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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

APPELLATE CASE NO. 2019-001008

Opinion No. 28145 (S.C.Sup.Ct. filed March 29, 2023)

CAPITAL CASE

THE STATE,……………………………………………………………………RESPONDENT

v.

TIMOTHY RAY JONES, JR.,………………………………………………………APPELLANT

RETURN TO PETITION FOR REHEARING

On March 29, 2023, this Court issued a published opinion affirming the convictions and sentence in the captioned case. Pursuant to Rule 221(a), SCACR, Appellant filed a petition for rehearing on April 13, 2023. On that same day, the court called for a return.[1] This return follows.

According to Rule 221(a), SCACR, a petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." Appellant has failed to identify any fact or point of law actually overlooked or misapprehended by this Court which is critical or dispositive of the issues presented. Moreover, Respondent submits that this

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[1] The request provided for a return to be filed within 10 days. The tenth day fell on Sunday, April 23rd, and per the court rules, this return is timely filed today, Monday April 24th. *See* Rule 263, SCACR.

Court's opinion reflects a comprehensive evaluation of the facts and law going to each of the issues presented and that affirmance was correct. Respondent does maintain that there was no error in admission of the photographs or in the trial court's prohibiting the Flores testimony, nevertheless, the record well and fully supports that if error, both could only be harmless as this Court has resolved. As such, Respondent submits the petition should be denied. In support of its position, Respondent would respectfully show the Court:

I. Neither the Eighth Amendment nor Due Process require that jurors be informed what occurs after a verdict for Not Guilty by Reason of Insanity.

Appellant asserts again that the jury should be informed as to what occurs upon a verdict of NGRI. Specifically, in the petition for rehearing, Appellant argues that even though he asserted in briefing to this Court that the denial to do so at his trial was a violation of the Eighth Amendment and Due Process, this Court failed to address the federal component to his argument. (Pet. 1-2). However, Appellant shows no error in the opinion and his offered federal basis is not applicable and need not be addressed.

First, this Court correctly resolved that such instruction is not warranted or allowed. (Op. 11-12). It is plainly correct that NGRI is a guilt phase determination, not a sentencing phase determination. The jury need not be instructed of a circumstance that has no bearing on what they are tasked to decided. As to instruction at qualification, this Court properly noted that

> *Voir dire* is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular predispositions. In our view the discovery and elimination of biased or prejudiced jurors during *voir dire* does not require that they first be informed of the consequences of each potential verdict.

(Op. at 12).

Appellant's "necessity" argument misses the mark. And further, without question, a capital jury does not determine any sentence upon a verdict of not guilty by reason of insanity. This fact is far from an "arbitrary and imaginary line" drawn by this Court, (Pet. at 4), rather, it is the reality of procedure. Again, Appellant's argument misses the mark. Moreover, even though Appellant continues his argument that the jury should know what happens upon such a finding, he has failed to offer any valid reason they must know the consequences of the verdict to carry out their duties as fair and impartial jurors for guilt.

To the contrary, Appellant's suggestion for an instruction, if accepted, appears far more prejudicial to him than possibly beneficial. Appellant's speculative argument that "[k]eeping the truth from the jury allows the state to capitalize on juror's fears that a dangerous defendant will go free if they render an NGRI verdict," (Pet. 4), fails to consider the important counterpoint that if the jury is made aware that a defendant who has committed a gruesome murder is exposed only to a few months in a mental hospital may be prejudicial to the defense. A jury may consider the commitment tantamount to no punishment at all and wholly unacceptable – a situation actually highlighted in *State v. Huiett,* 271 S.C. 205, 246 S.E.2d 862 (1978):

> At the first trial of this case without the commitment charge a mistrial was declared when the jury could not reach a verdict after seven hours. Here, with the commitment charge, the jury was able to return a guilty verdict after only thirteen minutes. The prejudice to appellant is manifest.

Id., at 210.

Lastly, this Court did not need to address the federal law arguments as those arguments were not necessary to the resolution of the issue. Appellant's offered support goes to either capital sentencing, incompetency barring execution, or exemptions from execution. (Pet. 2-3). That cited federal law is not applicable in these circumstances separating sentencing duties (for

all the reasons outlined in the opinion) and is not applicable given the instruction-based request as such a request cannot go to incompetency to be executed or exemption from execution. Again, the Court did not err by declining to address arguments that are not necessary to the resolution of the issue. Consequently, rehearing is not necessary.

