

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Grace Gilchrist Knie, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

**Sep 23 2022**

S.C. SUPREME COURT

STEVEN GILLIAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000769  
\_\_\_\_\_

MOTION FOR APPOINTMENT  
OF OUTSIDE COUNSEL  
\_\_\_\_\_

Undersigned counsel respectfully moves this Court to appoint outside counsel to represent Petitioner in the appeal of the denial of his application for post-conviction relief (PCR). Representation of Petitioner presents the appearance of a conflict of interest, or a potential conflict of interest, for the appellate defenders within the Division of Appellate Defense since Petitioner raised allegations of ineffective assistance of appellate counsel against Chief Appellate Defender Robert M. Dudek, who represented Petitioner on direct appeal, and the PCR judge made specific findings that Mr. Dudek was not ineffective as alleged by Petitioner. Additionally, Petitioner has a history of severe mental illness and was found incompetent to assist with the prosecution of his PCR action during the course of the lower court proceedings making it unlikely Petitioner has the

capacity to waive any potential conflict of interest. In support of this motion, undersigned counsel presents the following:

1. A Richland County Grand Jury indicted Petitioner on February 14, 2001 for the offense of murder. His case was called to trial on February 25, 2002 before the Honorable Marc H. Westbrook, and a jury. Assistant Solicitors R. Knox McMahon and K. Luck Campbell represented the state. Sheila Mims and Beatty Butler represented Petitioner. Petitioner was convicted as indicted and sentenced to life without parole.

2. The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). This Court granted certiorari and affirmed as modified. State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007). The remittitur was sent on June 27, 2007. Chief Appellate Defender Robert M. Dudek represented Petitioner on appeal.

3. On June 4, 2015, nearly eight years later, Petitioner filed an application for post-conviction relief (PCR). On July 24, 2017, the state filed a return to this application and motion to dismiss for failure to comply with the one year statute of limitations. With the assistance of counsel, Petitioner filed an amended application on April 1, 2019, and a second amended application on October 21, 2019, alleging various claims of ineffective assistance of trial counsel. On March 21, 2022, Petitioner filed a third amended application raising a claim of ineffective assistance of appellate counsel concerning Chief Appellate Defender Dudek's representation. Petitioner alleged Dudek was ineffective for failing to argue on appeal that the trial court erred in finding Petitioner competent to stand trial without Petitioner being evaluated by a neuropsychologist.

4. On January 16, 2019, before his evidentiary hearing, Petitioner was evaluated by Dr. Payne with the South Carolina Department of Mental Health pursuant to an order signed by the

Honorable Clifton Newman and filed on July 13, 2018. Dr. Payne opined that Petitioner was not competent to understand the proceedings or assist with the prosecution of his PCR action.

5. The matter proceeded to an evidentiary hearing on March 28, 2022 before the Honorable Grace Gilchrist Knie. Assistant Attorney General David Spencer represented the state, and Nancy Fennell represented Petitioner.

6. At the beginning of the hearing, the state moved to dismiss Petitioner's PCR action for failure to comply with the one year statute of limitations. In response to the state's motion, Petitioner called Donna Schwartz Maddox, who was qualified as an expert in forensic psychiatry. Dr. Maddox discussed Petitioner's history of severe mental illness. Petitioner has been held at Gilliam Psychiatric Hospital, the Department of Corrections' inpatient psychiatric care facility, for the majority of his incarceration. Dr. Maddox asserted that Petitioner is "one of the most psychotic individuals I have ever seen in over 30 years of practice as a psychiatrist." It was her opinion to a reasonable degree of medical certainty that Petitioner was not competent to file a PCR application between June 2007 and June 2008. She further opined that it was unlikely Petitioner regained competency between June 2008 and June 2015 when he ultimately filed his PCR application. At the conclusion of Dr. Maddox's testimony, the state withdrew its motion to dismiss.

7. By order filed April 28, 2022, Judge Knie denied Petitioner relief. The judge made specific findings that Chief Appellate Defender Dudek was not ineffective. Notably, Dudek testified during the evidentiary hearing.

8. Petitioner filed a notice of appeal. Due to his indigent status, the Office of Appellate Defense undertook representation of Petitioner and ordered the transcript of the March 28, 2022 evidentiary hearing. Once the transcript was received, the case was assigned to undersigned counsel. When undersigned counsel reviewed the file, she discovered Chief Appellate Defender

Dudek's representation of Petitioner during his direct appeal, the claim alleging ineffective assistance of appellate counsel concerning Dudek's representation, and the PCR court's order denying Petitioner relief.

9. To the best of undersigned counsel's knowledge, Petitioner has not requested this office file a motion to appoint outside counsel nor has he alleged this office has a conflict of interest or a potential conflict of interest. However, given Petitioner's long history of severe mental illness and previous findings that Petitioner is incompetent, undersigned counsel believes Petitioner would not be competent to waive any potential conflict of interest with counsel's representation.

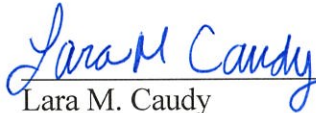
10. Consequently, out of an abundance of caution, undersigned counsel respectfully requests the appointment of outside counsel for Petitioner in light of the appearance of a conflict of interest presented by the representation of Petitioner and this office's employment of Chief Appellate Defender Dudek and undersigned counsel. Rule 1.7(a)(2) of the Rules of Professional Conduct explains that a lawyer has a concurrent conflict of interest "if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities ... by a personal interest of the lawyer." Rule 1.7(a)(2), RPC, Rule 407, SCACR. Due to the employment of Chief Appellate Defender Dudek and undersigned counsel as an assistant appellate defender, a concurrent conflict of interest, or potential conflict of interest, exists among the attorneys in the Division of Appellate Defense. Additionally, undersigned counsel is concerned that representation of Petitioner by this office may result in a Sixth Amendment conflict of interest in light of the claims of ineffective assistance presented to the lower court. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to conflict-free counsel. Mickens v. Taylor, 535 U.S. 162 (2002); Cuyler v. Sullivan, 446 U.S. 335 (1980).

11. The petition for writ of certiorari and appendix are due to be served and filed with this Court on November 14, 2022. No extensions have been requested. This motion is made at this time not to cause any undue delay in the timely disposition of Petitioner's appeal.

12. If outside counsel is appointed, undersigned counsel will immediately provide the attorney with a copy of Petitioner's file.

WHEREFORE, undersigned counsel respectfully requests the appointment of outside counsel to represent Petitioner in his appeal of the PCR court's order denying him relief. Undersigned counsel requests this Court hold the timelines for filing the petition for writ of certiorari and appendix in abeyance pending a decision on this motion.

Respectfully submitted,



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2022