



ALAN WILSON
ATTORNEY GENERAL

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July 27, 2012

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *The State, Respondent-Petitioner vs. Jonathan Kyle Binney,*
Petitioner-Respondent
Appellate Case No.: 2012-212107

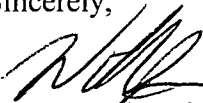
Dear Mr. Shearouse:

Attached please find a copy of the Transcript of Record from the telephone conference which was held on December 9, 2011 regarding the above matter. Counsel for the State received an electronic copy of the transcript yesterday, July 26, 2012. The original transcript has not yet been received by this office

By copy of this letter I am serving copies of the transcript upon counsel for the Petitioner-Respondent today.

Thank you for your consideration.

Sincerely,


William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

Enclosures

cc: Court Administration (w/copy of encls.)
John H. Blume, Esq. (w/copy of encls.)
Emily C. Paavola, Esq. (w/copy of encls.)
Robert M. Dudek, Esq. (w/copy of encls.)

THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
JONATHAN K. BINNEY, #6009) TELEPHONE CONFERENCE
)
) PLAINTIFF,) DECEMBER 9, 2011
)
) VERSUS) 2006-CP-11-0023
)
THE STATE OF SOUTH CAROLINA)
)
) DEFENDANT.)
)
_____)

BEFORE

THE HONORABLE J. MICHAEL BAXLEY

APPEARANCES

William Edgar Salter, III, Esquire
J. Anthony Mabry, Esquire
Attorney for The State

John H. Blume, Esquire
Emily C. Paavola, Esquire
Attorneys for that Applicant

Pamela Ozment-Cartee
Circuit Court Reporter

Telephone Conference

Page 03

Ruling by the Court (Taken Under Advisement.)

Page 25

Certificate of Reporter

Page 28

1 (Whereupon, this hearing was called to order
2 at 10:03 a.m. on Friday, December 9, 2011.)

3 **THE COURT:** Ladies and gentlemen, good morning. This
4 is Mike Baxley. I hope everyone can hear me. I am actually
5 on a speaker phone, and our court reporter today is Pamela
6 Cartee, who is taking this down. And my law clerk Mason
7 King, is also present in the room.

8 Let me ask, I know you have already identified yourself
9 to Jamie, but just so I can gauge volume and ability to hear
10 you, please tell me who all is on the telephone?

11 **MR. BLUME:** Well, your honor, this is John Blume, and I
12 represent Mr. Binney.

13 **THE COURT:** Very good. I can hear you well, Mr.
14 Blume.

15 **MS. PAAVOLA:** And this is Emily Paavola, and I also
16 represent Mr. Binney.

17 **THE COURT:** All right. Ms. Paavola I can hear you as
18 well. Good morning.

19 **MR. SALTER:** Your honor, this is Ed Salter, and I
20 represent the State.

21 **MR. MABRY:** And Anthony Mabry, and I represent The
22 State.

23 **THE COURT:** All right. Mr. Salter and Mr. Mabry, I
24 can hear you as well. And good morning to you additionally.

25 And let me ask, are you all able to hear me?

1 **MR. BLUME:** Yes, your honor, quite well.

2 **THE COURT:** All right. Let's let the record reflect
3 that we are conducting this conversation, actually this
4 hearing by telephone. It is December the ninth, and it is
5 ten o'clock in the morning.

6 We are here today to discuss and argue the motion by
7 applicant to alter or amend the Order that this Court issued
8 that denies post- conviction relief to Mr. Binney.

9 And, I have received in writing from the applicant the
10 Motion to Alter or Amend Judgment as well as attachments to
11 that, and have had the opportunity to review that.

12 The Attorney General has not submitted a response in
13 writing however, we set this matter for a hearing today to
14 give both sides an opportunity to argue their position, so
15 that the record would be preserved.

16 **MR. SALTER:** Your honor, may I interrupt sir?

17 **THE COURT:** Yes, sir.

18 **MR. SALTER:** Ed Salter. I don't mean to interrupt,
19 however, we did submit in writing April 12, 2011, a response
20 to some of the questions raised in the Motion to Alter or
21 Amend. It is a two page letter or response.

22 **THE COURT:** All right. Just a moment, please.

23 **(PAUSE.)**

24 **THE COURT:** All right. You say that was sent in
25 April of 2011?

1 **MR. SALTER:** Right.

