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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

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

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No: 2011-188687

BRIEF OF PETITIONER/RESPONDENT

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ISSUES PRESENTED

I.

Whether the PCR judge erred in finding deficient performance under *Strickland v. Washington* for failing to object to the phrasing of the jury instruction regarding mercy where this Court did not disapprove of the phrasing until *Rosemond v. Catoe*, over four years after trial.

II.

Whether the PCR judge erred in finding *per se* error in the jury instruction regarding mercy, thereby avoiding a proper *Strickland v. Washington* prejudice analysis.

III.

Whether the PCR judge erred in finding a federal constitutional right to a mercy charge where federal precedent, without exception, does not support such a federal constitutional right.

IV.

Whether the PCR judge's factual finding that the charge at issue disallowed the exercise of mercy is wholly without factual support where no person ever testified that the charge was intended or heard to limit the exercise of mercy, and both trial counsel testified it was not heard as a charge that limited the exercise of mercy, and trial counsel was focused on an appeal to exercise mercy in their penalty phase presentation and closing.

STATEMENT OF THE CASE

This matter comes before the Court by way of an appeal from a decision in a capital post-conviction relief ("PCR") proceeding. The Honorable D. Garrison Hill found "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)." (App. p. 4186). Judge Hill rejected all other issues presented. The State appealed and Petitioner cross-appealed.

On July 14, 2011, the State filed a Petition for Writ of Certiorari. Respondent/Petitioner ("Evans") filed a return to the petition on November 18, 2011. The State made a reply on December 12, 2011.

Evans also filed his Petition for Writ of Certiorari with the return to the State's petition on November 18, 2011. The State filed its return on March 12, 2012, and Evans made a reply on April 20, 2012.

On April 16, 2014, this Court granted the petitions and directed additional briefing pursuant to Rule 243(j), SCACR. This Brief of Petitioner follows.

Prior Procedural History of the Case

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

Jury qualification and selection for the trial began on September 13, 2004. The Honorable J. Derham Cole presided. The guilt phase began on September 17, 2004. On September 18, 2004, the jury convicted Evans on all counts. (App. p. 1502). On September 20, 2004, the lower court began the penalty phase. On September 21, 2004, the jury found the following statutory aggravating circumstances as to Deputy Sapinoso:

> 1) The murder was committed while in the commission of the crime of act of burglary in the first degree;
>
> 2) The murder was committed while in the commission of the crime or act of kidnapping;
>
> 3) That two or more persons were murdered by the defendant pursuant to one act or one scheme or course of conduct; and
>
> 4) The murder was of a law enforcement officer during or because of the performance of his official duties.

(App. p. 1795).

The jury found the same aggravating circumstances as to Antonio L. Sapinoso with the exception of the law enforcement aggravator. (App. p. 1794). The jury also recommended death. (App. pp. 1794-95).

The trial judge found that the evidence warranted the sentence, the sentence was not a result of "prejudice, passion or any other arbitrary factor," and, in accordance with the jury recommendation, sentenced Evans to death. (App. pp. 1799-1800). The judge also imposed a life sentence for burglary. (App. p. 1799). No sentences were necessary for the kidnapping and weapon convictions. *See* S.C. Code § 16-3-910 and § 16-23-490 (sentences not applicable where defendant sentenced to death pursuant to murder conviction).

Joseph L. Savitz, III, Chief Attorney of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Evans in his direct appeal.

Appellate counsel filed a Final Brief of Appellant in this Court on July 25, 2006, and raised the following issue:

> The judge erred at sentencing by failing to instruct the jury on the statutory mitigating circumstance provided by *S.C. Code Section 16-3-20(C)(b)(6)*: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." A charge on this mitigator was necessary because both the State (by introducing Evans' statement) and the defense (through Evans' own testimony and the testimony of expert witnesses) had introduced evidence that the killings were not premeditated, but had occurred when Evans snapped under the combined strain of extreme emotional turmoil and profound depression, among other factors.

(App. p. 1824).

The State filed its final brief on July 25, 2006. (App. pp. 1836-1857). The case was called for oral argument on October 3, 2006. On November 6, 2006, this Court affirmed the convictions and death sentence in *State v. Evans*, Opinion No. 26220 (S.C.Sup.Ct. filed November 6, 2006).[1] (App. pp. 1858-1863). The Court subsequently issued the remittitur on November 22, 2006. (App. p. 1864). Evans did not seek review from the United States Supreme Court.

On November 13, 2006, Evans filed a Petition for Stay of Execution expressing his desire to file a PCR application. On December 4, 2006, Evans filed an application for post-conviction relief ("PCR"). (App. p. 1866). This Court granted the stay on December 6, 2006 and appointed the Honorable D. Garrison Hill to hear the PCR action. (App. p. 1865). On February 28, 2007, Judge Hill appointed William Nettles, Esq., and Hank Ehlies, Esq., counsel for Evans. On June 23, 2008, the judge additionally appointed Christopher Seeds, Esq.

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[1] Reported at 371 S.C. 27, 637 S.E.2d 313 (2006).

An evidentiary hearing began June 1-5, 2009, and concluded October 12-14, 2009. Mr. Nettles, Mr. Ehlies and Mr. Seeds represented Evans. Senior Assistant Attorney General Melody J. Brown and Assistant Attorney General Anthony Mabry represented the State. Evans raised multiple issues. (App. pp. 4387-4395). On August 31, 2009, before reconvening for the remainder of the PCR evidentiary hearing October 12, 2009, Evans offered an amendment to the application to include the following allegation:

> 9(b), 10(b)(12) Counsel failed to object to the trial court's instruction to the jury not to recommend a sentence of life based on mercy. See *Rosemond v. Catoe*, ___ S.C. ___, 680 S.E.2d 5 (No. 26679)(June 29, 2009)(overruling *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000)). On June 29, 2009, the South Carolina Supreme Court ruled that a trial court's charge prohibiting the jury from considering mercy was error and that trial counsel performed deficiently in failing to object to the charge. The trial court in *Evans* (the same as in *Rosemond*) provided exactly the same charge that the South Carolina Supreme Court rejected in *Rosemond*. In *Rosemond*, the 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*." 680 S.E.2d at 10 (emphasis in original). The South Carolina Supreme Court explained that, contrary to the trial court's charge, the jurors were "entitled to consider [mercy]":
>
> > 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, 156 (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*, 680 S.E.2d at 10-11. Here, as in *Rosemond*, the trial court also 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.) Defense counsel's summation emphasized mercy: "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." (R.

