncertainty about the matter among the participants, the judge gave Inman a fleeting opportunity to withdraw his guilty plea. R. p. 825, lines 6 – 14. "[Defense counsel] may be convinced that he's got an appellate issue," he added, "and I don't know whether he does or not. But I am telling you I believe the law in South Carolina is clear that guilty pleas are unconditional." R. p. 825, lines 17 – 21.

When defense counsel refused to abandon his position, the judge decided, "[I]f this is a big issue, then I am not about to accept the plea." R. p. 826, lines 18 – 19. But this moment of clarity about the situation quickly slipped away. Instead, the judge addressed Inman one last time:

> Mr. Inman, clearly there is some disagreement about the preservation of this issue that your attorneys have raised. I am not involved in it. And I don't have an opinion about it. Whether or not [defense counsel] can do that successfully is something the Supreme Court will answer. The State does not believe that he can. He believes that he can . . . . [W]hether or not that happens on appeal is really of no concern here. I want your plea to not be dependent on that issue.

R. p. 827, lines 1 – 12.

After another short recess, the judge continued:

> [A]ll I'm trying to determine is that your entry of this plea is not based on or predicated on some issue that you think you might prevail on or might not prevail on in an appellate court . . . [W]hether or not you can prevail on an appellate issue should have not have nothing to do with your entry of this plea . . . So whether or not you are you are successful or not successful at some higher court on some issue that might be raised should have nothing to do with why you're entering this plea.

R. p. 827, line 19 – p. 828, line 25.

Inman replied, "I just want to enter the plea and get it over with, just go on from here with the sentencing phase." R. p. 829, lines 1 – 5. The judge accepted his plea. R. p. 829, line 22 – p. 830, line 4.

The judge denied defense counsel's motion to reconsider. R. p. 1014, lines 13 – 17. At the start of sentencing, he also denied counsel's "demand for a jury trial for the sentencing phase." R. p. 17, lines 13 – 21. Finally, after the State had rested at sentencing, counsel again asked the judge to reconsider and requested a mistrial. R. p. 245, lines 6 – 12. The judge denied the motions. R. 245, lines 21 – 23.

In State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528, 529 (1982), the Supreme Court held that conditional guilty pleas are:

> a practice not recognized in South Carolina and a practice which we expressly disapprove. *Pleas of guilty are unconditional, and if an accused attempts to attach any condition or qualifications thereto, the trial court should direct a plea of not guilty.* [Emphasis added.]

"If the trial court accepts a conditional guilty plea, then the plea will be vacated on appeal." State v. Downs, 351 S.C. 141, 604 S.E.2d 377, 380 (2004).

S.C. Code §16-3-20(B) explicitly provides, "[I]f the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge." The Court reaffirmed the constitutionality of this sentencing procedure in Downs. In Truesdale, the defense had attempted to preserve several meritless issues for direct appeal during the defendant's guilty plea. The Court held, "It was error of the trial court to accept the pleas on such terms." 296 S.E.2d at 529.

To give credit where credit is due, the Solicitor in this case was right about one thing: A capital defendant in South Carolina cannot at present plead guilty without waiving jury sentencing, even if the State were to consent. This was no longer an open question – if it ever was – at the time of Inman's guilty plea. (The Court will have noted that the undersigned do not raise this issue on appeal.)

The judge's duty was equally clear once defense counsel insisted "this issue is preserved and will survive the guilty plea" for direct appeal: He should have unequivocally rejected the plea, instead of issuing ambiguously oracular pronouncements such as, "Whether or not this issue is preserved for appeal is not something I will address and I have no control over it . . . An appellate court will make that determination: the Supreme Court of the State of South Carolina."

The judge's speculations about appealability – almost all of which were directed to Mr. Inman, – plainly suggested that the issue of jury sentencing might be preserved for direct appeal, which was an erroneous statement of existing law. See State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004). For this reason, the Supreme Court should vacate Inman's guilty plea to murder and reverse his death sentence.

2.

The judge committed reversible error at sentencing by refusing to grant a mistrial and recuse the Solicitor's Office from any further involvement in the case, despite finding prosecutorial misconduct, where the Solicitor threatened a key defense witness with a baseless criminal prosecution and subpoenaed her as a State's witness after the judge granted the defense a continuance to obtain a new expert because of his misconduct.

