

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Frank R. Addy, Circuit Court Judge

RECEIVED

OCT 15 2013

S.C. Supreme Court

JOSEPH WHITE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2013-001220

MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

Undersigned counsel respectfully moves this Court to appoint outside counsel to represent Petitioner in his appeal of his post-conviction relief matter. Representation of Petitioner presents a conflict of interest for undersigned counsel due to this Office's employment of Robert M. Pachak, who represented Petitioner during his direct appeal and who the PCR judge ruled was deficient, and undersigned counsel who has been appointed to represent Petitioner in his appeal.

Relevant Facts

On March 19, 2009, Petitioner was tried before the Honorable R. Knox McMahon in Lexington County for possession with intent to distribute crack cocaine and possession with intent to distribute crack cocaine within proximity of a school or park. Petitioner was represented by Sara

Hahn and David Mauldin. App. 1. The jury found Petitioner guilty and Judge McMahon sentenced him to fifteen years for possession with intent to distribute crack cocaine and ten years concurrent for the proximity offense. App. 162, ll. 7-22; App. 179, l. 22 - 180, l. 10.

Mr. Pachak filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), on December 2, 2009 arguing the police lack reasonable suspicion to seize Petitioner. App. 221-228. The South Carolina Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. State v. Joseph White, Op. No. 2010-UP-540 (S.C. Ct. App. Filed December 16, 2010).

On July 12, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 182-188. The matter proceeded to an evidentiary hearing on April 16, 2013 before the Honorable Frank R. Addy, Jr. App. 193. Assistant Attorney General J. Walt Whitmire represented the state, and John E. Duncan represented Petitioner. Id.

By order dated May 15, 2013, Judge Addy denied Petitioner relief. App. 229-238. The court found Mr. Pachak deficient for not raising a preserved issue in his Anders brief, specifically whether a certain narcotics agent's opinion testimony was proper. However, the court concluded Petitioner suffered no prejudice because the court presumed the Court of Appeals recognized the issue and did not find it to be an error substantial enough to warrant a reversal of the conviction. Id.

Petitioner filed a notice of appeal. Due to his indigent status, this Office was appointed to represent him. The case was originally assigned to Mr. Pachak. Upon noticing a conflict of interest, Mr. Pachak requested the case be reassigned to a different attorney. The case was reassigned to undersigned counsel on September 16, 2013, after the appendix had already been compiled. Upon a thorough review of the appendix, undersigned counsel discussed the case with Chief Appellate Defender, Robert M. Dudek, regarding a conflict of interest with the appointment of this Office to represent Petitioner. It was determined that a Motion for Appointment of Outside Counsel was the

best course of action after a thorough discussion of the facts of the case where the PCR court found Mr. Pachak deficient but failed to find prejudice stating the Court of Appeal carefully reviewed the record on appeal and still dismissed Petitioner's direct appeal.

The petition for writ of certiorari is currently due on October 16, 2013. One previous extension was granted by an order from this Court the day after undersigned counsel was assigned the case. The motion is made at this time to not cause any undue delay in the timely disposition of Petitioner's matter.

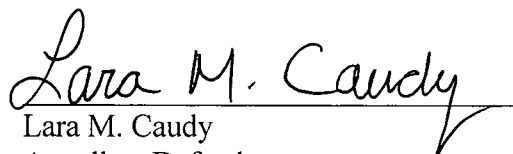
Law and Analysis

Undersigned counsel respectfully requests the appointment of outside counsel for Petitioner in light of the conflict of interest presented by the representation of Petitioner and the Office's employment of Mr. Pachak 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 Mr. Pachak and undersigned counsel by the Office, a current conflict of interest exists among the attorneys in the Office of Appellate Defense. Additionally, undersigned counsel is concerned that representation of Petitioner by the 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, 168 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

Conclusion

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 in abeyance pending a decision on this motion.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

Attorney for Petitioner

This 15th day of October, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Frank R. Addy, Circuit Court Judge

JOSEPH WHITE,

PETITIONER,

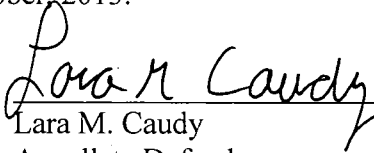
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

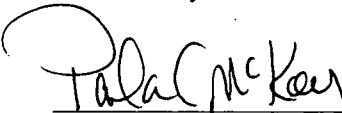
The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Joseph White #306786 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 15th day of October, 2013.



Lara M. Caudy
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 15th day of October, 2013.



(L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

 ORIGINAL

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 15, 2013

RECEIVED

OCT 15 2013

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Joseph White v. State of South Carolina

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Motion for Appointment of Outside Counsel in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

Lara M. Caudy
Appellate Defender

LMC/pcm

Enclosure

cc: John Walt Whitmire, Esquire