ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Cherokee County
The Honorable J. Michael Baxley, Circuit Court Judge
Appellate case No. 2012-212107

JONATHAN KYLE BINNEY,

Petitioner-Respondent,

vs.

THE STATE,

Respondent-Petitioner.

BRIEF OF PETITIONER BY RESPONDENT-PETITIONER

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Sr. Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT.

RECEIVED

MAY 19 2014

S.C. SUPREME COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE PRESENTED v

STATEMENT OF THE CASE 1

ARGUMENTS

The PCR judge's finding that trial counsel were ineffective in failing to object to the sentencing phase instruction was controlled by errors of law and lacks support in the record because: (1) the jury instruction accurately stated South Carolina law when given, (2) counsel was not required to anticipate a change in the law that did not occur until more than five years and eight months after Binney's November 2003 trial and two years after the PCR hearing, and (3) there was no basis for trial counsel to object on the ground that the instruction violated the United States Constitution 7

CONCLUSION 21

TABLE OF AUTHORITIES

Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) 9

Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) 7

Binney v. South Carolina, 546 U.S. 852 (2005) 2

Binney v. State, 384 S.C. 539, 683 S.E.2d 478 (2009) 3

Bobby v. Mitts,131 S.Ct. 1762 (2011) 15

Boyde v. California, 494 U.S. 370 (1990) 12, 18

Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009) 7

Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) 8

Cullen v. Pinholster,131 S.Ct. 1388 (2011) 7, 8

Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) 16

Edwards v. Arizona, 451 U.S. 477 (1981) 2

Estelle v. McGuire, 502 U.S. 62 (1991) 17

Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) 13

Harrington v. Richter, 131 S.Ct. 770 (2011) 7, 8, 13, 17

Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) 16

In Re: Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) 3

Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) 9

Kansas v. Marsh, 548 U.S. 163 (2006) 15

Kornahrens v. Evatt, 66 F.3d 1350 13

Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) 9

Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) 17

Padilla v. Kentucky, 559 U.S., 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) 9

Patterson v. State, 359 S.C. 115, 597 S.E.2d 150 (2004) 13

Porter v. McCollum, 130 S.Ct. 447 (2009) 9

Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) 14

Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) 11, 12, 13, 14, 15, 16, 17, 20

Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) 16

Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) 5

Skipper v. South Carolina, 476 U.S. 1 (1986) 13

State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) 13

State v. Binney, 362 S.C. 353, 608 S.E.2d 418 (2005), ... 2

State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) 10, 11, 12, 14, 15, 17, 20

State v. Jones, 312 S.C. 100, 439 S.E.2d 282 (1994) 13

State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) 17, 20

Strickland v. Washington, 466 U.S. 668 (1984) 3, 4, 7, 8, 9, 12, 13, 14, 15, 16, 17, 20, 21

Suber v. State, 371 S.C. 554–59, 640 S.E.2d 884, (2007) 7

Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007) 13

Teague v. Lane, 489 U.S. 288 (1989) 13

Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) 13

United States v. McNamara, 74 F.3d 514 (4th Cir. 1996) 14

Von Dohlen v. State, 602 S.E.2d 738 (S.C. 2005) 4

Weeks v. Angelone, 528 U.S. 225 (2000) 17

Wiggins v. Smith, 539 U.S. 510 (2003) 4, 7, 9, 16, 21

Wong v. Belmontes, 130 S.Ct. 383 (2009) 8, 9, 13, 16, 22

Statutes

S.C. Code Ann. § 17-27-130 (1996) 3

S.C. Code Ann. § 16-3-20(A) (Supp. 2003) 1

S.C. Code Ann. § 17-25-45(Supp. 2003) 2

Rules

Rule 243(j), SCACR 6

ISSUE PRESENTED

Whether the PCR judge's finding that trial counsel were ineffective in failing to object to the sentencing phase instruction was controlled by errors of law and lacks support in the record, because (1) the jury instruction accurately stated South Carolina law when given, (2) counsel was not required to anticipate a change in the law that did not occur until more than five years and eight months after Binney's November 2003 trial, and two years after the PCR hearing, and (3) there was no basis for trial counsel to object on the ground that the instruction violated the United States Constitution?

