

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2012-212107

JONATHAN KYLE BINNEY, SK 6009 Petitioner/Respondent,

v.

STATE OF SOUTH CAROLINA Respondent/Petitioner.

APPENDIX
VOLUME XII OF XII

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Applicant's adoptive mother that was before the sentencing jury.²² The records are at most cumulative to the evidence before the jury. *Id.*

Had Applicant's or his mother's records been introduced, this Court finds there has been no showing that the result of the sentencing proceeding would have been different. *Id.* The record does not support a finding that FAS caused Applicant to murder Judy Southern or to sexually assault his own daughter. Dr. Schwartz-Watts testified at trial and at PCR that Applicant was motivated by sexual sadism when he burglarized Mrs. Southern's home. This Court finds that Dr. Schwartz-Watts' testimony is credible on the point that there is no relation between sexual sadism and FAS. Her testimony on what motivated Applicant with regard to this crime is consistent with the evidence in this case. Applicant admitted he considered raping Judy Southern when entering her home. He admitted he did not enter the home until after he knew a man and a woman lived there. Also, he admitted he had fantasized about raping his brother-in-law's wife and then killing his brother-in-law. Dr. Schwartz-Watts opined that he raped his daughter because of a different sexual paraphilia, pedophilia. This diagnosis is supported by the credible facts and evidence in this case.²³ Therefore, the Court concludes that Applicant has not proven deficient performance or prejudice in Ground 11(b)(3) with regard to FAS issues.

VI. (5) FAILURE TO PRESENT AN EXPERT IN PRISON ADAPTABILITY

Applicant alleges in Ground 11(b)(4) that counsel were ineffective for not retaining an expert in adaptability to prison life and for not presenting any evidence about Applicant's adaptability to prison or his lack of violent or aggressive history during his prior incarcerations. The Court finds that counsels' performance was not deficient because counsel considered

²² Dr. Novick-Brown agreed that the best evidence that Applicant's mother drank while pregnant was the mother's report to the adoptive mother.

²³ Prior to sexually assaulting his daughter, Applicant had been viewing child pornography on his computer. Select portions of this pornography were admitted in the penalty phase of Applicant's trial.

presenting such testimony but made an objectively reasonable strategic decision under *Strickland* not to do so.

Mr. Slade correctly surmised that the State was not seeking the death penalty based on Applicant's future dangerousness. The correctness of his assessment is supported by the State's closing argument in the sentencing phase. **R. pp. 3439-55**. The State sought death as retribution for Judy Southern's murder based upon the circumstances of the offense and his character, as well as his motive, which was to avoid punishment and possible danger to himself because of his prior CSC involving his infant daughter. The State did not argue that Applicant would pose a danger to other inmates and staff in prison, or that he would pose a danger to the community if not sentenced to death. *Contra Simmons v. South Carolina*, 512 U.S. 154 (1994). As a result, Attorney Slade reasonably concluded that evidence of adaptability to prison would not be as effective in mitigating punishment.

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Attorney Pruett's reason for not wanting to present evidence of adaptability to prison was also objectively reasonable. At the time of Applicant's November 2003 sentencing hearing, prosecutors were routinely introducing evidence to rebut expert testimony in a fashion as described by Mr. Pruett, and there was no change in the law until years after Applicant's trial. *See State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005) (disapproving of this evidence). Thus, Mr. Pruett could reasonably determine that he did not want the final evidence heard by jurors to be that life in prison is not harsh. The Court further finds that Applicant has failed to prove any prejudice resulting from counsels' performance on this issue because trial counsel presented an extensive and reasonable case in mitigation of punishment at Applicant's trial; there was overwhelming proof of murder and burglary; and, because the point of PCR prison adaptability witness Aiken's opinion is that the level of security in the SCDC institutions where

Applicant would be housed if he received a life sentence is such that only inmates who engage in escape attempts or violently disruptive behavior (such as taking hostages or assaulting staff) are not adaptable to life in prison. Thus, this Court finds that the testimony of witness Aiken, even if presented at trial, would not have altered the outcome of the proceeding.

VI. (6) FAILURE TO OBJECT TO CLOSING ARGUMENT

Ground 11(b)(4) is that that counsel were ineffective for not objecting to the State's improper comments in closing argument, in three particulars: "failing to object to the State's suggestion that the jury should impose death for the victim of the unrelated [CSC] conviction, failing to object to the State's argument that the mitigating evidence had to have a nexus to the crime to be considered by the jury, and failing to object to the State's argument that the State was speaking on behalf of the victim in the case." Although Mr. Slade was primarily responsible for objecting to the Solicitor's closing, neither lawyer at PCR recalled any objectionable comments.

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The Court finds that Applicant cannot show deficiency or prejudice from counsel's failure to object to the State's closing argument (*R. pp. 3439-55*) because he did not prove that any of the three challenged portions of the closing argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). The Court specifically rejects the claim that the State urged death based upon evidence of the CSC case; rather, these remarks and the other challenged comments were fair comment on the record evidence and made in anticipation of the defense closing. *Id.* Applicant's contrary PCR position ignores that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Id.* at 647.

In the remarks that Applicant now challenges, this Court finds the Solicitor was merely urging jurors to accept the State's position that its evidence established that the CSC charge and Applicant's fear of the consequences of punishment for that offense provided the motive for him to murder Judy Southern, someone whom he had never met. These remarks were fair comment upon evidence that had been introduced in either the guilt or sentencing phases of Applicant's trial. Although the Solicitor was properly focusing upon what he contended the State had shown was a circumstance of the crime, the evidence commented upon was also relevant to prove Applicant's character.

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Likewise, the Solicitor did not argue that the mitigating evidence had to have a nexus to the crime to be considered by the jury. Rather, he was merely urging jurors to accept the State's position that Applicant had not sought help for any of the various mental illnesses that he may have had until he was arrested and faced incarceration, and that none of his mental illnesses caused him to murder Judy Southern. **R. pp. 3452-53.** Again, this argument is supported by the evidence and it was made in anticipation of the Mr. Slade's closing. **R. pp. 3456-69.**

Finally, the Court recognizes that a solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." *Von Dohlen v. State*, 360 S.C. 598, 609-610, 602 S.E.2d 738, 744 (2004). The Solicitor's argument here did not constitute a "Golden Rule" argument, as Applicant's allegation suggests. He did not urge jurors to abandon their impartiality and view the evidence from the victim's viewpoint, which was the basis for reversal of the petitioner's death sentence in *Von Dohlen*. Also, he did not tell jurors that they spoke for the victim with their verdict, as did the deputy solicitor in the non-capital case of *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006).

To the contrary, the Solicitor stated that he spoke for the victim's family; he specifically told jurors that he was not asking for vengeance; and, he asked them "on behalf of the State of South Carolina and the county of Cherokee to conclude that the only appropriate punishment for a man that can do what he's done is to forfeit his life." R. pp. 3454-55.

As with all of the challenged remarks, his comments were brief and the record is voluminous. For these reasons, the Court finds that the Solicitor's argument did not so infect the sentencing proceeding with unfairness as to make the sentence imposed a denial of due process, nor has Applicant proved either deficient performance or resulting prejudice with respect to trial counsels' failure to object to portions of Solicitor's closing argument.

Therefore, for all of the foregoing reasons cited above in discussion of the law and facts of the case on all of Applicant's claims of ineffective assistance of counsel relating to the penalty phase of Applicant's trial, this Court finds there has been no showing of deficient performance or resulting prejudice on the part of trial counsel, nor constitutional violations in the proceeding below. Applicant has failed to meet the necessary burden of proof entitling him to relief at PCR on penalty phase issues; thus, Applicant's claims relating thereto are denied.

VII. APPLICANT'S GROUND 11(c) - APPELLATE COUNSEL

Applicant's Ground 11(c) raises five allegations of ineffective assistance of appellate counsel that the Court discusses individually below. Applicant's appellate attorney, Joseph L. Savitz, III, testified at the PCR hearing. The Court specifically finds that appellate counsel's testimony on the issues relating to the appeal of Applicant's conviction is credible as to all of the allegations of ineffectiveness raised by Applicant, and the Court accepts his testimony in deciding those allegations.

VII. (1) FAILURE TO RAISE ISSUE OF PREJUDICIAL PHOTOGRAPHS

Applicant's Ground 11(c)(1) is that appellate counsel provided ineffective assistance because he did not raise, as an issue on appeal, the trial judge's denial of Applicant's motion to suppress inflammatory photographs of the victim of a prior crime. State's Exs. 120 and 121.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). "[R]eviewing courts must accord appellate counsel the presumption that he decided which issues were most likely to afford relief on appeal." *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir.1993). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, since "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). To obtain relief, a PCR applicant must prove that his counsel was objectively unreasonable in failing to identify and argue significant and obvious issues on appeal, and must also show a reasonable probability that, but for his counsel's unreasonable failure, he would have prevailed on his appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citation omitted).²⁴

The Supreme Court in *Robbins* recognized that, "[n]otwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim" on direct appeal, but Applicant faces a difficult burden of proof. *Robbins*, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented will the

²⁴ *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal"). See also *Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

presumption of effective assistance of counsel be overcome." *Id* (quoting *Gray*, 800 F.2d at 646. See also *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc).

The Court finds that Applicant did not show prejudice under *Strickland* and *Robbins* resulting from appellate counsel's failure to raise this adverse ruling on direct appeal because the trial judge did not abuse his discretion by admitting the two photographs (R. pp. 3043-45) over counsel's earlier objection. R. pp. 3111-12 (State's Ex. 120); 3192 (State's Ex. 121).²⁵ To the contrary, the trial judge determined that the photographs were probative of Applicant's character and that the expanded scope of their probative value was not outweighed by their prejudicial effect under Rule 403, SCRE.

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S. C. Code Ann. 16-3-20(B) requires that "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment" during the sentencing phase of a capital trial. Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979). Cf. *Woodson*, 428 U.S. at 304. The scope of the probative value of evidence in the sentencing phase is much broader than in the guilt phase. *State v. Rosemond*, 335 S.C. 593, 596-97, 518 S.E.2d 588, 589 (1999) (citing *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185-86 (1986)). "The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase." *Id*.

²⁵ Counsel argued that the photograph would not convey any additional information about Applicant's character and that the fact the crime involved his infant daughter was sufficient evidence to demonstrate his character. Also, counsel argued that "surely at some point the inflammatory nature of and the graphic nature of the pictures that they intend to present and in the testimony that they intend to present far outweigh[s] the intellectual or factual weight of the information that needs to be conveyed and the information that they have a right to convey about the [defendant's] character." R. pp. 2982-84. Further, counsel argued that the evidence at issue was character evidence and did not support a statutory aggravating circumstance. Thus, less of it needed to be introduced. R. pp. 2984-85.

Unquestionably, evidence of other crimes is admissible at the sentencing phase of a capital trial, including photographs of victims of the other offenses. *E.g.*, *State v. Bennett*, 369 S.C. 219, 230 n. 2, 632 S.E.2d 281, 287 n. 2 (2006) (*Bennett II*); *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *Skipper, supra*. Cf. *State v. Bell*, 302 S.C. 18, 32, 393 S.E.2d 364, 371-72 (1990). Here, *State's Ex. 120* was introduced during the testimony of Det. Dianne Lestage, the lead detective investigating the CSC case. Det. Lestage testified that it accurately depicted how Applicant's daughter appeared when Lestage saw her at the hospital in 1999. **R. pp. 3110-12**. This Court finds that *State's Ex. 120* shows the helplessness of the victim, and therefore was both probative and relevant to issues being considered by the jury.

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Further, *State's Ex. 121* depicts his daughter's injuries. It therefore shows precisely the wounds Applicant inflicted upon her in a more descriptive way than words could describe. Also, *State's Ex. 121* was introduced during the testimony of Dr. Andrea Mainman, the board certified Obstetrics and Gynecology physician who treated Applicant's daughter in the emergency room of Mary Black Hospital in December of 1999, immediately after Dr. Mainman had described her findings with respect to the daughter's injuries. **R. pp. 3188-92**. It thus corroborated her findings.

Moreover, the expanded scope of the photographs' probative value was not substantially outweighed by their prejudicial effect under Rule 403, SCRE, and Applicant has not shown that the photographs created a "tendency to suggest a decision on an improper basis." *See Franklin*, 318 S.C. at 55, 456 S.E.2d at 361. Both photographs were directly probative of Applicant's true character because they corroborate and visually demonstrate the evidence related to the CSC conviction. They are thus probative of disproving Applicant's initial claims to authorities that his daughter's injuries were accidental. Also, the Court finds that they corroborate the evidence of

the motive for Judy Southern's murder, as well as provide the reason underlying the defense and PCR counsels' arguments of Applicant being suicidal at the time of the murder.

The Court further finds that Applicant has not shown the jury's sentence was improperly influenced by the photographs. *See Ray v. State*, 330 S.C. 184, 188, 498 S.E.2d 640, 641-42 (1998). The trial judge gave a limiting instruction that precluded the jury from considering the photos as proof of the statutory aggravating circumstance. *R. p. 3474, l. 15-p.3475, l. 3*. This Court presumes the jurors obeyed his instruction, as the Record on Appeal contains no contrary evidence. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Further, while *State's Ex. 121* is unpleasant to view, it was not "staged" or altered to produce a shock value. Also, Applicant was able to attempt to minimize the prejudicial impact of this evidence through Dr. Schwartz-Watts' expert testimony of her diagnoses of Fetal Alcohol Syndrome and various sexual disorders, including pedophilia, as well as her explanation for Applicant's failure to be straightforward in admitting what he had done to his daughter when questioned by law enforcement. *R. pp. 3274-88; 3288-3305. See also Ground 11(b)(3).*

Further, and assuming *arguendo* that these photographs were improperly introduced, Applicant did not show prejudice in appellate counsel's failure to raise this issue on appeal because any alleged error was harmless beyond a reasonable doubt. First, there was overwhelming evidence proving Applicant guilty of murder and the statutory aggravating circumstance of burglary. *See Strickland*, 466 U.S. at 694. Second, the photos were cumulative to the other evidence that Applicant committed the crime of CSC with a minor in the first degree. *R. pp. 3099-3100; 3189-93; 3104-08; 3110-20; 3110-13; 3124-29; 3132-38*; *State's Ex. 117* (a taped statement) and *State's Ex. 124* (the vibrator device found during the search of his residence). Third, the trial judge gave the limiting instruction. Fourth, Applicant was able to

minimize the prejudicial impact of this evidence through Dr. Schwartz-Watts' expert testimony. As a result, he has not proven "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." *Robbins*, 528 U.S. at 285.

VII. (2) FAILURE TO RAISE ISSUE OF PORNOGRAPHIC MATERIALS

In Ground 11(c)(2), Applicant alleges that appellate counsel was ineffective for not raising on appeal the trial judge's denial of Applicant's motion to suppress the child pornographic images taken from his computer, introduced by the State in the sentencing phase as State's Ex. 123. Upon review, the trial judge's finding that Melanie Binney provided consent for officers to seize the computer and its contents (R. p. 2971) was correct. Both Det. Lestage's testimony (R. pp. 2875-96) and the consent forms executed by Melanie Binney (Ct.'s Exs. 5-6) support the finding that she voluntarily gave her consent. Also, the trial judge's determination that her consent authorized the seizure of the computer and its contents is supported by the United States Supreme Court's decision in *United States v. Matlock*, 415 U.S. 164 (1974).

In *Matlock*, the Court noted that its then-recent authority "clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id* at 170. The Court went on to hold that third-party consent may validly be given by one "who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id* at 171. Common authority does not require common ownership, but merely mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for the searching officers to believe that the person granting consent had the authority to do so. *State v. Moultrie*, 271 S.C. 526, 528, 248 S.E.2d 486, 487 (1978) (quoting *Matlock*, 415 U.S. at 171 n.

7). See also *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (suppression not warranted if officers had an erroneous but reasonable belief of authority to consent).

The prosecution has the burden of satisfying the test. *Matlock*, 415 U.S. at 171-72. See also *State v. Brockman*, 329 S.C. 115, 121-122, 494 S.E.2d 440, 443 (Ct.App. 1997). Here, the record of the officers' *in camera* testimony and the signed consent forms clearly support the trial judge's ruling.

The Court also finds that *Georgia v. Randolph*, 547 U.S. 103 (2006) does not compel a different result. It is unnecessary for this Court to decide whether *Randolph* applies retroactively to this case or is barred by the non-retroactivity principles announced in *Teague v. Lane*, 489 U.S. 288, 310-13 (1989),²⁶ since trial counsel never argued in the lower court that Melanie Binney lacked the authority to give consent to seize the computer and search its contents. R. pp. 2963-65. Also, the Court finds that *Randolph* is factually distinguishable from the search at issue in this case. Unlike *Randolph*, there was no evidence in the present case that the police had removed Applicant from the premises for the sake of avoiding a possible objection. 547 U.S. at 121-22. Therefore, the officers here were not required "to take affirmative steps to find Applicant before acting on the permission they had already received." *Id.* at 122.²⁷

²⁶ Applicant's conviction became final when United States Supreme Court denied certiorari on October 3, 2005, and *Randolph* was not decided until March 2006. The Court notes that at least one other court to consider the issue has applied a *Teague v. Lane* analysis and determined that *Randolph* does not apply retroactively to cases that were final before *Randolph* was decided. *Curtis v. Com.*, 2007 WL 1192070, *4 7 n. 5 (Ky.App., Apr. 6, 2007) (unpublished). Cf. *People v. Olmo*, 18 Misc.3d 307, 309-311, 846 N.Y.S.2d 568, 570-71 (N.Y.Supp. 2007).

