

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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 ORIGINAL

Certiorari to Beaufort County

Honorable Perry M. Buckner, Circuit Court Judge

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SEP 08 2017

ALFONZO J. HOWARD,

S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002269

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PETITION FOR WRIT OF CERTIORARI

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Chief Appellate Defender

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Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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## ISSUE PRESENTED

1.

Whether the PCR court erred by finding defense counsel's behavior, termed "unprofessional and "inexcusable" by this Court, during petitioner's trial had no effect on the trial court's rulings, and did not lessen confidence in the outcome of the trial, where the record revealed counsel became obsessed with moving to withdraw, and refusing to go forward -- which would have been relief for counsel, but counsel failed to seek proper relief for petitioner given counsel's problem -- a mistrial or a continuance -- where the trial judge openly expressed her concern that counsel had lost the ability to effectively represent petitioner given the stress of the financial disputes during the trial?

2.

Whether the PCR court erred by finding that the statements of co-defendant Hicks implicating petitioner in the crime were not the basis of the judge's ruling that the state had probable cause to obtain appellant's DNA, where the record showed the co-defendant's statements were the conclusive evidence the judge based his finding of probable cause on, and defense counsel admitted he could have shown the co-defendant's mental illness cast severe doubt on his credibility and the reliability of his statements had counsel properly prepared for the Schmerber hearing, or the state revealed this evidence pursuant to Brady as it was obligated to do before the Schmerber hearing?

## STATEMENT OF FACTS

### **Procedural History**

Petitioner Alfonzo Howard was indicted at the June 22, 2006, term of the Beaufort County Grand Jury for the offenses of criminal sexual conduct in the first degree, two counts of armed robbery, two counts of kidnapping, carjacking, and possession of a weapon during the commission of a violent crime. App. 1496 – 1509. Petitioner’s alleged co-defendant, Leonard Hicks, pled guilty in this case.

A Schmerber hearing was held on April 23, 2007, before the Honorable Howard P. King. James Brown represented petitioner. Assistant solicitor Angela McCall-Tanner represented the state. App. 1453.

At the conclusion of the truncated Schmerber hearing, the judge ruled: “I think that based upon the statement of a co-defendant, that he was involved and the presence of evidence there that identifies unknown male DNA, I think there’s sufficient probable cause to require [petitioner’s] sample to be given, and I would so order”. App. 1464, ll. 3-10.

Petitioner’s case came on for trial on February 23, 2009. Jim Brown represented petitioner. Angela Tanner was the assistant solicitor. App. 1.

At the conclusion of the trial on February 27, 2009, the jury found petitioner guilty on all counts. App. 1281, ll. 2-25. Judge Mullen sentenced petitioner to consecutive sentences of thirty years for criminal sexual conduct in the first degree, thirty years on each count of armed robbery, thirty years on each count of kidnapping, twenty years for carjacking, and five years for possession of a firearm or knife during a violent crime. The total sentences were one hundred and seventy-five years’ imprisonment. App. 1299, l. 23 – 1300, l. 23.

Petitioner was represented on appeal by Appellate Defender LaNelle DuRant. On February 22, 2011, this Court affirmed petitioner's convictions in State v. Howard, 2011-MO-006 (filed February 22, 2011).

Petitioner filed a pro-se application for post-conviction relief in the Beaufort County Court of General Sessions on July 14, 2011. App. 1303 – 1308. Appointed PCR counsel Scott Lee then filed an amended application for post-conviction relief on March 22, 2013. App. 1309 – 1312. The PCR applications cited defense counsel's "egregious and inappropriate conduct" during the trial, and his failing to properly challenge the state's assertion of probable cause to obtain petitioner's blood sample at the April 23, 2007, Schmerber hearing. App. 1305; App. 1310 – 1311.

An evidentiary hearing was convened on April 2, 2013, before the Honorable Perry M. Buckner. Scott Lee represented petitioner. Ashleigh Wilson represented the state. App. 1317 – 1318. Petitioner, Jim Brown, and Angela Tanner all testified during the PCR hearing.

The PCR court issued an order of dismissal which was filed on September 23, 2016. App. 1471 – 1491. PCR counsel Lee filed a motion to alter or amend the judgment on October 12, 2016. App. 1492 – 1493. The PCR court denied the motion to alter or amend in an order filed October 27, 2016. App. 1494 – 1495.

This appeal follows.

## ARGUMENT

1.