> 1770.) For the reasons set forth in *Rosemond*, the identical charge in Mr. Evans's [sic] violates South Carolina law and counsel's failure to object to the charge (see R. 1789), rejected in *Rosemond* and at odds with their defense, was deficient and prejudicial.

(App. pp. 2915-2926).

Respondent did not object to the amendment as it was based on new law not previously available to Evans, but noted its futility as raised as an ineffective assistance of counsel claim. (App. pp. 3280-3282). The Court took the motion under advise and later granted the motion to amend in the Order granting relief. (App. p. 4395).

On March 18, 2010, after the conclusion of the hearing, Judge Hill relieved Mr. Nettles and Mr. Seeds was formally appointed second chair.

Upon receipt of the transcripts for both parts of the hearing, Judge Hill established a briefing schedule for post-hearing briefs. Evans' brief was submitted on October 4, 2009. (App. p. 3906). The State submitted its post-hearing brief on November 10, 2010. (App. p. 4104). Evans submitted a reply on November 19, 2010. (App. p. 4217). On December 9, 2010, the PCR judge called for additional briefing of the *Rosemond* jury charge issue, and the State submitted its second post-hearing brief on the issue on December 14, 2010. (App. p. 4238). Evans submitted his second post-hearing brief on December 16, 2010. (App. p. 4245). The State and Evans both submitted proposed orders on January 19, 2011. On February 24, 2011, Judge Hill issued an Order denying relief on all grounds except the *Rosemond* jury charge issue. (App. p. 4254). On that issue, Judge Hill found deficient performance, presumed prejudice, and granted a new sentencing proceeding. The State filed a motion to alter or amend on March 9, 2011, (App. p. 4501), which was denied on March 10, 2011 (App. p. 4515). This appeal followed.

PETITIONER/RESPONDENT'S STATEMENT OF FACTS

There is no dispute that Evans shot and killed both victims after having held them hostage for approximately five (5) hours in the Sapinoso home in Greenville County. Evans acknowledged same in his statement to the authorities, in his testimony during the guilt phase, and in his closing statement to the jury. (App. p. 1233; p. 1432; p. 1473). At the PCR hearing, defense counsel testified that Evans repeatedly admitted the shooting, but maintained he wanted to pursue a manslaughter charge, *i.e.* he was provoked into shooting because Deputy Sapinoso reached for one of three guns Evans then had – the Deputy's own weapon Evans had taken from him. (App. p. 1444; pp. 2417-2418; p. 3821). Evans also admitted shooting Deputy Sapinoso in the back of head. (App. pp. 3807). Evans further admitted to his counsel that he was actually trying to re-load his weapon(s) when he was taken down. (App. p. 3818).

At trial, Evans testified that he went to see the Sapinosos on the night of April 1, 2003, because his relationship with Christina Rodriquez, a sister to Deputy Sapinoso, had soured and Christina had left him with financial difficulties. He asserted that he went to the Sapinoso home because they would "understand" his position of frustration, and "could put an end to everything." (App. p. 1425, line 11–p. 1426, line 4). He conceded he parked his truck away from the home, and waited for Deputy Sapinoso to return to the family home. (App. p. 1428). Evans testified he approached the Deputy when the Deputy drove up, and conceded he had a gun when he "asked" to speak with Deputy. According to Evans' trial testimony, the two sat on the porch until Evans began to cry and the Deputy suggested they go inside the home. (App. pp. 1428-1436). According to Evans, the Deputy's father was in the living room with them, while his mother remained upstairs in the house with her grandson. (App. p. 1431). Evans and the Deputy together called Christina. (App. pp. 1429-1430). Evans testified he placed Deputy Sapinoso's gun on the

coffee table in the living, and he only fired when he "perceived Joe going to the gun," and Mr. Sapinoso "standing up." (App. p. 1432).

The State's evidence showed that Christina had called the sheriff's department and told them that her brother, a sheriff's deputy, and her father were being held hostage, along with her mother and son, and that if she did not go to her home, Evans planned to kill her family. (App. pp. 1089-1091).

Tony Lee, a negotiator with the Greenville County Sheriff's Office, conducted negotiations with Evans to surrender and leave the home. Officer Lee testified that he initially made contact through Evans' sister, Tina, who was also present outside the home, and Lee told Evans he could come out at any time and he would not be harmed. (App. p. 1117, line 10-p. 1118, line 21). Through several hours of negotiations, in addition to speaking with Lee, Evans was also able to speak with family and friends who encouraged him to come out. (App. p. 1119, lines 6-15; p. 1121, lines 1-24; p. 1127, line 14- p. 1128, line 4). Evans complained to Lee about his relationship with Christina, but also indicated the situation was not limited to that problem, but was "bigger than that," though Lee was never able to ascertain exactly what Evans was referencing. (App. p. 1129, lines 15-25; p. 1134, lines 8-18). Evans remained "cordial and nice" throughout the negotiations, becoming agitated only when Lee asked to speak with the Deputy, or when Lee requested release of some of the hostages. (App. p. 1120, lines 2-10; p. 1122, line 3- p. 1123, line 19; p. 1125, lines 11-15; p. 1128, line 9-p. 1129, line 4). Lee arranged, at Evans' request, for Evans to speak with Christina. Lee listened to the conversation and thought the conversation "went real well." (App. p. 1124, line 19 - p. 1126, line 8). After Evans spoke with Christina, Lee spoke to Evans "a couple of more times" and continued negotiations. Evans told Lee he thought Lee was "cool" and said he was going to discuss

the matter with the Deputy and would call back later. (App. p. 1126, lines 11-24). Minutes later, Lee heard multiple shots. (App. p. 1126, line 25 - p. 1127, line 7).

