No._____

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Petitioner,

vs.

JOHN KENNEDY HUGHEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ABBEVILLE COUNTY COURT OF COMMON PLEAS AFTER DISMISSAL OF CERTIORARI AS IMPROVIDENTLY GRANTED BY THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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*** CAPITAL CASE ***

QUESTIONS PRESENTED

I. Whether the state post-conviction relief court misapplied the fundamental mandates of *Strickland v. Washington*, 466 U.S. 668(1984) in granting relief based upon trial counsel's failure to object to an instruction which was accepted at the time and specifically found to be adequate in the defendant's own direct appeal of the same case in 2000 by the South Carolina Supreme Court.

II. Whether the state post-conviction relief court misapplied *Strickland v. Washington,* 466 U.S. 668 (1984) where the capital defendant was unable to show Sixth Amendment prejudice on the failure to object to one portion of the penalty phase instructions when viewing the instructions as a whole, it is clear that the consideration of mercy was proper for the jury in its sentencing consideration - but also that the jury was not precluded from consideration of any mitigating evidence presented in its life sentence consideration.

III. Whether the state post-conviction relief court misapplied *Strickland v. Washington*, 466 U.S. 668 (1984) in granting re-sentencing on appellate counsel's failure to specifically raise an issue in the statement of issues concerning a sentencing phase instruction that the jury "may recommend a sentence of life for any reason or no reason at all

other than as an act of mercy" in the direct appeal when it was argued in the Final Brief of Appellant and Final Reply Brief of Appellant, raised in the oral argument and addressed on the merits in the opinion of the state supreme court and raised by appellate counsel in his certiorari petition to the United States Supreme Court.

IV. Whether the South Carolina Supreme Court's later opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) addressing in *obiter dicta* a similar jury instruction that the jury may recommend a sentence of life for any reason or no reason at all other than as an act of mercy" and expressly overruling the South Carolina Supreme Court's holding in *State v. Hughey* did not require the granting of re-sentencing in collateral review when the same holding did not require a new sentencing by the Court in *Rosemond*, the South Carolina Supreme Court concluded in the direct appeal in *Hughey* that the death sentence was not the subject of any arbitrary factor and any error was harmless error in light of the ameliorating instructions, evidence and closing arguments which did not preclude the jury from considering a verdict of life based upon mercy and the evidence and ineffective assistance of counsel could not be shown when viewed by counsel's conduct at the time of the trial or direct appeal under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of South Carolina respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Abbeville County post-conviction relief ("PCR") judge in granting resentencing proceeding in a capital case. The grant of relief in this case – and two (2) other capital cases which are simultaneously presented with this petition – constitutes an unprecedented windfall to three (3) capital defendants. The legal error at issue is plain. Each case reflects the *Strickland v. Washington* error argued was based upon *obiter dictum* in an opinion issued years after each of the trials in question that questioned the clarity of one sentence in a penalty phase instruction.

In this case involving the 1997 sentencing trial of John Kennedy Hughey, the grant of relief by the Court of Common Pleas in Abbeville County in 2010 is particularly troubling since the particular instructional issue was rejected years earlier by the South Carolina Supreme Court in the direct appeal in 2000 by Mr. Hughey making any Sixth Amendment challenge to either his trial counsel or appellate counsel performance frivolous on its face from any proper assessment under either prong of *Strickland*. This unwarranted grant of relief offends, without question, the contemporaneous evaluation this Court established in 1984 in *Strickland*. Further, the state circuit courts simply

presumed prejudice for reversal. This again is unquestionably error under *Strickland*. Yet, the majority of the Supreme Court of South Carolina, in apparent contravention of the state court's own rules, refused to issue opinions after granting certiorari review.

In short, the State of South Carolina, having properly sought review on a procedurally sufficient issue was inexplicably denied review. The State now must seek review from this Court to avoid the unentitled windfall sanctioned by the Supreme Court of South Carolina's intentional inaction in these three (3) capital cases: *State of South Carolina v. John Kennedy Hughey, State of South Carolina v. Jonathan Binney, and State of South Carolina v. Kamell D. Evans.*

CITATION TO OPINIONS BELOW

The state post-conviction relief decision of the Honorable Alexander J. Macaulay, Circuit Court Judge granting resentencing is styled as *John Kennedy Hughey v. State of South Carolina*, 00-CP-01-212, Order Granting Post-Conviction Relief (Abbeville County, May 7, 2010), and is not reported but is reproduced in the Appendix at App. pp. 3-13. The order of July 22, 2010 denying the motions to alter or amend is unpublished and reproduced at App.pp. 14-16. The order of the Supreme Court of South Carolina that granted certiorari review is unpublished is reproduced at App. p. 17. The opinion dismissing certiorari as improvidently granted is unpublished and cited as

John Kennedy Hughey v. State of South Carolina, Appellate Case No. 2010-170387, Op. No. 2015-MO-029 (S.Ct.S.C. filed May 13, 2015) and reproduced in the Appendix at App. pp. 18-28. The order denying the timely petition for rehearing on is unpublished and also reproduced in the Appendix at App. p. 44.

The opinion in the earlier direct appeal is published and cited as *State v. Hughey,* 339 S.C. 439, 529 S.E.2d 721 (2000) and was decided March 27, 2000. Certiorari to this Court was denied October 16, 2000 in *Hughey v. South Carolina,* 531 U.S. 946 (2000).

JURISDICTIONAL STATEMENT

The Supreme Court of South Carolina, over vigorous dissent, dismissed certiorari as improvidently granted on May 13, 2015 and denied rehearing on August 6, 2015. The Attorney General of the State of South Carolina sought and received one extension from the Chief Justice allowing this petition to be filed on or before January 3, 2016. The action is timely filed, and this Court has jurisdiction under 28 U.S.C. § 1257 (a).

Certiorari is properly directed to the Abbeville County Court of Common Pleas as the majority opinion from the Supreme Court of South Carolina provides "positive assurance" that the dismissal was not a ruling on the merits but a

refusal to accept the matter for decision.[1] *See R.J. Reynolds Tobacco Co. v. Durham Cty., N.C.*, 479 U.S. 130, 138, 107 S. Ct. 499, 506, 93 L. Ed. 2d 449 (U.S. 1986) ("In the absence of positive assurance to the contrary from the North Carolina Supreme Court, we consider that court's dismissal of Reynolds' appeal to be a decision on the merits....").[2]

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to counsel as secured by the Sixth Amendment to the United

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1 In South Carolina, state court rules provide that orders from capital PCR cases "shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari, according to the procedure set forth in this Rule." Rule 243(a), *South Carolina Appellate Court Rules*. Only if two or more justices of the five member court agree to hear the matter will full briefing be initiated. Rule 243 (j), *South Carolina Appellate Court Rules*. The Supreme Court of South Carolina considers this initial question of whether to grant certiorari review in PCR appeals a matter of discretion and not a ruling on the merits. *See generally Haggins v. State,* 377 S.C. 135, 136, 659 S.E.2d 170 (2008) (matter committed to that court's discretion"); *Ellison v. State,* 382 S.C. 189, 676 S.E.2d 71 (2009) (*Haggins* logic applies to cases where certiorari review is granted then later dismissed as improvidently granted).

2 This is also consistent with a prior South Carolina capital case requesting certiorari to the circuit court after denial of a petition for writ of certiorari from the Supreme Court of South Carolina in the PCR appeal. *See Plath v. S. Carolina*, 484 U.S. 1022, 108 S. Ct. 743, 98 L. Ed. 2d 757 (U.S.S.C. 1988) ("judgment is vacated and the case is remanded to the Court of Common Pleas of South Carolina, Beaufort County...").

States Constitution: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence." U.S. Const. amend VI.

STATEMENT OF THE CASE

A. Facts of the Crime.

"...what he did was nothing more than two brutal vicious murders. Two senseless, needless, tragic, unjustified murders. That's what he did. And it [doesn't] matter why he did it or really how he did it. He had no excuse. He had no reason. He had no basis for killing those two women in that home on that day. None." PCR App. p. 3406, l. 24 - p. 2407, l. 7. These comments in Solicitor Townes Jones guilt phase closing argument properly sum up the state's case against John Kennedy Hughey involving his murder of his former girlfriend Tesheka Jackson and her aunt, Luevinia Harris, who was in her own home on the telephone to the police when Hughey's second shotgun blast brutally ended her life. The following facts are summarized from the South Carolina Supreme Court's direct appeal opinion in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000):

> On December 4, 1995, Hughey forcibly entered Harris's house and had an altercation with his former girlfriend, Jackson. While Hughey and Jackson were arguing, Harris was on the phone with her son, Marcus Harris,

from Oklahoma City. Harris told her son to call the police because Hughey had a gun, so he immediately called 911. Harris also called the Abbeville City Police Department to request help. While Harris was on the phone with the dispatcher, Hughey shot both Harris and Jackson with a shotgun. Harris died from a solitary gunshot wound to the head. Jackson had three major injuries: (1) a gunshot wound to the back of her head, from a maximum shooting distance of two feet; (2) a large bruise on her face, likely caused by the blunt end of the shotgun; and (3) a stab wound in her chest.

Within thirty minutes of the shooting, Hughey stole Jackson's car and used her ATM card in Anderson. Hughey was arrested in Georgia and told the authorities "I killed them, it was an accident, the gun went off." Prior to the incident, Hughey left a note on his door that stated: "As of this morning I will be dead. Love you all. Please take care of my kids. John K."

After his arrest, Hughey gave an oral statement to Agent Eddie Clark. Hughey claimed he and Jackson had an altercation at Harris's house. According to Hughey, Jackson threw a vase at him and went outside to get a

shotgun from her car. Harris tried to get between Hughey and Jackson, grabbed the gun, and the gun accidentally fired. According to Hughey, Jackson chased him into the bedroom, they struggled for the gun, and he accidentally shot her.

Hughey gave an inconsistent statement during the guilt phase of the trial. He denied making the statement to the police after his arrest. At trial, Hughey claimed Harris invited him in for coffee and Jackson attacked him with a vase and a knife. According to Hughey, Jackson charged him with a knife and he pushed her resulting in a stab. Hughey then ran out of the house to get the shotgun from the car. He claims that Jackson stood on the steps and threatened to kill him. As he approached her, Jackson spit on him and attempted to slam the door. While they struggled at the door, the gun went off and Harris was shot. Hughey admitted that he was angry and attempted to shoot at Jackson. He chased Jackson into the bedroom where he shot her in the back of the head with a twenty gauge shotgun.

State v. Hughey, 339 S.C. 439, 446-447, 529 S.E.2d 721, 725 (2000).

B. Trial and Sentencing.

John Kennedy Hughey was indicted on March 11, 1996 by the Grand Jury of the Court of General Sessions for Abbeville County for (1) murder (involving the December 4, 1995 death of Tesheka Lanyra Jackson), (2) murder (involving the December 4, 1995 death of Luevinia H. Harris), (3) burglary in the first degree and (4) grand larceny of a vehicle.

The prosecution served notice of intent to seek the death penalty. On October 13, 1997, the matter was called for a trial before the Honorable J. Derham Cole, Circuit Court Judge.

On October 17, 1997, the proceedings re-started. PCR App. p. 209. The trial began after jury selection on October 22, 1997. The Respondent Hughey testified on his own behalf. On October 27, 1997 the jury returned with guilty verdicts on all four (4) counts. PCR App. p. 3495, ll. 9-17.

On October 28, 1997 at 11:00 a.m. the sentencing proceedings began. PCR App. p. 3508, ll. 1-2. After the presentation of evidence, the trial judge charged the following statutory aggravating and mitigating circumstances:

On Count One, the statutory aggravating circumstances to consider were:

> 1. That the murder of Tesheka L. Jackson was committed while in the

commission of the crime or act of burglary in the first degree.

2. That the murder of Tesheka L. Jackson was committed while in the commission of the crime or act of larceny with the use of a deadly weapon.

3. Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct.

On Count Two, the statutory aggravating circumstances to consider were:

1. That the murder of Luevinia H. Harris was committed while in the commission of the crime or act of burglary in the first degree.

2. Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct.

The statutory mitigating circumstances instructed on each count were as follows:

1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

2. The murder was committed

while the defendant was under the influence of mental or emotional disturbance.

3. The age or mentality of the defendant at the time of the crime.

You may also consider any NON-STATUTORY mitigating circumstance(s).

PCR App. 4055-56, 4060. As to each count, the jury found beyond a reasonable doubt the existence of all the statutory aggravating circumstances. PCR App. p. 4073. The jury returned a recommendation of death for each murder count. PCR App. p. 4073. On October 30, 1997 Judge Cole sentenced John Kennedy Hughey to death on each count of murder. He was sentenced to a life sentence on Count III of burglary in the first degree and ten (10) years on Count IV for grand larceny.

C. The Direct Appeal to the South Carolina Supreme Court and its rejection of the mercy instruction claim.

Hughey made a mandatory direct appeal to the South Carolina Supreme Court of his convictions and sentence. In his appeal to the South Carolina Supreme Court he was represented by Robert M. Dudek of the South Carolina Office of Appellate Defense.

The South Carolina Supreme Court denied the appeal on March 27, 2000. *State v Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000). In deciding this issue, the Supreme Court of South Carolina went to the heart of the current complaint on the instruction of "any reason or no reason at all other than as an act of mercy" and interpreting this claim as adequately presented and preserved:

> Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote. The trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy." (emphasis added). **This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error.** See *Singleton*, 284 S.C. at 393, 326 S.E.2d at 156; *State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984).
>
> **The jury charge, reviewed in its entirety, is not confusing** because it advises the jurors to consider all mitigating circumstance in making their recommendation. The non-statutory circumstances are repeatedly emphasized by the trial

> judge and are adequately defined according to current South Carolina case law.

State v Hughey, supra. (emphasis added). PCR App.p. 4284-85.

A timely petition for rehearing was filed on April 11, 2000. Rehearing was denied on May 11, 2000.

Certiorari was taken to the United States Supreme Court by Hughey. On certiorari, the sole question raised was:

> Did an unambiguous jury instruction that mercy was not an appropriate reason to sentence petitioner to life imprisonment violate the Eighth Amendment and Fourteenth Amendments since it precluded jury consideration of petitioner's severely disadvantaged background as mitigating character evidence, as well as the domestic nature of the homicide as a circumstance of the crime?

Hughey v. South Carolina, No. 00-5635, Petition for Writ of Certiorari, p. 1. On October 16, 2000, the Court entered an order denying certiorari. *Hughey v. South Carolina*, 531 U.S. 936, 121 S.Ct. 345 (2000). (NO. 00-5635).

D. The Post-Conviction Relief Proceedings and Order Granting Relief.

Hughey made an application for post-conviction relief raising numerous ineffective assistance of counsel claims against his trial and appellate counsel. In his Amended application, Hughey, thorough counsel, made the following pertinent allegations:

> 11(a) iii) Counsel failed to adequately object to the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*." This instruction is contrary to state law, which never requires a sentence of death, S.C. Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy. See, State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000); State v. Torrence, 305 S.C. 45, 406 S.E. 2d 315 (1991). This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or otherwise weighs in favor of a sentence of life imprisonment rather than the death penalty. . .
>
> 11(b). Appellate counsel failed to properly brief the trial court's improper

> instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*." This instruction is contrary to state law, which never requires a sentence of death. S.C. Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy. See, *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519 (2000); *State v. Torrence*, 305 S.C. 45, 406 S.E. 2d 315 (1991). This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or otherwise weighs in favor of a sentence of life imprisonment rather than the death penalty. . .

PCR App.p. 4406-4410 (emphasis added). The evidentiary hearing was convened in Abbeville County before the Honorable Alexander Macaulay on October 13-15, 2008. PCR App.p. 4654-5212. Testimony was received from trial counsel Robert Tinsley, Billy Garratt and appellate counsel Robert Dudek on these issues, among others.

