STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from York County
Court of Common Pleas
Capital Action

Honorable R. Keith Kelly, Circuit Court Judge

Lower Court Case No. 201 l-CP-46-0072
APPELLATE CASE NO. 2023-000505

JAMES DEJARNETTE ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

REPLY TO SCCID RETURN TO MOTION TO APPOINTMENT OF OUTSIDE COUNSEL

The undersigned requests that two attorneys be appointed to the petitioner's case for a variety of reasons. First, the petitioner's case is extremely complicated and voluminous. Not only is it procedurally complicated, but the volume of records is twice the amount of a normal capital case. Second, both attorneys do substantial *pro bono* work and have insufficient time to devote more *pro bono* time to this case. Based on the current hourly rate of one hundred fifteen dollars

($115.00) an hour approved by the trial judge, neither counsel can afford to continue to work on this matter individually. Appointing new counsel would be prohibitively expensive due to the time it would take to become familiar with the case.

This reply is based on the following legal reasons:

1. Forcing attorneys to work on appointed cases without adequate compensation is an unconstitutional taking of the attorney's property in violation of the United States and South Carolina constitution. *Ex Parte James A. Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011).
2. The appointment system unlawfully treats defendants who are represented by appointed counsel differently from defendants who are represented by public defenders, by failing to provide them with an adequately funded defense.
3. The defendant in this case has a sixth amendment right to competent and effective counsel. The defendant in this case has a sixth amendment right to unconflicted counsel. Failure to adequately pay the undersigned creates a conflict of interest between the attorneys' obligations to his and his family's financial wellbeing and his obligation to competently represent the defendant.
4. South Carolina Code Ann §§ 17-3-50, 17-27-160, and 16-3-26 allows the trial court to exceed the statutory rate and limits if it is necessary to provide adequate representation. Compensation at the statutory rates will not provide adequate representation and the rates and limits must be exceeded.
5. Exceeding hourly rates and limits is necessary based on the factors outlined in *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992).

STATEMENT OF FACTS

Lead counsel, William H. Ehlies, was asked to represent the petitioner. He has spent more than 1,200 hours on this case. Attorney Enderlin was asked to represent the petitioner to help finish the post-trial brief. He billed one time for forty-eight (48) hours on this case. Mr. Enderlin feels that it is impossible to maintain a practice and at the same time stay current in capital litigation standards and strategies. At some point in time, it became clear that Mr. Ehlies' bill was substantial, and Mr. Enderlin stopped billing because his hours were immaterial in comparison. Mr. Enderlin estimates he spent twice or three times as much time on this matter than he has billed.

An appeal will take significant additional time. The current hourly rate for Federal capital appointments is two hundred ten dollars ($210.00) an hour. Almost a hundred dollars more than the SCCID rate. The current hourly rate for standard Federal appointments is one hundred sixty-four dollars ($164.00) an hour. The $110.00 to $125.00 SCCID rate was recommended when attorney Enderlin was on the Commission in 2009 because it was the current non-capital Federal rate. In other words, the SCCID rate has not changed in fourteen years. The legal team for Alexander Murdaugh estimated it would cost an additional one hundred sixty-four thousand dollars ($164,000.00) to represent Mr. Murdaugh in his non-capital appeal – an appeal far less complicated than a capital case.

Mr. Enderlin has 29 years' experience in the practice of law. He was a law clerk to the honorable Alexander S. Macaulay, a prosecutor for the 10th circuit for two years, an assistant public defender and the chief public defender for Oconee County for many years. He has currently been in private practice for over 20 years. He has handled numerous criminal cases,

including six death penalty cases. He is currently on the CJA appointment list for the District Court of South Carolina and the Fourth Circuit Court of Appeals.