2 **THE COURT:** All right. Now I issued my Order in
3 September.

4 **MR. SALTER:** Yes, sir.

5 **THE COURT:** All right, sir. I just want to make sure
6 we are on the same wavelength. I issued the Order in
7 September 2011.

8 **MR. SALTER:** Yes, sir. I do apologize, your honor.
9 This is an earlier letter, I apologize, but it goes to the
10 same issues --- some of the same issues.

11 **THE COURT:** All right, very good. We will give you
12 an opportunity to comment on those today.

13 What I was pointing out in the history, at least as I
14 perceived it was that, I filed the Order on September the
15 11th. On September 15th, there was a Motion by the Applicant
16 to Reconsider, that is a Motion to Alter or Amend. I had
17 asked the Attorney General for a Brief. It was my
18 understanding that both you, Mr. Salter and Mr. Mabry were in
19 trial, and rather than wait what looked to be a lengthy
20 period for a written formal response, I set this Motion for a
21 hearing today. So, if you have submitted a letter back in
22 April that bore on these issues, I am certain that I reviewed
23 it and considered at the time when I was developing the Order
24 itself. But what I meant was subsequent to the Order, I have
25 not received anything in writing from the Attorney General's

1 Office.

2 **MR. SALTER:** That is correct. You are correct. I
3 apologize for the confusion.

4 **THE COURT:** All right, very good. What I would like
5 to do is discuss, if we could break this discussion down into
6 three points. And one is what I am going to call the quote,
7 general factual errors that Mr. Blume and Ms. Paavola allege
8 in their argument. Secondly, the matter of Juror Viquez.
9 And then thirdly, I would like to talk about the effect of
10 the Rosemond Order as well as the Hughey versus State Order
11 with regard to the charge that was given by Judge Cole at the
12 time this trial was originally had, that is the underlying
13 trial.

14 Let's start with the factual errors. Again, the
15 Applicant has submitted a Motion to Alter or Amend. It has
16 been commented in there that there were numerous factual
17 errors.

18 One specific one that was pointed out was that the
19 error, my Order contains an error when I state that, Mikayla
20 Binney had to have a hysterectomy as a result of the sexual
21 assault that Mr. Binney committed upon her. Do you want to
22 respond to that issue Mr. Salter, or Mr. Mabry?

23 **MR. SALTER:** I want to respond to that, Your Honor.
24 This is Mr. Salter.

25 We would agree that the witness, Dr. Mainman,

1 M-A-I-N-M-A-N, testified that she did not anticipate that the
2 victim would have any problems bearing children. She did not
3 reference performing a hysterectomy, but likened the injury
4 to an episiotomy. That is on pages 3190 to 3193. On page
5 3193 she explained that although the family did not let her
6 reexamine the child a week after the surgery, and she could
7 not be certain, she explained on lines thirteen through
8 seventeen, quote "But a child that small it is very difficult
9 to penetrate deeply enough into her vagina to cause internal
10 injuries. Most of her injuries that I was able to witness
11 were external. I don't believe that her uterus was damaged."
12 That is the end of the quotation. So, no, she does not say
13 anything about performing a hysterectomy.

14 **THE COURT:** Let me say to all counsel. What I did,
15 and, of course, this was back in May of 2007, I took
16 extensive notes as the PCR trial was occurring, and
17 thankfully I did, because obviously now we are four years
18 plus from that trial. That comment, I believe, was made
19 perhaps in opening statement Mr. Salter. Is it possible that
20 you would have said that in opening statement?

21 **MR. SALTER:** I don't believe so, Your Honor. I do
22 not recall saying that. And I know that it was not in our
23 proposed Order.

24 **THE COURT:** All right. It was not. That is correct.
25 And, you know, obviously I just can't imagine that I would

1 have made that up. But as I reviewed my notes I have been
2 unable to find that in my notes. So, it may be that somehow
3 I came up with that fact which was incorrect.

4 However, my position on that is that that is a
5 collateral fact at best. It is not something that formed a
6 basis of my decision. I am not certain that it is anything
7 more than harmless error. But, Mr. Blume, I will be glad to
8 hear from you or from Ms. Paavola if you wish to comment on
9 what appears to be an error, factual error in the Order.

10 **MR. BLUME:** Well, I am just thinking for purposes of
11 the record and for the appeal, we would ask and think the
12 Order should be accurate. And, no I mean, I understand that
13 an issue like that is probably not something that is going to
14 change your mind. It is just in reading the Order and
15 reviewing it, we felt like this and some other facts were
16 wrong and should be corrected.