The PCR court erred by finding defense counsel’s behavior, termed “unprofessional and “inexcusable” by this Court, during petitioner’s trial had no effect on the trial court’s rulings, and did not lessen confidence in the outcome of the trial, where the record revealed counsel became obsessed with moving to withdraw, and refusing to go forward -- which would have been relief for counsel, but counsel failed to seek proper relief for petitioner given counsel’s problem -- a mistrial or a continuance -- where the trial judge openly expressed her concern that counsel had lost the ability to effectively represent petitioner given the stress of the financial disputes during the trial.

### **Relevant Facts**

This case involves the PCR of petitioner Alfonzo Howard following the issuance of this Court’s opinion in Ex Parte James A. Brown, 393 S.C. 214, 711 S.E.2d 899 (2011), which pertained to petitioner’s trial. In Brown, this Court found that the appointment of attorneys to represent indigent clients implicated the taking clause of the Fifth Amendment to the United States Constitution. Ex Parte Brown, 393 S.C. 214, 220-221, 711 S.E.2d 899, 902 (2011).

However, this Court also held that the trial judge properly denied defense counsel’s request to exceed the statutory cap for attorney’s fees based on his “unprofessional conduct” during the trial. “Given the egregious level of appellant’s inexcusable conduct and persistent disregard for the trial court’s orders, we find the trial court did not abuse its discretion in refusing to award fees in excess of the statutory cap.” Ex Parte Brown, 393 S.C. at 220, 711 S.E.2d at 902.

Defense counsel Brown recalled he had exceeded the statutory cap prior to trial, and “I’m working for free, which, owning my own practice, means I’m actually paying money per hour to represent Mr. Howard out of my pocket.” Counsel said he told the judge that “financially, it was causing my private clients’ fees to subsidize the State’s obligation to defend Mr. Howard. And I could not, as a practical matter, anymore proceed, because of the conflict it put me in as a fiduciary to my clients’ fees that they paid me, and what my work was to them, and my obligations to Mr. Howard.” App. 1340, l. 9 – 1341, l. 16.

Counsel recalled that the trial judge told him his options were “to go forward or be incarcerated.” Counsel remembered: “From then on, I can tell you, it turned me off, not personally, [to] Mr. Howard’s cause, but to the fact that this was the file I didn’t want to ever open in my office or ever see again.” App. 1341, ll. 17-25.

Counsel continued: “It’s the worst thing that’s ever happened to me in the practice of law, to this day. And I will say, they’re still three years from the ruling to deny me payment [and it] has not run for purposes of 1983 actions against the State of South Carolina.” App. 1342, ll. 1-5.

The following occurred between PCR counsel and Counsel Brown:

Q. And just to get to one of the issues very quickly, how much did you ultimately get paid for your representation?

A. \$3,500.00.

Q. Okay. And that’s the statutory cap under the law?

A. That is correct.

Q. Okay. However, a judge can exceed that statutory cap, if they’re so inclined, correct?

A. That’s correct.

- Q. Okay. And as a result -- as you understand, that, as a result of some things that happened at trial that Judge Mullen refused to exceed the statutory cap?
- A. Two parts to the question. She did refuse to exceed it. And if you want me to tell you, I guess, why.
- Q. Yes.
- A. She issued a written order. That order was appealed. Part of the basis for the appeal was that what she quoted as language in there was absolutely not in the transcript at all.
- Q. Okay.
- A. So, I guess, to try to answer your question, I have no clue why she did what she did.
- Q. Okay.
- A. Because what she wrote in there is not accurate.
- Q. What was your bill, actually? What was your bill, total, for your attorneys' fees?
- A. Well, it's according to what hourly rate you put on there, but it was 291.7 hours, is my understanding.
- Q. The statutory rate of 40 and 60.
- A. Then, it would come out, I'm going to ballpark, somewhere in the \$13,000.00 range.
- Q. Okay.
- A. If you put it in my attorney fee rate at the time, that would come out to somewhere around \$60,000.00 in my private practice rate.
- Q. Right.
- A. And some of this is an affidavit. Given the -- some of the public nature of the trial --
- Q. Right.
- A. -- and things of that nature, I would have probably requested somewhere in the 80 to \$100,000.00 range

for this case, because there's negative will that would have been generated towards my office.

So what was the services I provided worth? I'd say somewhere in that range.

App. 1337, l. 10 – 1339, l. 5.

Petitioner remembered at the PCR hearing that the distractions of defense counsel not getting paid, and his battles with the trial judge affected Counsel Brown's performance, it affected his ability to get a fair trial, and it affected the outcome of his trial. App. 1331, l. 4 – 1332, l. 25. Petitioner told the PCR court: "I wanted him to get paid. Yeah. . . . I wanted him to do his job, too." App. 1332, ll. 22-25.

