STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE, PETITIONER,

V.

CHRISTOPHER BROADNAX, RESPONDENT.

APPELLATE CASE NO. 2013-000615

BRIEF OF RESPONDENT ON REHEARING

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ISSUE PRESENTED

Should the South Carolina Supreme Court remand Respondent's case to the Court of Appeals for consideration on the issues not considered by the Court of Appeals although Respondent did not address those undecided issues in his brief to this Court because not to remand would be a violation of Respondent's due process right to a complete first appeal, and would be adverse to the legal precedent as stated in State v. Grovenstein[1] and State v. Pinckney [2]?

[1] State v. Grovenstein, 335 S.C. 347, 517 S.E.2d. 216 (1999).
[2] State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000).

STATEMENT

In November 2009, the Richland County Grand Jury indicted Christopher Broadnax on the charges of armed robbery and four counts of kidnapping. On June 10, 14 – 16, 2010, Broadnax proceeded to trial before the Honorable G. Thomas Cooper, Jr., and a jury. He was represented by James May and Charles Cochran. The state was represented by Kathryn Luck Campbell. The jury returned verdicts of guilty as indicted on all charges. Judge Cooper sentenced Broadnax to the mandatory sentence of life without the possibility of parole (LWOP).

Broadnax's attorney filed a notice of appeal. The Court of Appeals reversed Broadnax's conviction and sentence and remanded the case for a new trial on January 9, 2013. State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013). App. 1 – 10.

The state filed a petition for rehearing which the Court of Appeals denied on February 22, 2013. App. 30. The state then filed a petition for writ of certiorari to the Court of Appeals on March 25, 2013. Appellate counsel filed a return to the petition for writ of certiorari. The Supreme Court granted the state's petition for a writ of certiorari to review the Court of Appeal's decision on June 12, 2014. The state filed Brief of Petitioner on July 14, 2014. The Brief of Respondent was filed July 23, 2014. Oral arguments were held before the Supreme Court on February 4, 2015.

This Court issued an opinion on July 8, 2015, and refiled a second opinion on July 29, 2015 affirming the Court of Appeals' finding that armed robbery was not a crime of "dishonesty or false statement" pursuant to Rule 609 (a)(2), SCRE. State v. Broadnax, Op. No. 27545 (refiled July 29, 2015). However, this Court reversed the finding by the Court of Appeals that Respondent's case should be remanded for a new trial. This Court found that admitting Broadnax's three prior convictions for armed robbery was harmless beyond a reasonable doubt.

Respondent Broadnax filed a petition for rehearing on August 6, 2015. This Court issued an Order on September 8, 2015 denying the rehearing on Respondent's harmless error issue but granting the rehearing on the issue of remanding the case to the Court of Appeals for a determination on the other issues not addressed. This Court directed Respondent to file a brief addressing the issue of remand to the Court of Appeals and specifically addressing the remand in light of Respondent not including the unaddressed issues in his initial Brief of Respondent. This Brief of Respondent follows.

ARGUMENT

The South Carolina Supreme Court should remand Respondent's case to the Court of Appeals for consideration on the issues not considered by the Court of Appeals although Respondent did not address those undecided issues in his brief to this Court because not to remand would be a violation of Respondent's due process right to a complete first appeal, and would be adverse to the legal precedent as stated in State v. Grovenstein and State v. Pinckney.

Respondent Broadnax raised four issues on his appeal to the Court of Appeals. He argued that the trial court erred in:

1. Admitting his three prior armed robbery convictions for impeachment purposes according to Rule 609(a)(2), SCRE, during his testimony when the admission was overly prejudicial under Rule 403, SCRE, and a violation of his due process right to a fair trial;

2. Denying his motion to withdraw the life without parole (LWOP) notice due to the arbitrary use of the prosecutor's discretion in the plea bargaining process which was a violation of the Fourteenth Amendment's guarantee to due process;

3. Denying his motion to withdraw LWOP because there is no standard to guide solicitors in when to seek a sentence of LWOP pursuant to S.C. Code Section 17-25-45 which is a violation of the Equal Protection Clause of the Fourteenth Amendment;

4. Denying his motion that the jury be informed that appellant was facing the mandatory sentence of LWOP which denied appellant his due process right to a fair trial.

The Court of Appeals granted Broadnax a new trial on Issue One by ruling that armed robbery was not a crime of dishonesty pursuant to Rule 609(a)(2), SCRE. The Court of Appeals found that the admission of Broadnax's prior armed robberies convictions was highly prejudicial.

Then the Court of Appeals wrote:

> The determination of this issue is dispositive, and thus, we decline to address Broadnax's remaining arguments relating to a solicitor's discretion in noticing LWOP and the trial court's denial of his request to inform the jury of his potential LWOP sentence.

State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013).