17 **THE COURT:** All right. That is a valid position.
18 And I accept the argument that whether or not there was some
19 basis for me to have come away with that conclusion is beside
20 the point. It is apparent at this juncture that it is not an
21 accurate statement of what happened. So, I am going to issue
22 an Order that will amend that factual finding.

23 Now, are there any other actual findings in particular
24 Mr. Blume, that you believe would rise to the level of being
25 either one, an error that needs to be corrected for the

1 accuracy of the record, or secondly, something that may bear
2 upon the decision made by the Court?

3 **MR. BLUME:** Ms. Paavola, do you want to respond to
4 this or do you prefer that I do?

5 **MS. PAAVOLA:** Yes, I would be happy to respond to
6 that. I think that there are several in the attachment, the
7 letter that was attached that are intertwined with some of
8 the findings that the Order makes. You know, for example,
9 the one about Mr. Pruitt on the first page of the attached
10 letter from March 24th, Mr. Pruitt's statement that he did not
11 consult the 2003 ABA Guidelines. He did testify to that.
12 However, the Order finds that he did not consult with them
13 because they did not yet exist. But that is factually
14 incorrect since the ABA guidelines have existed since 1989.

15 **THE COURT:** All right. Are there any others?

16 **MS. PAAVOLA:** Again, I think this letter that he
17 referenced from April responds to some of this, but it is our
18 position that the Court's Order makes a finding that Ms.
19 Tonya Brown was not a credible witness, because she had a
20 prejudice against the Solicitor's Office, because her
21 daughter was being prosecuted by that office. But her
22 testimony at the PCR Hearing was not that her daughter was
23 being prosecuted, but that her daughter was the victim of a
24 crime. And she specifically testified that she did not have
25 anything against the prosecutor's office. And that it wasn't

1 the same solicitor that is involved in this case.

2 **THE COURT:** All right. Let me take that down. I am
3 taking notes while you are commenting on those.

4 Are there any others that you believe are of sufficient
5 importance that may need to be addressed by the Court?

6 **MS. PAAVOLA:** Yes. The ones regarding Mr. Bookstein's
7 testimony. The Order in general finds that Mr. Bookstein's
8 testimony isn't relevant, because what he does wasn't
9 available at the time of Mr. Binney's trial. And the letter
10 points out in several respects that what Mr. Bookstein
11 testified to was available and known as early as 2002, and he
12 did explain that throughout his deposition testimony. And
13 much of the sections that said that Mr. Bookstein's testimony
14 isn't credible, reference two articles that he wrote in 2005.
15 But the articles don't discuss any techniques that Mr.
16 Binney's case involved.

17 **THE COURT:** Okay. And I note that is in the last
18 letter that you previously sent me. That is the last of the
19 factual claims that you raised in that correspondence. Are
20 there any other additional factual errors that you believe
21 the Order contains?

22 **MS. PAAVOLA:** I don't think so. The only other one
23 referenced in the Motion apart from the attachment was the
24 letter about Mikayla Binney, that the Court has already
25 addressed.

1 **THE COURT:** All right, very good. Let me hear now
2 from Mr. Salter on the three that were just raised, which is
3 the ABA Guidelines; Tonya Brown being not credible and the
4 reason for that being incorrectly stated, and then the Dr.
5 Bookstein issue.

6 **MR. SALTER:** Your Honor, I will speak to the first
7 two of that. Mr. Mabry will address Dr. Bookstein's
8 deposition.

9 **THE COURT:** Okay.

10 **MR. SALTER:** I think the Court's Order, beginning on
11 page sixteen of it, is correct. The Court indicated that as
12 a threshold issue, the Court did not accept Applicant's
13 counsels' argument that the guidelines established the
14 appropriate standard for counsels' investigation and
15 presentation. Because, that is precisely what Mr. Blume is
16 arguing on page sixty-six, lines nineteen through twenty-four
17 of the PCR transcript.

18 With respect to Mr. Pruitt's testimony, Mr. Pruitt did
19 testify that he did not rely upon the 2003 guidelines,
20 because those guidelines were not available at the time of
21 his representation, because the guidelines were being
22 amended. There were ABA Guidelines prior to 2003. However,
23 the 2003 guidelines were in the process of being amended. I
24 think again the Court's Order got it right.