In 2011 Mr. Enderlin spent hundreds of hours representing pro bono clients without compensation, including a case that went to the Supreme Court of the United States. This caused enormous financial stress on his practice and significant stress for his family. Since that date he has tried to limit *pro bono* work to no more than forty (40) hours a year. Mr. Enderlin has severely limited his criminal caseload over the last several years and spends considerable time on non-legal business matters. He is also currently a member of the City of Greenville Planning Commission. The Planning Commission is in the process of adopting an entirely new planning code. This has added significant time it takes to be on the Commission. Mr. Enderlin estimates he is spending at least twenty hours a month on planning commission business. He has been a South Carolina Bar House of Delegates member, a member of the South Carolina Bar's Rule 608 Committee, a member of the South Carolina Commission on Indigent Defense, the American Council of Chief Defenders, and the NLADA Systems Development and Reform Committee. He has been an officer or board member on the following: Keep Greenville County Beautiful, Stone Academy PTA, South Carolina Association of Criminal Defense Lawyers, Oconee Crime Stoppers, Oconee Community Theatre, and the Oconee County Bar. He has presented CLEs for the South Carolina Bar, SCACDL, and the South Carolina Public Defenders Association. Mr. Enderlin has spent thousands of hours in pro bono cases and in advising, researching, drafting briefs, and investigating matters involving attorneys that represent indigents and indigent defense organizations. He has previously volunteered for the South Carolina Bar in mock trials and *pro bono* estate planning. He is a veteran of the United States Army National Guard. He has

contributed significantly to the community through volunteer and *pro bono* efforts and will continue in those efforts, but he has learned that any death penalty case is a daunting amount of work and without just compensation, one cannot adequately represent the client without just compensation.

Capital cases are becoming more and more complex over time. The American Bar Association (ABA) noted, "[A]n in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition 2003, page 968. It is now suggested that the average attorney hours expended on death penalty cases are 3,300. https://deathpenaltyinfo.org/node/1811 (Last visited May 29, 2019).

I. Forcing attorneys to work on appointed cases without compensation is an unconstitutional taking of the attorney's property in violation of the United States and South Carolina constitution.

No one shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." US Const Amend. V. "[N]or shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws. SC Const Article I, Section 3. "Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." SC Const Article I, Section 13. The undersigned's normal hourly rate for

private clients is $300 an hour. By the involuntary servitude of this appointment without just compensation, this State will deprive the undersigned of property in the same amount.

II. The defendant in this case has a sixth amendment right to competent counsel. The undersigned cannot competently represent the defendant without adequate compensation.

The Sixth Amendment right to counsel is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). The undersigned cannot be an effective representative of the defendant unless he is assured of adequate compensation. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. *Griffin v. Illinois*, 351 U.S. 12 (1956). Indeed the defendant even has the right to funds to hire experts to assist him. *Ake v. Oklahoma*, 470 U.S. 68 (1985). Clearly, the defendant has the right to adequately funded counsel as well.

"[T[he absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense." *McFarland v. Scott*, 512 U.S. 1256, 1258 (1994) (Blackmun, J., dissenting). "[I]ncarceration [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States, implicit in such a rule." *Scott v. Illinois*, 440 U.S. 367, (1979).

> The organized bar has long recognized that if effective defense services are to be provided, the government must pay for them. As stated in the American Bar Association Standards Related to Providing Defense Services, "[g]overnment has responsibility to fund the full cost of quality legal representation for all eligible persons…."[ABA Providing Defense Services, supra note 58, at 5-1.6.] This standard reflects the enormous need for defense services in all of the kinds of cases to which the right to counsel attaches and that it is totally unrealistic to expect that effective representation will be delivered unless systems of public defense are adequately funded. In its Model Rules of Professional Conduct, the ABA strongly encourages lawyers to provide pro bono legal services but excludes from the category of appropriate volunteer service those cases covered by the

constitutional right to counsel.[Footnote eliminated]

Report of the National Right to Counsel Committee, Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel (The Constitution Project 2009), available at www.tcpjusticedenied.org

III. The defendant in this case has a sixth amendment right to unconflicted counsel. Failure to adequately pay the undersigned creates a conflict of interest between the attorney's obligations to his and his family's financial wellbeing and his obligation to competently represent the defendant.

