

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Cherokee County

Honorable J. Michael Baxley, Circuit Court Judge

RECEIVED

JUL 18 2012

JONATHAN KYLE BINNEY,

RESPONDENT/PETITIONER  
S.C. Supreme Court

v.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT

RETURN TO MOTION FOR APPOINTMENT  
OF OUTSIDE COUNSEL

Undersigned Counsel makes the following return to the motion for appointment of outside in this case.

1. Mr. Binney was represented at the PCR hearing by Emily C. Paavola, John Blume, and Sheri L. Johnson. Counsel Blume has moved this Court for the appointment of outside counsel, Emily Paavola. The motion states that John Blume and Sherri Lynn Johnson will assist Ms. Paavola in a *pro bono* capacity if Ms. Paavola is appointed.

2. Petitioner asserts that outside counsel should be appointed because: (a) the Office of Appellate Defense has a conflict of interest given that former Chief Attorney was appellate counsel [in this case on direct appeal]; (b) issues regarding the competency of his representation will be raised in the instant appeal; and, (c) Ms. Paavola is familiar with the

trial and PCR record, and thus, even aside from the conflict of interest, is better situated to provide the best representation on appeal.

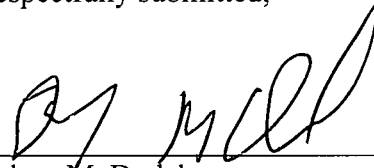
3. Petitioner also asks that the time to order the transcripts and prepare the appendix be tolled while this motion is pending in this court.

4. Defense counsel John Blume asserts that claims against former Chief Appellate Defense, Joseph L. Savitz, III, will be raised before this Court on appeal. Undersigned counsel's review of the order of dismissal reveals that there were "[f]ive allegations of ineffective assistance of counsel that the Court discusses individually below." Order of Judge Baxley at 56. These include the failure of appellate to argue on appeal that the judge erred by admitting inflammatory photographs of the victim of a prior crime. Order at 57-61. The order also addresses the failure to raise the refusal to suppress child pornographic images taken from Mr. Binney's computer. Order at 61-63. In addition the order discusses the failure to raise the issue of a late indictment amendment allegedly to conform to the evidence. Order at 63-66. The next allegation discussed was the failure to raise the issue that Mr. Binney's confession should have been excluded. Order at 66-67. Finally, the order addressed appellate counsel not raising the issue that sentencing a person to death who was mentally ill when he committed the crime violated the Eighth Amendments ban on cruel and unusual punishments. Order at 68-69.

(5) Given the nature and number of allegations of ineffective assistance of appellate counsel that were addressed by the PCR court, and the assurance of Counsel Blume that the representation of Joseph L. Savitz, III., will be an issue before this Court during this appeal, the motion raises ethical concerns. Further, since Ms. Paavola is familiar with the case as PCR counsel, and Mr. Blume and Ms. Johnson will serve as *pro bono* counsel on this appeal

if Ms. Paavol is appointed as outside counsel, undersigned counsel agrees, *under the highly unusual circumstances of this appeal*, that outside counsel should be appointed to represent Jonathan Binney.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

July 18, 2012

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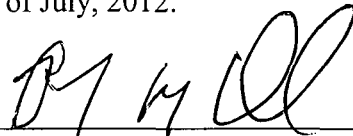
PETITIONER/RESPONDENT

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CERTIFICATE OF SERVICE

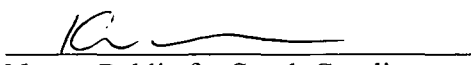
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The undersigned attorney hereby certifies that a true copy of the Return to the Motion for Appointment of Outside Counsel in the above referenced case has been served upon John Blume, Esquire; Emily Paavola, Esquire; Sherri Lynn Johnson, Esquire; and William Edgar Salter, III, Esquire, this 18<sup>th</sup> day of July, 2012.



Robert M. Dudek  
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me  
this 18<sup>th</sup> day of July, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013.