On May 14, 2010, the Honorable Alexander S. Macaulay, Presiding Judge entered his Order Granting Post-Conviction Relief dated May 7, 2010. App. p. 3-13. In the Order, Judge Macaulay concluded that the issues regarding the guilt phase of the trial was denied and dismissed, with prejudice, and the application for post-conviction

relief for sentencing was granted. In particular, on the issue granting relief before this Court, Judge Macaulay concluded:

> The jury instruction regarding mitigation that jurors "may recommend a sentence of death for any reason or no reason at all other than as an act of *mercy*," *State v. Hughey*, 339 S.C. 439, 460, 529 S.E.2d 721, 732 (2000) (emphasis that of the Court), is so inimical to the laws of the State and the United States in Capital Cases as to entitle the Applicant to a New Trial. (Issues III, IV, and V).

App.p. 9.

Judge Macaulay initial reviewed the direct appeal opinion in Hughey's case which specifically addressed the same challenged instruction:

> The Supreme Court noted "Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote." Id, 339 S.C. at 460, 529 S.E.2d at 732. As for the Respondent's contention that the trial court's charge had become "the law of the case", (Issue V), obviously the Supreme Court recognized and addressed it as an issue on appeal. The Supreme Court went on to approve and sanction the jury charge given by the trial court.

App.p. 10.

Judge Macaulay then reviewed an intervening decision in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009).

> Nevertheless, in a prior trial, *State v. Rosemond*, 335 S.C. 593, 598, 518 S.E.2d 588, 590 (1999), where "the trial court's jury instruction mirrored the instruction found proper in *State v. Hughey* on a subsequent post-conviction relief application, the Supreme Court expressly held:
>
> > We overrule Hughey to the extent it approved and sanctioned the charge given here
> > * * *
> > It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy.
>
> *Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009).

App.pp. 10-11.

Judge Macaulay next opined :

> It has long been the law of South Carolina "as to the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reached the conclusion that the appellant was guilty of

> murder." *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930). Prior to the enactment of Act No. 530, 21 Stat at L 785 (1894), the punishment for the crime of murder was death only. See Act No. 91, 14 Stat at L 175 (1869). The 1894 Act , "gave to a petit jury the right, when it found a defendant guilty of murder, to recommend him to the mercy of the court, and that the effect of such recommendation will be to save the accused from death, and cause him to be sentenced for life imprisonment at hard labor. The presiding judge was in error in stating to the jury repeatedly that they had nothing to do with mercy, and he committed further error in telling the jury some of the instances in which they should recommend mercy." *State v. King*, 158 S.C. 251, 155 S.E. 409, 425-426 (1930).

App.p. 11-12.

Judge Macaulay then concluded collateral relief in the form of a new sentencing hearing was appropriate:

> Under our most recent case law applying S.C. Code Ann. § 16-3-20 (2003), it is now well established that: "It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy." *Rosemond v. Catoe, supra.* Because the jury was instructed that they "may

> recommend a sentence of life for any reason or no reason at all ***other than as an act of mercy,***" (emphasis supplied), the Applicant has established his entitlement to a new sentencing phase of his trial. *State v. Hughey, supra; Rosemond v. Catoe, supra.*

App. p. 12. After motions to alter or amend were made, on July 26, 2010, Judge Macaulay filed his Order denying State's Motion to Alter and Amend Judgment Pursuant to Rule 59(E). App. pp. 14-16.

E. The Post-Conviction Relief Appeal to the South Carolina Supreme Court and Order Dismissing Certiorari as Improvidently Granted Over Dissent.

On April 16, 2014, the Supreme Court of South Carolina granted certiorari to review the PCR judge's decision granting relief and for the issues of the cross-petition. (App. p. 17). No issue was raised as to procedural deficiency and none is apparent. However, apparently contrary to the court's own rules, the Supreme Court of South Carolina refused to issue an opinion dismissing as improvidently granted over two dissents on May 13, 2015.[3] App. pp. 18-28.

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[3] The Supreme Court of South Carolina will review capital PCR decisions through a certiorari process. Rule 243 (a), South Carolina Appellate Court Rules. "Upon the concurrence of any two justices, the petition will be granted on any question presented." Rule 243(j), South Carolina Appellate Court Rules. The "Rule of Two" for certiorari is in

Justice Kittredge wrote an opinion, joined by Chief Justice Toal dissenting with respect to the dismissal of the State's certiorari petition. App.p. 17-27. Judge Kittredge announced that he would reverse the grant of post-conviction relief and incorporated by reference "the well-reasoned opinion of Chief Justice Toal in *Evans v. State*, Op. No. 2015-MO-027 (S.C.Sup.Ct. filed May 13, 2015) (Toal, C.J. dissenting). App.p. 20.

In sharp contrast with Judge Macaulay's conclusory order, Judge Kittredge addressed his reasoning in the *Roseboro* opinion that he authored and its limitations:

> I add the following comments. In 2009, I authored this court's unanimous opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). Rosemond was granted a new

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direct tension with the three justice opinion dismissing as improvidently granted. Two justices remain in dissent which should require an opinion – for or against either party – but an opinion. *Cf. Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (J. Stewart concurring) (this Court's similar "Rule of Four" dictates since "the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court."). Further, Rule 220, South Carolina Appellate Court Rules, provides that reasons for the opinion must be set out. There is no provision in that rule to announce retreat to a discretionary decision where certiorari has already been granted by the appropriate number of justices.

sentencing hearing based on trial counsel's failure to present any mental health mitigation evidence. *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10. Rosemond also asserted the mercy charge—"you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy"—as a basis for post-conviction relief. Id. We did not grant PCR based on the mercy charge, but clarified in dictum that the "other than as an act of mercy" language not be charged. Id. at 330, 680 S.E.2d 5, 680 S.E.2d at 10–11. I view the challenged instruction, in isolation, as potentially confusing, for it is susceptible to more than one interpretation.

This court never addressed the challenged mercy instruction in *Rosemond* in the context of the *Strickland v. Washington* test. *Id.* at 329–30, 680 S.E.2d at 10–11. **Given that the charge in this case was affirmed on direct review fifteen years ago, I cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding of deficient representation.** *See State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 732 (2000) (reviewing the charge on mitigating circumstances, including the mercy charge, and concluding "a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment"). **The**

> **finding of deficient representation is clear legal error. In any event, even were I to indulge in the fiction of deficient representation, Hughey cannot satisfy the prejudice prong of *Strickland*. . .**

Hughey v. State, supra. App.pp. 20-21. (emphasis added). Judge Kittredge incorporated the analysis of a similar instruction in the *Evans* dissenting opinion.

> [T]he ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the entire jury instruction. *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991); see also, e.g., *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction must be viewed in the context of the overall charge.").

App.p. 26.

The dissent in *Evans*, written by the Chief Justice and joined by Justice Kittredge[4], found relief

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[4] Justice Kittredge authored this dissent and the dissent *Binney* and joined in the dissent in *Evans*. Justice Kittredge incorporated the *Evans* dissent in this appeal and added that the capital defendants could show neither *Strickland* error nor prejudice. He instructed, as the author of the Rosemond dictum at issue, that it was clear the questioned phrase in *Rosemond* was not evaluated in context of the charge as a whole. Further, he observed that the court had "never

was not warranted. The Chief Justice noted that counsel did not have the benefit of *Rosemond*, but resolved that – the question of deficient performance aside – there could be no *Strickland* prejudice:

> Here, Evans contests one sentence of a lengthy charge that instructed the jury to consider all statutory and non-statutory mitigating factors in arriving at their verdict. In my opinion, the rest of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective instruction; consequently, his *Strickland* argument must fail.

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sanctioned an analytical framework that focuses narrowly on disputed language in a jury charge to the exclusion of the charge as a whole." 2015 WL 2230848, * 1 (Sup.Ct.S.C. 2015).

App. pp. 26-27.[5] Rehearing was sought by the State from this dismissal. App.pp. 29-43. It was denied on August 6, 2015. App. p. 44.

REASONS WHY CERTIORARI SHOULD BE GRANTED

"The people of the State are also entitled to due process of law." *Stein v. New York*, 346 U.S. 156, 197 (1953). As firmly pointed out in the dissenting opinion in this case and the companion dissenting opinions in *Evans v State*, 2015 WL 2230263

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[5] Justice Kittredge also wrote in *Hughey* of a uniquely troubling aspect of the strained construction argument at issue:

> Unlike the transcript in *Binney* ... the transcript here contains no comma between the word "all" and the word "other." The absence of a comma, and the assumed absence of a pause in the reading of the sentence to the jury, does not change my view that the jury charge, when considered in its entirety, conveyed to the jury that it could recommend a life sentence merely as an act of mercy. Although we commonly find typographical errors in transcripts, an appellate court must accept the transcript as presented. I observe that the *Hughey* transcript contains far more errors than the *Binney* transcript. It would be regrettable, indeed, if an otherwise error-free death penalty verdict is set aside due to sloppy transcription.

App.pp. 27-28.

(S.C.Sup.Ct. May 13, 2015) and *Binney v. State*, 2015 WL 2230848 (S.C.Sup.Ct. May 13, 2015), there is absolutely no error to correct; however, the circuit courts in South Carolina have ordered unnecessary and costly re-sentencing proceedings in these three (3) capital cases. New sentencing proceedings are not warranted by any fair reading of state or federal law.

As Justice Kittredge cogently stated concerning the error of the state post-conviction relief court in this case:

> **Given that the charge in this case was affirmed on direct review fifteen years ago, I cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding of deficient representation. [*citing State v Hughey*] . . . The finding of deficient representation is clear legal error. In any event, even were I to indulge in the fiction of deficient representation, Hughey cannot satisfy the prejudice prong of Strickland. . .**

Hughey v. State, supra. (emphasis added). App.p. 20-21.

The federal constitutional error of law shared in these cases presents a compelling reason for a grant of certiorari – the decisions are in clear and direct conflict with the *Strickland v. Washington*, 466 U.S. 668 (1984) mandates (1) that a court view counsel's conduct in context of the time the case was

tried, and (2) that prejudice be assessed on the trial record. The *Strickland* error found by the state lower courts is not only incorrect,[6] but also costly – costly in judicial resources; costly in excessive time for resolution; and, most importantly, costly to the integrity of the judicial system and resolution on behalf of the victims.

Further, the unexplained avoidance of the error correction by the state supreme court of the undisputed misapplication of this Court's *Strickland* decision is of concern to the public sense of justice and the victims in these cases. The avoidance of proper *Strickland* review is particularly disturbing in these three difficult and compelling capital cases. The State was entitled to fair review and a proper application of federal constitutional law. *Cf. White v. Wheeler*, 577 U.S. ___, ___, ___ S.Ct. ____, ___ (No. 14-1372) (decided December 14, 2015) (reminding lower court standard of review under AEDPA does not change "even when reviewing a conviction and sentence imposing the death penalty."). The Attorney General of the State of South Carolina seeks fair review in this Court.

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[6] Since its 1984 decision in *Strickland*, this Court has consistently applied the rule of contemporary assessment of counsel's conduct. E.g., *Maryland v. Kulbicki*, ___ U.S. ____, ____. 136 S.Ct. 2, 3 (2015); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *Burger v. Kemp*, 483 U.S. 776, 789 (1987); *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

I. The State Postconviction Judge Erred in Assuming Deficient Performance under *Strickland v. Washington* for 1997 Trial Counsel Based Upon *Rosemond v. Catoe* Which Was Decided in 2009 When the Instruction Was Addressed on the Merits in Hughey's Direct Appeal in 2000 in *State v. Hughey.*

The Supreme Court of South Carolina, in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), reviewed the very phrasing at issue and rejected the defendant's argument that the charge was "confusing because it suggested that an act of mercy would have been an invalid reason for a life vote" was "without merit...." *Id.* at 460, 529 S.E.2d at 732. *Hughey* was decided on March 27, 2000. As Justice Kittredge declared in his dissenting opinion in the denial of certiorari "[G]iven that the charge in this case was affirmed on direct review fifteen years ago, I cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding of deficient representation." Clearly, *Hughey* was good law in 1997 through at least 2009.

It has long been accepted in South Carolina that the trial judge may charge a capital jury that it may return a life sentence "for any reason or no reason at all." *See, e.g., State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990). Hughey's jury was similarly charged. App.p. 46. At issue is

merely the additional phrase "other than as an act of mercy."

This assumption of a Sixth Amendment deficient performance violation is even more troubling given that Hughey's trial counsel made a request for an instruction concerning mercy counsel in his Defendant's Request to Charge 16, PCR App.p. 4126-27. In its pertinent part, the request stated:

> . . . If you should conclude that a statutory aggravating circumstance exists, *you may consider whether the defendant should be sentenced to life imprisonment for any reason, or no reason at all.* **This is what has been traditionally referred to as a "sentence of mercy." ... In other words, you may choose to sentence the defendant, to life imprisonment if you find a mitigating circumstance, or you may sentence him to life imprisonment for no reason at all, that is as an act of mercy...**

PCR App. 4126-4127. Importantly, during the charge conference, Judge Cole stated that **"my general instruction covers that."** PCR App. 4018-19.

> Conversely, you may also recommend a sentence of life imprisonment even though

> you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do exist. **Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy.**

App.p. 48; PCR App. p. 4062, ll. 8-15. Trial counsel did not further object.[7]

In 2009, in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), the Supreme Court of South Carolina noted in *obiter dictum* that though the instruction was found proper in *Hughey* the language could be found confusing and should not be used. *Rosemond* overruled *Hughey* to this extent.

Counsel may logically rely on the law in existence at the time of trial to provide proper representation. To avoid this bar to finding deficient performance, the PCR judge implicitly relied upon a somewhat confused and internally conflicting

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[7] Trial Counsel Tinsley stated in the PCR proceeding that there was no specific objection to the "other than as an act of mercy" language. PCR App.p. 4770, l. 4-6. As to whether the instruction precluded the jury from considering "mercy," counsel Tinsley stated that he did not catch the [parsed] instruction and that in hindsight, he would object to it because it should have been "for no reason at all" and even as an act of mercy, not the opposite of that. **"But I just did not hear it like that ."** PCR App.p. 4770, l. 15-19. Counsel affirmed that the instruction could be construed as a comment on testimony if the defense puts in evidence requesting mercy. PCR App.p. 4771, PCR 118. Co-counsel Garrett claimed that he just did not see it and did not know how they missed it. PCR App.p. 4929.

interpretation of *Hughey*. But the confusion in interpretation of essentially a state law preference in language is without moment here; there could be no deficient performance under *Strickland*. Consequently, Petitioner is not entitled to any relief under *Strickland*. *See, e.g.*, *Maryland v. Kulbicki*, ___ U.S. ____, ____. 136 S. Ct. 2, 3 (2015) (summarily reversing the Court of Appeals of Maryland for failing to view counsel's representation as of the time of trial); *Harrington v. Richter*, 562 U.S. 86, 107 (2011) (finding error where "the Court of Appeals failed to 'reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time.").8

The *Kulbicki* case is particularly noteworthy here. In *Kulbicki*, the state appellate court found that trial counsel was constitutionally ineffective for failing to identify a "methodological flaw" in comparative bullet lead analysis ("CBLA") and mounted a challenge to the evidence presented at

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8 A counsel is not ineffective in failing to forecast changes or advances in the law. *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995 (counsel failed to anticipate holding in *Skipper v. S.C.*) *See also Walker v. Jones*, 10 F.3d 1569, 1573 (11th Cir.) (holding that trial counsel's performance under a similar situation was reasonable "[b]ecause Alabama courts had rejected similar claims and the Supreme Court had not yet decided *Cage [v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)], trial counsel had no basis for objecting to the trial court's instruction on reasonable doubt*"), cert. denied, --- U.S. ----, 114 S.Ct. 2111, 128 L.Ed.2d 671 (1994)*; *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir.1991) (ruling that trial counsel was not ineffective by failing to raise *Batson* challenge two days before *Batson* was decided).

trial. However, "[a]t the time of Kulbicki's trial in 1995, the validity of CBLA was widely accepted, and courts regularly admitted CBLA evidence until 2003." *Id.*, at 4. Adhering to the *Strickland* test, this Court reversed the Maryland court finding no deficient performance. *Id.*, at 5. The same core error is apparently here.