STATEMENT OF THE CASE

Petitioner-Respondent, Jonathan Kyle Binney (Binney), is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC), as the result of his Cherokee County murder and first degree burglary convictions and death sentence for the June 8, 2000, shooting death of Judy L. Southern, in her home. The Cherokee County Grand Jury indicted him in July 2000 for murder (2000-GS-11-526) and burglary in the first degree (2000-GS-11-525). **App. pp. 3735-36; 3738-39**. The State timely served a Notice of Intent to Seek the Death Penalty pursuant to S.C. Code Ann. § 16-3-20(A) (Supp. 2003).

Binney eventually received a jury trial before the Honorable J. Derham Cole on November 4-14, 2003. Trent N. Pruett, Esquire, and Samuel "Mitch" Slade, Jr., Esquire, represented Binney in all relevant proceedings in the trial court. Seventh Circuit Solicitor Trey Gowdy, III, and Deputy Seventh Circuit Solicitor Donnie Willingham prosecuted the case.

The jury convicted him of murder and burglary in the first degree on November 11, 2003. The sentencing phase was conducted following Binney's exercise of the twenty-four hour waiting period in § 16-3-20(B), for the presentation of evidence to the jury.[1] In the sentencing phase, the State relied upon the statutory aggravating circumstance that the murder was committed while in commission of burglary in any degree.[2] §16-3-20(C)(a)(i)(c). Judge Cole also charged the jury on the three statutory mitigating circumstances found in § 16-3-20(C)(b)(2), & (6)-(7). The jury found the alleged statutory aggravating circumstance of burglary and it recommended a death sentence.

---

[1] Both he and trial counsel waived his right to have motions addressed after the expiration of twenty-four hours. **R. pp. 2872-75**.

[2] The trial judge granted the defense's directed verdict motion on the statutory aggravating circumstance of larceny while armed with a deadly weapon and the State voluntarily abandoned the aggravator that "[t]he offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value." *See* § 16-3-20(c)(a)(4).

Judge Cole sentenced Binney to death for murder and to life without parole, for burglary in the first degree. **App. pp. 1-3626**. *See* S.C. Code Ann. § 17-25-45(Supp. 2003).

Binney timely served and filed a notice of appeal. Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented him on direct appeal. Binney filed a Final Brief of Appellant in the South Carolina Supreme Court on May 28, 2004, in which he raised the following issue:

> The judge erred by admitting into evidence a statement Binney gave to the police, in which he confessed to that he was guilty of murder and first degree burglary and requested "the death penalty" because "[t]he crime I committed definitely warrants it" because this statement was the product of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981).

App. pp. 3758-78. The State, through Senior Assistant Attorney General William Edgar Salter, III, filed a Final Brief of Respondent on December 10, 1997. **App. pp. 3779-3817**.

This Court affirmed Binney's convictions and death sentence in a published Opinion filed on September 21, 2004. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005), *cert. den.*, 546 U.S. 852 (2005). **App. pp. 3818-26**. The Court denied a timely petition for rehearing (**App. pp. 3827-30**) on February 17, 2005 (**App. pp. 3831-32**), and it sent the Remittitur to the Cherokee County Clerk of Court on the same date.

Binney, through Mr. Savitz, again challenged the admissibility of his statement by filing a Petition for Writ of Certiorari to the South Carolina Supreme Court, in the United States Supreme Court, on May 18, 2005. **App. pp. 3833-54**. The State made a Brief in Opposition to the Petition on July 5, 2005. **App. pp. 3870-3912**. The United States Supreme Court denied certiorari on October 3, 2005. *See Binney v. South Carolina*, 546 U.S. 852 (2005). **App. p. 3913**.

On November 3, 2005, this Court granted a stay, so that Binney could pursue PCR

remedies pursuant to *In Re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). In the same Order, the Honorable John C. Few was appointed to preside over the PCR case. However, Chief Justice Toal filed an Order on November 10, 2005, in which she found that Judge Few had to recuse himself, and she appointed the Honorable J. Michael Baxley.