Petitioner said he believed if defense counsel was getting paid -- as defense counsel thought he should get paid -- that he would have gotten better results for him during the trial. Petitioner said his complaints about Counsel Brown's money distractions during his trial were about his only complaints about counsel. App. 1333, ll. 9-12. The following occurred between PCR counsel and petitioner:

Q. All right. All right. Now, I've talked about some specific issues. In general, was there anything, Mr. Howard, that you felt like Mr. Brown didn't do, that he should have done or should have done differently, or anything like that, that concerns you, in general terms?

A. A few times in the trial, he -- he -- him and the -- him and the judge had a -- had a few, you know, problems or whatnot, *where caused him to call his own lawyer. So, I felt like he kind of went off the boat. You know, I mean, I felt like he kind of take the case a little personal.*

Q. Okay. So, you're saying that, at some point, Mr. Brown had to call his own lawyer?

A. Yes.

Q. Okay. And did it appear to you that he was maybe in trouble with the judge?

A. Yes, it did.

Q. Okay. Do you know what the issue was about or why that was done?

A. I'm not -- I'm not sure exactly what that issue was about, but I can kind of paraphrase. It was -- it was due to him -- I guess he felt like he wasn't getting his fair shake.

Q. Wasn't getting his fair shake?

A. Right. As far as getting paid.

Q. Oh, getting paid. So he was appointed to your case, right?

A. Right.

Q. Okay. And do you think that he felt he wasn't getting a fair shake as far as him getting compensated for representing you?

A. Right.

App. 1331, l. 4 – 1332, l. 10. (emphasis added).

### **The State's Theory of the Case**

In their opening argument, the solicitor said the state would attempt to prove that on the evening of May 25, 2006, and the early morning hours of May 26, 2006, Amy and Philip Davidson “crossed paths with Alfonzo Howard and his friend, Lorenzo Hicks.” App. 269, ll. 8-12. The solicitor maintained that petitioner and Hicks were discussing robbing someone that night. Amy and Philip Davidson, who were from out of state, had dinner at Salter's downtown Beaufort restaurant, and then they decided to go back to the hotel. App. 270, ll. 11-23.

The solicitor maintained as the Davidsons went to their car, they opened the trunk to get out a bottle of water. Petitioner allegedly came up behind them and put a gun to Amy's head while Hicks had a knife on Philip. App. 271, ll. 5-10.

The solicitor further alleged that petitioner and Hicks were the two African-American men who forced Mr. Davidson to drive to an ATM, and take out cash. Mr. Davidson was then directed him to drive to Beaufort High School, the football stadium, where Hicks tied up Mr. Davidson and made him lie on the ground. Hicks allegedly watched Mr. Davidson as petitioner allegedly took Mrs. Davidson to another area and forced her to have oral sex. He unsuccessfully tried to penetrate her also, according to the solicitor. When Hicks went to check on Petitioner Howard, Mr. Davidson managed to escape and ran to a nearby house, where he called 911. App. 272, l. 1 – 273, l. 23.

“They drive off in the car and they leave Amy alone there in the dark. As they are driving away, they do encounter a Sheriff's Deputy who is responding to the nine-one-one call. There was a brief car chase. The two guys jump out and run off on foot.” The two men ended up under a bridge and dove into the water to attempt to swim away, according to the solicitor. The two men returned to shore and Hicks “is caught at the base of the bridge. Alfonzo Howard makes it further but he is caught shortly thereafter hiding on the balcony at the Beaufort Inn, which is right around the corner from the Woodlands Bridge. They are both caught that night. Both soaking wet from being in the river.” App. 273, l. 24 – 274, l. 25.

Defense counsel Brown said in his opening that the description the police learned of the two men involved were only that they were two “African-American. One man was shorter than six feet tall, and one was heavier built and greater than six feet tall. App. 277, ll. 6-10. The descriptions did not match petitioner and Hicks. Counsel told the jury that they would hear of

DNA evidence which came from under the fingernail scrapings of Amy Davidson. It did not match Petitioner Howard, Hicks, or the husband of Amy Davidson. The DNA evidence was also contaminated. App. 278, l. 3 – 279, l. 10.

Counsel continued: “The same Beaufort County Public Defender’s Office that previously represented Mr. Howard in this very same case cut a deal so one of their clients would get less time than another client would get.” Counsel was referring to Hicks giving statements implicating petitioner. “You are also going to hear how Rico Hicks still asserts as recently as yesterday that he did nothing wrong but he [was] in the wrong place at the wrong time.” App. 281, ll. 12-23.