Even more troubling, though, in this case is the additional fact the state court opinion in *Rosemond* relied upon for finding deficient performance and presuming prejudice *did not even grant relief and reverse on an incorrect instruction.* As the author of the opinion noted in the *Hughey* dissent, the *dictum* was meant to alert the bench and bar of a possibility of confusion. When viewed in context, there was no error in use of the phrase and no reasonable probability of confusion in use of the phrase. App. 19. To allow re-sentencing in the complete absence of error is against the principles of justice.

Additionally troubling is an implicit finding of deficient performance resting upon appellate counsel Dudek's reasonable actions. He raised the "other than as an act of mercy" issue within his brief before the South Carolina Supreme Court and forcefully in his Reply Brief. The South Carolina Supreme Court fully addressed the merits of the mercy instruction claim in the direct appeal opinion. Appellate counsel then raised the same claim in his petition for writ of certiorari before this Court. This is not deficient performance under *Strickland* merely due to his inability to convince the state

supreme court in 2000 about the use of the language which was approved by them in his own case. Success in 2000 is not the test for deficiency. It is not deficient performance to fail to make a futile argument. *See Truesdale v. Moore,* 142 F.3d 749, 755 (4th Cir.1998) (noting that it is not ineffective assistance for "counsel not to pursue futile claims").

II. The PCR Judge Erred In Finding *Per Se* Reversible Error Thereby Avoiding a Proper *Strickland v. Washington* Prejudice Analysis When the Same Claim Was Denied on the Merits in the Direct Appeal.

The PCR judge also incorrectly relieved Petitioner of any burden of showing 6th Amendment prejudice. The state PCR judge merely read *Rosemond* as requiring such a conclusion – a conclusion which the author of *Rosemond* states was never made. This was complete misapplication of *Strickland.* As Justice Kittredge declared: "the finding of deficient representation is clear legal error. In any event, even were I to indulge in the fiction of deficient representation, Hughey cannot satisfy the prejudice prong of *Strickland.*"

First, "*Strickland* places the burden on the defendant ... to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes,* 558 U.S. 15, 27 (2009). Further, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington,* 562 U.S at 112.

The PCR judge's implicit ruling on prejudice cannot be reconciled with the precedent in Hughey's own direct appeal.

Here, the PCR court ignored the instructions as a whole which required the jury to consider mitigation, including factors set forth by the defense beyond statutory mitigation:

> . . .Those statutory mitigating circumstances are: The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense. . . .
>
> . . . A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder.
>
> Those that the defense contends should be considered are: any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result

> of physical and/or emotional trauma suffered as a child or as an adult, **and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case. . .**

App. 46-47. It cannot be rationally argued that the jury would have ignored these instructions in light of the challenged language. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy.

Third, the PCR judge's ruling here, like his implicit ruling on deficient performance, was also guided by his incorrect reasoning that *Rosemond* mandated relief. However, as the *Rosemond* author found, a reasonable juror would not have interpreted the instruction at issue as precluding consideration of the mitigation evidence in deciding whether to exercise mercy when the charge is properly reviewed as a whole. The trial judge emphasized the jury's duty to consider all statutory and non-statutory mitigating circumstances shown by the evidence, and emphasized the opportunity to exercise mercy.

The charge when read as a whole, was not deficient as a matter of state law and allowed for the exercise of mercy in the penalty phase. *Accord State v. Hicks*, 330 S.C. 207, 218-219, 499 S.E.2d 209, 215

(1998)("the trial judge is not required to instruct the jury it could impose a life sentence 'for any reason or no reason at all' where the jury is informed, as it was here, it could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found").

Additionally, an analysis of the instructions under *Boyde v. California*, 494 U.S. 370 (1990), though not strictly controlling under a *Strickland* prejudice is persuasive. The *Boyde* test is proper in review of the instruction here as the instruction is not clearly erroneous as a whole, but contains a possibly erroneous phrase in one sentence that seemly could contradict the remaining clear and correct language. *See also Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991) (applying *Boyde*). Thus, the proper question "is whether there is a reasonable likelihood the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. Applied to the instant case, in considering the charge as a whole, a reasonable juror would not have thought he was precluded from considering any of the mitigation evidence presented in the instant case. To the contrary, it demanded consideration.

III. The PCR Judge Erred In Finding A Federal Constitutional Right To A Mercy Charge Where Federal Precedent, Without Exception, Does Not Support Such A Federal

Constitutional Right.

Mercy is an act – not evidence. See Black's Law Dictionary (9th ed. 2009) ("Compassionate treatment, as of criminal offenders or of those in distress; esp. imprisonment, rather than death, imposed as punishment for capital murder.") (emphasis added). Evidence of mercy would be evidence of an act of the jury; thus, a charge regarding mercy does not impact on consideration of any sentencing phase evidence and does not implicate federal constitutional protections.

A capital defendant is allowed, pursuant to the Eighth and Fourteenth Amendments of the Constitution, to submit evidence in mitigation of "any aspect of [...his...] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" to enable the jury to make an "individualized decision" in sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). In that same vein, this Court has determined that a state may not create "limitations" on the consideration of properly admitted mitigation evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). "These two cases place clear limits on the ability of the State to define the factual bases upon which the capital sentencing decision must be made." *Saffle v. Parks*, 494 U.S. 484, 490 (1990) (emphasis added). However, there is a difference between the presentation and consideration of evidence and the exercise of unfettered sympathy or mercy: "Whether a juror feels sympathy for a capital defendant is

more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant." *Id.* at 493. This Court has rejected challenges to instructions that the jury "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,'" *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* at 542.

In South Carolina, "a capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf." *State v. Wise*, 359 S.C. 14, 27-28, 596 S.E.2d 475, 481 (2004). *See also State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2012) (*citing Wise*). While not a constitutional right, a plea for mercy is uniformly accepted in South Carolina under our evidence rules. *Id. See also State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991) (finding error in limitation on questioning but no prejudice where defendant's mother was allowed to make "a general plea for mercy for the life of her son"). Even so, this allowance is not without limitation.

Without question, mercy was a "primary element" of the defense argument in his opening and closing statements which stressed that the jury was allowed to sentence to life even if they did not find mitigation. PCR App. 3576-3584, 4037-4045. Here, however, there was no specific plea for mercy

in the penalty phase, though friends and family members did testify as to Hughey's good qualities and their emotional bond to him. (See, for example, PCR App. pp. 3792 ("I love my brother"), p. 3880 (loves brother and wants to keep brother). The penalty phase charge expressly directed the jury to consider any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case. App. p. 47. Nothing in the charge – even if parsed as Hughey suggests – precluded the jury from consideration of this evidence. Thus, the charge, as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the evidence presented, *i.e.* the emotional bond to Hughey. *See Boyde,* 494 U.S. at 380 (relevant question on constitutionally infirmity "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.").[9]

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[9] There is also a distinct difference between evidence in mitigation and the response to evidence in mitigation. The Eighth Amendment protects the defendant's right to present evidence in mitigation and have that evidence considered. It does not protect (address or require) a jury's exercise of mercy apart from evidence presented. *See Kansas v. Marsh*, 548 U.S. 163, 181 (2006) ("the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that

The PCR judge clearly erred in determining that mercy is a federally constitutionally protected sentencing consideration tied to evidence. (See App. p. 9). This Court has soundly rejected defense challenges to instructions that the jury "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,'" *California v. Brown*, 479 U.S. 538, 540 (1987), and

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aggravating and mitigating circumstances are in equipoise, is constitutional"). The Eighth Amendment does not require an instruction that "any individual juror may base the decision to impose a life sentence on mercy alone." *State v. McAnulty*, 356 Or. 432, 478, 338 P.3d 653, 681 (2014) cert. denied, 136 S. Ct. 34 (2015). Accord *Williams v. Bagley*, 380 F.3d 932, 962 (6th Cir.2004) (Ohio law precludes mercy when aggravators outweigh mitigators); *Saffle v. Parks*, 494 U.S. 484, 488–89, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (rejecting similar argument as a new rule).

Even so, the possibility of mercy in sentencing does not offend the constitutional approval of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) ("Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution"). The presentation of mitigation evidence, though, does not guarantee a lesser sentence. Defining "giving effect" as "securing a life sentence" reflects the conflation of an adversarial position with a legal structure. It is when evidence is excluded, either from sentencing or from consideration, that a legal flaw arises. *See, for example, Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed."). That does not exist here.

emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* at 542. *See also Saffle*, 494 U.S. at 492-493 ("It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that 'the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, not an emotional response to the mitigating evidence.'") (internal citations omitted) (brackets in original); *Johnson v. Texas*, 509 U.S. 350, 371-72 (1993) ("we have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant"). This Court has been very definite in separating the consideration of evidence and a response to the evidence.

Further, in *Kansas v. Marsh* this Court held that "Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." 548 U.S. 173. If there is no Eighth Amendment violation in requiring imposition of death where the jury unanimously finds circumstances in aggravation and the circumstances in aggravation and mitigation weighed equally, there could be no Eighth Amendment violation here based on the state

charge regarding the exercise of mercy. At any rate, the jury was instructed that it could return a life sentence for any reason. There could be no error.

CONCLUSION

Though post-conviction relief was argued and premised on the fact of the subsequent *Rosemond dictum*, the issue here is more than the state collateral court's disapproval of the phrasing of one part of one sentence in the charge. The issue here is whether the charge as a whole was sufficient, which, in turn, informs and affects the determination of *Strickland* prejudice. This record confirms the charge was sufficient, when properly viewed as a whole, and that defendant failed to show *Strickland* error and prejudice – especially when the basis for relief was *dictum* in an opinion issued years after trial. The defendant was plainly not entitled to any relief.

For these reasons, the State asks this Court to grant certiorari, vacate the judgment of the state PCR court and either reverse, *see Kulbicki*, or remand with instructions to properly apply *Strickland*.

Respectfully submitted,

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APPENDIX

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS

C/A/ No. 00-CP-01-212
John Kennedy HUGHEY, #5055)
)
Applicant,)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

ORDER GRANTING POST-CONVICTION RELIEF

This matter comes before the Court pursuant to an amended application for post-conviction relief (PCR) filed by the Applicant dated December 15, 2007. On October 13-15, 2008, this case was called before the Court of Common Pleas. The Applicant was present and represented by his appointed counsel Charles Grose, Esquire, Tara Schultz, Esquire, and Teresa Norris, Esquire. The Respondent was represented by Donald J. Zelenka, Esquire, Office of the South Carolina Attorney General. At the hearing, testimony was received from Robert Tinsley, Sr, Esquire, Jeff Yungman, Julia Perlotte, Martha Ann Stewart, Billy Garrett, Esquire, Robert Dudek, Esquire, Paige (Tarr) Haas, and Dr. Donna Schwartz-Watts.

Following the hearing, this Court took the matter under advisement and request Post-Hearing Briefs to be submitted by the parties. The Applicant, by and through his appointed counsel, submitted his post-hearing brief on June 8, 2009. On June 29, 2009, Applicant supplemented his post-hearing brief due to the South Carolina Supreme Court's decision overruling part of the opinion in the Applicant's direct appeal. *See Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). Thereafter, the Respondent served its post-hearing brief on August 31, 2009 and the Applicant then served his reply brief on December 11, 2009.

For the reasons stated more fully herein, Mr. Hughey's Application for Post-Conviction Relief regarding the guilt phase of the Applicant's trial is DENIED and DISMISSED, with prejudice, and the Application for a new sentencing phase of the trial is GRANTED.

TRIAL COUNSEL IS NOT INEFFECTIVE WHEN HE ARTICULATES A VALID REASON FOR EMPLOYING CERTAIN TRIAL STRATEGY (Issues I and II)

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the

defense as to deprive the defendant of a fair trial. *Id* at 687. To establish deficient performance under *Strickland*, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id* at 688. In order to establish prejudice, the applicant must show, "but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Id* at 694, *see also Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000). Where counsel articulates a valid reason for employing certain strategy, the conduct will not be deemed ineffective. *Caprood v. State*, 338 S.C. 103, 525 S.WE.2d 514 (2000).

A. The Presentation of Manslaughter and Applicant and Sister's Guilt Phase Testimony

The Applicant contends that his trial counsel erred in advising his sister and himself to testify in the guilt phase of the trial where "evidence was irrefutable to support convictions for murder." (Applicant's Post-Hearing Brief, p. 23). Based upon the argument presented at the hearing and Mr. Hughey's Post-Hearing Brief, the Applicant has failed to show either that there is a reasonable probability under *Strickland* that the result of the proceeding would have resulted in a different verdict, assuming that counsel did advise Applicant and his sister to testify. Nevertheless, the right to testify belongs to the Applicant and the trial court made a full inquiry of whether the Applicant wanted to testify and was advised of his right to testify. The mere fact that trial counsel's strategy was

unsuccessful does not render counsel's assistance unconstitutionally ineffective. *Strickland*, 466 U.S. at 689, *see also Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to asserting that trial counsel was ineffective for allowing the Applicant and his sister to testify during the guilt phase, Applicant contends that his attorneys were ineffective for pursuing a charge on the possible lesser included offense of voluntary manslaughter and transferred intent. Counsel's "strategic choices made after thorough investigation are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-691. In evaluating an ineffective assistance claim, a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id* at 690.

Applicant's trial counsel testified at the PCR hearing that the trial strategy was to keep the case from being a death eligible case by presenting evidence that would entitle their client to an instruction on manslaughter. PCR 281, ll. 10-14. Trial counsel was effective in properly presenting evidence to support a charge of voluntary manslaughter and the trial judge properly gave the manslaughter instruction and specifically included the manslaughter-transferred intent charge. R. 3465-68. With the trial counsel's success in having the charge given, deficient performance under

Strickland cannot be found merely because the result was rejected.

This Court finds that the Record from the Applicant's trial and sentencing hearing, as well as the PCR hearing, conclusively demonstrate that appointed counsel were not deficient in presenting manslaughter as a jury charge and allowing the Applicant and his sister to testify during the guilt phase. In addition, the Applicant was not prejudiced in any way by trial counsel's performance.

B. The failure to Properly Investigate and Present Available Mitigating Evidence

In his second specification of ineffective assistance of counsel, the Applicant asserts that his counsel failed to investigate or present adequate mitigation evidence. In particular, he specifies adaptability to confinement and the capacity to appreciate the criminality of his conduct as two examples of this error. After considerable review of the record, this Court finds that the trial counsel investigated both the mental and family background of the Applicant and presented an appropriate case in mitigation.

