

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

J. Cordell Maddox, Circuit Court Judge

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S.C. SUPREME COURT

EDRICK PEREGO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000928

MOTION FOR THE APPOINTMENT
OF OUTSIDE COUNSEL

Undersigned counsel respectfully moves this Court to appoint outside counsel to represent Petitioner in his appeal of the denial of post-conviction relief (PCR) based on a conflict of interest or the appearance of a conflict of interest. In short, representation of Petitioner will likely require counsel to argue that Hervery Young, Esquire, the Deputy Director and General Counsel of the South Carolina Commission on Indigent Defense, which is the governing agency of which undersigned counsel is a part, provided ineffective assistance of counsel during his representation of Petitioner. Specifically, the order denying Petitioner relief from his convictions and sentences made reference to the following claims for relief, related to the effectiveness of plea counsel, Mr. Young:

(1) failing to investigate, (2) failing to file a notice of appeal following the revocation of Petitioner's probation, (3) advising Petitioner to plead guilty, (4) allowing alleged victim testimony regard unsubstantiated allegations of criminal acts by Petitioner; and (5) failure to use Petitioner's dementia diagnosis to mitigate his conduct.

Procedural history

On April 16, 2013, Petitioner pled guilty to solicitation to commit assault and battery and solicitation to commit kidnapping. The plea judge sentenced Petitioner to ten years imprisonment suspended upon the service of thirty-four days followed by five years on probation. In September 2014, Petitioner was indicted for two counts of arson in the third degree and two counts of attempted murder. On May 13, 2016, Petitioner entered guilty pleas to two counts of third-degree arson and two counts of assault and battery of a high and aggravated nature. Hervery Young, Esquire, represented Petitioner during the guilty plea proceeding. The Honorable R. Scott Sprouse sentenced to ten years imprisonment on each charge. Additionally, Judge Sprouse revoked Petitioner's probation in full, ordering Petitioner to serve ten years imprisonment on those charges as well.

Young filed a timely notice of appeal from the guilty plea, but did not file a notice of appeal concerning the probation revocation. Subsequently, Petitioner withdrew his notice of appeal on December 15, 2016. Petitioner then filed an application for post-conviction relief on June 5, 2017. The Honorable J. Cordell Maddox, Jr., convened an evidentiary hearing on the application on February 21, 2018. Susannah C. Ross represented Petitioner, and Kelly Oppenheimer represented the state. By an order filed April 2, 2018, Judge Maddox denied Petitioner relief. Petitioner filed a motion to alter or amend judgment, which was denied by an order filed on May 9, 2018.

Petitioner served a timely notice of appeal. Thereafter, his case was assigned to undersigned counsel.

Relevant facts

According to the order denying relief, Petitioner and Young testified differently concerning numerous key points during the PCR hearing. For example, Petitioner testified that Young advised him to plead guilty because he would be sentenced to monitored house arrest. Order at 4. In sharp contrast, Young claimed the state agreed to a cap of ten years in exchange for Petitioner's guilty plea, which Young claimed he explained to Petitioner over the course of several visits. Order at 10. Nevertheless, Young stated it was his intention to argue for home incarceration at the guilty plea hearing. Order at 10. Petitioner testified he did not hurt anyone and he did not plan to hurt anyone. Order at 4. Petitioner denied placing a stick in his car to rig it to drive into the bar. Order at 4. In fact, Petitioner explained that he was in his other truck at the time, hit his head on the door, and woke up in the doctor's office, where he was arrested. Order at 4.

According to Petitioner, Young was not prepared for trial, despite Petitioner's desire for a jury trial. Order at 4-5. However, Young claimed he was preparing for a trial from the very first day of his representation of Petitioner. Order at 8. Further, Petitioner explained that he met with Young once or twice and reviewed photographs with Young once, which was the extent of the trial preparations. Order at 5. In contrast, Young claimed the pair met between twenty and twenty-five times, and that he reviewed the discovery with Petitioner in small amounts over time due to Petitioner's advanced age at the time. Order at 7. Petitioner was unaware of any investigation conducted by Young. Order at 6. On this point, Young testified that he hired an investigator to develop evidence to support Petitioner's version of events, but the investigation was not fruitful. Order at 7-8.

Young admitted he failed to file a notice of appeal from the probation revocation, but he claimed this was because he was not involved in the probation cases as they arose from a different county. Order at 11. Nevertheless, Young represented Petitioner during the probation revocation proceedings and because the probation revocation resulted in Petitioner serving a ten-year sentence concurrently with the sentences imposed during the guilty plea, Petitioner would receive no *real* relief from a successful direct appeal of the guilty plea without an accompanying success on the probation revocation. Order at 2.

In the order denying relief, the PCR judge found Young's testimony credible regarding several points. See e.g., Order at 16. To challenge the PCR judge's denial of relief to Petitioner on those grounds on appeal, it may be necessary to challenge Young's credibility.

Law and Analysis

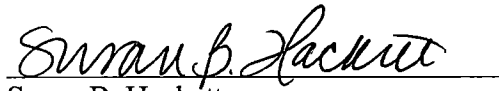
Under the Rules of Professional Conduct, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7(a), RPC, Rule 407, SCACR. "A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Rule 1.7(a)(2), RPC, Rule 407, SCACR. At a minimum, representation of Petitioner on appeal requires evaluation of the merits of Petitioner's claim that Young provided ineffective assistance of counsel. In all likelihood, representation of Petitioner on appeal requires pursuit of an issue claiming error by Judge Maddox in his denial of relief to Petitioner based upon the ineffectiveness of Young's representation. In other words, representation of Petitioner will likely require undersigned counsel to claim Young – her superior – provided ineffective assistance of counsel. Undersigned counsel works for the Division of Appellate Defense, which is a Division of the South Carolina Commission on Indigent

Defense. In order to pursue Petitioner's claim on appeal, undersigned counsel would be required to take a position directly contrary to the Deputy Director and General Counsel of the state agency for which she works. Therefore, there is a significant risk that counsel's representation of Petitioner will be materially limited by her personal interest – her employment.

Conclusion

Undersigned counsel respectfully requests the appointment of outside counsel to represent Petitioner in the appeal of the denial of PCR. Further, counsel respectfully requests the timelines for filing the petition for writ of certiorari and appendix be held in abeyance pending consideration of this motion.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

Attorney for Petitioner

This 18th day of December, 2018.

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CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Motion for the Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Kelly Oppenheimer, Esquire, at the Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, S.C. 29201 and Mr. Edrick Perego at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of December, 2018.



Susan B. Hackett
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 18th day of December, 2018.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2027