²⁷ In *Randolph*, both the defendant and his estranged wife were at the threshold of the residence when police arrived. The officers first asked Randolph for consent to search. When he objected, the officers turned to his wife, and she consented. The Supreme Court found that defendant had "unequivocally refused" consent to a warrantless search of the premises. 547 U.S. at 107. It concluded that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." It therefore found that the search violated the defendant's Fourth Amendment rights. *Id.* at 123-24. See also *Id.* at 106-08.

However, the Court in *Randolph* carefully distinguished and preserved the holdings in *Matlock* and *Rodriguez*. The Court explained it was "drawing a fine line" and that its holding was that, "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable

Because this issue is not clearly stronger than the appellate issues presented, Applicant has not overcome the presumption of effective assistance of appellate counsel. *Robbins*, 528 U.S. at 288. Likewise, he has not proven "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." *Id* at 285.

VII. (3) FAILURE TO RAISE ISSUE OF LATE INDICTMENT AMENDMENT

Addressing Ground 11(c)(3), Applicant alleges he received ineffective assistance by appellate counsel's failure to challenge on appeal the trial judge's alleged error in allowing the State to amend the indictment charging Applicant with burglary in the first degree (R. pp. 3604-05), after the jury had been instructed on the law.

Following the jury charge (R. pp. 2796-97),²⁸ Mr. Pruett objected to the first degree burglary instruction, arguing that the trial judge had "charged several statutory aggravators that were not alleged in the [burglary] indictment." The burglary indictment had only alleged the statutory aggravator that Applicant was armed with a deadly weapon, and Mr. Pruett argued that this was the only statutory aggravator that Applicant was called upon to defend. R. pp. 2809-10.

search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Id* at 121. The Court also explained that "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it." *Id* at 121-22. See also *United States v. Reed*, 539 F.3d 595, 598 (7th Cir. 2008).

²⁸ The trial judge charged jurors that:

A person is guilty of burglary in the first degree if that person enters a dwelling without consent and with the intent to commit a crime therein;

And, either, when effecting the entry, or while in the dwelling, or in immediate flight therefrom, he is armed with a deadly weapon;

Or, causes physical injury to the person of another person who is not a participant in the crime;

Or, he uses, or threatens to use, a dangerous instrumentality;

Or, he displays what appears to be a pistol or other type of firearm.

R. pp. 2796-97.

The State argued that S.C. Code Ann. § 17-19-100 (2003) permitted motions to amend indictments either before or during the trial, in order to conform the indictments to the evidence that had been presented. Also, under *State v. Quarles*, 261 S.C. 413, 2005 E.2d 384 (1973), amendments not changing the nature of the offense charged should be permitted. **R. p. 2811.**

In response, Mr. Pruett stated that he was not arguing that the trial court lacked subject matter jurisdiction. Rather, he was asserting that the burglary indictment did not support the additional aggravators that were charged and that it was too late to amend the indictment. He, therefore, asked the trial judge to instruct the jury that it should disregard the aggravators that were not supported by the indictment. **R. pp. 2811-12.**

The trial judge found that the motion to amend the indictment was not untimely and the amendment would not change the nature of the charge against Applicant. He further found that "there is no prejudice, because clearly the defendant has been aware and counsel has been aware all along that those allegations were present in this case, and those allegations have been made against the defendant, and you have been aware of that. And that evidence, of course, has been introduced, without objection, during the course of the trial." He therefore granted the motion to amend. **R. p. 2812, ll. 5-12.**

Appellate counsel's testimony supports the conclusion that his performance was not deficient, in spite of his lack of memory of this allegation, since it can be inferred from his testimony that he did not perceive this issue to be "clearly stronger than the issue presented." *Robbins*, 528 U.S. at 288. The Court finds that the record is insufficient to overcome the presumption of effective assistance.

Moreover, Applicant has not established that appellate counsel's failure to raise this issue on appeal was prejudicial. Applicant's trial pre-dated *State vs. Gentry*, 363 S.C. 93, 100-01, 610

S.E.2d 494, 498-99 (2005) and *State v. Means*, 367 S.C. 374, 382, 626 S.E.2d 348, 353 (2006). However, *Gentry* and its progeny are the correct law to apply in analyzing Applicant's claim. Otherwise, the Court would be granting him "a windfall to which [he is] not entitled." *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993).

Although the objection was cleverly argued by trial counsel, counsel's position was not correct under state law. In contrast to the indictment's purpose of providing a defendant with notice of the charges against him, the main "purpose of jury instructions is to tell the jury what facts they have to find and who has the burden of proving or disproving those facts." *Harris v. State*, 861 So.2d 1003, 1016 (Miss.2003). After review, this Court finds the trial judge did not abuse his discretion by charging the first degree burglary aggravators at issue because the evidence supported them. *Cf. State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010).

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Addressing the propriety of the trial judge's ruling on the motion to amend the indictment, in *State v. Lynch*, 344 S.C. 635, 641, 545 S.E.2d 511, 514 (2001), which was pre-*Gentry*, the Supreme Court reversed the defendant's conviction because the trial judge allowed the aggravating circumstance in the first-degree burglary indictment to be changed from entering during the darkness to causing physical injury. On appeal the Court held that the amendment changed the nature of the offense charged because the proof required for each aggravating circumstance was materially different. 344 S.C. at 641, 545 S.E.2d at 514.

This Court finds that, unlike *Lynch*, the trial judge here correctly determined that the amendment of the indictment did not change the nature of the offense charged. To the contrary, between the indictments, the notice of evidence in aggravation, the notice of statutory aggravating circumstances, and the State's discovery responses, Applicant received notice that the State's theory and evidence showed that he caused physical injury to Mrs. Southern, who was

not a participant in the crime, by shooting and killing her while in the commission of the burglary; that Applicant had used a dangerous instrumentality; and, that he had displayed a pistol or other type of firearm." See § 16-11-311(A)(1)(b)-(d).

The Court further finds that the amendment did not require counsel either to engage in additional investigation or change their strategy that Applicant had only entered the dwelling to commit suicide, which the trial judge instructed jurors was not a crime. R. p. 2798. *Contra Levelle, supra*. Rather, the amendment merely conformed the indictment to the evidence presented by the State. Therefore, for all the above-stated reasons, the Court finds that the trial judge did not abuse his discretion by allowing the prosecution to amend the indictment, [see *Means*. See also *Neal v. State*, 15 So.3d 388, 396 -398 (Miss. 2009); *Goldman v. State*, 9 So.3d 394, 397-98 (Miss.App. 2008)], and thus appellate counsel was not deficient in failing to raise it.

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VII. (4) FAILURE TO RAISE ISSUE OF APPLICANT'S CONFESSIONS

Applicant also alleges that appellate counsel was ineffective for not challenging the admissibility of Applicant's statements "on all viable legal theories including the Sixth Amendment to the United States Constitution." See **Ground 11(c)(4)**.

First, the Supreme Court on direct appeal in *Binney I* made detailed factual findings as to the events surrounding his statement, *Binney I*, 362 S.C. at 355-58, 608 S.E.2d at 419-21,²⁹ and it rejected his Fifth Amendment claim. *Id* at 359-61, 608 S.E.2d at 42-22. *Res judicata* bars Applicant from re-litigating the issue of whether the June 16th statement was taken in violation of his Fifth Amendment right to counsel, and the Court finds that collateral estoppel bars re-

²⁹ The Court in *Binney I* erroneously referred to the custodial statements as occurring on Friday June 14th and Monday June 17th. However, the record and a review of a calendar for the year 2000 reflect that the correct dates are Friday June 16 and Monday June 19th. The typographical errors may have occurred, at least in part, as the result of evidence that Mr. Thompson was appointed to represent Applicant on June 14th.

litigation of the Supreme Court's findings made in connection with Applicant's Fifth Amendment challenge to the introduction of State's Ex. 3.

This is important to Applicant's current allegation because the United States Supreme Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986) (forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding) in *Montejo v. Louisiana*, 129 S.Ct. 2079, 2085, 2091 (2009). In light of *Montejo*, the Sixth Amendment challenge to State's Ex. 3 fails for the reasons set forth in *Binney I*. Thus, Applicant has not proven either deficient performance or that appellate counsel's failure to raise this issue on appeal was prejudicial because he has not proven "a reasonable probability that, but for his counsel's unreasonable failure, he would have prevailed on his appeal." *Robbins*, 528 U.S. at 285.

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67 Likewise, the Court finds that the failure to challenge the admissibility of the June 19th statement was not deficient performance. The Court finds that the trial judge's factual findings are not clearly erroneous, and that he did not abuse his discretion by denying trial counsel's motion to suppress because the totality of the circumstances surrounding the June 19th statement support the trial judge's findings, by a preponderance of the evidence. R. p. 2172-77. In light of Applicant's failure to specifically allege error relating to the admissibility of the letter that Applicant wrote to the victim's husband (State's Ex. 6), the Court finds that he has waived a challenge to the introduction of the letter and its contents.

Finally, an *Edwards* violation is subject to harmless error analysis. See *Shea v. Louisiana*, 470 U.S. 51, 59 n. 4 (1985). Here, the Court finds that any admission in either the June 16th or June 19th statements must be deemed as harmless in both the guilt and penalty phases of Applicant's trial because they were merely cumulative to other statements made by

him and other evidence presented by the State, which is set forth in the "Statement of Facts" and Ground 11(a)(3), *supra*. As a result, he has not proven either deficient performance or that appellate counsel's failure to raise this issue on appeal was prejudicial because he has not proven "a reasonable probability that, but for his counsel's unreasonable failure . . . , he would have prevailed on his appeal." *Robbins*, 528 U.S. at 285.

VII. (5) FAILURE TO RAISE ISSUE OF APPLICANT'S MENTAL ILLNESS

Applicant's Ground 11(c)(5) is based on counsel's failure to argue "that a sentence of death imposed upon persons with mental illness constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution" under *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court finds that Applicant cannot meet either prong for relief under *Strickland* and *Robbins* for multiple reasons. First, there was no authority to support trial counsel's motion at the time of Mr. Savitz's representation of Applicant, and counsel cannot be ineffective for failing to "anticipate a change in the law." 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). See also *Jameson v. Coughlin*, 22 F.3d 427, 429-30 (2nd Cir. 1994); *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990). But even more important, there is no evidence before this Court that Applicant is "mentally retarded" or intellectually disabled within the meaning of *Atkins*.

To date, the Court is unaware of any majority decision by any state or federal court in America that would support such a motion by trial counsel. See, e.g., *State v. Irick*, 320 S.W.3d 284, 297-98 (Tenn. 2010); *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim.App. 2010); *Johnston v. State*, 27 So.3d 11, 26-27 (Fla. 2010). See also, e.g., *ShisInday v. Quarterman*, 511 F.3d 514 (5th Cir.2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir.2006) (citing *In re Woods*, 155 Fed.Appx. 132, 136, 2005 WL 3087882, *3 (5th Cir., Nov. 17, 2005) (unpublished); *State v.*

Ketterer, 111 Ohio St.3d 70, 855 N.E.2d 48 (2006); *Matheney v. State*, 833 N.E.2d 454 (Ind.2005); *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008); *Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 WL 118696 (Tenn.Crim.App., Jan.13, 2010) (unpublished).

Further, Applicant cannot demonstrate a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally disabled offenders. *Mays*, 318 S.W.3d at 379 & n. 25; *Irick*, *supra*; *Johnston*, 27 So.3d at 26-27.³⁰ Finally, Applicant has failed to show that whatever mental impairment he may have had at the time of the murders was so severe that he is necessarily and categorically less morally culpable than those who are not mentally disabled.³¹ *Mays*, *supra*. Thus, he cannot show deficiency or prejudice.

Therefore, for all of the foregoing reasons cited above in discussion of the law and facts of the case on all of Applicant's claims of ineffective assistance of appellate counsel, this Court finds there has been no showing of deficient performance or resulting prejudice on the part of appellate counsel, nor constitutional violations in the appellate proceedings below. Applicant has failed to meet the necessary burden of proof entitling him to relief at PCR on appellate issues; thus, Applicant's claims relating thereto are denied.

VIII. APPLICANT'S REMAINING DUE PROCESS CLAIMS

Applicant raises claims in his **Ground 11(d)**, which he maintains demonstrate that "his conviction and death sentence were obtained in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law." In **Ground 11(e)**, he maintains that errors by the trial judge "violated the Eighth,

³⁰ The Court in *Irick* pointed out that "Connecticut appears to be the only state that has adopted a statute barring the execution of offenders who, at the time of the offense, had a 'significantly impaired . . . ability to conform [their] conduct to the requirements of law.' Conn. Gen. Stat. Ann. 53a-46a(h)."

³¹ Applicant has not presented any evidence that he is insane or guilty but mentally ill.

Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law."

Each of these allegations will be discussed individually below.

VIII. (1) IMPROPER SUPPRESSION OF EVIDENCE BY STATE

Applicant's **Ground 11(d)(1)** claims that the State violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by improperly suppressing evidence that inmate prosecution witnesses Jerry Johnson and Danny Edwards "were improperly influenced to testify or received undisclosed benefits for doing so." Applicant further asserts that Edwards testified falsely regarding his "history of cooperation with law enforcement," and that the State failed to correct this testimony.

The Court finds that the testimony of Solicitor Gowdy, Deputy Solicitor Willingham, and trial counsel are all credible on these issues. Based upon the testimony of these witnesses, the Court finds that Johnson came forward about two weeks before trial on his own volition and without notifying the lawyer who was representing him on his then-pending charges. The State thereafter located Edwards. Although Applicant did make an incriminating statement to Edwards, the primary importance of these witnesses to the prosecution was to establish the chain of custody for the map prepared by Applicant and as possible witnesses to negate a potential defense of third-party guilt involving Mr. Southern. The PCR testimony reveals that the State did not make any promises to either witness in exchange for his cooperation, and Johnson was expressly told not to expect any consideration for his testimony.

The Court further finds that neither Edwards nor Johnson received any improper influence to testify, nor any undisclosed benefits in exchange for testimony. Thus, there was no *Brady* violation because the claim of failing to disclose any improper influence or benefit is unsupported. The Court also rejects Applicant's claim based on the State's failure to disclose that Edwards had cooperated in other criminal prosecutions outside of the Seventh Judicial Circuit,

by providing law enforcement with information implicating others, in an effort to receive a lesser sentence. The only credible evidence is that Solicitor Gowdy was unaware of any cooperation by Edwards in other, prior cases outside of the Seventh Circuit, and that he did not make any inquiry of Edwards about Edwards' cooperation in those other cases because this is not something that he would ask a witness in preparing the witness for trial. Further, knowledge of any cooperation by Edwards in those other cases cannot be imputed to the Seventh Circuit Solicitor's Office because Applicant did not establish that the law enforcement agencies in those other cases were part of the "prosecution team" in Applicant's case. *Accord Lovitt v. True*, 403 F.3d 171, 185-86 (4th 2005); *United States v. Merlino*, 349 F.3d 144, 154 (3^d Cir.2003); *Moon v. Head*, 285 F.3d 1301, 1310 (11th Cir. 2002). Likewise, Applicant has failed to establish that the evidence of Edwards' cooperation in those other cases was "material" under *Brady* and its progeny because he failed to prove that "the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict." *Strickler v. Greene*, 527 U.S. 263, 290 (1999). There was overwhelming evidence of guilt, separate and apart from the map (State's Ex. 6) or Edwards' testimony of Applicant's admissions to him about the CSC case (that was not presented until the sentencing phase). Thus, Edwards was not a necessary or even a "key" witness in the State's prosecution of Applicant's for murder or burglary in the first degree.

Moreover, Edwards' credibility was thoroughly and vigorously impeached by Mr. Slade's cross-examination. Given the abundance of other evidence and argument impeaching Edwards' credibility, counsel's cross-examination fully set forth enough information for the jury to properly assess his credibility and for defense counsel to demonstrate the supposed lack of it. *See Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998). Further, because the additional

impeachment at issue would have been merely cumulative, it was not material under *Brady*. *State v. Gunn*, 313 S.C. 124, 136-38, 437 S.E.2d 75, 82 (1993). Particularly in light of the overwhelming evidence of guilt, further impeachment of an individual who was not a key witness by presenting evidence of his cooperation in other cases outside of the jurisdiction in which he was testifying could not "put the case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290. Nor has there been a showing that the State knowingly used perjured testimony in violation of *Napue v. Illinois*, 360 U.S. 264, 269 (1959), because Applicant failed to prove either that the prosecution knew the evidence was false or that "there is a reasonable likelihood that the false testimony could have affected the judgment of the jury." *Kyles*, 514 U.S. at 433 n. 7.

VIII. (2) DUE PROCESS CLAIMS FOR ISSUES RAISED IN OTHER CONTEXTS

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The Court finds that Applicant's allegations Grounds 11(d)(2)-(4) & 11(e)(3)-(4)³² are not properly before it in PCR. These same allegations were raised within other contexts of the PCR application, but are now argued under a constitutional framework, as opposed to ineffective assistance of counsel. The jurisdiction of this Court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985). 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*, 430 S.E.2d at 520. See also *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983); *Humbert*, 548 S.E.2d at 866. For these reasons, these allegations are not cognizable in this proceeding; moreover, the Court finds no merit in these claims.

³² Grounds 11(d)(2)-(4) allege, respectively, that the trial judge violated *Ake v. Oklahoma*, 470 U.S. 68(1985), by not approving funding for a jury selection expert; that his death sentence violates due process because it was, at least partially based "upon an invalid prior conviction or convictions;" and that his "death sentence was obtained, at least in part, as a result of the State's" improper closing argument. Grounds 11(e)(3)-(4) assert constitutional error because jurors saw him in prison garb and restraints.