Applicant contends that trial counsel failed to include any evidence of adaptability to prison life based upon his confinement history. At the PCR hearing, trial counsel testified that the mental health evidence revealed that the Applicant, in times of stress, would revert to his learned behavior of violence. In addition, trial counsel testified that

they considered presenting the evidence, but because of previous negative experiences in capital murder trials on this very issue, they decided not to provide the testimony. Furthermore, trial counsel testified that they had met with the detention officers and learned that their testimony would not be of value to their case. This Court finds that was a strategic decision made by the counsel during the trial and concludes that the Applicant has failed to show the decision was based on neglect or ignorance. *Strickland*, 466 U.S. at 690-691. Furthermore, the Applicant has not demonstrated the prejudice that resulted by omitting this evidence required by *Strickland, supra.*

It is important to note that at trial the jury heard mitigation testimony from Mr. Anthony Wilson, Anthony Scott Harrison, Jessie Christopher Brown, Nancy Leigh Ramey, Rev. Wendall Cox, Gloria White Harrison, social worker Jeff Yungman, and Dr. James Evans, an expert in neuro-psychology and psychology. In addition, trial counsel ensured that the jury instructions during the sentencing phase focused the jury on potential mitigation suggested by the evidence. Specifically, the jury was instructed to consider

1. The Defendant has no significant history of prior criminal conviction involving the use of violence against another person
2. The murder was committed while the Defendant was under the influence of mental or emotional disturbance
3. The age or mentality of the Defendant at the time of the crime

The record clearly reveals that counsel retained a number of experts who provided their opinions in the case as well as a series of lay witnesses to testify on Applicant's behalf in mitigation. The sentencing jury was readily aware of the dysfunctional family experience that the Applicant experienced. This Court finds that the appointed trial counsel for the Applicant put into evidence a thoughtful and thorough case in mitigation considering various themes and presentations. *Accord Tucker v. Ozmint*, 350 F.3d 433, 441-42 (4th Cir. 2003). Accordingly, Applicant's claim that trial counsel failed to properly investigate and present available mitigating evidence is denied.

THE JURY INSTRUCTION REGARDING MITIGATION THAT JURORS "MAY RECOMMEND A SENTENCE OF LIFE FOR ANY REASON OR NO REASON AT ALL OTHER THAN AS AN ACT OF *MERCY, STATE v. HUGHEY,* 339 SC. 439, 460, 529 S.E.2d 721, 732 (2000) (EMPHASIS THAT OF THE COURT), IS SO INIMICAL TO THE LAWS OF THE STATE AND THE UNITED STATES IN CAPITAL CASES AS TO ENTITLE THE APPLICANT TO A NEW TRIAL (Issues III, IV and V).

The jury was instructed on non-statutory mitigating circumstances, in pertinent part, as follows:

> Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence or [sic] a circumstance or circumstances beyond a reasonable doubt. *And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or nonstatutory mitigating circumstance.* Simply stated, you may recommend a sentence of life imprisonment for *any reason or for no reason at all* other than as an act of mercy.

State v. Hughey, 339 S.C. 439, 458-459, 529 S.E.2d 721, 731 (2000)(emphasis that of the Court).

The Supreme Court noted "Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote." *Id*, 339 S.C. at 460, 529 S.E.2d at 732. As for the Respondent's contention that the trial court's charge had become "the law of the case", (Issue V), obviously the Supreme Court recognized and addressed it as an issue on appeal. The Supreme Court went on to approve and sanction the jury charge given by the trial court.

Nevertheless, in a prior trial, *State v. Rosemond*, 335 S.C. 593, 598, 518 S.E.2d 588, 590 (1999), where "the trial court's jury instruction mirrored the instruction found proper in *State v.*

Hughey on a subsequent post-conviction relief application, the Supreme Court expressly held
We overrule *Hughey* to the extent it approved and sanctioned the charge given here
* * *
It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy.

Rosemond v. Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009).

It has long been the law of South Carolina "as to the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reached the conclusion that the appellant was guilty of murder." *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930). Prior to the enactment of Act No. 530, 21 Stat at L 785 (1894), the punishment for the crime of murder was death only. *See* Act No. 91, 14 Stat at L 175 (1869). The 1894 Act[10], "gave to a petit jury the right, when it found a defendant guilty of murder, to recommend him to the mercy of the court, and that the effect of such recommendation will be to save the accused from death, and cause him to be sentenced for life

---

10 Section 109 (2454). Whoever is guilty of murder shall suffer the punishment of death. *Provided however*, that in each case where the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the Court whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner. 1894 (21) 785 § 1652 SC Code (1962) 1868 (14)175

imprisonment at hard labor. The presiding judge was in error in stating to the jury repeatedly that they had nothing to do with mercy, and he committed further error in telling the jury some of the instances in which they should recommend mercy." *State v. King*, 158 S.C. 251, 155 S.E. 409, 425-426 (1930).

Under our most recent case law applying S.C. Code Ann. § 16-3-20 (2003), it is now well established that "It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy." *Rosemond v. Catoe, supra.* Because the jury was instructed that they "may recommend a sentence of life imprisonment for any reason or no reason at all **other than as an act of mercy**", (emphasis applied), the Applicant has established his entitlement to a new sentencing phase of his trial. *State v. Hughey, supra, Rosemond v. Catoe, supra.*

CONCLUSION AND JUDGMENT

Due to the overwhelming evidence of guilt and want of prejudice, the relief regarding the guilt phase of the Applicant's trial is DENIED and DISMISSED, with prejudice, and, based on the foregoing, the Application for a new sentencing phase of the trial is GRANTED.

AND, IT IS SO ORDERED.

s/ Alexander S. Macaulay

ALEXANDER S. MACAULAY, Judge

May 7, 2010
Walhalla, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS
C/A No. 2000-CP-01-212

John Kennedy HUGHEY, #5055)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)
)

ORDER DENYING RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59 (E)

This matter comes before the Court pursuant to an amended application for post-conviction relief (PCR) filed by the Applicant dated December 15, 2007. On October 13-15, 2008, this case was called before the Court of Common Pleas. The Applicant was present and represented by his appointed counsel Charles Grose, Esquire, Tara Schultz, Esquire, and Teresa Norris, Esquire. The Respondent was represented by Donald J. Zelenka, Esquire, Office of the South Carolina Attorney General. At the hearing, testimony was received from Robert Tinsley, Sr, Esquire, Jeff Yungman, Julia Perlotte, Martha Ann Stewart, Billy Garrett, Esquire, Robert Dudek, Esquire, Paige (Tarr) Haas, and Dr. Donna Schwartz-Watts.

Following the hearing, this Court took the matter under advisement and request Post-Hearing Briefs to be submitted by the parties. The Applicant, by and through his appointed counsel, submitted his post-hearing brief on June 8, 2009. On June 29, 2009, Applicant supplemented his post-hearing brief due to the South Carolina Supreme Court's decision overruling part of the opinion in the Applicant's direct appeal. See *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). Thereafter, the Respondent served its post-hearing brief on August 31, 2009 and the Applicant then served his reply brief on December 11, 2009.

By order dated May 7. 2010 and filed May 14, 2010, this Court denied and dismissed with prejudice Mr. Hughey's application for Post Conviction Relief regarding the guilt phase of the Applicant's trial and granted a new sentencing phase of the trial for the Applicant. Applicant and Respondent timely submitted their respective Motions to Alter or Amend the Judgment pursuant to Rule 59 (e) of the South Carolina Rules of Civil Procedure.

After careful consideration of the able arguments and filings of Counsel and review of the record, the Court finds that its Order entered on May 14, 2010 is supported by the record. Moreover, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Applicant's and Respondent's respective Motions to

Alter or Amend Judgment pursuant to Rule 59, SCRCP is each DENIED.

S/ Alexander S. Macaulay
Alexander S. Macaulay, Judge

Walhalla, South Carolina
July 22, 2010

THE SUPREME COURT OF SOUTH CAROLINA

John Kennedy Hughey, Respondent-Petitioner,

v.

State of South Carolina, Petitioner/Respondent

Appellate Case No. 2010-170387

ORDER

This matter is before the Court by way of cross-petitions for a writ of certiorari. The petitions for a writ of certiorari are both granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

/s/ Jean H. Toal C.J.
/s/ Costa Pleicones J.
/s/ Donald W. Beatty J.
/s/ John Kittredge J.
/s/ Kaye G. Hearn J.

Columbia, South Carolina

April 16, 2014

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), 8(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Kennedy Hughey, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2010–170387.

ON WRIT OF CERTIORARI

Appeal From Abbeville County
The Honorable Alexander S. Macaulay, Circuit Court Judge.

Memorandum Opinion No. 2015–MO–029.
Heard Jan. 15, 2015. - Filed May 13, 2015

DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Petitioner / Respondent.

E. Charles Grose, of Greenwood, and Tara Schulz Waters, of Summerville, for Respondent/Petitioner.

J. Christopher Mills, for Amicus Curiae, South Carolina Religious Leaders and Scholars.

PER CURIAM.: After careful review of the record, appendix, and briefs, the writs of certiorari are dismissed as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, BEATTY and HEARN, JJ., concur.
KITTREDGE, J., concurring in part and dissenting in part in a separate opinion in which TOAL, C.J., concurs.

Justice KITTREDGE.
I concur in part and dissent in part. I concur as to the dismissal of John Kennedy Hughey's certiorari petition. I dissent with respect to the dismissal of

the State's certiorari petition, which, in effect, upholds the post-conviction relief court's grant of a new sentencing hearing based on the erroneous mercy charge. I would reverse the post-conviction relief court and reinstate Hughey's death sentence. I incorporate the well-reasoned opinion of Chief Justice Toal in *Evans v. State*, Op. No.2015–MO–027 (S.C. Sup.Ct. filed May 13, 2015) (Toal, C.J., dissenting).

I add the following comments. In 2009, I authored this court's unanimous opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). Rosemond was granted a new sentencing hearing based on trial counsel's failure to present any mental health mitigation evidence. *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10. Rosemond also asserted the mercy charge—"you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy"—as a basis for post-conviction relief. Id. We did not grant PCR based on the mercy charge, but clarified in dictum that the "other than as an act of mercy" language not be charged. *Id.* at 330, 680 S.E.2d 5, 680 S.E.2d at 10–11. I view the challenged instruction, in isolation, as potentially confusing, for it is susceptible to more than one interpretation.

This court never addressed the challenged mercy instruction in *Rosemond* in the context of the *Strickland v. Washington* 1 test. Id. at 329–30, 680 S.E.2d at 10–11. Given that the charge in this case was affirmed on direct review fifteen years ago, I

cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding of deficient representation. *See State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 732 (2000) (reviewing the charge on mitigating circumstances, including the mercy charge, and concluding "a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment"). The finding of deficient representation is clear legal error. In any event, even were I to indulge in the fiction of deficient representation, Hughey cannot satisfy the prejudice prong of *Strickland*. The trial court's instruction in Hughey was as follows:

> Now as I indicated to you, you'll also have a form which is a recommendation of a life sentence. Now that particular form just simply states and sets forth that you twelve jurors have determined that a life sentence has been recommended in this case. And as I've said, you will have two separate forms. One relating to county [sic] one of the indictment, one relating to county [sic] two of the indictment.
>
> By that recommendation-of-sentence form, you twelve jurors may recommend that the defendant be sentenced to life imprisonment. Please note that while a recommendation of a

life imprisonment sentence must also be a unanimous decision by the jury, only the foreman is required to sign his name to that recommendation-of-sentence form.

In arriving at your decision as to what the appropriate sentence would be in this cases [sic], you are instructed that you must also consider any statutory mitigating circumstances. Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the state legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder. It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder.

A mitigating circumstance is neither a justification nor an excuse for the crime of murder. It is simply something which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable.

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances. The following statutory mitigating circumstances are set forth on your statutory instruction form. They are the same as to each of the counts of the indictment.

Those statutory mitigating circumstances are: The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense.

Now you are also permitted under the law to consider, anesthesia [sic] you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case.

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose. That is to lessen or

reduce the degree of the defendant's guilt in the commission of the crime of murder.

Those that the defense contends should be considered are: any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case.

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or circumstances beyond a reasonable doubt. And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or non-statutory mitigating circumstance.

In making your determination as to which sentence to recommend in these

cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision.

While you must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before you may consider recommending a sentence of death, once such a finding is made you are permitted to recommend the sentence of death even though you may also find the existence of one or more statutory or non-statutory mitigating circumstances.

The existence of any statutory or non-statutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.

Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do existence

> [sic]. Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy. 2

In my judgment, the analysis here is no different than Chief Justice Toal articulated in Evans:

> [T]he ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the entire jury instruction. *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991); see also, *e.g.*, *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction must be viewed in the context of the overall charge.").
>
> Here, Evans contests one sentence of a lengthy charge that instructed the jury to consider all statutory and non-statutory mitigating factors in arriving at their verdict. In my opinion, the rest of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context

> of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective instruction; consequently, his Strickland argument must fail.

Evans v. State, Supra (Toal, C.J., dissenting).

I agree with Chief Justice Toal's dissenting opinion in Evans, and I would reverse the grant of post-conviction relief to Hughey.

TOAL, C.J., concurs.

Footnotes

1

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

2

Unlike the transcript in *Binney v. State*, Op. No.2015–MO–028 (S.C. Sup.Ct. filed May 13, 2015), the transcript here contains no comma between the word "all" and the word "other." The absence of a comma, and the assumed absence of a pause in the reading of the sentence to the jury, does not change my view that the jury charge, when considered in its

entirety, conveyed to the jury that it could recommend a life sentence merely as an act of mercy. Although we commonly find typographical errors in transcripts, an appellate court must accept the transcript as presented. I observe that the Hughey transcript contains far more errors than the Binney transcript. It would be regrettable, indeed, if an otherwise error-free death penalty verdict is set aside due to sloppy transcription.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Alexander S. Macaulay, PCR Circuit Judge
2000-CP-01-212
J. Derham Cole, Trial Circuit Judge

Appellate Case No. 2010-170387
Memorandum Opinion No. 2015-MO-029
Filed May 13, 2015

JOHN KENNEDY HUGHEY,
Respondent/Petitioner,

V.

STATE OF SOUTH CAROLINA,
Petitioner/Respondent,

PETITION FOR REHEARING

The Petitioner-Respondent State of South Carolina, through the Attorney General of South Carolina, hereby makes a Petition for Rehearing to the opinion of May 13, 2015 in which three members of the Court in a per curiam opinion concluded that

the writ of certiorari, which was issued on April 16, 2014 on the State's petition for writ of certiorari, was improvidently granted, and two members of the Court dissented concerning the writ of certiorari and would have reversed the post-conviction relief court granting of resentencing and would have further reinstated John Hughey's Abbeville County death sentence. For all reasons set forth below, the State submits that the extraordinary action of the Court—when two members of the Court who granted the writ of certiorari and entered opinions concluding the post-conviction relief was improperly granted and the authorized sentence of death should be reinstated—requires rehearing in the interest of justice pursuant to SCACR Rule 221 and Rules 200 and 243(j) and S. C. Code Ann. § 17-27-100. "The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law." *Stein v. New York*, 346 U.S. 156, 197 (1953).

1. **When two Justices continue to agree that certiorari is appropriate, the Court erred in the issuance of a Per Curiam opinion that certiorari Should Be dismissed as improvidently granted pursuant to SCACR Rule 243(j).**

"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Payne v. Tennessee*, 501 U.S.

808, at 827 (1991) (quoting *Snyder v. Mass.*, 291 U.S. 97, 122 (1934)).

"The Rule of Two" Misapplication

It was improvident and in contravention of the South Carolina Appellate Court Rules under SCACR Rule 243(j) for three members of the Court to issue a *per curiam* order dismissing a granted writ of certiorari and deeming it to be improvidently granted when two justices concluded that certiorari was appropriate.[1] SCACR Rule 243(j) is clear and unambiguous: "upon the concurrence of any two justices, the petition may be granted on any question presented." [2] The "Rule of Two" for certiorari in Rule 243(j) remains applicable in this case because Justice Kittredge entered a dissenting opinion from the three justices' dismissal of the writ certiorari as improvidently granted and indicating that he "would reverse the grant of post-conviction relief to Hughey" in which Chief Justice Toal concurred. Where this Rule was overlooked or misapprehended, rehearing under Rule 221 is proper. The merits must be addressed.

In an analogous action in the United States Supreme Court addressing their "Rule of Four" concerning the grant of certiorari and the requirement to address the merits, two members of the Court stated:

> We are bound here, however, by the 'Rule of Four.' That rule ordains that

> the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court. See *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 559, 77 S.Ct. 459, 478, 1 L.Ed.2d 515 (separate opinion of Harlan, J.).