This Court then affirmed the Court of Appeals decision that armed robbery is not a crime of dishonesty pursuant to Rule 609(a)(2) finding that the trial court erred. However, this Court denied Broadnax a new trial based on a finding of overwhelming guilt.

Broadnax is asking this Court to grant him a complete appeal by allowing him to obtain a ruling on his three remaining issues and whether he is entitled to relief on these other issues. This is the proper and equitable procedure based on legal precedent and due process.

In State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999), the Court of Appeals had reversed Grovenstein's conviction for criminal sexual conduct with a minor first and second degree and remanded his case for a new trial. Because the Court of Appeals did not address his remaining issues because his case was reversed. This Court remanded Grovenstein's case to the Court of Appeals for consideration of the other issues he raised. This Court wrote in Footnote 6:

> As the Court of Appeals reversed Grovenstein's convictions, it did not address his remaining issues. Accordingly, we remand to the Court of Appeals for consideration of the other issues raised by Grovenstein.

State v. Grovenstein, id.

In his Brief of Respondent, Grovenstein did not mention the three remaining issues that he argued to the Court of Appeals but which the Court of Appeals did not address. (Exhibit A).[3]

[3] The complete Brief of Respondent was not included but is available for the Court's review. Only the pertinent pages were included.

The same procedure applied in State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000). Pinckney was convicted of first degree burglary. The Court of Appeals reversed the trial court's decision not to grant a directed verdict. This Court reversed the Court of Appeals and remanded Pinckney's case to the Court of Appeals for consideration of his remaining issue which the Court of Appeals had not addressed. This Court wrote:

> As the Court of Appeals reversed Pinckney's convictions, it did not address his remaining issue whether the trial court erred in denying respondent's directed verdict motion on the ground of not guilty by reason of insanity.

State v. Pinckney, id.

In his Brief of Respondent, Pinckney made no mention of the remaining issue that the Court of Appeals did not reach in their decision to reverse. (Exhibit B).[4]

Moreover, South Carolina Code Section 18-1-30 provides that any party **aggrieved** may appeal in the cases prescribed in this title. Section 18-1-10 provides that this title covers all appeals in civil and criminal actions. Rule 201(b), SCACR, provides that only a party **aggrieved** by an order, judgment, sentence or decision may appeal.

In Cisson v. McWhorter, 255 S.C. 174, 177 S.E.2d 603 (1970), this Court wrote:

> Our statutory provision limiting appellate review to those who have been aggrieved by the judgment below is, in our opinion, a wise and well reasoned requirement, as our court is concerned with correcting errors that have practically wronged the appealing party. It, therefore, follows that it is our duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court.

This Court then went on to define an aggrieved party by citing Bivens v. Knight, 254 S.C. 10, 173 S.E.2d 150 (1970):

[4] The complete Brief of Respondent was not included but is available for the Court's review. Only the pertinent pages were included.

> In Parker v. Brown, 195 S.C. 35, 10 S.E.2d 625 (1940), we held that an aggrieved party is one who is injured in a legal sense; one who has suffered an injury to person or property. A good definition of an aggrieved party is contained in the case of Bowles v. Dannin, 62 R.I. 36, 2 A.2d 892 (1938). It is there stated that an aggrieved party within the statute relating to appeals is a person who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation.

Cisson v. McWhorter, *supra.*

This was shown in this Court's opinion in the case of In the Matter of the Care and Treatment of Vincent Neal Way, 410 S.C. 377, 764 S.E.2d 701 (2014). In that case, Way appealed the finding by the trial court that he met the definition of a sexually violent predator. The Court of Appeals affirmed the trial court. Way filed a petition for a writ of certiorari which this Court granted. The state, the prevailing party, filed a cross petition for a writ of certiorari which this Court granted. However, in the opinion, this Court dismissed the state's petition for a writ of certiorari as improvidently granted.

These cases remain good law. It would be a serious violation of Broadnax's federal and state due process rights to apply a rule that the prevailing respondent must address the issues left unresolved by the Court of Appeals in the face of long-standing precedent that this Court would remand to the Court of Appeals for disposition of the unadjudicated issues.

Broadnax was not aggrieved by the decision of the Court of Appeals as he won a new trial. The state appealed the decision of the Court of Appeals by filing the writ of certiorari asking this Court to review that decision. There was no reason for Respondent to raise the unaddressed issues to this Court because he had a winning issue. This Court held that his issue was a winning issue and that the trial court erred. This Court only reversed the Court of Appeals stating there was overwhelming evidence of guilt.

Rule 226 (f), SCACR provides that in the return to the petition for a writ of certiorari, the respondent shall include an argument on each question and may include a counter-statement of the case and of the questions presented for review. The state raised only issues concerning the court of Appeals final decision on Respondent's Issue One. Respondent followed Rule 226(f), SCACR, and presented an argument on the questions raised by the state. Respondent did not fail to address the remaining issues; respondent was following the rule.