The deployed SWAT team had not attempted any action prior to the shooting as they were informed negotiations were going well and Evans would come out. (App. p. 1098, line 16 - p. 1102, line 7; p. 1108, lines 17-23; p.1166, line 22 – p. 1167, line 2; p. 185, lines 5-13; p. 1186, lines 16-22). Officers stationed at the entries of the home first heard a series of shots, then a plea of "no, no, no" and another series of shots. (App. p. 1146, lines 2-25; p. 1167, line 13 – p. 1168, line 17; p. 1187, line 11 – p. 1188, line 14; p. 1199 line 18 – p. 1200, line 23). After gaining entry, the officers saw Deputy Sapinoso face down on the floor, his arms folded underneath his body, with gunshots wounds to the back of his head. His father's body was on the couch. (App. p. 1153, lines 1-9; p. 1174, lines 12-16; p. 1191, lines 3-8; p. 1202, lines 24-25). When the officers rushed Evans, he immediately said, "don't hurt me." (App. p. 1151, lines 6-14). As the officers restrained Evans, Evans kept trying to turn to see the Deputy's body. (App. p. 1178, lines 1-21). The SWAT team also rescued Mrs. Sapinoso and Christina's son who remained hidden upstairs until the officers escorted them outside the home. (App. p. 1154, lines 1-17).

Investigators at the scene recovered three guns, a 9mm, a .38, and a Glock that was the Deputy's service weapon. (App. p. 1288, lines 2-6; p. 1312, lines 20-24). Investigators also recovered a black nylon bag in the entryway that held 140 rounds of ammunition in boxes plus several loose rounds, and an 8 inch knife. (App. p. 1291, lines 2-21). (See also App. p. 2757-2758; pp. 3810-3813). Additionally, investigators found Evans' hat in an abandoned house close to the Sapinoso home, where Evans waited for his victim, and his car parked significantly, a half of mile so, away. (App. p. 1271; pp. 2753-2754; p. 3814). Evans was wearing all black at the time of murders, and had several

blue bandanas, which were recovered from the scene. (App. p. 1298; p. 2755; p. 3811). Blue is the color associated with the gang in Evans' multiple, highly visible, tattoos. (App. pp. 1589-1590; p. 1598; p. 2998). Forensic evidence, as presented through the State's expert at trial, showed that Deputy Sapinoso was shot in the back of the head, four times, at close range (within two to three feet), while his head was on the floor. (App. p. 1392-p.1395; p.1398–p. 1403). Moreover, the shots "very likely occurred at a time when neither the shooter nor Mr. Joe Sapinoso were moving and occurred in a very rapid sequence to each other. They are all basically in the same part of Joe Sapinoso's head at very nearly the same distance." (App.p. 1407, lines 13-18). The father suffered three gunshot wounds – two to the head and one to the arm. The one to the arm was considered a defensive wound. (App. p. 1407). Evans' PCR expert agreed that three of the four shots to Deputy Sapinoso's head were inflicted at close range while his head was on the floor. (App. p. 2739).

SUMMARY OF THE ARGUMENT

This Court will not affirm a ruling that is "controlled by an error of law" or lacks factual support in the record. *See, e.g, Brown v. State*, 383 S.C. 506, 514-515, 680 S.E.2d 909, 914 (2009). Here, the PCR judge's decision is controlled by no less than three distinct errors of law, and lacks factual support in the record. Indeed, the PCR judge relied upon a mash of inconsistent theories and findings to cobble together a basis of relief that is not warranted on state law, federal law, or the facts. His decision should be reversed.

The PCR judge denied relief on a variety of complex, detailed claims vetted over nearly two weeks of testimony and multiple rounds of briefing. He granted relief solely on an ineffective assistance of counsel claim based upon counsel not objecting to the following charge language: "You may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy." (App. p. 1785). Nearly all of the PCR judge's errors may be tracked to an erroneous belief that relief premised on the wording of the charge was mandated by this Court's ruling in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). (App. p. 4384, "... 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)."). This Court in *Rosemond*, however, did not address whether a charge including the language at issue when reviewed as a whole would be incorrect or misleading – a fact recognized later in the Order but nonetheless wholly discounted. (App. p. 4484). This Court, overruling *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) "to the extent it approved and sanctioned the charge," 383 S.C. at 330, 680 S.E.2d at 10, disapproved of the phrasing of one portion of this one sentence that may be read to restrict "consideration of evidence of mercy in the sentencing phase," 383 S.C. at 330, 680 S.E.2d at 11. There was no consideration of the sentence, and in

particular the phrase at issue, in context of the remainder of the charge. Indeed, relief was not granted in *Rosemond* on this issue, but the wording of the last phrase, and its applicability, was addressed in *obiter dicta*. Contrary to the PCR judge's opinion, there was no mandate for relief whenever this now disfavored wording is identified in a charge. Moreover, his legal analysis pursuant to *Strickland*[2] was consistently flawed.

First, the PCR judge wholly erred in failing to apply the well-established *Strickland* standard to the facts of this case to determine error. It cannot be disputed the charge at issue was reviewed and approved in *State v. Hughey*. However, the PCR judge found error in the decision not to object to the charge because *Hughey* was, at best, incorrectly decided or misleading, and/or did not address the (non-existent) federal issue. (See App. pp. 4477-4478). In other words, counsel had no cause to rely on state law precedent regarding a state law issue, and/or should have attempted to argue federal law on a state law issue. Under any reading of *Strickland*, this finding and conclusion cannot stand. Counsel had the right to rely on then controlling state law on a state law issue.

