SUPREME COURT OF LOUISIANA

No. 2018-KP-0686

STATE OF LOUISIANA

versus

WARREN HARRIS

ON SUPERVISORY WRITS TO THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS

CRICHTON, J., additionally concurs

As I have noted previously, adversarial proceedings are the norm in our system of criminal justice, while ex parte proceedings are the disfavored exception that may be invoked in good faith only in very limited circumstances. *See State v. Brown*, 16-0274 (La. 4/22/16), 192 So.3d 720 (Crichton, J., concurring). In the present case, the defendant sought and obtained substantial public funding in an ex parte proceeding that defendant contends he needs to show he should be eligible for parole pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Montgomery v. Louisiana*, 577 U.S. —, —, 136 S.Ct. 718, 736, 193 L.Ed.2d 599 (2016). While this court in *State v. Touchet*, 93-2839 (La. 9/6/94), 642 So.2d 1213, answered the very narrow question of whether and to what extent indigent defendants are entitled to ex parte hearings on their motions for state funding of expert witness services—and notably did not purport to create a general procedure by which indigent defendants can hide all of their filings from the public eye—this court has never expressed whether *Touchet* applies in the context of a *Miller* hearing that is conducted long after conviction (and in accordance with *Montgomery*).

The present matter presents two separate questions: whether the request for such a significant public expenditure should have been litigated ex parte and out of the public eye, and whether defendant is entitled to the funds at all. The latter question cannot be answered because the proceedings were conducted ex parte and not transcribed. Furthermore, they were not filed under seal so that they could be subjected to appellate scrutiny.[1] Even assuming *Touchet* applies here, it is self-evident that ex parte proceedings must be conducted in the presence of a court reporter and the proceedings transcribed and filed under seal so that they can be reviewed. *Cf. Touchet*, 93-2839, p. 12, 642 So.2d at 1220 ("During the review of this interlocutory ruling, the application for funding and the trial court reasons for its denial or granting of an ex parte hearing shall both remain under seal so as to protect the defendant's case in the event of a favorable ruling.). Thus, the lack of a transcript of the ex parte hearing in this case is problematic.

In contrast, the former question is readily answered from the information available. Again, looking to *Touchet* for guidance while leaving the question open whether it applies in this context, defendant failed to show good cause, in the form of "some particularized prejudice to him by state participation in the hearing," to deviate from the norm of open and contradictory hearings. *See Touchet*, 93-2839, p. 11, 642 So.2d at 1220. Defendant's motion to conduct the proceedings ex parte contained only the most generic allegations of prejudice. Defendant's bare assertion that it would be unfair to compel him to reveal his "mitigation strategy"

[1] While the funding question cannot be answered without a transcript, in my view, there are strong indications before this court that the substantial funding requests were not well justified. Defendant provided examples of hourly billing rates and other funds (in excess of $20,000) that would be charged by various experts and investigators without ever alleging those specific experts were needed in his case. Regardless, without the transcript, it is not even apparent to this court what amount and for what purposes the district court authorized substantial public funds be expended.

to the state does not suffice. Although no specific allegations of brain dysfunction or childhood trauma are presently before the court, I note that those sorts of factors would be encompassed within La.C.Cr.P. art. 878.1(C), be "well-known to the state", *see Touchet*, 93-2839, pp. 11–12, 642 So.2d at 1220, and the revelation of those reasons for needing experts would not be prejudicial per se to defendant. Accordingly, I see no justification for proceeding with such a substantial request for public funds for expert assistance in a *Miller* hearing out of the public eye and without participation by the State.