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S.C. Supreme Court

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

JOHN KENNEDY HUGHEY, #5055

Respondent/Petitioner,

V.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent,

BRIEF OF PETITIONER STATE OF SOUTH CAROLINA

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QUESTIONS PRESENTED ON CERTIORARI

I. Did the PCR Court err in granting re-sentencing relief based upon a jury instruction where trial counsel and appellate counsel were not determined to be ineffective when the jury instruction claim was only raised as a specification of ineffective assistance of appellate counsel and trial counsel and the PCR Court did not conclude that either trial counsel or appellate counsel was ineffective?

II. Whether the PCR Court erred in granting re-sentencing when trial counsel's failure to object to a sentencing phase instruction that the jury "may recommend a sentence of life for any reason or no reason at all other than as an act of mercy" where counsel testified that the instruction as a whole did not preclude the jury to consider mercy and the failure to object did not preclude the South Carolina Supreme Court from addressing the merits in the direct appeal when the State did not raise a procedural bar and this Court addressed the merits?

III. Whether the PCR Court erred in granting re-sentencing when appellate counsel's failure to specifically raise an issue in the statement of issues concerning a sentencing phase instruction that the jury "may recommend a sentence of life for any reason or no reason at all other than as an act of mercy" where it was raised within the Final Brief of Appellant and Final Reply Brief of Appellant, raised in the oral argument and addressed on the merits in the opinion of this Court?

IV. Whether this Court's opinion in *Rosemond v. Catoe* addressing in *obiter dicta* the similar jury instruction that the jury may recommend a sentence of life for any reason or no reason at all other than as an act of mercy" and expressly overruling this Court's holding in *State v. Hughey* requires the granting of re-sentencing in Hughey when the same holding did not require a new sentencing by this Court in *Rosemond*, the Court concluded in the direct appeal in Hughey that the death sentence was not the subject of any arbitrary factor and any error was harmless error in light of the ameliorating instructions, evidence and closing arguments which did not preclude the jury from considering a verdict of life based upon mercy and the evidence?

STATEMENT OF THE CASE

This Brief of Petitioner-Respondent State of South Carolina concerns the granting of re-sentencing by the Honorable Alexander Macaulay in post-conviction relief orders filed May 14, 2010 and July 26, 2010. In particular, the granting of post-conviction relief involved a jury instruction that that the "may recommend a sentence of life for any reason or no reason at all ***other than as an act of mercy***," in light of *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009), which overruled the earlier holding in the Applicant's direct appeal in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000). This Petition is based upon the impact of the Court's limited holding in *Rosemond*, its application to the instant case where this Court denied relief on the same instruction in the direct appeal, particularly where the defense counsel at trial did not take issue with the instruction. On April 16, 2014, the South Carolina Supreme Court granted certiorari on this petition and Mr. Hughey's cross-petition. This briefing follows.

PROCEDURAL HISTORY OF THE APPLICATION FOR POST-CONVICTION RELIEF

On October 19, 2000, John Kennedy Hughey, through appointed appellate counsel, Robert M. Dudek of the South Carolina Office of Appellate Defense, filed a petition for a stay of execution asserting a desire to pursue state post-conviction relief proceedings contending that his appointed trial counsel did not adequately represent him at trial. The stay request was granted November 2, 2000. App.p. 4307. Counsel Charles Grose and Teresa Norris were appointed on November 13, 2000 in Newberry County by the Honorable Wylie Saunders, assigned judge. App.p. 4309-4314. An order of appointment was entered on November 16, 2000. App.p. 4315.

The initial application was filed on October 25, 2000. App.p. 4298-4306. In his initial application for post-conviction relief filed on October 25, 2000, the Applicant makes the following allegations:

I. 9(a) - Ineffective Assistance of Counsel:

> A. The failure to specifically object to the "no mercy" instruction on federal constitutional grounds;
>
> B. Requesting a "plain and ordinary meaning" instruction during the penalty phase rather than an instruction that life imprisonment means life without parole pursuant to State v. Simmons [Simmons v S.C.] and the South Carolina statute;
>
> C. The failure to secure petitioner's presence during all critical stages of the trial;
>
> D. The failure to object to evidence petitioner attempted suicide following the victim's death since this evidence should have been excluded pursuant to Rule 403, SCRE;
>
> E. The failure to properly investigate and prepare witness testimony;
>
> F. Eliciting prejudicial guilt phase testimony that petitioner had been expelled from school since this evidence was irrelevant;
>
> G. The failure to properly investigate and present available mitigating evidence.

App.p. 4298-4306.The Respondents initial Return was filed on January 19, 2001. App.p. 4323-4364.

An amended application for post-conviction relief dated December 15, 2006 was filed. App.p. 4405-4410. In his Amended application, Hughey, thorough counsel, makes the following allegations:

> *10(a).* ***Applicant was denied the effective assistance of counsel during both the trial and sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.***

11(a). During both the trial and sentencing phase, Applicant's counsel failed to provide effective assistance of counsel in numerous ways, including, but not limited to, the following:

I). Despite substantial irrefutable evidence to support convictions for murder, counsel advised the applicant and his sister to testify during trial in a futile attempt to rebut the state's evidence and made the incredible argument, based in part, on counsel's misunderstanding of the law, that Applicant was guilty only of voluntary manslaughter, which was contradicted even by the Applicant's and the defense expert's testimony.

ii) Counsel failed to adequately investigate, develop, or present mitigation evidence, including, but not limited to, evidence of Applicant's adaptability to confinement and evidence supporting the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

iii) **Counsel failed to adequately object to the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*." This instruction is contrary to state law, which never requires a sentence of death, S.C. Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy. See, State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000); State v. Torrence, 305 S.C. 45, 406 S.E. 2d 315 (1991). This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or otherwise weighs in favor of a sentence of life imprisonment rather than the death penalty.**

Counsel's conduct in each instance separately and cumulatively was both unreasonable and prejudicial in sentencing. Strickland v. Washington, 466 U.S. 668 (1984). Wiggins v. Smith, 539 U.S. 510 (2003); Florida v. Nixon, 543 U.S. 175 (2004).

10(b) ***Applicant was denied the effective assistance of appellate counsel in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.***

11(b). **Appellate counsel failed to properly brief the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*." This instruction is contrary to state law, which never requires a sentence of death. S.C. Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy. See, State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000); State v. Torrence, 305 S.C. 45, 406 S.E. 2d 315 (1991). This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or otherwise weighs in favor of a sentence of life imprisonment rather than the death penalty. Counsel's conduct was both unreasonable and prejudicial in sentencing. Strickland v. Washington, 446 U.S. 668(1984); Smith v. Robbins, 528 U.S. 259(2000).**

App.p. 4406-4410 (emphasis added). The Respondent made a Return on January 7, 2008. App.p. 4411-4465.

On August 17, 2007, the Supreme Court re-assigned the Honorable Alexander Macaulay to replace Judge Saunders in the action. App.p. 4468. On June 28, 2008, Judge Macaulay entered an order of continuance in the matter. App.p. 4469-72.

On March 31, 2008, the Applicant made a Trial Brief. App.p. 4473-4569. On May 2, 2008, Respondent State of South Carolina made its Trial Brief. App.p. 4570-4636.

The evidentiary hearing was convened in Abbeville County before the Honorable Alexander Macaulay on October 13, 2008 and was completed on October 15, 2008. App.p. 4654-5212. The Applicant was present and represented by his appointed counsel E. Charles Grose, Tara Schultz and Teresa Norris. The Respondent was represented by Donald J. Zelenka of the Attorney General's Office. Testimony was received from Robert Tinsley, Sr., Jeff Yungman, Julia Perlotte, Martha Ann Stewart, Billy Garrett, Robert Dudek, Paige (Tarr) Haas, and Dr. Donna Schwartz Watts. PCR Tr.p. 11-530. App.p. 4654-5183. Closing statements were made by counsel. App.p. 5184-5211, PCR Tr.p.

531-556. Judge Macaulay took the matter under advisement pending posthearing briefing.

The Applicant filed his post-hearing memorandum of law on June 8, 2009. App.p. 5622-5839. The State of S.C. made its post-hearing memorandum on August 31, 2009. App.p. 5444-5621. Hughey made a reply memorandum on December 11, 2009. App.p. 5840-5920.

On May 14, 2010, the Honorable Alexander S. Macaulay, Presiding Judge entered his Order Granting Post-Conviction Relief dated May 7, 2010. App.p. 5921-5927. In the Order, Judge Macaulay concluded that the issues regarding the guilt phase of the trial was denied and dismissed , with prejudice, and the application for post-conviction relief for sentencing was granted. [1] In particular, on the issue granting relief, Judge Macaulay concluded:

> **The jury instruction regarding mitigation that jurors "may recommend a sentence of death for any reason or no reason at all other than as an act of *mercy*," *State v. Hughey*, 339 S.C. 439, 460, 529**

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[1] Concerning the guilt phase issues, Judge Macaulay concluded that counsel was not ineffective in the guilt phase concerning the presentation of manslaughter and allowing the Applicant and his sister to testify in the guilt phase, claiming that the evidence was irrefutable to support a conviction for murder." App.p. 5923-25, Order, p. 2-4. The PCR judge found that Hughey had failed to show that there was a reasonable probability that the result of the proceeding would have resulted in a different verdict and the right to testify belongs to the defendant. App.p. 5924, Order, p. 3.

Judge Macaulay also concluded on the allegation that counsel was ineffective in pursuing a verdict of voluntary manslaughter and transferred intent, the PCR judge that appointed counsel were not deficient in presenting manslaughter as a jury charge and allowing Applicant and his sister to testify during the guilt phase and were not prejudiced. App.p. 5924-25, Order, p. 3-4.

In addressing the second specification of ineffective assistance of counsel, Judge Macaulay denied relief on the claims that counsel failed to investigate or present adequate mitigation evidence, specifically concerning his adaptability to confinement and the capacity to appreciate the criminality of his conduct. App.p. 5925-26, Order, p. 4-5. "This Court finds that was a strategic decision made by counsel during the trial and concludes that the Applicant has failed to show the decision was based on neglect or ignorance..." He further concluded that Applicant had not demonstrated prejudice under *Strickland.* App.p. 5925, Order, p. 4. Summarizing the presentation of evidence in mitigation that was presented at the sentencing proceeding and the statutory mitigating factors instructed, Judge Macaulay that : "the sentencing jury was readily aware of the dysfunctional family experience that the Applicant experienced. The Court finds that the appointed trial counsel for the applicant put into evidence a thoughtful and through case in mitigation consisting of various themes and presentations..." App.p. 5926, Order, p. 5.