It is fair to say that mitigation was the central issue at Inman's sentencing. He had, after all, admitted his guilt and pleaded guilty. A key defense witness in this regard was Dr. Marti Loring, of the Center for Mental Health and Human Development in Atlanta. R. p. 324, lines 12 – 15. Loring was licensed in Georgia, but not in South Carolina, as "an expert in the field of trauma, abuse, forensic and therapeutic interviewing, and as a social historian in capital cases." R. p. 325, lines 20 – 22; R. p. 328, lines 1 – 3; R. p. 326, line 21 – p. 327, line 3.

The Solicitor characterized Loring's testimony in general as "a rambling recitation of rank hearsay." R. p. 251, lines 20 – 21. In his opinion, "[T]here's not a great deal of expertise in the field of social work." R. p. 253, lines 10 – 12. When given the opportunity to cross-examine Dr. Loring on *voir dire*, the Solicitor promptly accused her of violating S.C. Code § 40-63-200 which, as he announced, "deals with the unauthorized practice of social work within the State of South Carolina" and "carries . . . both civil and criminal penalties for violation." R. p. 328, line 1 – p. 329, line 8. Defense counsel objected to the Solicitor's "inappropriate attempt to intimidate the witness with the authority that this Solicitor has in this state to indict" and predicted that "it will infect us from this point forward." R. 329, line 12 – p. 330, line 22.

The Solicitor continued:

> I'm raising the issue of licensing for the purposes of *voir dire*. And that's as far as we've gotten. And whether or not I present an indictment against her is a totally separate issue.

R. p. 330, line 23 – p. 331, line 2.

The judge overruled the objection to Loring's qualifications and authorized her to testify. R. p. 331, lines 3 – 21.

Defense counsel argued that the consequences of the Solicitor's misconduct could not be so easily avoided:

> [T]he Solicitor's attempt to make the testimony that Dr. Loring may potentially give fit within a criminal statute is a due process violation. It is an attempt to improperly intimidate this witness. And it specifically violates the defendant's due process right to present his defense witnesses freely. . . . [T]he intimidation at this point amounts to a substantial government interference with this defense witness' free and unhampered choice to be able to testify unfettered.

R. p. 332, lines 1- 20.

The Solicitor then offered to grant Loring immunity "[a]s to the present testimony." R. p. 333, lines 12 – 14. But as far as her prior testimony in South Carolina was concerned:

> I can't grant her immunity for that. . . . If somebody wanted to indict her for violating the statute, they could have already done that many, many times based on her prior testimony. That's not the issue.

R. p. 333, lines 2 – 25.

As increasingly-apprehensive Loring informed the judge that she was "concerned" about the situation. R. p. 334, lines 9 – 17. The judge said, "You are granted immunity, so

you will not be indicted based on your work in this case. Now, do you feel secure?" R. p. 335, lines 8 – 10. No, she did not:

> I wouldn't be honest if I didn't tell you that what I have just heard alarmed and concerned me a great deal. So I will hope that I can return my attention to what I came here to do in the first place and be as effective as I would hope to be. But to tell you that I'm not alarmed and concerned at what I heard would not be truthful.

R. p. 335, lines 11 – 18.

The judge took a recess to allow Loring an opportunity to obtain and consult with counsel. R. p. 335, line 19 – p. 336, line 11.

When court reconvened, on the advice of counsel Dr. Loring invoked her privilege against self-incrimination as provided by the Fifth Amendment:

> With profound condolences to Tiffany's family and with respect to the family of Jerry Inman and with deep apologies to the court, I worked so hard to gather all this information to come here today to tell you the truth about Jerry Inman's past. I'm so sorry, Your Honor. Upon advice of counsel, I must plead the Fifth. I feel threatened as a witness in this case and in other cases in which I've testified in South Carolina.

R. p. 336, lines 14 – 24.

Loring's impromptu counsel explained, "The Solicitor. . . has intimidated this witness." R. p. 339, lines 12 – 23. He added:

> If the Solicitor was going to raise such an issue as this, it appears it should have been raised pretrial and not during *voir dire*. But what he has done now is chilled the doctor's ability to testify, which was exactly his intent.

