STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Court of General Sessions
Trial Court Case No.: 2003-GS-40-6670

Ex Parte: Tara Dawn Shurling, Attorney, Appellant,

In Re:
State of South Carolina, Respondent,

v.

Bejay Harley, Defendant

Appellate Case No. 2013-001298

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Appellant respectfully submits that the statement of the case presented in her Initial Brief of Appellant is factually accurate. As regards to the brief segment of Appellant statement that Respondent "notes its dissatisfaction with", Appellant would point out that the sentence in question is factually accurate. When Judge Manning's original Orders were signed, the Orders previously signed by Judge Newman expressly authorized the presiding judge to make a final determination as to fees and expenses. Thus, Appellant's statement was and is factually accurate. At the time SCCID objected to Appellant's payment in accordance with Judge Manning's Orders, the Orders of Judge Newman which were in place did expressly authorize the presiding judge to make a final determination as to fees and expenses.

ARGUMENT

Reply to Respondent's Argument I.

Appellant is confident that the arguments presented in her Initial Brief clearly state the necessary legal analysis and supporting authority on this issue. There are however, a few minor points from Respondent's Brief that warrant a Reply.

The Respondent, and indeed Judge Newman, both have repeatedly asserted that the proposed order originally signed by Judge Newman concerning fees did not accurately reflect his rulings from the bench during the May 23, 2011 hearing. Interestingly, neither the Respondent nor Judge Newman have pointed to any portion of the May 23, 2011 hearing wherein the Court made any ruling that was inconsistent with the content of the proposed order provided to the Court by Appellant and which was subsequently signed and adopted by the Court.

As discussed at length in the Brief of Appellant, during the May 23, 2011 hearing the Court ruled against Appellant on some aspect of every funding issue she presented for approval. For that reason, coupled with the fact that the Court had not asked Appellant for proposed orders, Counsel had assumed that the Court would either prepare its own order or request an order from Respondent. On May 25, 2011, the Court in fact filed an Order addressing Appellant's motion for funding for general expenses. That Order was the proposed order submitted to the Judge with Appellant's original funding requests. Judge Newman edited said order before signing and filing it. R. p. 184. When this case was concluded many months later, and Counsel prepared to submit her bill for payment, she discovered that no order addressing her fee requests had been entered following the May hearing. Appellant was not being surreptitious, but rather was simply trying to get paid when she prepared a proposed order for the Court. When that Order was signed by Judge Newman, and returned to Appellant, she submitted the same to the presiding judge charge along with her voucher for payment of her fees in this matter. Appellant maintains that she did not

not intentionally fail to send a copy of the proposed order to Respondent. She would note however, that at that point in history she did not view the state agency charged with seeing to it that court-appointed lawyers are paid from funds made available for that purpose by the legislature, as being a party to litigation in the traditional sense of the term. Indeed, both the previous Orders of this Honorable Court on this subject, as well as SCCID's own policies, indicate that the trial court *may* seek impute from that agency in deciding funding requests. While the proposed order was not sent to Respondent, the fact remains that the proposed order provided to the Chief Administrative Judge was entirely consistent with all of the rulings made by the Court during the May 23, 2011 hearing and its terms were consistent with consistent with both S.C. Code Ann. § 17-3-50 and existing case law. As noted in the Amended Final Brief of Appellant, her interpretation of S. C. Code Ann. § 17-3-50(C) is consistent with the previous rulings of this Honorable Court in which the Court has found that an award of attorney fees in excess of the section 17-3-50 cap is "**within the sound discretion of the trial judge.**" *Ex Parte Brown, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (2011)*, citing, Bailey *v. State*, 309 S. C. 455, 464, 424 S.E.2nd 503, 508 (1992).