S.E.2d 721, 732 (2000) (emphasis that of the Court), is so inimical to the laws of the State and the United States in Capital Cases as to entitle the Applicant to a New Trial. (Issues III, IV, and V).

App.p. 5026. Judge Macaulay further declared :

> Under our most recent case law applying S.C. Code Ann. § 16-3-20 (2003), it is now well established that: "It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy." *Rosemond v. Catoe, supra.* Because the jury was instructed that they "may recommend a sentence of life for any reason or no reason at all ***other than as an act of mercy***," (emphasis supplied), the Applicant has established his entitlement to a new sentencing phase of his trial. *State v. Hughey, supra; Rosemond v. Catoe, supra.*

App.p. 5928. He summarized that "due to overwhelming evidence of guilt and want of prejudice, the relief regarding the guilt phase of the trial is denied and dismissed , with prejudice, but granted re-sentencing based upon the alleged instructional issue. App.p. 5928.

The State of South Carolina made a Motion to Alter and Amend pursuant to SCRCP 59 on May 28, 2010. App.p. 5954 - 5968. The Applicant, through counsel, also made a Rule 59(e), SCRCP Motion to Alter or Amend the Judgment on May 28, 2010. App. 5929-5953.

On July 26, 2010, Judge Macaulay filed his Order denying Respondent's Motion to Alter and Amend Judgment Pursuant to Rule 59(E). App.p. 5969- 71.

On August 25, 2010, the State of South Carolina filed and served its notice of appeal. On August 26, 2010, the Applicant, John Hughey made notice of cross-appeal.

The State of South Carolina made its petition for writ of certiorari on January 12, 2011. Mr. Williams made a cross-petition for writ of certiorari on April 29, 2011. On April 16, 2014, the South Carolina Supreme Court granted certiorari on both petitions.

This briefing follows.

Prior Trial and Appellate Proceedings

The Petitioner, John Kennedy Hughey, was indicted on March 11, 1996 by the Grand Jury of the Court of General Sessions for Abbeville County for (1) murder (involving the December 4, 1995 death of Tesheka Lanyra Jackson), (2) murder (involving the December 4, 1995 death of Luevinia H. Harris), (3) burglary in the first degree and (4) grand larceny of a vehicle.[2]

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[2] ***STATEMENT OF THE STATE'S VERSION OF THE FACTS***

"...what he did was nothing more than two brutal vicious murders. Two senseless, needless, tragic, unjustified murders. That's what he did. And it [doesn't] matter why he did it or really how he did it. He had no excuse. He had no reason. He had no basis for killing those two women in that home on that day. None." App. p. 3406, l. 24 - p. 2407, l. 7. These comments in Solicitor Jones guilt phase closing argument properly sum up the case against John Kennedy Hughey involving his murder of his former girlfriend Tesheka Jackson and Luevinia Harris who was in her own home on the telephone to the police when Hughey's second shotgun blast within her home brutally ended her life.

On December 4, 1995, Marcus Harris called his mother, Luevinia Harris at 11:56 a.m. from Oklahoma City. App. pp. 2212, 2225-2229. He found that his mother's tone revealed that she was scared and asked her what was wrong and learned that John Hughey was present in his mother's house with a gun. He got his cousin, Tesheka Jackson, on the telephone, who also with a "scared" tone to her voice, confirmed John had a gun, and attempted to get John on the telephone, but John refused to come to the telephone and attempts to turn on the speaker were unsuccessful. App. pp. 2213-2218, 2220. Marcus then immediately called back to the house at noon and the speaker was activated. Harris heard John respond and told him to leave. Harris heard cussing in the background and his mother call out "just leave." App. pp. 2218-19, 2245. Tussling was heard while his mother was on the telephone. App. pp. 2245-46. Then Harris heard his mother state: "Call the police, call the police." App. pp. 2219, 2246. Harris hung up the telephone and within four seconds called 911 in Oklahoma City who patched him into the Abbeville emergency system, but he was too late. App. pp. 2219-21. While on the phone, Marcus Harris learned the tragic truth of Hughey's malicious attacks: "one down with gunshot wound to the head," "two down with gunshot wound to head." App. pp. 2220-21.

"Don't shoot that gun in here... Don't shoot that gun in here." App. pp. 2278-79. These were the final words and request to John Kennedy Hughey from Luevinia Harris while she was on the telephone with Sgt. Angela Patterson, the Abbeville City Police dispatcher. This was immediately after Mrs. Harris requested the police to come to her home. App. pp. 2278-79. Without hearing any scuffling or fighting, the dispatcher heard an initial gunshot and within six seconds heard another gunshot. App. p. 2279. Although Mrs. Harris voice had been described as "excited, demanding, and extremely upset," there was now silence, except for the two gunshots. App. pp. 2279-80. The dispatched officer was on his way. App. p. 2280.

She then received a call from Oklahoma City from Marcus Harris, Mrs. Harris' son, who stated police needed to go to his mother's home because John Hughey had a gun. App. pp. 2281-82, 2284. She advised him the police were there and that she had just gotten off of the telephone with his mother. App. p. 2282. The police then entered her home and described the injuries to the victims. Hughey was not on the scene when the police arrived having left within 45 seconds of the telephone call by Luevinia. App. p. 2285. The dispatcher had spoken to the victim at 12:04 and the police arrived at 12:05. App. p. 2289.

Cpl. Patrick Neil Henderson of the Abbeville Police Department was with the dispatcher when the

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Cpl. Patrick Neil Henderson of the Abbeville Police Department was with the dispatcher when the

fearful call from Luevinia Harris came in. App. p. 2291. He was on his way when he heard the first "pop" like a gunshot and learned that there was a second before he arrived. After hearing a baby cry upon his entry to the Harris home, he found Luevinia Harris on the floor of the hallway in a pool of blood without a pulse. App. p. 2313. He recognized Tesheka Jackson as the second person who was lying across the bed with her head down. App. pp. 2316-17. Both had head wounds.

Cpl. Henderson recognized Tesheka Jackson from an incident on December 3, 1995 when she had told him that Hughey said he would kill her and Henderson advised her to stay at a safe home. App. pp. 2319-21, 2650-51.

Lt. Barry New also arrived at Harris home. He noticed damage to the front door and the strike plate was on the floor. App. pp. 2253-55. He found a knife on the floor that had Tesheka's shoe print apparently on it. App. p. 2255. He saw Ms. Harris in the hallway near a telephone. App. pp. 2357-60. He located Tesheka with a gunshot wound to her head and obviously deceased. App. p. 2361. Also, a single shot shotgun was found in the bedroom with a shell in it. App. pp. 2362-64. The gun belonged to Hughey's deceased father. App. p. 2364. A shotgun shell box was found in the defendant's bedroom. App. p. 2368.

The ominous planning of the tragedy was revealed in the testimony of Cpl. Mitch Christopher who found a note by the Petitioner on his door stating: "As of this morning I will be dead. Love you all. Please take care of my kids." App. p. 2393. The noted was confirmed by Hughey in his testimony. App. pp. 3111-12, 3202.

Michael Adams, who started dating Tesheka in February 1995 revealed that on December 3, 1995, the Petitioner came up and pushed Tesheka and stated that he was going to kill both of them and then ran away. App. pp. 2402-03. This incident was reported to the police. It was reported by the decedent that Hughey told her "I'm going to kill you, I'm going to kill both of you." App. p. 2443.

Upon his arrest in Georgia, Hughey advised the authorities that "I killed them, it was an accident, the gun went off." App. p. 2456. Hughey had tried to cut his wrist prior to the arrest. App. pp. 2463-66.

It was also learned that during his flight within thirty (30) minutes of the crime, Hughey had used the victim's ATM card while driving her car at an ATM in Anderson. App. p. 2471.

SLED Agent David Black described the crime scene and the various location of red substances at the home. He documented the evidence of forced entry at the door and the knife with the impression of the sole. App. pp. 2485-89. He showed the location of shotgun shells and gun found as well as the blood splatter marks. App. pp. 2494-2504. He located the telephone pulled from the wall and one in the bedroom. App. pp. 2504-2509. He documented the injuries to the bodies. App. p. 2511.

The pathologist, Dr. Woodard, found the cause of death of Luevinia Harris to be from a solitary gunshot to the head which resulted in instant brain death.. App. p. 2532. He opined that the distance was between two and ½ and three feet for the shooting. App. pp. 2538-39. Tesheka Jackson has three major injuries: 1) the fatal gunshot wound to the head above the right ear that exited her eye, 2) a large bruise on her face likely caused by the blunt end of the shotgun and 3) a stab wound in her chest possibly caused by the knife found on the floor. App. pp. 2541-42. The doctor opined the shooting distance was at a maximum of two feet. App. p. 2547.

David Black described returning to the crime scene, after the defendant's statement, and finding another shotgun hole in the bathroom and subsequently finding the third shell in a bag from the bedroom. App. pp. 2659-66.

Nancy Skraba described locating blood either consistent with the victim's or insufficient for typing in the house. App. pp. 2678-91.

The banks confirmed the ATM transaction and presented the video photo of Hughey at the ATM machine. App. pp. 2701-20. The record revealed the stolen Mitsubishi was in the name of Tesheka and her grandparents, not Hughey. App. pp. 2788-2803.

Agent Dan DeFresse of SLED opined that each of the shells were consistent with being fired from the located shotgun and the bathroom firing was at a distance of 3 to 5 feet. App. pp. 2814-2825.