After holding a hearing to determine Binney's desire to pursue PCR and have counsel appointed, Judge Baxley filed an Order Appointing Counsel For Post-Conviction Relief on March 15, 2006, appointing John H. Blume, III, and Sheri Lynn Johnson, Esquires, to represent Binney. Mr. Blume was designated to act as lead counsel. *Accord In Re: Stays of Execution.*

Binney filed a PCR Application on April 7, 2006, which raised three broad claims but neither of the specific claims upon which relief was later granted. **App. pp. 3914-19**. The State submitted its Return on May 5, 2006. **App. pp. 3920-29**. After agreeing to participate *pro bono*, Emily C. Paavola, Esquire, was later admitted to practice *pro hoc vice* and she was also appointed to represent Binney. On December 19, 2006, Judge Baxley signed an Order scheduling an evidentiary hearing for May 29-June 1, 2007.[3]

On May 1, 2007, Binney served the State with an amended Application for Post-Conviction Relief. This was the first time that he raised the issues upon which a new sentencing phase was granted. *See* **App. pp. 2930-37**. Binney filed an Amended Application, dated May 21, 2007, in which he alleged, in pertinent part, that:

---

[3] On April 30, 2007, the State served each of Binney's attorneys, by mail, with a transcribed copy of a conversation between trial counsel and Binney that occurred during the trial, along with relevant letters from Mr. Binney to trial counsel that the State had obtained as the result of trial counsel Pruett's disclosure of his file to it. Mr. Blume subsequently confirmed that trial counsel had disclosed his entire file to counsel for the State. This ultimately led to Binney's interlocutory appeal, which this Court resolved adversely to him on September 21, 2009. *See Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009) (*Binney* II) (S.C. Code Ann. § 17-27-130 (1996), waiving attorney-client privilege to extent necessary for prior counsel to respond to allegations of ineffective assistance of counsel, automatically waived privilege to defendant's entire trial file; so, trial counsel was justified in disclosing entire trial file to counsel for Respondent).

11.b. Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984); *Von Dohlen v. State*, 602 S.E.2d 738 (S.C. 2005). Counsel's acts or omissions included, but are not limited to, the following:

6). Counsel failed to object to the trial court's improper instruction to the jury that the jurors could not give life as an act of mercy.

11.(e). A number of errors occurred at Applicant's trial that violated the Eighth, Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:

1). Applicant's death sentence was obtained, at least in part, as a result of the trial court's erroneous instruction to the jury that the jurors could not give life as an act of mercy.

App. pp. 3938-45.[4]

Judge Baxley held the May 29-June 1, 2007, evidentiary hearing into the amended allegations, at the Cherokee County Courthouse. Binney was present at the hearing and Mr. Blume, Ms. Johnson and Ms. Paavola represented him. William Edgar Salter, III, and J. Anthony Mabry, of the South Carolina Attorney General's Office, represented the State.[5] **App. pp. 3946-4776**. Judge Baxley indicated in a November 21, 2007, conference call with counsel for the parties that the evidentiary record in this case is closed, and that he was denying PCR relief. He also asked the State to prepare a proposed Order within sixty days. However, this Court granted

[4] Binney also served and filed a notice of appeal from Judge Baxley's denial of his discovery motion on the same date. This Court originally dismissed his appeal in an Order filed on May 22, 2007.

[5] Binney presented testimony from Dr. Leroy Riddick; Arlene Andrews; James Aiken; Natalie Norvick-Brown; Tonya Brown; John Purvis; Allison Haygood; Sandra Binney; Teresa Norris, Esquire; and Jill Rider. The State presented Seventh Circuit Solicitor Harold W. "Trey" Gowdy, III; Dr. Donna Schwartz; Donnie Willingham, Esquire; Binney's appellate counsel, Joseph L. Savitz, III, Esquire; and Binney's trial counsel, Trent N. Pruett (lead counsel) and Sam Mitchell Slade, Esquires. At the conclusion of the hearing, the Court left the record open for Binney to take and submit depositions of Melanie Binney, Dr. Fred Bookstein, and Dr. Ronald W. Maris. **App. pp. 4411; 4773-75**. Without objection, the State was permitted to supplement the current record with Binney's brief, sworn testimony from his January 12, 2005 Spartanburg County PCR hearing.

supersedeas, in an Order filed on December 5, 2007. That Order vacated both the Order closing the record and the ruling denying relief, and it stayed the taking of the remaining depositions as well as any ruling on the merits.

After the case was remitted to the Cherokee Clerk of Court, Judge Baxley held a telephonic status conference on January 28, 2010. Mr. Blume represented Binney, while Mr. Salter and Mr. Mabry represented the State. In the status conference, the Court agreed with Mr. Blume's proposal that Binney would submit affidavits from the remaining three witnesses under Simpson v. Moore, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006). On February 1, 2010, the Court filed a Case Status Order, in which the Court granted Binney thirty days within which to submit the affidavits and the Court granted the State sixty days from the day of the Court's Order to notify the Court of whether or not it wished to depose the witnesses. Binney submitted affidavits from Dr. Bookstein (**App. pp. 5248-57**), Melanie Binney (**App. pp. 5258-59**) and Dr. Janet Grossman York (**App. pp. 5260-62**)[6] on February 24, 2010. The State took Bookstein's deposition on June 7, 2010. **App. pp. 5263-5449**.

