

STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN 29 2017

S.C. SUPREME COURT

Appeal from Richland County
J. Michelle Childs, Circuit Court Judge
Certiorari to the Court of Appeals

Appellate Case No. 2014-001191

ISRAEL WILDS,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

REPLY TO THE RETURN TO REQUEST FOR COSTS

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ATTORNEY FOR
RESPONDENT

Now comes, the undersigned PCR appellate counsel, hereafter Counsel, in this matter, responding to the objections entered by the South Carolina Commission on Indigent Defense in response to Counsel's request for the reimbursement of her expenses incurred in fulfilling her court-appointment in this appeal. In support of her request for reimbursement of the full \$2,293.80 in expenses incurred in connection with this appeal, she would note the following in Reply to the objections raised by SCCID.

I.

The procedural background provided by Respondent is essentially correct. Counsel would object, however, to the attempt by SCCID to characterize their Return to Counsel's billing submission as a Motion. Their position, as set forth at footnote 1 to their Return at page 1, is nothing more than an attempt to have the last word. Petitioner respectfully submits that this Honorable Court has correctly categorized her payment request as a motion inasmuch as she is clearly the moving party in this matter. SCCID has had the opportunity to respond to her payment requests in their Return to that submission. Accordingly, Counsel submits that her current pleading is properly considered a Reply.

II.

Counsel submits that the issues before the Court are,

1. Whether this Honorable Court has the authority to order PCR Counsel's reimbursement for the expenses claimed by her; and
2. Whether the Westlaw expenses claimed by PCR Counsel are reasonable and appropriate on the facts of the appeal.

III.

The Timing of Counsel's Request for Reimbursement

Counsel has acknowledged that the expenses she asks to be reimbursed for exceed the cap for expenses addressed in S.C. Code §17-3-50. She acknowledges that §17-3-50 appears to require advance approval for court-appointed counsel to obtain, “investigative, expert, or other services” found by the Court in an *ex parte* proceeding to be “reasonably necessary for the representation of the defendant.” She would note however, that §17-3-50 (C) clearly permits the Court to authorize payment in excess of the caps provided that the Court finds that “payment in excess of the limit is appropriate because the services provided *were* reasonably and necessarily *incurred*.” (Emphasis added). This subsection therefore, suggests that it was the intent of the legislature that the Court have the authority to authorize payment in excess of the statutory caps upon such a finding at the conclusion of the case. Respondent argues that this interpretation of the statute is absurd in that it would require advance approval of expenses up to the \$500.00 cap, but allow requests for payment of larger sums after the case is over. This analysis is faulty for two reasons. First, SCCID routinely pays expenses in Court appointed matters up to the \$500.00 cap addressed in §17-3-50 (B) without prior approval. They acknowledge as much in their Return by saying that reimbursement for expenses in excess of \$500.00 requires advance approval. Secondly, under the terms of the statute, any court-appointed lawyer who waits until after the expenses are incurred to request approval and reimbursement is on notice by the plain language of §17-3-50 (C) that approval and reimbursement at that stage will require express approval of the Court upon a find that the expenses “*were* reasonably and necessarily *incurred*.” In other words, the court-appointed lawyer is on notice that although the Court may allow reimbursement for such

expenses, there is a chance the Court will not find the expenses in question were reasonable and necessary.

As SCCID acknowledges, Budget Proviso 47.5 in fact mirrors the language of §17-3-50 (C) and provides for the Court to authorize payment of expenses in excess of the \$500.00 cap set forth in §17-3-50 (B) upon a specific find that, “the services *provided were* reasonable and necessarily *incurred* to provide adequate defense.” Return pgs 4-5. (Emphasis added). With regard to this Court’s Order dated September 29, 2006, Respondent consistently chooses to ignore that Item 5 therein expressly states that,

If there is an objection by the Office of Indigent Defense to the reasonableness of the amount or the amount requested exceeds the hourly rates or statutory caps provided by §17-3-50 (A) and B), then the Office of Indigent Defense *shall pay such amount as may be authorized by the trial court.*(Emphasis added).

SCCID ironically takes the position that it has the authority to pay up to the statutory cap of \$500.00 for expenses without prior approval despite their position that the statute requires advance approval for any expense under this section. Counsel has it upon information and belief, based in large part on her own past billings, that SCCID in fact does pay up to \$500.00 in expenses without prior approval by the Court. SCCID notes that their policies require advance approval of any expense in excess of the \$500.00 cap. Return, pg. 7-8. Counsel asserts that while the legislature gave SCCID authority to design policies and procedures for performing their responsibilities under the statutes controlling indigent defense funding, there simply is no authority for them having the ability to subvert the statutory law or the Orders of this Court.

