

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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May 26 2023

S.C. SUPREME COURT

Appeal from York County
Capital Action
Honorable R. Keith Kelly, Circuit Court Judge

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

JAMES DEJARNETTE ROBERTSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

**RETURN TO MOTION TO CLARIFY ORDER OR IN THE
ALTERNATIVE TO RELIEVE COUNSEL**

Undersigned counsel makes the following return to petitioner's motion to clarify order or in the alternative to relieve counsel:

I. STATEMENT OF FACTS

1. By order dated May 9, 2019, the Honorable Keith Kelly (hereafter Trial Court) relieved petitioner's prior counsel due a potential conflict of interest and appointed Attorney William Hank Ehlied, II (hereafter Ehlied) to assume the lead counsel role with a second attorney to be appointed by a subsequent order. The Trial Court inquired from Ehlied "whether he would be able to assume the lead attorney position should there be a need to relieve present counsel..." Ehlied "confirmed with this Court that he is available, **willing** and statutorily qualified to be appointed lead counsel". (Emphasis added)

2. Prior to the Trial Court officially appointing Ehlies and after his appointment, the South Carolina Commission on Indigent Defense (SCCID) reached out to Ehlies regarding the appointment of co-counsel. SCCID requested Ehlies agree to the appointment of counsel from the Commission's Capital Trial Division. The attorneys of this Division are some of the most qualified capital litigation attorneys in the State and salaried employees. This appointment could have avoided the payment of significant funds to private counsel, while also insuring the appointment of **extremely** qualified co-counsel. Ehlies objected to this request questioning whether the enabling legislation (proviso) of the Capital Division made them disqualified to serve as second chair. SCCID did not agree with the analysis and still asserts that counsel from the Capital Division could have assumed the role as co-counsel.
3. SCCID and Ehlies held a phone conference on May 8, 2019, with the Trial Court wherein SCCID stated its position regarding the appointment of co-counsel from the Capital Division. Ehlies stated his objection and stated someone like Attorney Susan Hackett (SCCID employee at that time) would be more qualified. SCCID informed the Court they could have Attorney Hackett assigned to the case agreeing with Ehlies she would be extremely qualified. When questioned by the Trial Court regarding SCCID's offer to have Attorney Hackett appointed Ehlies objected and requested he be allowed to select co-counsel of his choice.
4. Ehlies then suggested the Trial Court appoint Attorney Joseph Bradley Bennett as co-counsel. By Order dated June 18, 2019, the Trial Court appointed Mr. Bennett.
5. After the PCR trial Ehlies filed a motion "advising the Court that there has been a transition in the Applicant's team members which necessitates the substitution of counsel in the place of Joseph Bradley Bennett". The Trial Court upon Ehlies request appointed Derek Enderlin to serve as co-counsel by Order dated August 18, 2021.
6. At the time of Mr. Bennett's substitution he received compensation from SCCID in the amount of **ninety-three thousand five hundred and eighteen dollars (\$93,518)**. Mr. Enderlin has billed and received fees in the amount of five thousand five hundred twenty dollars (\$5,520). As Ehlies noted in his Reply to this Court dated April 10, 2023: "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." (Emphasis added)
7. Ehlies has billed and received as of the date of this return **one hundred twenty-nine thousand two hundred and thirty-seven dollars (\$129,237) in attorney's fees. He has also been reimbursed for \$2,691.73 in expenses.**
8. In addition to attorney's fees SCCID has paid **\$100,896.96** in expenses, expert fees, and other miscellaneous costs since Ehlies appointment in this case.

II. ARGUMENT

9. It is the position of SCCID that the plain and unambiguous language of the most recent General Appropriations Act (H. 5150), Proviso 61.3, is the governing authority as it relates to voucher review and maximum fees allowed in Appellate Division conflict cases. The proviso states:

(INDEF: Appellate Conflict Fund) The purpose of the Appellate Conflict Fund is to provide money to pay attorneys for representing indigent defendants on appellate review when the Office of Appellate Defense is unable to do so. Funds designated for appellate use in conflict cases shall be administered by the Commission on Indigent Defense. The Office of Appellate Defense must first determine that it is unable to provide representation. Fees shall be at \$40 per hour for out of court work and \$60 for in court work, with a maximum of \$3,500 per case for noncapital appeals. Fees shall be \$50 per hour for out of court work and \$75 per hour for in court work in capital appeals with a **maximum of \$10,000 per capital appeal. The appropriate appellate court shall review and approve vouchers for payment of appellate conflict cases.** The Office of Appellate Defense shall continue to provide printing and other support functions currently provided from their resources. On June thirtieth of each year, the Commission on Indigent Defense shall review all outstanding obligations in this fund. Any unspent and unobligated money shall be used to pay outstanding vouchers in the Death Penalty Trial Fund or the Conflict Fund, provided the designated fund has become exhausted during the year. (Emphasis added)