Agent Eddie Clark described the Petitioner's inconsistent oral statement that he went to the Harris home and had an argument with Tesheka. Initially, she threw a vase at him and later she came into the house with a shotgun she had gotten out of the car. App. pp. 2856-57. He stated he pushed the gun away and it went off. He tried to run through the trailer, but she followed. Mrs. Harris tried to get between them and grabbed the gun and it went off. He said Tesheka shot Mrs. Harris. App. pp. 2857-58. He was scared and

The prosecution served notice of intent to seek the death penalty. On October 13, 1997, the matter was called for a trial before the Honorable J. Derham Cole. The Petitioner was present and represented by court-appointed counsel, Billy J. Garrett, Robert Tinsley and Edward McCallum. The prosecution was represented by W. Townes Jones, IV, Solicitor of the Eighth Judicial Circuit and Deputy Solicitor, Michael Coulter. At the outset Hughey was ordered submitted to the William S. Hall Institute on October 13, 1997 for a psychiatric evaluation. App. pp. 206-209. The evaluations was then completed prior to the trial.

On October 17, 1997, the proceedings re-started. App. p. 209. The trial began after jury selection on October 22, 1997. The Petitioner testified on his own behalf. On October 27, 1997 the jury returned with guilty verdicts on all four (4) counts. App. p. 3495, ll. 9-17.

On October 28, 1997 at 11:00 a.m. the sentencing proceedings began. App. p. 3508, ll. 1-2. After the presentation of evidence, the trial judge charged the following statutory aggravating and mitigating circumstances:

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ran into the bedroom and Tesheka followed and he tried to get the gun away from her and it went off and he left. App. p. 2858. Jerry Sloan of SLED confirmed the recited oral statement. App. pp. 2876-77.

The victim's mother, Bernice Jackson, confirmed that Tesheka normally stayed at her grandmother's home and denied that the Petitioner and Tesheka ever lived together, were husband and wife, or otherwise. She confirmed that she had met her daughter's friend, Mike Adams, before Thanksgiving. App. p. 2888. She never saw her daughter with a shotgun. App. p. 2890. She last spoke with her on December 3 when looking for a place to stay. App. p. 2886.

George Mack Harris, Luevinia's husband, confirmed that the front door and bedroom doors were not in the same condition as when he left before the murders. App. pp. 2904-11. He described the telephone calls he received from Hughey that night. The first one was after midnight and he declared that Sheka's not there. The second call came between 4 and 5 a.m. after he learned she was there and told Hughey she was asleep, call back later. At 6 a.m., he calls again and says "Mack, I won't be here in the morning" and he then gives Sheka the telephone. App. pp. 2911-13. Harris also described the fact that the red substances were not on the floor and other areas when he left on December 5, 1995. App. pp. 2916-18.

On Count One, the statutory aggravating circumstances to consider were:

> 1. That the murder of Tesheka L. Jackson was committed while in the commission of the crime or act of burglary in the first degree.
>
> 2. That the murder of Tesheka L. Jackson was committed while in the commission of the crime or act of larceny with the use of a deadly weapon.
>
> 3. Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct.

On Count Two, the statutory aggravating circumstances to consider were:

> 1. That the murder of Luevinia H. Harris was committed while in the commission of the crime or act of burglary in the first degree.
> 2. Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct.

The statutory mitigating circumstances instructed on each count were as follows:

> 1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
>
> 2. The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> 3. The age or mentality of the defendant at the time of the crime.
>
> You may also consider any NON-STATUTORY mitigating circumstance(s).

As to each count, the jury found beyond a reasonable doubt the existence of all the statutory aggravating circumstances. App. p. 4073. The jury returned a recommendation of death for each count. App. p. 4073. On October 30, 1997 Judge Cole sentenced John Kennedy Hughey to death on each count of murder. He was sentenced to a life sentence on

Count III of burglary in the first degree and ten (10) years on Count IV for grand larceny.

On November 7, 1997, counsel filed the notice of appeal which was served on the Eighth Circuit Solicitor's Office on November 10, 1997. In his appeal to the South Carolina Supreme Court he was represented by Robert M. Dudek of the South Carolina Office of Appellate Defense. In the direct appeal, he briefed the following questions presented:

> 1.
>
> Whether the judge erred by refusing to disqualify juror #55, Brian Daly, since he was employed at McCormick Correctional Institution, and S.C. Code § 24-3-930 provides that all guards and officers employed at a penitentiary shall be excepted from service on a jury, and also because Daly was the functional equivalent of a law enforcement officer?
>
> 2.
>
> Whether the judge erred by refusing to instruct the jury on examples of acts of legal provocation, since the jury was left without any guidance on what might constitute a legal provocation, and the judge had a duty to fashion an appropriate charge to the facts and circumstances of this case?
>
> 3.
>
> Whether the judge erred by allowing Mack Harris, the husband of the decedent Harris, to testify during the guilt phase about the blood he cleaned off the floor of his home after the shooting, since this testimony was not relevant, and was highly prejudicial?
>
> 4.
>
> Whether the judge erred by refusing to charge the statutory mitigating circumstance contained in S.C. Code § 16-3-20(C)(b)(6), which allows the jury to consider the capacity of the defendant to appreciate the criminality of his conduct or to consider that his ability to conform his conduct to the requirements of the law was substantially impaired, since there was evidence supporting that mitigating circumstance?
>
> 5.
>
> Whether the judge erred by allowing the victim impact witnesses to testify in narrative form, rather than proper question-answer format, since it resulted in the victim's family personally chastising appellant from the witness stand, and this was far beyond the permissible scope of *Payne v. Tennessee*?
>
> 6.
>
> Whether the judge erred by instructing the jury that a non-statutory circumstance was "one which the defendant contends serves the same purpose" as a statutory mitigating circumstance, since this was an improper

charge, and it did not inform the jury as a matter of law that they could consider these non-statutory mitigating circumstances?

7.

Whether the judge erred by admitting State's Exhibit #95 since this photograph of the victim's face showed brain matter coming from beneath her eyes, was unduly prejudicial, was calculated to inflame the passions of the jury, and denied appellant a fair sentencing hearing?

The South Carolina Supreme Court denied the appeal on March 27, 2000. *State v Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000). A timely petition for rehearing was filed on April 11, 2000. Rehearing was denied on May 11, 2000.

Certiorari was taken to the United States Supreme Court. On certiorari, the following question was the sole question raised:

> **Did an unambiguous jury instruction that mercy was not an appropriate reason to sentence petitioner to life imprisonment violate the Eighth Amendment and Fourteenth Amendments since it precluded jury consideration of petitioner's severely disadvantaged background as mitigating character evidence, as well as the domestic nature of the homicide as a circumstance of the crime?**

Hughey v. South Carolina, Petition for Writ of Certiorari, p. 1. On October 16, 2000, the Court entered an order denying certiorari. *Hughey v. South Carolina*, 531 U.S. 936, 121 S.Ct. 345 (U.S.S.C. October 16, 2000). (NO. 00-5635).

On October 19, 2000, Hughey, through appointed appellate counsel, Robert M. Dudek of the South Carolina Office of Appellate Defense, filed a petition for a stay of execution asserting a desire to pursue state post-conviction relief proceedings contending that his appointed trial counsel did not adequately represent him at trial. The stay request was granted November 2, 2000 [App.p. 4307] and counsel was appointed on November 13, 2000 in Newberry County. App.p. 4309-4322.

ARGUMENT

In the Order, the PCR Court concluded that the penalty phase instructions which included the phrase "may recommend a sentence of life for any reason or no reason at all other than as an act of mercy" warranted a new sentencing phase, citing *Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009). The PCR Court concluded that:

> Under our most recent case law applying S.C.Code Ann. § 16-3-20 (2003), it is now well established that: "It is proper to instruct a jury in a capital sentencing proceeding that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy." *Rosemond v. Catoe, supra*. Because the jury was instructed that they "may recommend a sentence of life imprisonment for any reason or no reason at all ***other than as an act of mercy***," (emphasis supplied), the Applicant has established his entitlement to a new sentencing phase of his trial. *State v. Hughey, supra; Rosemond v. Catoe, supra*.

App.p. 5928, Order, p. 7. This order granting re-sentencing in a post-conviction relief setting should be vacated and reversed for the following reasons.

I. The PCR Court Erred In Addressing the "Other Than As An Act of Mercy" Issue As A Free-Standing Claim Where the Claim Was Only Raised Within Two Separate Sixth Amendment Violations of Ineffective Assistance of Trial Counsel and/or Appellate Counsel And The PCR Court Failed To Determine that Counsel Was Deficient or Ineffective under Strickland v. Washington.

The PCR Order erroneously only addressed the instructional issue concerning "other than as an act of mercy" as a free-standing claim instructional issue - not as a Sixth Amendment ineffective assistance claim as pled in the application for post-conviction relief. The State respectfully submits that this was procedural and substantive error for a series of independent reasons. When both trial and appellate counsel cannot be found to be deficient in this setting, it was error to grant relief by improperly expanding the jurisdiction of the PCR court beyond its statutory limitations under S.C. Code Ann. § 17-27-10, et seq.

The "other than as an act of mercy" claims were raised in the application, as amended and during the hearing, ***only*** as a Sixth Amendment violation concerning either ineffective assistance of trial counsel [Tinsley and Garrett] or ineffective assistance of appellate counsel [Dudek].

> Counsel failed to adequately object to the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*." This instruction is contrary to state law, which never requires a sentence of death, S.C. Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy. See, State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000); State v. Torrence, 305 S.C. 45, 406 S.E. 2d 315 (1991). This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or otherwise weighs in favor of a sentence of life imprisonment rather than the death penalty. **[Allegation 11(a)(iii)] [App.p. 4407]**

and *10(b)* ***Applicant was denied the effective assistance of appellate counsel in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.***

> 11(b). Appellate counsel failed to properly brief the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*." This instruction is contrary to state law, which never requires a sentence of death. S.C. Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy. See, State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000); State v. Torrence, 305 S.C. 45, 406 S.E. 2d 315 (1991). This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or otherwise weighs in favor of a sentence of life imprisonment rather than the death penalty. Counsel's conduct was both unreasonable and prejudicial in sentencing. Strickland v. Washington, 446 U.S. 668(1984); Smith v. Robbins, 528 U.S. 259(2000). [App.p. 4407-08]

App.p. 4407-08.

The PCR Order failed to address either of the Sixth Amendment trial and appellate

counsel claims specifically related to the "other than as an act of mercy" instruction.[3] Instead, the PCR Court addressed the issue solely as a free-standing instructional 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).[4] The Applicant 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 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.