Second, the PCR judge wholly erred in failing to apply the well-established *Strickland* prejudice standard to the facts of this case. Instead, the PCR judge found "per se reversal" and a "structural defect." (See App. pp. 4484-4493). Consequently, the PCR judge failed to properly evaluate the lack of impact on the sentencing phase. He failed to place the perceived error in perspective of the whole of the charge and all the evidence presented in sentencing, and he failed to make a considered ruling on whether Evans demonstrated it was reasonably probable that but for the deficient performance, the result would have been different. *See generally Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259, 3264-3265 (2010) (reversing state supreme court opinion, finding "Although the court

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[2] *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984)

appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case" where state court had determined, "'it is impossible to know what effect [a different mitigation theory] would have had on [the jury].'"). The PCR judge here simply concluded, similarly to the rejected position in *Sears v. Upton*: "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." (App. p. 4486). He is similarly wrong.

Third, the PCR judge found the charge offended federal law as it prevented consideration of "evidence of mercy." (App. pp. 4486-4487; p. 4492). This is confused in several ways and is a recurring theme weaving error throughout that portion of the Order. Initially, the PCR judge confused "evidence" with "mercy," which is an act. Further, and as a result of the first, the PCR judge concluded the charge offended federal law. The State does not contest that state law allows the jury to return a verdict for any reason or no reason – the jury was, in fact, so charged in this very case. That is the essence of the *exercise* of mercy. But there is a distinct difference in federal precedent between the presentation and consideration of evidence which may prompt sympathy or mercy, and unfocused, unreasoned exercise of emotional whim. The exercise of unfettered emotion in sentencing is not required by the federal constitution, and is, in fact, the antithesis of the reasoned application of the death penalty anticipated in modern capital case jurisprudence. See, for example, *Saffle v. Parks,* 494 U.S. 484, 493 (1990) ("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 with our longstanding recognition, that, above all, capital sentencing must be reliable, accurate, and nonarbitrary"). In fact, the United States Supreme Court has repeatedly upheld weighing-

state directions that the jury *must* (*i.e.* without discretion) return a death sentence where the aggravating circumstances outweigh the mitigating circumstances. See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 173 (2006)("Kansas' death penalty statute, ***consistent with the Constitution***, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise.") (emphasis added). Cf. *Bobby v. Mitts*, 563 U.S. __, __, 131 S.Ct. 1762, 1764 (2011) (reversing and rejecting lower court's determination that jury charges "required the jury to first decide whether to "acquit" Mitts of the death penalty before considering "mercy and some form of life imprisonment.'..."). But the instant charge does not in any way limit the *consideration of mitigation* ***evidence***, thus, does not offend federal law.

Lastly, the PCR judge's factual determination that the charge could only have been understood to exclude the exercise of mercy wholly lacks support. The only evidence in the record as to the understanding of the charge – which in isolation may be interpreted as misleading – was that counsel did not understand the charge to have prevented an act of mercy. (See App. p. 4480). (See also App. pp. 3258-3261; pp. 3271-3273; p. 3279). Rather than constituting subjective intent or backward-looking rationalization, the contemporaneous impressions provide insightful evidence of how the now disproved of single phrase would have been interpreted in light of the charge as a whole. While this Court certainly has disapproved of the language, no witness in the instant matter testified that the instruction was meant to restrict the exercise of mercy in any way,. much less was heard to restrict the exercise of mercy. Additionally, the record exclusively supports that the charge was intended to advise the jury that it may exercise mercy, with the jury repeatedly instructed that they could return a life sentence regardless

of the finding of aggravating circumstances. There is no factual support in the record for the PCR judge's findings.

The PCR judge's ruling should be reversed, and sentence of death upheld. Evans is not entitled to a new sentencing proceeding.

ARGUMENT

As relief was premised upon a finding of ineffective assistance of counsel, the well-established test of *Strickland v. Washington* is controlling.

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness ("deficient performance"), and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different ("prejudice"). *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984); *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694; *Walker v. State*, 407 S.C. 400, ___, 756 S.E.2d 144, 146 (2014) (quoting *Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001)).

In order to prove deficient performance, the applicant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, ___ U.S. ___, ___, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 687). After making this initial showing, the applicant for relief "must [then] demonstrate that [counsel's] deficiency prejudiced him to the point that he was deprived for a fair trial whose result is reliable." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2001).

"The standard for judging counsel's representation is a most deferential one." *Harrington*, 131 S.Ct. at 788. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland*, 466 U.S. at 689. Further, "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

counsel's perspective at the time." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985) (quoting *Strickland*, [466 U.S. at 690]). "An attorney is not required to anticipate potential changes in the law, which are not in existence at the time of the conviction." *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004). See also *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) ("the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law").

In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, 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." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (quoting *Strickland*, 466 U.S. at 695). See also *Sigmon v. State*, 403 S.C. 120, 127, 747 S.E.2d 394, 398 (2013) (same). Further, prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S.Ct. 383, 389-390 (2009). "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792 (citing *Strickland*, 466 U.S. at 693).

"[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' *Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 131 S.Ct. at 791.

I.

The PCR Judge Erred in Finding Deficient Performance Under Strickland v. Washington Where Counsel Did Not Object to the Phrasing of the Jury Instruction Regarding Mercy When This Court Did Not Disapprove of the Phrasing Until Rosemond v. Catoe, Over Four Years After Trial.

It has long been accepted that the trial judge may charge a capital jury that it may return a life sentence "for any reason or no reason at all." See, e.g., *State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990). The jury in the instant case was so charged. (App. p. 1785). At issue is the additional phrase "other than as an act of mercy."