Appellant respectfully submits that Respondent's interpretation of S.C. Code Ann. § 17-3-50 is erroneous. Clearly subsection A of this statutory provision sets the rates and the caps to be paid to court-appointed lawyers in South Carolina. Subsection B of the same statute addresses the statutory cap for "investigative, expert, or other services ... reasonably necessary for the representation of the defendant" and does speak in terms of authorizing an attorney to *obtain* such services. There is nothing in this statutory provision which addresses the *general expenses* a court-appointed attorney will incur in the course of representing a court-appointed client; mileage, postage, printing costs, research costs, etc. S.C. Code Ann. §17-3-80 (2012) specifically provides for a private-appointed attorney to be reimbursed for up to $2,000.00 in necessary

necessary expenses provided the expenses were ***"actually incurred"*** and the expenses are approved ***"by the trial judge"***. Thus, both §17-3-50(C) and §17-3-80 address the question of court-appointed counsel's reimbursement for necessary expenses and both sections were phrased by the legislature in the past tense. Notably, §17-3-80 indicates that such expenses are to be approved by the trial judge.

Subsection C addresses the authority of the Court to authorize fees in excess of the statutory rate and caps as well as expenses in excess of the limits provided by statute. Therefore, the only portion of § 17-3-50 which addresses requests for payment of fees in excess of the statutory rate or caps, as well requests for the payment of expenses in excess of the statutory limits, is subsection C. Subsection C is very clearly drafted in past tense and, Appellant would respectfully submit, envisions the presiding judge being able to determine whether such a request for fees is reasonable at the end of the case. While, unlike §17-3-80, §17-3-50(C) does not expressly reference the trial judge it does require that the Court certify in any order authorizing payment of fees in excess of the rates and caps provided in that section, "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.***" (Emphasis added). Thus, not only is this provision written in past tense, it requires certification of facts that the trial judge would be in the best position to be familiar with.

The argument found on page 15, last full paragraph, of the Brief of Respondent, is particularly repugnant to the constitutional guarantees afforded by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina State Constitution. Respondent has chosen to cite the Supreme Court's recent decision in *Ex parte Shurling*, Opinion No. 27375, Shearouse's Adv. Sh. No. 14 at pp. 17 -20 (April 9,

2014), multiple times in its brief. It is important to note that our Supreme Court declined to adopt to reach the statutory interpretation urged by Respondent in that case. Appellant would respectfully submit that the argument advanced by Respondent on this point is offensive to the very purpose for which that state agency was created. Respondent has effectively argued that an attorney appointed to represent an indigent defendant should determine the amount of effort he or she should expend in the defense of that individual based on how much he or she has been told they can get paid for their services. Respondent advanced this same line of argument in *Ex parte Shurling*, *supra*, and the Supreme Court did not hasten to adopt their position. While Respondent feels that it is "*only logical*" to assume that Counsel would be more effective if she knew in advance that she would get paid for her efforts, their position does disservice not only to Appellant, but to all the court-appointed lawyers who faithfully seek to honor their ethical obligation to provide effective assistance of counsel for their clients regardless of whether they will ever be fairly compensated for their efforts.

Respondent's reliance upon the Supreme Court's decision in *Ex parte Shurling*, *supra*, is misplaced for another reason as well. A careful reading of that decision indicates that the High Court found that a strict interpretation of the order involved in that case expressly required advance approval of any fees in excess of the caps set by the Order of the Chief Administrative Judge. For that reason, the Supreme Court declined to address the question of whether §17-3-50 required advance approval of fees in excess of the rates and caps set forth in Subsection A of that statute. In the present case, the Orders originally signed by Judge Newman required further approval of the Court for payment of fees in excess of the cap set therein. Once again, however, there is nothing in the record of the May 23, 2011 proceeding which indicated that the ***"further approval of the court"*** had to be obtained from the same judge who signed the order. Indeed, for the reasons fully addressed in the Brief of Appellant, there are some very practical reasons why

such a policy would not work. These practical concerns, along with Appellant's long held view of the proper interpretation of §17-3-50(C), are the reasons why it did not logically occur to Appellant that the Court's rulings from the bench at the May, 2011 proceeding would be intended to mean further approval from the same judge.

