STATE OF SOUTH CAROLINA
In the Supreme Court



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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
(Capital PCR: 2006-CP-23-7719)
The Honorable D. Garrison Hill, Circuit Court Judge

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Kamell D. Evans,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

Appellate Case No. 2011-188687

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# PETITIONER/RESPONDENT'S REPLY TO BRIEF OF RESPONDENT ON BEHALF OF RESPONDENT/PETITIONER

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PETITIONER/RESPONDENT

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## ARGUMENT IN REPLY

Petitioner/Respondent, the State, began its brief with a succinct summary of the problems with the PCR order: "the PCR judge's decision is controlled by no less than three distinct errors of law, ... lacks factual support in the record" and rests on "a mash of inconsistent theories." (Brief of Petitioner/Respondent, p. 14). The errors of law, the lack of factual support, and the "mash of inconsistent theories" are merely highlighted and perpetuated in Respondent/Petitioner's brief. Those errors have already been fully explained and discussed in the State's brief and will not be repeated here. Several points, though, must be clearly understood to fairly evaluate the divergent positions presented by the parties.

First, the State does not assert that mercy is not available in capital proceedings in this jurisdiction. It may be requested. It may be received. The State neither seeks to change or challenge that position.

Second, it is not contested, in regard to the instant case, that trial counsel presented a case in mitigation which included family and friends seeking mercy and that counsel requested the jury exercise mercy.[1] (See Brief of Petitioner/Respondent, pp.36-37; Respondent's Brief on Behalf of Respondent/Petitioner, p. 5). It is likewise not contested that the jury was instructed that they could return a life sentence *regardless of whether they accepted or rejected the mitigation evidence*, (see App. p. 1784, lines 9-11, "You may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance"), and *regardless of*

[1] In fact, the parties also appear to agree that it seems most unlikely that trial counsel, so focused on mercy, would not have objected to a charge that they thought precluded mercy. (See, for example, Brief of Respondent on Behalf of Respondent/Petitioner, pp. 6, 11, 16, 22-23).

*whether circumstances of aggravation* were proven beyond a reasonable doubt, (see App. p. 1785, lines 4-7, "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."). In short, there was no limitation on the expression of leniency in sentencing. Accord *State v. Hicks*, 330 S.C. 207, 219-219, 499 S.E.2d 209, 215, *cert. denied* 525 U.S. 1022, 119 S.Ct. 552 (1998) ("the trial judge is not required to instruct the jury it could impose a life sentence 'for any reason or no reason at all' where the jury is informed, as it was here, it could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found").[2] Thus, having been adequately and properly instructed that they could return a life sentence whether they accepted *or rejected* any of the evidence offered in mitigation, the jury determined that the death sentence was appropriate based on the particulars of the defendant and his crime. See *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378 (1982) ("For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt."). The jury was not precluded from the consideration of evidence or the exercise of mercy in reaching this decision.

Third, there is a difference between evidence in mitigation and the response to evidence in mitigation. Federal law protects the defendant's right to present evidence in mitigation and have that evidence considered. It does not protect (address or require) a jury's exercise of mercy apart from evidence presented. See *Kansas v. Marsh*, 548 U.S.

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[2] Respondent/Petitioner simply does not address this precedent at all eventhough the concepts are quite similar, and the holding is supportive of the State's position.

163, 181, 126 S.Ct. 2516, 2529 (2006) ("the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional")[3]; *Lockett v. Ohio*, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964 - 2965 (1978) ("the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"). However, the possibility of mercy in sentencing does not offend the constitutional approval of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2902, 2937 (1976) ("Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution"). Even so, this Court tied the propriety of the mercy charge in *Rosemond* to consideration of "a plea for mercy" as evidence. *Rosemond v. Catoe*, 383 S.C. 320, 329-330, 680 S.E.2d 5, 10-11 (2009). Respondent/Petitioner apparently concedes no such actual "plea" was admitted into the evidence, but appears to argue that the charge somehow limited the hoped for effect of his general mitigation evidence and counsel's argument.[4] (Brief of Respondent

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[3] The Supreme Court referenced that Kansas also allows for consideration of a wealth of mitigation evidence and instructs the jury may exercise mercy. 548 U.S at 176, 126 S.Ct. at 2526.

[4] To the extent that he argues that mitigation may only be given effect by the exercise of mercy, *i.e.* a result of a life sentence, such reasoning is counterintuitive to the legal premise. (See Brief of Respondent on Behalf of Respondent/Petitioner, at pp. 23-25). The presentation of mitigation evidence does not guarantee a lesser sentence. Defining "giving effect" as "securing a life sentence" reflects the conflation of an adversarial position with a legal structure. It is when evidence is excluded, either from sentencing or from consideration, that a legal flaw arises. See, for example, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264, 127 S.Ct. 1654, 1675 (2007) ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence—because it is forbidden

on Behalf of Respondent/Petitioner, p. 27 n. 9). But, once again, this is not a case where the jury was prevented from considering evidence or prevented from exercising mercy. Whatever distinction he wishes to draw carries no difference on this record.

