

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 17 2019

Appeal from Beaufort County

S.C. SUPREME COURT

Maite Murphy, Circuit Court Judge

ABDIYYAH BEN ALKEBULANYAHH,
A/K/A/ TYREE ROBERTS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2019-000529

RETURN TO MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

Undersigned counsel makes this return to petitioner's motion for the appointment of outside counsel, Lindsey Vann, Esquire, for petitioner's post-conviction relief (PCR) appeal to this Court.

1. Petitioner Abdiyyah Alkebulanyahh, a/k/a Tyree Roberts was indicted by the Beaufort County grand jury on March, 2002 on two charges of murder for the shooting death of two Beaufort County Sheriff's Deputies. The state sought the death penalty. Petitioner was convicted and sentenced to death.

2. On his mandatory appeal to this Court petitioner was represented by then Chief

Appellate Defender Joseph L. Savitz, III, of this office, and then Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek.

3. During the pendency of the direct appeal appellate counsel opposed petitioner's motion to represent himself in his capital appeal. This Court denied petitioner's motion to proceed pro se on appeal finding, inter alia, it was untimely, that there was no Constitutional right to self-representation on appeal, and that petitioner could pursue any ineffectiveness allegations regarding his appellate attorneys in PCR, See State v. Tyree Alphonso Roberts a/k/a Abdiyyah Ben Alkebulanyahh, 364 S.C. 583, 614 S.E.2d 626 (2005). Petitioner's convictions and death sentence were later affirmed on direct appeal in State v. Tyree Alphonso Roberts a/k/a Abdiyyah Ben Alkebulanyahh, 369 S.C. 580, 632 S.E.2d 871 (2006). Certiorari was denied by the United States Supreme Court in Roberts v. South Carolina, 127 S.Ct. 1828 (2007).

4. Petitioner then filed an application for PCR. Both counsel Dudek and counsel Savitz were deposed by prior PCR counsel – whom present PCR counsel challenge as unqualified -- based upon petitioner's allegations of ineffective assistance of Appellate Counsel.

5. The PCR Judge, the Honorable Edward Miller addressed the allegations of ineffective assistance of appellate counsel in his order of dismissal. Judge Miller ruled that he found "the testimony of both of Applicant's appellate counsel was credible." Order at 44. Judge Miller also found that while petitioner was "disappointed in the initial brief filed in his direct appeal because it did not contain any issues involving the guilt phase of the trial . . . [that he had failed] to point out any preserved, meritorious issues that he would have requested appellate counsel brief in his direct appeal." Order at 45. In addition, Judge Miller cited the depositions of both appellate attorneys

noting that petitioner representing himself at trial caused him not to “[p]roperly preserve issues for direct appeal at trial.” Order at 45. Finally, Judge Miller found that petitioner’s complaint regarding the failure to raise his “Fourth Amendment claim” was not preserved for appeal, and that appellate counsel could not be expected to raise an issue that was not preserved. Order at 46.

6. After petitioner’s PCR was denied, undersigned counsel conceded in a motion to appoint outside counsel on December 2, 2009 that a conflict of interest, or the strong appearance of a conflict of interest existed, since appellate counsel where “targets” in the PCR action. This Court then appointed outside counsel for petitioner’s PCR appeal. Petitioner’s PCR appellate claims were later rejected by this Court.

7. Petitioner has subsequently raised his claims in federal habeas proceeding, and in a second in time PCR proceeding. The Honorable Maite Murphy dismissed the second PCR as “time barred.”

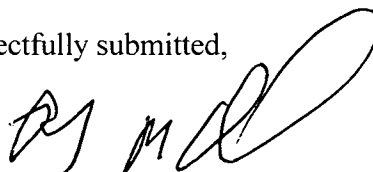
8. Petitioner is now seeking the appointment of outside counsel to represent him in the appeal of the denial of this second in time PCR action asserting various reasons including that Lindsey Vann, Esquire as his appellate counsel would assure judicial efficiencies since she “would not require additional time to become familiar with the record and legal issues.” Motion at 3.

9. Regardless, undersigned counsel earlier acknowledged a conflict of interest, or the strong appearance of a conflict of interest, existed before petitioner’s initial PCR appeal because counsel was deposed in that PCR action, and although counsel was not found ineffective, that it would have been improper for Appellate Defense to represent petitioner in that PCR appeal. Since undersigned counsel had a conflict of interest that led to the appointment of outside counsel for the prior PCR

appeal, he believes that the taint from that prior conflict of interest still exists particularly given the highly unusual facts of this case where petitioner's present PCR counsel has challenged the prior PCR attorneys -- who deposed undersigned counsel -- as being unqualified to handle that PCR case.

WHEREFORE, undersigned counsel does not oppose the appointment of outside counsel, Lindsey Vann, Esquire, in this case, and leaves the matter to the sound discretion of this Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

April 17, 2019

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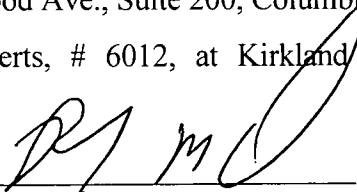
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STATE OF SOUTH CAROLINA,

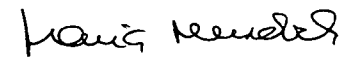
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the return to the motion for the appointment of outside counsel in the above-referenced case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon Lindsey S. Vann, Esquire, at 900 Elmwood Ave., Suite 200, Columbia, SC 29201, and Abdiyyah Ben Alkebulanyahh, a/k/a/ Tyree Roberts, # 6012, at Kirkland Correctional Institution, this 17th day of April, 2019.


Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 17th day of April, 2019.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: June 3, 2023.