

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 9

THE NORTH CAROLINA STATE BAR,

Plaintiff,

vs.

GRETCHEN M. ENGEL,

Defendant

**ORDER
DISMISSING COMPLAINT**

(27 NCAC § 01B.0114(u))

THIS MATTER was heard on September 25, 2015, before a hearing panel of the Disciplinary Hearing Commission composed of Beverly T. Beal, Chair, and members R. Lee Farmer and Michael S. Edwards (“Hearing Panel”). Mary D. Winstead represented the Plaintiff, the North Carolina State Bar. Defendant, Gretchen M. Engel, was represented by Amos G. Tyndall and F. Lane Williamson.

At the conclusion of the hearing, based upon the Stipulations on Pre-Hearing Conference, the exhibits admitted into evidence, and the testimony of sworn witnesses, the Hearing Panel unanimously found from the credible evidence, that Plaintiff failed to establish the alleged Rule violations by clear, cogent, and convincing evidence and therefore enters this order dismissing the complaint against Defendant. In support of its decision, and based upon all the credible evidence found in the Stipulated Facts, the exhibits admitted into evidence, and additional facts found at the hearing, the Hearing Panel makes the following:

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. Defendant, Gretchen M. Engel, was admitted to the North Carolina State Bar in March 1993 and is an Attorney at Law subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During the relevant period referred to herein, Defendant was employed as the Director of Post-Conviction Litigation for the Center for Death Penalty Litigation (CDPL) and was actively engaged in the practice of law in Durham, Durham County, North Carolina

4. In 1994, Marcus Reymond Robinson (Robinson) was convicted of first degree murder and was sentenced to death in Cumberland County, North Carolina, file number 91 CRS 23143.

5. In 2009, the North Carolina General Assembly enacted the Racial Justice Act (RJA), which provided capital defendants the opportunity to have their death sentences commuted to life without parole upon proof by a preponderance of the evidence that race was a significant factor in decisions to seek or impose the death penalty.

6. In August 2010, two attorneys filed a Motion for Appropriate Relief (MAR) pursuant to the RJA in Cumberland County Superior Court on behalf of Robinson.

7. The Robinson MAR was the first Motion for Appropriate Relief pursuant to the RJA litigated in North Carolina.

8. Malcolm E. "Tye" Hunter, Jr., James E. Ferguson, Jay H. Ferguson, and Cassandra Stubbs represented Mr. Robinson at the hearing on his MAR.

9. As part of their strategy, these lawyers planned to call Bryan Stevenson, a lawyer and law professor, to testify about the harm caused to African-American jurors who are excluded from jury service. Because Mr. Stevenson's study of jury selection did not include results from North Carolina, the defense interviewed African Americans excluded from jury service in Mr. Robinson's case and, in some circumstances, asked excluded jurors to sign affidavits.

10. Cassandra Stubbs (Stubbs), an attorney with the American Civil Liberties Union, coordinated and assumed primary supervisory authority over the juror interviews project.

11. During this process, Staff (Adam Pfeifer and William Webster) interviewed Elliott N. Troy (Troy) and Nelson Johnson (Johnson), both African-Americans who had been peremptorily challenged by the prosecution during Robinson's trial in 1994.

12. Stubbs determined that the team should attempt to procure the affidavits of Troy and Johnson.

13. Engel was not counsel of record in the Robinson MAR hearing or the Golphin, Walters, & Augustine MAR hearing but was part of a team assembled to deal with issues in capital cases tried in North Carolina, including Robinson's. Her primary responsibility in the RJA litigation was to review a massive amount of information produced by the State during the discovery process and analyze the information for comparative juror analysis.

14. Prior to Stubbs going on maternity leave, in August 2011, Engel assumed the responsibility for procuring the affidavits of Troy and Johnson.

15. Engel reviewed the typed memoranda prepared by CDPL Investigator Adam Pfeifer of Staff's interviews with Troy and Johnson and discussed them with Pfeifer.

16. The typed memorandum of Troy's interview referred to Murchison Road as the area where the crime occurred and the area about which he was questioned.

17. Engel did not direct Staff to clarify with Troy whether this was in fact the area about which he was questioned.

18. The memorandum of Troy's interview describes separation between whites and blacks after jurors "returned from being questioned by the attorneys and had learned more about the case."

19. At Robinson's trial in 1994, after the orientation of the jurors by the presiding judge, the Clerk called the names of twelve prospective jurors and these individuals were seated in the jury box.

20. Prosecutors questioned the potential jurors in the jury box as a group and then individually.

21. Engel did not direct Staff to clarify with Troy whether he was in a position to make the observations described in the memorandum of his interview as having occurred after questioning by the attorneys.

22. Engel either drafted the affidavits of Troy and Johnson or reviewed and edited them prior to Staff presenting the affidavits to Troy and Johnson.

