

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Cherokee County
The Honorable J. Michael Baxley, Circuit Court Judge
Appellate case No. 2012-212107

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APR 17 2013

S.C. Supreme Court

JONATHAN KYLE BINNEY,

Petitioner-Respondent,

vs.

THE STATE,

Respondent-Petitioner.

MOTION TO FILE REPLY TO RETURN
TO PETITION FOR WRIT OF CERTIORARI

Respondent-Petitioner, State of South Carolina would respectfully move the Court, pursuant to Rule 242(c), SCACR, for permission to file out of time a Reply to the Return to Respondent-Petitioner's Petition for Writ of Certiorari filed by the Petitioner-Respondent, Jonathan Kyle Binney. Specifically, Respondent seeks permission to address the additional sustaining ground raised in the Return:

The PCR Court's order granting Petitioner a new sentencing trial should also be sustained because trial counsel provided ineffective assistance in the penalty phase when, despite knowing that Petitioner's birth mother was an alcoholic who drank heavily throughout her pregnancy, they failed to investigate, retain an appropriate expert, and present mitigating evidence that Petitioner suffers from Fetal Alcohol Spectrum Disorder.

In support of this motion, Respondent would respectfully show unto the Court that:

I.

This case involves cross-appeals from the partial grant of Post-Conviction Relief to the Petitioner-Respondent, who is a Cherokee County death row inmate. The Return to Respondent-Petitioner's Petition for Writ of Certiorari filed by the Petitioner-Respondent is dated March 20, 2013 and was received by the State on March 22, 2013. Thus, under Rule 243(c), the Reply was due to be filed on April 1, 2013. *See* Rule 263(a), SCACR.

II.

Counsel did calendar and file pleadings in six other cases in the week leading up to April 1, 2013, including two that were due on April 1st. However, the due date for the Reply was not calendared for a response through inadvertence and mistake. As a result, that deadline was missed. The undersigned discovered this oversight on April 16, 2013, when beginning the preparation of writing a Return to Binney's certiorari petition, which is due to be filed on April 22, 2013.

III.

Respondent-Petitioner further submits that the grant of this relief would be appropriate since this case and the issues presented in it are important to both parties as it is a capital case, and the record supports the PCR judge's denial of relief on the issue raised as an additional sustaining round. Respondent-Petitioner has attached a Reply to Return to State's Petition for Writ of Certiorari, which is also being served on counsel for Mr. Binney.

Wherefore, Respondent-Petitioner would respectfully ask this Court permission to file out of time a Reply to the Return to Respondent-Petitioner's Petition for Writ of Certiorari filed by the

Petitioner-Respondent. Respondent would further ask the Court to accept the attached Reply for filing.

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April 17, 2013.

By: 

ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of April, 2013, he served the Respondent-Petitioner's Motion to File Reply to Return to Petition for Writ of Certiorari on counsel for the Petitioner-Respondent by depositing two copies of same in the United States mail, first class, postage prepaid, and addressed as follows:

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