VIII. (3) DUE PROCESS CLAIMS RELATING TO THE JUDGE'S CHARGE

Applicant's Ground 11(e)(1) challenges the jury charge on mitigating circumstances (R. p. 3482, l. 12-p. 3484, l. 14) based on the inclusion of the phrase "other than as an act of mercy." His Ground 11(b)(6) asserts ineffectiveness in not objecting to this portion of the charge. He is not entitled to relief on either allegation.

First, this free-standing, substantive claim of trial court error is not properly before this Court in PCR. *Id.* Second, it is clear that the challenged portion of the trial judge's charge does not offend the United States Constitution. 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. See also *Saffle v. Parks*, 494 U.S. at 484, 492-493 (1990) (O'Connor, J. concurring) ("It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities without our longstanding recognition, that, above all, capital sentencing must be reliable, accurate, and nonarbitrary").

Third, there is no general holding that the Supreme Court's decision in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), which explicitly overruled the earlier holding in *State v. Hughey*, 339 S.C. 439, 458-59, 529 S.E.2d 721, 731 (2000), requires PCR relief. Indeed, it was not the basis for relief in *Rosemond*. Rather, the Court concluded that PCR relief was warranted on a separate ground of ineffective assistance of counsel based upon trial counsel's failure to present evidence of defendant's alleged paranoid schizophrenia as mitigating factor in the sentencing phase. *Rosemond*, 680 S.E.2d at 8-10. *Rosemond* also does not address whether the

remainder of the charge was sufficient to cure any deficiency. The Court focused only on the isolated phrase, not its relationship to the remaining charge, or the remaining charge itself absent the phrase. This Court finds that, reviewing the charge as a whole, a reasonable juror would not have thought he was precluded from considering the mitigation evidence presented in the instant case. *See Boyle v. California*, 494 U.S. 370 (1990).

Fourth, *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, and it cannot fairly be said that all reasonable jurists would have agreed that the rule set forth in *Rosemond* existed before it was decided. *Teague v. Lane*, 489 U.S. 288 (1989). To the contrary, Applicant's trial was held on November 4-14, 2003. Thus, the charge given was proper at the time of the sentencing proceeding, and *Hughey* was still controlling precedent, even as late as the May 29-June 1, 2007 PCR hearing.

974 In *Hughey*, the Court held on direct appeal that the same trial judge, Judge Cole, had not erred in his sentencing-phase instruction on the jury's consideration of non-statutory mitigating circumstances. The Supreme Court in *Hughey* expressly approved a jury instruction that was virtually identical to the charge given in Applicant's case, *Hughey*, 529 S.E.2d at 731; and the Court rejected an argument virtually identical to Applicant's, noting that this jury instruction was similar to other charges of non-statutory mitigating circumstances 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 732. Also, the South Carolina Supreme Court had not given any indication that it was allegedly improper. Therefore, the rule in *Rosemond* was a new rule that cannot be applied retroactively under *Teague*.

Fifth, Applicant's position 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 is defined as "in addition to" or "as well." See *Roget's 21st Century Thesaurus, Third Edition* (2009). As a result, the sentence is reasonably interpreted as the jury can return a recommendation of life (1) for any reason or (2) for no reason, (3) in addition to just as an act of mercy.

This Court 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 Court finds, as a matter of state law, that the jury can consider a life sentence as an act of mercy, even if no plea from witnesses for mercy is given. The problem with the Supreme Court's *obiter dicta* opinion in *Rosemond* and Applicant's reliance upon it, is that it ignores that the sentencing juries in *Rosemond*, *Hughey* and in this case, would have properly considered "mercy" evidence 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 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.

Also, because the present case is one for PCR, counsel is not deficient for failing to anticipate a change in the law and argue such at trial; thus, there is no ineffective assistance. *Gilmore*, 314 S.C. at 457, 445 S.E.2d at 456; *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992). See also *Strickland*, 466 U.S. at 689 (a reviewing court must eliminate the effects of hindsight and evaluate the conduct from counsel's perspective at the time). Further, the Court is not convinced that the language of the charge used in Applicant's case, when this one sentence is

considered in context of the charge as a whole,³³ was such that a reasonable juror would have perceived that he/she did not have the ability to consider mercy in determining the sentence.

Additionally, the Court finds that Applicant cannot show prejudice resulting from counsel's failure to object because he cannot show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. 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 Wiggins v. Smith*, 539 U.S. 510, 537 (2003). The Court finds that he did not meet this burden.

VIII. (4) DUE PROCESS CLAIMS RELATED TO JUROR VIQUEZ

Finally, for the reasons stated at the hearing, the Court rejects Applicant's **Ground 11(e)(2)**, wherein he claims Juror Henry Viquez was inappropriately threatened and pressured by other jurors to vote for death. **PCR Tr. pp. 43-56**. The Court excluded the "affidavit" of juror Viquez offered as evidence by Applicant's counsel because the juror was then in Mexico and not available for cross-examination or impeachment, the statement was unsworn, the statement was contradicted by deposition testimony, the statement appeared unreliable on its face, and this type of collateral attack on a jury decision is allowed in only very limited circumstances, none of which were not met here.

Therefore, for all of the foregoing reasons cited above in discussion of the law and facts of the case on all of Applicant's due process claims relating to Applicant's trial, this Court finds

³³ Applicant's argument that *Rosemond* requires summary reversal where the trial judge gives instructions similar to those in *Rosemond* and *Hughey* fails to properly view the jury charge as a whole, to determine whether it is constitutional. *See Boyde, supra*.

there has been no showing of a due process constitutional violation; thus, Applicant's claims relating thereto are denied.

CONCLUSION

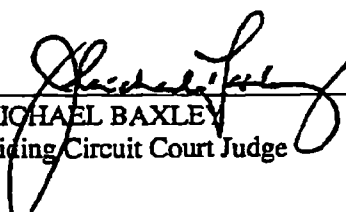
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Counsel for Jonathan Kyle Binney were confronted with an extremely difficult case. The evidence of their client's guilt on the charges of murder and burglary was overwhelming. Forensic evidence proved: (1) Defendant had been conducting surveillance at the Southern residence; (2) Defendant had traveled to the scene carrying items useful to commit burglary and a weapon necessary to commit murder; (3) Defendant owned the murder weapon, eventually took the police to where the weapon was hidden, and an unspent round matching the fatal bullet was found in Defendant's pants pocket; (4) Defendant's fingerprint was found on a note left at the scene; (5) Defendant's culpability was evidenced by his flight and hiding after the murder; (6) Defendant, upon arrest, inquired of officers about whether the victim was deceased, admitting he had shot her; (7) Defendant formally confessed the crimes to police in two separate interviews, in a letter of apology to the victim's husband, and to cellmates at the Detention Center; (7) Defendant had recently committed the rape with a vibrator device of his infant biological daughter, requiring her to have reconstructive surgery and a hysterectomy; and, (8) Defendant requested the death penalty. Counsel capably undertook the representation of Jonathan Kyle Binney, and in an effort to save his life, employed objectively reasonable investigation methods, trial tactics, and appellate strategies. This Court finds that counsel provided the best defense possible for Jonathan Kyle Binney under the circumstances, well within the standards required of counsel practicing criminal trial and appellate law in this state. Even though the trial and appeal outcome was not favorable for Mr. Binney, this Court finds that Mr. Binney was not prejudiced in any way by the actions of counsel at any stage of the

proceedings. Counsel at this level of criminal prosecution is expected to provide highly professional services and extremely competent representation, which this Court finds was provided to Mr. Binney. Counsel cannot be expected to produce a miracle or accomplish the impossible, and the fact that Mr. Binney was convicted of murder while in the commission of a burglary, that he was sentenced to death for these crimes, and that these convictions were upheld on appeal is not the fault or responsibility of counsel. Thus, this Court denies this application for Post-Conviction Relief.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief in this matter is denied and dismissed, with prejudice; and
2. That Applicant must remain in the custody of Respondent for the completion of his sentence.

IT IS SO ORDERED this 1st day of September, 2011.


J. MICHAEL BAXLEY
Presiding Circuit Court Judge

Hartsville, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

IN THE COURT OF COMMON PLEAS

Jonathan Kyle Binney)

C. A. No. 06-CP-11-223

Applicant,)

v.)

CERTIFICATE OF SERVICE

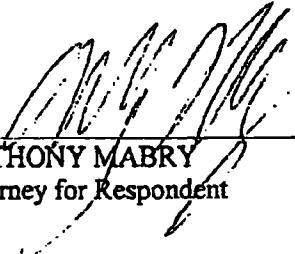
State of South Carolina,)

Respondent.)
_____)

The undersigned certifies that on the 7th day of September, 2011, he served the *Order Denying Post-Conviction Relief* on counsel for applicant by depositing same in the United States Mail, first class, postage prepaid, and addressed as follows:

John Blume, III
Blume, Weyble & Norris, LLC
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ANTHONY MABRY
Attorney for Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

Jonathan K. Binney)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2006-CP-11-223

MOTION TO ALTER OR AMEND
THE JUDGMENT

Pursuant to Rule 59, S.C. R. Civ. P., Applicant, Jonathan Kyle Binney, respectfully moves this Court to alter or amend the judgment contained in the Court's Order Denying Post-Conviction Relief (hereafter "PCR Order"), entered on September 8, 2011. In support of this motion, Binney submits the following.

First, the PCR Order contains a number of factual errors. Many of those errors are set forth in Binney's March 24, 2011 letter to the Court, attached here as Exhibit A. In addition, the PCR Order states that the March 1, 2006 Application for Post-Conviction Relief raised only three general grounds. *PCR Order at p.3*. On the contrary, this application raised a number of specific factual allegations.¹ Moreover, there is no support in the record below for the Court's

¹ In full, the Application alleged:

10(a): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt-or-innocence phase of his capital trial.

11(a): Supporting facts: Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

1) Counsel failed to ensure jurors were not aware that applicant was shackled during the proceedings.

assertion that [REDACTED] Binney was required to have a hysterectomy as a result of the CSC. See *PCR Order at p.7*. Dr. Andrea Mainman testified at trial that [REDACTED] suffered no internal injuries, her uterus was not damaged, and she did not expect her to have any difficulty having children. *ROA p.3193*.

Second, with regard to Binney's claims related to the trial judge's instruction that "you may recommend a sentence of life imprisonment for any reason, or for no reason at all, other

2) Counsel failed to seek an instruction stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in this case.

3) Counsel failed to seek an instruction stating the specific elements of the crime named in the burglary charge.

4) Counsel failed to adequately investigate the facts and circumstances surrounding the death of the victim. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of applicant's guilt or innocence. See *Wiggins v. Smith*, 539 U.S. 510 (2003).

10(b): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial.

11(b): Supporting facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

1) Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence. See *Wiggins v. Smith*, 539 U.S. 510 (2003). As a result of counsel's failure to uncover and present this evidence, applicant's death sentence is unreliable.

2) Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution. As a result of counsel's failure to make all appropriate objections, applicant's death sentence is unreliable.

10(c): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the appellate phase of his capital trial.

11(c): Supporting facts: Counsel's performance on direct appeal was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following: Counsel failed to raise all relevant and meritorious issues in applicant's appeal to the South Carolina Supreme Court.

than as an act of mercy," (*ROA p.3484*), the PCR Order states that the South Carolina Supreme Court's decision in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), does not explicitly overrule the Court's decision in *State v. Hughey*, 339 S.C. 439, 458-59, 529 S.E.2d 721, 731 (2000). *PCR Order at p.73*. However, the PCR Order does not address the fact that Judge Alexander Macaulay granted post-conviction relief to Hughey on this same claim, finding that *Rosemond did indeed* overrule the Court's previous decision. *See Order Granting Post-Conviction Relief in Hughey v. State*, at p.6, entered on May 11, 2010, attached here as Exhibit B; *see also, Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009) ("We overrule *Hughey* to the extent it approved and sanctioned the charge given here."). Binney previously brought the *Hughey* PCR Order to this Court's attention by letter dated June 1, 2010. Moreover, another PCR court has also recently granted relief on this same issue. *See Order Granting Post-Conviction Relief in Evans v. State*, at p. 92-110, entered on February 24, 2011, attached here as Exhibit C.

Finally, the PCR Order denies Binney's claims related to Juror Viquez on the basis that his affidavit was not admitted at the PCR hearing because it was unsigned. *PCR Order at p.76*. However, the PCR Order fails to address or discuss Mr. Viquez' sworn deposition, which was admitted into the record. *See Letter from Mr. Salter dated June 26, 2007*, attached here as Exhibit D. Mr. Viquez was not available to testify during the PCR hearing because he planned to be in Costa Rica during that time. Accordingly, the State noticed and took sworn testimony from Mr. Viquez during a transcribed deposition prior to the hearing. During the deposition, Mr. Viquez was cross-examined at length by the State, and he testified in detail to the facts in support of this claim. There is no impediment to this Court's consideration of evidence taken by deposition or affidavit. This procedure is authorized pursuant to S.C. Code § 17-27-80, which

applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." Furthermore, this procedure has been used in numerous capital post-conviction cases, *see, e.g., Herman Lee Hughes v. Michael Moore*, 98-CP-09-101 (Calhoun Common Pleas); *Joseph M. L. Gardner v. Michael Moore*, 98-CP-18-453 (Dorchester County); *Keith L. Simpson v. Michael Moore*, 97-CP-42-1911 (Spartanburg County); *Kenneth Simmons v. State*, 05-CP-18-1368 (Dorchester County). The South Carolina Supreme Court has specifically approved this process. *Simpson v. Moore*, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006) (finding that the PCR court did not err in allowing the applicant to introduce over forty depositions and approximately twenty-two affidavits into evidence in lieu of live testimony); *see also, Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982). Thus, there is no barrier to this Court's consideration of Mr. Viquez's deposition, particularly here where the State noticed and took Mr. Viquez's deposition in anticipation of his unavailability for the PCR hearing.

For all of the reasons discussed above, Jonathan Binney respectfully requests that the Court alter or amend its Order Denying Post-Conviction Relief.

Respectfully submitted,

By: Emiley C. Paavola
Counsel for Applicant *EP*

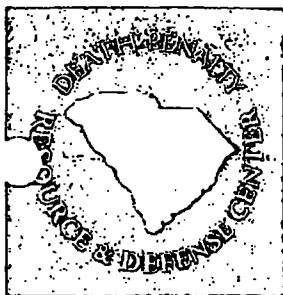
EMILY C. PAAVOLA
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JOHN H. BLUME, III
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
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September 15, 2011

EXHIBIT A

EXHIBIT A
STAY AT HOME
DO NOT GO OUT
DO NOT GATHER



March 24, 2011

Hon. Judge Michael Baxley
Fourth Judicial Circuit
531 E. Carolina Avenue
Hartsville, South Carolina 29550

Re: Binney v. South Carolina
C/A No.: 2006-CP-11-223 (Capital PCR)

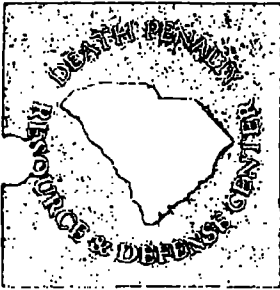
Dear Judge Baxley:

I am writing in response to respondent's proposed order for the above captioned case. In accordance with this Court's July 6, 2010 letter to Mr. Blume and Mr. Salter, it is our understanding that, at this particular stage, we are to review the proposed order for mistake of fact or misstatement of our position, but we are not asked to argue the respective merits of the issues, the weight of the evidence, or other similar matters. Thus, this letter sets forth the following items that applicant asserts are either mistakes of fact or misstatements of applicant's position.

The ABA Guidelines

First, the proposed order states that the Court "rejects Binney's argument that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases establish *the appropriate standard* for counsel's investigation for and presentation of mitigating evidence in the penalty phase." (Proposed Order p.13) (emphasis in original). This is a mischaracterization of applicant's position. Applicant did not make this argument. Applicant simply stated that the United States Supreme Court has referenced the ABA Guidelines as a touchstone for analyzing deficient performance. (PCR Transcript p.66).

Moreover, the proposed order states that "it does not appear that the Guidelines existed at the time of trial. Indeed, Mr. Pruett testified that he did not consult the ABA's 2003 Guidelines because they did not yet exist. Rather, they were in the process of being revised at the time of Binney's trial." (Proposed order p.14). This is an incorrect statement of fact. Mr. Pruett did testify at the PCR hearing that he did not review the 2003 ABA Guidelines. However, it is not true that the ABA Guidelines did not exist prior to 2003, as this section of the Proposed Order suggests. Rather, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases were first adopted in 1989.



Applicant's claim of ineffective assistance during voir dire

Second, the proposed order states that Applicant's claim that trial counsel failed to conduct an adequate *voir dire* must be denied because Applicant failed to allege any specific jurors who were either erroneously qualified to serve or erroneously removed for cause because of counsel's ineffective performance. (Proposed order p.15 and 16). Applicant simply notes that the specifics of this claim would typically be addressed in briefing, including specific reference to the trial record below. However, the Court did not request briefing in this case.