Lastly, Appellant would note that Respondent, as well as the court below, has repeatedly sought to support its position by noting that Appellant represented the Defendant in question in a previous Post-Conviction Relief action. The Brief of Appellant sets forth in detail why this fact does not support any argument that her fees were unreasonable and why Respondent's position is just plain unfair. Appellant represented this defendant over a period of several years. The scope and subject matter of the post-conviction relief case were different from the scope of the case as it was prepared for retrial. Not only had there been a significant lapse of time between the reversal and the retrial, but the prosecution had greatly expanded its intended use of expert witnesses prior to the scheduled retrial. While one expert witness was presented at the original trial, the state had announced intentions to present approximately *seven* expert witnesses at the retrial. Appellant had been limited to funding for one expert witness by the Chief Administrative Judge. In addition, this case was scheduled for a date certain trial *three times* before the State, after jury qualification *on the third trial date*, finally made an offer for an *Alford* plea[1] which the Defendant was willing to accept. As a result, Appellant had to prepare this extremely complicated case, involving serious questions of proximate causation of death, three times.

Reply to Respondent's Argument II

Appellant was court-appointed to represent this defendant in the General Sessions court on March 30, 2009. After she submitted various funding requests relating to both fees and expenses to the Chief Administrative Judge, along with proposed orders, a hearing was held

[1] *North Carolina v. Alford*, 400 U. S. 25 (1970).

before then Chief Administrative Judge for the Fifth Judicial Circuit, Clifton Newman. As it is abundantly clear from the record below, Respondent was aware of these funding requests and appeared at the May 23, 2011 hearing and presented their position concerning Appellant's various requests for funding. Following that proceeding, Judge Newman made hand written changes to the proposed order presented along with the Motions for General Expense Funding and signed them. That Order was returned to Appellant shortly after the May, 2011 hearing and is dated May 24, 2011. The Order was filed on May 25, 2011. R. p. 184. The express language of that Order allowed the Appellant to submit a bill for expenses in excess of the approved amounts to the presiding judge at the conclusion of the case with the caveat that Appellant assumed the risk that those expenses might not be approved by the presiding judge.

The record below does not indicate that Respondent at any time expressed an objection to this language in the proposed order. While Judge Newman made numerous handwritten changes to the expense order in question, and struck through a portion of the language contained in that order, he did not strike the language in question. Therefore, Appellant would respectfully submit that Judge Manning had the authority to approve all of her expenses as originally approved by him in his initial orders. While a portion of the Order in references advance approval of any expenses in excess of those approved by the expense order, it clearly states that Counsel could seek approval of expenses above that from the presiding judge at the end of the case if she was willing to risk the possibility that the presiding judge might not approve those expenditures. Judge Manning did approve those expenditures and found them to be reasonable and necessary to providing this Defendant effective assistance of counsel. Once again, only after Judge Newman indicated that he had intended for his ruling to be that no further expenses would be paid unless they were approved in advance ***by him***, did Judge Manning reverse himself and limit Appellant's expenses. Appellant respectfully submits that the proposed order originally submitted by

Appellant was clear and was known to Respondent before the May 23, 2011 hearing before Judge Newman. It is ironic that the March 15, 2013 Order of Judge Manning, R. p112, specifically says that ***"this Court cannot issue an order that does not follow the Order of Judge Newman"*** where the plain language of the General Order originally signed by Judge Newman expressly allowed for Appellant's total expenses to be subject to approval by the presiding judge at the conclusion of the case. It is significant to note that the total expenses claimed by Appellant came to $1,138.37 and the total expenses authorized by Judge Newman's original Order were not to exceed $1,250.00. The request for additional approval for general expenses was necessitated by the fact the Appellant's general expenses exceeded the $750.00 cap set by Judge Newman's original order for that category of expense. R. pp. 183-185. Once again Appellant would note that Respondent has made very few, if any, specific objections to Appellant's expenses.

