

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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Case No. 06-CP-11-223

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Jonathan Kyle Binney, #6009, *Pertitioner-Respondent*,

v.

State of South Carolina, *Respondent-Petitioner*.

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**RECEIVED**

JUL 11 2012

**S.O. SUPREME COURT**

**PETITION FOR REHEARING**

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**JOHN H. BLUME**  
Cornell Law School  
158 Myron Taylor Hall  
Ithaca, NY 14853  
(607) 255-1030

**EMILY C. PAAVOLA**  
Death Penalty Resource & Defense Center  
900 Elmwood Ave., Suite 101  
Columbia, SC 29201  
(803) 765-1044

## REASONS REHEARING SHOULD BE GRANTED

Petitioner-Respondent, Jonathan Binney, moves for rehearing in the above captioned matter. In support of the motion, Mr. Binney would inform this Court of the following relevant facts and legal principles.

1. Mr. Binney was convicted of murder and first degree burglary and sentenced to death. This Court affirmed his convictions and sentence, and the United States Supreme Court denied certiorari. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418, *cert. denied*, 546 U.S. 852 (2005). Mr. Binney filed a timely application for post-conviction relief. Following the PCR hearing, the Honorable J. Michael Baxley vacated Mr. Binney's death sentence and ordered a new sentencing proceeding, but Judge Baxley denied Mr. Binney's claims challenging his convictions. Mr. Binney filed a Notice of Appeal, as did the State.

2. At some time unknown to undersigned counsel, counsel for the State provided this Court with a letter from Mr. Binney dated May 21, 2012, indicating that Mr. Binney did not wish to pursue the appeal. On July 2, 2012, this Court remanded the matter to Judge Baxley for a determination of whether Mr. Binney is competent and his decision to waive his right to petition this Court for a writ of certiorari is knowing and voluntary. This Court appointed undersigned counsel to represent Mr. Binney in the competency proceeding. Mr. Binney now moves this Court to withdraw its July 2, 2012 Order requiring a competency hearing because he no longer wishes to drop his appeal. See July 5, 2012 Letter from Jonathan Binney, attached as Exhibit A.

3. Undersigned counsel would also inform the Court that Mr. Binney previously made a similar request to waive post-conviction review and then subsequently withdrew that request as well. See February 6, 2012 Letter from Jonathan Binney, attached as Exhibit B. Mr. Binney has

a long-standing history of depression and suicidal ideation. Moreover, Mr. Binney's mother recently died and his father has announced plans to re-marry and move to another country. Like many other South Carolina death row inmates, Mr. Binney has also been distraught in recent months due to excessively harsh and likely unconstitutional prison conditions. *See Kirby v. Blackledge*, 530 F.2d 583 (4th Cir. 1976); *see also Hearn v. Terhune*, 413 F.3d 1036 (9th Cir. 2005); *Delaney v. DeTella*, 256 F.3d 679 (7th Cir. 2001); *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803 (10th Cir. 1999); *Divers v. Dep't of Corr.*, 921 F.2d 191 (8th Cir. 1990). South Carolina's death row inmates have not been allowed out-of-cell exercise since November of last year. The inmates are removed from their cells only for showers or visitation. They have been told that these conditions are likely to continue until at least August of 2012. Despite repeated requests from inmates and attorneys, the South Carolina Department of Corrections has not corrected this issue. *See Letters to SCDC Officials Regarding Prison Conditions*, attached as Exhibit C. These conditions have further contributed to Mr. Binney's depression.

4. Mr. Binney does not, however, actually desire to waive his appeal. As evidenced by his most recent letter, Mr. Binney asks this Court to disregard his previous letter and to allow the appellate process to proceed in this case.

**CONCLUSION**

This Court should grant rehearing and withdraw its order requiring a competency determination on the basis that Mr. Binney does not desire to waive or forfeit the appeal in this case.

Respectfully submitted,

**JOHN H. BLUME**  
Cornell Law School  
158 Myron Taylor Hall  
Ithaca, NY 14853  
(607) 255-1030

**EMILY C. PAAVOLA**  
Death Penalty Resource & Defense Center  
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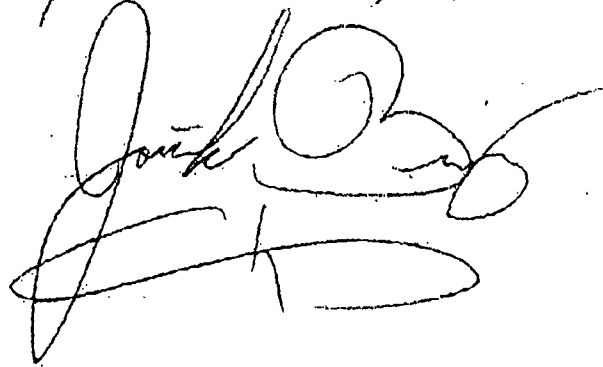
BY: Emily C. Paavola  
COUNSEL FOR PETITIONER-RESPONDENT

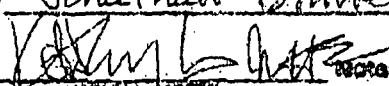
July 10, 2012

July 5th, 2012

To the State Supreme Court of South Carolina

I do not wish to waive my appeals at this time.  
It is my request that you re-instate my appeals and disregard my previous letter.



Dorchester County, State of South Carolina  
Subscribed and sworn to before me  
this 5th day of July, 2012  
by Jonathan Binney  
  
Kathy Lockett, Secretary Public  
My commission expires December 22, 2021

# Exhibit B

Feb. 06, 2011

Judge Baxley,

This is a request to withdraw the request to stop my appeal.  
Please reinstate my appeals.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jonathan W. ...". The signature is written in black ink and is positioned below the word "Sincerely,".