Judge Baxley notified the parties of his original ruling in a July 6, 2010, letter. On September 8, 2011, he entered an Order denying relief. **App. pp. 5450-5527**. Binney moved the Court to alter or amend the judgment on September 15, 2011. **App. pp. 5529-70**. On December 9, 2011, Judge Baxley held a telephonic hearing regarding the issues raised in Binney's Motion to Alter or Amend. Mr. Blume and Ms. Paavola represented Binney during this hearing. Mr. Salter and Mr. Mabry represented the State. **App. pp. 5571-98**.

---

[6] On March 16, 2010, Judge Baxley denied the State's motion to strike Dr. York's affidavit that was based, in part, on Binney's failure to disclose her as a witness until his May 22, 2007 Supplemental Answers to the State's First set of Interrogatories because the responses were not received in the Attorney General's Office in Columbia until the afternoon of the first day of the PCR hearing in Gaffney, on Tuesday, May 29, 2007.

On May 11, 2012, Judge Baxley filed an Order Granting Applicant's Motion To Reconsider The Denial Of Post Conviction Relief And Granting Post-Conviction Relief As To Sentencing. Judge Baxley found that trial counsel was ineffective in failing to object to the trial judge's sentencing phase instruction that the jury could not give life as an act of mercy. **App. pp. 5600-05.**

Both parties timely perfected appeals from Judge Baxley's Orders. Binney is the Petitioner-Respondent and he is currently represented by Ms. Paavola and Mr. Blume. Binney served his Petition for Writ of Certiorari on November 19, 2012. On April 22, 2013, the State filed its Return to Petitioner's Petition for Writ of Certiorari.

The State filed its Petition for Writ of Certiorari on December 19, 2012. On March 20, 2013, Binney filed his Return to Respondent-Petitioner's Petition for Writ of Certiorari, in which he raised an additional sustaining ground. The State filed a "Reply to Return to State's Petition" on April 17, 2013. This Court filed an Order on April 16, 2014, in which it granted both petitions for writ of certiorari and directed the parties to "serve and file appendix and briefs as provided by Rule 243(j), SCACR." This Brief of Petitioner by Respondent-Petitioner follows.

ARGUMENTS

I. The PCR judge's finding that trial counsel were ineffective in failing to object to the sentencing phase instruction was controlled by errors of law and lacks support in the record because: (1) the jury instruction accurately stated South Carolina law when given, (2) counsel was not required to anticipate a change in the law that did not occur until more than five years and eight months after Binney's November 2003 trial and two years after the PCR hearing, and (3) there was no basis for trial counsel to object on the ground that the instruction violated the United States Constitution.

This Court will not affirm a ruling that is "controlled by an error of law" or lacks factual support in the record. *Brown v. State*, 383 S.C. 506, 514-515, 680 S.E.2d 909, 914 (2009); *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007). The State submits that this Court must reverse the Order granting Binney a new sentencing phase because the PCR judge's finding that trial counsel were ineffective in failing to object to the sentencing phase instruction that the jury "may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" was both controlled by errors of law and lacks support in the record because: (1) the jury instruction accurately stated South Carolina law when given, (2) counsel was not required to anticipate a change in the law that did not occur until more than five years and eight months after Binney's November 2003 trial and two years after the PCR hearing, and (3) there was no basis for trial counsel to object on the ground that the instruction violated the United States Constitution.

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 688 (1984). The mere fact that trial counsel's defense strategy was unsuccessful does not render counsel's assistance constitutionally ineffective. *Id* at 689; *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995). This Court must "begin with the premise that 'under the

circumstances, the challenged action [s] might be considered sound trial strategy.' " *Cullen v. Pinholster*, 131 S.Ct. 1388, 1404 (2011) (quoting *Strickland*, 466 U.S. at 689) (internal quotation marks omitted by Court).

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id. See also Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*); *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985) (quoting *Strickland*, 466 U.S. at 690).