SCAR 407:

> [7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided *by personal conscience and the approbation of professional peers.* A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.
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> [9] In the nature of law practice, however, conflicting responsibilities are encountered. *Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.*[Emphasis Added]

When considering whether counsel is effective, there are circumstances of such magnitude that the defendant need not show any prejudice if the circumstance exists. One such circumstance is when counsel has a conflict of interest. *Mickens v. Taylor*, 535 U.S. 162 (2002). And when the objection is made prior to trial, the defendant need not show any adverse effect

that the conflict has upon the representation, only that there is a conflict of interest. *Mickens*. The defendant, through his undersigned counsel, objects to the representation of the undersigned due to the inherent conflict of interest between the attorney's financial concerns and time spent on the defendant's case.

South Carolina Appellate Rules of Professional Conduct, Rule 1.7(a)(2) states that a conflict exists when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by *a personal interest of the lawyer*". (Emphasis added). There is a significant risk that the representation of the defendant will be limited by the lawyer's personal interest in trying to lose as little money as possible while representing the defendant. The undersigned states that if he is paid $110 an hour there is a significant risk, he will limit the amount of work on the defendant's case so he can limit the amount of money he loses on the defendant's case.

"The *Holloway* Court deferred to the judgment of counsel regarding the existence of a disabling conflict, recognizing that a defense attorney is in the best position to determine when a conflict exists, that he has an ethical obligation to advise the court of any problem, and that his declarations to the court are "virtually made under oath." *Id.,* at 485—486 (internal quotation marks omitted)." *Mickens.* The undersigned is concerned that consciously or subconsciously he will be unable to diligently work on the defendant's case because he will be concerned about maintaining his office expenses and his own salary. Furthermore, the undersigned is concerned that if it comes between spending time on the defendant's case and providing for an adequate living for his family, his children's college education, or his own retirement, the undersigned

may fail to work on the case as diligently as he should if he is afraid, he will not be compensated for that work.

The undersigned is mindful of his oath to provide public service to the community, and he exerts what he feels is substantial time and resources to that cause, however, the undersigned is also mindful of his oath and ethical responsibilities to defend his client competently and with due diligence, to zealously assert his client's defenses, and to communicate with his client. As noted above, counsel does contribute significantly to public service.

South Carolina Rules of Professional Conduct Rule 6.2 allows a lawyer to decline representation in appointment cases when it is "likely to result in an unreasonable financial burden on the lawyer." The comments specifically provide that a lawyer may "seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust." Rule 6.2, Comment 2. Also, a lawyer "fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients." Rule 6.2 Comment 1.

Furthermore, Rule 6.1 governing voluntary *pro bono* service requires a lawyer to render public interest legal service, including to charitable groups, by service in activities improving the law, the legal system or the legal profession, and by financial support. It also notes this includes civil rights law. The Rules do not specify that appointments take precedence over voluntary service under 6.1, and therefore the entire pro bono service should be considered when determining the lawyer's financial burden involved in the appointment. See also *State v. Bailey*, supra.

IV. South Carolina Code Ann § 17-3-50 allows the trial court to exceed the statutory rate and limits if it is necessary to provide adequate representation. Compensation at the statutory rates will not provide adequate representation and the rates and limits must be exceeded.

Payment more than the statutory rates and limits is necessary for the undersigned to provide an adequate defense based on South Carolina Code § 17-3-10 et seq.

South Carolina Code Ann § 17-3-50:

> (A)When private counsel is appointed pursuant to this chapter, he must be paid a reasonable fee to be determined on the basis of forty dollars an hour for time spent out of court and sixty dollars an hour for time spent in court. The same hourly rates apply in post-conviction proceedings. Compensation may not exceed three thousand five hundred dollars in a case in which one or more felonies is charged … .
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> (C) Payment in excess of the hourly rates and limits in subsection (A) or (B) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred.