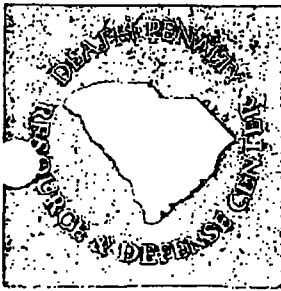
The testimony of Tonya Brown

Third, the proposed order states that Ms. Tonya Brown was not a credible PCR witness because she "actively encouraged Judy (the victim) to leave Mr. Southern (her husband)" and because Ms. Brown admitted to having "a prejudice against the Seventh Circuit Solicitor's Office and the Gaffney Police Department, stemming from the prosecution of her daughter." (Proposed order p.23, n.12). These factual assertions are incorrect. Ms. Brown specifically denied that she encouraged Judy to leave Mr. Southern. Rather, she testified that she just wanted Judy to get some help at a safe home. (PCR Tr. p.391). Moreover, Ms. Brown did not testify that her daughter was being prosecuted. She testified that her daughter had been molested by her landlord. She explained that the solicitor's office and the police department had said that they "couldn't do anything about it," and that she felt that was unfair, but that she didn't "have anything against all them." She further testified that the Seventh Circuit solicitor that she had dealt with regarding her daughter was not the same solicitor who had prosecuted Mr. Binney at his trial. (PCR Tr. p. 391).

The testimony of Dr. Bookstein

Finally, the proposed order contains a number of factual mistakes regarding the testimony of Dr. Bookstein. The proposed order states that "Dr. Bookstein measured the corpus collosum of a 3-D image of Binney's brain generated by a program Bookstein wrote." (Proposed Order at p.45). This is incorrect. Dr. Bookstein specifically testified that he did not write the computer program used to create a 3-D image of Mr. Binney's brain. (Bookstein Depo at p.25).

The proposed order then states: "However, Bookstein was engaged in frontier research science at the time of Binney's trial. During Dr. Bookstein's deposition, Respondent examined him about a paper that he wrote in 2005 complaining that these communities would not accept or recognize his pioneering work or research." (Proposed Order at p.45, citing Bookstein's Deposition pp. 66-133). The proposed order further asserts that "Dr. Bookstein admitted that he wrote this paper; and he admitted that his scientific research attempting to demonstrate fetal alcohol damage to the center of the brain – the corpus collosum – through 3-D MRI study and



measurement, was not accepted by fetal alcohol and psychiatric communities until 2005 *and after*, long after Binney's trial." (Proposed order at p.45, also citing Bookstein's Deposition at pp.66-133).

These assertions are factually incorrect. Dr. Bookstein testified during his deposition that it was discovered in the 1990s that the MRI of patients with FASD showed abnormalities in the corpus collosum, and that he worked with a research group at the University of Washington to apply for federal funds and conduct studies on those brain structures. (Bookstein Depo. p.22). The results of these studies were published in 2002. (See Affidavit of Dr. Bookstein at p.1, citing two peer-reviewed articles that appeared in 2002; see also, Bookstein Depo. at p.23 (explaining that in Mr. Binney's case, "I carried out measurements exactly analogous to the measurements that I carried out for the Seattle study that was published in the early part of the last decade"))).

Respondent repeatedly cites pages 66-133 collectively, so it is difficult to pinpoint exactly which of these nearly 70 pages respondent claims supports these assertions. However, for the most part, the discussion on pages 66-133 of Mr. Bookstein's deposition contains extensive questioning by respondent about an essay that Dr. Bookstein wrote in 2005. Dr. Bookstein repeatedly explained that the essay is about ideas, events and techniques that were not used in Mr. Binney's case or are otherwise irrelevant to Mr. Binney's case. See, e.g., Bookstein Depo pp. 79-80 (explaining that the Journal of the American Medical Association would not publish their study because they said it was too technical to be of interest to their readers); pp.81-83 (explaining that Dr. Bookstein felt that the psychological part of his group's research did not amount to much - i.e., "the part that didn't have the brain images" - because FASD is not a "psychometric phenomenon"; rather, it is "at root a phenomenon of organic brain damage and should be founded on observations of the physical brain"); pp.84-88 (discussing the "thin-plate spline" technique, which Dr. Bookstein testified was not used in Mr. Binney's case); pp.90-92 (discussing the visualspatail technique, which Dr. Bookstein testified was not used in Mr. Binney's case); pp.93-94 (explaining that there was a gap in funding for the Edgewarp program from 2007 to 2009); pp.98-103 (explaining that the paper discusses a statistical calculation of error rate regarding summarizing group differences, whereas Dr. Bookstein's "report on Mr. Binney, by contrast, was about the form in which he most differed from our Seattle normals in a way that agreed with our Seattle syndromals, and that is not the statistic here. The statistic here is for a different purpose, a description of two groups"); see also, page 103 (explaining that the 2005 paper discussed "two specific measures of the corpus callosum, neither of which are relevant to this case because I didn't use them here"); pp.108-112 (extensive discussion about whether one particular paragraph in the paper is about a new topic or related to the previous paragraph; counsel for Respondent repeatedly questioned Dr. Bookstein about whether the first paragraph was a "lead-in" to the next paragraph and Dr. Bookstein repeatedly answered that it was not and that the second paragraph was under a new sub-heading and therefore about a



different topic); pp.113-116 (discussion about a new study using ultrasounds on newborn children); p.123-128 (discussion about Dr. Bookstein's thoughts on where to go in the future with his research and funding goals); pp.129-133 (discussion about when Dr. Bookstein first began research related to FASD (1983) when he first testified as an expert (2004), how he is paid for his work, and who the money goes to).

The proposed order states that Dr. Bookstein "admitted fetalalcoholexperts.com, of which Novick-Brown is a member, stated in its own publication, that it did not begin the systematic forensic diagnosis of FAS until 2007 and that diagnosis of FAS prior to 2004 was 'hit or miss.'" (Proposed Order at p.46). This is incorrect. Respondent showed Dr. Bookstein a publication printed from the internet that contained the words FASDExperts.com at the bottom of the page. Dr. Bookstein testified that he was not part of FASDExperts.com. (Bookstein Depo. at p.50) Dr. Bookstein further testified that Dr. Natalie Novick-Brown was previously part of his own research group, but that she left before Dr. Bookstein came on board. He testified that he was not at the conference that the internet document purported to be generated for. (Bookstein Depo at p.51). Dr. Bookstein did not admit that FASDExperts.com stated in its own publication that diagnosis of FAS prior to 2004 was "hit or miss." *Dr. Bookstein could not even identify this document.* He was asked if he agreed with the statement that FASD Experts were making the first, systematic, structured approach to forensic assessment of FASD. He responded that he agreed generally because, as he understood it, FASD is the first group that is trying to systematically apply the 2004 CDC standards for FASD. (Bookstein Depo at pp.52-53).

Thank you for your time and consideration of this matter. Please do not hesitate to contact us if you have any questions.

Sincerely,

Emily C. Paavola
Emily C. Paavola

cc: Edward Salter, Esq.
John Blume, Esq.
Sheri L. Johnson, Esq.

EXHIBIT B

FIGURE 10-10
OF
THE
GENERAL
COURT
OF
THE
STATE
OF
NEW
JERSEY
IN
CASE
NO. 16 A.C. 45
JANUARY 19, 1966

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2000-CP-01-212

JOHN KENNEDY HUGHEY V. STATE OF SOUTH CAROLINA

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came for a hearing before the court this date.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ Other: _____

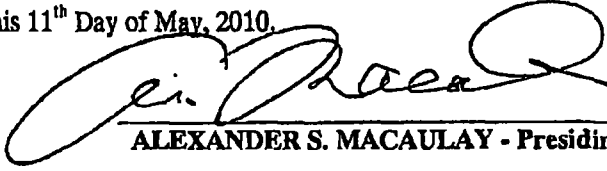
IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court/Formal Order to Follow:

Dated at Greenville, South Carolina, this 11th Day of May, 2010.

Court Reporter: NA


ALEXANDER S. MACAULAY - Presiding Judge

This judgment was entered on the _____, and a copy mailed first class this _____, to attorneys of record or to parties (when appearing pro se) as follows:

✓ E. Charles Grose, Jr., Esquire - Office of the Public Defender Greenwood and Abbeville Counties, 600 Monument Street, Box P-133, Greenwood South Carolina 29646 0 864.229.9505
Tara M. Schultz, Esquire - Khaled Law Firm, PC, 1365 Ebenezer Road, Rock Hill, South Carolina 29732 - 803.908.1199
Teresa N. Norris, Esquire - Blume Weyble & Norris, LLC, Post Office Box 11744, Columbia, South Carolina 29211 - 803.765.1044

Donald J. Zelenka, Assistant Deputy Attorney General - South Carolina Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211 - 803.734.6305



ATTORNEY(S) FOR THE APPLICANT(S)

ATTORNEY(S) FOR THE RESPONDENT(S)

SCRCP APP-24/FORM 4

The Honorable Emily Y. McMahahan - Clerk of Court

CPFORM4M

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2010 MAY 14 AM 8 48
EMILY Y. MCMAHAN
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

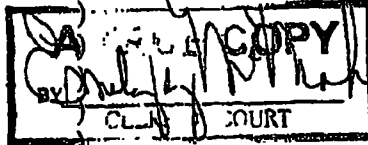
John Kennedy Hughey, #5055

Case Number: 2000-CP-01-0212

Applicant,

v.

The State of South Carolina,
Respondent.



ORDER GRANTING POST-
CONVICTION RELIEF

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2010 MAY 14 AM 8 48
EMILY Y MCMAHAN
CLERK OF COURT

This matter comes before the Court pursuant to an amended application for post-conviction relief (PCR) filed by the Applicant dated December 15, 2007. On October 13-15, 2008, this case was called before the Court of Common Pleas. The Applicant was present and represented by his appointed counsel Charles Grose, Esquire, Tara Schultz, Esquire, and Teresa Norris, Esquire. The Respondent was represented by Donald J. Zelenka, Esquire, Office of the South Carolina Attorney General. At the hearing, testimony was received from Robert Tinsley, Sr., Esquire, Jeff Yungman, Julia Perlotte, Martha Ann Stewart, Billy Garrett, Esquire, Robert Dudek, Esquire, Paige (Tarr) Haas, and Dr. Donna Schwartz-Watts.

Following the hearing, this Court took the matter under advisement and requested Post-Hearing Briefs to be submitted by the parties. The Applicant, by and through his appointed counsel, submitted his post-hearing brief on June 8, 2009. On June 29, 2009, Applicant supplemented his post-hearing brief due to the South Carolina Supreme Court's decision overruling part of the opinion in the Applicant's direct appeal. *See Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). Thereafter, the Respondent served its post-hearing brief on August 31, 2009 and the Applicant then served his reply brief on December 11, 2009.

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For the reasons stated more fully herein, Mr. Hughey's Application for Post-Conviction Relief regarding the guilt phase of the Applicant's trial is DENIED and DISMISSED, with prejudice, and the Application for a new sentencing phase of the trial is GRANTED.

TRIAL COUNSEL IS NOT INEFFECTIVE WHEN HE ARTICULATES A VALID REASON FOR EMPLOYING CERTAIN TRIAL STRATEGY (Issues I and II)

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. *Id.* at 687. To establish deficient performance under *Strickland*, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In order to establish prejudice, the applicant must show, "but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Id.* at 694; *see also Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000). Where counsel articulates a valid reason for employing certain strategy, the conduct will not be deemed ineffective. *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000).

A. The Presentation of Manslaughter and Applicant and Sister's Guilt Phase Testimony

The Applicant contends that his trial counsel erred in advising his sister and himself to testify in the guilt phase of the trial where "evidence was irrefutable to support convictions for murder." (Applicant's Post-Hearing Brief, P. 23). Based upon the argument presented at the hearing and Mr. Hughey's Post-Hearing Brief, the Applicant has failed to show either that there is a reasonable probability under *Strickland* that the result of the proceeding would have resulted in a different verdict, assuming that counsel did advise Applicant and his sister to testify. Nevertheless, the right to testify belongs to the Applicant and the trial court made a full inquiry

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of whether the Applicant wanted to testify and was advised of his right to testify. The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. *Strickland*, 466 U.S. at 689; see also *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to asserting that trial counsel was ineffective for allowing the Applicant and his sister to testify during the guilt phase, Applicant contends that his attorneys were ineffective for pursuing a charge on the possible lesser included offense of voluntary manslaughter and transferred intent. Counsel's "strategic choices made after thorough investigation ... are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-691. In evaluating an ineffective assistance claim, a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Applicant's trial counsel testified at the PCR hearing that the trial strategy was to keep the case from being a death eligible case by presenting evidence that would entitle their client to an instruction on manslaughter. PCR 281, 1. 10-14. Trial counsel was effective in properly presenting evidence to support a charge of voluntary manslaughter and the trial judge properly gave the manslaughter instruction and specifically included the manslaughter -transferred intent charge. R. 3465-68. With the trial counsel's success in having the charge given, deficient performance under *Strickland* cannot be found merely because the result was rejected.

This Court finds that the Record from the Applicant's trial and sentencing hearing, as well as the PCR hearing, conclusively demonstrate that appointed counsel were not deficient in presenting manslaughter as a jury charge and allowing the Applicant and his sister to testify

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during the guilt phase. In addition, the Applicant was not prejudiced in any way by trial counsel's performance.

B. The Failure to Properly Investigate and Present Available Mitigating Evidence.

In his second specification of ineffective assistance of counsel, the Applicant asserts that his counsel failed to investigate or present adequate mitigation evidence. In particular, he specifies adaptability to confinement and the capacity to appreciate the criminality of his conduct as two examples of this error. After considerable review of the record, this Court finds that the trial counsel investigated both the mental and family background of the Applicant and presented an appropriate case in mitigation.

Applicant contends that trial counsel failed to include any evidence of adaptability to prison life based upon his confinement history. At the PCR hearing, trial counsel testified that the mental health evidence revealed that the Applicant, in times of stress, would revert to his learned behavior of violence. In addition, trial counsel testified that they considered presenting the evidence, but because of previous negative experiences in capital murder trials on this very issue, they decided not to provide the testimony. Furthermore, trial counsel testified that they had met with the detention officers and learned that their testimony would not be of value to their case. This Court finds that was a strategic decision made by the counsel during the trial and concludes that the Applicant has failed to show the decision was based on neglect or ignorance. *Strickland*, 466 U.S. at 690-691. Furthermore, the Applicant has not demonstrated the prejudice that resulted by omitting this evidence required by *Strickland*, *supra*.

It is important to note that at trial the jury heard mitigation testimony from Ms. Anthony Wilson, Anthony Scott Harrison, Jessie Christopher Brown, Nancy Leigh Ramey, Rev. Wendall Cox, Gloria White Harrison, social worker Jeff Yungman, and Dr. James Evans, an expert in

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neuro-psychology and psychology. In addition, trial counsel ensured that the jury instructions during the sentencing phase focused the jury on potential mitigation suggested by the evidence.

Specifically, the jury was instructed to consider:

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.

The record clearly reveals that counsel retained a number of experts who provided their opinions in the case as well as a series of lay witnesses to testify on Applicant's behalf in mitigation. The sentencing jury was readily aware of the dysfunctional family experience that the Applicant experienced. This Court finds that the appointed trial counsel for the Applicant put into evidence a thoughtful and thorough case in mitigation considering various themes and presentations. *Accord Tucker v. Ozmint*, 350 F.3d 433, 441-42 (4th Cir. 2003). Accordingly, Applicant's claim that trial counsel failed to properly investigate and present available mitigating evidence is denied.

THE JURY INSTRUCTION REGARDING MITIGATION THAT JURORS "MAY RECOMMEND A SENTENCE OF LIFE FOR ANY REASON OR NO REASON AT ALL OTHER THAN AS AN ACT OF MERCY," STATE V. HUGHEY, 339 S.C. 439, 460, 529 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).

The jury was instructed on non-statutory mitigating circumstances, in pertinent part, as follows:

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 or [sic] a circumstance or circumstances beyond a reasonable doubt. *And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or nonstatutory mitigating circumstance.*

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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.

State v. Hughey, 339 S.C. 439, 458-459, 529 S.E.2d 721, 731 (2000) (emphasis that of the Court).

The Supreme Court noted: "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." *Id.*, 339 S.C. at 460, 529 S.E.2d at 732. As for the Respondent's contention that the trial court's charge had become "the law of the case," (Issue V), obviously the Supreme Court recognized and addressed it as an issue on appeal. The Supreme Court went on to approve and sanction the jury charge given by the trial court.

Nevertheless, in a prior trial, *State v. Rosemond*, 335 S.C. 593, 598, 518 S.E.2d 588, 590 (1999), where "the trial court's jury instruction mirrored the instruction found proper . . . in *State v. Hughey*," on a subsequent post-conviction relief application, the Supreme Court expressly held:

We overrule *Hughey* to the extent it approved and sanctioned the charge given here.

* * *

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, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009).

It has long been the law of South Carolina "as to the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reached the conclusion that the appellant was guilty of murder." *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930). Prior to the enactment of Act No. 530, 21 Stat. at L. 785 (1894), the punishment for the

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crime of murder was death only. See Act No. 91, 14 Stat. at L. 175 (1869). The 1894 Act,¹ "gave to a petit jury the right, when it found a defendant guilty of murder, to recommend him to the mercy of the court, and that the effect of such recommendation will be to save the accused from death, and cause him to be sentenced for life imprisonment at hard labor. The presiding judge was in error in stating to the jury repeatedly that they had nothing to do with mercy, and he committed further error in telling the jury some of the instances in which they should recommend mercy." *State v. King*, 158 S.C. 251, 155 S.E. 409, 425-426 (1930).

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 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*.

CONCLUSION AND JUDGMENT

Due to the overwhelming evidence of guilt and want of prejudice, the relief regarding the guilt phase of the Applicant's trial is DENIED and DISMISSED, with prejudice, and, based on the foregoing, the Application for a new sentencing phase of the trial is GRANTED.