Even if the inmate can prove deficient performance, he must also demonstrate that he was prejudiced by his attorneys' errors. *Strickland*, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). To demonstrate that he was prejudiced by his attorneys' performance he must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.* In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did

not warrant death." *Strickland*, 466 U.S. at 695; *see also Wong v. Belmontes*, 130 S.Ct. 383, 386 (2009); *Porter v. McCollum*, 130 S.Ct. 447, 453-54 (2009) ("To assess that probability, we consider 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding'-and "reweig[h] it against the evidence in aggravation") (citation omitted); *Wiggins*, 539 U.S. at 534; *Jones v. State*, 332 S.C. 329, 333-41, 504 S.E.2d 822, 823-28 (1998) (petitioner did not meet burden).[7]

The PCR judge denied relief on a variety of complex, detailed claims that the parties litigated for almost a week of testimony, post-hearing affidavits, a deposition and argument. He granted relief solely on the claim that trial counsel were ineffective because they did not object to the following language in the sentencing phase jury charge:

> 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. 3609, lines 12-14.

In its entirety, the trial judge's sentencing phase jury instructions on the jury's consideration of mitigating circumstances reads as follows:

---

7 The Court in *Richter* further added that:

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

131 S.Ct. at 788.

Now, you shall consider any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case.

* * * * *

Now, while there must be some evidence which supports a finding by you of the existence of any mitigating circumstances, it is not necessary that you find the existence or a circumstance or circumstances beyond a reasonable doubt. You must simply find that in your view such [a circumstance] is supported by the evidence in the case.

* * * * *

I do emphasize to you . . . that you are permitted under the law to impose a sentence of life imprisonment, whether or not you find the existence of a statutory or nonstatutory mitigating circumstance.

In making your determination as to which sentence to recommend in this case, you shall consider the statutory aggravating circumstance, as well as the statutory and nonstatutory mitigating circumstances in arriving at your decision.

* * * * *

you may also recommend a sentence of life imprisonment, even though you did find the existence of the statutory aggravating circumstance beyond a reasonable doubt and you find no mitigating circumstances to be supported by the evidence in the case.

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. 3607, l. 12-p. 3609, l. 14. Binney's **Ground 11(b)(6)** alleged ineffective assistance of counsel in failing to object to this instruction. The PCR judge agreed and granted relief based upon counsel's failure to object.

The grant of relief must be reversed. This Court had approved a charge virtually identical to the challenged instruction in *State v. Hughey*, 339 S.C. 439, 458-59, 529 S.E.2d 721, 731 (2000). The Court in *Hughey* also noted that this instruction was similar to other charges of non-statutory mitigating circumstances previously upheld by the Court because it authorized the

jury to recommend life imprisonment even if they did not find the existence of mitigating circumstances. *Id* at 459-60, 529 S.E.2d at 732.

The Court specifically rejected Hughey's challenge that the sentence that "you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote. The Court found that "[t]his 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." Also, the Court observed that "[t]he 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." *Id* at 460, 529 S.E.2d at 732.

Hughey was controlling precedent at the time of Binney's trial. Indeed, it was still controlling precedent, at the time of the May 29-June 1, 2007 PCR hearing, and Mr. Slade testified that he would have objected to any instruction given that he thought was inaccurate. **App. pp. 4538-39.** [8]

Initially, the State submits that the PCR judge's grant of relief is based upon an erroneous belief that relief was mandated by this Court's ruling in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). *See* **Order, p. 3, App. p. 5602** ("This instruction is identical to the one that the South Carolina Supreme Court found erroneous in *Rosemond*[.]"). *See also* **Order, p. 4, App. p. 5603** ("Here, as in *Rosemond.* the trial judge instructed Applicant's jury: '[Y]ou may recommend a

[8] Ironically, proceedings in the PCR court would have concluded in 2007, but for the interlocutory appeal in *Binney II*, and *Hughey* would have still been controlling precedent on certiorari.

sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy.*' (emphasis added). Trial counsel's failure to object to the erroneous charge was both deficient and prejudicial"). However, this Court in *Rosemond* did not address whether a charge including the language at issue would be incorrect or misleading, when reviewed as a whole, *accord Boyde v. California*, 494 U.S. 370 (1990), and it did not did not mandate post-conviction relief where this alleged charge was given and there is no objection.

