

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Charleston County
G. Thomas Cooper, Circuit Court Judge

RECEIVED

MAR 19 2018

S.C. SUPREME COURT

DAVID LEE MEGGETT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000065

MOTION FOR OUTSIDE COUNSEL

Undersigned counsel respectfully moves this Court to appoint outside counsel to represent Petitioner 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. In short, representation of Petitioner will likely require counsel to take a position contrary to that of Hugh Ryan, the Executive Director the South Carolina Commission on Indigent Defense, which is the governing agency of which undersigned counsel is a part.

Procedural history

Petitioner was convicted of burglary and criminal sexual conduct in the first degree. State v. Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012). Petitioner's convictions and sentences

were affirmed on appeal. Id. Thereafter, Petitioner filed an application for PCR. The matter proceeded to an evidentiary hearing before the Honorable G. Thomas Cooper. Tricia Blanchette represented Petitioner, and Alicia A. Olive represented Respondent. By an order filed on September 26, 2017, Judge Cooper denied Petitioner relief from his convictions and sentences. Petitioner moved for entry of new judgment and/or to amend the findings of fact and conclusions of law. By an order filed on December 14, 2017, Judge Cooper denied Petitioner's post-trial motion. Petitioner served a timely notice of appeal. Thereafter, his case was assigned to undersigned counsel.

Relevant facts

On September 8, 2014, PCR counsel moved for discovery, explaining that trial counsel had requested a continuance for time to retain a DNA expert at the start of Petitioner's trial. See Meggett, 398 S.C. at 520-521, 728 S.E.2d at 494. PCR counsel noted that she had consulted with a DNA expert, who provided her with a list of items he would need to work on Petitioner's case. Relying upon this list, PCR counsel requested discovery to permit her to investigate and prepare a potential claim of ineffective assistance of trial counsel for failing to obtain a DNA expert prior to trial. On September 8, 2014, Judge Cooper granted the request for discovery.

On April 1, 2016, PCR counsel moved for indigent funds for an expert witness. Exhibit #1. On April 18, 2016, the Honorable Doyet A. Early heard argument on the motion. Hugh Ryan appeared at the hearing on behalf of the South Carolina Commission on Indigent Defense. Mr. Ryan testified that there is no bar to retained counsel requesting and receiving funds from the Office of Indigent Defense to pay for expert services. Mr. Ryan also testified that it was a rare occurrence for retained counsel to request funds from Indigent Defense. Nevertheless, Mr. Ryan opposed the request because Ms. Blanchette had been retained by Petitioner and received a "not [] insubstantial

amount of money.” During the argument on the motion, Judge Early explained that Ms. Blanchette’s fee was not “outlandish” and was “probably on the low side.” Thereafter, he took the matter under advisement.

By an order filed on December 7, 2016, Judge Early denied the request for funding from Indigent Defense. Exhibit #2. Judge Early relied heavily upon Mr. Ryan’s testimony that “it is a rare instance for a retained attorney to request indigent funds,” and that “he was not interested in starting a trend of awarding additional funds to retained counsel.” Exhibit #2. Finding Mr. Ryan’s testimony “compelling” and determining there was “a public policy interest to denying indigent funding to [Petitioner] based on the facts of this case,” Judge Early denied the request for funding to permit Petitioner to retain the services of a DNA expert to testify at his PCR hearing. Exhibit #2.

At the PCR hearing, Petitioner, through PCR counsel, pursued his claim of ineffective assistance of trial counsel based on trial counsel’s failure to retain a DNA expert. Additionally, PCR counsel renewed the request for funding to retain a DNA expert. Furthermore, during the hearing, it was repeatedly noted that Petitioner’s full development of this claim had been curtailed by his inability to obtain funding from Indigent Defense to retain a DNA expert to testify at the PCR hearing. Judge Cooper’s order denying Petitioner relief addressed Petitioner’s claim of ineffective assistance of trial counsel based on trial counsel’s failure to retain a DNA expert; therefore, this issue is preserved for appeal. In the order, Judge Cooper explained that he found Petitioner did not suffer prejudice because “he did not present any expert testimony regarding DNA testing” of the disputed evidence. The order continued that due to this failing, “the Court is left to speculate about ... what, if anything, further DNA analysis by an expert might reveal.” In the motion to alter or amend the judgment, PCR counsel raised the funding issue as well. Respondent filed a response, explaining Judge Cooper did not have the authority to alter Judge Early’s ruling on the matter and

that Judge Early's ruling was "based upon representations made to him by Mr. Ryan." Judge Cooper ultimately denied the motion to alter or amend the judgment.