R. p. 340, lines 4 - 8

The judge apologized to Loring for getting "caught in the middle of all this" but expressed his concern that if she did not testify, "the defense would feel compelled to request that this sentencing hearing be basically ended and we have to come back and do it all again." R. p. 342, line 2 – p. 343, line 10. After another short recess, Loring again informed the judge that she was "[f]ull of sorrow" because "I must, upon advice of counsel, tell you that I can not testify." R. p. 343, line 11 – p. 344, line 7. The Solicitor's threats had made her apprehensive about "my professional reputation in other jurisdictions in which I am involved currently." R. p. 344, lines 8 – 14.

At this point - "insofar as I am able to"- the judge attempted to grant Loring "immunity in all your prior cases that you testified in this state." R. p. 344, lines 17 – 19. "And while . . . judicial immunity may not be generally recognized in South Carolina," he added, "I think the fact that I'm putting it out there would carry some weight." R. p. 346, lines 6 – 12. Consequently, the judge concluded, "I do not believe you have a lawful ground to refuse to testify." R. p. 346, lines 15 – 16.

As an aside, the judge had no authority to grant Dr. Loring statewide immunity from prosecution for testifying as an expert witness in South Carolina.

> In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

State v. Needs, 333 S.C. 134, 508 S.E.2d 857, 863 (1999) (citations omitted).

And:

> [T]he South Carolina Constitution [Article V, §24] and South Carolina case law [citations omitted] place the unfettered discretion to prosecute solely in the prosecutor's hands. . .

> The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor's actions.

State v. Thrift, 312 S.C. 282, 440 S.E.2d 341, 346 (1994). "Furthermore, a trial court generally has no power to dismiss a properly-drawn indictment issued by a properly-constituted grand jury before trial unless a statute grants that power to the court." Needs, 508 S.E.2d at 863.

Defense counsel moved for a mistrial "based on prosecutorial misconduct." R. p. 415, line 18 – p. 417, line 25. The Solicitor's intimidation tactics, he argued, had violated Inman's right to due process, specifically his Sixth Amendment right "to present a full and complete defense" and "his Eighth Amendment right to . . . . a full and fair presentation of mitigation in this case." R. p. 417, line 25 – p. 418, line 13.

But counsel had also received information that, in an earlier capital case the Solicitor had threatened to prosecute another defense witness for running afoul of § 40-63-200. R. p. 418, line 20 – p. 419, line 25. Apart from violating Rule 407 ("Rules of Professional Conduct"), SCACR, counsel asserted, the Solicitor had quite possibly violated S.C. Code § 16-9-340, which makes it illegal to intimidate a witness "by threat or force" or to "attempt to obstruct or impede the administration of justice in any court."

In addition to requesting a mistrial, defense counsel moved to recuse the Solicitor's Office from further participation in Inman's case. R. p. 420, line 1 – p. 423, line 25. He also asked the judge to quash the death notice and sentence Inman to life without parole. R. p. 426, lines 17 – 20.

Concerning Dr. Loring, the Solicitor responded, "I have never threatened her. I have never even moved to indict her even though, theoretically, she would have violated the statute from a prior case." R. p. 429, lines 6 – 13. In his mind, the whole issue was "truly a red herring." R. p. 429, lines 14 – 15.

Counsel for Loring informed the judge that she still intended to take the Fifth. R. p. 430, line 20 – p. 431, line 20. The judge ruled:

> I'm not going to grant [a] mistrial. I am going to continue the case. I would instruct counsel to seek another social historian so that Dr. Loring will never have to deal with this case again.

R. p. 434, lines 11 – 14. But, he added, "I wouldn't rule that Dr. Loring is completely out of the case." R. p. 435, lines 4 – 8.

Seven months passed. As a result of Dr. Loring's continuing unease about testifying in South Carolina, she and the defense had reluctantly agreed to part ways shortly after the September 2008 hearing. R. p. 1024, line 14 – R. 1025, line 1. An already bad situation only got worse when the Solicitor then subpoenaed Loring in Georgia and nearly triggered the forced entry of her home by Georgia police with a warrant to arrest her as a fugitive. R. 1025, lines 2 – 4; R. p. 446, line 14 – p. 15, line 11.