# Exhibit C

John R. Mill

John R. Mill  
1000 10th Street, Suite 100  
Ridgely, MD 21117  
Tel: 410-786-1111  
Fax: 410-786-1112

Date: January 5, 2012

Mr. Wayne McCabe  
P.O. Box 205  
Ridgeville, CT 06472

Re: Concern re. Recreation Time

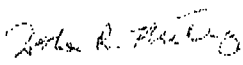
Dear Mr. McCabe:

I am writing because it has come to my attention that inmates on death row have not received recreation in a couple months and that they will not be able to do until at least March.

This concerns me for several reasons. I worry that these inmates are being subjected to conditions that may have serious effects on their physical and mental wellbeing. I also worry that the safety of the inmates and correctional officers may be compromised by the volatile situation created by giving such little recreation.

I'm sure that you share these concerns and I appreciate your prompt attention to this matter.

Sincerely,

  
John R. Mill  
Attorney

cc: Louis Michael Winkler

**John R. Mills**

201 W. Main Street, Suite 301 • Durham, NC 27701  
Phone: 919 251 6259 • Fax: 919 237 9254 • E-Mail: john@jrmillslaw.com  
Web: jrmillslaw.com

Date: April 13, 2012

Mr. Wayne McCabe  
P.O. Box 205  
Ridgeville, C 29472

Re: Concern re: Recreation Time

Dear Mr. McCabe:

I am writing over my concern that the inmates on death row are still not receiving recreation time. I previously wrote in January, and in response to that letter you wrote that you expected the renovation to conclude and for recreation time to resume in March 2012. It has come to my attention that the prison has not yet completed the renovations and does not expect to until May.

I am writing because I am concerned that the inmates' physical and mental health may be unnecessarily compromised by this now nearly six-month stretch without access to recreation time. I understand that construction projects frequently run beyond their estimated schedule, but I suspect there may be other options for inmates to have an opportunity to move around outside of their cells. There seems to be other reasonably available alternatives, such as using the common room as an area in which inmates could walk around or using the recreation yard accessed by other prisoners at Lieber.

I am sure you share these concerns, and I look forward to hearing from you.

Sincerely,



John R. Mills  
Attorney

cc: Louis Michael Winkler



July 3, 2012

Robert Ward, Deputy Director of Operations  
South Carolina Department of Corrections  
P.O. Box 21787  
Columbia, SC 29210

David Tatarsky, General Counsel  
South Carolina Department of Corrections  
P.O. Box 21787  
Columbia, SC 29210

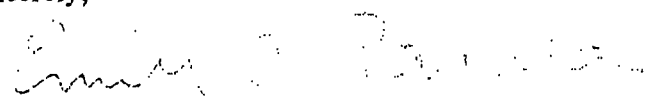
Dear Sirs:

I represent an inmate housed on Lieber Correctional Institution's death row. I am writing to express my concern over the prison's ongoing violation of my client's right to out-of-cell exercise. No one on death row has had access to out-of-cell exercise since November of last year. It is also my understanding that August of 2012 is the earliest that my client is likely to receive access to out-of-cell exercise. I am concerned about the physical and psychological toll being taken on my client and the other men on Lieber's death row.

Out of cell exercise is one of the basic human necessities protected by the Eighth Amendment to the United State Constitution. Courts, including courts with jurisdiction over Lieber, have long held that depriving inmates of out-of-cell and outdoor exercise violates inmates' rights. See *Kirby v. Blackledge*, 530 F.2d 583 (4th Cir. 1976); see also *Hearns v. Terhune*, 413 F.3d 1036 (9th Cir. 2005); *Delaney v. DeTella*, 256 F.3d 679 (7th Cir. 2001); *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803 (10th Cir. 1999); *Divers v. Dep't of Corr.*, 921 F.2d 191 (8th Cir. 1990). The situation at Lieber, where no one on death row has had access to out-of-cell exercise since November of last year, is inhumane and unconstitutional.

I am writing to request that the South Department of Corrections immediately correct this injustice. A failure to do so will require me to advise my client to seek legal recourse.

Sincerely,

  
Emily C. Pavola

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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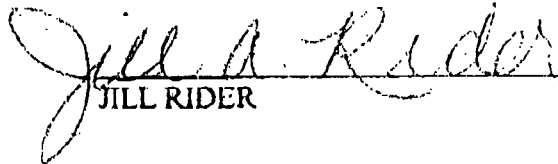
**CERTIFICATE OF SERVICE**

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I, Jill Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of Petitioner's Petition for Rehearing in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

William Edgar Salter, III  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549

This the 10th day of July, 2012, in Columbia, South Carolina.

  
JILL RIDER

§ e of South Carolina  
The Circuit Court of the Fourth Judicial Circuit

J. Michael Baxley  
Judge

531 East Carolina Avenue  
Hartsville, SC 29550-4311  
Phone: (843) 383-4114  
Fax: (843) 383-4116  
jbaxleyj@sccourts.org

**FAX COVER SHEET**

To: Daniel E. Shearouse, Clerk of Court  
Fax Number: 803-734-1499  
From: Judge Baxley  
Date: July 11, 2012

**Comments:**

Attached are the Jonathan Binney documents that we spoke about on the phone this morning.  
Thank you for your assistance in this matter.

**RECEIVED**  
JUL 11 2012  
S.C. SUPREME COURT

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