In *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), this Court, having reviewed the very phrasing at issue found Hughey's argument that the charge was "confusing because it suggested that an act of mercy would have been an invalid reason for a life vote" was "without merit…." 339 S.C. at 460, 529 S.E.2d at 732. *Hughey* was decided on March 27, 2000. The jury was sworn and Evans' trial began on September 17, 2004. (App. p. 1047). Consequently, *Hughey* was good law and controlling at the 2004 trial – a fact that the PCR judge was constrained to admit. (See App. p. 4481). Indeed, the issue of the propriety of the charge was not even raised in this PCR action until *after* the first portion of the evidentiary hearing was held, and *after* this Court's opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). (See App. pp. 4476). In fact, the State did not object to the late amendment because supporting precedent was not available at time of the "final" amendment previously offered, but also noted the futility of amendment as an ineffective assistance of counsel claim. (See also App. pp. 3280-3238). Indeed, the very fact the issue was a late amendment premised on *Rosemond* cuts against the finding by the PCR judge that reasonable counsel would have seen plain error in the charge. (See App. p. 4482; pp. 2915; pp. 2919-2920). *Strickland*, 466 U.S. at 690 ("a court deciding an actual ineffectiveness claim 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*") (emphasis added).

On June 29, 2009, this Court issued the decision in *Rosemond*. This Court did not grant relief on the charge issue in *Rosemond*, but elected to address the propriety of the charge. This Court – notably writing that the instruction was found *proper* in *Hughey* – reversed itself. 383 S.C. at 330, 680 S.E.2d at 10. This Court advised: "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." *Id.* (emphasis added). Simply, *Rosemond* cannot mandate post-conviction relief on an ineffective assistance of counsel claim for a failure to object where *Rosemond* established a new rule four years after trial.

As a general rule, a new rule of law cannot be applied retroactively to cases on collateral review. See *State v. Jones*, 312 S.C. 100, 102, 439 S.E.2d 282, 282-283 (1994) ("A new rule of criminal law which does not fall into one of those categories [lack or jurisdiction or conduct not subject to criminal sanction] should be applied retroactively, but only to those cases pending on direct review at the time the new decision is issued."). See also *Tally v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007)("In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity"). Cf. *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (decision that jury charge on inference of malice from use of a deadly weapon "represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved" and specifically providing "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief.").

Moreover, as noted above, counsel may logically rely on the law in existence at the time of trial to provide proper representation. *Butler, supra, Patterson, supra.* To avoid this bar to finding deficient performance, the PCR judge relied upon a somewhat confused and internally conflicting interpretation of *Hughey*. For instance, the PCR judge agreed that in *Rosemond* this Court "overrule[d] Hughey to the extent it approved the instruction...." (App. pp. 4477). Yet, the PCR judge concluded, essentially, that this Court *always* read the instant mercy charge as *precluding* mercy. (App. pp. 4477). His ruling creates a paradox.

If this Court always read the charge as precluding mercy, then *Hughey* changed the law of the state and approved a charge precluding mercy. As the charge there is the same here, there could be no deficient performance as a matter of state law on a matter of state law in this pre-*Rosemond* case. Consequently, Petitioner is not entitled to any relief under *Strickland.*

If this Court did not always read the charge as precluding mercy, then this Court interpreted the phrased charge in *Hughey* as allowing mercy, and found it was not inconsistent with the charge that the jury may not rely on mere unfettered emotion in sentencing. Again, Petitioner is not entitled to any relief. Moreover, this second interpretation bears the least strain to the fit in light of all circumstances, not the least of which is the *Hughey* opinion.

The *Hughey* opinion supports the alternative interpretation only if one parses the entirety of the ruling. Such a reading requires ending review too soon, before the ultimate conclusion. The following passage from the opinion controls:

> Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote. The trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of *mercy.*" (emphasis added). This argument is without

> merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error. *See Singleton,* 284 S.C. at 393, 326 S.E.2d at 156; *State v. Chaffee,* 285 S.C. 21, 328 S.E.2d 464 (1984).
>
> *The jury charge, reviewed in its entirety, is not confusing because it advises the jurors to consider all mitigating circumstance in making their recommendation. The non-statutory circumstances are repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law.*

State v. Hughey, 339 S.C. 439, 460, 529 S.E.2d 721, 732 (2000), overruled by *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) (emphasis added).

Thus, according to *Hughey*, the jury was instructed to consider all statutory and non-statutory mitigation. This rebuts a finding that the instruction allowed mitigation evidence to be disregarded. The PCR judge, in his effort to distinguish the case, completely missed the point of the *Hughey* conclusion: "The jury charge, reviewed in its entirety, is not confusing because it advises the jurors to consider all mitigating circumstance[s] in making their recommendation." 339 S.C. at 460, 529 S.E.2d at 732. In other words, the jury was adequately charged. *Id.* See also *Sigmon*, 403 S.C. at 401, 742 S.E.2d at 134 (rejecting argument of jury instruction error where appellant "analyzes this language in isolation").

In light of all the evidence – including the plain language in *Hughey*, the remainder of the charge and defense counsel's testimony at the PCR hearing that each, independently, believed the charge to allow the exercise of mercy, (See App. pp. 3260-3261; pp. 3272-3273), along with the fact that the judge never indicated an intention to limit mercy within the whole charge, (App. p. 3259; pp. 3271-3272; p. 3279) – it is most logical to consider the charge, though now disfavored and interpreted differently, was then considered to allow the return of a life sentence as an act of mercy. One must consider that this was a charge given in multiple cases without objection – in this case, in *Hughey*, and in *Rosemond* among others. In the PCR judge's reasoning, multiple well

established and well qualified attorneys would have misinterpreted the phrasing (which, of course, begs the question of whether there could be deficient performance at all). Again, it cannot be ignored that this issue was a late amendment premised on *Rosemond.*

Lastly, the strain of the PCR judge's logic is most evident when one considers this Court in *Rosemond* only addressed the issue in *dicta.* The State does not contend that this Court has not disapproved of the language – it clearly has – but there has been no finding of reversible error. *Rosemond* is most fairly read as a guide to the bench and bar that the language at issue *may* be interpreted as precluding mercy and cannot be used where there is "evidence of mercy" (not argument for mercy) that could potentially be discarded from consideration.