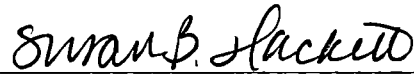
Law and Analysis

Under the Rules of Professional Conduct, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7(a), RPC, Rule 407, SCACR. "A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Rule 1.7(a)(2), RPC, Rule 407, SCACR. At a minimum, representation of Petitioner on appeal requires evaluation of the merits of the funding issue presented in the case. In all likelihood, representation of Petitioner on appeal requires pursuit of an issue claiming error by Judge Early in his denial of funding to Petitioner. There is little doubt that Judge Early's decision relied heavily, if not completely, upon the testimony of Mr. Ryan, the Executive Director of the South Carolina Commission on Indigent Defense. Undersigned counsel works for the Division of Appellate Defense, which is a Division of the South Carolina Commission on Indigent Defense. In order to pursue Petitioner's claim on appeal, undersigned counsel would be required to take a position directly contrary to the Executive Director of the state agency for which she works. Therefore, there is a significant risk that counsel's representation of Petitioner will be materially limited by her personal interest – her employment.

Conclusion

Undersigned counsel respectfully requests the appointment of outside counsel to represent Petitioner in the appeal of the denial of PCR. Further, counsel respectfully requests the timelines for filing the petition for writ of certiorari and appendix be held in abeyance pending consideration of this motion.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

Attorney for Petitioner

This 19th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

G. Thomas Cooper, Circuit Court Judge

DAVID LEE MEGGETT,

PETITIONER,


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Motion for the Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, William Edgar Salter, Esquire, and Mr. David Lee Meggett at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of March, 2018.



Susan B. Hackett
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 19th day of March, 2018.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

Exhibit #1

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
David Meggett, #343610,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2013-CP-10-3740

MOTION FOR INDIGENT FUNDS

FILED
2016 APR - 1 PM 12:23
JULIE J. ARMSTRONG
CLERK OF COURT

COMES NOW Applicant, by and through his undersigned attorney, and requests that this Court enter an Order for Authorization of Payment of Expert Fees pursuant to S.C. Code Ann. §17-30-50(b) (2008) and Reeves v. State, Op. No. 5359 (S.C. Ct. App. filed November 12, 2015) (Shearouse Adv. Sh. No. 44 at 47).

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 25, 2013. The State submitted a Return on December 11, 2013. On September 8, 2014, Tricia A. Blanchette filed a Motion for Discovery and Motion for Substitution of Counsel, which was heard by the Honorable G. Thomas Cooper, Jr., on that same date at the Charleston County Courthouse. On September 29, 2014, the Honorable G. Thomas Cooper, Jr., issued an Order Substituting Counsel and Authorizing Discovery in Post Conviction Relief.

By way of the discovery motion and at the hearing, counsel explained that she had consulted a DNA expert (Ronald Ostrowski) since Applicant's trial began with a request for a continuance to address matters related to DNA.¹ Counsel explained that Mr. Ostrowski had provided her with a list of case records/items that were necessary for him to work on Applicant's case. As a result of the Order Authorizing Discovery, Applicant was granted the opportunity to obtain the discovery requested by Mr. Ostrowski. In

¹ A copy of Mr. Ostrowski's curriculum vitae is attached.

March of 2015, Mr. Ostrowski was retained by payment of \$2,000.00 and the records were provided for his review. Thereafter, Mr. Ostrowski met with counsel and spent several hours thoroughly reviewing the case and sharing his initial findings. He also explained to counsel how his expertise could have been utilized at the trial stage and how his expertise could be utilized in preparation for and at the evidentiary hearing. As a result, Applicant, through counsel, filed an Amendment to Application for Post Conviction Relief making several allegations involving the DNA evidence and lack of DNA expert prior to and at trial.

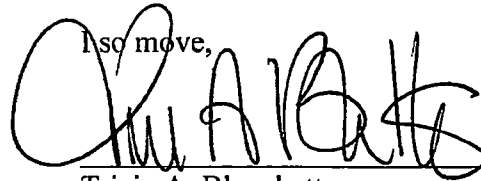
At this time, undersigned retained counsel has not received her full retainer fee due to medical issues of the contracted responsible party and the indigent status of Applicant.² Counsel has also been unable to provide Mr. Ostrowski the second portion of his fee to prepare for and testify at an evidentiary hearing.