Alternately, the recent decision in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (S.C. 2009) did not mandate post-conviction relief in this setting. As noted below, this Court in Rosemond did not find reversible error in this particular instruction in Rosemond's case, concluding that PCR relief was warranted on a separate ground. See Petition for Writ of Certiorari, infra. Also, *Respondent's Post-Hearing Memorandum of Law, p. 154-156.* App.p. 5597-5599.

[3] As stated within, the State submits that neither trial nor appellate counsel were deficient - a condition precedent to granting Sixth Amendment relief.

[4]The application did not raise these claims as a free-standing claim, instead resting upon a Sixth Amendment violation. However, it was the PCR Court who improperly expanded the claim from a Sixth Amendment violation that could not be proven due to trial and appellate counsel's reasonable performance to supervisory function of an appellate court beyond its statutory limitation. See Simmons v. State, Drayton v. Evatt, supra.

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. App.p. 5599-5604. *Respondent's Post-Hearing Memorandum of Law, p. 156-161.*

Finally, in summarily addressing the Rosemond decision revision of the implicit sanctioning the language in the instructions similar to those in *Hughey*, the PCR Court failed to apply an appropriate standard of review for jury instruction analysis. See, State v. Sims, 304 S.C. 409, 422, 405 S.E.2d 377, 384 (1991). If this deferential analysis had been done, it would only reveal that jury would not have construed the particular instructions in a manner to prevent or preclude "mercy." The fundamental flaw in the logic on this issue is the claim that the "other than as an act of mercy" instruction was intended to preclude a consideration of mercy whereas according to Judge Cole that the instruction covered the defense counsel's request to authorize a sentence of mercy. App. 4018-19. Particularly, the State submits that the PCR Court has erred and overlooked the following points that:

1. Viewing the penalty phase instructions as a whole, it is clear that the trial judge, as well as counsel at the time of the trial, was aware that consideration of mercy was proper for the jury in its sentencing consideration - *but also that the jury was not limited to "mercy" in its life sentence consideration.*

2. Judge Cole had previously declared that: "my general instruction covers that." App. 4018-19. The Applicant is now suggesting that Judge Cole's own instruction was contrary his own expressed understanding and interpretation of the law that mercy was a valid consideration and a sentence of mercy could be given.

3. Viewing the instructions as a whole and not this challenged sentence in

isolation, a reasonable juror would have known it had the ability to consider mercy in determining the sentence. See Boyde v. California, 494 U.S. 370 (1990) (Eighth Amendment satisfied where there is not a reasonable likelihood that the penalty phase instructions would preclude consideration of relevant mitigating evidence offered by the petitioner).

4. The State agrees [and have always agreed] that state law authorized consideration of mercy by a capital sentencer, although the federal constitution did not require it.

5. Since the PCR Court erred in apparently interpreting the challenged sentence in isolation, the Court cannot overlooked the ameliorating language within the remainder of the instruction which clarified the ability of the jury to sentence the Hughey to a life sentence as an act of mercy. **First, it is reasonable that the trial judge intended that the instruction tells the jury, "you may recommend a sentence of life imprisonment for ... no reason at all other than as an act of mercy." The phrase "other than as an act of mercy" modifies the phrase "for no reason at all," not the phrase "for any reason."**

6. The problem with the Applicant's assertion is that he fails to recognize that Judge Cole was using the term "other than" as an ***adverb***, not as an ***adjective***. As an adverb, the phrase means "besides" and defined as "in addition to" or "as well". See *Roget's 21st Century Thesaurus, Third Edition (2009)*. Also "other than" can be a preposition for "besides" and defined as in addition to with synonyms of "added to, along with, as well as , beside, beyond, together with. Id. Instead, the Applicant is limiting the phrase "other than" as an adjective meaning barring and defines as "except for." Id.

The State agrees with Judge Cole and the Court that "if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it" as a matter of state law. Rosemond v. Catoe, 680 S.E.2d 5 (S.C. 2009). Beyond that, we would affirmatively assert as a matter of state law that even if no plea from witnesses for mercy is given the jury can consider a life sentence as an act of mercy. The problem with the Supreme Court's intervening new opinion in *Rosemond v. Catoe*, albeit in *obiter dicta*, and the PCR Court and Applicant's reliance upon it, is that it ignores that the jury in Rosemond's sentencing, as well as the jury in State v. Hughey, 339 S.C. 439, 459, 529 S.E. 2d 721, 731 (2000),

would have properly considered "mercy" evidence and that neither instructions "precluded a capital jury's consideration of mercy evidence in the sentencing phase," because any reasonable jury would have read the term as an adverb and not as an adjective as Applicant's isolated parsing suggests. Here, the plain meaning of the instruction, in this setting demands that the jury would have reasonably interpreted the language to allow mercy, not exclude it. As the Supreme Court has consistently stated, jury instruction must be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Sims, 304 S.C. 409, 422, 405 S.E.2d 377, 384 (1991) (implausible that jury would have interpreted mitigation instruction to preclude consideration of mitigation evidence of Sims background and character).

Since it is unquestionably apparent that Judge Cole was aware and agreed that a sentencing jury could consider mercy in its sentencing decision, it is important that the instructions be viewed as a whole and not taken out of context. Simply put, if the author of the language (Judge Cole) intended the language to be similar to the request for a sentence of mercy and the trial counsel who had sought such a charge did not see a contradiction when listening to the penalty charge in its entirety at trial, a reasonable juror would likely have reached the same conclusion rather than the contrary conclusion assumed by the Applicant. The fact that in hindsight a different and alternate interpretation to the parsed language suggests a different result must fail in light of the directions to both consider the evidence presented, the expressed mitigating circumstance instructions and the simple fact that all at the time of the trial did not treat this sentence with the construction now suggested.

2. Hughey is unable to show deficient performance or prejudice related to ineffective assistance of trial counsel concerning the failure to object to the instruction with the phrase "other than as an act of mercy." [INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL]

The PCR court failed to address the Sixth Amendment issue related to trial counsel's failure to object to the instruction. See *Respondent's Post-Hearing Memorandum*, pages 124-142. App.p. 5567- 5585. Had counsel done so, it would not have resulted in relief. How do we know this- because this Court addressed the merits of the claim in the direct appeal.

How The Issue Was Presented At Trial

1. The Request to Charge.

At trial, counsel Tinsley made a request to charge, Defendant's Request to Charge 16, App.p. 4126-27. In its pertinent part, the request stated:

> . . . If you should conclude that a statutory aggravating circumstance exists, you may consider whether the defendant should be sentenced to life imprisonment for any reason, or no reason at all. **This is what has been traditionally referred to as a "sentence of mercy."** ... **In other words, you may choose to sentence the defendant, to life imprisonment if you find a mitigating circumstance, or you may sentence him to life imprisonment for no reason at all, that is as an act of mercy...**

App. 4126-4127. Importantly, during the charge conference, Judge Cole stated that **"my general instruction covers that."** App. 4018-19.

2. The Instructions As Given.

During the penalty phase portion of the trial, Judge Cole gave the following instruction on mitigating circumstances:

> In arriving at your decision as to what the appropriate sentence would be in this case, you are instructed that you must also consider any statutory

mitigating circumstances. Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the State Legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder. It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder.

A mitigating circumstance is neither a justification nor an excuse for the crime of murder. It is simply something which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable.

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances. The following statutory mitigating circumstances are set forth on your statutory instruction form. They are the same as to each of the counts of the indictment.

Those statutory mitigating circumstances are: The defendant has no significant history of prior criminal conviction involving the use of violence against another person; two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance; and three, the age or mentality of the defendant at the time of the offense.

Now you are also permitted under the law to consider, [anesthesia] you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case.

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of

> the defendant's guilt in the commission of the crime of murder.
>
> Those that the defense contends should be considered are: Any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case.
>
> Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or circumstances beyond a reasonable doubt. And you may recommend a sentence of life imprisonment and whether or not you find the existence of a statutory or non-statutory mitigating circumstance.
>
> In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision.

App. p. 4058, l. 25 - p. 4061, l. 18. Further, the trial court charged:

> Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do exist. ***Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy.***

App. p. 4062, ll. 8-15.

3. The Lack of Objection to the Given Charge.

After the instructions were given, counsel Tinsley made no specific objection to the "mercy" language set out in App. p. 4062, ll. 8-15, but made a general request : that "beyond that I would just merely refer the Court to our request to charge 11 through 18, renew all prior motions at this time in the case, and sit down." App. p. 4068, ll. 5-8. The defense counsel took exception to the judge's instruction on mitigating circumstances solely on the use of the phrase "the defense contends." App.. pp. 4066-67. He asserted that the language "the defendant contends" should be "the law allows." App.. pp. 4066. The trial judge responded that the defense misunderstood his comment because it related to those "specifically that the defendant contends are non-statutory mitigating circumstances...those that are not set forth in the statute and so those non-statutory mitigating circumstances that I referred to in that part of the instruction are those that the defendant contends should be considered as non-statutory mitigating circumstances." App.. p. 4067. The defense counsel then generally repeated his request to charge eleven through eighteen. App. p. 4068. [5]

Analysis under Strickland v. Washington.

B. *Defense trial counsel was not deficient in failing to object when counsel specifically requested an instruction that "you may consider whether the defendant should be sentenced to life imprisonment for any reason or for no reason at all ", the judge stated his instruction "covers that" and one counsel did not hear it at trial to preclude mercy.*

Counsel Robert Tinsley testified that he made penalty phase instruction request #16

[5]The defense's request to charge 16 was a request to charge " you may consider whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all. This is what has been traditionally referred to as a sentence of mercy..." App.. p. 4126.

to try to get a life sentence "for no reason at all." App.p. 4767, PCR 114, ll. 19-24. He admitted that this charge request was to have the jury be allowed to consider mercy and have a life sentence as an act of mercy. App.p. 4768, PCR 115, l. 7-18. Counsel acknowledged that when the request was discussed at the charge conference, Judge Cole declared "my general instruction covers that." App.p. 4768-69, PCR 115-116, l. 3. However, at the PCR hearing, counsel Tinsley opined that the "other than as an act of mercy" language in the instruction was contrary to the charge he requested. App.p. 4769, PCR 116, l. 6-17., citing App. 4062.