Even so, neither interpretation (including or precluding the ***label*** of "mercy" on a juror's act) is inconsistent with this State's jurisprudence. This is so because whether identified as "mercy" or merely as a part of our broader allowance that a life sentence may be returned for any reason or no reason at all, we do not require a death sentence, even where a circumstance in aggravation is found. See, for example, *State v. Hicks*, 330 S.C. 207, 218-219, 499 S.E.2d 209, 215 (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"). No particular tag must be assigned to the recommendation of life.

Moreover, even though the PCR judge made reference to a long history of mercy in our State's jurisprudence, (See App. pp. 4481-4482), the State's jurisprudence does not show a pristine historical consistency for allowance of the complete disregard of the evidence in favor of an act of mercy. See, for example, *State v. Bethune*, 86 S.C. 143, 67 S.E. 466, 470 (1910) ("we do not think that the Legislature meant that the power to

recommend to mercy should be exercised arbitrarily or capriciously, or without regard to some circumstance in the case"). At any rate, the focus should be on the post-*Furman* statutes and cases – the statutes and cases that are relevant today. See generally *State v. Torrence*, 305 S.C. 45, 60, 406 S.E.2d 315, 324 (1991) (J.Toal, Concurring) (commenting on dispensing with "the outdated doctrine of *in favorem vitae*" noting that "in light of advances in the quality of legal representation; in light of the many protections and avenues of relief available to criminal defendants; and in light of the modern day restricted use of capital punishment post *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the doctrine has become counterproductive to the administration of justice in some instances"). Cf. *Kansas v. Marsh*, 548 U.S. at 191 (J.Scalia, Concurring) ("The legal community's general attitude toward criminal defendants, the legal protections States afford, the constitutional guarantees this Court enforces, and the scope of federal habeas review are all vastly different from what they were" in the pre-*Furman* era, such that these older cases fail to demonstrate "current relevance" and "cast no light upon the functioning of our current system of capital adjudication").

Evans' jury was repeatedly instructed to consider the statutory and non-statutory mitigation evidence, and that a life sentence could be returned regardless of the presence of aggravating circumstances, and regardless of whether mitigating circumstances were proven. (See App. pp. 1784-1785). In short, life could be recommended for any reason or no reason. The exercise of mercy was not prohibited. Even if counsel were deficient in failing to object to an isolated phase in one sentence of the charge, there was no prejudice, and Evans is not entitled to any relief.

II.

The PCR Judge Erred In Finding Per Se Error In The Jury Instruction Regarding Mercy, Thereby Avoiding a Proper Strickland v. Washington Prejudice Analysis.

The PCR judge incorrectly relieved Petitioner of the burden of showing prejudice by finding that he cannot evaluate the effect the "erroneous mercy charge" would have had on the jury's determination. (App. pp. 4486, "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."). Further, the incorrect statement of law and conclusion presents a keen danger to further cases if such logic could be accepted.

First, the judge's conclusion plainly reflects an incorrect application of *Strickland* as a matter of law. The United States Supreme Court has found: "…*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, 558 U.S. 15, 27, 130 S. Ct. 383, 390-91(2009). Moreover, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792. The PCR judge's ruling on prejudice cannot be reconciled with this precedent.

Second, to tie unfettered emotion to the sentencing phase in such a broad manner would make review of any finding of deficiency a guarantee of a new proceeding. For example, under the PCR judge's reasoning, because this State allows the jury to return a life sentence for any reason or no reason, the *Strickland* prejudice prong would always be met whenever any mitigation evidence was erroneously omitted, or evidence in aggravation erroneously admitted, because it may have affected the exercise of mercy. In other words, the ruling, if allowed to stand, would fundamentally alter post-conviction

relief, not just for issues regarding the phrasing of the charge, but review of *all* sentencing phase error.

Third, the PCR judge's ruling here, like his ruling on deficient performance, was also guided by his incorrect reasoning that *Rosemond* mandated relief. This Court did not provide guidance as to possible reversible error. Rather, this Court focused only on an isolated phrase, not its relationship to the remaining charge, or the remaining charge itself absent the phrase.[2] What is still at issue is "what a reasonable juror would have understood the charge as meaning" in light of the context in which it is given. See *State v. Jackson*, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989). See also *Sigmon*, 403 S.C. at 133, 742 S.E.2d at 401 ("'The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean.'") (quoting *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991)). Here, a reasonable juror would not have understood the charge as a whole to preclude the consideration of, or exercise of, mercy.

Of course, the PCR judge was constrained to admit that trial counsel testified that mercy was a major element in the presentation and argument, and neither understood the charge as precluding mercy. (App. pp. 4480). This is similar to the pending case *John Kennedy Hughey v. State of South Carolina*, (Appellate Case No.: 2010-170387), where trial counsel testified that they did not, at the time the charge was given, take the charge to mean the jury was precluded. (*Hughey v. State*, State's Petition for Writ of Certiorari, filed January 12, 2011, at pp. 24-25; State's Brief of Petitioner, filed May 16, 2014, at pp.

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[2] That is not to say the *dicta* reasoning is not helpful. In fact, it may well be argued that the reasoning allows the bench and bar to avoid the possibility of unfavorable hyper-technical interpretation, or simple misunderstanding, of the phrase, by substitution of "including" as opposed to the more controversial "other than."383 S.C. 330, 680 S.E.2d at 10.

24-25). Moreover, it is clear from the record that the trial judge – Judge Cole – did not intend the charge to prevent consideration the exercise of mercy. (See also *Hughey*, State's Petition and State's Brief of Petitioner, at p. 24, Judge Cole's response to request for charge being his charge covered the mercy charge request). Judge Cole's charge repeatedly explained the jury's right to return a life sentence regardless of the aggravating circumstance found or rejection of mitigating circumstances. (App. pp. 1784-1785). Moreover, the charge, in this instance, is undeniably tied to the prior sentence by the introductory phrase, "simply stated," and the prior sentence clearly instructs the jury they may recommend life even if they find no mitigating circumstance, *i.e.* as an act of mercy. (App. p. 1785). Further, Judge Cole's charge can be reasonably interpreted as not precluding mercy.