When sentencing reconvened on April 20, 2009, defense counsel renewed his motions for a mistrial and for a sentence of life without parole. R. p. 455, lines 2 – 11. The severity of the situation his own misconduct had created was apparently lost on the Solicitor: "[A]s you can see, the Thirteenth Circuit Solicitor's Office had nothing to do with any of this. This is just a continuation by the defense to perpetrate an issue that is not real." R. p. 459, lines 21 – 25. In fact, he maintained, whatever had happened in Georgia after the

subpoena left his hands was "every bit the fault of Dr. Loring, under the Georgia system." R. p. 459, line 16 – p. 23, line 5. As far as he was concerned, it was all "more of the tempest in the teapot over nothing." R. p. 461, lines 5 – 7.

Loring voluntarily attended the hearing. R. p. 468, line 11. If the defense did not intend to call her as a witness, though, the judge was initially inclined to "cut her loose." R. p. 468, lines 16 – 21.

The defense elected to call Loring as a witness "for the limited purpose of putting what we can on the record regarding what happened in Georgia." R. p. 470, lines 4 – 7. She testified:

> I've never had an arrest warrant or anything like that. So it was a new experience for me. So I was alarmed, concerned, frightened, especially when I found out that I had been described as a flight risk. . . . And then I really didn't know exactly what to do. I've never had an experience like this before.

R. p. 480, lines 4-25.

As to her ability to testify effectively on behalf of Inman, Loring admitted:

> Well, I would have to truthfully tell you that this is a very alarming experience. And I cannot assure you a hundred percent that going through all this would not have an impact on me.

R. p. 483, lines 7 – 14.

Nevertheless, she was prepared if required "to do my very best, to do a professional and thorough job in the role of mitigation expert." R. p. 483, lines 15 – 20. "[I]f you are called as a witness," the judge interjected, "I would not allow [the Solicitor] to be the attorney who handled the examination." R. p. 484, lines 16 – 21.

The defense renewed its motion to disqualify the entire Solicitor's Office. R. p. 498, lines 20 – 23. He alleged that the Solicitor had also threatened a defense psychologist for violating § 40-63-200 at capital resentencing in State v. Michael James Laney in April 2007. R. p. 500, line 18 – p. 502, line 6. "[I]t sounds like Grassy Knoll stuff," the judge observed, but allowed the defense to proffer its evidence. R. p. 502, lines 7 – 12.

Counsel for Laney testified that he had also filed a motion to quash the death notice based on the Solicitor's prosecutorial misconduct in that case. R. p. 516, line 7 – p. 517, line 7. As was apparently his wont, the Solicitor by sending the witness an intimidating letter requesting her attendance at a meeting to discuss her testimony. R. p. 525, line 5 – p.89, line 7. Counsel for Laney renewed his motion to quash the death notice, outlining this ongoing misconduct. R. p. 529, lines 4 – 21. The very next day, the Solicitor invited counsel to a meeting to discuss the possibility of a plea. R. p. 531, lines 2 – 10. As counsel put it, "[T]here was significant movement regarding the resolution of that case" at that point. R. p. 532, line 8 – p. 533, line 4.

As far as the Solicitor was concerned, the only sticking point preventing a life sentence in the Laney case was defense counsel's refusal to concede that their expert had violated § 40-62-200. R. p. 535, line 22 – p. 536, line 16. The Solicitor eventually agreed to withdraw the death notice if the defense would withdraw their prosecutorial misconduct motions. R. p. 545, lines 7 – 22. He later suggested that Laney's counsel needed a "political advisor." R. p. 584, line 20 – p. 586, line 14.

Dr. Loring had previously testified in the capital case of State v. David Edens and Jennifer Holloway in June 2006 without objection by the Solicitor. R. p. 547, line 1 – p. 548, line 16. His attitude changed when the jury returned life sentences for both defendants.

R. p. 590, line 7 – p. 591, line 6. Several weeks later, the Solicitor's Office invited the jurors to dinner at a local restaurant. R. p. 591, line 8 – p. 592, line 11. According to one of those jurors:

> I took it to be they wanted to know what had influenced us the most as a jury in not giving them the death penalty. And what they had done . . . wrong or what they had done right. They were just picking our brains to kind of get a general idea of how to better do it next time.