Counsel Tinsley stated that there was no specific objection to the "other than as an act of mercy" language. App.p. 4770, PCR 117, l. 4-6. As to whether the instruction precluded the jury from considering "mercy," counsel Tinsley stated that he did not catch the [parsed] instruction and that in hindsight, he would object to it because it should have been "for no reason at all" and even as an act of mercy, not the opposite of that. **"But I just did not hear it like that ." App.p. 4770, PCR 117, l. 15-19.** Counsel affirmed that the instruction could be construed as a comment on testimony if the defense puts in evidence requesting mercy. App.p. 4771, PCR 118.

Counsel Billy Garrett testified that he "missed" the instruction concerning mercy. He stated that in addition to counsel Tinsley, Ed McCallum was at counsel table with them whose job it was to listen to the instructions. App.p. 4875, PCR 222-223. Counsel Garrett stated that they were asking in their requests for jurors to consider a sentence based upon mercy. App.p. 4876, PCR 223. He stated from the "cold transcript" it makes the matter appear glaring. At the trial, Garrett claimed that he just did not see it and did not know how

they missed it. App.p. 4929, PCR 276.[6]

The admission by counsel Garrett that he did not hear the mercy instructions at trial to have precluded mercy consideration, is an admission that a reasonable juror listening to the instructions would not have heard it that way either - similar to Judge Cole's interpretation of the charge request and his consistent instruction. The problem with this retrospective assessment by counsel is that a reasonable juror would have rejected that interpretation because it ignores the penalty phase instructions as a whole, the evidence and counsel's own argument in requesting a life sentence. Simply put, under Hughey's new concrete and parsed interpretation, the charge would have precluded a life sentence as an "act of mercy" but not precluded a life sentence for "any reason." This flies in the face of the other ameliorating instructions, as well as Judge Cole's expressed intent with his general instruction and the arguments. It is evident why defense counsel "missed it" - they heard the instruction as Judge Cole and any reasonable juror would have considered it - as an adverb [in addition to, as well, besides] rather than as an adjective [barring, except for] - in light of the closing argument by counsel requesting "mercy" [App. 4038, 4045 - "should you decide to recommend a sentence of mercy," "spare my client's life"]. Hughey has failed to show deficient performance.

B. Sixth Amendment Prejudice Not Shown.

This Court should vacate and reverse the lower court's order granting re-sentencing and conclude that trial counsel was not deficient in failing to object and that 6th Amendment prejudice was not proven. Hughey has failed in his burden of proof in showing

[6]The State submits that the problem with trial counsel's new retrospective assessment is that it was presented to him at the hearing that the instruction actually precluded consideration of an act of mercy - treating the "other than" phrase as an adjective rather than an adverb.

counsel was constitutionally deficient in *failing to object* specifically to the instruction in 1997. Further, in light of the expressed rejection of the same underlying claim in the direct appeal in State v. Hughey and the trial judge's expressed statement that his instruction covered their request, [App. 4018-19,] prejudice under Strickland cannot not been shown. The non-statutory circumstances were repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law. The evidence that the Petitioner had previously emphasized in his appellate brief "that justified mercy" was adequately considered by the jury based upon the instructions that required the jury to consider the evidence as a whole and in mitigation in making the decision on whether a life sentence was appropriate. The Constitution does not and should not require more. His counsel was not at constitutional deficiency in failing to object to the instructions in the manner collateral counsel now asserts. He has failed to show *Strickland* prejudice.

3. **Hughey is unable to show either deficient performance or prejudice related to ineffective assistance of appellate counsel concerning the failure to brief the instruction with the phrase "other than as an act of mercy" since the issue was discussed within the brief and addressed in the appellate decision on the merits.**[INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL]

The PCR court failed to address the Sixth Amendment issue related to appellate counsel's failure to object to the instruction. In his post-hearing memorandum, Hughey asserted appellate counsel Dudek inadequately briefed the "other than as an act of mercy " issue in the direct appeal. In the application, he contended that it should have been raised as an independent issue that it was contrary to state law and was also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or otherwise

weighs in favor of a sentence of life imprisonment rather than the death penalty. The State incorporates its Post-Hearing Memorandum, pages 143-170, App.p. 5587-5613. Because of this omission by the PCR court, the Court should vacate and hold the claim of ineffective assistance of appellate counsel was not proven. This issue was raised in the application, but Respondent submits that Hughey is unable to show either deficient performance or prejudice under Strickland v. Washington.

Standard for Ineffective Appellate Counsel.

Appellate counsel cannot be deemed constitutionally deficient and ineffective under the Sixth Amendment when he in fact actually raised the same issue to the Supreme Court within his initial merit brief and reply brief, the Supreme Court addressed and rejected the merits of this claim specifically in the direct appeal order, and that appellate counsel additionally argued it more specifically in his petition for rehearing the same assertions raised herein. See, App.p. 5593-5597, *Respondent's Post-Hearing Memorandum of Law, p. 150-154* (how issue raised and decided in the direct appeal).

More importantly, Sixth Amendment prejudice was not shown where it is evident from a reasonable reading of the trial record, that the jury would have considered the challenged language to have allowed, not precluded an "act of mercy." See 5206-5208,PCR 552. It is also evident that it was Judge Cole's own assessment that the charge he gave concerning "any reason or no reason at all other than an act of mercy" was similar to the particular instruction requested by the defense for a "sentence of mercy." [Judge Cole stated that "my general instruction covers that." [App. 4018-19].

The Instruction As Given Did not Preclude Consideration of Mercy or An Act of Mercy.

First, the fundamental flaw in the Applicant's logic on this issue, as with ground three, is the claim that the "other than as an act of mercy" instruction was intended to preclude a consideration of mercy whereas according to Judge Cole that the instruction covered the defense counsel's request to authorize a sentence of mercy. App. 4018-19. The State incorporates by reference its earlier portion of this Petition.

The "Other Than As An Act of Mercy Issue Was Presented And Decided In The Direct Appeal.

The issue actually raised in the PCR application is that appellate counsel was constitutionally deficient under the Sixth Amendment because he failed to assert his claim as a separate ground rather than within the section challenging the statutory mitigating circumstance instructions. While better appellate practice may suggest that properly preserved claims should be raised in a separate issue presented, appellate counsel Dudek was faced with a unique situation because there was no specific objection to the charge as given setting out either any state law or federal constitutional claim. Since appellate counsel reasonably perceived that the State would likely oppose the first time challenge based upon a procedural defect, appellate counsel sought to blend the unpreserved issue into a properly preserved claim. This was done with the hopes that the Supreme Court would either address the claim or conclude that the claim was not properly before the court and should be presented in a state postconviction relief action - setting up the claim. However, the State chose to not assert the procedural bar and the merit of the state law instructional claim was addressed. The issue then becomes one of *style - not deficiency* under the Sixth Amendment. His claim should have been denied.

First, appellate counsel cannot be deemed deficient because trial counsel did not object to the penalty phase instruction, as given, on this same issue, although he made a written request to charge similar to the newly preferred charge set out in *Rosemond.* Appellate counsel is not deficient for failing to raise on appeal an issue that was not preserved for review. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002): Gilchrist v. State, 612 S.E.2d 702, 705 (S.C. 2004) (appellate counsel not ineffective where trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances."). See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, cert. denied, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review) Simply put, at no time did trial counsel make any specific objection that the "other than as an act of mercy" instruction violated state law because it precluded consideration of the evidence of a request for mercy or precluded a life sentence as an act of mercy. To the contrary, when his request was made for instruction request 16, Judge Cole declared that his own general instruction covered the same defense request - the request for a sentence of mercy. [As noted within, when the given charge is read with "other than" as an adverb or preposition, it does exactly as Judge Cole suggested and defense counsel requested - it authorizes a sentence of life as an act of mercy.].

The inquiry then becomes whether an appellate counsel be constitutionally deficient for raising an unpreserved claim, but not as a separate ground. The simple answer is that counsel cannot be deemed ineffective concerning the raising of an unpreserved claim. First, South Carolina preservation rules are clear. The failure to object to language in

an instruction bars appellate review. State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1996). See also State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (holding making "standard motions" at trial does not preserve an issue for appellate review and stating, "A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."); State v. Jordan, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) ("This court has, in numerous cases, held that it will not consider a question on appeal which was not presented in the court below."); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991) (an issue must be raised to and ruled on by the trial judge to preserve for appellate review); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (an issue which is not properly preserved cannot be raised for the first time on appeal); State v. Crowley, 226 S.C. 472, 85 S.E.2d 714 (1955) (objection must be on specific ground); State v. Nichols, 325 S.C. 111, 120-121, 481 S.E.2d 118, 123 (1997) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review."). The record is devoid of any showing that the issue was preserved at trial on the same grounds asserted. Contrary to the claim, at no time did Judge Cole state that the request 16 was rejected - it was instead that his instruction covered the request. Simply put, Judge Cole believed his language was similar to the request for a sentence of mercy instruction, not that mercy was an invalid factor.

To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, the Applicant must prove prejudice by showing he would have prevailed on appeal had a brief raising the same claim been filed by counsel and granted by the Court. See, Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142

(1991) (appellate counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal).

How Appellate Counsel Dudek Actually Presented The "Other Than As An Act of Mercy Issue In The Direct Appeal.

In the Final Brief of Appellant before the South Carolina Supreme Court, the Appellant raised the following Question Presented:

> 6. Whether the judge erred by instructing the jury that a non-statutory circumstance was "one which the defendant contends serves the same purpose" as a statutory mitigating circumstance, since this was an improper charge, and it did not inform the jury as a matter of law that they could consider these non-statutory mitigating circumstances?