Rather, this Court, overruling *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) "to the extent it approved and sanctioned the charge," 383 S.C. at 330, 680 S.E.2d at 10, stated in *obiter dicta* that it disapproved of the phrasing of one portion of this one sentence that may be read to restrict "consideration of evidence of mercy in the sentencing phase," 383 S.C. at 330, 680 S.E.2d at 11. There was no consideration of the sentence in context of the remainder of the charge. Indeed, relief was not granted in *Rosemond* on this issue. Contrary to the PCR judge's order, there was no mandate for relief whenever this now disfavored wording is identified in a charge and no objection is made.

Secondly, the PCR judge granted relief based upon a fundamental misapplication of the *Strickland* standard because the grant of Post-Conviction Relief is based upon counsel's failure to anticipate a change in the law that did not occur until almost six years after Binney's November 2003 sentencing proceeding and two years after the PCR hearing. However, this was not deficient performance or prejudicial under *Strickland*. Again, *Rosemond* is inconsistent with the result reached in *Hughey*, which this Court recognized in *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 11. ("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").[9]

The PCR judge's Order ignores that *Hughey* was binding precedent at the time of trial and, in essence, granted relief based upon counsel's failure to utilize a crystal ball or have Periclean foresight. This type of standard is inconsistent with *Strickland* because an attorney is never required to anticipate or discover changes in the law or facts that did not exist at the time of trial. *See Strickland*, 466 .S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"); *see also Richter*, 131 S.Ct. at 787; *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (although *Skipper v. South Carolina*, 476 U.S. 1 (1986) was on appeal to the Supreme Court at the time of Kornahrens' trial and trial counsel "testified that he was aware of that fact, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law"); *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004); *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grds.*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993) (counsel not

[9] Further, and contrary to the PCR judge's finding that this "Court's statement in *Rosemond* is not a new rule," **Order, p. 4, App. p. 3603**, *Rosemond* unquestionably established a new rule of law that cannot be applied retroactively to this case because this case became final before that rule was announced. Therefore, retroactive application of *Rosemond* would violate *Teague v. Lane*, 489 U.S. 288 (1989) and *State v. Jones*, 312 S.C. 100, 439 S.E.2d 282 (1994). *See also Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity"). *Cf. State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (decision that jury charge on inference of malice from use of a deadly weapon "represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved" and specifically providing "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief"). In light of *Huey*, it cannot fairly be said that all reasonable jurists would have agreed that the rule set forth in *Rosemond* existed before it was decided.

ineffective for encouraging defendant to plead guilty although counsel never interviewed the victim because he had her written statement against defendant, even though victim changed her mind by the time of the PCR hearing and testified for defendant); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial); *United States v. McNamara*, 74 F.3d 514, 515-17 (4th Cir. 1996) (counsel cannot be considered ineffective for failing to anticipate changes in law). Under *Strickland*, trial counsel were reasonably entitled to rely upon this Court's decision in *Huey* and they were not ineffective for failing to anticipate that this Court would subsequently reverse *Huey*, as it did in *Rosemond*.

Implicit in the grant of relief is that the PCR judge concluded that this Court always read the instant charge as precluding mercy. **Order, p. 4, App. p. 3603** ("Trial counsel should have known that the charge was inconsistent with long-standing South Carolina law and the United States Constitution. The South Carolina Supreme Court's statement in *Rosemond* is not a new rule. It has been the rule for decades that mercy can be considered by a South Carolina capital jury"). However, this ruling creates a paradox.

If this Court always read the charge as precluding mercy, then *Hughey* changed the law of the state and approved a charge precluding the jury's consideration of mercy. As the charge in *Huey* is the same as the one given here, there could be no deficient performance on a matter of state law in this pre-*Rosemond* case and Binney is not entitled to any relief under *Strickland*. On the other hand, if this Court did not always read the charge as precluding mercy, then this Court interpreted the contested phrase in *Hughey* as allowing juror's to consider mercy and found that it was not inconsistent with the charge that the jury may not rely on mere unfettered emotion in sentencing. Again, Binney is not entitled to relief. Moreover, this second interpretation bears the

least strain to the fit in light of all circumstances, not the least of which is the *Hughey* opinion, itself, *see Hughey*, 339 S.C. at 460, 529 S.E.2d at 732, as well as this Court's acknowledgment in *Rosemond* that "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." 383 S.C. at 330, 680 S.E.2d at 11.