II. Juror #338 was properly disqualified.

Appellant ties his request to rehear this issue with his request to rehearing the NGRI verdict consequence argument. (Pet. 4). Missing from his argument is the basis for the disqualification. The juror admitted "she could not consider an NGRI verdict unless she was informed of its consequences," thus, she could not discharge the required duties. (Op. 11). The more subtle point here is not whether the law should be changed, but the fact the juror simply had an "inability to render a verdict according to law." (Op. 11). That would be true regardless of a subsequent change (though a change is not warranted at all as discussed above). At any rate, the fact that she could not "faithfully discharge [her] responsibilities as a juror under the law," is a sound basis for disqualification. *See State v. Green,* 301 S.C. 347, 355, 392 S.E.2d 157, 161 (1990). Appellant has shown no cause for rehearing.

III. The Mississippi roadblock did not violate the Fourth Amendment.

Appellant contends "this Court misapprehended" the ruling in *Delaware v. Prouse,* 440 U.S. 648 (1979) and *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000), in finding "the checkpoint was precisely the type of checkpoint suggested" as proper by the Supreme Court. (Pet. 5-6; Slip. Op. 15). As this Court found, the record supported that the "primary purpose … was highway safety" and narrowed to checks for "driver's licenses, vehicle registrations, and proof of insurance." (Op. 15). In *Edmond,* the United States Supreme Court decided,

> We nonetheless acknowledge that States' "vital interest in ensuring that only those qualified to do so are permitted to operate motor

> vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." Accordingly, we suggested that "questioning of all oncoming traffic at roadblock-type stops" would be a lawful means of serving this interest in highway safety.

531 U.S. at 39 (*quoting Prouse,* 440 U.S. at 663).

There is no error, and no basis for rehearing.

Further, though not mentioned in the opinion, in Mississippi, there is a Court of Appeals decision on point that works against Appellant's suggestion of pretext. (See Pet. 6-7). In *Briggs v. State,* 741 So.2d 986 (Miss.Ct.App. 1999), the Mississippi court decided that the issue of roadblock type checkpoints where every vehicle is stopped versus random stops of individual vehicles not under any suspicion seems to serve as the dividing line between constitutionally permissible police activity and unreasonable intrusions into the personal security of motorists. *Briggs,* 741 So.2d at 989. This further shows the intent to follow the law, not to create pretext under the law.

Appellant also continues to deride the reasons for this checkpoint as stemming from boredom alone. (See Pet. 5, 9). But this was a necessary measure to ensure that individuals within that county abide by the laws of the road ensuring the safety of their citizens. And contrary to Appellant's argument there were no limits on discretion, (see Pet. 9), the guidelines were stated by Undersheriff Patterson during his trial testimony and included a requirement that officers must have permission to conduct the stops at all:

1. You must have a safe place in order to stop vehicles. A place where vehicles can pull over on the side so oncoming traffic would not be blocked;

2. During the commission of the checkpoint the deputies must have their blue lights on at all times;

3. You must have two or more vehicles at the checkpoint;

4. You must check <u>every</u> vehicle that comes through;

5. You must have your safety clothing on and what is used as a reflective vest;

6. You must first get permission before the checkpoint can take place. This approval must come from the Sheriff and if he is not available from the Undersheriff.

(R. p. 2780 l. 10-13).

Deputies Charles Johnson and Wayne Thompson testified that they followed the Smith County Sheriff Department guidelines for posting a safety checkpoint. They got permission from Undersheriff Marty Patterson, (R. p. 2740 l. 24- p. 2741 l. 1), they chose Mississippi highway 18 due to it location near the city limits so it had adequate lighting and the fact it had wide shoulders on both sides in order for someone to pull over without blocking the highway, (R. p. 2780 l. 19-22), both officers only checked driver licenses, proof of insurance, and child restraints, (R. p.6648 l. 7-9), deputies used their flashlights for the purpose of stopping oncoming vehicles, and both deputies were wearing reflective gear and stopped every car that approached per policy. (R. p. 6650 l. 8 – p. 6652 l. 4). The deputies followed every guideline that was expected of them in order to have a lawful checkpoint.