AND, IT IS SO ORDERED.


ALEXANDER S. MACAULAY, Judge

May 7, 2010
Walhalla, South Carolina

¹ Section 109. (2454). Whoever is guilty of murder shall suffer the punishment of death: *Provided, however*, That in each case where the prisoner is found guilty of murder, the jury may find a special verdict recommending him to the mercy of the Court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner. 1894 (21) 785; § 16-52, S.C. Code (1962); 1868 (14) 175.

EXHIBIT C

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL
JAN 16 1945
U.S. DEPARTMENT OF JUSTICE

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Kamell Delshawn Evans, #6016,)

Evans,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

C/A No.: 2006-CP-23-7719
(Capital PCR Action)

ORDER

In this capital post conviction relief action, Kamell Delshawn Evans challenges his convictions for murder and sentence of death; possession of a weapon during the commission or attempted commission of a violent crime, burglary first degree, and kidnapping. The court, after careful consideration of all the evidence of record and the applicable law, affirms Evans' convictions, but finds a new sentencing hearing is required due to the law set forth by the decision of our supreme court in Rosemond v. Catoe, 383 S.C. 320, 680 S.E. 2d 4 (2009).

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PROCEDURAL HISTORY

In June 2003, a Greenville County Grand Jury indicted Evans on two (2) counts of murder; two (2) counts of possession of a weapon during the commission or attempted commission of a violent crime; burglary, first degree; and two (2) counts of kidnapping. (R. p.1802-13). Evans shot and killed Antonio J. "Joe" Sapinoso, and his father, Antonio L. Sapinoso. The State filed and served a Notice of Intent to Seek the Death Penalty. (R. p. 1814). Steven W. Sumner, Esq., and James Lee "Skip" Goldsmith, Jr., Esq., represented Evans at the trial.

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could not have been presented, but the lack of proof of specific and significant effect would lessen its impact.

As to abuse and neglect, the evidence of abuse against the mother could only be shown by calling individuals who would demonstrate a rift in the family, and by a witness who was uncooperative with the defense team. Again, this would detract rather than enhance the defense. Moreover, the evidence of abuse against Evans, i.e. use of force in discipline, was contested. Further, attacking the father would only lead to unraveling the carefully crafted defense theme and making his testimony in support of his son less credible.

Additionally, to consider all the evidence together, *Wong, supra*, the evidence would confuse and dilute the clear theory that this event was a critical break from his normal behavior. This was the very theme that Evans presented to the jury himself. (R. p. 1774, "That wasn't me that night. It's not the person I am. ... Twenty-seven years before though, that wasn't me. That's not the person I am.").

Lastly, on the other side of the scale, there is the fact of a horrible, planned hostage taking ending in two murders, one of a law enforcement officer kidnapped from his car before he could end his shift and reach the safety of his home; a forced entry into the home and a night of terror for the Sapinoso family. Moreover, to offer evidence of neglect, with the concomitant evidence of "running the streets," would support that there were not "two Kamell Evans," but one – one who spurned real family life and actively sought gang life, who resolved his issues with escalating violence.

Evans has failed to demonstrate deficient performance and prejudice, and is not entitled to any relief.

9(b)(12) Ineffective Assistance: Failure to Object to Charge Referencing Mercy

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Twenty-four days after the June 2009 portion of the evidentiary hearing, the South Carolina Supreme Court issued *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). In light of the state supreme court's decision in *Rosemond*, Mr. Evans moved to amend his application for post-conviction relief to allege that trial counsel provided ineffective assistance in failing to object to an instruction identical to that found erroneous in *Rosemond*. When the evidentiary hearing resumed on October 12 to 14, 2009, trial counsel testified with respect to the claim of error based on *Rosemond*.

1. The South Carolina Supreme Court's Decision in *Rosemond v. Catoe*

The South Carolina Supreme Court, while granting relief based on a finding of ineffective assistance due to counsel's failure to present evidence of the defendant's mental illness, chose nevertheless to address an additional issue. *Rosemond* claimed that trial counsel were also ineffective for failing to object to the trial court's instruction "not to recommend a sentence of life based on mercy: 'you may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy.*'" *Id.* at 329, 680 S.E.2d at 10 (emphasis in original). The South Carolina Supreme Court found that the trial court's instruction prevented jurors from considering the defendant's evidence and argument for mercy. This, the Court emphasized, ran contrary to state law, under which a defendant is entitled to present evidence seeking mercy (see *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991)) and by which jurors must be instructed that they can return a life sentence "for any reason or no reason at all":

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. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion" *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 16 (1985) overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

Rosemond, 383 S.C. at 329, 680 S.E.2d at 10-11; see also *State v. White*, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) (noting the "absolute discretion of the jury with regard to the issue of mercy"); cf. *Saffle v. Parks*, 494 U.S. 484 (1990).

Further, the Court recognized that the trial court's jury instruction in *Rosemond* mirrored the instruction found proper in *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000). The Court therefore "overrule[d] *Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase"—even as it granted relief on another, independent ground. *Id.* at 329, 680 S.E.2d at 10-11.

Rosemond, as it addresses the mercy charge, does not constitute a "new rule" where it has been the rule for decades that mercy can be considered by a capital jury. A careful reading of *Hughey* reveals that at the time of Mr. Evans trial the supreme court was interpreting the challenged "mercy" language as precluding the jury from considering mercy. If this were not so, then the court's decision in *Hughey* would be nonsensical, as the court there upheld the charge on the ground that "a judge's charge that the jury should not be guided by sympathy, prejudice, passion or public opinion is not reversible error." *Hughey*, 339 S.E. at 460.

It is important to realize that *Hughey* did not discuss or decide the issue of whether the "other than an act of mercy" charge infringed on a capital defendant's constitutional right to

present mitigating evidence. Instead, *Hughey* only went so far as to uphold the charge on the basis that it was consistent with the common law rule that a jury can properly be instructed that its verdict cannot be swayed by sympathy or prejudice. *Hughey* thus left undecided the issue of whether a charge that removes mercy as a sentencing consideration violates constitutional commands. Reasonable trial counsel would have understood that *Hughey* did not confront this lingering issue, rather than accepting on faith that *Hughey* insulated the "other than as an act of mercy" language from any challenge

The trial court in Mr. Evans' case provided the jury with a charge identical to the one that the South Carolina Supreme Court disapproved in *Rosemond v. Catoe*. Here, as in *Rosemond*, the trial judge instructed the jury: "[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*." (R. 1785) (emphasis added). For the reasons that follow, this Court finds that trial counsel's failure to object to the erroneous charge was both deficient and prejudicial.

II. Ineffective Assistance of Counsel

Applicant alleges, as *Rosemond* did, that trial counsel provided ineffective assistance of counsel in failing to object to the trial court's instruction precluding mercy.

A. Deficient performance

The "crux" of the mitigation case at Applicant's sentencing trial was mercy. Mercy, trial counsel testified during the evidentiary hearing, was the "primary element" of the mitigation

plea. PCR 344. The mitigation evidence consisted primarily of testimony from family members, coaches, and friends. The presentation began with Mr. Evans' high school football coach (R. 1651-53), his high school basketball coach (R. 1645-47), his community college football coach (R. 1648-50), and the high school football team chaplain (R. 1642-44), who testified that Mr. Evans was respectful, courteous, and a team leader. A friend with whom Mr. Evans coached little league football testified that Mr. Evans developed a positive relationship with he and his son. R. 1655-58. Another friend, who worked with Mr. Evans in a youth football and basketball association, testified that Evans had been a positive role model for his twenty-two year old son. R. 1660-62. A coworker testified that Mr. Evans was a hard worker, who had not been involved in problems on the job. R. 1664-65. Evans' sister said that Kamell was a father figure to her children, even in prison (R. 1672), and Kamell's father testified in two transcript pages, speaking of Kamell's positive attributes and stating that, while Kamell's actions caused the family pain, "he is still my friend, he will always be my friend." R. 1669. Counsel also called two witnesses who testified that Evans would adjust positively in prison (corrections expert George Martin and Greenville County Detention Center corrections officer John Merkle) and two mental health experts (a neuropsychologist, Dr. James Evans, and a psychiatrist, Dr. Elin Berg).

During the postconviction evidentiary hearing before this Court, trial counsel referred to mercy, by turns, as the "primary element" (PCR 344), the "key highlight" (PCR 345), and "a major part" (PCR 334) of the mitigation case. Trial counsel James Goldsmith testified that he "built [his] closing argument around [mercy]." PCR 344. In sentencing summation, Goldsmith told the jurors:

I am going to ask for mercy for Kamell Evans. . . . Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway. . . . We don't repay evil for evil. And mercy is appropriate in this case.

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R. 1770; PCR 344.

Both trial counsel testified that, given the centrality of mercy to the sentencing phase defense, they would have objected to any charge that suggested a limitation on the jury's consideration of mercy when deliberating on the sentence. PCR 335-36, 353. The trial judge reviewed the proposed jury charges verbally with counsel in chambers. PCR 332-35 (trial counsel Sumner), 345 (trial counsel Goldsmith). Yet neither counsel objected when the trial court proposed the instruction that eliminated the "primary element" of their argument." Trial counsel Goldsmith thought what the judge proposed during the conference "was appropriate." PCR 345. He testified that he knew the court would charge the jury "you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" before he made his argument to the jury. PCR 346. Counsel submitted no proposed jury charges. PCR 338-39. Counsel made no attempt, alternatively, to change the argument to avoid a conflict between their argument and the judge's charge. PCR 351; see PCR 333-34, 344. And when the trial court issued the instruction to the jury, R. 1785, and later provided the same to the jury in writing pursuant to S.C. Code Ann. § 16-3-20(C), R. 1786, counsel made no objection.

At the evidentiary hearing, trial counsel testified that they did not object to the erroneous charge because they viewed it as helpful. Trial counsel Sumner claimed that he did not think the charge limited the jury's consideration of mercy; because "it use[d] the word mercy," he believed the charge was actually preferable to a charge that simply tracked the words of the statute. PCR 338, see PCR 335. Trial counsel Goldsmith similarly testified that he thought this "an expansive charge" that allowed jurors to consider mercy. PCR 346-47. The charge, counsel say, told the jury to consider mercy, not abjure it.

This Court finds trial counsel's reasons for not objecting to the charge are unavailing. As the South Carolina Supreme Court recognized in *Rosemond*, the plain meaning of the words of the charge given is that mercy is precluded as a consideration for a sentence of life. The charge, by substituting the words "other than" for the word "including," in effect eviscerates the role of mercy in the jury's consideration of the sentencing options. As the Supreme Court understood, the last clause of the instruction plainly reads as a limitation on and qualification of the previous sentence, not a reiteration. The interpretation offered by trial counsel defies both the Supreme Court's determination in *Rosemond* and common sense.

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. The fact that the *Hughey* decision, which *Rosemond* reversed, was "in effect" at the time of Mr. Evans' trial in 2004 does not ameliorate counsel's failure to object to the erroneous charge. It has been the rule for decades that mercy can be considered by a South Carolina capital jury. In South Carolina in the year 2000, as in 2004 at the time of Evans's trial, a defendant was entitled to offer at sentencing evidence asking "for mercy on his behalf," *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); see *State v. Johnson*, 338 S.C. 114, 126, 525 S.E.2d 519, 525 (2000); *State v. Sapp*, 366 S.C. 283, 292-94, 621 S.E.2d 883, 887-88 (2005). It was proper for defense counsel to try to "appeal to the jury's sense of mercy." *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993). It was proper for a defendant to address the jury and ask for mercy. See *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). Under S.C. Code Ann. § 16-3-20(C), "The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law..." Mercy is embraced within this statutory directive as a basis for

returning a life sentence. This is also supported by the fact that the statute does not require that the jury "weigh" aggravating circumstances against mitigating circumstances; rather, South Carolina is a non-weighting state, meaning the jury can return a verdict of life for any reason "otherwise authorized or allowed by law." S.C. Code Ann. § 16-3-20(C).²¹ Objecting here did not impose a duty of clairvoyance on counsel, or force a lawyer to anticipate a change in the law. It is misleading to argue, as the State does, that the charge represented the correct law at the time of Evans' trial. As previously noted the law has always been that a capital jury can consider mercy. Indeed, the law used to be that one convicted of murder was sentenced to death *unless* the jury recommended mercy.²² As noted above, however, the court in *Hughey* interpreted the "other than as an act of mercy" phrase as precluding a jury from considering mercy. But the court did not consider the pivotal question of whether the preclusion violates the common law right to a mercy charge (as *Rosemond* found) or the constitutional right—long recognized by *Lockett* and its progeny-- to grant the jury the practical ability to give meaningful effect to all mitigation. Reasonable trial counsel familiar with the common law mercy right, *Hughey* and *Lockett* would have objected to the charge and pressed this very point. Counsel performed deficiently in failing to object to the erroneous instruction.

Further, it is well established that the Eighth Amendment, under the *Lockett v. Ohio*, 438 U.S. 586 (1978), line of cases, permits no restriction on a capital defendant's ability to present

²¹ Long-standing South Carolina law also holds that a trial court's instructions to the jury cannot impede "the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reach the conclusion that appellant was guilty of murder." *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930).

²² For example, S.C. Code Ann. § 16-52, as amended (1962) provided: "whoever [was] guilty of murder shall suffer the punishment of death; provided, however, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court whereupon the punishment shall be reduced to imprisonment during the whole lifetime of the prisoner." See *State v. Hurper*, 251 S.C. 379, 162 S.E.2d 712 (1968).

any relevant mitigating evidence. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). Mitigating evidence has been defined as any evidence that might serve "as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In *Lockett*, the Court held that a statute that prevents the sentencer from giving effect to applicable mitigation "creates the risk that that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U.S. at 605. Subsequent decisions have made clear that a capital sentencing jury must be able to consider and give effect to mitigating evidence, for it is only when a jury is provided a vehicle for expressing its reasoned moral response to such evidence that "we can be sure the jury 'has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence.'" *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal citation omitted).

The South Carolina legislature has decided to allow mercy as a sentencing consideration, encompassed in the language "for any reason or no reason at all," and the South Carolina Supreme Court has so interpreted the statute. As such mercy is indisputably a valid basis for imposing a life sentence under state law. Because *Hughey* neither addressed nor ruled upon the issue of whether precluding a capital jury from considering mercy comported with *Lockett* and its progeny, reasonable counsel would also have objected to the charge precluding mercy on that basis.

Given this precedent, of which trial counsel should have been aware, it was not proper for the trial court in Mr. Evans's case to issue an instruction to the jury that it could not return a life sentence "as an act of mercy." Trial counsel's failure to object to the charge was deficient. In

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counsel's failure to object to the erroneous charge precluding consideration of mercy prejudiced Mr. Evans. Mr. Evans is, therefore, entitled to a new sentencing trial.

I. Harmless Error

a. Harmless Error Does Not Apply to the Instruction Precluding Mercy.

In *Lowry v. State*, the South Carolina Supreme Court recognized that "[c]ertain constitutional errors may be harmless in terms of their effect on the *fact-finding* process at trial." 376 S.C. at 507-08, 657 S.E.2d at 764 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 79 (1993) (emphasis added)). "For this reason," *Lowry* stated, "an unconstitutional jury instruction will not require reversal of the conviction if the Court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (citing *Arnold v. Plath*, 309 S.C. at 165, 420 S.E.2d at 838 (quoting *Chapman v. California*, 386 U.S. 18 (1967))). *Lowry* involved a burden shifting instruction that left the jurors with the mistaken view that, if they found petitioner took part in the crime, malice should be presumed. After considering the charge in the context of the entire jury instruction, the Court searched for harmless error by weighing the evidence the jury considered against the "probative force" of the mistaken instruction. *Id.* at 765. The reasoning behind the harmless-error analysis in *Lowry* is that a court should assess the "basis on which the jury actually rested its verdict" because an instructional error may be "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

The erroneous instruction in this case, which precluded consideration of mercy by the capital jury ("you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy"), stands on different footing. The instruction at hand

did more than implicate jurors' fact-finding. Cf. *Neder v. United States*, 527 U.S. 1, 8-15 (1999) (applying harmless error where instruction omitted element of offense); *Johnson v. United States*, 520 U.S. 461, 468-49 (1997) (same); *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) (finding erroneous malice charge not harmless). The instruction precluding mercy limited the sentencing jury's ability to give any effect to the defendant's mitigation. As such, the instruction "deprive[d] the jury of a vehicle for expressing its reasoned moral response to the defendant's background, character, and crime." *Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006) (quoting *Penry v. Johnson*, 532 U.S. 782, 797 (2001)) (emphasis in original). In South Carolina, the consideration of mercy is central to the capital jury's discretion. See *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); *State v. Blakely*, 158 S.C. 304, 155 S.E. 408, 409 (1930). It is impossible to estimate the impact of the charge eliminating mercy—an inscrutable concept that defies qualification—as a sentencing consideration on the jurors' reasoned moral response.

Addressing an instructional error that prevented a jury from giving full effect to mitigating evidence under *Penry v. Lynaugh* and its progeny, the Fifth Circuit in *Nelson* noted that "the Supreme Court has *never* applied a harmless-error analysis to a *Penry* claim or given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence." *Id.* *Quarterman*, 472 F.3d at 314-15 (5th Cir. 2006). Finding harmless error analysis incongruent in that similar circumstance, the Fifth Circuit explained:

Given that the entire premise of the *Penry* line of cases rests on the possibility that the jury's reasoned moral response might have been different . . . had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases.