Counsel also wishes to note that SCCID totally ignores another provision relating to the expenses of court-appointed counsel to indigents. S.C. Code §17-3-80 expressly provides

for a special appropriation of \$50,00.00 for the payment of up to \$2,000.00 per case for expenses incurred by court-appointed counsel to indigents for “necessary expenses.” Counsel acknowledges that this section appears to reference a one time appropriation for funds in that amount for the fiscal year commencing July 1, 1969, however, that same section has remained in our code every year thereafter. Absent a showing that those funds have been exhausted, and not replenished, SCCID should be required to pay Counsel’s general expenses from that defense fund if needs be. Counsel would additionally note that the arguable requirement that Counsel obtain advance approval for retaining an investigator, or other expert, in a case makes more common sense than the suggestion that Counsel should have to get advance approval for expenses which are inherent in a court-appointment; for example research tools, printing costs and postage in an appointment representing an incarcerated client on appeal. ¹

The Reasonableness of Counsel’s Reimbursement Requests

The only portion of Counsel’s reimbursement request which SCCID specifically objects to as unreasonable concerns the request for payment of Westlaw charges incurred in this case. As a threshold matter, Counsel would submit that the ruling of a circuit court judge on a similar request in a different case has no precedential value or relevance to the case and should not be considered by this court. The decision of the circuit court in the *Prophet* case was not appealed and has no relevance to this case. Counsel questions why SCCID would expend public funds to order a transcript of the hearing held on the *Prophet* matter, where the

¹ The Order of Appointment in this case provided that, “[t]he Division of Appellate Defense shall remain associated for the limited purpose of paying for any necessary transcript(s) and providing copies of the petition, appendix and briefs.” Thus, certain of Counsel’s expenses were in fact approved in advance in the Order of Appointment. SCCID subsequently agreed to allow Counsel to utilize her regular commercial printer, or to print certain documents in-house, once Counsel demonstrated that she could in fact get the work done at a price that met with the satisfaction of SCCID.

ruling of the circuit court in that case was not appealed. Counsel is further baffled by the assertion of SCCID that she could have used other research tools such as Casemaker (Fastcase) to “assist in preserving limited resources for indigent defense”, inasmuch as Counsel has it upon information and belief that SCCID utilizes Westlaw in its representation of indigent clients. Counsel further asserts that Westlaw is a necessary tool for an appellate lawyer in that it, as opposed to other free services, allows Counsel to Sheppardize caselaw.

The records before this Honorable Court will verify that Counsel has been representing Mr. Wilds, as Respondent in the State’s appeal, and Petitioner in his cross-appeal, since July 24, 2008, when she was appointed in this matter due to a conflict of interest with the South Carolina Commission on Indigent Defense, Division of Appellate Defense.² These PCR appeals were transferred to the Court of Appeals. The South Carolina Court of Appeals granted Certiorari was on both sides and briefs were subsequently submitted. Oral arguments were held before that Court on November 5, 2013 and the judgment of the lower court was subsequently affirmed. The State filed a Petition for Rehearing and subsequently filed a Petition for Writ of Certiorari in this Honorable Court. This Court ultimately granted review of the Court of Appeal’s decision. Oral arguments were held before this Honorable Court on October 7, 2015. On October 14, 2015, this Court issued Opinion No. 27581, dismissing the writ as improvidently granted.

Counsel’s in-house expenses totaled \$2,293.80. That amount included a claim for Westlaw charges totaling \$1,359.44. Those charges covered Counsel’s research in preparing the following,

² A factor which, in and of itself, calls into question the propriety of SCCID trying to limit the funds expended on this appeal involving a successful claim of ineffective assistance of counsel against a former Chief Appellate Defender over their Division of Appellate Defense.

1. Return to the State's Certiorari Petition; April 9, 2009.
2. Certiorari Petition in cross-appeal; April 9, 2009.
3. Reply to State's Return to my Certiorari Petition; August 26, 2009.
4. Brief of Respondent-Petitioner; October 30, 2012.
5. Respondent's Brief of Respondent-Petitioner; February 28, 2013.
6. Preparation for Oral Argument in the S.C. Court of Appeals held November 5, 2013.
- 7.
8. Return to State's Petition for Rehearing in the S.C. Court of Appeals.
9. A Return to the Petition for Writ of Certiorari filed by the State in the PCR appeal to the Supreme Court; September 15, 2014.
10. Preparation for Oral Argument in the Supreme Court of South Carolina held October 7, 2015.
11. Return to the State's Petition for Rehearing in the Supreme Court. April 21, 2014.