25 We also stand by Your Honor's discussion of Ms. Brown's

1 testimony on page twenty-five and twenty-six. It is our
2 understanding that regardless of whether her daughter was a
3 victim or a defendant, that there was basically bad blood
4 between her and the Solicitor's Office's, over whatever
5 incident that involved.

6 Your Honor made several other findings that were not in
7 our proposed order with respect to the inadmissibility of her
8 testimony that we think are correct. That it potentially
9 involved the admission of hearsay. It could get into
10 inconsistent statements to his knowledge of the victim's
11 husband. I think Your Honor's findings are correct.

12 I will now turn it over to Mr. Mabry for a discussion of
13 Dr. Bookstein.

14 **MR. MABRY:** Yes, can you hear me, judge?

15 **THE COURT:** Yes, sir, I can.

16 **MR. MABRY:** Judge, I went back, I spent all day
17 yesterday going back and looking at Ms. Paavola's letter
18 regarding Dr. Bookstein, and reviewing his deposition and the
19 articles published in 2005. And I believe your Order
20 accurately reflects testimony and the evidence before the
21 Court including the deposition, and including the article
22 published. In fact on page 118 and 119 of his deposition,
23 you have to read his deposition from beginning to end,
24 because there is specific point in the deposition where he
25 says well, in the article I talk about this, and in the next

1 paragraph he talks about this. But when we got to the end I
2 asked him on page 118, we were unable to publish any aspect
3 of the work of the adult brain into how far the literature,
4 both psychiatric literature and the grant and contracts that
5 underwrote the software for the 3D image now and its
6 animation have all been defunded, and I asked him, did I read
7 that correctly, and he said, yes; and if he wrote that, and
8 he said, yes. Then I said that is talking about the 3D image
9 analysis that you used in this case, and he said, yes. It is
10 also talking about the situation in the middle of 2005. And
11 then I go on and ask him some more, and he said about the ---
12 So, at that time you could not get this process, the three-
13 dimensional process that you were using in your work to look
14 at these MRIs, talking about this case. Published on the
15 alcohol literature or any psychiatric literature in grant
16 contrast were all defunded, am I correct, and he said, yes,
17 and then everything changed. And I asked him if that was
18 2006, and he said after the writing in 2005.

19 So, I reviewed the Order and the Order accurately
20 reflects what his testimony was in the deposition. And, in
21 fact, he was overly kind to the defendant. Because, if you
22 read this publication in 2005, that publication indicates
23 that they did not go to neuroimaging people to get it
24 published, but they actually went looking into the defense
25 bar for help in this area. So, we think the Order is

1 accurate.

2 **THE COURT:** Does anyone want to reply to that from the
3 applicant's position. I don't insist upon it, but if you
4 have something that you want to say in reply, I will give you
5 an opportunity to Mr. Blume or Ms. Paavola.

6 **MS. PAAVOLA:** Your Honor, Dr. Bookstein, you know,
7 the sections that Mr. Mabry has just cited discuss whether or
8 not his studies were defunded, and then they are subsequently
9 refunded by other people. But, that doesn't mean that the
10 work didn't exist before then. Dr. Bookstein clearly sites
11 two studies that were published in 2002 in his report on Mr.
12 Binney's analysis and defining from the 2002 studies which
13 were both published in those years are the basis for the
14 findings he made in this case.

15 **THE COURT:** Thank you. And Mr. Blume?

16 **MR. BLUME:** No, nothing on this point.

17 **THE COURT:** All right. Let's move forward to the
18 issue of Juror Viquez, and talk a little bit about that issue
19 if we may.

20 Let me begin by asking, so our record here in this
21 proceeding will be fairly complete, what is it that the Juror
22 Viquez, what was the position that he took both at deposition
23 and in Affidavit, which I excluded happened at the trial?

24 **MR. BLUME:** Do you want to provide the substance, and I
25 will make any argument?

1 **MS. PAAVOLA:** Mr. Viquez testified that he did not
2 want to vote for the death penalty, and that the other jurors
3 in the room with him pressured him to do that by calling him
4 names, and making reference to the fact that he was not born
5 as a U.S. Citizen. And telling him that if he did not do
6 what he told the Judge that he was willing to do and vote for
7 death, he would go to jail.

8 **THE COURT:** All right. Now, let's go to the legal
9 argument that arises from that factual claim. And Mr. Blume,
10 did you want to speak to the legality --- the legal
11 implications?

