

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County
Capital Post-Conviction Action
Honorable Robert E. Hood, Circuit Court Judge

RECEIVED

Sep 11 2025

S.C. SUPREME COURT

GARY DUBOSE TERRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2025-001760

RETURN TO MOTION FOR APPOINTMENT OF OUTSIDE COUNSEL

Undersigned counsel makes the following return to petitioner's motion for the appointment of outside counsel to handle this death penalty post-conviction relief appeal:

1. Petitioner alleges in this post-conviction relief action that he is ineligible for the death penalty because he is intellectually disabled. Atkins v. Virginia, 536 U.S. 306. The Honorable Robert E. Hood denied relief on this claim and petitioner's attorneys, Allison Franz and Brianna Cruz, filed a Notice of Appeal on September 3, 2025.
2. On September 8, 2025, petitioner's counsel filed a Motion for Appointment of Outside Counsel with this Court. Ms. Franz and Ms. Cruz seek appointment by this Court to handle the appeal of Judge Hood's denial of relief.
3. The Motion for Appointment of Outside Counsel recognizes that Appellate Defense is automatically appointed in most capital cases. Mot. App. at 5. The motion correctly cites

S.C. Code Ann. § 17-3-360 for this proposition. Section 17-3-360 states that the Division of Appellate Defense shall represent indigents in appeals from convictions. S.C. Code Ann. § 17-3-360(C). Supreme Court Rule 602 also requires Appellate Defense to represent an indigent accused in mandatory language, stating that Appellate Defense “shall represent the accused until final judgment.” Rule 602, SCACR. Appellate Defense also represents indigents in appeals from post-conviction relief actions. Rule 71.1(g), SCRCP.

4. Appellate Defense does not represent indigents when it has a conflict of interest. S.C. Code Ann. § 17-3-370. This section states, “The provisions of this article shall not restrict a court in which an appeal is to be effected, from appointing counsel for indigent persons when the division is disqualified from representation for reasons of conflict or when the division seems it advisable that it not provide representation for the indigent person.” S.C. Code Ann. § 17-3-370. Reading these statutes and rules together, it is the Legislature’s intent that Appellate Defense represent indigent persons on appeal unless there is a conflict of interest or some other substantial reason in the view of the division.

5. Ms. Franz and Ms. Cruz do not seek appointment because of a conflict of interest on the part of Appellate Defense. Instead, they seek appointment based on judicial efficiency, conservation of resources, and “a right to continuity of counsel.” None of these reasons justify appointing outside counsel. The reasons they claim support judicial efficiency are present in every appeal: trial lawyers are familiar with their trials and pleadings. This general statement, which is true in every case handled by Appellate Defense, is not a sufficient reason to contravene statutes, rules, and longstanding practice requiring Appellate Defense to handle indigent appeals—whether it is an appeal from a minor conviction or a death penalty case like the one at issue here.

6. Appointing outside counsel will not promote conservation of resources. The attorneys of Appellate Defense are some of the most qualified attorneys in the State and are

also salaried employees. Appointing outside counsel in capital litigation matters has traditionally resulted in the payment of significant funds to private counsel. These payments reduce the amount of critical resources available to defend other capital defendants.

7. Nor is there any right to continuity of counsel from the trial stage to the appellate stage. The case cited by Ms. Franz and Ms. Cruz, a case from California in 1968, deals with the summary removal of trial counsel by a trial judge. See Smith v. Superior Court of Los Angeles County, 440 P.2d 65 (Cal. 1968). In Smith, the defendant was tried and sentenced to death. A new lawyer for the defendant argued the motion for a new trial and then won the defendant's appeal. Smith at 66-67. When the case returned to the trial court, the lawyer continued his vigorous representation of the defendant and pursued multiple motions on the defendant's behalf. Id. The trial judge and defense counsel became involved in a dispute over defense counsel's demeanor and the trial judge ultimately removed the attorney and found he was incompetent to handle the capital case. Id. at 67-69. The California Supreme Court reversed and found that defense counsel must be free from the threat of summary removal. The concern of continuity of counsel is valid and important during the trial of any case, especially capital cases, and the rapport between attorney and client is important for many reasons, including investigation of the facts of the case. But in an appeal, counsel is limited to the record before the lower court. Counsel is also given mastery over the selection of issues to raise. Jones v. Barnes, 463 U.S. 745, 753-54 (1983). The United States Supreme Court has also rejected the notion "that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel." Morris v. Slappy, 461 U.S. 1, 13-14 (1983). See also United States v. Parker, 469 F.3d 57, 61 (2nd Cir. 2006) ("There is no constitutional right to continuity of appointed counsel.") (opinion by then-Circuit Judge Sotomayor).