It is the judge's duty to consider facts and circumstances that make it necessary to exceed those rates and limits. Some circumstances make it necessary to compensate attorneys not "*at market rate,* rather at a reasonable, but lesser rate, which reflects the unique difficulty these cases present as balanced with the attorney's obligation to defend the indigent." *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992).

V. Exceeding hourly rates and limits is necessary based on the factors outlined in *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992).

Judges are to consider attorney's fees based on the factors laid out in *Bailey. Ex Parte James A. Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011). Some of the factors this Court should consider are the complexity of the case, the time spent on the case, the severity of the

punishment, the threat to the livelihood of the attorney, the other pro bono work done by the attorney, the necessary knowledge and experience the attorney must have to represent the particular case, the possibility of being scrutinized at the post-conviction stage, the fact that a "gross and fundamental unfairness is inflicted upon these attorneys when the fees and compensation fail to cover even the overhead costs of maintaining their law offices.", and whether, "token compensation will suffice in the future to provide an indigent defendant with the quality of legal representation mandated by the United States Supreme Court."

VI. The burden placed on the attorney.

This burden is exacerbated by the fact that the undersigned spend significant time on volunteer work and most of his legal time representing government entities which is part of his public service. This representation already comes at a reduced rate of compensation and the undersigned cannot afford to represent additional clients without sufficient compensation. Other considerations are the complexity of the case, and the severity of the punishment.

VII. The threat to the livelihood of the attorney and the other *pro bono* work done by the attorney.

As noted above, counsel has not shirked from service to this state. In addition to the appointed hours spent in the defense of indigents, we have consistently acted "As a public citizen [to] seek improvement of the law" SCAR Rule 407 and 607. Counsel has done this by his noted activities in Section IV of this motion.

VIII. The necessary knowledge and experience the attorney must have to render effective assistance of counsel.

As noted above, as these cases have become more extensive and complicated, the private capital bar has dwindled and gotten older. This is likely due in part to the overwhelming nature

of these cases, and the fact that even standard Federal rates are fifty percent higher than the current capital rate, and that the current capital rate has not changed for fourteen years.

IX. Being mindful that counsel' representation will be reviewed in subsequent proceedings.

The undersigned performance will be reviewed and measured against prevailing norms for effective assistance in the post-conviction stage and, in fact a Federal Habeas case is already pending. Undersigned counsel will have to continue working with and responding to future counsel long after their appointment ends.

X. The gross and fundamental unfairness inflicted upon the undersigned when the fees and compensation fail to cover even the overhead costs of maintaining their law offices.

Bailey noted "a gross and fundamental unfairness is inflicted upon these attorneys when the fees and compensation fail to cover even the overhead costs of maintaining their law offices."

XI. Whether "token compensation will suffice in the future to provide an indigent defendant with the quality of legal representation mandated by the United States Supreme Court."

There is little doubt that this "token compensation" will not provide an indigent defendant with quality representation. *Bailey*. As the Supreme Court noted in *Bailey*,

> [I]t would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated. *The indigent client, of course, will be the one to suffer the consequences if the balancing job is not tilted in his favor.*

Counsel understands that hourly rates and limits on fees are generally determined by the trial court, however, because SCCID has asked this Court to restrict appointment to one attorney, the undersigned would ask for more direction in this matter. Counsel would suggest the following alternatives. Appoint both attorneys to represent the petitioner at the rate of one

hundred fifteen dollars ($115.00) an hour. In the alternative, appoint one attorney at the rate of one hundred sixty-four dollars ($164.00) an hour. The undersigned asks this with the understanding that the trial court will be able to go above the mandatory limits on overall compensation in this case.

April 10, 2023.

s/ William Harry Ehlies, II
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