Rule 226 (a), SCACR, addresses the authority of the Supreme Court. The rule provides:

> The Supreme Court, or any two justices thereof, may in its discretion, on motion of any party to the case or on its own motion, issue a writ of certiorari to review a final decision of the Court of Appeals.

The state filed a writ of certiorari asking this Court to review the decision of the Court of Appeals. Respondent Broadnax addressed the question raised by the state. There was no reason for respondent to raise the remaining issues not addressed by the Court of Appeals because there was no final decision on those. Therefore, there was no ruling for this Court to review on certiorari pursuant to Rule 226(a), SCACR.

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), the trial judge, prior to the guilt phase closing arguments, told the parties that he planned to give the reasonable doubt charge from State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991) which included the language "to hesitate to act." Defense counsel structured and delivered his closing argument around that language. After closing arguments and before the jury charge, the solicitor asked the trial judge to remove from his jury charge on reasonable doubt the language "to hesitate to act." The judge agreed to remove that language from his jury charge. This Court ruled that it was fundamentally unfair to the defendant to omit the language "to hesitate to act" from the reasonable doubt charge after defense counsel had

structured his closing argument around that language which was legal. This Court reversed and remanded Jones' case on that and three other issues.

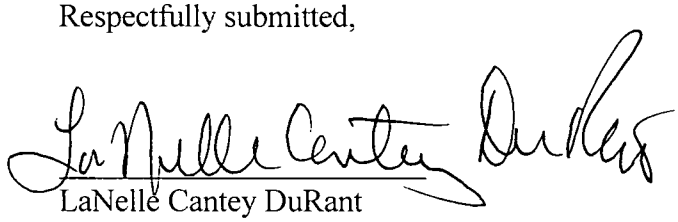
Broadnax has a right to appeal his convictions and sentences. To deny him a complete appeal in order to have all of his issues addressed where he believes the trial court erred in denying him a fair trial is a violation of his due process rights. Otherwise, his remaining issues are lost through no fault of his own. He argued a winning issue.

A contrary rule, as a policy matter, would result in chaos as all unadjudicated issues from the Court of Appeals would be argued by respondents prevailing without a grant of certiorari.

CONCLUSION

Based on the above, Respondent's case should be remanded to the Court of Appeals for a determination on his remaining issues.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT

This 17th day of September, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE, PETITIONER,

V.

CHRISTOPHER BROADNAX, RESPONDENT

APPELLATE CASE NO. 2013-000615

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of respondent on rehearing, in this case has been served on Mary S. Williams, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and to Christopher Broadnax, #099356, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 17th day of September, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 17th day
of September, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
Court of General Sessions

Honorable Henry F. Floyd, Circuit Court Judge

Docket No. 98-221

The State.....Petitioner,

v.

Gary Groyenstein.....Respondent.

BRIEF OF RESPONDENT

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State v.

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STATEMENT OF ISSUES ON APPEAL

1. Should the decision of the Court of Appeals be affirmed on grounds that a presumption of prejudice arose from the presence of the deliberating, opinion-voicing, and voting alternate juror in the jury room and that the State failed to rebut this presumption?

2. Should the decision of the Court of Appeals be affirmed on grounds that the presence of the deliberating, opinion-voicing, and voting alternate juror in the jury room constitutes reversible error per se?

3. If a defendant complaining of an alternate juror intrusion is required to prove actual prejudice, should the decision of the Court of Appeals be affirmed on grounds that Mr. Grovenstein did prove actual prejudice by establishing the presence of the deliberating, opinion-voicing, and voting alternate juror in the jury room?

4. Does the general rule that a party moving for a mistrial must show actual prejudice apply when the movant has shown that an alternate juror has deliberated with the true jurors, has voiced her opinion, and has voted in a preliminary vote?

5. Did Mr. Grovenstein waive his right to complain about the denial of the motion for a mistrial because he did not object to the content of the curative instructions but instead moved for a mistrial?

who deliberates with the jury causes prejudice to the defendant as a matter of law. The Court accordingly should affirm the reversal of the convictions on all charges.

Respectfully submitted,

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EXHIBIT B

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Marc H. Westbrook, Circuit Court Judge

THE STATE,

PETITIONER,

V.

MIKELL PINCKNEY,

RESPONDENT.

BRIEF OF RESPONDENT

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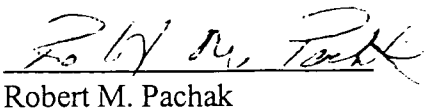
STATEMENT OF ISSUE ON APPEAL

Whether the Court of Appeals was correct in finding that the state failed to present any substantial evidence to prove that respondent entered the dwelling with the intent to commit a crime?

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,



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This 8th day of September, 1999