12 **MR. BLUME:** Well, I mean, the legal --- I'm sorry, I
13 thought you were talking about whether -- Essentially it
14 would be that there was racial and ethnic bias in the jury
15 room, which was used to coerce Mr. Viquez in the voting for
16 death, and this was a position which he didn't want to do,
17 and he was pressured through this sort of use, and I will
18 call racial and ethnic slurs and threats, and that the jury
19 has to be unanimous to impose the death penalty. That that
20 renders the death penalty in this case invalid.

21 **THE COURT:** And now moving forward to admissibility,
22 under what theory and particularly here at PCR would that be
23 admissible and really cognizable?

24 **MR. BLUME:** Well, to claim effectively jury misconduct;
25 claims of jury misconduct are generally or often, or not

1 often but are commonly raised in post-convictions, because
2 the information was not available. This is not information
3 that was available or known at the time of trial. There have
4 been other cases where issues of other bias in the jury room
5 has been admitted. But it really couldn't have been raised
6 previously. Post-conviction would be the place to do it. I
7 think it was relevant to this post- conviction relief action.
8 And also the fact that it was done by deposition, I mean it
9 is not as if --- Yes, there was an affidavit which the Court
10 excluded. But because everyone knew that Mr. Viquez was
11 going to be unavailable at the time of the post-conviction
12 relief hearing, the Attorney General provided notice of that,
13 and provided the affidavit, and the deposition was taken and
14 the anticipation was he would not be available, and it would
15 be admissible. Depositions have been admitted in numerous
16 post-conviction relief actions.

17 **THE COURT:** All right. And let me hear from the State
18 about the admissibility of it, and my findings in the Order,
19 whatever your position is; we will be glad to hear from you.

20 **MR. MABRY:** This is Mr. Mabry, Judge. We believe the
21 findings in the Order are correct.

22 First of all, the only evidence that they offered at the
23 hearing in this regard was the quote, and I use the word
24 loosely quote, affidavit of Juror Viquez. It was basically a
25 signed statement, because it was not sworn. The Court

1 excluded it, would not allow it into evidence, and allowed it
2 to simply to be mark as an exhibit so any appellate court
3 could review the Court's decision. It was not a signed or a
4 sworn affidavit. It did not fall under the statute. That is
5 why it was excluded. And they did not offer the deposition
6 into evidence. It was never entered into evidence. That is
7 incorrect. What occurred then was, the State had the
8 deposition marked as a court's exhibit in case the appellate
9 court ever reviewed the admissibility --- the Court's
10 determination to not admit the affidavit to show there was no
11 prejudice.

12 So, there is no evidence in the record of supporting any
13 juror misconduct. That is the first problem they are
14 claiming.

15 The second problem is Juror Viquez admits in his
16 deposition that it is either toward the end paragraph or six
17 or thirteen, I can't remember the exact number, those
18 paragraphs under the fourth affidavit is not even true. He
19 didn't say those things. And we attached the deposition of
20 the Court's exhibit so that it is clear to any reviewing
21 court that this recorded affidavit does not in fact, contain
22 stuff that is not even true.

23 **THE COURT:** All right. And now putting aside the
24 veracity of it, and let's just assume for the moment it is
25 true; what is your position on whether that would be

1 admissible to collaterally attack the affidavit of a juror to
2 collaterally attack a jury's decision?

3 **MR. MABRY:** Right. Our position that speaks to our
4 hearing and still remains is that it is not admissible,
5 especially given his deposition testimony. He could not even
6 remember in his deposition what these other jurors said to
7 him. And I have not reviewed it a long time. But I remember
8 asking him that, and he couldn't remember exactly what they
9 said. He also said that he still made the right decision.
10 So, it did not affect his ultimate decision in this case.

11 **THE COURT:** All right. And then Mr. Blume, let me
12 come back to you if I may. My records reflect that I believe
13 it was back in the year 2007 I was mailed by Mr. Salter a
14 copy of Juror Viquez's deposition. But I do not reflect in
15 my notes that it was ever put into evidence at the trial. I
16 do not have it down as a trial exhibit. So, tell me, how is
17 it part of our evidentiary record here?

18 **MR. BLUME:** Your Honor, maybe I am wrong about this.
19 This was my understanding, that it was admitted into the
20 record that either at the end or at some point at the PCR
21 hearing. I didn't go look, and I didn't realize that was an
22 issue. I thought the deposition was admitted.

