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SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

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

April 15, 2014

RECEIVED

APR 15 2014

S.C. Supreme Court

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

Re: Marlon Rivera 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: Karen C. Ratigan, Esquire

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

RECEIVED

APR 15 2014

S.C. Supreme Court

MARLON RIVERA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2013-002652

MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

Undersigned counsel respectfully moves this Court to appoint outside counsel to represent Petitioner in the appeal of his post-conviction relief matter. Representation of Petitioner presents a conflict of interest, or a potential conflict of interest, for the appellate defenders within the Office of Appellate Defense since Chief Appellate Defender Robert M. Dudek represented Petitioner on his direct appeal, testified at the post-conviction relief hearing, and the judge made specific findings that he was not ineffective as alleged by Petitioner.

Relevant Facts

On October 10, 2005, Petitioner was tried before the Honorable C. Victor Pyle, Jr. in Greenville County for murder. Petitioner was represented by Susannah Ross. On October 13, 2005, the jury found Petitioner guilty and Judge Pyle sentenced him to thirty years imprisonment.

Chief Appellate Defender Dudek filed an Initial Brief of Appellant on December 1, 2006 raising five issues. The South Carolina Court of Appeals reversed Petitioner's conviction and sentence and remanded for a new trial after the Court of Appeals found the trial court erred in failing to charge involuntary manslaughter. State v. Marlon Rivera, Op. No. 2008-UP-187 (S.C. Ct. App. Filed March 18, 2008). Since this issue was dispositive, the Court of Appeals did not address the remaining issues raised by Petitioner. Id.

After granting the state's petition for writ of certiorari, this Court reversed the Court of Appeals' decision finding Petitioner was not entitled to a charge on involuntary manslaughter. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010).

On February 17, 2011, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of both trial counsel and appellate counsel. The state filed a return to this application on June 28, 2011. The matter proceeded to an evidentiary hearing on August 26, 2013 before the Honorable Robin B. Stilwell. Assistant Attorney General Karen C. Ratigan represented the state, and J. Falkner Wilkes represented Petitioner.

By order dated November 7, 2013, Judge Stilwell denied Petitioner relief. The court found Chief Appellate Defender Dudek was not ineffective for failing to file a motion to remand the case to the Court of Appeals after this Court issued its opinion in order for the Court of Appeals to address the remaining issues raised in Petitioner's Initial Brief of Appellant.

Petitioner filed a notice of appeal. Due to his indigent status, the Office of Appellate Defense undertook representation. The case was assigned to undersigned counsel on March 14, 2014. Upon receipt of the file, undersigned counsel reviewed the materials and discovered Chief Appellate Defender Dudek's representation of Petitioner during his direct appeal, the claims alleging ineffective assistance of counsel concerning Chief Appellate Defender Dudek's

representation, Chief Appellate Defender Dudek's testimony at the PCR hearing, and the PCR court's order denying Petitioner relief.

The petition for writ of certiorari is currently due on May 30, 2014, and has not been extended by any orders from this Court. The motion is made at this time not to cause any undue delay in the timely disposition of Petitioner's matter.

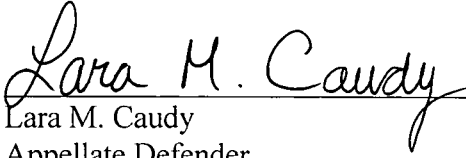
Law and Analysis

Undersigned counsel respectfully requests the appointment of outside counsel for Petitioner in light of the conflict of interest, or potential 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 appellate defender, 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 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, 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 April, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

MARLON RIVERA,

PETITIONER,

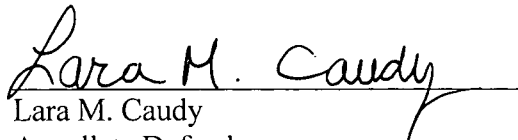
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

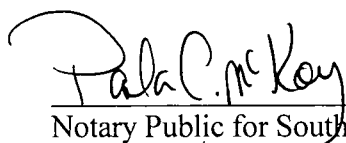
The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Karen C. Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Marlon Rivera #311864 at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 15th day of April, 2014.



Lara M. Caudy
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 15th day of April, 2014.



(L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.