Id. at 314-15 (other citations and quotations omitted); accord *Rivers v. Thaler*, 2010 WL 3058721 (5th Cir. 2010); *Aldridge v. Thaler*, 2010 WL 1050335 (S.D. Tex. 2010).

The trial court's erroneous charge restricting the jury's consideration of mercy as a basis for a life sentence requires *per se* reversal because it "deprived the jury of a vehicle for expressing its reasoned *moral* response to the defendant's background, character, and crime." *Nelson*, 472 F.3d at 314-15 (quotation and citation omitted). Accordingly, the "mercy" instruction was a structural defect to which harmless error analysis does not apply. *Id.* at 332.

There is another equally important reason why harmless error analysis is wholly incompatible with the instruction precluding mercy. Under South Carolina law, mercy is a factor that can play a dispositive role in a juror's decision to impose a life sentence, even after considering and giving weight to overwhelming evidence of guilt and substantial aggravating circumstances. S.C. Code § 16-3-20 provides that jurors may vote for a life sentence "for any reason or no reason at all." This provides a direct option for jurors who, having considered all the evidence—even substantial aggravating evidence—reach a reasoned moral conclusion that a capital defendant should be sentenced to life imprisonment without parole. The type of evidence balancing applied in *Lowry*, consequently, is incongruous with a jury's consideration of mercy under South Carolina law, because under South Carolina law mercy serves as a basis for a vote for life based on consideration of the evidence presented at sentencing, yet *despite* the weight of that evidence.

This is evident when considering the role mercy plays in a highly aggravated sentencing case. A strong case in aggravation renders many instructional errors moot. By contrast, the mercy option becomes *even more important* to a capital defendant's chance for a life sentence in

a highly aggravated case. Acknowledging the weight of the aggravating evidence, Mr. Evans' trial counsel made mercy the central component—the "crux" — of the mitigation case. The United States Court of Appeals for the Eleventh Circuit recognized the same when it considered the role of mercy under Georgia's capital statute, which like South Carolina's statute also authorizes the jury to return a life verdict for any reason or no reason at all:

Even if the Supreme Court precedent allowed us to consider harmless error as to guilt, *the absolute discretion of a Georgia jury to grant mercy for any reason would make it anomalous to apply the overwhelming evidence concept to the sentencing phase.*

Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1985) (quoting *Zant v. Stephens*, 297 S.E.2d 1 (1982)) (emphasis added). This Court finds that the Eleventh Circuit's reasoning is compelling. Harmless error analysis does not apply to assessing the prejudice of the erroneous instruction on mercy.

b. Even If Harmless Error Analysis Applied, It Cannot Be Proven Beyond a Reasonable Doubt that the Erroneous "Mercy" Charge Did Not Contribute to the Death Verdict.

Even if harmless error analysis applied, the instruction would not be harmless. Given the substantial aggravating evidence against Mr. Evans—which included the murder of two innocent victims, one of who was a law enforcement officer—mercy is a factor that would have been highly significant to the capital sentencing jury. In addition, as trial counsel testified at the postconviction hearing, mercy played the central role in the defense of the death penalty and in the mitigation presentation. The trial court's erroneous instruction precluding mercy took that pivotal sentencing factor away from the jury. In these circumstances, it cannot be established "beyond a reasonable doubt that the [the erroneous instruction precluding mercy] did not contribute to the verdict obtained." *Lowry*, 376 S.C. at 507-08, 657 S.E.2d at 764. Accordingly,

even if harmless error analysis applies, there is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694-96.

2. *Boyle v. California*

a. *Boyle v. California* Does Not Apply to the Instruction Precluding Mercy.

In *Boyle v. California*, the defendant argued that an ambiguous jury instruction prevented the jury from giving effect to the mitigating evidence. 494 U.S. 370, 378-381 (1990). The United States Supreme Court examined the objectionable language in the context of the entire charge and, applying a new standard, held there was not "a reasonable likelihood that the jury [] applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

Boyle does not apply to the clearly erroneous instructional error in this case because *Boyle* supplies a standard for testing *ambiguous* jury instructions. *Boyle* does not apply to *clearly erroneous* jury instructions. In *Boyle*, the Court distinguished the ambiguous charge before it from the case of a "concededly erroneous" instruction, such as that in *Stromberg v. California*, 283 U.S. 359 (1931). *Boyle*, 494 U.S. at 380; see *Weeks v. Angelone*, 528 U.S. 225, 238 (2000) (Stevens, J., dissenting) (recognizing that *Boyle* dealt with an instruction that "though not erroneous, is sufficiently ambiguous to be subject to erroneous interpretation") (quotation omitted). In contrast to *Boyle*, the instruction at issue here involved precise language found contrary to South Carolina law. *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10-11. This distinguishes the present case from cases such as *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384-85 (1991), and *State v. Bell*, 305 S.C. 11, 22, 406 S.E.2d 165, 171 (1991), which

involved ambiguous (but not clearly erroneous) instructions alleged to have precluded jury consideration of evidence in mitigation. The instruction precluding mercy, delivered here and in *Rosemond*, is an anomaly, evidently delivered in only a handful of capital trials. Because the South Carolina Supreme Court's opinion in *Rosemond v. Catox* establishes that the instruction, as given in Mr. Evans's case, is clearly erroneous, and it runs directly counter to long-standing South Carolina legal precedent and principle, 383 S.C. at 330, 680 S.E.2d at 11, this Court holds that *Boyd* analysis does not apply.

b. Even If *Boyd* Applied, the "Reasonable Likelihood" Standard
Would Be Easily Met.

Even if *Boyd* applied, this would be a straightforward case and the *Boyd* standard easily met. The impact of the erroneous instruction on jury deliberations must be assessed in the context of the jury charge as a whole. No language in the charge cured the instruction precluding mercy. In the entire sentencing charge, the word "mercy" appears only once, when it is excluded as a ground for a sentence of life. The remainder of the charge did not address mercy. The court's charge did inform the jurors that they should consider all aggravating and mitigating factors, statutory and non-statutory. And the trial court informed jurors "you may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance" and "you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt and you find no mitigating circumstances to exist." R. 1784-85. A reasonable juror, however, would not interpret these *general* instructions to override the *specific* and clearly erroneous instruction that he or she was not to consider mercy as a basis for a life sentence. As the South Carolina Supreme Court recognized in *Lowry*: "Language that merely

contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." 376 S.Ct. at 507-08, 657 S.E.2d at 764 (citation omitted). Here, the trial court gave no clarifying explanation.

Moreover, the trial court told the jury repeatedly that it must follow the law as instructed. It is hard to imagine a more pointed way to inform the jury of its role than the way the trial court explained:

You must ... under [y]our oath as a juror accept the law as I give it to you as being the law that is applicable in this particular case.

You're not to concern yourself with what you thought the law was before you came to serve as a juror in this case. You must not concern yourself with what you think the law ought to be.

You must simply accept the law as I give it to you as being the law that is applicable in this particular case, and then you simply take that law and you apply it to the facts ...

R. 1480-81. Later, the judge charged the jury that at the sentencing phase they would be given "certain applicable instructions as to the law which you are to apply." R. 1515, ll. 9-11. Prior to deliberating, the jury was instructed in part: "you will make your determination as to the appropriate sentence to be imposed for each of the murder convictions based upon your consideration of all the evidence presented in the case and my instruction as to the law that is applicable." R. 1777.

There is perhaps no more potent presumption in the law than the fundamental creed that jurors follow their instructions. *CSX Transp., Inc. v. Hensley*, 129 S.Ct. 2139, 2141 (2009); *United States v. Olano*, 507 U.S. 725, 740 (1993); *Penry v. Johnson*, 532 U.S. 782, 789 (2001); *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *State v. Northcutt*, 372 S.C. 207, 228, 641 S.E.2d 873 (2007) ("Our jurisprudence unwaveringly provides that we are to presume juries follow their instructions ...") (Toal, C.J., dissenting).

Consequently, even if the *Boyle* analysis were applied to this case, there is a reasonable likelihood that the jury applied the instruction in a way that limited the jury's application of the mitigating evidence, obstructed its reasoned moral response to the evidence, and violated the Fifth, Eighth and Fourteenth Amendments to the Constitution.

To find otherwise would be to conclude that the jury not only violated its oath and ignored the judge's flawed charge on mercy, but that they were coincidentally armed with such a workable understanding of *Lockett* and its accompanying constitutional jurisprudence that they unilaterally chose to consider Evans' plea for mercy.

Although it has reached discordant decisions on death penalty procedure over the last forty years, the United States Supreme Court has been consistent on one bedrock principle: guaranteeing that the ultimate sentence is rendered as the product of a reliable and fair procedure. It would mock this principle to indulge in the fiction that the jury considering Mr. Evans' fate purposely ignored the law it was sworn to uphold. It would offend fundamental notions of reason and fairness to conclude that allowing one sentencing jury to consider and give effect to mercy while forbidding another to do so has no impact on the reliability of capital verdicts.

3. There is a Reasonable Probability that, But For Counsel's Failure to Object to the Instruction Precluding Mercy, the Outcome of Applicant's Trial Would Have Been Different.

The exclusion of mercy in a capital murder trial violates state law as well as federal law pursuant to *Lockett v. Ohio*, as it prevents the jury from giving full effect to the mitigation evidence. Such an error is highly prejudicial in a South Carolina capital trial where jurors may impose a life sentence for any reason or no reason at all. Recently, a highly respected circuit judge granted postconviction relief to the defendant in *Hughey*, finding that the identical instruction given in *Rosemond* and *Hughey*—and the same provided at Mr. Evans' sentencing

phase - was "so inimical to the laws of the State and the United States in capital cases as to entitle the applicant to a new trial." *Hughley v. State*, 2000-CP-01-0212, Abbeville County (Order Granting PCR Relief, May 14, 2010) (Macaulay, J.). The erroneous instruction precluding mercy was particularly prejudicial under the circumstances in Mr. Evans' case because counsel positioned mercy as the crux of the mitigation case against substantial aggravating evidence. Trial counsel's failure to object to the erroneous charge left the jury deliberating the case without being able to place the defendant's "primary element" on the scale. There is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694-96.

In conclusion, the Court notes that, like *Rosemond* and *Hughey*, Mr. Evans' case belongs to a closed universe of cases in which an idiosyncratic charge was given on a critical issue. It would be fundamentally unfair to allow one defendant to live and a handful of others to die based only on the timing of their trial.

9(c)(1) Ineffective Assistance of Appellate Counsel: Failed to Challenge the Trial Court's Denial of Trial Counsel's Request to Charge the Jury on Voluntary Manslaughter

"A defendant is constitutionally entitled to the effective assistance of appellate counsel." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The *Strickland* error and prejudice standard is applicable to claims involving ineffective assistance of appellate counsel. *Id.* To show prejudice to entitle him to relief, "the Evans must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Id.*

EXHIBIT D

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HENRY McMASTER
ATTORNEY GENERAL

June 26, 2007

The Honorable J. Michael Baxley
Judge of Fourth Judicial Circuit
531 E. Carolina Avenue
Hartsville, South Carolina 29550

RE: Jonathan K. Binney v. Jon Ozmint, et al.

Dear Judge Baxley:

Enclosed please find the original transcript of the deposition of Henry Viquez. A copy of this deposition was entered into evidence during the evidentiary hearing. If you should have any questions, please contact me.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/hb

Enclosure

cc: John H. Blume, III, Esquire
Sheri L. Johnson, Esquire
Emily C. Paavola, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

JONATHAN KYLE BINNEY,
Applicant,

v.

STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS

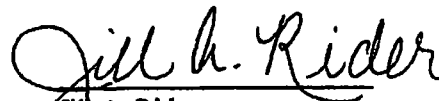
Case No.: 06-CP-11-223

CERTIFICATE OF SERVICE

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THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHEROKEE)
JONATHAN K. BINNEY, #6009) TELEPHONE CONFERENCE
PLAINTIFF,) DECEMBER 9, 2011
VERSUS) 2006-CP-11-0023
THE STATE OF SOUTH CAROLINA)
DEFENDANT.)
_____)

BEFORE

THE HONORABLE J. MICHAEL BAXLEY

APPEARANCES

John H. Blume, Esquire
Emily C. Paavola, Esquire
Attorneys for that Applicant

William Edgar Salter, III, Esquire
J. Anthony Mabry, Esquire
Attorneys for The State

Pamela Ozment-Cartee
Circuit Court Reporter

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1 (Whereupon, this hearing was called to order
2 at 10:03 a.m. on Friday, December 9, 2011.)

3 **THE COURT:** Ladies and gentlemen, good morning. This
4 is Mike Baxley. I hope everyone can hear me. I am actually
5 on a speaker phone, and our court reporter today is Pamela
6 Cartee, who is taking this down. And my law clerk Mason
7 King, is also present in the room.

8 Let me ask, I know you have already identified yourself
9 to Jamie, but just so I can gauge volume and ability to hear
10 you, please tell me who all is on the telephone?

11 **MR. BLUME:** Well, your honor, this is John Blume, and I
12 represent Mr. Binney.

13 **THE COURT:** Very good. I can hear you well, Mr.
14 Blume.

15 **MS. PAAVOLA:** And this is Emily Paavola, and I also
16 represent Mr. Binney.

17 **THE COURT:** All right. Ms. Paavola I can hear you as
18 well. Good morning.

19 **MR. SALTER:** Your honor, this is Ed Salter, and I
20 represent the State.

21 **MR. MABRY:** And Anthony Mabry, and I represent The
22 State.

23 **THE COURT:** All right. Mr. Salter and Mr. Mabry, I
24 can hear you as well. And good morning to you additionally.

25 And let me ask, are you all able to hear me?

1 MR. BLUME: Yes, your honor, quite well.

2 THE COURT: All right. Let's let the record reflect
3 that we are conducting this conversation, actually this
4 hearing by telephone. It is December the ninth, and it is
5 ten o'clock in the morning.

6 We are here today to discuss and argue the motion by
7 applicant to alter or amend the Order that this Court issued
8 that denies post- conviction relief to Mr. Binney.

9 And, I have received in writing from the applicant the
10 Motion to Alter or Amend Judgment as well as attachments to
11 that, and have had the opportunity to review that.

12 The Attorney General has not submitted a response in
13 writing however, we set this matter for a hearing today to
14 give both sides an opportunity to argue their position, so
15 that the record would be preserved.

16 MR. SALTER: Your honor, may I interrupt sir?

17 THE COURT: Yes, sir.

18 MR. SALTER: Ed Salter. I don't mean to interrupt,
19 however, we did submit in writing April 12, 2011, a response
20 to some of the questions raised in the Motion to Alter or
21 Amend. It is a two page letter or response.

22 THE COURT: All right. Just a moment, please.

23 (PAUSE.)

24 THE COURT: All right. You say that was sent in
25 April of 2011?

1 MR. SALTER: Right.

2 THE COURT: All right. Now I issued my Order in
3 September.

4 MR. SALTER: Yes, sir.

5 THE COURT: All right, sir. I just want to make sure
6 we are on the same wavelength. I issued the Order in
7 September 2011.

8 MR. SALTER: Yes, sir. I do apologize, your honor.
9 This is an earlier letter, I apologize, but it goes to the
10 same issues --- some of the same issues.

11 THE COURT: All right, very good. We will give you
12 an opportunity to comment on those today.

13 What I was pointing out in the history, at least as I
14 perceived it was that, I filed the Order on September the
15 11th. On September 15th, there was a Motion by the Applicant
16 to Reconsider, that is a Motion to Alter or Amend. I had
17 asked the Attorney General for a Brief. It was my
18 understanding that both you, Mr. Salter and Mr. Mabry were in
19 trial, and rather than wait what looked to be a lengthy
20 period for a written formal response, I set this Motion for a
21 hearing today. So, if you have submitted a letter back in
22 April that bore on these issues, I am certain that I reviewed
23 it and considered at the time when I was developing the Order
24 itself. But what I meant was subsequent to the Order, I have
25 not received anything in writing from the Attorney General's

1 Office.

2 MR. SALTER: That is correct. You are correct. I
3 apologize for the confusion.

4 THE COURT: All right, very good. What I would like
5 to do is discuss, if we could break this discussion down into
6 three points. And one is what I am going to call the quote,
7 general factual errors that Mr. Blume and Ms. Paavola allege
8 in their argument. Secondly, the matter of Juror Viquez.
9 And then thirdly, I would like to talk about the effect of
10 the Rosemond Order as well as the Hughey versus State Order
11 with regard to the charge that was given by Judge Cole at the
12 time this trial was originally had, that is the underlying
13 trial.

14 Let's start with the factual errors. Again, the
15 Applicant has submitted a Motion to Alter or Amend. It has
16 been commented in there that there were numerous factual
17 errors.

18 One specific one that was pointed out was that the
19 error, my Order contains an error when I state that, [REDACTED]
20 Binney had to have a hysterectomy as a result of the sexual
21 assault that Mr. Binney committed upon her. Do you want to
22 respond to that issue Mr. Salter, or Mr. Mabry?

23 MR. SALTER: I want to respond to that, Your Honor.
24 This is Mr. Salter.

25 We would agree that the witness, Dr. Mainman,

1 M-A-I-N-M-A-N, testified that she did not anticipate that the
2 victim would have any problems bearing children. She did not
3 reference performing a hysterectomy, but likened the injury
4 to an episiotomy. That is on pages 3190 to 3193. On page
5 3193 she explained that although the family did not let her
6 reexamine the child a week after the surgery, and she could
7 not be certain, she explained on lines thirteen through
8 seventeen, quote "But a child that small it is very difficult
9 to penetrate deeply enough into her vagina to cause internal
10 injuries. Most of her injuries that I was able to witness
11 were external. I don't believe that her uterus was damaged."
12 That is the end of the quotation. So, no, she does not say
13 anything about performing a hysterectomy.