Final Brief of Appellant, p. 40-43. App.p. 4180-4183. Within the brief, appellate counsel Robert Dudek noted that in State v. Bell, 302 S.C. 18, 393 S.E.2d 364, 374 (1990) that the judge had charged an instruction the a life sentence could be given for any reason or no reason at all. *Final Brief of Respondent*, p. 41. App.p. 4180. However, in challenging the "other than as an act of mercy" instruction at issue in this portion, counsel Dudek argued:

> "Further, the judge's instruction did not allow the jury to impose a life sentence for any reason or no reason at all. The judge, as seen, told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all **other than as an act of mercy**. R. 2062, ll. 8-15. **[emphasis in original brief]** This confusing instruction suggested that an act of mercy would have been an invalid reason for a life vote.
>
> At a minimum, this charge was confusing. The judge's instructions that non-statutory mitigating circumstances were matters the defendant contends the jury should consider, rather than were matters authorized by law for the jury to consider , was so confusing as a whole that a reasonable juror could have applied the law incorrectly. What the defendant contends the jury should consider , and the law authorizes it to consider are vastly different matters.
>
> In short, a reasonable juror would have interpreted the trial judge's charge to mean that non-statutory mitigating circumstances were not on an equal par with statutory mitigating circumstances. The dismissive tone about nonstatutory mitigation circumstances violated the Eighth and Fourteenth Amendments. See Penry v. Lynaugh, 109 U.S. 302, 109 S.Ct.

2934 (1989); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869(1982).

Further, considering the charge as a whole, the jury was plainly instructed that it could not impose a life sentence as an act of mercy. This made the importance of mitigating circumstances, and here specifically non-mitigating circumstances, all the more important, since the jury could not sentence appellant as an act of mercy. [Emphasis added].

In short, the jury was essentially instructed that some matter in mitigation had to anchor their decision to impose a life sentence. This made the judge's instruction which de-emphasized the importance of non-statutory mitigating circumstances all the more prejudicial.

The judge had a duty to avoid a charge that was confusing to a reasonable juror. See State v. Manning, 305 S.C. 413, 409 S.E.2d 372, 375 (1991). Appellant should be granted a new sentencing proceeding.

Final Brief of Appellant, p. 43-43. App.p. 4182-83.

In the *Final Brief of Respondent* on this issue, Respondent did not assert any procedural bar. App.p. 4239-4242. The State asserted essentially, citing Boyde v. California, 494 U.S. 370 (1990) and Buchanan v. Angelone, 522 U.S. 269 (1998), State v. Sims, 304 S.C. 409, 422, 405 S.E.2d 377, 384 (1991)(implausible that jury would have interpreted mitigation instruction to preclude consideration of mitigation evidence of Sims background and character); State v. Bell, 305 S.C. 11, 21, 406 S.E.2d 165, 171 (1991), that the instructions given there was constitutionally adequate because it did not preclude consideration of relevant mitigating evidence., Eaton v. Angelone, 139 F.3d 990 (4th Cir. 1998). Further noting that in State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998), the court upheld a death sentence challenge to a mitigation instruction, even though the jury was not specifically advised it could impose a life sentence for any reason or no reason at all, that the court therein found that considering the instructions, as a whole, a reasonable juror would not have understood to preclude consideration of mitigation or preclude a life sentence even if no mitigation was found. Respondent contended that Judge Cole satisfied

state and federal law in the instruction on mitigating circumstances, emphasizing the following portions of the instructions including Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy . App. p. 4062, ll. 8-15. See *Final Brief of Respondent*, p. 41-44. App.p. 4239-4242. The State argued that it was unclear what the Appellant's complaint to the instructions on mitigation, despite the timely objection, citing App. pp. 4066-4068. App.p. 4242. His concern there appeared to be related to asserting "the defendant contends" dilutes the impact of the request. Tr. p. 4066, ll. 2024. App.p. 4242.

> Contrary to the conclusion in the brief, these instructions were not confusing. He ignores the view of the instructions as a whole in making the determination. As recognized in Buchanan, he ignores the setting where the jury had just completed a day of testimony from the Appellant's family members, a social worker, and a psychologist presenting evidence to support both types of mitigating circumstances. He misreads the entirety of the instructions to suggest otherwise. The argument is without merit. The jury would have considered the evidence appropriate. Boyde, Buchanan.

Final Brief of Respondent, p. 44. App.p. 4242.

In the *Final Reply Brief of Appellant*, counsel Dudek replied, again citing State v. Bell and urging that:

> " **[T]he instruction informed the jury that a life sentence as an act of mercy was invalid, rather than a permissible reason to give a life sentence. The instruction in this case violated the Eighth and Fourteenth Amendments and was confusing**. Lockett v. Ohio, 438 U.S. 104, 98 S.Ct. 2954 (1978); State v. Manning, 305 S.C. 413, 409 S.E.2d 372, 375 (1991). Appellant is entitled to a new sentencing proceeding.

Final Reply Brief of Appellant, p. 18-19. (emphasis added). App.p. 4267-68.

In deciding this issue, the Supreme Court of South Carolina went to the heart of the current complaint on the instruction of "any reason or no reason at all other than as an act of mercy" and interpreting this claim as adequately presented and preserved:

> ***Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote. The trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy." (emphasis added). This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error. See Singleton, 284 S.C. at 393, 326 S.E.2d at 156; State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984).***
>
> ***The jury charge, reviewed in its entirety, is not confusing because it advises the jurors to consider all mitigating circumstance in making their recommendation. The non-statutory circumstances are repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law.***

State v Hughey, supra. App.p. 4284-85.

Counsel Dudek made a "petition for rehearing" on April 11, 2000. Within the petition, he made the following argument:

> **The confusing and conflicting penalty phase instruction on acceptable reasons for giving a life sentence.**
>
> Finally, the Court's approval of the trial judge's instruction that a verdict of life imprisonment could not be given as an "act of mercy" conflicts with the tradition of a jury being allowed to give a recommendation of mercy to the sentencing judge. An act of mercy is not synonymous with a verdict guided by "sympathy, prejudice, passion, or public opinion." State v. John Kennedy Hughey, Op. No. 25096, Shearouse Adv. Sh. #12 at page 38. However, that a life sentence can be recommended for "**any reason or no reason at all**" does conflict with a charge that an "act of mercy" was an improper basis for a life recommendation.
>
> Petitioner respectfully submits the "other than as an act of mercy" instruction is internally confusing, and conflicts with tradition in capital cases. For all these reasons, petitioner asks that this Court reconsider its opinion in State v. John Kennedy Hughey, Op. No. 25096, Shearouse Adv. Sh. #12 at pages 25-42, and grant rehearing.

State v. Hughey, Petition for Rehearing, April 11, 2000, p. 6-7. App.p. 4294. The petition for rehearing was denied by the Court on May 11, 2000.

Appellate counsel Dudek, however, did not stop with the South Carolina Supreme

Court with his presentation of the claim. He actually raised it to the United States Supreme Court as his sole claim on certiorari in the direct appeal. In the Petition for Writ of Certiorari, counsel Dudek directed the Court to the instruction in his Question Presented stating:

> Did an unambiguous jury instruction that mercy was not an appropriate reason to sentence petitioner to life imprisonment violate the Eighth Amendment and Fourteenth Amendments since it precluded jury consideration of petitioner's severely disadvantaged background as mitigating character evidence, as well as the domestic nature of the homicide as a circumstance of the crime?

On October 16, 2000, the Court entered an order denying certiorari. *Hughey v. South Carolina*, _ U. S. _ , 121 S.Ct. 345 (U.S.S.C. October 16, 2000). (NO. 00-5635).

Appellate Counsel Dudek's Testimony

Counsel Robert Dudek, a nineteen year counsel with the South Carolina Division of Appellate Defense, testified that he handled the Hughey appeal. App.p. 4960, PCR 307. He stated that at the time of the trial, South Carolina did not have a plain error rule and that he had to rely upon contemporaneous and specific objections for appellate issues. App.p. 4961, PCR 308. Counsel Dudek referred to R. 4018 where the trial judge indicated that his general instruction would cover defense counsel's Request 16. App.p. 4963-64, PCR 310-311.

He was next referred to App.p. 4126-27 which included the defense request to charge, which included the reference to "a sentence of mercy" and "... you may sentence him to life imprisonment for no reason at all, that is an act of mercy." App.p. 4964, PCR 311. Appellate counsel maintained that the trial judge's initial indication at R. 4018 suggested the request for a mercy instruction would be covered. App.p. 4965, PCR 312.

Counsel Dudek was next referred to App.p.4062, ll. 8-15 which include the phrase "... you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy." App.p. 4966, PCR p. 313, ll. 6-12. Counsel Dudek declared that the charge as given was not consistent with the request. He claimed it "turned the charge on its head" and that it was telling the jurors that a life sentence based upon mercy would be improper. App.p. 4966, PCR p. 313, ll. 19-23. Counsel Dudek next considered App.p. 4068, ll. 11-18 and opined that charge 16 would have been included in that exception. PCR 314.

Counsel Dudek stated that the argument in his appellate brief concerned a broader issue of non-statutory mitigating factors. He stated that he felt the "mercy" charge was an important issue because he recalled it was the first time he had seen an instruction that you cannot sentence a defendant to life as an act of mercy. He stated it jumped out to him as an issue. He said, in retrospect, where there was not a specific objection, he tried to blend it in with the other issue. Although you rarely get away with it. App.p. 4968-69, PCR 315-16.

Counsel Dudek stated that he was trying to set up the mercy instruction issue to be procedurally barred because it was not preserved for appellate review. He said this would have set it up for post-conviction relief. However, the Supreme Court "kind of reached out and grabbed the issue." App.p. 4969, PCR 316.

In hindsight, Dudek said if he did it again, he should have raised it as a stand-above issue with a separate topic heading that the mercy instruction was improper and prejudicial, rather than blending it. App.p. 4969, PCR 316. He stated his argument would be that a jury had the right to sentence the defendant for any reason or no reason at all and as an act of mercy. He stated that mercy was a different concept than passion. He stated that he

would argue that Hughey was a human being and as an act of mercy to sentence life rather than death. App.p. 4970, PCR 317.

On cross-examination, counsel Dudek admitted that he raised within issue 6 the present issue on the charge of you can give a life sentence for any reason or no reason at all other than as an act of mercy at pages 40-43. App.p. 4970, PCR p. 317, ll. 20-22. He further notes that within the brief, page 41, he emphasized the "other than as an act of mercy" in bold print. App.p. 4971, PCR p. 318, ll. 9-15. He further admitted that he argued in his brief that instruction did not allow for the jury to impose life for any reason or no reason at all, and that the instruction was confusing and suggested that an act of mercy was an invalid reason for a life sentence. App.p. 4972, PCR 319.

