

2. Mr. Lusick proceeded to seek a certificate of appealability without the benefit of counsel. On April 20, 2006, a panel of this Court granted the motion for a certificate of appealability limited to two claims: “that trial counsel was ineffective for failing adequately to impeach the victims' testimony with their prior inconsistent statements; that trial counsel was ineffective for failing to object to hearsay testimony from witnesses Szott and Rodriguez; and that appellate counsel was ineffective for failing to pursue both issues; . . .”

3. On April 20, 2006, the Court appointed Elayne C. Bryn, Esquire to represent Mr. Lusick in further appellate proceedings. Ms. Bryn moved to withdraw based upon a potential conflict arising from her then-partner's representation of a co-defendant in prior state-court proceedings. Having concluded his capital representation, counsel agreed to be reappointed to represent Mr. Lusick, and the Court appointed him and allowed Ms. Bryn to withdraw on June 26, 2007.

4. The case has been fully briefed, and is scheduled for February 5, 2008 for argument.

5. Counsel has expended significant time and expense in briefing the case. This case has been hard-fought for eleven years, and it is doubtful that either side will accept as final the resolution of the case by a three-judge panel of this case. It is likely that further rehearing, en banc and certiorari proceedings will

ensue. Any proceedings short of briefing and argument in the Supreme Court would be compensable under the CJA-20 issued by this Court. A claim for final payment will not be ripe until, at a bare minimum, at least 90 days after the opinion in this case is issued by a panel of this court.

6. Counsel is in the process of gathering his cash resources for investment in a real estate project that will have a positive impact on social conditions within the City of Philadelphia. He has purchased a vacant lot on Lancaster Avenue that used to be occupied by a condemned crack house, and proceeded to develop plans, work with community groups, and get government approvals for construction of a new mixed-use building. The building will include, among other things, his office and residence. Counsel's own funds, including the funds sought in this motion, proved inadequate to obtain financing for a project in a difficult neighborhood in these financially challenging times. As evidenced by the attached letter, the City of Philadelphia has reserved funds to contribute to the project, provided counsel can obtain financing with the combined contributions of the City and counsel. The City's reservation of funds is conditional upon, among other things, obtaining financing no later than June 28, 2008. It is very unlikely that this case will be resolved—and the fee application submitted, approved and paid—in the 144 days between February 5, 2008 and June 28, 2008. Moreover, it would be best to obtain the financing as soon as possible,

so that the non-owner-occupied rentable commercial and residential tenancies can be marketed for the fall of 2008.

7. For the foregoing reasons, counsel has a genuine financial need for the making of an interim payment in this case.

B. PAYMENT EXCEEDING THE STATUTORY CAP

8. Counsel seeks total compensation in the amount of \$19,958.08, which comprises \$2,156.28 for out-of-pocket expenses and \$17,801.80 for compensation for services. The compensation for services includes 104.3 hours in connection with preparing the Brief for Appellant and the Appendix at the then-prevailing rate of \$92.00 per hour and 87.3 hours in connection with reviewing and replying to the district attorney's Brief for Appellee at the then prevailing rate of \$94.00. The requested compensation is fair and reasonable compensation in a complex case of this nature.

9. The case is a habeas corpus challenge to convictions for allegedly sexually assaulting two very young girls. The record on appeal involves events and proceedings occurring between 1992 and 2005. The post-appeal challenges to the conviction began almost eleven years ago.

10. The underlying case involved four preliminary hearings, four days of trial, a sentencing and a reconsideration of sentence, and an appeal. There were opinions by the Court of Common Pleas and the Superior Court of Pennsylvania.

11. Proceedings in the Pennsylvania post-conviction stage included extensive briefing by both sides before the PCRA court, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania. Before the PCRA Court, there were at least nine separate transcribed proceedings (but no evidentiary hearings). There opinions by both the PCRA court and the Superior Court of Pennsylvania.

12. There was extensive briefing and motions practice before the district court. The magistrate judge issued a report and recommendation, which the district court adopted. On behalf of petitioner, counsel filed extensive objections to the report and recommendation, to which the government extensively responded.

13. All of the foregoing proceedings are implicated in this appeal from a denial of *habeas corpus* relief. The Appendix in this appeal, which counsel had to compile and organize, was over 2400 pages in length.

14. The briefing in this appeal has been both extensive and complex. Counsel moved for, and granted, leave to file a 64 page, 15,522 word Brief for Appellant. Counsel moved for, and was granted, leave to file a 44 page, 10,505 word Reply Brief for Appellant. Given the claims counsel advanced, the counter-arguments the district attorney advanced and the divergent reasoning of the lower federal courts and the various state courts, counsel had to painstakingly place

numerous arguments into their appropriate contexts and document the contexts with extensive citations to the record.

15. The claims upon which this Court granted the certificates of appealability were ones of ineffectiveness of counsel and appellate counsel. Such claims are, in the context of this case, very fact intensive.