14 **THE COURT:** Let me say to all counsel. What I did,
15 and, of course, this was back in May of 2007, I took
16 extensive notes as the PCR trial was occurring, and
17 thankfully I did, because obviously now we are four years
18 plus from that trial. That comment, I believe, was made
19 perhaps in opening statement Mr. Salter. Is it possible that
20 you would have said that in opening statement?

21 **MR. SALTER:** I don't believe so, Your Honor. I do
22 not recall saying that. And I know that it was not in our
23 proposed Order.

24 **THE COURT:** All right. It was not. That is correct.
25 And, you know, obviously I just can't imagine that I would

1 have made that up. But as I reviewed my notes I have been
2 unable to find that in my notes. So, it may be that somehow
3 I came up with that fact which was incorrect.

4 However, my position on that is that that is a
5 collateral fact at best. It is not something that formed a
6 basis of my decision. I am not certain that it is anything
7 more than harmless error. But, Mr. Blume, I will be glad to
8 hear from you or from Ms. Paavola if you wish to comment on
9 what appears to be an error, factual error in the Order.

10 MR. BLUME: Well, I am just thinking for purposes of
11 the record and for the appeal, we would ask and think the
12 Order should be accurate. And, no I mean, I understand that
13 an issue like that is probably not something that is going to
14 change your mind. It is just in reading the Order and
15 reviewing it, we felt like this and some other facts were
16 wrong and should be corrected.

17 THE COURT: All right. That is a valid position.
18 And I accept the argument that whether or not there was some
19 basis for me to have come away with that conclusion is beside
20 the point. It is apparent at this juncture that it is not an
21 accurate statement of what happened. So, I am going to issue
22 an Order that will amend that factual finding.

23 Now, are there any other actual findings in particular
24 Mr. Blume, that you believe would rise to the level of being
25 either one, an error that needs to be corrected for the

1 accuracy of the record, or secondly, something that may bear
2 upon the decision made by the Court?

3 MR. BLUME: Ms. Paavola, do you want to respond to
4 this or do you prefer that I do?

5 MS. PAAVOLA: Yes, I would be happy to respond to
6 that. I think that there are several in the attachment, the
7 letter that was attached that are intertwined with some of
8 the findings that the Order makes. You know, for example,
9 the one about Mr. Pruitt on the first page of the attached
10 letter from March 24th, Mr. Pruitt's statement that he did not
11 consult the 2003 ABA Guidelines. He did testify to that.
12 However, the Order finds that he did not consult with them
13 because they did not yet exist. But that is factually
14 incorrect since the ABA guidelines have existed since 1989.

15 THE COURT: All right. Are there any others?

16 MS. PAAVOLA: Again, I think this letter that he
17 referenced from April responds to some of this, but it is our
18 position that the Court's Order makes a finding that Ms.
19 Tonya Brown was not a credible witness, because she had a
20 prejudice against the Solicitor's Office, because her
21 daughter was being prosecuted by that office. But her
22 testimony at the PCR Hearing was not that her daughter was
23 being prosecuted, but that her daughter was the victim of a
24 crime. And she specifically testified that she did not have
25 anything against the prosecutor's office. And that it wasn't

1 the same solicitor that is involved in this case.

2 THE COURT: All right. Let me take that down. I am
3 taking notes while you are commenting on those.

4 Are there any others that you believe are of sufficient
5 importance that may need to be addressed by the Court?

6 MS. PAAVOLA: Yes. The ones regarding Mr. Bookstein's
7 testimony. The Order in general finds that Mr. Bookstein's
8 testimony isn't relevant, because what he does wasn't
9 available at the time of Mr. Binney's trial. And the letter
10 points out in several respects that what Mr. Bookstein
11 testified to was available and known as early as 2002, and he
12 did explain that throughout his deposition testimony. And
13 much of the sections that said that Mr. Bookstein's testimony
14 isn't credible, reference two articles that he wrote in 2005.
15 But the articles don't discuss any techniques that Mr.
16 Binney's case involved.

17 THE COURT: Okay. And I note that is in the last
18 letter that you previously sent me. That is the last of the
19 factual claims that you raised in that correspondence. Are
20 there any other additional factual errors that you believe
21 the Order contains?

22 MS. PAAVOLA: I don't think so. The only other one
23 referenced in the Motion apart from the attachment was the
24 letter about [REDACTED] Binney, that the Court has already
25 addressed.

1 **THE COURT:** All right, very good. Let me hear now
2 from Mr. Salter on the three that were just raised, which is
3 the ABA Guidelines; Tonya Brown being not credible and the
4 reason for that being incorrectly stated, and then the Dr.
5 Bookstein issue.

6 **MR. SALTER:** Your Honor, I will speak to the first
7 two of that. Mr. Mabry will address Dr. Bookstein's
8 deposition.

9 **THE COURT:** Okay.

10 **MR. SALTER:** I think the Court's Order, beginning on
11 page sixteen of it, is correct. The Court indicated that as
12 a threshold issue, the Court did not accept Applicant's
13 counsels' argument that the guidelines established the
14 appropriate standard for counsels' investigation and
15 presentation. Because, that is precisely what Mr. Blume is
16 arguing on page sixty-six, lines nineteen through twenty-four
17 of the PCR transcript.

18 With respect to Mr. Pruitt's testimony, Mr. Pruitt did
19 testify that he did not rely upon the 2003 guidelines,
20 because those guidelines were not available at the time of
21 his representation, because the guidelines were being
22 amended. There were ABA Guidelines prior to 2003. However,
23 the 2003 guidelines were in the process of being amended. I
24 think again the Court's Order got it right.

25 We also stand by Your Honor's discussion of Ms. Brown's

1 testimony on page twenty-five and twenty-six. It is our
2 understanding that regardless of whether her daughter was a
3 victim or a defendant, that there was basically bad blood
4 between her and the Solicitor's Office's, over whatever
5 incident that involved.

6 Your Honor made several other findings that were not in
7 our proposed order with respect to the inadmissibility of her
8 testimony that we think are correct. That it potentially
9 involved the admission of hearsay. It could get into
10 inconsistent statements to his knowledge of the victim's
11 husband. I think Your Honor's findings are correct.

12 I will now turn it over to Mr. Mabry for a discussion of
13 Dr. Bookstein.

14 MR. MABRY: Yes, can you hear me, judge?

15 THE COURT: Yes, sir, I can.

16 MR. MABRY: Judge, I went back, I spent all day
17 yesterday going back and looking at Ms. Paavola's letter
18 regarding Dr. Bookstein, and reviewing his deposition and the
19 articles published in 2005. And I believe your Order
20 accurately reflects testimony and the evidence before the
21 Court including the deposition, and including the article
22 published. In fact on page 118 and 119 of his deposition,
23 you have to read his deposition from beginning to end,
24 because there is specific point in the deposition where he
25 says well, in the article I talk about this, and in the next

1 paragraph he talks about this. But when we got to the end I
2 asked him on page 118, we were unable to publish any aspect
3 of the work of the adult brain into how far the literature,
4 both psychiatric literature and the grant and contracts that
5 underwrote the software for the 3D image now and its
6 animation have all been defunded, and I asked him, did I read
7 that correctly, and he said, yes; and if he wrote that, and
8 he said, yes. Then I said that is talking about the 3D image
9 analysis that you used in this case, and he said, yes. It is
10 also talking about the situation in the middle of 2005. And
11 then I go on and ask him some more, and he said about the ---
12 So, at that time you could not get this process, the three-
13 dimensional process that you were using in your work to look
14 at these MRIs, talking about this case. Published on the
15 alcohol literature or any psychiatric literature in grant
16 contrast were all defunded, am I correct, and he said, yes,
17 and then everything changed. And I asked him if that was
18 2006, and he said after the writing in 2005.

19 So, I reviewed the Order and the Order accurately
20 reflects what his testimony was in the deposition. And, in
21 fact, he was overly kind to the defendant. Because, if you
22 read this publication in 2005, that publication indicates
23 that they did not go to neuroimaging people to get it
24 published, but they actually went looking into the defense
25 bar for help in this area. So, we think the Order is

1 accurate.

2 **THE COURT:** Does anyone want to reply to that from the
3 applicant's position. I don't insist upon it, but if you
4 have something that you want to say in reply, I will give you
5 an opportunity to Mr. Blume or Ms. Paavola.

6 **MS. PAAVOLA:** Your Honor, Dr. Bookstein, you know,
7 the sections that Mr. Mabry has just cited discuss whether or
8 not his studies were defunded, and then they are subsequently
9 refunded by other people. But, that doesn't mean that the
10 work didn't exist before then. Dr. Bookstein clearly sites
11 two studies that were published in 2002 in his report on Mr.
12 Binney's analysis and defining from the 2002 studies which
13 were both published in those years are the basis for the
14 findings he made in this case.

15 **THE COURT:** Thank you. And Mr. Blume?

16 **MR. BLUME:** No, nothing on this point.

17 **THE COURT:** All right. Let's move forward to the
18 issue of Juror Viquez, and talk a little bit about that issue
19 if we may.

20 Let me begin by asking, so our record here in this
21 proceeding will be fairly complete, what is it that the Juror
22 Viquez, what was the position that he took both at deposition
23 and in Affidavit, which I excluded happened at the trial?

24 **MR. BLUME:** Do you want to provide the substance, and I
25 will make any argument?

1 **MS. PAAVOLA:** Mr. Viquez testified that he did not
2 want to vote for the death penalty, and that the other jurors
3 in the room with him pressured him to do that by calling him
4 names, and making reference to the fact that he was not born
5 as a U.S. Citizen. And telling him that if he did not do
6 what he told the Judge that he was willing to do and vote for
7 death, he would go to jail.

8 **THE COURT:** All right. Now, let's go to the legal
9 argument that arises from that factual claim. And Mr. Blume,
10 did you want to speak to the legality --- the legal
11 implications?

12 **MR. BLUME:** Well, I mean, the legal --- I'm sorry, I
13 thought you were talking about whether -- Essentially it
14 would be that there was racial and ethnic bias in the jury
15 room, which was used to coerce Mr. Viquez in the voting for
16 death, and this was a position which he didn't want to do,
17 and he was pressured through this sort of use, and I will
18 call racial and ethnic slurs and threats, and that the jury
19 has to be unanimous to impose the death penalty. That that
20 renders the death penalty in this case invalid.

21 **THE COURT:** And now moving forward to admissibility,
22 under what theory and particularly here at PCR would that be
23 admissible and really cognizable?

24 **MR. BLUME:** Well, to claim effectively jury misconduct;
25 claims of jury misconduct are generally or often, or not

1 often but are commonly raised in post-convictions, because
2 the information was not available. This is not information
3 that was available or known at the time of trial. There have
4 been other cases where issues of other bias in the jury room
5 has been admitted. But it really couldn't have been raised
6 previously. Post-conviction would be the place to do it. I
7 think it was relevant to this post- conviction relief action.
8 And also the fact that it was done by deposition, I mean it
9 is not as if --- Yes, there was an affidavit which the Court
10 excluded. But because everyone knew that Mr. Viquez was
11 going to be unavailable at the time of the post-conviction
12 relief hearing, the Attorney General provided notice of that,
13 and provided the affidavit, and the deposition was taken and
14 the anticipation was he would not be available, and it would
15 be admissible. Depositions have been admitted in numerous
16 post-conviction relief actions.

17 **THE COURT:** All right. And let me hear from the State
18 about the admissibility of it, and my findings in the Order,
19 whatever your position is; we will be glad to hear from you.

20 **MR. MABRY:** This is Mr. Mabry, Judge. We believe the
21 findings in the Order are correct.

22 First of all, the only evidence that they offered at the
23 hearing in this regard was the quote, and I use the word
24 loosely quote, affidavit of Juror Viquez. It was basically a
25 signed statement, because it was not sworn. The Court

1 excluded it, would not allow it into evidence, and allowed it
2 to simply to be mark as an exhibit so any appellate court
3 could review the Court's decision. It was not a signed or a
4 sworn affidavit. It did not fall under the statute. That is
5 why it was excluded. And they did not offer the deposition
6 into evidence. It was never entered into evidence. That is
7 incorrect. What occurred then was, the State had the
8 deposition marked as a court's exhibit in case the appellate
9 court ever reviewed the admissibility --- the Court's
10 determination to not admit the affidavit to show there was no
11 prejudice.

12 So, there is no evidence in the record of supporting any
13 juror misconduct. That is the first problem they are
14 claiming.

15 The second problem is Juror Viquez admits in his
16 deposition that it is either toward the end paragraph or six
17 or thirteen, I can't remember the exact number, those
18 paragraphs under the fourth affidavit is not even true. He
19 didn't say those things. And we attached the deposition of
20 the Court's exhibit so that it is clear to any reviewing
21 court that this recorded affidavit does not in fact, contain
22 stuff that is not even true.

23 **THE COURT:** All right. And now putting aside the
24 veracity of it, and let's just assume for the moment it is
25 true; what is your position on whether that would be

1 admissible to collaterally attack the affidavit of a juror to
2 collaterally attack a jury's decision?

3 MR. MABRY: Right. Our position that speaks to our
4 hearing and still remains is that it is not admissible,
5 especially given his deposition testimony. He could not even
6 remember in his deposition what these other jurors said to
7 him. And I have not reviewed it a long time. But I remember
8 asking him that, and he couldn't remember exactly what they
9 said. He also said that he still made the right decision.
10 So, it did not affect his ultimate decision in this case.

11 THE COURT: All right. And then Mr. Blume, let me
12 come back to you if I may. My records reflect that I believe
13 it was back in the year 2007 I was mailed by Mr. Salter a
14 copy of Juror Viquez's deposition. But I do not reflect in
15 my notes that it was ever put into evidence at the trial. I
16 do not have it down as a trial exhibit. So, tell me, how is
17 it part of our evidentiary record here?

18 MR. BLUME: Your Honor, maybe I am wrong about this.
19 This was my understanding, that it was admitted into the
20 record that either at the end or at some point at the PCR
21 hearing. I didn't go look, and I didn't realize that was an
22 issue. I thought the deposition was admitted.

23 THE COURT: All right. Ms. Paavola, do you have a
24 different recollection?

25 MS. PAAVOLA: No, Your Honor. It was my understanding

1 that the deposition was offered as an exhibit at the hearing.

2 THE COURT: All right. Let me just go ahead and state
3 on the record with regard to this particular issue.

4 I am going to decline to grant any relief on this issue,
5 because again for the same reasons.

6 I find that the affidavit was clearly inadmissible
7 because it was not sworn.

8 The deposition, I do not believe was part of the record.
9 But even giving the benefit of the doubt to the applicant on
10 that point, I find that it is not credible, not consistent
11 with the comments made in the affidavit.

12 And I simply do not find sufficient evidence here in any
13 way to overturn or impact the verdict below.

14 And even further, I am not certain that any of that
15 would be admissible, even if it was all completely true at
16 this juncture at PCR to overturn a, I guess to collaterally
17 attack the decision of the jury. So, I am again going to
18 deny relief on that point.

19 And let's move to the final point, which may be the most
20 important of them all, which is the charge given by Judge
21 Cole that the jury could not recommend life as an act of
22 mercy. That is not the exact wording. That is a paraphrase.
23 And subsequent decisions that have granted post-conviction
24 relief, I believe the Hughey decision is one which was
25 referenced by Mr. Blume and Ms. Paavola, and that was decided

1 by Judge McCaulay, and that happened in the year 2010. I am
2 not aware of the current appellate status of that decision.
3 And apparently since that time, there has been another PCR
4 granted on the same basis.

5 So, Mr. Blume or Ms. Paavola I will be glad to hear from
6 you on that point.

7 **MR. BLUME:** Yes, sir. The other case is Kamell Evans
8 out of Greenville County, where relief was granted recently
9 on the same issue.

10 I mean, the instructions in the case are virtually
11 identical. In all these cases this is an idiosyncratic
12 instruction given by Judge Cole, and he used it in Rosemond,
13 as well as Hughes, Evans, and in Mr. Binney's case. There is
14 no material distinction in the instructions, and has formed
15 the basis for relief in the other cases in which it has been
16 given. And, we don't see any viable reason that the same
17 result shouldn't occur in this case. The instruction really
18 precludes the jury from considering, from giving a life
19 sentence as an act of mercy. It is inconsistent with the
20 Eighth Amendment. It is inconsistent with the Supreme Court
21 Jurisprudence. That was a defect recognized in Rosemond. It
22 is a relatively small set of cases in which this instruction
23 was heard. But there is no basis that we see that
24 distinguishes the instructions given in the Rosemond.

25 **THE COURT:** And has the Supreme Court considered these

1 PCR cases yet? Have they reached the argument level, or
2 decision level by the South Carolina Supreme Court?

3 MR. BLUME: My understanding is, and Mr. Salter and Mr.
4 Mabry may know more than I do, is that Hughey is pending on
5 cert. The cert is pending before the Court in a cert
6 petition. And in Evans, the cert decision the Briefs have
7 been --- not all the Briefs have been filed. I think they
8 are still in the briefing stage in Evans. But, I am not ---
9 but Mr. Salter or Mr. Mabry may know better.

10 THE COURT: Mr. Salter, do you know the status of
11 those two cases?

12 MR. SALTER: Yes, sir, Your Honor. Certiorari is
13 pending in both. I believe the last paragraph presented by
14 Mr. Blume is correct in Evans, all the briefing has not yet
15 been done. The briefs have been filed. The pleadings have
16 been filed in the Hughes case. We are the appealing party on
17 those issues.