Donnelly v. DeChristoforo, 416 U.S. 637, 648 (1974) (concurring opinion of Justices Stewart and White).

Similarly, in this action two justices remained so minded after oral argument that certiorari and error correction of the granting of post-conviction relief was required. The silent three members of the Court should be required to address the merits of the matter. In the *per curiam* opinion, the three members of this Court may have overlooked the effect of Rule 243(j) concerning the fact that two members of the Court continue to find the appropriateness of their grant of certiorari who seek to address the merits. The full Court, including the silent three members, under Rule 243 should be required to address the merits of the proceeding.

SCACR Rule 220 Misapplication

The three members of the Court may have also overlooked the requirement under SCACR Rule 220 that the Court issue a decision on the merits with the required explanation of the reasons for the decision rather than a discretionary conclusion that certiorari was improvidently granted when two members dissent. The three members may have also overlooked Rule 220(b) only authorizes a memorandum opinion:

"dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, the Supreme Court determines that a published opinion would have no precedential value and any one or more of the following circumstances exist and is dispositive of the issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact that are or are not clearly erroneous; . . . (D) that no error of law appears."

None of those provisions apply to authorize a memorandum opinion in this case. When two members are still of the opinion that certiorari is proper, Rule 220 has not been followed unless the majority issues an opinion "every point distinctly stated in the case which is necessary to the decision," [Rule 220(b)] because it is not a "unanimous decision."

WHY THE APPLICATION OF THESE RULES IS IMPORTANT

Here, the interest of justice demands the litigants and the public be provided with the basis for the

decision because the failure to do so has societal consequences. Under the discrete circumstances in this case, absent a reason for the inaction, our faith in the justice system for error correction of an undisputed erroneous judgment by the PCR court is questioned. As firmly pointed out in the dissenting opinion in this case and the companion dissenting opinions in *Hughey v. State*, 2015 Westlaw 2231252 (S.Ct.S.C. May 13, 2015); Binney v. State, 2015 Westlaw 2230848 (S.Ct.S.C. May 13, 2015); and *Evans v. State*, 2015 Westlaw 2230263 (S.Ct.S.C. May 13, 2015), the actions of the circuit courts in ordering unnecessary and costly re-sentencing proceedings in these three cases, which the dissent cogently points out, are not authorized by a fair and appropriate reading of the opinion in *Rosemond v. Catoe,* 383 S.C. 320, 680 S.E.2d 5 (2009), according to Justice Kittredge, the author of that opinion.

Clearly, re-sentencing relief was improvidently ordered by the circuit court by a misreading of this Court's mandate in Rosemond. The circuit court's errors of law are an even more compelling reason for error correction, particularly when placed against the fabric of its misapplication of United States Supreme Court precedent of *Strickland v. Washington*, 466 U.S. 668 (1984) and its constitutional requirement to view counsel's conduct when the case was tried. As the *Strickland* Court itself observed, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's

challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689, 104 S.Ct. 2052. Here, where the underlying, so-called *Rosemond* error found by the PCR court evaporates in light of its author's repudiation of the PCR judge's interpretation, there is no basis for re-sentencing relief to be given based upon the non-error by the trial judge and the lack of deficient performance or prejudice—even in hindsight.

Simply put, the decision by the PCR judge had no basis in law, was an undisputed misinterpretation of the limited holding by this Court in Rosemond, and created through the unexplained (in)action by the three members of the Court, a windfall to the properly convicted and sentenced inmate. The unexplained failure of the three members of the Court to act in the certiorari action before this Court without the error correction appropriate allowing these unnecessary re-sentencing proceedings, is a defeat of fundamental fairness to the litigants and unnecessary use of limited judicial and prosecutorial resources. Such unexplained avoidance of the necessary error correction of the undisputed misapplication of this Court's precedent and the decision in *Strickland v. Washington*, 466 U.S. 668(1984), may be considered "shocking to the universal sense of justice" to the public and survivors of the victims in these cases. Such avoidance by the three members of this Court to address the error as implicitly required under its own Rules, specifically Rule 243(j) and Rule 220, is particularly disturbing in a capital case. Here, transparency requires the basis for the unexplained

inaction by the three members in light of the salient factors against that action, as reflected in the opinions of Justice Kittredge and Chief Justice Toal. This is why the requirements of Rule 220 are necessary.

It has recently been stated concerning the fact that "death is different" and that "trial courts must do everything legitimately in their power to ensure that these trials are fair and that the proceedings and verdict are especially reliable." *State v. Barnes*, 407 S.C. 27, 48, 753 S.E.2d 545, 556 (2014) (Toal, C.J., dissenting). A retrial without a reason for it can only be considered a defeat for justice. As this Court stated in *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), "[I]t would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial." It would do well for three silent members of the Court to remember that and to act properly under its rules to prevent the misapplication of its own decisions and the negative effect that such inaction has on justice. See *Stein v. New York*, 346 U.S. 156, 197 (1953) ("The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law.").

II. Rehearing is appropriate under Rule 221 where the decision under review demands error correction where the underlying precedent was misapplied by the circuit court which undermines any entitlement to a new sentencing proceeding.

Rehearing is appropriate where the three members of the court may have misapprehended that the PCR court's basis for relief in John Hughey's case was a misapplication of this Court's mandate in *Rosemond v. Catoe* which undermines any conclusions related to deficient performance and prejudice. Simply put, the entire lower court order related to the resentencing judgment is an unsupportable error of law.

First, it is undisputed now that Rosemond did not require the action by Judge Macaulay. As Justice Kittredge stated in his dissent in *Hughey v. State* about the Rosemond opinion that he authored:

> Rosemond also asserted the mercy charge—"you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy"—as a basis for post-conviction relief. Id. We did not grant PCR based on the mercy charge, but clarified in dictum that the "other than as an act of mercy" language not be charged. Id. at 330, 680 S.E.2d at 10–11. I view the challenged instruction, in isolation, as potentially confusing, for it is susceptible to more than one interpretation.
>
> This court never addressed the challenged mercy instruction in Rosemond in the context of the Strickland v. Washington test.

Hughey v. State, supra.

However, even more telling of the misapplication of this Court's precedent is the fact that the "mercy charge" was raised and rejected for relief in Hughey's direct appeal. As Justice Kittredge noted:

> Given that the charge in this case was affirmed on direct review fifteen years ago, I cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding of deficient representation. *See State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 732 (2000) (reviewing the charge on mitigating circumstances, including the mercy charge, and concluding "a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment"). The finding of deficient representation is clear legal error. In any event, even were I to indulge in the fiction of deficient representation, Hughey cannot satisfy the prejudice prong of *Strickland*.

Hughey v. State, supra.

The PCR Court was plainly wrong in its conclusion that Rosemond alone mandated the decision to require resentencing of Hughey without any analysis. App.p. 5928. This reading of Rosemond demands vacation.

Further the Court may have misapprehended that that the claim was properly presented below. The PCR Court granted relief under Rosemond as a free-standing claim even though had been presented as a tortured ineffective assistance of counsel claim. This was error that must be vacated and reversed. The subject matter jurisdiction of the PCR Court is limited by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for an appeal. *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973).

The Court may have also misapprehended that deficient performance was shown. The PCR Court did not address deficient performance and could not in light of the intervening decision in Hughey's direct appeal. The petitioner did in fact did raise this same issue on direct appeal within Final Brief of Appellant [App.p. 4181-4183] and Final Reply Brief of Appellant. [App.p. 4267-68]. The PCR Court erred in addressing the issue without resolving the condition precedent of either deficient performance or prejudice under *Strickland v. Washington*, 466

U.S. 668 (1984) required under the state post-conviction relief act.

Further, the "law of the case" doctrine should apply because this issue was addressed in the direct appeal. While the PCR Court in its order granting the new sentencing hearing recognized this limitation, as well as the fact that it was adversely decided to Hughey in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), the PCR Court failed to address the earlier opinion's vitality as being previously ruled upon and therefore barred under the Act. App.p. 5599-5604.

The Court may have may have misapprehended that the PCR court found that Sixth Amendment prejudice had been shown. At no time in its order did it make that conclusion. As noted in Justice Kittredge's dissenting opinion here, prejudice could not be shown as to either trial counsel or appellate counsel. Counsel Dudek actually raised the issue and it was ruled upon by this Court on the merits in the direct appeal. Even if we assume that the Court had not previously addressed the issue, prejudice under Strickland still cannot be proven. The ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the entire jury instruction. *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991); see also, e.g., *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction must be viewed in the context of the overall charge."). As Chief Justice

Toal stated herein with applicability to Hughey's case:

> In my opinion, the rest of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective instruction; consequently, his Strickland argument must fail.

Hughey v. State, supra.

In summary, rehearing is warranted where the merits of the decision of the state PCR court were eviscerated in the undisputed dissenting opinion which plainly shown Judge Macaulay's reliance on Rosemond was misplaced. In Hughey's direct appeal, the Court addressed the merits thereby making any the existence of deficient performance of either trial counsel for not objecting or appellate counsel impossible. Further, when a prejudice assessment is attempted, something the

PCR court did not do, the Petitioner cannot meet his burden of proof.

Respondent respectfully submits that rehearing is warranted.

Respectfully submitted,
ALAN WILSON
Attorney General
DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
ATTORNEYS FOR PETITIONER-RESPONDENT

May 28, 2015
Footnotes:

1. S.C.Code Ann. § 17-27-100 ("[F]inal judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules.").

2. See South Carolina Constitution, Art. V, § 4 (The Supreme Court shall makes rules governing the administration of all the courts of the state. Subject to statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.); Art. V, § 4A (submission of Supreme Court rules to the judiciary committee). S.C. Code Ann. § 14-3-640 (promulgation of rules); § 17-27- 100 (final judgment entered under this chapter may be reviewed by a writ of

certiorari as provided by the South Carolina Appellate Court Rules').

THE SUPREME COURT OF SOUTH CAROLINA

John Kennedy Hughey, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent

Appellate Case No. 2010-170387

ORDER

The Petition for Rehearing filed on behalf of the petitioner/respondent in the above entitled matter is denied.

/s/ Costa Pleicones J.
/s/ Donald W. Beatty J.
/s/ Kaye G. Hearn J.

I would grant the Petition for Rehearing.

/s/ Jean H. Toal C.J.
/s/ John Kittredge J.

Columbia, South Carolina
August 6, 2015

PENALTY PHASE JURY INSTRUCTION EXCERPT (PCR Appendix 4058-4062)

Now as I indicated to you, you'll also have a form which is a recommendation of a life sentence. Now that particular form just simply states and sets forth that you twelve jurors have determined that a life sentence has been recommended in this case. And as I've said, you will have two separate forms. One relating to county [sic] one of the indictment, one relating to county [sic] two of the indictment.

By that recommendation-of-sentence form, you twelve jurors may recommend that the defendant be sentenced to life imprisonment. Please note that while a recommendation of a life imprisonment sentence must also be a unanimous decision by the jury, only the foreman is required to sign his name to that recommendation-of-sentence form.

In arriving at your decision as to what the appropriate sentence would be in this cases [sic], you are instructed that you must also consider any statutory mitigating circumstances. Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the state legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder. It is a circumstance which may be considered as mitigating or extenuating the degree of moral

culpability for the commission of the offense of murder.

A mitigating circumstance is neither a justification nor an excuse for the crime of murder. It is simply something which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable.

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances. The following statutory mitigating circumstances are set forth on your statutory instruction form. They are the same as to each of the counts of the indictment.

Those statutory mitigating circumstances are: The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense.

Now you are also permitted under the law to consider, anesthesia [sic] you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case.

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one

which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder.

Those that the defense contends should be considered are: any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case.

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or circumstances beyond a reasonable doubt. And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or non-statutory mitigating circumstance.

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision.

While you must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before you may consider recommending a sentence of death, once such a finding is made you are permitted to recommend the sentence of death even though you may also find the existence of one or more statutory or non-statutory mitigating circumstances.

The existence of any statutory or non-statutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.

Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do existence [sic]. Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy.

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ALAN WILSON
ATTORNEY GENERAL

January 4, 2016

Honorable Scott S. Harris
Clerk, United States Supreme Court
1 First Street, N.E.
Washington, DC 20543

ATTN: Danny Bickell

Re: State of South Carolina v. John Kennedy Hughey

Dear Mr. Bickell:

Enclosed for filing, please find forty (40) copies of the State of South Carolina's Petition for Writ of Certiorari in the above-referenced case; a certificate of compliance; a certificate of service; and a check in the amount of three hundred ($300.00) for the filing fee. Thank you for your assistance in the filing of these documents.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

Enclosures

cc: E. Charles Grose, Jr., Esquire
Tara Schultz Waters, Esquire
The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina
The Honorable David Stumbo, Solicitor, Eighth Judicial Circuit
Trisha Allen, Victim Services, Office of the Attorney General, State of South Carolina

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,

Petitioner,

vs.

JOHN KENNEDY HUGHEY ,

Respondent.

On Petition for Writ of Certiorari to the Abbeville County Court of Common Pleas After Dismissal of Certiorari as Improvidently Granted by the Supreme Court of South Carolina

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains **8,888** words, according to the Word processing system word count function, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that he foregoing is true and correct.

This 4th day of January, 2016.

DONALD J. ZELENKA
Sr. Asst. Deputy Attorney General
Office of the Attorney General
State of South Carolina
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-6305

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,

Petitioner,

vs.

JOHN KENNEDY HUGHEY,

Respondent.

On Petition for Writ of Certiorari to the Abbeville County Court of Common Pleas After Dismissal of Certiorari as Improvidently Granted by the Supreme Court of South Carolina

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, a member of the Bar of this Court, hereby certify that I have served three (3) copies of the Petition for Writ of Certiorari and Appendix on counsel for Respondent by depositing same in the United States mail, postage prepaid, and addressed as follows:

Mr. E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, S.C. 29646

Mrs. Tara Schultz Waters, Esquire
Waters Law Firm
120 S. Magnolia Street
Summerville, S.C. 29483

this 4th day of January, 2016.

DONALD J. ZELENKA
Sr. Asst. Deputy Attorney General
Office of the Attorney General

State of South Carolina
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-6305

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 26, 2015

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: South Carolina, Applicant,
v. John Kennedy Hughey
Application No. 15A454
(Your No. 2015-MO-029)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on October 26, 2015, extended the time to and including January 3, 2016.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Michael Duggan
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Donald J. Zelenka
Senior Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Hopkins, Debbie

From: Garrett, Tracy
Sent: Wednesday, October 14, 2015 3:09 PM
To: Hocker, Donald B.
Cc: Addy, Frank R.; Macaulay, Alexander S.; McMahan, Emily Yeargin; Stumbo, David M.; PD 8th Circuit; charles@groselawfirm.com; Hopkins, Debbie
Subject: Special Order (Circuit) Re: State v. John Kennedy Hughey 1996-GS-01-00220
Attachments: Special Order (Circuit) Hocker State v John Kennedy Hughey 1996 GS 01 00220.pdf

Dear Judge Hocker,

Attached is a special order regarding the above-listed case.

Thank you,

Tracy Garrett
Judge Scheduling Coordinator
SC Court Administration
1220 Senate Street, Suite 200
Columbia, SC 29201
803-734-1861
803-734-0269 (fax)

The Supreme Court of South Carolina

State of South Carolina, Prosecutor,

v.

John Kennedy Hughey, Defendant.

Abbeville County
1996-GS-01-00220

ORDER

The Honorable Alexander S. Macaulay issued an order in the John Kennedy Hughey v. State Post-Conviction Relief action granting the application for a new sentencing phase of this trial. The South Carolina Supreme Court dismissed the State's petition for a writ of certiorari on May 13, 2015. Now therefore,

IT IS ORDERED that the Honorable Donald B. Hocker be vested with exclusive jurisdiction to hear and dispose of the above case. Judge Hocker shall decide all matters pertaining to this case, including motions to appoint or relieve counsel, and shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard as to whether there is a term of court scheduled. In addition, Judge Hocker is requested to provide the Office of Court Administration with an update on the status of this case every one hundred and twenty days.