Fourth, the issue here, at bottom, should be whether the jury instructions were sufficient when viewed as a whole – the nub of the prejudice issue in this case. However, it is the effect of one phrase of one sentence of the jury charge repeatedly referenced in isolation that is the focus of the relief. Critically, Respondent/Petitioner never explains his position on a reasonable juror's understanding of the charge *as a whole* – specifically, in regard to the clear charge that the jury could return a life sentence even if all mitigation evidence presented was rejected. (See App. pp. 1784-1785). This is arguably greater protection for the exercise of mercy than Respondent/Petitioner now argues for – he argues that a charge was necessary to allow a jury to *give effect to mitigation evidence.* (See Brief of Respondent on Behalf of Respondent/Petitioner, p. 24). When viewed as a whole the jury instructions correctly and plainly charged that the jury could return a life

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from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed."). Thus, it is not tied to effect. *Id.* See also *Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir. 2006), *amended*, 01-99015, 2006 WL 997605 (9th Cir. Apr. 18, 2006) ("We have recognized a distinction between a failure to consider relevant evidence and a conclusion that such evidence was not mitigating. ... Once mitigating evidence is allowed in, a finding that there are 'no mitigating circumstances' does not violate the Constitution" as fact-finder allowed to "assess" the weight of the evidence). Here, the reasoned moral assessment of defendant and his crime in his individualized sentencing proceeding was not restricted or limited regarding his mitigation evidence and his request for leniency – the jury was clearly instructed they could recommend a life sentence with or without findings regarding the mitigation and even with a finding statutory aggravating circumstances existed. This allowed – without objection or contest – even more discretion for leniency than required for the constitutional protections. See *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378 ("punishment must be tailored to his personal responsibility and moral guilt."). See also *Kansas v. Marsh*, 548 U.S. at 171, 126 S.Ct. at 2523 (citing *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990) ("The Court also pointedly observed that while the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered" however, "the States are free to determine the manner in which a jury may consider mitigating evidence.").

sentence for any reason – based on mitigation evidence or not, even where the jury found the presence of a statutory aggravating circumstance. That is an instruction allowing the exercise of mercy.

Lastly, Respondent/Petitioner is also forced to implicitly concede that this charge issue at its core is an issue of state law. Even while he urges the finding of federal law implications, he repeatedly returns to *Rosemond*. (See Brief of Respondent on Behalf of Respondent/Petitioner, pp. 8-9; 11; 14-16; 19-20; 23, 28-29). This is, indeed, a matter of state law – in particular, *Rosemond* – and this Court has already spoken on the phrasing at issue. The one phrase at issue has already been disapproved of by this Court in *Rosemond*. That particular phrase may no longer be used, and need not be disapproved of once again for instruction to the bench and bar.[5] However, the issue here is more complex than the disapproval of the phrasing of one part of one sentence in the charge. The issue here is whether the charge as a whole was sufficient, which, in turn, informs and affects the determination of *Strickland* [6] prejudice. This record confirms the charge was sufficient, when properly viewed as a whole, and that Respondent/Petitioner failed to show *Strickland* prejudice. Again, not to be lost in the minutia of Respondent/Petitioner's phrase-focused argument is the fact that his mitigation evidence was before the jury and the jury was not precluded from consideration of any evidence or exercising mercy/leniency in as much as it could return a life sentence even where there were

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[5] Respondent/Petitioner also appears to object to the State arguing against the *Rosemond* precedent, while at the same time conceding this Court did not address prejudice for the disapproved of language. (See Brief of Respondent on Behalf of Respondent/Petitioner, at p. 9). The concession makes moot the objection. The State is not seeking to argue against the disapproval of the language, the State is seeking to have this Court determine prejudice on this record. That is not inconsistent with *Rosemond*.

[6] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

aggravating circumstances proven beyond a reasonable doubt and no mitigating circumstances proven at all. Respondent/Petitioner cannot show *Strickland* prejudice – he cannot show prejudice at all. Respondent/Petitioner is not entitled to a new sentencing proceeding.

## CONCLUSION

For all the foregoing reasons, and the reason presented in full in the Brief of Petitioner/Respondent and this reply, the State submits that this Court should reverse the grant of relief.

Respectfully submitted,

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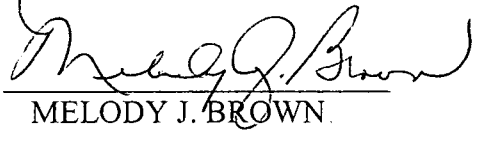
BY: 
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**PROOF OF SERVICE**

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I, Melody J. Brown, hereby certify that the *Petitioner/Respondent's Reply to Brief of Respondent on Behalf of Respondent/Petitioner* has been served upon Respondent/Petitioner by depositing one copy in the United States mail, postage prepaid, to each of his attorneys of record, addressed as follows:

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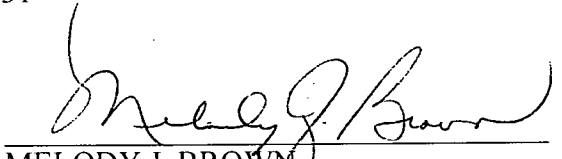
This 4th day of August, 2014.



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