

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to the Court of Appeals

S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Honorable Maite Murphy, Circuit Court Judge

Unpublished Opinion No. 2020-UP-178 (S.C. Ct. App. filed June 10, 2020
Withdrawn, Substituted, and Refiled July 29, 2020)

THE STATE, RESPONDENT-PETITIONER

v.

CHRISTIAN ANTHONY HIMES, PETITIONER-RESPONDENT.

Appellate Case No. 2020-001177

STATE'S REPLY

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ARGUMENT IN REPLY 1

Himes cannot show that the Court of Appeals did anything other than commit error by reaching an admittedly unpreserved sentencing issue in contravention of this Court’s precedent and well-established preservation rules. Critically, Himes cannot show that procedural rules are of such little value or importance that they may be regularly abandoned.....1

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ARGUMENT IN REPLY

Himes cannot show that the Court of Appeals did anything other than commit error by reaching an admittedly unpreserved sentencing issue in contravention of this Court's precedent and well-established preservation rules. Critically, Himes cannot show that procedural rules are of such little value or importance that they may be regularly abandoned.

“A State's procedural rules are of vital importance to the orderly administration of its criminal court” and should be honored to prevent “undermin[ing] the criminal justice system.” *Johnson v. Lee*, 136 S. Ct. 1802, 1807 (2016) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S.Ct. 1517 (1997)). Courts may choose to allow plain error review, but this Court does not. *See, e.g., State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). Therefore, it follows that the requirement of issue preservation should not lightly be abandoned. Himes fails to show cause that the requirement should be abandoned in his case. This Court has clearly set out the reason that Himes' position runs counter to the “judicial economy” to which he holds fast. (See Return to State's Petition, p. 5). In *State v. Torrence*, 305 S.C. 45, 66–67, 406 S.E.2d 315, 327 (1991) (Toal, JJ, concurring),¹ this Court recognized our “contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.” In other words, had the issue been raised below in accordance with the contemporaneous objection rule, it would have been addressed below and corrected below. Consequently, faithful adherence to true judicial economy bolsters enforcement of the contemporaneous objection rule. It surely does not support its routine avoidance.

¹ Then Justice Toal expressed that she was writing for the majority “for the purpose of expressing our abolition of the outdated doctrine of *in favorem vitae*.” *Torrence*, at 60, 406 S.E.2d at 324.

Similarly, Himes cannot argue any position where it is somehow unfair to require him to raise his patently unpreserved sentencing issue in a subsequent post-conviction relief action, where all similarly unpreserved claims are required to go. *See* S.C. Code § 17-27-20 (B) (“This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.”). *See also Cummings v. State*, 274 S.C. 26, 28, 260 S.E.2d 187, 188 (1979) (“At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal,” further, he could only “raise such issue on Post-Conviction” through “an allegation of ineffective assistance of counsel.”). It is the structure in place for such review. Additionally, Himes is simply incorrect that relief in PCR may not affect such a sentence. He fails to consider the relief that may be ordered in a particular case. For instance, under certain circumstances, a PCR court may find that an offered agreement was not conveyed and resentencing was warranted, *see Bell v. State*, 410 S.C. 436, 439–40, 765 S.E.2d 4, 6 (Ct. App. 2014); or find that only one conviction is challenged, and one sentenced reached, *see State v. Slocumb*, 412 S.C. 88, 92–93, 770 S.E.2d 436, 439 (Ct. App. 2015) (sentence re-opened only on one count in a case where several sentences were imposed). It is only logical that treating all the collateral claims together fosters judicial economy when the window to cure at trial has closed.

Rules exist so litigants will be treated similarly, yet the failure to apply this Court’s contemporaneous objection rule has resulted in uneven treatment. (See, for example, State’s Cross-Petition, p. 2 n. 1). And, though this Court has sanctioned the rare exception to the rule, it has never abandoned the rule. *See State v. Johnston*, 333 S.C. 459, 464 n. 3, 510 S.E.2d 423, 425 n.3 (1999) (“Our holding today is not intended to disrupt our settled rules on issue preservation and PCR

applications. The facts here are unique *and demand an expedited result.*”) (emphasis added).² That directive has either been overlooked or misunderstood. The harm is evident. Where there is routine exception to the rule, there follows expansion, or extinction.³ This should not be so.

For any and all of these reasons, the Court of Appeals is wrong to upset and ignore established rules of error preservation.

CONCLUSION

Based on the petition, and the foregoing reply, this Court should grant the petition, dispense with further briefing, and reverse the grant of relief. The error is so plain that this Court could summarily correct the Court of Appeals.

Respectfully submitted,

² No one has ever argued, and the record does not support, any danger of Himes being held past the maximum sentence possible. At issue is his concurrent five (5) year sentence. Himes was convicted of murder and sentenced to life without parole. (R. 570).

³ A case pending before this Court is a prime example. In *State v. Arthur Jason Bowers*, Appellate Case No. 2020-001186, Bowers argues both a theory on preservation and a theory for avoiding the procedural bar. He makes the following argument in support of avoiding the procedural bar:

Generally, the rules of issue preservation are strictly enforced. However, the appellate courts have carved out certain limited exceptions. For example, this Court found exceptional circumstances existed to excuse the lack of objection where failure to review the merits of a sentencing error would result in the defendant remaining incarcerated beyond the legal sentence. *State v. Johnston*, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999). If this Court determines the issue is not preserved under the traditional error preservation analysis, this Court should find an exceptional circumstance exists and address the issue in the interest of judicial economy. *See State v. Bonner*, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012) (excusing the lack of preservation to address the merits of the claim, found Bonner’s sentence violated the United States Constitution, vacated the sentence, and remanded the case for re-sentencing).

Bowers Petition, p. 6 n.2. Mr. Bowers is currently serving a fifty (50) year sentence for murder, imposed on April 26, 2018. Bowers Petition, p. 3.

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