

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

J. Derham Cole, Circuit Court Judge  
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APR 04 2019

S.C. SUPREME COURT

ZACOATA LOPEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000320  
\_\_\_\_\_

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 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 counsel against Appellate Defender Joanna K. Delany, who represented Petitioner in his Family Court waiver hearing and during his guilty plea in the Court of General Sessions. In addition, Petitioner asserted ineffective assistance of appellate counsel against Appellate Defender Susan B. Hackett, who represented Petitioner during his direct appeal. The

PCR judge made specific findings that Ms. Delany and Ms. Hackett were not ineffective as alleged by Petitioner. In support of this motion, undersigned counsel presents the following:

1. Petitioner was initially charged in Family Court for armed robbery, first degree burglary, kidnapping, and first degree criminal sexual conduct. The Fifth Circuit Solicitor's Office moved to transfer Petitioner from Family Court to the Court of General Sessions pursuant to S.C. Code Ann. § 63-19-1210(5).

2. The Honorable F. Fraley, Jr. presided over the transfer hearing on February 21-22, 2012, and March 27-29, 2012. Assistant Solicitors Kathryn Luck Campbell, Joanna McDuffie, and Meghan Walker represented the state. James H. May and Appellate Defender Joanna K. Delany, then of the Richland County Public Defender Office, represented Petitioner. At the conclusion of the hearings, Judge Fraley transferred jurisdiction to the Court of General Sessions.

3. A Richland County grand jury indicted Petitioner on April 11, 2012 for first degree burglary, armed robbery, kidnapping, and first degree criminal sexual conduct. On March 12, 2013, Petitioner pled guilty as indicted to all charges without negotiations before the Honorable Thomas W. Cooper, Jr. Assistant Solicitors Kathryn Luck Campbell, Joanna McDuffie, and Meghan Walker represented the state. Jennifer C. Davis and Joanna K. Delany represented Petitioner. Judge Cooper sentenced Petitioner to thirty years for first degree burglary, armed robbery, and first degree criminal sexual conduct. He ordered these sentences be served concurrently. Concerning the kidnapping conviction, Judge Cooper sentenced Petitioner to fifteen years imprisonment suspended to five years probation. He ordered this sentence be served consecutively.

4. The Court of Appeals dismissed Petitioner's direct appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Lopey, Op. No. 2015-UP-012 (S.C. Ct. App. filed January 14, 2015). Appellate Defender Susan B. Hackett represented Petitioner on appeal.

5. On February 5, 2015, Petitioner filed an application for post-conviction relief (PCR). The state filed a return to this application dated June 10, 2015. With the assistance of counsel, Petitioner filed an amended application on August 31, 2015, alleging, as stated, ineffective assistance of plea counsel, Joanna K. Delany, and appellate counsel, Susan B. Hackett. The matter proceeded to an evidentiary hearing on February 1, 2016 before the Honorable J. Derham Cole. Assistant Attorney General J. Clayton Mitchell represented the state, and Anna R. Good represented Petitioner.

6. By order filed February 19, 2019, Judge Cole denied Petitioner relief. The judge made specific findings that Appellate Defenders Joanna Delany and Susan Hackett were not ineffective.

7. Petitioner filed a notice of appeal. Due to his indigent status, the Division of Appellate Defense undertook representation and the case was assigned to undersigned counsel. Upon receipt of the file, counsel discovered Appellate Defender Delany's representation of Petitioner during his Family Court transfer hearing and guilty plea in the Court of General Sessions, Appellate Defender Hackett's representation of Petitioner during his direct appeal, the claims alleging ineffective assistance of counsel concerning both Delany's and Hackett's representation, and the PCR court's order addressing these claims. Notably, Delany testified during Petitioner's PCR hearing. However, Ms. Hackett did not testify.

8. Upon discovering this potential conflict of interest, undersigned counsel discussed the matter with Chief Appellate Defender Robert M. Dudek, who determined, based on the combined nature of both Delany's and Hackett's representation of Petitioner, that the best course of action would be to file a motion to appoint outside counsel.

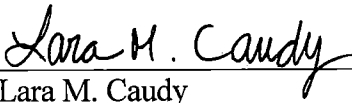
9. Therefore, undersigned counsel respectfully requests the appointment of outside counsel for Petitioner in light of the conflict of interest, or potential conflict of interest, presented by the representation of Petitioner and this office's employment of Appellate Defender Delany, Appellate Defender Hackett, 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 Appellate Defender Delany, Appellate Defender Hackett, and undersigned counsel as an appellate defender, a current 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, 168 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

10. The petition for writ of certiorari and appendix are due to be served and filed with this Court on May 13, 2019. No extensions have been requested. The motion is made at this time not to cause any undue delay in the timely disposition of Petitioner's appeal.

11. 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 and leaves the matter to the sound discretion of this Court. 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,

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of April, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

J. Derham Cole, Circuit Court Judge

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ZACOATA LOPEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

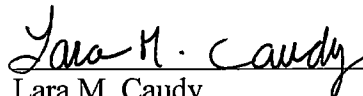
RESPONDENT

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CERTIFICATE OF SERVICE

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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 Samuel Key, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Zacoata Lopey, #354734, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 4th day of April, 2019.



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 4th day of April, 2019.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.





# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

April 4, 2019

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APR 04 2019

S.C. SUPREME COURT

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

Re: Zacoata Lopey v. State of South Carolina  
Appellate Case No. 2019-000320

Dear Mr. Shearouse:

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

Sincerely,

Lara M. Caudy  
Appellate Defender

LMC/sl

Enclosure

cc: Samuel Key, Esquire