

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Beaufort County

Honorable Perry M. Buckner, Circuit Court Judge

RECEIVED
JUN 05 2017
S.C. SUPREME COURT

ALFONZO J. HOWARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2016-002269

MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

Undersigned counsel respectfully moves this Court to appoint outside counsel to represent petitioner Alphonso J. Howard in his appeal of the denial of post-conviction relief (PCR) based on a conflict of interest or the appearance of a conflict of interest.

Petitioner was convicted of criminal sexual conduct in the first degree, two counts of armed robbery, two counts of kidnapping, carjacking, and possession of weapon. He was sentenced by the Honorable Carmen Mullen, pursuant to South Carolina Code §17-25-45 to life imprisonment without parole for criminal sexual conduct in the first degree, life imprisonment without parole on both counts of armed robbery, life imprisonment without parole

on the two kidnapping counts, and life imprisonment without parole on the charge of charge of carjacking. The possession of a weapon during the commission of a violent crime conviction was subsumed by the other life without parole sentences. App. 1298, ll. 7-19.

Petitioner was represented on appeal by Appellate Defender LaNelle Durant. Petitioner's convictions and sentences were affirmed on appeal by this Court in State v. Howard, Op. No. 2011-MO-006 (filed February 22, 2011). App. 1472.

Thereafter, petitioner filed an application for post-conviction relief on July 14, 2011 in the Beaufort County Court of Common Pleas. App. 1303 – 1308. As grounds for relief, petitioner cited “egregious and inappropriate conduct during the trial, and failure to present case at trial.” App. 1305. Petitioner was complaining of the apparent conduct of his trial lawyer, James A. Brown, Jr. App. 1307.

An amended application for post-conviction relief was filed on March 22, 2013 through PCR counsel Scott W. Lee. App. 1309 – 1312. The amended application cited several grounds of ineffective assistance of trial counsel, including trial counsel's alleged failure to seek remedies for the prosecution's failure to timely reveal exculpatory and relevant discovery, and trial counsel's failure to raise the issue of the state's failure to reveal contamination in the SLED DNA lab. App. 1311.

The amended application for PCR also alleged that Appellate Defender LaNelle DuRant was ineffective for failing to raise the issue of whether trial counsel Brown's actions during petitioner's trial so tainted the proceedings as to amount to a denial of due process, and prevented petitioner from receiving a fair trial. The application also alleged that Appellate Counsel DuRant failed to raise the issue of a conflict of interest between trial counsel Brown and petitioner. The amended application finally raised the issue of Appellate Counsel DuRant's

ineffectiveness for failing to raise the issue of the trial judge's denial of trial counsel Brown's request for certain investigative expenses. App. 1311. The state filed a return in this case dated March 20, 2012. App. 1313 – 1316.

A post-conviction hearing was convened on April 2, 2013, before the Honorable Perry M. Buckner. Petitioner Alphonso Howard and James Arthur Brown, Jr. and Solicitor Angela McCall-Turner testified at the PCR hearing.

An order of dismissal was filed on September 23, 2016. App. 1471 – 1491. The order found, in pertinent part,

“This Court finds counsel's behavior while trying to obtain payment for his representation of the Applicant in no way affected the outcome of the Applicant's trial. This Court finds the Applicant has failed to present any evidence that counsel's behavior affected the jury verdict or the Court's ruling on issues argued at trial. All discussions with the Court with regard to obtaining payment for representation or experts took place outside of the presence of the jury. The record also reflects the trial court was more than patient with the counsel when he raised issues with regard to his compensation. Counsel's inability to obtain payment for his extensive representation of the Applicant prior to trial in no way resulted in ineffective assistance of counsel. Counsel's effective representation of the applicant at trial is further reflected by counsel's testimony that he spent 291.7 hours working on the Applicant's case. This Court finds this allegation is without merit and the Applicant has failed to prove counsel was ineffective.”

App. 1484.

PCR counsel Lee filed a motion to alter or amend the judgement on October 12, 2016. App. 1492 – 1493. An order denying petitioner's motion to alter or amend was filed on October 27, 2016. App. 1494 – 1495.