23 **THE COURT:** All right. Ms. Paavola, do you have a
24 different recollection?

25 **MS. PAAVOLA:** No, Your Honor. It was my understanding

1 that the deposition was offered as an exhibit at the hearing.

2 **THE COURT:** All right. Let me just go ahead and state
3 on the record with regard to this particular issue.

4 I am going to decline to grant any relief on this issue,
5 because again for the same reasons.

6 I find that the affidavit was clearly inadmissible
7 because it was not sworn.

8 The deposition, I do not believe was part of the record.
9 But even giving the benefit of the doubt to the applicant on
10 that point, I find that it is not credible, not consistent
11 with the comments made in the affidavit.

12 And I simply do not find sufficient evidence here in any
13 way to overturn or impact the verdict below.

14 And even further, I am not certain that any of that
15 would be admissible, even if it was all completely true at
16 this juncture at PCR to overturn a, I guess to collaterally
17 attack the decision of the jury. So, I am again going to
18 deny relief on that point.

19 And let's move to the final point, which may be the most
20 important of them all, which is the charge given by Judge
21 Cole that the jury could not recommend life as an act of
22 mercy. That is not the exact wording. That is a paraphrase.
23 And subsequent decisions that have granted post-conviction
24 relief, I believe the Hughey decision is one which was
25 referenced by Mr. Blume and Ms. Paavola, and that was decided

1 by Judge McCaulay, and that happened in the year 2010. I am
2 not aware of the current appellate status of that decision.
3 And apparently since that time, there has been another PCR
4 granted on the same basis.

5 So, Mr. Blume or Ms. Paavola I will be glad to hear from
6 you on that point.

7 **MR. BLUME:** Yes, sir. The other case is Kamell Evans
8 out of Greenville County, where relief was granted recently
9 on the same issue.

10 I mean, the instructions in the case are virtually
11 identical. In all these cases this is an idiosyncratic
12 instruction given by Judge Cole, and he used it in Rosemond,
13 as well as Hughes, Evans, and in Mr. Binney's case. There is
14 no material distinction in the instructions, and has formed
15 the basis for relief in the other cases in which it has been
16 given. And, we don't see any viable reason that the same
17 result shouldn't occur in this case. The instruction really
18 precludes the jury from considering, from giving a life
19 sentence as an act of mercy. It is inconsistent with the
20 Eighth Amendment. It is inconsistent with the Supreme Court
21 Jurisprudence. That was a defect recognized in Rosemond. It
22 is a relatively small set of cases in which this instruction
23 was heard. But there is no basis that we see that
24 distinguishes the instructions given in the Rosemond.

25 **THE COURT:** And has the Supreme Court considered these

1 PCR cases yet? Have they reached the argument level, or
2 decision level by the South Carolina Supreme Court?

3 **MR. BLUME:** My understanding is, and Mr. Salter and Mr.
4 Mabry may know more than I do, is that Hughey is pending on
5 cert. The cert is pending before the Court in a cert
6 petition. And in Evans, the cert decision the Briefs have
7 been --- not all the Briefs have been filed. I think they
8 are still in the briefing stage in Evans. But, I am not ---
9 but Mr. Salter or Mr. Mabry may know better.

10 **THE COURT:** Mr. Salter, do you know the status of
11 those two cases?

12 **MR. SALTER:** Yes, sir, Your Honor. Certiorari is
13 pending in both. I believe the last paragraph presented by
14 Mr. Blume is correct in Evans, all the briefing has not yet
15 been done. The briefs have been filed. The pleadings have
16 been filed in the Hughes case. We are the appealing party on
17 those issues.

18 **THE COURT:** All right. And then Mr. Blume told us why
19 he felt that should entitle Mr. Binney to relief. Let me
20 hear from you, if you believe it should not, why?

21 **MR. SALTER:** Your Honor, we think that you got it right
22 on pages seventy-three to seventy-six of your Order. The
23 bottom line in all of this is at the time that this Court
24 held the hearing in May of 2007, Hughes was still law.
25 Counsel can't be ineffective in failure to anticipate a

1 change in the law. Obviously, we also take the position that
2 because this is the change in the law, it should not be
3 applied retroactively. The problem is relying upon the
4 Hughes PCR opinion, is that in that case the relief was
5 granted on the substantive claim that the charge was bad.
6 And that goes beyond the power of the post-conviction relief
7 court to grant it, because it is an issue that was litigated
8 on direct appeal.

