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

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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,

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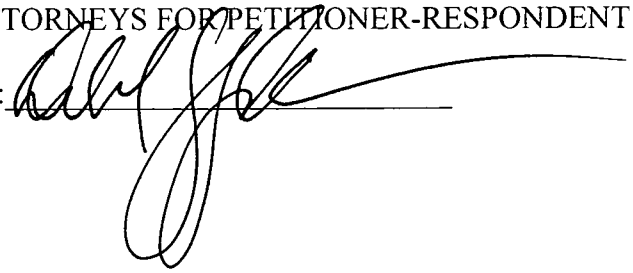
ATTORNEYS FOR PETITIONER-RESPONDENT

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:

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

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General