Additionally and contrary to the finding of the PCR judge (**Order, p. 4, App. p. 3603**), the change in the law in *Rosemond* is purely a change in state law, since the United States Constitution does not require the consideration of mercy by jurors in capital cases. Indeed, the United States Supreme Court has repeatedly upheld weighing state instuctions that the jury **must** (*i.e.*, without discretion) return a death sentence where the aggravating circumstances outweigh the mitigating circumstances. *See, e.g., Kansas v. Marsh*, 548 U.S. 163, 173 (2006) ("Kansas' death penalty statute, **consistent with the Constitution**, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise") (emphasis added). *Cf. Bobby v. Mitts*, 131 S.Ct. 1762, 1764 (2011) (reversing and rejecting the lower court's determination that jury charges "required the jury to first decide whether to 'acquit' Mitts of the death penalty before considering 'mercy and some form of life imprisonment.'..."). Thus, counsel's failure to object was objectively reasonable under *Strickland* because the jury instruction given comported with state law at the time of trial.

Instead of analyzing the reasonableness of counsel's performance at the time that it was rendered or acknowledging that *Huey* was controlling precedent at the time of Binney's trial, the PCR judge erroneously relies upon this Court's subsequent decision in *Rosemond* and the fact that PCR judges in *Huey* and *Kamell Delshawn Evans, #6016 v. State*, Appellate Case No.

2011-188687 have granted relief where the same charge was given and counsel did not object. This Court has granted certiorari in those cases to review the same or an analogous issue as that upon which the PCR judge granted Binney a new sentencing proceeding.

Further, neither case was binding precedent in this case, nor does anything in either case require reversal. To the contrary, Binney's ineffectiveness claim fails for the reasons argued herein. Also, any grant of PCR relief based upon a substantive claim that the trial judge gave an instruction that was erroneous under *Rosemond* would be beyond the statutory jurisdiction of the PCR court to grant because the PCR court's jurisdiction is limited by S.C. Code Ann. § 17-27-20(b) (1985) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). Thus, Post-Conviction Relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). *See also Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (same); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885-86 (1975) (same). Thus, Binney could not have prevailed on his substantive claim, **Ground 11(b)(6)**. *Id.*

Also, the State submits that Binney cannot show prejudice resulting from counsel's failure to object because he cannot show that "there is a reasonable probability that ... the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *See also Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Sixth Amendment prejudice under *Strickland* is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. *Wong v. Belmontes*, 558 U.S. 15 (2009).

"The likelihood of a different result must be substantial, not just conceivable." *Richter*, 131 S.Ct. at 792, citing *Strickland*, 466 U.S. at 693. "[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Richter*, 131 S.Ct. at 791.

First, there was overwhelming evidence presented that Binney is guilty of murder and the statutory aggravating circumstance. The State incorporates the facts as found by the PCR judge, **App. pp. 5456-61**, as amended in the Order on Binney's motion to alter or amend, **App. p. 5601**. These facts show that this murder was calculated, premeditated, and planned well in advance. Additionally, it was motivated by Binney's desire to avoid going to prison for sexually assaulting his three-month-old daughter, by vaginally penetrating her with a vibrator. Moreover, the evidence was that Binney did not know either the victim or her husband. This point was confirmed in the PCR hearing.

More importantly, in concluding that *Rosemond* requires reversal where the trial judge gives instructions similar to those in *Rosemond* and *Hughey*, the PCR judge failed to apply the appropriate standard of review for analyzing jury instructions. *See State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384 (1991). He found that "[t]he language used is, at best, ambiguous, and certainly capable of being construed as a limitation; thus, trial counsel should have objected." **Order, p. 6, App. p. 5605**. However, it is not enough that there is some "slight possibility" that the jury misapplied the instruction. *Weeks v. Angelone*, 528 U.S. 225, 236 (2000). The pertinent question "is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,'" *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

The State submits that application of the correct standard reveals that Binney's jury would not have construed the particular instructions in a manner to prevent or preclude mercy. The fundamental flaw in the PCR judge's logic on this issue is the finding that the "other than as an act of mercy" instruction was intended to preclude a consideration of mercy.