8. Prior Orders of this Court have appointed outside counsel in capital cases when Appellate Defense has a conflict of interest. On the day before this Return was filed, this Court

appointed Justice 360 as counsel for Ricky Lee Blackwell, Sr., because of the existence of a potential conflict of interest for Appellate Defense. See Blackwell v. State, App. Case No. 2025-001377, Order dated Sept. 10, 2025, and Mot. App't Outside Counsel filed July 14, 2025. In Blackwell, and similar capital cases, issues related to the effectiveness of the representation provided by attorneys at Appellate Defense were raised in the PCR actions. See also Robertson v. State, App. Case No. 2023-000505, Order dated May 17, 2023, and Mot. Continue Case Pending App't Outside Counsel filed Mar. 29, 2023; Inman v. State, App. Case No. 2020-000881, Order dated Aug. 24, 2020, and Mot. App't Counsel filed July 10, 2020; Stanko v. State, App. Case No. 2017-000211, Order dated Mar. 24, 2017.

9. No conflict of interest is alleged in the current motion. Without any conflict of interest, the reasons for appointment of outside counsel do not outweigh the statutory intent of the Legislature that Appellate Defense shall handle indigent appeals. Appointing outside counsel here will consume scarce funds needed for capital cases where Appellate Defense has a conflict of interest.

10. If this Court grants the motion and appoints outside counsel, SCCID opposes the appointment of two attorneys. South Carolina Code § 17-27-160(B) provides that in a trial level capital post-conviction relief matter “two counsel shall be immediately appointed to represent the petitioner in this action.” However, this statute clearly provides for the appointment of two counsel only in the circuit court. There is no provision in the statute, court rule, or this state’s case law providing for the appointment of two compensated outside counsel in a capital PCR **appeal** to this Court. Further, S.C. Code Ann. § 17-27-160(B) references S.C. Code Ann. § 16-3-26 as to funding for PCR lawyers. This section provides that the trial court shall appoint “two attorneys to defend such person in the *trial of the action*” when the death penalty is sought in a murder case. S.C. Code Ann. § 16-3-26(B)(1) (emphasis added).

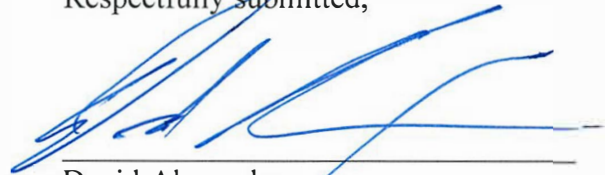
Likewise, no provision exists for two attorneys to be compensated for the direct appeal of an indigent person in a death penalty case.

11. In recent cases where this Court has appointed more than one attorney to a capital appeal, it has required that they split the statutorily allowed compensation. See Blackwell (“Ms. Vann and Ms. Major shall split any compensation associated with the appointment.”); Inman (“Mr. Grose and Ms. Holt shall split any compensation associated with the appointment.”). SCCID’s interpretation of these Orders is that the statutory cap applies and both attorneys would split the compensation, as compensation limits are established per case, not per attorney. The maximum amounts in capital appeals are established by budget proviso. The most recent General Appropriations Act (H. 4025), Proviso 61.3 (Appellate Conflict Fund) establishes a maximum fee of \$10,000.00 per capital appeal, regardless of the number of attorneys.

12. SCACR, Rule 602(h) also establishes any combined fees shall not exceed case maximums. Rule 602(h) states: “in any case in which more than one attorney is appointed to represent a defendant, the combined fees paid to such attorneys shall not exceed the maximum amounts as provided by statute relating to indigent representation”.

WHEREFORE the motion for the appointment of outside counsel should be denied and the deadlines in this case should be held in abeyance pending decision on this motion. Alternatively, appointment and compensation should be limited to that provided for one attorney and the statutory maximum.

Respectfully submitted,



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This 11th day of September, 2025