18 THE COURT: All right. And then Mr. Blume told us why
19 he felt that should entitle Mr. Binney to relief. Let me
20 hear from you, if you believe it should not, why?

21 MR. SALTER: Your Honor, we think that you got it right
22 on pages seventy-three to seventy-six of your Order. The
23 bottom line in all of this is at the time that this Court
24 held the hearing in May of 2007, Hughes was still law.
25 Counsel can't be ineffective in failure to anticipate a

1 change in the law. Obviously, we also take the position that
2 because this is the change in the law, it should not be
3 applied retroactively. The problem is relying upon the
4 Hughes PCR opinion, is that in that case the relief was
5 granted on the substantive claim that the charge was bad.
6 And that goes beyond the power of the post-conviction relief
7 court to grant it, because it is an issue that was litigated
8 on direct appeal.

9 Now, there was a different result reached in others, but
10 I went through, and I believe that Your Honor correctly
11 address the issue in the Order.

12 **THE COURT:** But I am thinking beyond where we are
13 today, and trying to bring some judicial economy. Of course,
14 there is a Federal Habeas Corpus coming, as well as perhaps
15 other collateral proceedings. And, is the history of
16 jurisprudence in this area, such that when a Court grants
17 relief, I am talking about the U.S. Supreme Court obviously,
18 with wording in a charge that is later to be found
19 unacceptable, even if this was not the law at the time it was
20 given? Ultimately does the applicant or the defendant
21 receive relief somewhere along the way from it? What do you
22 say to that, Mr. Salter?

23 **MR. SALTER:** No, he does not because, the claim is one
24 of whether or not counsel is ineffective.

25 **THE COURT:** Well, I hear what you are telling me. I

1 am asking though about fairness and about whether this is an
2 appropriate decision. I realize you are talking about post-
3 conviction relief claim and this is where we find yourself.
4 But I am really trying to look at the big picture to
5 determine whether or not the applicant should be granted
6 relief.

7 Because number one, there may be relief coming somewhere
8 else down the line.

9 Or secondly, just the fairness and equity demands it.

10 **MR. SALTER:** No, sir. I would take the position that
11 fairness and equity demand the relief not be granted.

12 First off, this is not apart from ineffective
13 assistance, this is not a constitutional claim, this is a
14 state law issue. The State Supreme Court in Hughey, which is
15 what the lawyers had a right to rely upon when conducting
16 their representation of Mr. Binney, that law was discharged
17 as not bad. The charge is good. It accurately reflects
18 state law. So, and the irony is that Hughes would have still
19 been the law if there had not been an interlocutory appeal
20 that took several years. There is no federal constitutional
21 right to this claim. The instruction did not preclude a
22 consideration of mercy. And I think and I believe in the
23 decision of California versus Brown, or Brown versus
24 California, that it would conflict with that. The State
25 Supreme Courts have indicated they do not want to see the

1 charge given in the future. I don't think it impacts cases
2 where the charge has been previously given. That was in the
3 Rosemond case itself, and I think again that justice demands
4 that relief be denied.

5 **THE COURT:** All right. Are there other --- Obviously,
6 I was not present at Judge Cole's charge when it was given.
7 I have not had the chance to review it recently at least. I
8 wonder if there are other comments or portions of the charge
9 that bear on this that would tend to mitigate that if it is
10 indeed an error. What do you say to that Mr. Salter, or Mr.
11 Mabry; do you have a response? Or maybe I should say are you
12 prepared to respond to that? I know you may not have looked
13 at that charge either lately.

14 **MR. SALTER:** I did not look at the charge, but I
15 believe in some of our prior submissions, I assume I did this
16 in the last proposed Order, I know we did it in the original
17 one, the remaining portion of his jury instruction are such
18 that taken as a whole the consideration of mercy is not
19 precluded. And Your Honor's Order makes a finding in this
20 case. And again I think we got it right in this case.
21 Again, we are going to appeal any adverse determination and
22 do everything in judicial economy to be had. It will be
23 litigated for years.

24 **THE COURT:** That is an interesting point. Mr. Blume,
25 let me come back to you, and what do you say to what you have

1 heard?

2 **MR. BLUME:** I looked at it, and there has been some
3 other situations where in the history of death penalty
4 litigation in this state and a judge gave an idiosyncratic
5 set of instructions, or particular practice that was later
6 found to be either unconstitutional by the State Supreme
7 Court or the U.S. Supreme Court. And you know in general, I
8 think the State Supreme Court has tried to clean these up in
9 sort of a uniform way. And it certainly would be an anomaly
10 if you played this out, because the instructions are
11 identical. This was sort of a pattern instruction. Judge
12 Cole gave it, and he was the only judge that gave it. And to
13 say okay, you know, Rosemond gets relief based on this.
14 Hughey gets relief based on this. Evans gets relief on this.
15 All these cases --- Evans and Hughey were both in the exact
16 same procedural posture as Mr. Binney's case, but somehow Mr.
17 Binney doesn't. It is just bad instruction. It precluded at
18 least one key component in the reason why a jury can give
19 life/mercy. And there is really not a legitimate reason to
20 say, well okay, Binney should loose, and Hughey and Evans
21 should win. There is just no real reason for that. And I
22 think if you look at the Hughey Order and the Evans Order, in
23 part they were based on what I think Your Honor put his
24 finger on that in a way, a sense of fairness. This is a bad
25 instruction. There is not a whole lot of cases out there.

1 But in the cases in which it was given, those defendants are
2 entitled to a new sentencing proceeding that is not
3 contaminated by instruction which precludes a key component
4 of the reason a jury might give life.

5 **THE COURT:** And was that the relief in Hughey and
6 Evans granted by the trial court which was a re-sentencing
7 proceeding?

8 **MR. BLUME:** Yes, Your Honor.

9 **THE COURT:** All right. And tell me, who was the trial
10 court in Evans?

11 **MR. BLUME:** The trial judge, or the PCR judge, you
12 mean?

13 **THE COURT:** Yes.

14 **MR. BLUME:** The PCR judge in Evans was Judge Stilwell
15 from Greenville.

16 **THE COURT:** All right, very good. What I would like
17 to do is just take that matter under advisement, and review
18 it, consider it, and let you know sometime in the near future
19 what my decision will be with regard to that.

20 Is there anything else that anyone else wishes to place
21 on this record before we close the record about that final
22 issue we were discussing, or anything else which was raised
23 in the Motion to Alter or Amend?

24 Let's start with the State, Mr. Mabry, or Mr. Salter?

25 **MR. SALTER:** Just very briefly. Your Honor, Mr.

1 Rosemond did not get relief based on that jury instruction.
2 Again, the Court seems to admonish basically -- they want to
3 put it out there, we don't like this jury instruction, but
4 they did not grant relief on that.

5 Also, again in Hughey, Judge McCaulay granted relief
6 based on the substantive claim that the charge was bad.
7 Which the Supreme Court had already said in Hughey it was
8 not. His Order should not have any weight whatsoever.

9 Now, in Evans, the Judge did reach a contrary
10 conclusion.

11 **MR. MABRY:** Judge, this is Mr. Mabry. I have not
12 looked at that Order. That was Ms. Brown's case in our
13 office. I believe Judge Hill, he granted relief on
14 ineffective assistance of counsel, finding that --- it was
15 something, it was that mercy charge, but it was a federal
16 issue that they should have raised.

17 **THE COURT:** Mr. Salter, would you kindly send to me,
18 and you may do it electronically would be find, Judge
19 McCaulay's Order as well as Judge Hill's Order in those two
20 cases?

21 **MR. SALTER:** Yes, sir, Your Honor.

22 **MR. MABRY:** I may be wrong Your Honor, but I am going
23 by what Ms. Brown told me again. But I believe it was
24 something about maybe the attorney to preserve the issue
25 federally, I think, or a federal violation.

1 **THE COURT:** All right. We will review those. But if
2 you would kindly send --

3 **MS. PAAVOLA:** I'm sorry, but those are attached to the
4 Applicant's Motion to Alter.

5 **THE COURT:** Excuse me. I am actually looking at them
6 even as I am asking for that. Thank you, Ms. Paavola. They
7 are. I see them. I have them both.

8 Anything further now from the State? Hearing nothing.
9 How about from Mr. Binney; anything further counsel?

10 **MR. BLUME:** No, Your Honor.

11 **THE COURT:** All right. This case has been pending for
12 a long time. I appreciate your patience. I appreciate the
13 professionalism with which an advocacy with which these
14 issues are argued. And I will be back in touch in near
15 future. I am going to delete the point about the
16 hysterectomy, and will consider the other matters. And then
17 of course, take a close look at this issue about the charge.
18 And I will be back in touch after a decision on those are
19 made.

20 In the meantime, happy holidays everyone. Merry
21 Christmas. Good bye.

22 (Whereupon, this hearing was concluded at
23 10:26 a.m. on Friday, December 9, 2011.)

24 -- END OF TRANSCRIPT --

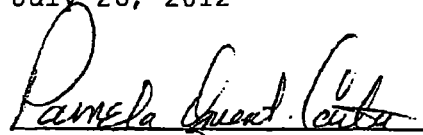
CERTIFICATE OF REPORTER

29

I, the undersigned, Pamela Ozment-Cartee, official Court Reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the above captioned case, relative to appeal, in The Court of Common Pleas in Darlington County, South Carolina, on the 9th day of December 2011.

I do further certify that am neither, of kin, counsel, nor interest of any party hereto.

July 26, 2012

A handwritten signature in cursive script, appearing to read "Pamela Ozment-Cartee", is written over a horizontal line.

Pamela Ozment-Cartee
Circuit Court Reporter

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

Jonathan K. Binney)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2006-CP-11-223

**ORDER GRANTING
APPLICANT'S MOTION TO
RECONSIDER THE DENIAL OF
POST CONVICTION RELIEF
AND
GRANTING POST-CONVICTION
RELIEF AS TO SENTENCING**

 This death penalty Post-Conviction Relief (PCR) action is before the Court pursuant to an April 7, 2006 application filed on behalf of Jonathan Kyle Binney, as amended. This Court held an evidentiary trial into the matter on May 29-June 1, 2007, at the Cherokee County Courthouse. Applicant was present at the trial, and John H. Blume, III, Sheri Lynn Johnson and Emily C. Paavola, Esquires, represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Anthony Mabry represented the State. On September 8, 2011, this Court entered an Order denying post-conviction relief. The passage of time between the trial and the issuance of a final Order occurred in part because of an interlocutory appeal over issues of attorney/client privilege that arose during the pendency of the case. After the final judgment was issued by this Court denying PCR, Applicant moved the Court to alter or amend the judgment on September 16, 2011 (hereafter, "Motion to Alter"). On December 9, 2011, the Court held a telephonic hearing regarding the issues raised in Applicant's Motion to Alter. Applicant was represented during this hearing by Mr. Blume and Ms. Paavola. Mr. Salter and Mr. Mabry participated on behalf of the State.

After considering the arguments made by counsel for both parties, this Court determines that the facts as stated in its original Order, filed September 8, 2011, must be altered in two

instances. Moreover, the Court amends its original Order by granting a new sentencing hearing based on an ambiguous jury charge about mercy given by the trial judge. The reasons for these amendments are stated herein.

I. FACTUAL AMENDMENTS

The original Order found that Applicant's daughter, [REDACTED] Binney, was required to have a hysterectomy as a result of the sexual assault against her. See September 8th Order at p.7. Applicant has noted that this factual assertion is incorrect and that Dr. Mainman testified at trial that [REDACTED] suffered primarily internal injuries, her uterus was not damaged, and she was not expected to have any difficulties bearing children. Record on Appeal p.3193. After review of the record, this Court agrees that this factual finding was incorrect and hereby strikes this factual assertion from the original Order.

Sub 2
Second, in its September 8th Order, the Court found that Applicant's PCR witness, Ms. Tonya Brown, was biased against the Seventh Circuit Solicitor's Office and the Gaffney Police department because these entities were prosecuting her daughter. See September 8th Order at p.26, n.12. Applicant points out that Ms. Brown did not testify at the PCR hearing that her daughter was being prosecuted. Rather, she testified that her daughter had been molested by her landlord and the authorities told her that they could not do anything about this. Ms. Brown stated that she felt this was unfair, but that she did not "have anything against all them." PCR Hearing Transcript p.391. While the Court still finds Ms. Brown to be biased, the reason given was incorrect. Thus, the original Order is hereby altered in this regard. The Court denies the remainder of Applicant's allegations of factual error as either lacking merit or harmless.

II. AMENDMENT GRANTING POST-CONVICTION RELIEF

Applicant alleges that his trial counsel was ineffective in failing to object to the trial court's sentencing-phase instruction that the jury could not give life as an act of mercy. *See* PCR Application, Ground 10 & 11(b)(6). This instruction is identical to the one that the South Carolina Supreme Court found erroneous in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). In addition, two other circuit courts have recently granted post-conviction relief on the basis of this erroneous instruction. *Hughey v. South Carolina*, 2000-CP-01-0212, Order Granting Post-Conviction Relief dated May 14, 2010; *Evans v. South Carolina*, 2006-CP-23-7719, Order dated August 29, 2011. After full review, this Court determines that Applicant is likewise entitled to relief on this claim and orders that Applicant is, therefore, entitled to a new sentencing trial.

93 The South Carolina Supreme Court, while granting relief based on a finding of ineffective assistance due to counsel's failure to present evidence of the defendant's mental illness, chose nevertheless to address an additional issue. Rosemond claimed that trial counsel was also ineffective for failing to object to the trial court's instruction to jurors 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.*" *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10 (emphasis in original). The Court found that the trial court's instruction prevented jurors from considering mercy as part of their sentencing decision. This, the Court emphasized, ran contrary to state law, under which a defendant is entitled to present evidence of mercy (see *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991)) and state law requiring that jurors be instructed that they can return a life sentence "for any reason or no reason at all." *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10;

see also, *id.* ("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.").

Here, as in *Rosemond*, the trial judge instructed Applicant's jury: "[Y]ou may recommend a 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. 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. See, e.g., *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993); *State v. Johnson*, 339 S.C. 114, 126, 525 S.E.2d 519, 525 (2000); *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004); *State v. Sapp*, 366 S.C. 283, 292-94, 621 S.E.2d 883, 887-88 (2005). Under S.C. Code Ann. § 16-3-20(C), "[t]he judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law. . ." Mercy is embraced within this statutory directive as a basis for returning a life sentence. This is also supported by the fact that the statute does not require the jury to "weigh" aggravating circumstances against mitigating circumstances; rather, South Carolina is a non-weighing state, meaning the jury can return a verdict of life for any reason "otherwise authorized or allowed by law." S.C. Code Ann. § 16-3-20(C).

Given this precedent, of which trial counsel should have been aware, it was not proper for the trial court in Applicant's case to issue an instruction to the jury that it could not return a life sentence "as an act of mercy." Trial counsel's failure to object to the charge was deficient. Moreover, trial counsel's failure prejudiced Applicant because it permitted the jury to operate

under the false belief that they could not consider mercy as a reason to impose a life sentence when, in fact, it has long been the law in this State that a jury may properly consider mercy and may impose a life sentence for any reason or no reason at all. The improper instruction was inherently prejudicial because it prevented the jury from carrying out one of its core responsibilities, *i.e.*, to determine whether the defendant should be sentenced to life as an act of mercy. *See, e.g., State v. Blakely*, 158 S.C. 304, 304, 155 S.E. 408, 409 (1930) (holding a trial court's instructions cannot impede "the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reached the conclusion that the appellant was guilty of murder."); *State v. Chasteen*, 228 S.C. 88, 104, 88 S.E.2d 880, 887 (1955) ("The discretion of the jury as to recommending mercy is an unlimited one. . . . [A] recommendation to mercy does not have to be based on evidence; [rather], it [is] sufficient to simply inform the jury that they may recommend the defendant to mercy, the effect of which is to reduce the punishment to life imprisonment."); *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930) (same); *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387 (1942) (same); *State v. Tyner*, 273 S.C. 646, 660, 258 S.E.2d 559, 566 (1979) ("the trial judge failed to charge the jury that it could recommend life imprisonment even if it found the existence of one or more statutory aggravating circumstances beyond a reasonable doubt. The omission of this instruction to the jury was an "arbitrary factor," also requiring reversal of the death penalty") (citing S.C. Code § 16-3-25(C)). Applicant is, therefore, entitled to a new sentencing trial.

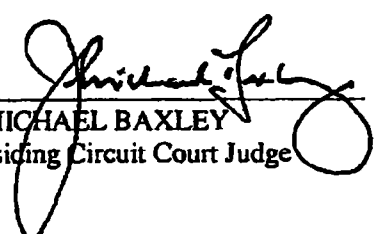
In making this decision, this Court is aware of Respondent's argument that this Court is misconstruing the words of the trial judge, and that the charge read in its entirety informed the jury that a life sentence can be given as an act of mercy. Moreover, Respondent argues that within the specific sentence from the charge of which Applicant complains, the phrase "other

than as an act of mercy," is not intended to limit the preceding phrase "for any reason, or for no reason at all," but to actually expand it. The language used is, at best, ambiguous, and certainly capable of being construed as a limitation; thus, trial counsel should have objected.

IT IS THEREFORE ORDERED:

1. That the Court's original Order is altered in two factual respects as stated above; and,
2. That Applicant is granted a new sentencing hearing based on the trial court's ambiguous jury charge regarding the jury's consideration of mercy.

IT IS SO ORDERED this 11th day of May, 2012.


J. MICHAEL BAXLEY
Presiding Circuit Court Judge