Jean Hoefer Toal
Chief Justice

October 14, 2015
Columbia, South Carolina

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: chasgrose@gmail.com
Web: GroseLawFirm.com

September 21, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *John Kennedy Hughey v. State*, Appellate Case No. 2010-170387
State v. John Kennedy Hughey, Case No. 1996-GS-01-220

Dear Mr. Shearouse:

As you are aware, this Court issued the Remittitur in the post-conviction relief case on August 6, 2015. Please allow Ms. Waters and I to update the Court on the developments since then and request this Court assign a Circuit Court Judge to preside over the re-sentencing proceedings.

On August 31, 2015, Ms. Waters and I submitted a proposed order appointing counsel for the re-sentencing proceedings to the Honorable Frank R. Addy, Jr., Chief Administrative Judge (Criminal) for the Eighth Judicial Circuit. A copy of the proposed order is attached.

Because Judge Addy had worked on this case when he was a Deputy Solicitor in the Eighth Circuit, he referred this matter to the Honorable Donald B. Hocker, Chief Administrative Judge (Civil) for the Eighth Circuit.

On September 1, 2015, Hugh Ryan, General Counsel for the Office of Indigent Defense, requested that his agency be heard on the issue of appointment of counsel and stated he would forward a pleading to Judge Hocker. Judge Hocker indicted he would schedule a hearing on the matter. So far, Mr. Hugehy's proposed order appointing counsel is the only pleading that has been submitted to His Honor.

In addition to resolving appointment of counsel, Mr. Hughey needs to begin the process of seeking funding to prepare for the re-sentencing hearing. Logically, one Circuit Court Judge should be assigned to preside over this process in a coordinated manner. Therefore, Mr. Hughey respectfully requests this Court assign a judge to preside over these proceedings. *See Rosemond v. Catoe*, 383 S.C. 320, 326, fn. 3, 680 S.E.2d 5,

8 fn. 3 (2009) ("[T]he Chief Justice of the South Carolina Supreme Court makes judicial assignments in death penalty cases in conjunction with Court Administration.").

By copy of this letter, we are advising the Circuit Court and counsel of this request.

Thank you for your attention to this matter. We look forward to hearing from the Court.

With kindest regards, I am

Yours very truly,

E. Charles Grose

E. Charles Grose, Jr.

By: Laura Wigard

cc: The Honorable Frank R. Addy, Jr.
The Honorable Donald B. Hocker
The Honorable David M. Stumbo
Hugh Ryan, Esquire
Tara Schultz Waters, Esquire

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF ABBEVILLE	)	
	)	Case No. 1996-GS-01-220
THE STATE	)	
	)	**Order Appointing Counsel**
vs.	)	
	)	
John Kennedy Hughey	)	
Defendant.	)	

This matter came before me on the motion of the defendant, John Hughey, and his post-conviction relief counsel, Charles Grose and Tara Waters, for an order appointing counsel. After a review of the procedural history of Mr. Hughey's case, the Court will make findings of fact and conclusions of law.

Procedural History

On December 4, 1995 Mr. Hughey murdered Tasheka Jackson and Luvenia Harris. The state charged Mr. Hughey with two counts of murder, first-degree burglary, grand larceny of a motor vehicle, and possession of a firearm during the commission of a violent crime. Beginning on October 13, 1997, the state tried Mr. Hughey before the Honorable J. Derham Cole and a jury. On October 27, 1997, the jurors convicted Mr. Hughey of all counts. On October 30, 1997, Judge Cole imposed two death sentences in accordance with the jury's recommendation.

Mr. Hughey appealed his convictions and sentences. The Supreme Court of South Carolina affirmed the convictions and sentences on March 27, 2000. *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000). The United States Supreme Court denied *certiorari* on October 16, 2000. *Hughey v. South Carolina*, 531 U.S. 946 (2000).

On October 25, 2000, Mr. Hughey filed his initial application for PCR. Hughey filed

amended PCR applications on September 15, 2006 and December 15, 2006. The Honorable Alexander S. Macaulay conducted an evidentiary hearing on the second amended PCR application on October 13-15, 2008. By order dated May 7, 2010, Judge Macaulay granted Mr. Hughey post-conviction relief and ordered a new sentencing hearing

On May 28, 2010 both the State and Mr. Hughey timely served motions to alter or amend the judgment, pursuant to Rule 59(e), SCRCP. By order dated July 22, 2010, Judge Macaulay denied both motions.

On August 25, 2010 the state served a notice of intent to appeal. Hughey filed a notice of intent to cross-appeal on August 26, 2010. The state filed its petition for *certiorari* on January 12, 2011. Mr. Hughey filed his Petition for *Certiorari* on April 29, 2011. By Order dated April 16, 2014, the Supreme Court granted both petitions for writs of *certiorari*. At the request of Mr. Hughey and due to a conflict with the Office of Appellate Defense, Mr. Grose and Ms. Waters represented Mr. Hughey during the cross appeals to the Supreme Court.

On January 15, 2015, the Supreme Court convened oral arguments. On May 13, 2015, the Supreme Court dismissed the cross petitions for writs of *certiorari* as improvidently granted, thereby affirming Judge Macaulay's order granting Mr. Hughey a new sentencing hearing. *Hughey v. State*, (S.C. S.Ct. Op. No. 2015-MO-029) (Filed May 13, 2105). The State petitioned for rehearing. On August 6, 2015, the Supreme Court denied the State's petition for rehearing and issued the Remittitur.

Findings of Fact

Mr. Hughey requests this Court appoint Mr. Grose and Ms. Waters to represent him during his resentencing procedures. As set forth in more detail below, this Court finds Mr. Grose and Ms. Waters qualified to represent defendants in capital cases.

The Honorable Wyatt T. Saunders, the Circuit Court Judge initially assigned to Mr. Hughey's capital post-conviction relief case, appointed Mr. Grose as counsel in 2000. Mr. Grose has continuously represented Mr. Hughey ever since.

Mr. Grose received a B.A. from Furman University (1989) and a J.D. form the University of South Carolina School of Law (1992). He was admitted to practice law in South Carolina on May 17, 1993 and the United States District Court for South Carolina on February 23, 1994. From 1993-1996, he was an Associate Attorney with Grimball & Cabanis P.A. in Charleston South Carolina. In 1996, he became an Assistant Public Defender in Orangeburg County, South Carolina, where he was later promoted to Deputy Public Defender. From 1999-2008, he was the Chief Public Defender for Greenwood and Abbeville Counties, South Carolina. Upon implementation of the Indigent Defense Act of 2007, he was appointed the Circuit Public Defender for the Eighth Judicial Circuit (Abbeville, Greenwood, Laurens, and Newberry Counties), serving a term from August 2008 to August 2012. He is currently a sole practitioner in Greenwood, South Carolina. Throughout his career Mr. Grose has tried numerous felony cases.

Mr. Grose has extensive capital experience and is certified by the South Carolina Supreme Court to be lead counsel in capital cases. His capital trial court experience includes: *State v. Bennie Ray Brown*, Laurens County Warrant Numbers I-556766-67, J-619971-77, currently awaiting a ruling pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002); *State v. Bixby*, Abbeville County Case Numbers 2004-GS-01-321, 322 and *State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010) as trial and appellate counsel; *State v. Steven A. Tinch*, Abbeville County Case Number 2006-GS-01-417, 419, which resulted in a guilty plea and a forty-five year sentence; *State v. Domonique O. Brown*, Laurens County Case Number 2007-GS-30-220, which resulted

in a guilty plea and a thirty-year sentence; *State v. Anthony A. Myers*, Greenwood County Case Number 2000-GS-24-1170, which resulted in a guilty plea and sentence of life imprisonment without the possibility of parole; *State v. Barry L. Ervin*, Greenwood County Case Number 1998-GS-24-1770, which resulted in a guilty plea and sentence of life imprisonment without the possibility of parole.

In addition to Mr. Hughey's capital post-conviction relief case, Mr. Grose's is currently counsel in the capital post-conviction relief cases of *William O. Dickerson, Jr. v. State*, Charleston County Cases Number 2012-CP-10-3216 and *Jerry Buck Inman v. State*, Pickens County Case Number 2012-CP-39-00918. Most recently, the United States District Court for the district of South Carolina appointed Mr. Grose as counsel in the Federal Habeas action of *Stephen Corey Bryant v. Sterling et. al.*, Case No. 9:15-mc-00217-DCN-BM.

Mr. Grose has received significant death penalty training, including but not limited to federal habeas training, through the Annual National Federal Habeas Corpus Seminar, (2015, 2014, 2013, and 2011); NAACP Legal Defense & Educational Fund, Inc.'s Annual Capital Punishment Training Conference, Airlie Conference Center, Warrenton, VA (2012, 2010, and 2005); and Capital Case Initiative, sponsored by South Carolina Commission on Indigent Defense (2013, 2012, 2011, and 2010).[1]

Ms. Waters received a B.A. for the University of North Carolina, Charlotte (2001) and a J.D. from the University of South Carolina School of Law (2004). She was admitted to practice

[1] Additionally, Mr. Grose is the current Chair of the Board of Directors of the Death Penalty Resource & Defense Center, which was formerly known as the Center for Capital Litigation, and was designated by this Court as a Community Defender Organization authorized to provide representation, assistance, information and other matters related to federal death penalty habeas corpus cases. *See In re: Amendments to the Plan on the United States District Court for the District of South Carolina for Implementing the Criminal Justice Act*, filed May 25, 2010.

law in South Carolina on November 15, 2004. She was an Assistant Public Defender for Greenwood and Abbeville Counties from November 2004 until December 2006 and Deputy Public Defender from January 2007 until June 2007. She was an Assistant Public Defender in Charleston County from July 2007 to June 2008. She practiced at the Khaled Law Firm from June 2008 to January 2010. She was an Assistant Public Defender for the Eighth Judicial Circuit in Laurens County from January 2010 to July 2012. She is currently a sole practitioner in Summerville, South Carolina.

When Ms. Waters was employed as an Assistant Public Defender or Deputy Public Defender for Greenwood and Abbeville Counties, her responsibilities included Mr. Hughey's capital post-conviction relief case. When Ms. Waters left the Public Defender for Greenwood and Abbeville Counties, she remained on Mr. Hughey's capital post-conviction relief case and was later formally appointed as one of Mr. Hughey's attorneys by Judge Macaulay. Since her employment in the Office of the Public Defender for Greenwood and Abbeville Counties, Ms. Waters has continuously represented Mr. Hughey.

Ms. Waters has been certified by the South Carolina Supreme Court to be lead counsel in capital cases. In addition to Mr. Hughey's capital post-conviction relief case, Ms. Waters currently serves as mitigation counsel in the capital post-conviction relief actions of *Jerry Buck Inman v. State*, Pickens County Case Number 2012-CP-39-00918, *Ron O'Neal Finklea v. State*, Lexington County Case Number 2010-CP-32-05076, and *Norman Starnes v. State*, Lexington County Case Number 2011-CP-32-00830. Additionally, Ms. Waters provided support for the defense team in the capital trial of *State v. Steven Vernon Bixby*, Abbeville County Case Numbers 2004-GS-01-00321 and 2004-GS-01-322, and currently serves as *guardian ad litem* for death row inmate Donald Allen Jones.

Ms. Waters' capital training includes the NAACP Legal Defense & Educational Fund, Inc.'s Annual Capital Punishment Training Conference, Airlie Conference Center, Warrenton, VA (2010); and Capital Case Initiative, sponsored by South Carolina Commission on Indigent Defense (2013, 2012, 2011, and 2010).

Conclusions of Law

S.C. Code Ann. §16-3-26(B)(1) provides:

> Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.

The statute requires the Supreme Court to "promulgate guidelines on the expertise and qualifications necessary for attorneys to be certified as competent to handle death penalty cases." S.C. Code Ann. §16-3-26(F). Rule 421, SCACR lists these qualifications. Mr. Grose and Ms. Waters meet the requirements of §16-3-26(F) and Rule 421.

"The Sixth Amendment provides that [i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense. [The Supreme Court of the United States has] previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (internal quotations omitted). "With respect to continued representation...there is no distinction between indigent defendants and non-indigent defendants." *Lane v. State*, 80 So. 3d 280, 295 (Ala. Crim. App. 2010), rehearing denied (Apr.

16, 2010), *cert. quashed,* 80 So. 3d 303 (Ala. 2011) *cert. denied,* 132 S. Ct. 1144 (2012). Therefore, "[a]lthough an indigent defendant does not have the right to force a trial court to appoint counsel of his or her own choosing, once counsel is appointed, the trial judge is obliged to respect the attorney-client relationship created through the appointment.... The attorney-client relationship between appointed counsel and an indigent defendant is no less inviolate than if counsel is retained." *Id.* at 297.[2]

South Carolina Supreme Court precedent is consistent with *Gonzalez-Lopez* and *Lane*. "[T]he right to be represented by an attorney of one's choosing could, in effect, determine the action, and it is closely related to the right to a particular mode of trial, which is an established substantial right." *State v. Wilson*, 387 S.C. 597, 602, 693 S.E.2d 923, 925 (2010). The right is so significant that "an order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed." *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005). In a criminal prosecution, the right to counsel is a fundamental right. U.S. Const. Am. VI and XIV; S.C. Const. Art. I, § 14.

Mr. Hughey requests this Court appoint Mr. Grose and Ms. Waters to represent him during his resentencing hearing. Because the Sixth Amendment protects the continuity of counsel, the Court concludes that Mr. Grose and Ms. Waters should be appointed to represent Mr. Hughey in his resentencing.

---

[2] *See also Smith v. Superior Court of Los Angeles County*, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74 (1968) ("A superficial response is that the defendant does not pay his fee, and hence has no ground to complain as long as the attorney currently handling his case is competent. But the attorney-client relationship is not that elementary: it involves not just the causal assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service.").

Therefore, it is ordered that Mr. Grose and Ms. Waters are appointed as counsel for Mr. Hughey.

IT IS SO ORDERED.

Frank R. Addy, Jr.
Chief Administrative Judge, Eighth Judicial Circuit

_____, 2105
Greenwood, South Carolina

We So Move:

John Kennedy Hughey, Defendant

E. Charles Grose, Jr.
The Grose Law Firm, LLC
400 Main Street
Greenwood, South Carolina 29646
(864) 538-4466
(864) 538-4405 (fax)
charels@groselawfirm.com

Tara Schultz Waters
Waters Law Firm, LLC
Post Office Box 1313
Summerville, South Carolina 29484
(843) 834-3600
(843) 883-6827 (fax)
tara@waterslawsc.com

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

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FAX: (803) 734-1499

www.sccourts.org

August 6, 2015

The Honorable Emily Yeargin McMahan
Clerk of Court, Abbeville County
PO Box 99
Abbeville SC 29620-0099

REMITTITUR

Re: John Kennedy Hughey v. The State
Lower Court Case No. 2000-CP-01-00212
Appellate Case No. 2010-170387

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Brenda F. Shealy

CHIEF DEPUTY CLERK

cc:
Ernest Charles Grose, Jr., Esquire
Tara Schultz Waters, Esquire
Donald J. Zelenka, Esquire
John Christopher Mills, Esquire
The Honorable Alexander S. Macaulay

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Kennedy Hughey, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2010-170387

Appeal From Abbeville County
The Honorable Alexander S. Macaulay, Circuit Court Judge

Memorandum Opinion No. 2015-MO-029
Heard January 15, 2015 – Filed May 13, 2015

DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Petitioner/Respondent.

