

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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May 22 2023

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Keith Kelly, Circuit Court Judge

Case No. 2011-CP-46-0072
SCSC 2023-000505

James Dejarnette Robertson,

Applicant/Appellant,

-vs-

State of South Carolina,

Respondent.

MOTION TO CLARIFY ORDER OR IN THE ALTERNATIVE TO RELIEVE COUNSEL

Counsel moves this Court to clarify the order of appointment issued on May 17, 2023, and, in an abundance of caution, counsel asks this Court to accept this motion as a potential motion to be relieved so that the case is held in abeyance under Rule 240(b), SCACR until this Court rules on this motion.

The Motion to Appoint Outside Counsel stated:

“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.”

It appears the Court has followed counsels’ first suggestion, but certain language seems to be at odds with that order, specifically, "the request for additional compensation is denied" and that counsel "shall split any compensation associated with the appointment." While counsel feels the rates for capital representation should be raised, it agreed to continue representation at the rate of \$115 an hour assuming the statutory limits could be exceeded by the trial court. Counsel would therefore ask:

1. Whether this order is allowing the limits to be exceeded?
2. What does “split any compensation” mean?

Counsel believes question 1 is probably covered in the language referring to the trial court’s order, but counsel would ask for assurance in that regard. It should be noted that the trial court exceeded the statutory limitations concerning attorneys’ compensation.

Regarding question 2, counsel normally bill SCCID independently. Therefore, it is not clear how they would split compensation.

Finally, the order’s reference to Ex Parte Brown, infra, and additional compensation make counsel concerned that their lengthy and detailed motion for fees may not have been clear. Counsel has offered the suggestion that the Court has apparently adopted. Counsel would prefer to continue billing in the normal method by submitting invoices to SCCID and the trial court. Regardless of the method of

billing, assuming there are no limits except as to whatever is in the discretion of the trial judge or this Court, and each counsel bills independently at \$115 an hour, counsel believes the Constitutional issues ruled upon in Ex Parte Brown would be moot. However, an arbitrary limit, set in advance of providing the necessary services, creates a conflict of interest¹ for counsel which was not addressed in Ex Parte Brown. The Sixth Amendment not only creates a right to “effective assistance” but to “conflict free” counsel. Wheat v. United States, 486 U.S. 153 (1988). Counsel reserves the right to ask the Court to raise the rate if some unforeseen circumstances exist, but counsel has never made such a request before and does not foresee it happening in this case. Again, counsel only includes a request to be relieved to hold this case in abeyance and under the unlikely interpretation that the Court is limiting the amount of compensation or “split any compensation” means the attorneys would bill at \$57.50. Counsel cannot represent the appellant at the rate of \$57.50 and would have to decline representation based on the reasons in their original motion.

(Signature page separate)

¹ If providing effective assistance requires 1,000 hours but the case is governed by a hard limit of 200 hours, counsel must decide whether to go to his savings or get a loan to fund delivery of effective assistance or leave the case at 200 hundred hours from the beginning thereby providing less than effective assistance and go to other revenue source cases. Putting counsel in that position impugns and contradicts the holding in Wheat infra., to the client's detriment.

May 22, 2023.

s/ William Harry Ehlies, II

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