16. In the Brief for Appellees, the district attorney raised at least two grounds for leaving the merits of Mr. Lusick's constitutional claims undecided. First, the district attorney raised the defense of a failure to exhaust the claims in state court. This defense was predicated upon the entirely novel proposition that, for purposes of federal exhaustion doctrine and as a matter of law, a properly layered claim of trial counsel and appellate counsel ineffectiveness does not suffice to exhaust the wholly subsumed claim of trial counsel ineffectiveness. In his Reply Brief, counsel had to debunk the purported authority for the novel, *per se* proposition advanced, as well as demonstrate with a complete review of the history of the claims that he had sought a ruling on the merits of the trial counsel ineffectiveness claim at each level of state court review. Second, the district attorney asserted that deference is owed to adjudications of constitutional claims by lower state courts, which adjudications are neither adopted nor affirmed by the final decision by the state appellate courts. Responding to this novel, unestablished assertion entailed reviewing the language and history of 28 U.S.C

2254(d) in the broad context of *habeas corpus* jurisprudence. Additionally, responding entailed illustrating the pitfalls, generally and in this case, of adopting the textually unsupported transformation of federal jurisdiction. Moreover, an additional layer of legal complexity was added by the fact that the district attorney neither prevailed on these points before the magistrate judge nor filed any objections to the report and recommendation before the district court; the matters were briefed by counsel under the plain error standard.

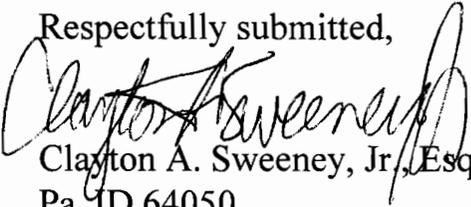
17. Further legal complexity was added to the case by the district attorney's merits-related arguments. The district attorney attempted to truncate this Courts' review of claims upon which this Court granted a certificate of appealability by invoking the limited nature of the certificate of appealability. Yet, the district attorney also advanced matters occurring at trial, which petitioner had challenged as unconstitutional and upon which this court did not issue a certificate of appealability, as grounds providing a reasonable basis for counsel's decisions. This required counsel to address those grounds in the context of the certificated claims as well as the trial as a whole, and to research and argue the Court's authority to expand a certificate of appealability after it has been granted.

18. Generally, *habeas corpus* cases are inherently complex. This case was particularly complex, given the nature and extent of the state court proceedings and the arguments and defenses raised by the district attorney. The

time counsel expended in this case was necessary to present the issues adequately and represent Mr. Lusick, as the court appointed counsel to do. The requested compensation is therefore reasonable and should be approved.

WHEREFORE, court appointed counsel Clayton A. Sweeney, Jr. respectfully requests that the court approve payment of an interim voucher in the total amount of \$19,958.08.

Dated: January 11, 2008

Respectfully submitted,

Clayton A. Sweeney, Jr., Esquire
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De. ID 3359

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CITY OF PHILADELPHIA

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JOHN F. STREET
MAYOR

December 28, 2007

Mr. Clayton Sweeney
Sally Gardens LP
4161 Tower Street
Philadelphia, PA 19127-1624

Re: City Funding for 3933 Lancaster Avenue

Dear Mr. Sweeney:

I am pleased to inform you that the City of Philadelphia has reserved up to One hundred fifty eight thousand two hundred dollars (\$158,200) from the ReStore Philadelphia Corridors Fund to be provided as a grant for the construction of a mixed-use development at 3933 Lancaster Avenue.

The ReStore Philadelphia Corridors grant is to be used exclusively for capital improvements that will allow Sally Gardens LP to construct a mixed-use building for commercial and residential uses. The City's funding is intended to leverage other funds that Sally Gardens LP will commit to the project.

Release of funding through the ReStore Philadelphia Corridors Fund will be subject to Sally Gardens LP's compliance and conformance with the requirements of a Grant Agreement with the Philadelphia Authority for Industrial Development (PAID), the administrator of the ReStore Philadelphia Corridors Fund. This reservation of funds will expire six months from the date of this letter if Sally Gardens LP has not been able to enter into a Grant Agreement with PAID prior to that date.

In the interim, should you have any questions regarding the City's funding commitment, please do not hesitate to contact Eva Gladstein, Director of Neighborhood Transformation, at 215-683-2157. Congratulations on this award and keep up the good work!

Very truly yours,

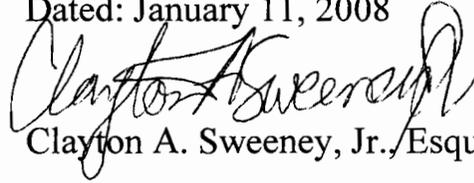
John F. Street, Esquire

cc: Eva Gladstein
Councilwoman Jannie L. Blackwell

CERTIFICATE OF SERVICE

I, Clayton A. Sweeney, Jr., Esquire, hereby certify that this motion has been filed ex parte and has not been served.

Dated: January 11, 2008


Clayton A. Sweeney, Jr., Esquire