Viewing the instructions as a whole and not considering this challenged phrase in isolation, a reasonable juror would have known that it had the ability to consider mercy in determining the sentence. *See Boyde*, 494 U.S. at 380 (the defendant must show both that the instruction was ambiguous and that there was "a reasonable likelihood" that the jury applied the instruction in a way that precluded consideration of mitigating evidence). *Accord Huey*. Further, 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*, since counsel presented mitigating evidence and argument that was based upon a plea for mercy, Binney's expression of remorse in his closing (**App. p. 3580**), as well as other statutory and non-statutory mitigating circumstances. *E.g.*, **App. pp. 3381-3552; 3581-94**. Likewise, it was not lost on the Solicitor that mercy was a matter that the defense would argue. *E.g.*, **App. pp. 3575-77**.

The State agrees that state law authorized consideration of mercy by a capital sentencer, although the federal constitution did not require it. Binney is interpreting the challenged sentence in isolation. However, the Court cannot properly overlook the ameliorating language within the remainder of the instruction which clarified the ability of the jury to sentence Binney 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."

The problem with Binney's position is that it fails to recognize that the trial judge 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," and "together with." *Id.* Instead, Applicant is limiting the phrase "other than" as an adjective meaning "barring" and defines as "except for." *Id.*

Further, the challenged portion of the charge is undeniably tied to the prior sentence by the introductory phrase, "simply stated," and the prior sentence clearly instructs the jury they may recommend life even if they find no mitigating circumstance, *i.e.*, as an act of mercy. Moreover, under normal grammar rules, the phrase "other than an act of mercy" modifies the phrase "for no reason at all," not the phrase "for any reason." In support of this position the State would direct the Court to http://www.yourdictionary.com/grammar/grammar-rulesand-tips/misplacedmodifiers ("According to grammar rules, modifiers should be placed as close as possible to the person or thing that they are modifying.").

Thus, the sentence is reasonably interpreted as the jury can return a recommendation of life (1) for any reason or (2) for no reason, just (3) as an act of mercy. As a matter of grammar, this would be a consistent application of "other than" as a preposition, which is its function, indicating "with the exception of, except for, besides," Merriam-Webster Online Dictionary, 2010, Merriam-Webster Online, 2 November 2010 (http://www.merriam-webster.com/dictionary/other than), differentiating "no reason" from "an act." While true that if one looks at the sentence as containing a misplaced modifier, one may read "for any reason" except mercy, that depends on

assuming a grammatical error.

The State agrees with the Supreme Court in *Rosemond* 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*, 383 S.C. at 329, 680 S.E.2d at 10. Beyond that, the State submits that, as a matter of state law, the jury can consider a life sentence as an act of mercy, even if no plea from witnesses for mercy is given.[13]

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).

According to this Court's decision in *Hughey*, the jury was instructed to consider all statutory and non-statutory mitigation. This rebuts a finding that the instruction allowed mitigation evidence to be disregarded. The PCR judge completely missed the point of the *Hughey* conclusion: "The jury charge, reviewed in its entirety, is not confusing because it advises the jurors to consider all mitigating circumstance[s] in making their recommendation." 339 S.C. at 460, 529 S.E.2d at 732. In other words, the jury was adequately charged. *Id.* Thus, there cannot be any prejudice under *Strickland* because Binney cannot establish that "there is a reasonable probability that ... the sentencer - including an appellate court, to the extent it independently reweighs the

[13] The problem with the *obiter dicta* in *Rosemond* and Binney's reliance upon it, is that both ignore that the sentencing jurys in *Rosemond*, *Hughey* and in Binney's case, would have properly considered "mercy" and that none of the challenged 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 Binney's isolated parsing suggests.

evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *See also Wiggins*, 539 U.S. at 537.

CONCLUSION

Wherefore, Respondent-Petitioner submits that this Court should grant its Petition for Writ of Certiorari for the above-stated reasons.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

May 15, 2014.

By: _____
ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Cherokee County
The Honorable J. Michael Baxley, Circuit Court Judge
Appellate case No. 2012-212107

JONATHAN KYLE BINNEY,

Petitioner-Respondent,

vs.

THE STATE,

Respondent-Petitioner.

PROOF OF SERVICE

The undersigned certifies that on the 15th day of May, 2014, he served the Brief of Petitioner by Respondent-Petitioner on counsel for the Petitioner-Respondent by depositing two (2) copies of same in the United States mail, first class, postage prepaid, and addressed as follows:

Emily C. Paavola, Esq.
Death Penalty Resource & Defense Ctr
900 Elmwood Ave., Ste. #101
Columbia, SC 29201

John H. Blume, Esq.
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853

WILLIAM EDGAR SALTER, III
Attorney for Respondent-Petitioner