

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 22 2013

S.C. Supreme Court

JONATHAN KYLE BINNEY, #6009,

Petitioner-Respondent,

vs.

THE STATE,

Respondent-Petitioner.

**MOTION TO STRIKE FROM PETITIONER-RESPONDENT'S OF CERTIORARI
PETITION FOR WRIT INFORMATION FOUND IN EXHIBIT
THAT WAS RULED INADMISSIBLE AT PCR HEARING**

Pursuant to Rule 243(g), SCACR, the undersigned counsel for Respondent respectfully asks this Court to strike matter from the Petition for Writ of Certiorari for the following reasons:

This is a capital case on certiorari following the denial of Post-Conviction Relief as to all guilt phase claims and all sentencing phase claims except for the PCR judge's finding that trial counsel were ineffective in failing to object to the sentencing phase instruction that the jury "may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy."

In his Petition, Petitioner-Respondent Binney claims that the PCR judge erred by finding that (1) trial counsel were not ineffective for failing to adequately investigate and present evidence

concerning the possibility that the victim's husband may have had some involvement in her death; and (2) trial counsel were not ineffective in failing to develop and present evidence to support their theory that Binney entered the victim's home with the intent to commit suicide.

The Appendix to the Petition for Writ of Certiorari contains four exhibits that were not introduced at the PCR hearing: **Applicant's Exhibits 11-14 for ID, Court's Exhibit 3 (App. 4930-71)**. In the following paragraph found at **Petition, p. 9**, Binney relies upon **Court's Exhibit 3**:

As a result of Judy's death, Allan Southern received approximately \$100,000 in life insurance funds and kept nearly \$90,000 in property they owned, as well as at least three businesses, without the division that would have inevitably resulted from a divorce. *App. p. 4930-4971*. Allan purchased a new truck for himself and another one for Roy Chapman. He also installed an in-ground pool and made other improvements to his home and properties. *App. p. 4572; 4930-4971*.

The record reflects that the PCR judge excluded **Defendant's Exhibit 11 for I.D.** on the State's objection that it was irrelevant and it was marked as **Court's Exhibit 3**. Moreover, Respondent would note that this exhibit was not offered in connection with the present allegation. Rather, Binney argued before the PCR judge that was relevant evidence of a possible conflict of interest based upon the fact that an attorney who represented a prosecution witness in Binney's case was counsel for the probate of the victim's estate. **See App. 3951; 4382; 4683, line 21 - p. 4406, line 1.**

Therefore, Respondent would ask the Court to strike the first sentence from the quoted paragraph and all information in the second sentence from that paragraph that is based solely on **Court's Exhibit 3**, as opposed to the testimony of trial counsel.

Respectfully submitted,

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April 22, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of April, 2013, he served the Respondent-Petitioner's Motion to Strike 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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