This Court correctly rejected Appellant's arguments both based on the facts of record and under the correct and prevailing law. Rehearing is not warranted.

IV. The photographs that were admitted into evidence, although gruesome, were admissible in sentencing and a harmless error analysis unnecessary; however, the Court correctly found that any such error was harmless in light of the facts and circumstances of this case and Appellant is not entitled to any relief.

Appellant embraces the finding of error but contends that this Court "overlooked the application of *State v. McClure,* 342 S.C. 403, 537 S.E.2d 273 (2000)" in conducting the harmless error analysis. (Pet. 10). In *McClure,* this Court merely "note[d] that the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because

of the discretion that is given to the sentencing jury." *Id.,* 342 S.C. at 409, 537 S.E.2d at 275. Yet in *McClure* this Court conducted the proper analysis of the potential impact of the solicitor's improper argument. *Id.* To the extent Appellant is suggesting that prejudice cannot be assessed, he is incorrect.

Further, at issue here was the admission of autopsy photographs, evidence unique in its reflection not just of the victim but of the murderer. The admissibility of the photographs here is the one point on which the Court was not unanimous. Respondent agrees with Justice Few: "There is hardly anything 'unfair' in allowing the jury to see – not just hear – what this man did to the bodies of his children." (Op. 37, Few, J.). Respectfully, this Court's decision finding error places far too much emphasis on the decomposition of the children's bodies. That, too, is a reflection of Appellant – it is precisely what he intended. The majority appears to agree with this point, in part, as it noted in the harmless error analysis that the evidence shows Appellant's "*calculated* efforts to dispose of his children's bodies in a remote area to evade responsibility for what he had done." (Op. 35) (emphasis added). No one removed the bodies from his possession and placed them in the open without Appellant's knowledge. He did that. And the photographs precisely reflect what happened, his "purpose of having them deteriorate to the condition shown in the photographs." (Op. 37, Few, J.).

Further still, while it is very logical that "even without photographs such as these, evidence of what this man did to his children certainly caused a forceful, emotional reaction from the jury," (Op. 37, Few, J.), that only reinforces the response is due *to Appellant's actions*, *his intent and character* – a precise and correct focus for the sentencing phase. At any rate, that the photographs show what Appellant did is simply inescapable, and Respondent urges the Court to reconsider and resolve that the photographs were, in fact, probative.

But Respondent also recognizes that if the photographs were indeed admitted in error (which it maintains there was none), such error could only be harmless for much the same reason – the actions are admissible, and they will logically evoke "a forceful, emotional reaction" (Op. 37, Few, J.), but not from unfair prejudice. Stated differently, the "prejudice" is not "unfair," but a natural product of Appellant's acts. What Appellant essentially asks this Court to do is find he was "unfairly" prejudiced by the fact that his crimes were so bad that no jury can fairly decide his punishment if they *see* (rather than only hear) what he did. Again, that is not *unfair* prejudice. It cannot be. Moreover, if viewed in this way, Appellant's reference to *McClure* is even more solidly against him.

In *McClure*, at issue was the solicitor's arguments going to lack of remorse. This Court found reversible error because the argument "focused the jury's attention on *an improper consideration*—on whether appellant had to testify and express remorse to avoid the death penalty," and agreed with "the trial judge" that "the issue of appellant's remorse" implicated the consideration of "'future dangerousness.'" 342 S.C. at 409, 537 S.E.2d at 275 (emphasis added). The majority found the photographs were inadmissible by drawing a line, separating what they showed about Appellant at the time of the murder and a limited point beyond, compared to showing of deterioration. Specifically, the majority determined that the bodies were not in exactly the same condition as they were at the moment Appellant dropped the garbage bags with the children's remains in the remote area, and that the decomposition made the illustration of their injuries too unclear. (Op. 34). The majority also resolved though that even if probative, there was a danger of "unfair prejudice" because the bodies had decomposed and ravaged by animal life. (Op. 34). But again, Respondent agrees with Justice Few that Appellant's "crimes were unspeakable; his efforts to get away from his crimes were unconscionable; he is despicable.