The state’s DNA expert testified that a glove discarded near the crime scene had a DNA match with Petitioner Howard being the major contributor. App. 768, l. 3 – 769, l. 15. The DNA on the glove was a mixture of at least two individuals, it matched Petitioner Howard, and there was no opinion whether the mixture included or excluded Philip and Amy Davidson. App. 771, l. 21 – 772, l. 8. As will be seen more fully infra, the DNA evidence was undisputedly contaminated.

### **The Dispute between Counsel Brown and the Trial Judge**

The issue of the competency of co-defendant Hicks arose and the judge said that defense counsel Brown “implored me to help him locate Dr. Smith, because Mr. Rowell [Brown’s investigator] was spending time and funds trying to hunt down Dr. Smith in Charleston and was not successful in doing that.” App. 623, l. 20 – 624, l. 11. The judge noted that Dr. Michael Smith was now in the courtroom. The judge said she presumed the issue was the competency of co-defendant Hicks and his ability to testify. App. 624, ll. 2 – 18.

Defense counsel Brown said he was renewing his request of the prior week for funds for an expert to assist him with the competency issues involving Hicks. App. 624, l. 19 – 625, l. 12. “Dr. Smith is not my doctor. He is not assisting me or my team. Now, I certainly don’t have any objection to having him opine on the question [of competency].” The judge responded that Counsel Brown was the one who wanted Dr. Smith in the courtroom in the first place. App. 625, l. 2 – 626, l. 21.

The judge then stated she would not allow defense counsel Brown to question Dr. Smith about an evaluation of Hicks for his criminal responsibility. The judge said that report was not “a relevant account to be used in the trial of the case.” Defense counsel responded “I know of no rule that says that.” The judge repeated that the matter was not relevant “but, again, it can never be used by the State because in that case you would have the Solicitor using every forensic evaluation against every person who was prosecuted.” Defense counsel retorted that he had the right to pursue this avenue of inquiry, and the judge responded “in my courtroom it isn’t coming in. There is no way that you are going to open up an evaluation where it gives a rendition of facts of an event when asking an alleged defendant who is being accused. Why in the world would a defendant ever say anything to any doctor? They would never submit to a competency evaluation.” App. 626, l. 9 – 629, l. 2.

Defense counsel Brown asserted he had the right to impeach Hicks with any inconsistent statements. The judge responded: “Mr. Brown, I am not going to [allow you to] use that report when Mr. Hicks is on the stand, asking him questions such as did you tell Dr. Smith X Y and Z in regard to the events of this case. You’re not going to ask him that. You can go ahead and come forward, Dr. Smith. I apologize.” Defense counsel again responded that the statement he

was talking about was not privileged, and that it was a fair line of inquiry. App. 629, l. 16 – 630, l. 23.

Dr. Smith then testified that he had evaluated co-defendant Hicks on February 19, 2008. However, Dr. Smith said that evaluation was for “a different trial and a different defendant . . . I feel very uncomfortable even addressing those issues at all with this Court. It is not the case for which I did the evaluation.” Dr. Smith added that he had not met with Hicks since his evaluation and he stated: “I stand by my report at the time but I cannot offer any new information as to his competency.” App. 633, l. 13 – 636, l. 13.

As the judge and defense counsel continued to argue, the judge told counsel not to interrupt her and to sit down. The judge then excused Dr. Smith, and she said she was quashing the subpoena for him. App. 636, l. 3 – 637, l. 7. The following then occurred between defense counsel and the judge:

MR. BROWN: I’m going to ask to withdraw. I cannot be an effective lawyer for my client.

THE COURT: Motion denied.

MR. BROWN: I cannot go forward . .

THE COURT: Mr. Brown , . .

(Mr. Brown is speaking at the same time as the Judge is speaking)

MR. BROWN: I cannot go forward.

THE COURT: Corporal Lewis, you can come back to the stand.

MR. BROWN: Your Honor, I cannot go forward.

THE COURT: Do you need a break?

MR. BROWN: I cannot go forward.

THE COURT: Respectfully, Mr. Brown, I'm going to give this Court a fifteen minute break. We will be back at four ten.

For everyone present, we will continue this trial of this case.

I'll see you all back then. We're in recess until then.

(Court stood in recess from 3:54 until 4:21 P.M., when the Judge resumed the Bench)

THE COURT: All right. Where is Mr. Brown?

MR. BROWN: I'm here. Your honor, I would ask for time to talk to my malpractice attorney.

THE COURT: Okay. Respectfully, Mr. Brown, you can go ahead and have a seat.

