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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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.").

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[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

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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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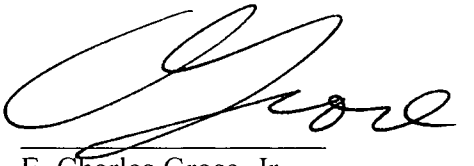

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