Recently, in Reeves v. State, Op. No. 5359 (S.C. Ct. App. filed November 12, 2015) (Shearouse Adv. Sh. No. 44 at 47), the South Carolina Court of Appeals found counsel was ineffective for failing to utilize an expert to refute the State's experts called at trial. Applicant submits that his claims of ineffective assistance are directly in line with Reeves. Furthermore, upon review of Reeves, undersigned counsel is concerned that she has a duty to request indigent funding for the payment of Mr. Ostrowski's fee since she has consulted with him and is cognizant of the fact that his services are necessary to properly present Applicant at an evidentiary hearing.

Therefore, Applicant, through counsel, respectfully requests that this Court authorize payment to not exceed the amount of Five Thousand Dollars for the expert

² Applicant will submit a completed Affidavit of Indigency at the motion hearing scheduled for April 18, 2016.

services and/or testimony of Mr. Ostrowski, to be payable at the approved rate of \$220.00 an hour for working time and \$110.00 for travel time.

Also move,


Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
Attorney for Applicant

March 30 2016
Columbia, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
David Meggett, #343610,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

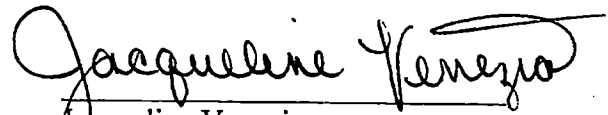
2013-CP-10-3740

CERTIFICATE OF SERVICE

FILED
2016 APR - 1 PM 12:22
JULIE J. WARRICK
CLERK OF COMMON PLEAS

I, Jacqueline Venezia, Law Clerk to Tricia A. Blanchette, Esq., hereby certify that I placed in the mail this 30th day of March, 2016, a copy of Motion for Indigent Funds, to Rutledge Johnson of the Attorney General's Office, at:

Office of the Attorney General
ATTN: Rutledge Johnson
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Jacqueline Venezia
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Law Clerk

March 30, 2016

Exhibit #2

Cc
AG
AT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
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)
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)
David Meggett, #343610,)
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Applicant,)
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v.)
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)
State of South Carolina,)
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)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2013-CP-10-3740

ORDER DENYING
ADDITIONAL FUNDING

FILED
2016 DEC - 7 AM 11:48
JULIE J. HARRINGTON
CLERK OF COURT

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 25, 2013. The Respondent (the State) made its Return and Motion to Dismiss on December 5, 2013. Applicant, through PCR counsel Tricia A. Blanchette, Esquire, filed "AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF" on December 17, 2015. Applicant, through counsel, then filed "MOTION FOR INDIGENT FUNDS" on March 30, 2016. A hearing into this matter was convened on April 18, 2016 at the Charleston County Courthouse. Applicant was present and represented by Ms. Blanchette. Respondent was represented by Assistant Deputy Attorney General J. Rutledge Johnson, Esquire. Also in attendance was James Hugh Ryan, III, Esquire of the S:C. Commission on Indigent Defense.

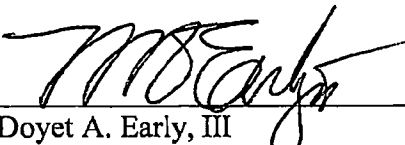
Applicant, through counsel, moved for indigent funding to pay an expert in Applicant's PCR case. Counsel stated that even though Applicant receives around \$22,000 per year for pension from the National Football League, this money goes towards paying child support. Counsel also, very candidly, explained that most of her retainer fee had been paid in the estimated amount of \$12,000.

Hugh Ryan testified that he is in charge of indigent funding in South Carolina. Mr. Ryan explained that it is a rare instance for a retained attorney to request indigent funds. He also explained that he was not interested in starting a trend of awarding additional funds to retained counsel.

This Court finds Mr. Ryan's testimony compelling and believes, in its discretion, that there is a public policy interest to deny indigent funding to Applicant based on the facts of this case.

IT IS THEREFORE ORDERED that Applicant's Motion for Indigent Funds is DENIED.

AND IT IS SO ORDERED this 30th day of November, 2016.



Doyet A. Early, III
Presiding Judge
Ninth Judicial Circuit

Bamberg South Carolina.