MR. BROWN: I'm sorry, but one of the attorneys I've asked to call me back, Mr. Savage, is calling me right now.

THE COURT: Well, respectfully, sir, you can call Mr. Savage back. I'm going to give you the opportunity to do that, but if you would go ahead and have a seat for me.

Mr. Brown, you made a motion to be relieved as counsel?

MR. BROWN: Yes, maam.

THE COURT: And I believe you consulted with your client before doing that?

Of course, you know you cannot make a unilateral motion to be relieved as counsel.

Additionally, Mr. Brown, just because I ruled adversely on one issue to you does not mean you are entitled to be relieved as counsel.

If that were the case, we would never have an attorney in a Courtroom because any time there is any motion someone prevails and someone loses.

Sir, you took an oath as a lawyer, sir, and I believe you honor that oath.

We're going to go forward in this case. You have worked very hard, as you've told the Court repeatedly, and you have spent a lot of hours preparing for this case, and I think it would be an injustice not only to you but specifically to your client for this case not to go forward.

I will give you the time you need, Mr. Brown, right now to go back and speak with Mr. Savage or any other lawyer that you have, and, respectfully, we need to try this case.

You made a motion last week to be relieved as well, and, again, I cannot relieve every attorney who has a ruling adverse to them.

Mr. Brown, I'm going to give you another ten minutes to go and talk with Mr. Savage. At that point, sir, we're going to come back in the courtroom and we're going to continue the trial of this case.

App. 637, l. 11 – 640, l. 1.

Defense counsel Brown then told the judge that attorney Andy Savage was presently representing an enemy combatant and meeting with him at the Brig in Charleston. Counsel said the issue now was him committing malpractice by going forward “given the fact I don't have funds to present the case that I presented to the jurors in my opening.” The judge repeated that this was not a basis for counsel to be relieved as counsel. She added that the court denying his

motions for funds for a psychological expert was also not a grounds for a malpractice suit. App. 639, l. 23 – 641, l. 24.

The judge told defense counsel he had made a full and complete record regarding his request for a forensic evaluation of Hicks. The judge said the trial was going forward, and defense counsel responded: “I am also operating under a previous threat of being held in contempt of court in this same proceeding.” The judge responded if she held counsel in contempt “then that is of your choosing, not mine.” The judge ruled she was adjourning court for the day, and would hear from Counsel Savage the following morning. App. 643, l. 1 – 646, l. 13.

The following morning, Counsel Savage told the judge that defense counsel Brown “has been under significant stress on a Court-appointed case in which he has plowed a lot of his time, energy and effort on behalf of his client.” Savage offered that he was “a member of the Indigent Defense Commission which is why I believe that [Counsel Brown] called me.” App. 660, l. 1 – 662, l. 11.

The judge told Savage that her problem was whenever she ruled against defense counsel “he attempts to withdraw as counsel.” The judge informed Savage that she had told Counsel Brown that she would entertain his request to raise the cap on the fees at the end of the case. The judge added that she understood Counsel Brown’s plight but she could not have him continue to demand to be relieved each time she ruled against him. “He’s done that three times, and he’s sat down and refused to proceed with the case. That is simply not professional. It is not consistent with his oath.” App. 663, l. 1 – 664, l. 20.

The judge told Savage that she was confident that Savage would never act in this fashion in a courtroom. “My concern now is what kind of stress is Mr. Brown under and can he

effectively represent his client. That is now becoming a question. That is now my concern. My job here is to protect this trial, protect the record and protect Mr. Howard.” App. 663, l. 1 – 664, l. 20.

The judge continued: “What I am concerned about now is that Mr. Brown’s ambit and posture is getting in the way of trying this case, and if he is adequately representing his client. That’s where we are right now.” App. 665, ll. 5-8. The judge reiterated that the prior day, counsel told her he was not going to proceed with the case, and “he wasn’t going to do anything more. I told him we were going to go forward, and he said no.” App. 665, ll. 20-25.

The judge added that she had attempted to help Counsel Brown by approving fees for a defense investigator. Judge Perry Buckner had also approved fees for a DNA expert. App. 666, ll. 1-20.

The judge stated that she did not know if counsel was “posturing for a mistrial” but she stated the court had done everything “we can to ensure that Mr. Brown is paid.” App. 666, ll. 3-13. The judge said she would give Savage forty-five minutes to talk with Counsel Brown alone. App. 667, ll. 16 – 669, l. 12.

After the break, Counsel Savage said that there was nothing in his opinion, after consultation with Brown and petitioner, that he believed required a mistrial. App. 669, l. 20 – 670, l. 12. Counsel Savage, of course, was representing Counsel Brown to avoid a contempt of court charge, and not petitioner.