Upon review of the State's brief, counsel Dudek conceded that the State did not assert a procedural bar to the challenge to the mercy instruction in its brief. App.p. 4972-73, PCR 319-20. Rather, the State asserted the instruction was not confusing. App.p. 4973, PCR 320.

Counsel Dudek conceded that while he attempted to set up the issue for post-conviction relief that the Supreme Court addressed the issue. App.p. 4973, PCR p. 320, l. 21. However, he stated the argument was not whether the sentence would be based upon passion or prejudice, but whether it could be based upon an act of mercy. App.p. 4974, PCR 321.

Counsel stated the Supreme Court did not ignore his argument, conceding that they paraphrased it in the order. He stated that the 3Court grabbed the issue and he did not expect them to do so and it was his error in thinking he was only "squarely presenting the issue for post-conviction relief." App.p. 4976, PCR 323.

Counsel Dudek further conceded that he argued the issue in his brief in the direct appeal as forcefully as he argued it in his PCR testimony. App.p. 4976, PCR p. 323, ll. 9-12. He admitted he made a petition for rehearing which was denied. App.p. 4977, PCR 324, 327.

On re-direct, counsel Dudek stated that it would be inconsistent to have a family member testify and ask for mercy and then have the judge state that they could give a life sentence for any reason or no reason at all other than as an act of mercy. App.p. 4981, PCR 328. In

Dudek's opinion, it would essentially say disregard the testimony. App.p. 4981, PCR p. 328, ll. 5-11.

SUMMARY

The State submits that Hughey has failed to show, in light of the South Carolina Supreme Court's prior treatment of the instruction in Hughey's appeal and appellate counsel's Initial and Final Brief of Appellant that to have argued his emphasis differently on the "other than as an act of mercy" the appeal would have been reversed and that the Court would have vacated the death sentence. Absent this showing, complaints about technique and emphasis do not satisfy the burden of proof.

The Court should vacate Judge Macaulay's order and address this issue which it failed to address in the original order. The State submits that this claim must be dismissed. Appellate counsel Dudek was successful in raising the claim in the direct appeal in Hughey and having it addressed on the merits. He cannot be deemed constitutionally deficient and ineffective under the Sixth Amendment when he in fact raised the same issue to the Supreme Court within his initial merit brief and reply brief, the Supreme Court

addressed and rejected the merits of this claim specifically in the direct appeal order, and that appellate counsel additionally argued it more specifically in his petition for rehearing the same assertions raised, but rejected.

Despite the recent action in *Rosemond*, it is evident from a reasonable reading of the trial record and the jury instructions, that the jury would have considered the challenged language to have allowed, not precluded an "act of mercy" - the giving of a life sentence. Simply put there is no showing in the record of any mandate for a death sentence. It is also evident that it was Judge Cole's own assessment that the charge he gave concerning "any reason or no reason at all other than an act of mercy" was similar to the particular instruction requested by the defense for a "sentence of mercy." [Judge Cole stated that "my general instruction covers that." App. 4018-19].

4. **This Court's opinion in *Rosemond v. Catoe* addressing in obiter dicta the similar jury instruction that the jury may recommend a sentence of life for any reason or no reason at all other than as an act of mercy" and expressly overruling this Court's holding in *State v. Hughey* does not require the granting of re-sentencing in Hughey when the same holding did not require a new sentencing by this Court in *Rosemond*, the Court concluded in the direct appeal in Hughey that the death sentence was not the subject of any arbitrary factor and any error was harmless error in light of the ameliorating instructions, evidence and closing arguments which did not preclude the jury from considering a verdict of life based upon mercy and the evidence.**

***The Procedural Impact of Rosemond v. Catoe,* 680 S.E.2d 5 (S.C. 2009).**

This issue faces a confusing procedural posture for three separate reasons. First, as noted above, the same "other than as an act of mercy" issue was not presented to the trial judge and therefore was not technically preserved for a direct appeal. Second, while there was no contemporaneous objection to the particular instruction as given, counsel Robert

Dudek did raise a challenge to the "any reason or no reason" in the direct appeal.[7] Since the State in its *Initial Brief of Respondent* did not assert a procedural bar due the lack of the objection, the appellate court was free to address the merits of the claim. Importantly, the Supreme Court specifically rejected the claim on the merits in the direct appeal. Thirdly, while the PCR matter was pending briefing, the Supreme Court took an extraordinary step and partially overruled *State v. Hughey* in *Rosemond v. Catoe, et al*, supra, , 680 S.E.2d 5 (S.C. June 29, 2009).[8]

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[7]In the Applicant's Brief, they refer to Defendant's Request to Charge 16, App. , p. 4126-27. In its pertinent part, the request stated:

> . . . If you should conclude that a statutory aggravating circumstance exists, you may consider whether the defendant should be sentenced to life imprisonment for any reason, or no reason at all. This is what has been traditionally referred to as a "sentence of mercy." ... In other words, you may choose to sentence the defendant, to life imprisonment if you find a mitigating circumstance, or you may sentence him to life imprisonment for no reason at all, that is as an act of mercy...

App. 4126-4127. During the charge conference, Judge Cole stated that "my general instruction covers that." App. 4018-19. After the instructions were given, counsel Tinsley made no specific objection to the "mercy" language set out in App. , p. 4062, ll. 8-15, but made a general request : that "beyond that I would just merely refer the Court to our request to charge 11 through 18, renew all prior motions at this time in the case, and sit down." App.p. 4068, ll. 5-8.

[8]An attorney is not required to anticipate or discover changes in the law or facts, which did not exist, at the time of trial, to render effective assistance of counsel. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). But, a finding by the Supreme Court that an attorney was ineffective for failing to request an instruction on well-established law is not a "change in the law" which would protect other attorneys who failed to do so prior to the Court's opinion. Chalk v. State, 313 S.C. 25, 437 S.E.2d 19 (1993).

A counsel is not ineffective in failing to forecast changes or advances in the law. *Larrea v. Bennett*, 368 F.3d 179 (2d Cir. 2004) (failure to anticipate change in state law not ineffective, rejecting at 184 n. 2 that an attorney should be familiar with cases from other jurisdictions; *Sherrill v. Hargett*, 184 F.3d 1172 (10th Cir. 1999); *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993); *Moore v. Deputy Commissioners, Sci-Huntington*, 946 F.2d 236, 245, fn. 6 (3rd Cir. 1991); *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir. 1991); *Sistrunk v. Vaughn*, 96 F.3d 666, 672 (3rd Cir. 1996) (not ineffectiveness to fail to anticipate "*Batson*"). The Ninth Circuit says counsel cannot be required to anticipate later decisions. *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994). See also *Murtishaw v. Woodford*, 255 F.3d 926, 949-950 (9th Cir. 2001) (not ineffective to fail to request imperfect self-defense instruction before Supreme Court adopted it); *U.S. v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990) (view counsel's conduct at the time counsel is required to act). The same is true for counsel who fails to preserve an issue after U.S.S.C. has granted certiorari but U.S.S.C. has not yet decided the case. *U.S. v. McNamara*, 74 F.3d 514 (4th Cir. 1996); *U.S. v. Smith*, 915 F.Supp. 1378 (W.D. Pa. 1995). Failure to seek a continuance in anticipation of a possible change in federal sentencing law was not ineffectiveness in *U.S. v. Gonzalez-Lerma*, 71 F.3d 1537, 1542

In the *Rosemond* decision, the Court concluded:

> During the sentencing phase, the testimony of two family friends was properly admitted and these witnesses asked the jury for mercy. In contrast, the trial court then instructed the jury to discount such pleas by instructing the jury that it could not recommend a life sentence based on the evidence of mercy. Notably, the trial court's jury instruction mirrored the instruction found proper subsequent to Rosemond's trial in *State v. Hughey,* 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000). **We overrule *Hughey* to the extent it approved and sanctioned the charge given here.**

Rosemond v. Catoe, supra. Importantly, while the Court removed its apparent sanction of the instruction in Hughey's case, it did not grant the sentencing hearing based upon the Hughey conclusion. See PCR 555. To the contrary, the Court's conclusory mandate was:

> Due to the overwhelming evidence of guilt and want of prejudice, we affirm the PCR court's denial of relief regarding the assignment of errors related to the guilt phase of Rosemond's trial. We reverse the PCR court and hold Rosemond established his entitlement to a new sentencing hearing as a result of trial counsel's failure to present any mental health mitigation evidence in the sentencing phase. We remand the case for a new sentencing hearing. **We overrule *State v. Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase.**

Rosemond, supra. Thus, the mandate is clear of two matters - first, trial judges should not use the similar language in the future. However, it did not conclude that new sentencing proceedings were required when a similar instruction is given. To the extent that Hughey may claim that relief is automatic after *Rosemond*, a closer reading of *Rosemond* requires that the assertion must be rejected.

Nothing in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), prevents this

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(10th Cir. 1995). Counsel was not ineffective in *U.S. v. Goode*, 143 F.Supp.2d 817, 826-827 (E.D.Mich. 2001) for failure to raise a proof beyond a reasonable doubt sentencing claim before the decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

finding as no analysis was made as to the charge as a whole in *Rosemond*.[9] Consequently, the incorrect phrase in one sentence of the charge, erroneous under current state law, did not negatively contribute to the verdict as the charge as a whole was not incorrect. *See also State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error"); *State v. Bell*, 305 S.C. 11, 21, 406 S.E.2d 165, 171 (1991) (applying *Boyde* in direct appeal review, and finding, after review of a no unfettered sympathy instruction, "from the context of the charge, there is no reasonable likelihood this charge prevented the jury from considering any mitigating evidence in fairness and mercy").

Moreover, in *Rosemond*, the Supreme Court tied the propriety of the consideration of mercy to the receipt of "proper *evidence* of mercy." 680 S.E.2d at 10 (emphasis added). It is this consideration of mercy based on the evidence that makes the charge consistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *Id.* Thus, according to *Rosemond*, the charging language *does not* support unfettered, unreasoned, emotional reaction; rather, the charge is meant to preserve the exercise of mercy *based on consideration of the evidence submitted.* To the extent this logic focuses on reasoned consideration of the evidence, it is consistent with United States Supreme Court precedent.