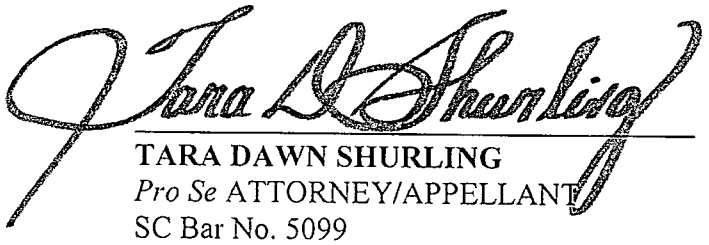
Appellant submits that the language contained in the proposed order originally submitted to Judge Newman was consistent with the statutory language found in S. C. Code Ann. § 17-3-50 (C) and that Respondent did not object to the proposed order as drafted at the time of the May 23, 2011 hearing. Likewise, the Court did not request an edited order from Appellant following the May 2011 hearing. The Court chose to make handwritten changes on the proposed order submitted by Appellant. R. pp. 184 - 185. While the proposed expense order submitted by Appellant was extensively edited by the Chief Administrative Judge, he did not strike the language which permitted Appellant to seek approval of expenses in excess of the caps set therein at the end of the case. Likewise, the Court did not add language specifically requiring any future approval of additional expenses be sought ***from him*** specifically as opposed to the presiding judge. As previously noted, the only other statutory provision addressing the reimbursement of private-appointed counsel for reasonably incurred expenses, S.C. Code Ann. §17-3-80 (2012), specifically provides for a private-appointed attorney to be reimbursed for up to $2,000.00 in

to $2,000.00 in necessary expenses provided the expenses were ***"actually incurred"*** and the expenses are approved ***"by the trial judge"***. Finally, Appellant would respectfully ask this Court to note that the total expenses claimed by counsel were extremely modest considering the duration of representation and the complexity of this murder case.

CONCLUSION

For all the above reasons Appellant respectfully asks that this Honorable Court find that the presiding judge erred in withdrawing his original Orders approving Appellant's fees and expenses when said Orders were entered in reliance upon duly executed Orders of the Chief Administrative Judge expressly authorizing him to approve Counsel's fee and expense requests. Appellant seeks this Court's finding that at the time of this fee dispute S. C. Code Ann. § 17-3–50 (C) authorized the presiding judge to approve both fees and expenses in excess of caps at the conclusion of the case. In addition, Appellant seeks this Court's finding that the Chief Administrative Judge erred in orally modifying the previous fee Order signed by the Court where the language of said Order was consistent with the Court's rulings on the record during the May 23, 2011 hearing, with § 17-3-50(C) and with existing precedent. Appellant seeks this Court's decision directing that she been paid consistent with the Orders originally issued by Judge Manning, wherein the Court found that her fees and expenses as submitted were reasonable and necessary to provide the Defendant with effective assistance of counsel.

Respectfully submitted,



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This 20th day of November, 2014.

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CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR. In the Initial Brief of Appellant she cites to the billing records submitted to the lower court and to SCCID. Through a clerical oversight the SCCID Voucher, and Counsel's time records submitted with that voucher, were inadvertently left off Appellant's Designation of the matter. Appellant's Record on Appeal was sent to opposing counsel for his review on October 23, 2014 and he subsequently approved it as containing all the matter contained in his designation of the matter. He did not cite to the billing records omitted from Appellant's Designation of the Matter in his Final Brief which was filed on November 12, 2014. In preparing her own Final Brief, Appellant discovered this oversight and contacted opposing counsel and asked if he would have any objection to her adding this material, clearly cited in Appellant's Brief, to the end of the Record on Appeal. By return email, opposing counsel said he would consent to the documents in question being added to the Record on Appeal provided that it did not change the pagination of the portions of the Record on Appeal cited in Respondent's Final Brief. The SCCID voucher, and accompanying time records, have been added to the end of the material originally included in the draft Record on Appeal and have been added to the Index to the Record on Appeal. The inclusion of this material in this manner has not changed the pagination of the portions of the Record on Appeal cited by Respondent in any way.

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This 20th day of November, 2014