### **Order of Dismissal**

In his order of dismissal on the issue of counsel’s behavior as it affected this trial, the judge wrote:

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 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.

### **Discussion**

This Court has already called defense counsel's conduct "unprofessional." This Court has written that the conduct was an "egregious level of inexcusable conduct and persistent disregard of the court's orders . . ." Ex Parte James A. Brown, 393 S.C. 220, 711 S.E.2d 899, 902 (2011).

As seen above, the trial court repeatedly stated that she had ruled on matters, and that defense counsel continued to argue – essentially -- in violation of Rule 18(a), SCRCrimP. The judge said that counsel repeatedly moved to withdraw, and sat down "refusing to go forward." While this Court noted the trial court's "patience" with defense counsel there can be no doubt that the trial judge was extremely annoyed with defense counsel's "refusals to go forward," and his "motions to withdraw" when the trial judge ruled against him.

Respectfully, the client, petitioner Alfonzo Howard, got lost in the sideshow that became the main show of defense counsel sparring with the trial judge over his fees in this case, and whether he could continue representing petitioner. No one means to diminish a lawyer's right to get paid for his professional services while attempting to lay out the facts in an objective manner

to this Court. The bottom line was that while the judge should have been concentrating on making legal correct and pristine rulings, she had to show that she was going to maintain control of her courtroom, and over defense counsel. That simply was unfair to petitioner on so many levels.

While the PCR court noted the sparring between the judge, and defense counsel over payment, his motions to withdraw, and his refusal to “go forward” took place outside the presence of the jury, it did not remove the fact that counsel’s motions were to serve his own interests by not going forward or withdrawing from representation. Those motions were not in petitioner’s best interests.

Counsel Andy Savage was brought into the case to represent defense counsel Brown. He was not representing Petitioner Howard. While Savage argued that he had calmed the waters and that a mistrial was not necessary, defense counsel Brown had the responsibility to make that call. Despite the fact that trial had gotten “out of control,” and that petitioner was entitled to a fresh start, defense counsel never moved for a mistrial. A mistrial meant the trial would start anew seemingly with defense counsel still representing petitioner.

While one manifestation of defense counsel being held in contempt by the trial court would have been a mistrial, defense counsel owed at least that much to Petitioner Howard by moving for a mistrial where his own conduct had caused the trial to become a battle of wills between the trial judge and defense counsel. That the trial judge would ultimately win that battle should have come as no surprise to defense counsel, given that his conduct caused the situation. Given the highly unusual facts of this case, defense counsel’s failure to move for a mistrial constituted deficient performance and that deficient performance was prejudicial to petitioner within the meaning of Strickland v. Washington, 466 U.S. 668 (1984).

The tenor of the arguments between defense counsel and the trial judge showed that defense counsel had created a situation where there could no longer be an assurance that the judge's rulings were not devices to control counsel rather than reasoned legal rulings. There should be no doubt that trial counsel's unprofessional conduct and his "egregious" level of inexcusable conduct and persistent disregard of the trial court's orders," as this Court termed them constituted deficient performance. Counsel's actions caused the trial judge to have to focus her attention on counsel's conduct rather than legal rulings.

Further, while defense counsel did move for a continuance during this affray to seemingly assist petitioner, it was based on a motion the judge had already denied. It was not a serious legal motion, and a motion for a mistrial or a meaningful motion for a continuance so the trial horribly tainted trial could start anew was the proper motion to protect *petitioner's interests*.

Moreover, it would also seem counterintuitive or naïve to think that the jurors in this case did not pick up on defense counsel's hostility towards the trial judge, and the judge's annoyance with defense counsel. Jurors are known to look up to and respect the trial judge. Petitioner respectfully asserts that defense counsel's conduct, in this extremely unusual case, undermined confidence in petitioner's ability to receive a fair trial, it affected the trial court's rulings, distracted the trial judge's ability to concentrate on complex legal rulings since she had to be concerned first with maintaining control of the courtroom, and petitioner should be granted a new trial for all of the reasons above. Strickland v. Washington, supra.

2.

The PCR court erred by finding that the statements of co-defendant Hicks implicating petitioner in the crime were not the basis of the judge's ruling that the state had probable cause to obtain appellant's DNA, where the record showed the co-defendant's statements were the conclusive evidence the judge based his finding of probable cause on, and defense counsel admitted he could have shown the co-defendant's mental illness cast severe doubt on his credibility and the reliability of his statements (establishing probable cause) had counsel properly prepared for the Schmerber hearing, or the state revealed this evidence pursuant to Brady as it was obligated to do.