9 Now, there was a different result reached in others, but
10 I went through, and I believe that Your Honor correctly
11 address the issue in the Order.

12 **THE COURT:** But I am thinking beyond where we are
13 today, and trying to bring some judicial economy. Of course,
14 there is a Federal Habeas Corpus coming, as well as perhaps
15 other collateral proceedings. And, is the history of
16 jurisprudence in this area, such that when a Court grants
17 relief, I am talking about the U.S. Supreme Court obviously,
18 with wording in a charge that is later to be found
19 unacceptable, even if this was not the law at the time it was
20 given? Ultimately does the applicant or the defendant
21 receive relief somewhere along the way from it? What do you
22 say to that, Mr. Salter?

23 **MR. SALTER:** No, he does not because, the claim is one
24 of whether or not counsel is ineffective.

25 **THE COURT:** Well, I hear what you are telling me. I

1 am asking though about fairness and about whether this is an
2 appropriate decision. I realize you are talking about post-
3 conviction relief claim and this is where we find yourself.
4 But I am really trying to look at the big picture to
5 determine whether or not the applicant should be granted
6 relief.

7 Because number one, there may be relief coming somewhere
8 else down the line.

9 Or secondly, just the fairness and equity demands it.

10 **MR. SALTER:** No, sir. I would take the position that
11 fairness and equity demand the relief not be granted.

12 First off, this is not apart from ineffective
13 assistance, this is not a constitutional claim, this is a
14 state law issue. The State Supreme Court in Hughey, which is
15 what the lawyers had a right to rely upon when conducting
16 their representation of Mr. Binney, that law was discharged
17 as not bad. The charge is good. It accurately reflects
18 state law. So, and the irony is that Hughes would have still
19 been the law if there had not been an interlocutory appeal
20 that took several years. There is no federal constitutional
21 right to this claim. The instruction did not preclude a
22 consideration of mercy. And I think and I believe in the
23 decision of California versus Brown, or Brown versus
24 California, that it would conflict with that. The State
25 Supreme Courts have indicated they do not want to see the

1 charge given in the future. I don't think it impacts cases
2 where the charge has been previously given. That was in the
3 Rosemond case itself, and I think again that justice demands
4 that relief be denied.

5 **THE COURT:** All right. Are there other --- Obviously,
6 I was not present at Judge Cole's charge when it was given.
7 I have not had the chance to review it recently at least. I
8 wonder if there are other comments or portions of the charge
9 that bear on this that would tend to mitigate that if it is
10 indeed an error. What do you say to that Mr. Salter, or Mr.
11 Mabry; do you have a response? Or maybe I should say are you
12 prepared to respond to that? I know you may not have looked
13 at that charge either lately.

14 **MR. SALTER:** I did not look at the charge, but I
15 believe in some of our prior submissions, I assume I did this
16 in the last proposed Order, I know we did it in the original
17 one, the remaining portion of his jury instruction are such
18 that taken as a whole the consideration of mercy is not
19 precluded. And Your Honor's Order makes a finding in this
20 case. And again I think we got it right in this case.
21 Again, we are going to appeal any adverse determination and
22 do everything in judicial economy to be had. It will be
23 litigated for years.

24 **THE COURT:** That is an interesting point. Mr. Blume,
25 let me come back to you, and what do you say to what you have

1 heard?

2 **MR. BLUME:** I looked at it, and there has been some
3 other situations where in the history of death penalty
4 litigation in this state and a judge gave an idiosyncratic
5 set of instructions, or particular practice that was later
6 found to be either unconstitutional by the State Supreme
7 Court or the U.S. Supreme Court. And you know in general, I
8 think the State Supreme Court has tried to clean these up in
9 sort of a uniform way. And it certainly would be an anomaly
10 if you played this out, because the instructions are
11 identical. This was sort of a pattern instruction. Judge
12 Cole gave it, and he was the only judge that gave it. And to
13 say okay, you know, Rosemond gets relief based on this.
14 Hughey gets relief based on this. Evans gets relief on this.
15 All these cases --- Evans and Hughey were both in the exact
16 same procedural posture as Mr. Binney's case, but somehow Mr.
17 Binney doesn't. It is just bad instruction. It precluded at
18 least one key component in the reason why a jury can give
19 life/mercy. And there is really not a legitimate reason to
20 say, well okay, Binney should loose, and Hughey and Evans
21 should win. There is just no real reason for that. And I
22 think if you look at the Hughey Order and the Evans Order, in
23 part they were based on what I think Your Honor put his
24 finger on that in a way, a sense of fairness. This is a bad
25 instruction. There is not a whole lot of cases out there.