23. Paragraph 6 of Troy's affidavit states: "When all of the people called for jury duty first arrived in court, people were mingling around freely. After jurors were questioned and then returned to the larger group, a kind of racial tension seemed to grow in the waiting room. I noticed that white jurors sat with white jurors and black jurors sat with black jurors. As time went on, there were no blacks and whites sitting together. On at least one occasion I saw a group of whites talking together and the conversation abruptly stopped when an African American juror sat down near the group. I also heard white jurors making comments about the case, such as 'It was wrong how he killed him' and 'He should get the death penalty.' These comments stood out to me because the judge had told us not to talk about the case. Also, we had not heard any evidence yet, just questions from the lawyers."

24. In addition, paragraph 7 of the affidavit executed by Troy reads: "I remember the prosecutor asked people questions about the area off Murchison Road where the crime occurred. The prosecutor seemed concerned not to have any jurors who lived there or had friends there or even jurors who were familiar with that area. Of course, Murchison Road was a black neighborhood, and the result was that more black jurors were dismissed."

25. Paragraphs 2 through 6 of the affidavit executed by Johnson purport to describe Johnson's experience in the trial of State v. Robinson.

26. Paragraph 6 of the affidavit Johnson executed reads: "There was a tense atmosphere in the courtroom because the case involved two black men who were accused of

killing a white man. I felt like the way I was questioned had something to do with race. White jurors were not talked down to the way I was.”

27. Johnson was called for questioning as the second alternate juror, was questioned individually and did not see other jurors questioned.

28. The typed memorandum from Johnson’s interview states in part: “He thought he was alone with prosecutor so doesn’t know how the prosecutor questioned others. He knows that for him he was asked a bunch of questions but doesn’t know if he was asked them differently.”

29. The memorandum also states: “He didn’t see different treatment but characterized the way he was treated or questioned by the prosecutor and other court personnel as demeaning.”

30. The memorandum also contains this statement: “Didn’t recall seeing any white jurors where he was. All blacks were around him so treated the same.”

31. Engel reviewed the typed memorandum from Johnson’s interview, which contains the statements in paragraphs 29, 30, and 31 above.

32. The affidavits were sworn to and signed by Troy and Johnson and then placed in the hands of trial counsel for Marcus Robinson.

33. At the hearing, Stubbs tendered Professor Bryan Stevenson to the Court as an expert in race and the law and he was accepted by the Court as an expert.

34. The affidavits of Troy and Johnson were admitted into evidence at Robinson’s MAR hearing as part of the bases for Professor Stevenson’s opinion.

35. Professor Stevenson testified about the harm to African-American jurors excluded from jury service.

36. The affidavits of Troy and Johnson were the only affidavits from State v. Robinson that Professor Stevenson reviewed on the issue of harm to African-American jurors excluded from jury service.

37. Neither Troy nor Johnson was called as a witness in Robinson’s MAR hearing.

38. The affidavits of Troy and Johnson were subsequently admitted into evidence at the Golphin, Walters, & Augustine MAR hearing and Professor Stevenson testified using these affidavits as part of the bases for his opinion.

39. The State did not object to the admission of the Troy or Johnson affidavits in the Robinson MAR hearing or the Golphin, Walters, & Augustine MAR hearing.

40. The State had the trial transcript including jury selection from State v. Robinson in its possession.

41. Counsel for the State was aware of at least some of the alleged discrepancies in the Troy and Johnson affidavits when he cross-examined Bryan Stevenson.

42. The State did not cross-examine Professor Stevenson about any discrepancies in the Troy or Johnson affidavits during the Robinson MAR hearing or during the Golphin, Walters, & Augustine MAR hearing.

43. In an order dated December 13, 2012, Judge Gregory A. Weeks found that “any immaterial inconsistencies between these affidavits and other record evidence, if they are inconsistencies, and the submission into evidence and representations of counsel regarding those affidavits, were not the product of intentional misconduct, willfulness, or bad faith on the part of any member of the defense team.”

Based upon the foregoing Findings of Fact, the Hearing Panel enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the Hearing Panel has jurisdiction over Defendant, and the subject matter of this proceeding.

2. Plaintiff failed to meet its burden of proving by clear, cogent, and convincing evidence that Defendant, by her conduct in this matter, failed to act with reasonable diligence in representing a client in violation of Rule 1.3 of the North Carolina Rules of Professional Conduct.

3. Plaintiff failed to meet its burden of proving by clear, cogent, and convincing evidence that Defendant, by her conduct in this matter, engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the North Carolina Rules of Professional Conduct.

5. “If the hearing panel finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint.” 27 NCAC 01B.0114(u).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Panel enters the following:

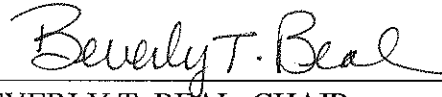
ORDER DISMISSING THE COMPLAINT

IT IS THEREFORE, ORDERED AND ADJUDGED:

1. The Complaint filed in this case is **DISMISSED** as to all allegations against Defendant, Gretchen M. Engel.

2. All parties shall bear their own costs.

Signed by the Chair with the consent of the other Hearing Panel members,
this 2nd day of November, 2015.

A handwritten signature in cursive script that reads "Beverly T. Beal". The signature is written in black ink and is positioned above a horizontal line.

BEVERLY T. BEAL, CHAIR
DISCIPLINARY HEARING PANEL