The PCR court erred by ruling that Hicks' statements were not the reason the judge concluded there was probable cause to obtain P

Petitioner Howard's DNA. App. 1481. The judge stated: "*I think that based upon the statement of a co-defendant, that he was involved and the presence of evidence there that identifies unknown male DNA, I think there's sufficient probable cause to require the sample to be given and I would so order.*" App. 1464, ll. 3-11. (emphasis added). Respectfully, it could not be much clearer.

Defense counsel acknowledged that State v. Sanders, 388 S.C. 292, 696 S.E.2d 592 (2009), required the state to show at a Schmerber<sup>1</sup> hearing that (1) probable cause to believe the suspect had committed the crime exists, (2) a clear indication that relevant evidence will be found exists, and (3) the method used to secure the evidence is safe and reliable. App. 1348, ll. 12-24. Defense counsel testified he had read the Schmerber hearing transcript before the PCR hearing, and correctly concluded "it appears he [Judge King] based it [probable cause] on the

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<sup>1</sup> Schmerber v. California, 384 U.S. 757 (1966).

statement of Lorenzo Hicks, who was a co-defendant.” App. 1350, ll. 3-12; App. 1351, l. 19 – 1352, l. 6.

Defense counsel admitted that prior to the Schmerber hearing he did not investigate the mental health history of co-defendant Hicks. App. 1352, l. 23 – 1353, l. 1. “And in hindsight, that might have been fruitful, for the purposes of the hearing.” App. 1353, ll. 3-4. Counsel acknowledged he later learned “there was [were] substantial mental health questions.” App. 1353, ll. 5-9.

Defense counsel reviewed a report wherein it was revealed that co-defendant Hicks, fifteen months before the trial, had said that “he was the devil, and she [the victim] better not ever wake him up again.” App. 1354, l. 10 – 1357, l. 4.

Further, defense counsel said he became aware that co-defendant Hicks had been accused of stealing a pickup truck from the parking lot of Beaufort Memorial Hospital, and that law enforcement took Hicks to a mental institution instead of to the detention center. App. 1357, ll. 14-25. The following occurred on direct examination of Counsel Brown:

Q. What significance would you put on Mr. Hicks’ 2005 -- the 2/25/2005 incident involving a fire truck at the hospital?

A. I find it significant that he was so mentally ill that they committed him to Two East, which is the wing for folks who are committed that are a harm to themselves or others, in lieu of going to the jail. They didn’t even take him to the jail first to book him and then take him down there, *which tells me he’s that crazy.*

Q. Do you know -- this is, again, this is some 15 months before the arrest in this case.

A. That’s correct.

Q. And some -- some -- really, *two years before the Schmerber hearing.*

A. *That's correct.*

Q. *Okay. And two years before the Schmerber hearing that based PC on Mr. Hicks' testimony.*

A. *That's correct.*

Q. Okay. Now, are you aware of whether or not Mr. Hicks ultimately was arrested on this incident about stealing the truck?

A. I don't know. I don't recall. I mean, if it's in my file, something I had in there, then, I'd probably be aware of it. But I don't recall otherwise.

THE COURT: Now, we're not going to try Mr. Hicks today, Mr. Lee.

MR. LEE: I understand. I'm going to --

THE COURT: We're here for a post-conviction relief matter, so let's proceed.

MR. LEE: All right.

BY MR. LEE:

Q. Would it surprise you to learn that Mr. Hicks was arrested by Investigator Ott for this?

A. No, because I think Investigator Ott was the one that took him to the hospital.

Q. Okay. Now, so, Investigator Ott is the one that arrested Mr. Hicks at this point, knew, or should have known, arguably, about his mental health issues.

A. And on that note, I think that's an issue I raised as a partial defense at the trial; that they were able to coerce Mr. Hicks into testifying against Mr. Howard; because I believe Detective Ott was involved in the investigation of the case -- underlying case at issue involving Mr. Howard.

They met with him immediately after Hicks' arrest, and I think that was part of my defense, was that they found him to be a pliable person.

- Q. Well, and in fact, Investigator Ott was the lead investigator for Mr. Howard's case, right?
- A. And that was my point is, I think I later raised that as defense to how -- how could Mr. Hicks suggest Mr. Howard's involvement? Well, Ott -- Detective Ott knew he was not mentally stable.
- Q. Okay.
- A. And again, I didn't have any of this information before a *Schmerber* hearing.
- Q. **Okay. But it was available, you would agree.**
- A. **It was available, and I think it also should have been provided by the government.**
- Q. **Okay. But even if it was not, it was available.**
- A. **That's correct.**
- Q. **You could have independently gotten it.**
- A. **There's absolutely no question.** Although I don't know that I had a reason to suspect Mr. Hicks' mental stability, but I didn't look into it.