E. Charles Grose, of Greenwood, and Tara Schulz Waters, of Summerville, for Respondent/Petitioner.

J. Christopher Mills, for Amicus Curiae, South Carolina Religious Leaders and Scholars.

PER CURIAM: After careful review of the record, appendix, and briefs, the writs of certiorari are dismissed as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, BEATTY and HEARN, JJ., concur. KITTREDGE, J., concurring in part and dissenting in part in a separate opinion in which TOAL, C.J., concurs.

JUSTICE KITTREDGE: I concur in part and dissent in part. I concur as to the dismissal of John Kennedy Hughey's certiorari petition. I dissent with respect to the dismissal of the State's certiorari petition, which, in effect, upholds the post-conviction relief court's grant of a new sentencing hearing based on the erroneous mercy charge. I would reverse the post-conviction relief court and reinstate Hughey's death sentence. I incorporate the well-reasoned opinion of Chief Justice Toal in *Evans v. State,* Op. No. 2015-MO-027 (S.C. Sup. Ct. filed May 13, 2015) (Toal, C.J., dissenting).

I add the following comments. In 2009, I authored this court's unanimous opinion in *Rosemond v. Catoe,* 383 S.C. 320, 680 S.E.2d 5 (2009). Rosemond was granted a new sentencing hearing based on trial counsel's failure to present any mental health mitigation evidence. *Rosemond,* 383 S.C. at 329, 680 S.E.2d at 10. Rosemond also asserted the mercy charge—"you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy"—as a basis for post-conviction relief. *Id.* We did not grant PCR based on the mercy charge, but clarified in dictum that the "other than as an act of mercy" language not be charged. *Id.* at 330, 680 S.E.2d at 10–11. I view the challenged instruction, in isolation, as potentially confusing, for it is susceptible to more than one interpretation.

This court never addressed the challenged mercy instruction in *Rosemond* in the context of the *Strickland v. Washington*[1] test. *Id.* at 329–30, 680 S.E.2d at 10–11. Given that the charge in this case was affirmed on direct review fifteen years ago, I cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding of deficient representation. *See State v. Hughey,* 339 S.C. 439, 459, 529 S.E.2d 721, 732 (2000) (reviewing the charge on mitigating circumstances, including the mercy charge, and concluding "a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment"). The finding of deficient representation is clear legal error. In any event, even were I to indulge in the fiction of deficient representation, Hughey cannot satisfy the prejudice prong of *Strickland.* The trial court's instruction in *Hughey* was as follows:

> Now as I indicated to you, you'll also have a form which is a recommendation of a life sentence. Now that particular form just simply states and sets forth that you twelve jurors have determined that a life sentence has been recommended in this case. And as I've

[1] 466 U.S. 668 (1984).

said, you will have two separate forms. One relating to county [sic] one of the indictment, one relating to county [sic] two of the indictment.

By that recommendation-of-sentence form, you twelve jurors may recommend that the defendant be sentenced to life imprisonment. Please note that while a recommendation of a life imprisonment sentence must also be a unanimous decision by the jury, only the foreman is required to sign his name to that recommendation-of-sentence form.

In arriving at your decision as to what the appropriate sentence would be in this cases [sic], you are instructed that you must also consider any statutory mitigating circumstances. Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the state legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder. It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder.

A mitigating circumstance is neither a justification nor an excuse for the crime of murder. It is simply something which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable.

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances. The following statutory mitigating circumstances are set forth on your statutory instruction form. They are the same as to each of the counts of the indictment.

Those statutory mitigating circumstances are: The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense.

Now you are also permitted under the law to consider, anesthesia [sic] you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case.

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder.

Those that the defense contends should be considered are: any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case.

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or circumstances beyond a reasonable doubt. And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or non-statutory mitigating circumstance.

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision.

While you must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before you may consider recommending a sentence of death, once such a finding is made you are permitted to recommend the sentence of death even though you may also find the existence of one or more statutory or non-statutory mitigating circumstances.

The existence of any statutory or non-statutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.

> Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do existence [sic]. Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy.[2]

In my judgment, the analysis here is no different than Chief Justice Toal articulated in *Evans*:

> [T]he ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the *entire* jury instruction. *State v. Bell,* 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991); *see also, e.g., State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction must be viewed in the context of the overall charge.").
>
> Here, Evans contests one sentence of a lengthy charge that instructed the jury to consider all statutory and non-statutory mitigating factors in arriving at their verdict. In my opinion, the rest of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective instruction; consequently, his *Strickland* argument must fail.

---

[2] Unlike the transcript in *Binney v. State*, Op. No. 2015-MO-028 (S.C. Sup. Ct. filed May 13, 2015), the transcript here contains no comma between the word "all" and the word "other." The absence of a comma, and the assumed absence of a pause in the reading of the sentence to the jury, does not change my view that the jury charge, when considered in its entirety, conveyed to the jury that it could recommend a life sentence merely as an act of mercy. Although we commonly find typographical errors in transcripts, an appellate court must accept the transcript as presented. I observe that the *Hughey* transcript contains far more errors than the *Binney* transcript. It would be regrettable, indeed, if an otherwise error-free death penalty verdict is set aside due to sloppy transcription.

Evans v. State, *Supra* (Toal, C.J., dissenting).

I agree with Chief Justice Toal's dissenting opinion in *Evans*, and I would reverse the grant of post-conviction relief to Hughey.

TOAL, C.J., concurs.

The Supreme Court of South Carolina

John Kennedy Hughey, Respondent/Petitioner,

v.

The State, Petitioner/Respondent.

Appellate Case No. 2010-170387

ORDER

The Petition for Rehearing filed on behalf of the petitioner/respondent in the above entitled matter is denied.

_____ J.

_____ J.

_____ J.

I would grant the Petition for Rehearing.

_____ C.J.

_____ J.

Columbia, South Carolina

August 6, 2015

cc:
Ernest Charles Grose, Jr., Esquire
Tara Schultz Waters, Esquire
Donald J. Zelenka, Esquire
John Christopher Mills, Esquire

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 28 2015
S.C. Supreme Court

May 28, 2015

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: John Kennedy Hughey v. State of South Carolina
Appellate Case No. 2010-170387

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Petitioner/Respondent State of South Carolina Petition for Rehearing** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosures

cc: E. Charles Grose, Jr., Esquire
Tara Schultz Waters, Esquire
Trisha Allen, Victim Assistance

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Alexander S. Macaulay, PCR Circuit Judge
2000-CP-01-212
J. Derham Cole, Trial Circuit Judge

Appellate Case No. 2010-170387
Memorandum Opinion No. 2015-MO-029
Filed May 13, 2015

JOHN KENNEDY HUGHEY, #5055

Respondent/Petitioner,

V.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent,

PETITION FOR REHEARING

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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COUNSEL FOR
PETITIONER/RESPONDENT

The Respondent State of South Carolina, through the Attorney General of South Carolina, hereby makes a Petition for Rehearing to the opinion of May 13, 2015 in which three members of the Court in a *per curiam* opinion concluded that the writ of certiorari, which was issued on April 16, 2014 on Respondent's petition for writ of certiorari, was improvidently granted, and two members of the Court dissented concerning the writ of certiorari and would have reversed the post-conviction relief court granting of resentencing and would have further reinstated John Kennedy Hughey's Abbeville County death sentence. For all reasons set forth below, Respondent submits that the extraordinary action of the Court—when two members of the Court who granted the writ of certiorari and entered opinions concluding the post-conviction relief was improperly granted and the authorized sentence of death should be reinstated—requires rehearing in the interest of justice pursuant to SCACR Rule 221 and Rules 200 and 243(j) and S. C. Code Ann. § 17-27-100. "The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law." *Stein v. New York*, 346 U.S. 156, 197 (1953).

1. **When two Justices continue to agree that certiorari is appropriate, the Court erred in the issuance of a *Per Curiam* opinion that certiorari Should Be dismissed as improvidently granted pursuant to SCACR Rule 243(j).**

"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance

true." *Payne v. Tennessee*, 501 U.S. 808, at 827 (1991) (*quoting Snyder v. Mass.*, 291 U.S. 97, 122 (1934)).

"The Rule of Two" Misapplication

It was improvident and in contravention of the South Carolina Appellate Court Rules under SCACR Rule 243(j) for three members of the Court to issue a *per curiam* order dismissing a granted writ of certiorari and deeming it to be improvidently granted when two justices concluded that certiorari was appropriate.[1] SCACR Rule 243(j) is clear and unambiguous: "upon the concurrence of any two justices, the petition may be granted on any question presented."[2] The "Rule of Two" for certiorari in Rule 243(j) remains applicable in this case because Justice Kittredge entered a dissenting opinion from the three justices' dismissal of the writ certiorari as improvidently granted and indicating that he "would reverse the grant of post-conviction relief to Hughey" in which Chief Justice Toal concurred. Where this Rule was overlooked or misapprehended, rehearing under Rule 221 is proper. The merits must be addressed.

In an analogous action in the United States Supreme Court addressing their "Rule of Four" concerning the grant of certiorari and the requirement to address the merits, two members of the Court stated:

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[1] S.C.Code Ann. § 17-27-100 ("[F]inal judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules.").

[2] See South Carolina Constitution, Art. V, § 4 (The Supreme Court shall makes rules governing the administration of all the courts of the state. Subject to statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.); Art. V, § 4A (submission of Supreme Court rules to the judiciary committee). S.C. Code Ann. § 14-3-640 (promulgation of rules); § 17-27- 100 (final judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules').

> We are bound here, however, by the 'Rule of Four.' That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. **If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court.** *See Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 559, 77 S.Ct. 459, 478, 1 L.Ed.2d 515 (separate opinion of Harlan, J.).

Donnelly v. DeChristoforo, 416 U.S. 637, 648 (1974) (concurring opinion of Justices Stewart and White). Similarly, in this action two justices remained so minded after oral argument that certiorari and error correction of the granting of post-conviction relief was required. The silent three members of the Court should be required to address the merits of the matter. In the *per curiam* opinion, the three members of this Court may have overlooked the effect of Rule 243(j) concerning the fact that two members of the Court continue to find the appropriateness of their grant of certiorari who seek to address the merits. The full Court, including the silent three members, under Rule 243 should be required to address the merits of the proceeding.

SCACR Rule 220 Misapplication

The three members of the Court may have also overlooked the requirement under SCACR Rule 220 that the Court issue a decision on the merits with the required explanation of the reasons for the decision rather than a discretionary conclusion that certiorari was improvidently granted when two members dissent. The three members may have also overlooked Rule 220(b) only authorizes a memorandum opinion:

> "dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, **in unanimous decision,** the Supreme Court determines that a published opinion would have no precedential value and any one or more of the following circumstances

> exist and is dispositive of the issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact that are or are not clearly erroneous; . . . (D) that no error of law appears."

None of those provisions apply to authorize a memorandum opinion in this case. When two members are still of the opinion that certiorari is proper, Rule 220 has not been followed unless the majority issues an opinion "every point distinctly stated in the case which is necessary to the decision," [Rule 220(b)] because it is not a "unanimous decision."

WHY THE APPLICATION OF THESE RULES IS IMPORTANT

Here, the interest of justice demands the litigants and the public be provided with the basis for the decision because the failure to do so has societal consequences. Under the discrete circumstances in this case, absent a reason for the inaction, our faith in the justice system for error correction of an undisputed erroneous judgment by the PCR court is questioned. As firmly pointed out in the dissenting opinion in this case and the companion dissenting opinions in *Hughey v. State*, 2015 Westlaw 2231252 (S.Ct.S.C. May 13, 2015); *Binney v. State*, 2015Westlaw 2230848 (S.Ct.S.C. May 13, 2015); and *Evans v. State,* 2015 Westlaw 2230263 (S.Ct.S.C. May 13, 2015), the actions of the circuit courts in ordering unnecessary and costly re-sentencing proceedings in these three cases, which the dissent cogently points out, are not authorized by a fair and appropriate reading of the opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), according to Justice Kittredge, the author of that opinion.

Clearly, re-sentencing relief was improvidently ordered by the circuit court by a misreading of this Court's mandate in *Rosemond.* The circuit court's errors of law are an

even more compelling reason for error correction, particularly when placed against the fabric of its misapplication of United States Supreme Court precedent of *Strickland v. Washington*, 466 U.S. 668 (1984) and its constitutional requirement to view counsel's conduct when the case was tried. As the *Strickland* Court itself observed, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689, 104 S.Ct. 2052. Here, where the underlying, so-called *Rosemond* error found by the PCR court evaporates in light of its author's repudiation of the PCR judge's interpretation, there is no basis for re-sentencing relief to be given based upon the non-error by the trial judge and the lack of deficient performance or prejudice—even in hindsight.

Simply put, the decision by the PCR judge had no basis in law, was an undisputed misinterpretation of the limited holding by this Court in *Rosemond*, and created through the unexplained (in)action by the three members of the Court, a windfall to the properly convicted and sentenced inmate. The unexplained failure of the three members of the Court to act in the certiorari action before this Court without the error correction appropriate allowing these unnecessary re-sentencing proceedings, is a defeat of fundamental fairness to the litigants and unnecessary use of limited judicial and prosecutorial resources. Such unexplained avoidance of the necessary error correction of the undisputed misapplication of this Court's precedent and the decision in *Strickland v. Washington*, 466 U.S. 668(1984), may be considered "shocking to the universal sense of justice" to the public and survivors of the victims in these cases. Such avoidance by the

three members of this Court to address the error as implicitly required under its own Rules, specifically Rule 243(j) and Rule 220, is particularly disturbing in a capital case. Here, transparency requires the basis for the unexplained inaction by the three members in light of the salient factors against that action, as reflected in the opinions of Justice Kittredge and Chief Justice Toal. This is why the requirements of Rule 220 are necessary.

It has recently been stated concerning the fact that "death is different" and that "trial courts must do everything legitimately in their power to ensure that these trials are fair and that the proceedings and verdict are especially reliable." *State v. Barnes*, 407 S.C. 27, 48, 753 S.E.2d 545, 556 (2014) (Toal, C.J., dissenting). A retrial without a reason for it can only be considered a defeat for justice. As this Court stated in *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), "[I]t would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial." It would do well for three silent members of the Court to remember that and to act properly under its rules to prevent the misapplication of its own decisions and the negative effect that such inaction has on justice. *See Stein v. New York*, 346 U.S. 156, 197 (1953) ("The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law.").

II. Rehearing is appropriate under Rule 221 where the decision under review demands error correction where the underlying precedent was misapplied by the circuit court which undermines any entitlement to a new sentencing proceeding.

Rehearing is appropriate where the three members of the court may have misapprehended that the PCR court's basis for relief in John Hughey's case was a misapplication of this Court's mandate in *Rosemond v. Catoe* which undermines any

conclusions related to deficient performance and prejudice. Simply put, the entire lower court order related to the resentencing judgment is an unsupportable error of law.

First, it is undisputed now that *Rosemond* did not require the action by Judge Macaulay. As Justice Kittredge stated in his dissent in Hughey *v. State* about the Rosemond opinion that he authored:

> Rosemond also asserted the mercy charge—"you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy"—as a basis for post-conviction relief. Id. **We did not grant PCR based on the mercy charge,** but clarified in dictum that the "other than as an act of mercy" language not be charged. Id. at 330, 680 S.E.2d at 10–11. I view the challenged instruction, in isolation, as potentially confusing, for it is susceptible to more than one interpretation.
>
> **This court never addressed the challenged mercy instruction in Rosemond in the context of the Strickland v. Washington test.**

Hughey v. State, supra.

However, even more telling of the misapplication of this Court's precedent is the fact that the "mercy charge" was raised and rejected for relief in Hughey's direct appeal. As Justice Kittredge noted:

> Given that the charge in this case was affirmed on direct review fifteen years ago, I cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding of deficient representation. *See State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 732 (2000) (reviewing the charge on mitigating circumstances, including the mercy charge, and concluding "a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment"). The finding of deficient representation is clear legal error. In any event, even were I to indulge in the fiction of deficient representation, Hughey cannot satisfy the prejudice prong of *Strickland.*

Hughey v. State, supra.