The photographs show all that, and thus the photographs have probative value." (Op. 37, Few, J.). Respondent, though, also agrees that if admitted in error, the admission could only be harmless for all the reasons explained – the depravity of the crime and Appellant's calculated steps for the disposal of the children as listed in the opinion. (Op. 35).

In sum, Respondent would respectfully urge the Court to reconsider finding error at all. Respondent urges the Court to consider that even the most difficult to view photographs of the most innocent of victims, as are the photographs of the children here, should not be suppressed under the law. But Appellant has, for all the reasons asserted above, failed to show that rehearing is warranted on the harmless error analysis.

V. Dr. Flores not being allowed to testify should be considered harmless error.

Appellant argues that the Court "fail[ed] to appreciate that the excluded evidence went to whether Dr. Kruse's testimony that appellant was malingering psychosis was based on sound science…." (Pet. 15). It appears that Appellant attempts to make a case that Dr. Kruse was much more credible on her presentation of her test for malingering than any other doctor. (Pet. 15-16). But what he cannot overcome is the Court's far reaching, comprehensive review of the *eight* witnesses who concluded Appellant was not malingering (6 specifically, 2 opining to brain damage), (Op. 20-23), including Dr. Frierson who relied on Dr. Kruse's testing but opined that, rather than malingering, Appellant '" was trying to convince himself he had schizophrenia so he could live with what he did.'" (Op. 21). Further still, the issue did arise in the *guilt* phase, but *sentencing* so the question is whether the omission would have *reasonably* affected the sentencing decision. While any evidence on "rescoring" could have potentially "cast doubt on Dr. Kruse's scoring and *allegedly* flawed approach" in her one conclusion on malingering, this Court properly and logically found "it is not reasonably likely Dr. Flores' testimony would have

affected the jury's decision to impose a death sentence." (Op. 23). Appellant cannot overcome both the hefty evidence against malingering,[2] the potential that a "battle of experts" would lead a non-result, and the overwhelming depravity of the crime as shown in the record. Appellant has failed to show rehearing is warrant on the harmless error analysis.

VI. The videotaped testimony of Cynthia Turner was not offered to demonstrate "love and concern" and the argument is not properly before the Court for the first time on rehearing.

Appellant contends that in affirming the trial court's ruling declining to admit the video, that "this Court may have overlooked the fact that a mother's love and concern for her child – who is on trial for his life – being conveyed to his sentencing jury was uniquely mitigating." (Pet. 19). But this Court correctly found the video was offered "as mitigation evidence of Jones's state of mind and mental illness," reflective of a possible genetic link that could perhaps forecast '"his future,'" and affirmed the trial court's decision which considered admissibility on that basis. (See Op. 28-29). Indeed, on appeal, Appellant contended the video showed – as he phrased in his appellate brief – "an accurate portrayal of her mental illness." (BOA at 140). The argument Appellant forwards now was not previously presented and should not be considered through a petition for rehearing.[3] *See, e.g., Nelson v. QHG of S.C., Inc.,* 362 S.C. 421, 427, 608

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[2] Respondent argued that the testimony would be cumulative to all of the other testimony presented as another reason to affirm, and also as part of a harmless error analysis. (FBOR pp. 94 and 99-100). This Court agreed as to the harmless error analysis, but rejected the argument as an additional sustaining ground for the ruling as it was not ruled upon. (Op. 18). The Court may wish to consider that under Rule 220(c), SCACR, the Court may affirm on "any ground(s) appearing in the Record on Appeal," which gives this Court discretion to affirm regardless of the ruling itself. *See.,e.g., I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. ").

[3] Even Appellant's representation of the video in his petition fails to show a "uniquely mitigating" circumstance, especially where there is a noted incomprehension of how a father

S.E.2d 855, 858 (2005) (issue not preserved when first raised on rehearing); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."). Appellant has failed to show rehearing is warranted.

CONCLUSION

For all the above reasons, Respondent submits the petition should be denied.

Respectfully submitted,

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could murder his children as Appellant did. (Pet. 19). He lacks a firm factual basis to support his position even if it could be reached procedurally.