R. p. 592, line 12 – p. 593, line 2.

She was left with the distinct impression the Solicitor was upset with their verdict. R. p. 593, lines 3 – 6.

Following this testimony, counsel for Inman informed the judge that he planned to call the Solicitor and his Deputy as witnesses on the issue of the Solicitor's misconduct, especially the matter of his intent. R. p. 604, line 16 – p. 605, line 22. The judge summarily denied the motion. R. p. 605, lines 23 – 25. Counsel objected to this limitation on his ability to present Inman's defense under the Sixth and Fourteenth Amendments. R. p. 606, lines 1 – 6. (This issue gives rise to the next issue addressed in this brief.)

Finally, the judge decided to call Dr. Loring as a court's witness. R. p. 640, lines 5 – 7. He denied defense counsel's motion for a mistrial. R. p. 645, lines 15 – 19. In reaching this result, the judge had decided that "[t]he events in Georgia" – Loring's near-arrest thanks to the Solicitor's efforts to subpoena her – were irrelevant to the issue of prosecutorial misconduct. R. p. 647, lines 2 – 24.

In Loring's presence, the judge accused the defense of being "more interested in pursuing the misconduct issue than in presenting a full defense." R. p. 661, line 24 – p. 662, line 16. He then called Dr. Loring as his witness and questioned her himself. Loring

testified that she no longer felt threatened by the Solicitor and would try "to do my very best," although:

> I'm worried and anxious that I have not received attorney guidance for six months, have not seen Mr. Inman for that period of time, nor have I re-interviewed his family members for the last six months. . . . Had I known that I was still on the case, Your Honor, I would have been sure to have done these three things so I wouldn't leave out important information when I testified.

R. p. 666, line 3 – p. 667, line 17.

Loring conceded that "there is some important information that I don't have as a result of what I've just talked about." R. p. 667, line 21 – p. 668, line 3.

The judge ruled that the Solicitor's intimidation of Dr. Loring constituted prosecutorial misconduct but not *intentional* prosecutorial misconduct. R. p. 700, lines 6 – 19. He accused defense counsel of "participating in the limitation of this evidence that they intended to offer, which contributes to any constitutional violation that might exist." R. p. 700, lines 20 – 23.

Obviously, a Solicitor may not "lob baseless threats or charges at a potential defense witness in an effort to prevent the witness from testifying." State v. Needs, 333 S.C. 134, 508 S.E.2d 857, 863 (1999).

> Improper intimidation of a witness may violate a defendant's due process right to present his defense witnesses freely if the intimidation amounts to substantial government interference with a defense witness' free and unhampered choice to testify.

State v. Williams, 326 S.C. 130, 485 S.E.2d 99, 102 (1997) (citation and quotation marks omitted). Moreover:

> If the State seeks to compel a defendant's non-testifying consultative expert to testify on its behalf, the State must prove that it has a "substantial need" for the expert and that its inability to compel the expert to testify will present "undue hardship."

State v. Jones, 383 S.C. 535, 681 S.E.2d 580, 586 (2009); see, also, State v. Northcutt, 272 S.C. 207, 641 S.E.2d 873 (2007).

To summarize: The judge found that the Solicitor had committed prosecutorial misconduct by threatening Dr. Loring with indictment and prosecution, but that the misconduct had not been intentional. He refused to consider the consequences of the Solicitor's equally wrongheaded attempt to subpoena Loring from Georgia as a State's witness. Finally, he called Loring as his own witness.

In Jones, the Supreme Court recognized that "there is undoubtedly a potential for abuse by the prosecution to compel a non-testifying, consultative defense agent to testify." 681 S.E.2d at 585.

> Furthermore, because defense counsel will be placed in the posture of cross-examining the expert witness, we believe counsel may be reticent in pursuing certain lines of questioning in the event the responses of the witness may "open the door" to privileged information.

*Id*. at 586.

Add to this an atmosphere of governmental intimidation, threats and paranoia, and a judge's decision to call a defense witness as a court's witness presents additional problems: The danger the witness' testimony will become biased because she views the judge as her protector. This is not a matter of speculation in the present case. According to Dr. Loring's attorney, "She did tell me that she felt like she was protected by the court." R. p. 641, lines

20 - 21. "She will be," the judge replied. R. p. 641, line 23. Defense counsel's cross-examination of Loring was severely truncated. R. p. 697, line 14 – p. 699, line 3.