The position taken by SCCID with regard to Westlaw expenditures is not reasonable for a number of reasons. As the parties acknowledge, Counsel has a plan with Westlaw that allows her unlimited usage each month for a flat fee. That fee is then billed out to each client for whom research was conducted based upon the time expended during that billing cycle for that client. Those bills, which have been submitted to this Court for review, and which are attached to the Return filed by SCCID as Exhibit F, show what the charge for the research conducted would have been if Counsel had not contracted for her special plan with Westlaw. See, billing column titled "Standard Charge." In virtually every instance, the standard charge, without a special plan, would have far exceeded the cost of the research under Counsel's plan. Ironically, the one significant error caught by Counsel, and corrected in her amended submission, was a bill dated December 19, 2012

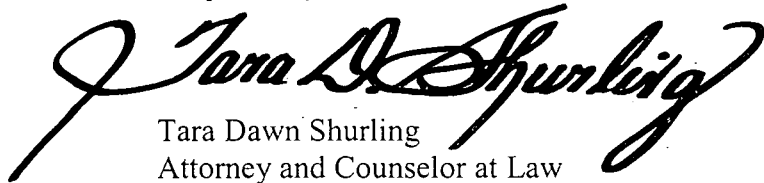
wherein the standard rate would have resulted in a charge of \$198.00 and the plan charge was \$495.40. In such circumstances Counsel's bookkeeping staff are supposed to give SCCID the benefit of the lower of the two rates and failed to do so. In fairness to Counsel's staff, that circumstance virtually never presents itself and it was therefore easy to understand how they forgot to take that factor in to account. That error was caught by Counsel, the correction was made and the claim found in Counsel's Amended submission reflected that change to the advantage of SCCID. Counsel wishes to most respectfully note that the total Westlaw charges attributed to this case were actually significantly mitigated by Counsel's special plan with Westlaw. Counsel can only work on so many cases during one billing cycle and to the extent she and her staff are conducting research on a court-appointed client's case, that effort precludes the time being spent on behalf of one her retained clients. Counsel submits that she should not be expected to absorb the cost of this research while being paid a mere \$40.00 an hour to do the work on this appeal or any other court-appointed matter. Some of the research in this matter, as the bills document, was conducted by Anne Pearce, a retired South Carolina Lawyer who sometimes does research for Counsel. At other times the research was done by paralegals in Counsel's employ. Counsel did not bill SCCID for the time expended by anyone other than herself doing Westlaw research and in fact, paid those individuals out of her own pocket. SCCID was only billed for the time Counsel personally spent reading, studying and applying that research to the documents drafted in this case and her preparation for the oral arguments held in this matter in both the S.C. Court of Appeals and this Honorable Court. Counsel would most respectfully submit that it is offensive that SCCID would fight a \$1,359.44 Westlaw bill covering the amount of work Counsel

performed in this matter in a court-appointment which lasted *over seven years*. Counsel's paralegal staff expended many hours assisting with this case. Counsel paid for their time and did not bill SCCID for any of it, while at the same time she did not request an increase in her out of court hourly rate above the standard \$40.00 per hour.

CONCLUSION

Counsel asks that SCCID be directed to pay her for the full expenses reimbursement requested, \$2,293.80, where she has demonstrated that the expenses claimed, specifically the Westlaw bills, were reasonably and necessarily incurred in providing this court-appointed client effective assistance on appeal. Inasmuch as SCCID has not questioned the reasonableness of any other expenses claimed, Counsel will not address her other expenses herein except to say that the expenses Counsel absorbed out of pocket in this matter far exceeded those she seeks reimbursement for at this time.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT/PETITIONER

This 26th day of June, 2017.

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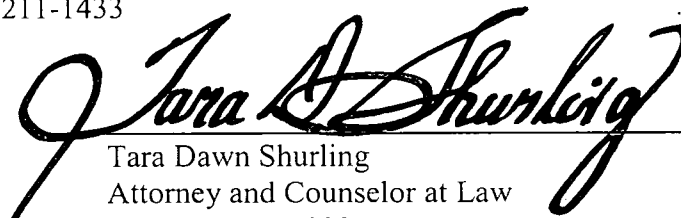
STATE OF SOUTH CAROLINA,

PETITIONER.

CERTIFICATE OF SERVICE

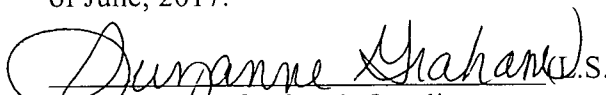
The undersigned attorney certifies that a copy of the Reply to the Return to Request for Costs in the above-entitled case has been served upon J. Hugh Ryan, III, Executive Director and General Counsel, by depositing in the U.S. mail with proper postage, this 26th day of June, 2017 to the address listed below:

J. Hugh Ryan, III
Executive Director and General Counsel
South Carolina Commission on Indigent Defense
P. O. Box 11433
Columbia, South Carolina 29211-1433


Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

Attorney for Respondent

SWORN TO BEFORE me this 26th day
of June, 2017.


Dorianne Graham (S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24