Under normal grammar rules, the phrase "other than an act of mercy" should modify the phrase "for no reason at all," not the separate phrase "for any reason." See http://www.yourdictionary.com/grammar/grammar-rules-and-tips/misplaced-modifiers ("According to grammar rules, modifiers should be placed as close as possible to the person or thing that they are modifying."). Consequently, the sentence is reasonably interpreted as the jury can return a recommendation of life 1) for any reason *or* 2) for no reason, just 3) as an act of mercy (differentiating a reason from an act). Additionally, "other than" is defined as "with the exception of, except for, besides" *Merriam-Webster Online Dictionary*, 2010, 2 November 2010, (http://www.merriam-webster.com/dictionary/otherthan). While true that if one looks at the sentence as containing a misplaced modifier, and, in so doing, assigns an alternate meaning for "other than" in the sentence, one may read "for any reason" *except* for the *reason* of mercy (of course this leaves the dichotomy of act verses reason, and the question whether mercy can be a reason or an act based on the absence of a reason, but for the sake of argument,

one may read the sentence presuming error). Further, because of the alternate readings, this Court may properly, and indeed has already addressed, any possible confusion from the phrase alone by directing the phrase "including as an act of mercy" be used and not "other than." *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10. But that clarification does not equate with a finding that the instant charge was intended to exclude an act of mercy, especially in light of the remaining charge. Further, that clarification does not equate with a finding that the jury misconstrued the charge.

To show the instruction as a whole was infirm, one would have to find the jury accepted the contrary interpretation as a reasonable interpretation in light of the fact that the remainder of the charge *confirms* that mercy was not precluded in any way, shape or form. That is not a finding supported by record. Further still, to establish counsel error, Evans had to show that counsel performed deficiently by not embracing the same grammatical rules or parsed evaluation, a disfavored presumption. See *California v. Brown*, 107 S.Ct. at 840, 107 S.Ct. 837 ("While strained in the abstract, respondent's interpretation is simply untenable when viewed in light of the surrounding circumstances," *i.e.* the jury had heard the mitigation evidence and would not reasonably have thought the evidence "a virtual charade," rather, more reasonably, when consider the admonition an instruction "to only ignore the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase."). A reasonable juror, under the circumstances cited herein, would not have interpreted the charge as precluding consideration of the mitigation evidence in deciding whether to exercise mercy. *Id.* See also *Jackson, supra; State v. Bookter*, 93 S.C. 97, 76 S.E. 110 (1912) ("Considering the instruction in the immediate connection in which it was given, and in connection with the whole charge, we are satisfied it was not misleading"). Consequently, there is no error in the instant charge, and certainly no deficient performance.

The instructions here show that the PCR judge emphasized the jury's duty to consider all statutory and non-statutory mitigating circumstances shown by the evidence, and emphasized the opportunity to exercise mercy:

> *... it is not necessary that you find the existence of such mitigating circumstance or circumstances beyond a reasonable doubt. You may recommend a sentence of life imprisonment whether or not you find the existence of a statutory or a nonstatutory mitigating circumstance.*
>
> ...
>
> *... 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.*

(App. pp. 1784-1785).

As noted, only one portion of the charge could possibly preclude the consideration of mercy (the phrase "other than an act of mercy"), and that according to *Rosemond* decided four years after the trial. The remaining charge clearly instructed the jury that it could return a life sentence for any reason or no reason at all. Thus, the charge as a whole was not deficient as a matter of state law as it certainly allowed for the exercise of mercy in the penalty phase. Accord *State v. Hicks*, 330 S.C. 207, 218-219, 499 S.E.2d 209, 215 (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").

Consequently, the incorrect phrase in one sentence of the charge, now erroneous under state law, did not negatively contribute to the verdict as the charge as a whole was not incorrect. See *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error"); *State*

v. Bell, 305 S.C. 11, 21, 406 S.E.2d 165, 171 (1991) (finding, after review of a no unfettered sympathy instruction, "from the context of the charge, there is no reasonable likelihood this charge prevented the jury from considering any mitigating evidence in fairness and mercy.").

Further, the PCR judge erred in discounting the *Boyd v. California*, 494 U.S. 370, (1990), analysis as the charge at issue was erroneous not ambiguous. (See App. pp. 4489). The *Boyd* analysis is not strictly controlling because it is *Strickland* prejudice at issue. Even so, the *Boyd* analysis is persuasive because no case, including *Rosemond*, has reviewed whether the instructions *as a whole* are sufficient. In other words, the *charge* may be considered ambiguous where a portion of the charge is infirm. The *Boyd* test is proper in review of the instruction here as the instruction is not clearly erroneous as a whole, but contains an erroneous phrase in one sentence that seemly could contradict the remaining clear and correct language. Compare *Stromberg v. California*, 283 U.S. 359 (1931) (reversing where charge included unconstitutional ground for conviction). See also *Griffin v. United States*, 502 U.S. 46, 53 (1991) ("This language, and the holding of *Stromberg,* do not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."). *Boyd* sets out the test for evaluating such ambiguous instructions. See also *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991) (applying *Boyd*). Thus, the proper question "is whether there is a reasonable likelihood the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyd*, 494 U.S. at 380.

Again, when "[t]he charge, as a whole, is not misleading," an applicant's allegation of error challenging any one particular phrase must be rejected. *State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990), citing *State v. Patterson*, 299 S.C. 280,

384 S.E.2d 699 (1989). Applied to the instant case, in considering the charge as a whole, a reasonable juror would not have thought he was precluded from considering considered any of the mitigation evidence presented in the instant case. See *Jackson*, 297 S.C. at 527, 377 S.E.2d at 572 ("the test is what a reasonable juror would have understood the charge as meaning" in light of the context in which it is given). Additionally, as noted above, as to the state law provision for the exercise of mercy, the charge as a whole was consistent with state law – and in particular used the language that was then approved – as the charge clearly allowed for same. Consequently, there could be no prejudice.

