



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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

November 5, 2013

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NOV - 5 2013

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

S.C. Supreme Court

Re: Marshall Miller 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,

Robert M. Pachak
Appellate Defender

RMP/pcm

Enclosure

cc: Ashley A. McMahan, Esquire
Mr. Marshall Miller, #249557

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

RECEIVED

NOV - 5 2013

S.C. Supreme Court

MARSHALL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001076

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 because there was an allegation of ineffective assistance of appellate counsel that was raised against Robert M. Dudek, Chief Appellate Defender of the Division of Appellate Defense. Mr. Dudek is the undersigned's supervisor.

Relevant Facts

Petitioner was convicted of conspiracy to traffick in methamphetamine after a jury trial held on January 20 – 30, 2004, before the Honorable Wyatt T. Saunders, Jr., in Abbeville County. Petitioner was tried in his absence. He was represented by Kim R. Varner, Esquire. On August 24, 2004, petitioner was brought before the court and his sealed sentence of twenty-five (25) years was opened and read.

Petitioner appealed his conviction and he was represented by Robert M. Dudek, Esquire, of this office. The South Carolina Court of Appeals affirmed the conviction and sentence on October 19, 2007. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007). A petition for rehearing was denied on January 17, 2008. Petitioner filed a petition for writ of certiorari to the South Carolina Supreme Court on April 21, 2008. The petition was denied on November 7, 2008.

Petitioner filed an application for post-conviction relief on April 20, 2009. He alleged ineffective assistance of trial counsel and appellate counsel. Respondent filed a return dated April 16, 2010. An evidentiary hearing was held on November 30, 2012, before the Honorable R. Lawton McIntosh. Petitioner was present and was represented by John D. Compton, III, Esquire. Respondent was represented by Ashley A. McMahan, Assistant Attorney General. Petitioner testified in his own behalf at the hearing. Both trial counsel and appellate counsel testified in respondent's behalf.

On March 25, 2013, Judge McIntosh issued an order denying and dismissing petitioner's application for post-conviction relief. Judge Lawton made a specific finding that appellate counsel

was not ineffective in “failing to raise the issue of jurisdiction concerning the alleged evidence that was introduced at trial due to its unreliability and jurisdiction and chain of custody.” Order at p. 10.

Petitioner filed a notice of appeal. This office was appointed to represent him and the undersigned is representing him. The petition for writ of certiorari is currently due on December 20, 2013.

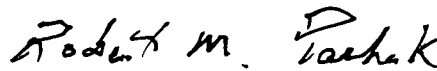
Law and Analysis

Undersigned counsel respectfully requests the appointment of outside counsel for petitioner in light of the conflict of interest presented by the representation of petitioner who was previously represented by Robert M. Dudek, Chief Appellate Defender, and who is alleged to have been ineffective on direct appeal. The undersigned should not have to sit in judgment of his supervisor. 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. 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 State 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). Petitioner has also contacted this office by letter dated May 30, 2013, requesting the appointment of outside counsel because of the conflict of interest.

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 timeliness for filing in abeyance pending a decision on this motion.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

Attorney for Petitioner

This 5th day of November, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

MARSHALL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

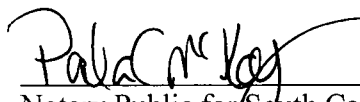
The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Ashley A. McMahan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Marshall Miller, #249557 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 5th day of November, 2013.



Robert M. Pachak
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 5th day of November, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022