App. 1358, l. 9 – 1360, l. 24. (emphasis added).

Defense counsel said all he was able to do at the Schmerber hearing was present evidence that Hicks gave a contrary statement. "One statement says Howard did it and one statement says Howard didn't do it; so, Judge, there's no probable cause; we have, if anything, 50/50 tie. App. 1363, l. 22 – 1367, l. 23. Defense counsel acknowledged, despite the evidence he learned regarding co-defendant Hicks' mental illness, he never asked the trial court to revisit the Schmerber issue regarding his credibility or reliability to provide probable cause prior to trial. App. 1382, ll. 3-6.

## Discussion

In Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994), the Court noted that a petitioner must show counsel's representation on a Fourth Amendment issue fell below an objective standard of reasonableness, and that the petitioner was prejudiced by the deficient performance. Generally, the petitioner must show that his Fourth Amendment claim -- here, Schmerber -- was meritorious, and that the verdict would have been different absent that evidence that should have been excluded. Kimmelman v. Morrison, 477 U.S. 65 (1986).

Here, defense counsel acknowledged that an investigation of credibility of co-defendant Hicks would have shown he had mental health problems, and that he was mentally ill. The judge at the Schmerber hearing did indeed rely co-defendant Hicks' claim that petitioner was with him to find probable cause for the search warrant to draw petitioner's blood. The DNA sample results from the glove showed petitioner was a major DNA contributor on that glove. As seen, the glove was allegedly discarded at the crime scene, constituting seemingly strong corroborating evidence of petitioner's presence at the crime scene.

The two African-American men involved in this case wore dark clothing and covered their faces. The victim was unable to say or identify her rapist. App. 385, l. 13 – 386, l. 5. The DNA evidence was clearly very important in this case, and defense counsel admitted a proper investigation would have unearthed this testimony regarding co-defendant Hicks' lack of credibility due to his mental illness.

Further, defense counsel acknowledged he did not "revisit" the Schmerber issue at trial, wherein the state obtained petitioner's blood based on the Hicks' claims. Moreover, counsel was correct in also asserting that this mental health evidence which was exculpatory to petitioner, and that should have been revealed pursuant to Brady v. Maryland, 373 U.S. 83 (1963) prior to the

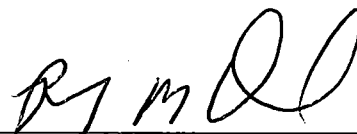
Schmerber hearing. However, counsel, as to the IAC issue, acknowledged that a proper investigation would also have provided him with this necessary ammunition to show that Hicks was not credible, not reliable, and that he was mentally ill. Hicks was taken to a mental institution rather than the jail after committing a grand larceny. Further, there was other evidence Hicks was severely mentally ill, such as the incident where he said he was the devil.

Defense counsel provided deficient performance, which he essentially admitted, and to petitioner's prejudice, by not being prepared to destroy the credibility of Hicks who *the trial judge relied on as establishing probable cause for the drawing of petitioner's blood for the DNA testing*. Counsel was also deficient, by not revisiting the Schmerber issue prior to trial, and moving to suppressing the fruits of the blood draw since the Schmerber hearing was fatally flawed, and where the state failed to reveal the Brady evidence prior to the Schmerber hearing.

The contamination of the DNA evidence was a separate issue which did not exclude the fact that defense counsel provided ineffective assistance of counsel in not being prepared with the mental illness evidence to destroy the credibility of co-defendant Hicks, who provided the probable cause for the search warrant or court order for petitioner's DNA. See, Strickland v. Washington, supra.

### CONCLUSION

By reason of the foregoing arguments, a petition for writ of certiorari should be issued to allow full briefing on these issues.



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2017

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Beaufort County

Honorable Perry M. Buckner, Circuit Court Judge  
\_\_\_\_\_

ALFONZO J. HOWARD,

PETITIONER

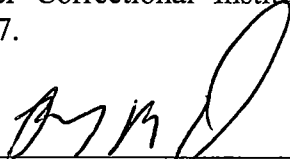
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

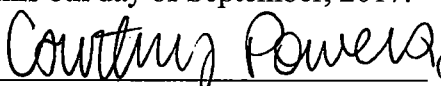
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Alfonzo J. Howard, #333399, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 8th day of September, 2017.

  
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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 8th day of September, 2017.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: May 2, 2027.