Relevant Facts

Undersigned counsel was not consulted by anyone from the Commission on Indigent Defense during petitioner's trial about the trial judge's decision to deny trial counsel attorney's fees above the statutory "cap," or other fees that he was seeking. Counsel is also not aware if management from Indigent Defense was consulted during petitioner's trial about attorney's fees because he did not inquire during petitioner's trial or thereafter. However, as counsel continued to work on this case the conflict of interest or appearance of the conflict of interest issue has become clear given the full case history.¹

In Ex Parte James A. Brown, Jr., 393 S.C. 214, 711 S.E.2d 899 (2011), this Court held that the services of court-appointed counsel was property that implicated the taking clause and required just compensation. However, this Court also ruled that the trial court ruled within her discretion in denying the request of attorney's fees due to the attorney's unprofessional conduct at trial. This Court called its holding that a court could properly deny a request to exceed the statutory "cap" for attorney's fees based on the attorney's unprofessional conduct "unique and compelling." Ex Parte James A. Brown, Jr., 393 S.C. 214, 220, 711 S.E.2d 899, 902 (2011).

Undersigned counsel does remember hearing discussions about petitioner's trial as it was taking place. Specifically, counsel remembers that Andrew Savage, Esquire, apparently went to Beaufort to advocate on Mr. Brown's behalf during petitioner's trial with Judge Mullen.

¹ Counsel regrets not having made this motion before the third extension was granted. However, the enormity of the potential appearance of a conflict of interest or actual conflict of interest was not fully appreciated by undersigned counsel until he seriously began working on this case in anticipation of filing a petition for writ of certiorari. However, and further, since this is a case that involves conflict of interest issues, a substantial funding issue, and "attorney misconduct" in court issue that could be litigated for years in federal habeas counsel felt compelled to make the present motion to appoint outside counsel.

An additional conflict issue in this case exists since ineffectiveness allegations were made against Appellate Defender LaNelle DuRant based on her not raising the issue of the lack of “fair compensation” for trial counsel Brown as a due process or other violation. Undersigned counsel thinks for this additional reason that counsel outside of Appellate Defense, a Division of the Commission on Indigent Defense, should be appointed to represent petitioner on appeal.

Law and Analysis

Under the rules of professional conduct, there is the appearance of a conflict under Rule 1.7(a)(2), RPC, Rule 407, SCACR, since undersigned counsel, as the Chief Appellate Defender, is under the authority of the South Carolina Commission on Indigent Defense, and this highly unusual case involved trial counsel being denied funding above the statutory “cap,” and an opinion from this Court which recognized that attorney’s work could involve the “takings clause.” However, this Court found that defense counsel, by his misconduct, waived any argument that he should have been compensated above the statutory cap by the trial judge.

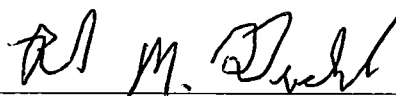
Since there is a risk that undersigned counsel would have to take a position adverse to the Commission on Indigent Defense, or its policies on funding or prior approval to exceed the cap, in order to represent petitioner, outside counsel should respectfully be appointed. There is an issue involved in this case of trial counsel’s failure to preserve the issue of a conflict of interest between petitioner and trial counsel based on the issue of compensation.

Further, given the highly unusual facts of this case, where the central issue became trial counsel’s “unprofessional behavior” due to what trial counsel perceived to be “unfair compensation,” and where appellate counsel’s failure to raise the issue on direct appeal was raised in PCR, undersigned counsel additionally strongly thinks that counsel outside of the Office of Appellate Defense should be appointed to represent petitioner.

Conclusion

Undersigned counsel respectfully requests the appointment of outside counsel to represent petitioner in the denial of PCR. Further, counsel respectfully requests the time limits for filing the Petition for Writ of Certiorari and Appendix be held in abeyance pending a ruling on this motion. If this motion is granted, undersigned counsel will immediately turn over the appendix and petitioner's case file to the newly appointed outside counsel.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

This 5th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Honorable Perry M. Buckner, Circuit Court Judge

ALFONZO J. HOWARD,

PETITIONER,

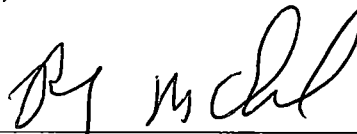
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

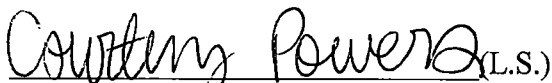
The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Ruston W. Neely, Esquire, and Alfonzo J. Howard, #333399, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 5th day of June, 2017.



Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 5th day of June, 2017.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.