The PCR Court was plainly wrong in its conclusion that *Rosemond* alone mandated the decision to require resentencing of Hughey without any analysis. App.p. 5928. This reading of Rosemond demands vacation.

Further the Court may have misapprehended that that the claim was properly presented below. The PCR Court granted relief under *Rosemond* as a free-standing claim even though had been presented as a tortured ineffective assistance of counsel claim. This was error that must be vacated and reversed. The subject matter jurisdiction of the PCR Court is limited by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for an appeal. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised **at trial** or **on appeal**. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

The Court may have also misapprehended that deficient performance was shown. The PCR Court did not address deficient performance and could not in light of the intervening decision in Hughey's direct appeal. The petitioner did in fact did raise this same issue on direct appeal within Final Brief of Appellant [App.p. 4181-4183] and Final Reply Brief of Appellant. [App.p. 4267-68]. The PCR Court erred in addressing the issue without resolving the condition precedent of either deficient performance or prejudice under Strickland v. Washington, 466 U.S. 668 (1984) required under the state post-conviction relief act.

Further, the "law of the case" doctrine should apply because this issue was addressed in the direct appeal. While the PCR Court in its order granting the new

sentencing hearing recognized this limitation, as well as the fact that it was adversely decided to Hughey in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), the PCR Court failed to address the earlier opinion's vitality as being previously ruled upon and therefore barred under the Act. App.p. 5599-5604.

The Court may have may have misapprehended that the PCR court found that Sixth Amendment prejudice had been shown. At no time in its order did it make that conclusion. As noted in Justice Kittredge's dissenting opinion here, prejudice could not be shown as to either trial counsel or appellate counsel. Counsel Dudek actually raised the issue and it was ruled upon by this Court on the merits in the direct appeal. Even if we assume that the Court had not previously addressed the issue, prejudice under *Strickland* still cannot be proven. The ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the entire jury instruction. *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991); *see also, e.g., State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction must be viewed in the context of the overall charge."). As Chief Justice Toal stated herein with applicability to Hughey's case:

> In my opinion, the rest of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective instruction; consequently, his *Strickland* argument must fail.

Hughey v. State, supra.

In summary, rehearing is warranted where the merits of the decision of the state PCR court were eviscerated in the undisputed dissenting opinion which plainly shown Judge Macaulay's reliance on *Rosemond* was misplaced. In Hughey's direct appeal, the Court addressed the merits thereby making any the existence of deficient performance of either trial counsel for not objecting or appellate counsel impossible. Further, when a prejudice assessment is attempted, something the PCR court did not do, the Petitioner cannot meet his burden of proof.

Respondent respectfully submits that rehearing is warranted.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ATTORNEYS FOR PETITIONER-RESPONDENT

By: _____

May 28, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Abbeville County
Honorable Alexander S. Macaulay

Case No. 2000-CP-01-212

JOHN KENNEDY HUGHEY,

Respondent/Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Petition for Rehearing on:

Mr. E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, S.C. 29646

Mrs. Tara Schultz Waters, Esquire
Waters Law Firm
120 S. Magnolia Street
Summerville, S.C. 29483

by depositing copies in the United States mail, postage prepaid, this 28th day of May, 2015.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: chasgrose@gmail.com
Web: GroseLawFirm.com

June 8, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: John Kennedy Hughey v. State
Appellate Case Number: 2010-170387

Dear Mr. Shearouse:

In accordance with the Court's request, enclosed please find the original and six copies of Mr. Hugehy's Return to the State's Petition for Rehearing.

By copy of this letter to Mr. Zelenka, I am serving the State.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Tara Schultz Waters, Esquire
Donald J. Zelenka, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

Case No. 2000-CP-01-210
Appellate Case Number: 2010-170387

John Kennedy Hughey, Respondent/Petitioner

v.

The State, Petitioner/Respondent.

Return to State's Petition for Rehearing

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Attorneys for Respondent/Petitioner
John Kennedy Hughey

John Kennedy Hughey, responds to the State's Petition for Rehearing (hereinafter "Petition") as follows:[1]

I. Procedural Issues.

A. Rule 243(j), SCACR.

The State suggests, "It was improvident and in contravention of the South Carolina Appellate Court Rules under SCACR 243(j) for three members of the Court to issue a *per curiam* order dismissing a granted writ of *certiorari* and deeming it to be improvidently granted when two justices concluded that *certiorari* was appropriate." Petition 3. The State's Petition overlooks the complete procedural history of this case. This Court granted the parties' cross petitions for writ of *certiorari*. The parties fully briefed all issues. This Court convened oral arguments. Because this Court fully reviewed all issues, the requirements of Rule 243(j) and S.C. Code § 17-27-100 are met.

B. Rule 220(b), SCACR.

The State contends Rule 220(b) does not "authorize a memorandum opinion in this case." Petition 5. Although designated as a memorandum opinion, the majority opinion is technically not a memorandum opinion, but rather and an order dismissing the cross petitions for writ of *certiorari*. The State overlooks the inherent authority of this Court to dispose of its cases in a just manner. *Renaissance Enterprises, Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999) ("The adjudicative power of the [Supreme] Court carries with it the inherent power to control the order of its business to safeguard the rights of litigants.").

[1] By telephone call on May 29, 2015, this Court requested Hughey file a Return to the State's Petition for Rehearing.

C. Policy Argument.

The State contends the majority's order dismissing the cross petitions for writs of *certiorari* causes "our faith in the justice system for error correction" to come under "question." Petition 5. And, "transparency requires the basis for the unexplained inaction by three members" of this Court. Petition 7. As discussed in Subsection A, *supra*, this Court had the benefit of full briefing and oral argument before dismissing the cross appeals. The Appendix, containing the complete trial court and post-conviction record, is a public record. The briefs filed during the direct appeal and post-conviction relief appeal are public records. The oral argument is available online on the Judicial Department website. Suggestions that the disposition of this case lacks transparency or shakes the public's faith in the judicial system, accordingly, are without merit.

II. Substantive Issues.

A. *Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 11 (2009).

The State contends the post-conviction relief court and the majority of this Court "misappli[ed] this Court's mandate in *Rosemond v. Catoe*." Petition 7. In *Rosemond*, this Court "overrule[d] *State v. Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase." 383 S.C. at 330, 680 S.E.2d at 11. As discussed in the Respondent/Petitioner's Brief of Respondent (hereinafter "Brief of Respondent" or "Brief"), at 21-47, the instruction in Hughey's trial was contrary to the role of mercy in capital sentencing in South Carolina both before and after the trial of Hughey's case.

Section IV of the Brief of Respondent, at 55-58, further explained how Hughey was presenting the no mercy instruction as ineffective assistance of trial and appellate counsel claims prior to this Court's decision in *Rosemond.*

The majority of this Court, therefore, properly agreed with the post-conviction relief court that Hughey's jurors were instructed not to consider mercy as a reason for recommending a life sentence. As will be discussed in more detail below, both trial and appellate counsel provided ineffective assistance of counsel regarding the no mercy jury instruction.

B. Fiction of a Free-Standing Claim vs. Ineffective Assistance of Counsel Claims.

The Petition argues, "[T]he Court may have misapprehended that the claim was properly presented below." And, "The PCR Court granted relief under *Rosemond* as a free-standing claim," even though the State acknowledges Hughey "presented" the no mercy jury instruction as "ineffective assistance of counsel claim[s]." Petition 9. These contentions ignore the full record in the case. In his Brief of Respondent, at 4-11, Hughey summarized the trial, appellate, and post-conviction relief records. Section I of the Brief, at 14-20, explained why the post-conviction relief court found ineffective assistance of both trial and appellate counsel.

The State also argues that the post-conviction relief court and the majority of this Court misapplied *Strickland v. Washington*, 466 U.S. 668 (1984). Petition 9. The record supports the post-conviction relief court and the majority of this Court ordering a new sentencing hearing based on ineffective assistance of counsel. The Brief of Respondent, at 12-13, sets forth the applicable legal standards for ineffective assistance of trial and appellate counsel.

Section II of the Brief of Respondent, at 21-50, discussed ineffective assistance of trial counsel. The Brief, at 48, pointed out that trial counsel failed to object to the no mercy instruction. The Brief, at 48-50, demonstrated that the erroneous jury instruction—much like what happened in *State v. Jones*, 343 S.C. 562, 541, S.E. 2d 813 (2001)—undermined the credibility of a witness called to ask for mercy and trail counsel's closing argument urging the jurors to recommend a life sentence based on mercy.

Section III of the Brief, at 51-54, discussed ineffective assistance of appellate counsel. Ineffective assistance of counsel as the basis for relief was addressed during the oral argument. The brief discussed the similarity of Hughey's direct appeal with the direct appeal in *Patrick v. State,* 349 S.C. 203, 562 S.E.2d 609 (2002), where this Court found ineffective assistance of appellate counsel because of inadequate briefing of the issue in the direct appeal.

Section IV of the Brief of Respondent, at 55-58, further explained how Hughey was presenting the no mercy instruction as ineffective assistance of counsel claims prior to this Court's decision in *Rosemond.*

The record, therefore, supports the post-conviction relief court and the majority of this Court ordering a new sentencing hearing based on ineffective assistance of counsel.

Additionally, "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if

convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.").

C. The Direct Appeal.

The State further argues, "[T]he law of the case doctrine should apply because this issue was addressed in the direct appeal." Petition 10. Hughey addressed this contention in Section IV(B) of the Brief of Respondent, at p. 57.

The Petition also completely overlooks the concept of ineffective assistance of appellate counsel, in general, and this Court's opinion in *Patrick, supra,* in particular. As seen, Section III of Brief of Respondent, at 51-55, discussed ineffective assistance of appellate counsel. Section IV of the Brief of Respondent, at 55-58, further explained how Hughey was presenting the no mercy instruction as ineffective assistance of trial and appellate counsel claims prior to this Court's decision in *Rosemond.*

III. Conclusion.

Because the majority did not overlook or misapprehend any points of law or fact, this Court should deny the State's Petition for Rehearing.

Respectfully submitted,

By _____

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June 8, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

Case No. 2000-CP-01-210
Appellate Case Number: 2010-170387

John Kennedy Hughey, Respondent/Petitioner

v.

The State, Petitioner/Respondent.

Certificate of Service

I certify that I have served a copy of Mr. Hughey's Return to the State's Petition for Rehearing on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

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June 8, 2015
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Kennedy Hughey, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2010-170387

Appeal From Abbeville County
The Honorable Alexander S. Macaulay, Circuit Court Judge

Memorandum Opinion No. 2015-MO-029
Heard January 15, 2015 – Filed May 13, 2015

DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Petitioner/Respondent.

E. Charles Grose, of Greenwood, and Tara Schulz Waters, of Summerville, for Respondent/Petitioner.

J. Christopher Mills, for Amicus Curiae, South Carolina Religious Leaders and Scholars.

PER CURIAM: After careful review of the record, appendix, and briefs, the writs of certiorari are dismissed as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, BEATTY and HEARN, JJ., concur. KITTREDGE, J., concurring in part and dissenting in part in a separate opinion in which TOAL, C.J., concurs.

JUSTICE KITTREDGE: I concur in part and dissent in part. I concur as to the dismissal of John Kennedy Hughey's certiorari petition. I dissent with respect to the dismissal of the State's certiorari petition, which, in effect, upholds the post-conviction relief court's grant of a new sentencing hearing based on the erroneous mercy charge. I would reverse the post-conviction relief court and reinstate Hughey's death sentence. I incorporate the well-reasoned opinion of Chief Justice Toal in *Evans v. State,* Op. No. 2015-MO-027 (S.C. Sup. Ct. filed May 13, 2015) (Toal, C.J., dissenting).

I add the following comments. In 2009, I authored this court's unanimous opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). Rosemond was granted a new sentencing hearing based on trial counsel's failure to present any mental health mitigation evidence. *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10. Rosemond also asserted the mercy charge—"you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy"—as a basis for post-conviction relief. *Id.* We did not grant PCR based on the mercy charge, but clarified in dictum that the "other than as an act of mercy" language not be charged. *Id.* at 330, 680 S.E.2d at 10–11. I view the challenged instruction, in isolation, as potentially confusing, for it is susceptible to more than one interpretation.

This court never addressed the challenged mercy instruction in *Rosemond* in the context of the *Strickland v. Washington*[1] test. *Id.* at 329–30, 680 S.E.2d at 10–11. Given that the charge in this case was affirmed on direct review fifteen years ago, I cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding of deficient representation. *See State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 732 (2000) (reviewing the charge on mitigating circumstances, including the mercy charge, and concluding "a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment"). The finding of deficient representation is clear legal error. In any event, even were I to indulge in the fiction of deficient representation, Hughey cannot satisfy the prejudice prong of *Strickland.* The trial court's instruction in *Hughey* was as follows:

> Now as I indicated to you, you'll also have a form which is a recommendation of a life sentence. Now that particular form just simply states and sets forth that you twelve jurors have determined that a life sentence has been recommended in this case. And as I've

[1] 466 U.S. 668 (1984).

said, you will have two separate forms. One relating to county [sic] one of the indictment, one relating to county [sic] two of the indictment.

By that recommendation-of-sentence form, you twelve jurors may recommend that the defendant be sentenced to life imprisonment. Please note that while a recommendation of a life imprisonment sentence must also be a unanimous decision by the jury, only the foreman is required to sign his name to that recommendation-of-sentence form.

In arriving at your decision as to what the appropriate sentence would be in this cases [sic], you are instructed that you must also consider any statutory mitigating circumstances. Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the state legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder. It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder.

A mitigating circumstance is neither a justification nor an excuse for the crime of murder. It is simply something which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable.

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances. The following statutory mitigating circumstances are set forth on your statutory instruction form. They are the same as to each of the counts of the indictment.

Those statutory mitigating circumstances are: The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense.

Now you are also permitted under the law to consider, anesthesia [sic] you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case.

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder.

Those that the defense contends should be considered are: any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case.

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or circumstances beyond a reasonable doubt. And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or non-statutory mitigating circumstance.

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision.

While you must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before you may consider recommending a sentence of death, once such a finding is made you are permitted to recommend the sentence of death even though you may also find the existence of one or more statutory or non-statutory mitigating circumstances.

The existence of any statutory or non-statutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.

> Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do existence [sic]. Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy.[2]

In my judgment, the analysis here is no different than Chief Justice Toal articulated in *Evans*:

> [T]he ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the *entire* jury instruction. *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991); *see also, e.g., State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction must be viewed in the context of the overall charge.").
>
> Here, Evans contests one sentence of a lengthy charge that instructed the jury to consider all statutory and non-statutory mitigating factors in arriving at their verdict. In my opinion, the rest of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective instruction; consequently, his *Strickland* argument must fail.

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[2] Unlike the transcript in *Binney v. State*, Op. No. 2015-MO-028 (S.C. Sup. Ct. filed May 13, 2015), the transcript here contains no comma between the word "all" and the word "other." The absence of a comma, and the assumed absence of a pause in the reading of the sentence to the jury, does not change my view that the jury charge, when considered in its entirety, conveyed to the jury that it could recommend a life sentence merely as an act of mercy. Although we commonly find typographical errors in transcripts, an appellate court must accept the transcript as presented. I observe that the *Hughey* transcript contains far more errors than the *Binney* transcript. It would be regrettable, indeed, if an otherwise error-free death penalty verdict is set aside due to sloppy transcription.

Evans v. State, *Supra* (Toal, C.J., dissenting).

I agree with Chief Justice Toal's dissenting opinion in *Evans*, and I would reverse the grant of post-conviction relief to Hughey.

TOAL, C.J., concurs.