1 But in the cases in which it was given, those defendants are
2 entitled to a new sentencing proceeding that is not
3 contaminated by instruction which precludes a key component
4 of the reason a jury might give life.

5 **THE COURT:** And was that the relief in Hughey and
6 Evans granted by the trial court which was a re-sentencing
7 proceeding?

8 **MR. BLUME:** Yes, Your Honor.

9 **THE COURT:** All right. And tell me, who was the trial
10 court in Evans?

11 **MR. BLUME:** The trial judge, or the PCR judge, you
12 mean?

13 **THE COURT:** Yes.

14 **MR. BLUME:** The PCR judge in Evans was Judge Stilwell
15 from Greenville.

16 **THE COURT:** All right, very good. What I would like
17 to do is just take that matter under advisement, and review
18 it, consider it, and let you know sometime in the near future
19 what my decision will be with regard to that.

20 Is there anything else that anyone else wishes to place
21 on this record before we close the record about that final
22 issue we were discussing, or anything else which was raised
23 in the Motion to Alter or Amend?

24 Let's start with the State, Mr. Mabry, or Mr. Salter?

25 **MR. SALTER:** Just very briefly. Your Honor, Mr.

1 Rosemond did not get relief based on that jury instruction.
2 Again, the Court seems to admonish basically -- they want to
3 put it out there, we don't like this jury instruction, but
4 they did not grant relief on that.

5 Also, again in Hughey, Judge McCaulay granted relief
6 based on the substantive claim that the charge was bad.
7 Which the Supreme Court had already said in Hughey it was
8 not. His Order should not have any weight whatsoever.

9 Now, in Evans, the Judge did reach a contrary
10 conclusion.

11 **MR. MABRY:** Judge, this is Mr. Mabry. I have not
12 looked at that Order. That was Ms. Brown's case in our
13 office. I believe Judge Hill, he granted relief on
14 ineffective assistance of counsel, finding that --- it was
15 something, it was that mercy charge, but it was a federal
16 issue that they should have raised.

17 **THE COURT:** Mr. Salter, would you kindly send to me,
18 and you may do it electronically would be find, Judge
19 McCaulay's Order as well as Judge Hill's Order in those two
20 cases?

21 **MR. SALTER:** Yes, sir, Your Honor.

22 **MR. MABRY:** I may be wrong Your Honor, but I am going
23 by what Ms. Brown told me again. But I believe it was
24 something about maybe the attorney to preserve the issue
25 federally, I think, or a federal violation.

1 **THE COURT:** All right. We will review those. But if
2 you would kindly send --

3 **MS. PAAVOLA:** I'm sorry, but those are attached to the
4 Applicant's Motion to Alter.

5 **THE COURT:** Excuse me. I am actually looking at them
6 even as I am asking for that. Thank you, Ms. Paavola. They
7 are. I see them. I have them both.

8 Anything further now from the State? Hearing nothing.
9 How about from Mr. Binney; anything further counsel?

10 **MR. BLUME:** No, Your Honor.

11 **THE COURT:** All right. This case has been pending for
12 a long time. I appreciate your patience. I appreciate the
13 professionalism with which an advocacy with which these
14 issues are argued. And I will be back in touch in near
15 future. I am going to delete the point about the
16 hysterectomy, and will consider the other matters. And then
17 of course, take a close look at this issue about the charge.
18 And I will be back in touch after a decision on those are
19 made.

20 In the meantime, happy holidays everyone. Merry
21 Christmas. Good bye.

22 (Whereupon, this hearing was concluded at
23 10:26 a.m. on Friday, December 9, 2011.)

24 -- END OF TRANSCRIPT --

CERTIFICATE OF REPORTER

29

I, the undersigned, Pamela Ozment-Cartee, official Court Reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the above captioned case, relative to appeal, in The Court of Common Pleas in Darlington County, South Carolina, on the 9th day of December 2011.

I do further certify that am neither, of kin, counsel, nor interest of any party hereto.

July 26, 2012

Pamela Ozment-Cartee
Circuit Court Reporter