The judge's finding that the Solicitor's misconduct was unintentional finds no evidentiary support. The Laney case had placed the Solicitor on notice that his actions constituted prosecutorial misconduct.

The decision whether to grant or deny a mistrial is within the discretion of the judge and will not be reversed on appeal absent an abuse of discretion. State v. Sweet, 374 S.C.1, 647 S.E.2d 202 (2007). An abuse of discretion occurs when the conclusions of the judge lack evidentiary support. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006).

The chain of events leading to this insupportable outcome began with the Solicitor's foolhardy decision to threaten a key defense witness with a baseless criminal prosecution and then subpoena her as State's witness when the judge granted the defense a continuance to obtain a new expert because of the initial misconduct.

> Prosecutors are ministers of justice and not merely advocates. [Citation omitted.] A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics . . . . [The Supreme Court] will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice.

State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 110 (2000). The Solicitor's misconduct and the judge's rulings concerning that misconduct require the Court to vacate Inman's death sentence and remand for resentencing.

3.

The judge committed reversible error at sentencing by refusing to allow the defense to cross-examine the Solicitor and his Deputy on the issue of prosecutorial misconduct, as the Solicitor's intent was directly relevant to that issue.

As noted previously, the judge concluded that the Solicitor's intimidation of Dr. Loring, while prosecutorial misconduct, was not intentional. R. p. 700, lines 6 - 19. This finding of a lack of intent permitted him to deny defense counsel's mistrial motion and avoid, for the time being, the possibility that Inman might be entitled to a sentence of life without parole as a consequence of that misconduct.

The judge summarily denied defense counsel's motion to call the Solicitor and his Deputy as witnesses on the issue of the Solicitor's intent. R. p. 604, line 16 – p. 605, line 25. Counsel objected to this limitation on his ability to present Inman's defense under the Sixth and Fourteenth Amendments. R. p. 606, lines 1-6.

Long story short, this ruling was reversible error under State v. Quattlebaum, 527 S.E.2d at 111. As in Quattlebaum, the judge did not articulate his reasons for refusing to allow defense counsel to question the Solicitor and his Deputy. Thus, the ruling was also controlled by an error of law and was therefore an abuse of the judge's discretion.

For this reason as well, the Supreme Court should vacate Inman's death sentence and remand for resentencing.

## CONCLUSION

In view of these errors, Jerry Buck Inman and his undersigned counsel ask the Supreme Court to vacate both his guilty plea to murder and death sentence.

Respectfully submitted,

_____

Robert M. Dudek
Chief Appellate Defender

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEYS FOR APPELLANT

This 20th day of June, 2011

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 20, 2011

_____

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Appellate Defender

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Pickens County

Edward W. Miller, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

JERRY BUCK INMAN,

APPELLANT

---

# FINAL BRIEF OF APPELLANT

---

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ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Pickens County
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THE STATE,

RESPONDENT,

V.

JERRY BUCK INMAN,

APPELLANT

---

CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Suite 501, Columbia, S.C. 29201, this 20th day of June, 2011.

_____
Robert M. Dudek
Chief Appellate Defender

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of June, 2011
_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014

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**Wanda H. Carter, Deputy Chief Appellate Defender**

June 20, 2011

Donald J. Zelenka, Esquire
Assistant Deputy Attorney General
Office of the Attorney General
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Columbia, SC 29211

Re: The State v. Jerry Buck Inman

Dear Don:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Supreme Court.

Please call me if you have any questions.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD:lec

Enclosures

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**Wanda H. Carter, Deputy Chief Appellate Defender**

June 20, 2011

Mr. Jerry Buck Inman, #5256
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

Re: Your appeal

Dear Mr. Inman:

Enclosed is a copy of the Final Brief of Appellant, Final Brief of Respondent, and Record on Appeal in your case, which have been filed with the South Carolina Supreme Court.

Please contact our office if you have any questions.

Sincerely,

Lauren E. Cruse
Legal Assistant

:lec

Enclosure