10. Ehli's request "to continue billing in the normal method by submitting invoices to SCCID and the trial court" should be denied as Proviso 61.3 specifically states in unambiguous language that: "the appropriate appellate court shall review and approve vouchers for payment of appellate conflict cases". This Court is the appropriate appellate court and has current jurisdiction.
11. Ehli's also seeks clarification of "whether the order is allowing the limits to be exceeded."
12. Ehli's has made numerous references in his filings to S.C. Code Ann §17-3-50, S.C. Code §17-27-160 and S.C. Code §16-3-26 that allow the trial court to exceed the statutory rate and limits. However, these code sections are not applicable to this appeal. 17-3-50 references trial level matters to include non-capital post-conviction relief. 17-27-160 is applicable to capital post-conviction matters but the only reference to appeals is that "appointed counsel on appeal from state post-conviction relief cases shall be funded and compensated from the funds established for representation of indigents on appeal by the

Office of Appellate Defense pursuant to Chapter 4, Title 17”¹ If the General Assembly intended that caps could be exceeded for capital PCR appeals, it could have easily made that clear in 17-27-160.

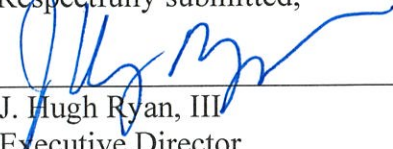
13. S.C. Code Section 17-3-330 et. al does not address fees and expenses of appointed appellate counsel. As noted, proviso 61.3 provides the specific authority that sets a case cap of \$10,000 per capital appeal. While the General Assembly specifically provided courts the ability to exceed case limits in both capital trial and post-conviction relief proceedings such language is not included for capital appeals. Thus, it is SCCID’s interpretation that the General Assembly has set a maximum fee cap of \$10,000 for capital appeals. Ehliès is requesting the Court ignore the plain unambiguous language of the proviso and disregard SCCID’s interpretation of its own proviso. See Brown v. DHEC, 348 S.C. 507, 560 S.E.2d 410 (2002). (The Court generally gives deference to an administrative agency’s interpretation of an applicable statute or its own regulation.) As in this case where counsel has received almost \$130,000 in attorney’s fees for the PCR trial the General Assembly could have determined that a hard cap for appeals was proper where Counsel would likely have already billed significant fees, would be very familiar with the case (Ehliès has spent 1200 hours) and would have developed issues for appeal during the PCR trial.
14. SCACR 602(h) supports the language of the Court’s Order requiring counsel split any compensation. SCACR 602(h) specifically states “in any case in which more than one attorney is appointed to represent a defendant, the combined fees paid to such attorneys shall not exceed the maximum amounts provided by statute relating to indigent representation,” which in this matter is set by Proviso 61.3.
15. SCCID is extremely concerned about the language reasserted in this motion and counsel’s previous Reply dated April 10, 2023, that “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.” (Reply To SCCID Return to Motion to Appointment of Outside Counsel at p. 8.)
16. Ehliès states: “Furthermore, the undersigned is concerned that if it comes between spending time on the defendant’s case and providing for an adequate living for this 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”. (Reply at pp.8-9) If counsel does not think he can adequately represent the applicant in this capital litigation proceeding SCCID would submit the remedy is to move this Court to be relieved.

¹ With the merger of Appellate Defense and Indigent Defense in 2005 Chapter 4, Title 17 duties and responsibilities were transferred to the Office on Indigent Defense and enumerated in 17-3-360 et. al

WHEREFORE, undersigned counsel respectfully requests that:

1. The Court deny the request of Petitioner's counsel that the Court allow the case limits for capital appeals set by the General Assembly to be exceeded.
2. The Court clarify that split compensation means counsel's combined fees cannot exceed the maximums set by proviso 61.3 and SCACR 602(h), leaving it to the discretion of counsel how they will divide their fees within the case limits.

Respectfully submitted,



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Executive Director

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This 26th day of May, 2023.