A capital defendant is allowed, pursuant to the Eighth and Fourteenth Amendments of the Constitution, to submit evidence in mitigation of "any aspect of [...his...] character or

[9] The Court in *Rosemond* did not grant relief on this issue at all, rather, the language addressing the one sentence is found in *dicta*.

record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" to enable the jury to make an "individualized decision" in sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). In that same vein, the Court has determined that the State may not create "limitations" on the consideration of properly admitted mitigation evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). "These two cases place clear limits on the ability of the State to define the *factual bases* upon which the capital sentencing decision must be made." *Saffle v. Parks*, 494 U.S. 484, 490 (1990)(emphasis added). However, there is a difference between the presentation and consideration of evidence (i.e. *Lockett* and *Eddings*), and the exercise of unfettered sympathy or mercy: "Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant." *Id* at 493. The Supreme Court has rejected challenges to instructions that the jury "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id* at 542.

This State has long allowed a plea for mercy in the sentencing phase. *See, e.g., State v. Torrence*, 305 S.C. 45, 50-51, 406 S.E.2d 315, 318-319 (1991). However, according to modern jurisprudence, such a plea must be grounded in the emotional tie to the defendant, and not simply an opinion on the appropriate sentence. *State v. Wise,* 359 S.C. 14, 596 S.E.2d 475, 481-482 (2004). *See also State v. Sapp*, 366 S.C. 283, 292-294, 621 S.E.2d 883, 887-888 (2005). A family member making a plea for mercy may *not*

weigh in on what the appropriate sentence should be. *State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000)("the defense did not seek to elicit the opinion of Johnson's sister about what verdict the jury 'ought' to reach. Defense counsel merely proposed to ask her whether *she wanted* Johnson to die" which "did not address the ultimate issue to be decided by the jury"). In sum, the basis for admissibility of the plea is not mere mercy, but the plea's value as evidence of the shared bond which itself is a reflection of the defendant's character in that he is able to maintain that bond. Otherwise, there would be no reason to draw a distinction between 1) a plea for mercy and an opinion on which sentence is appropriate; and 2) allowing only family members to so plead, not even a victim who would arguably have an interest in the disposition. *Id. See also Torrence, supra, Wise supra.*

The only constitutional issue that could arise under these facts would be if the charge at issue *precluded* consideration of the *evidence* that the state allowed. *Eddings, supra*. Such an interpretation would not be reasonable based on this record. As set out above, the trial court appropriately charged that a life sentence could be returned based on the mitigation evidence or not based on the mitigation evidence – said differently, for any reason or no reason at all.[10] Again, the Supreme Court of South Carolina has previously held that even that charge ("any reason or no reason at all"), as phrased, is not required where the jury is charged that they can impose a life sentence even if they do not find

[10] If the charge is read to encourage mere emotion, the charge may run contrary to the constitution: "The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror." *Saffle v. Parks*, 494 U.S. at 495. See also *Boyde*, 494 U.S. at 377 ("there is no... constitutional requirement of unfettered sentencing discretion in the jury...."); *Johnson v. Texas*, 509 U.S. 350, 362 (1993)(same).

mitigating circumstances. *State v. Hicks*, *supra*. If mercy is an act by the sentencer (mercy is defined as "compassionate *treatment*..."), the ability to impose a life sentence whether mitigation evidence is accepted or not *is* the ability to exercise mercy. The jury here was so instructed. A finding of *Strickland* prejudice is not warranted and re-sentencing is not required under Rosemond.

The Law of the Case Doctrine Precludes Reconsideration of the Holding in Hughey for Hughey in Post-conviction relief as a free-standing claim.

South Carolina applies the "law of the case" doctrine to its decisions. In *Greenwood County v. Watkins*, 196 S.C. 51, 12 S.E.2d 545(1940), the Court stated that it was well settled in S.C. that the rulings in a case, even though admittedly wrong become the law of the case. The doctrine of "the law of the case" prohibits issues which have been decided in a prior appeal from being relitigated in the trial court in the same case. 5 Am.Jur.2d *Appellate Review* § 605 (1995). The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case. *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957) (where Court granted a new trial in first appeal for errors in the charge, it logically determined trial court had not erred in refusing defendant's motion for a directed verdict "for if there had been error in this respect it would have been unnecessary to consider any other questions"); *see also Warren v. Raymond,* 17 S.C. 163 (1882) (all points decided by the Court on appeal, or necessarily involved in what was decided, are res judicata and cannot be considered again in the cause). [11] *Ross v. Medical University of*

[11] 21 C.J.S. *Courts* § 143 (1990) (" *[a]n adjudication on any point within the issues presented by the case cannot be considered a dictum, and this rule applies as to all pertinent questions,* although only incidentally involved, *which* are presented and decided in the regular course of the consideration of the case, and *lead up to the final conclusion,* and to any statement in the opinion as to a matter on which the decision is

South Carolina, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (S.C.,1997). Also, *Johnson v. Board of Com'rs of Police Ins. & Annuity Fund of State*, 68 S.E.2d 629, 633 (S.C.1952) ("[T]he rulings in a case even though admittedly wrong become the law of the case and res judicata between the parties); *Jenkins v. Southern R. Co. , 145* S.C. 161, 143 S.E. 13 (1927)(application for an injunction was refused on the ground that the initial decision in the first appeal was "not only res adjudicata as between the parties, but is the law of the case,' right or wrong," even though earlier decision was overruled).

Retroactive Application of Rosemond Is Not Appropriate

Further, retroactive application to collateral cases is not required. In *McCray v. State*, 287 S.C. 160, 337 S.E.2d 218 (1985), the Court relied upon *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985) and *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) to conclude that a state court decision did not have retroactive application. Although the later interpretation of the decision as being grounded in the federal constitution and subject to retroactive treatment, the McCray decision stood for the general proposition concerning non-retroactivity as a matter of state procedure.

Subsequently, the Court in *Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 880 - 881 (S.C.,2007), addressed the inapplicability of retroactivity of decisions. The Court looked to both *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and *State v. Jones,* 312 S.C. 100, 439 S.E.2d 282 (1994), to determine whether new decision in the U.S. Supreme Court should be applied retroactively on collateral review in state court. The Court concluded that in determining whether Respondent was deprived of his federal

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predicated.") (Emphasis added). *Ross v. Medical University of South Carolina,* 328 S.C. 51, 62, 492 S.E.2d 62, 68 (S.C.,1997).

constitutional right to counsel, it was required to follow the United States Supreme Court's decisions on retroactivity. *Am. Trucking Ass'ns, Inc. v. Smith,* 496 U.S. 167, 178, 110 S.Ct. 2323, 2330, 110 L.Ed.2d 148, 159 (1990) ("In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions."); *see also, e.g., State v. Means,* 367 S.C. 374, 626 S.E.2d 348 (2006) (applying *Jones* in determining *State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005), should be applied retroactively); *State v. Hill,* 361 S.C. 297, 604 S.E.2d 696 (2004) (applying *Jones* in determining *State v. Sutton,* 340 S.C. 393, 532 S.E.2d 283 (2000), should be applied retroactively); *Gibson v. State,* 355 S.C. 429, 586 S.E.2d 119 (2003) (applying *Teague* to determine whether *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), should be applied retroactively on collateral review).

The Talley court determined that the question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision. *Teague,* 489 U.S. at 300, 109 S.Ct. at 1070, 103 L.Ed.2d at 349. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 301, 109 S.Ct. at 1070, 103 L.Ed.2d at 349 (internal citations omitted) (emphasis in original). *Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 880 - 881 (S.C.,2007).

Here, reconsideration of the merits within the direct appeal in *Hughey* in light of *Rosemond* is not required and need not be given retroactive effect. Plainly, the *Hughey*

direct appeal became final for retroactivity purposes when the remittitur was entered (or when certiorari was denied in the United States Supreme Court for federal habeas corpus purposes). The change represented by *Rosemond* was plainly not dictated by the precedent at the time of Hughey's case because this Court in *Hughey* expressly decided otherwise. As such we respectfully submit that the intervening decision in *Rosemond* has no impact on the present issues in Hughey's case with respect to issue three and four.

Further, in overruling *Hughey*, the Supreme Court did not conclude that postconviction relief should be granted based upon the particular claim that counsel was ineffective for failing to object to a similar sentence in the penalty phase instruction. This Court expressly declined to address the actual issue. To the contrary, it only chose to address the prior precedent in *Hughey*. Thus, postconviction relief is not mandated by this intervening decision.

To hold otherwise would undermine finality in criminal procedures unnecessarily.[12] See *Anderson v. Leeke*, 271 S.C. 435, 441-442, 248 S.E.2d 120, 123

[12] In *Anderson v. Leeke*, 271 S.C. 435, 441-442, 248 S.E.2d 120, 123 (S.C.,1978), the Court stated:

> Most of what Mr. Justice Harlan said in his separate opinion in Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1160, 1179, 28 L.Ed.2d 404 (1971), with respect to collateral relief from a criminal conviction, is applicable here:
> "Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.
>
> A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt

(S.C.,1978). Further, it would eviscerate a series of precedents concerning ineffective assistance of counsel claims concerning the fact that there was no 6th Amendment constitutional requirement to anticipate changes in the law, thereby holding trial counsel effective. *See, Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994); *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993) (an attorney is not required to anticipate or discover changes in the law or facts, which did not exist, at the time of trial, to render effective assistance of counsel).

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or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. (citation omitted) This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first."

Anderson v. Leeke, 271 S.C. 435, 441-442, 248 S.E.2d 120, 123 (S.C.1978)

CONCLUSION

For all the forgoing reasons, the limited granting of state post-conviction relief should be vacated to the extent it granted re-sentencing and the application for post-conviction relief must be ordered denied in its entirety.

Respectfully submitted,

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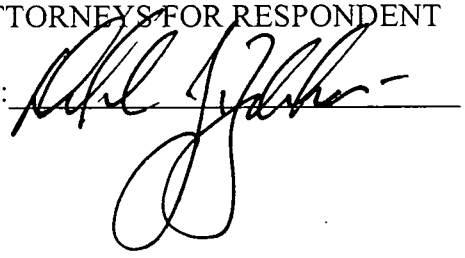
By: 

May 16, 2014

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 Brief of Petitioner-Respondent on Writ of Certiorari on:

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