Additionally, in *Rosemond*, this Court tied the propriety of the consideration of mercy to the receipt of "proper *evidence* of mercy." 680 S.E.2d at 10 (emphasis added). Pursuant to *Rosemond*, it is this consideration of mercy based on the evidence that makes the charge consistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *Id.* In short, the charge is not intended to promote unreasoned reaction. Rather, the charge is meant to preserve the exercise of mercy *based on consideration of the evidence submitted.* To the extent this logic focuses on reasoned consideration of the evidence, not only is the instant charge as a whole free from error – given its uncontested direct instruction to consider *all* evidence of statutory and non-statutory mitigating circumstances – it is consistent with United States Supreme Court precedent. However, to attempt to tie the charge here to evidence in order to prompt federal constitutional protection is incorrect.

III.

The PCR Judge Erred In Finding A Federal Constitutional Right To A Mercy Charge Where Federal Precedent, Without Exception, Does Not Support Such A Federal Constitutional Right.

Mercy is an act – not evidence. See Black's Law Dictionary (9th ed. 2009) ("Compassionate *treatment*, as of criminal offenders or of those in distress; esp. imprisonment, rather than death, imposed as punishment for capital murder.") (emphasis added). See also *Lusk v. Singletary*, 976 F.2d 631, 632 (11th Cir. 1992) (rejecting appellant's argument that the judge evidenced a "refus[al] to consider and give effect to mitigating evidence" based on the "court's statement that '[t]he law of this State does not permit this Court to extend mercy to this Defendant or others convicted of a capital felony.'"). Evidence of mercy would be evidence of an act of the jury; thus, a charge regarding mercy does not impact on consideration of any sentencing phase evidence and does not implicate federal constitutional protections.

A capital defendant is allowed, pursuant to the Eighth and Fourteenth Amendments of the Constitution, to submit evidence in mitigation of "any aspect of [...his...] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" to enable the jury to make an "individualized decision" in sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). In that same vein, the Court has determined that the State may not create "limitations" on the consideration of properly admitted mitigation evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). "These two cases place clear limits on the ability of the State to define the *factual bases* upon which the capital sentencing decision must be made." *Saffle v. Parks*, 494 U.S. 484, 490 (1990) (emphasis added). However, there is a difference between the presentation and consideration of evidence (*i.e. Lockett* and *Eddings*), and the exercise of unfettered sympathy or mercy: "Whether a juror feels

sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant." *Id.* at 493. The Supreme Court has rejected challenges to instructions that the jury "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,'" *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* at 542. The following quote is instructive:

> Petitioner suggests that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances "outweigh" the mitigating circumstances. But there is no such constitutional requirement of unfettered sentencing discretion in the jury...

Boyde, 494 U.S. at 377.

In South Carolina, "a capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf." *State v. Wise*, 359 S.C. 14, 27-28, 596 S.E.2d 475, 481 (2004). See also *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2012) (citing *Wise*). While not a constitutional right, a plea for mercy is uniformly accepted in South Carolina under our evidence rules. *Id. See also State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000) (finding error in a limitation on questioning but no prejudice where "Johnson's sister was able to make a general plea for mercy on her brother's behalf."); *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991) (finding error in limitation on questioning but no prejudice where defendant's mother was allowed to make "a general plea for mercy for the life of her son"). A family member making a plea for mercy may *not* weigh in on what the appropriate sentence should be. *Dickerson, supra.* See also *State v. Johnson*, 338 S.C. at 126-127, 525 S.E.2d at 525 ("the defense did not seek to elicit the opinion of

Johnson's sister about what verdict the jury 'ought' to reach. Defense counsel merely proposed to ask her whether *she wanted* Johnson to die" which "did not address the ultimate issue to be decided by the jury"). In sum, the basis for admissibility of the plea for mercy is not mere mercy, but the plea's value as evidence of the shared bond which itself is a reflection of the defendant's character in that he is able to maintain that bond. Otherwise, there would be no reason to draw a distinction between 1) a plea for mercy and an opinion on which sentence is appropriate; and 2) allowing only "defense witnesses who know the defendant well" to so plead, not even a victim who would arguably have an interest in the disposition. *Dickerson, supra*; *Johnson, supra*; *Torrence, supra*; *Wise supra*. Cf. *People v. Ochoa*, 966 P.2d 442, 505-506 (Cal. 1998) ("A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character").

Without question, mercy was a "primary element" of the defense argument in closing. (App. pp. 1760-1772; pp. 3258-3261; pp. 3271-3273; pp. 4478-4480).[3] Here, however, there was no specific plea for mercy in the penalty phase, though friends and family did testify as to Evan's good qualities and their emotional bond to him. (See, for

[3] Of course, it was not the only element. Defense counsel reminded the jury of the other significant punishment (life imprisonment without the possibility of parole); dramatized the reality of the death sentence is that the defendant will be killed; urging the jury not to "repay evil with evil"; emphasized the "mental or emotional defect" mitigator and reminding the jury of testimony from experts Dr. Evans and Dr. Berg; emphasized Evans' adaptability to the structured environment of prison; downplayed gang membership (against his client's instruction), and reminded the jury of the testimony from prison officials that regardless of membership, the fact Evans would be kept under close watch thereby countering the suggestion of benefits from gang membership in prison; emphasized the emotion in Evans' father's testimony to balance the emotion associated with the victim impact testimony; and emphasized the redeemable qualities, good qualities, that existed in Evans who also committed two murders. (App. pp. 1760-1772). In addition to these arguments, counsel discussed mercy, and plainly asked for mercy: "I am going to ask for mercy for Kamell Evans." (App. p. 1770).

example, App. pp. 1677-1678). Nothing in the charge precluded the jury from consideration of this evidence. Thus, the charge, as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the evidence presented, *i.e.* the emotional bond to Evans. See *Boyde*, 494 U.S. at 380 (relevant question on constitutionally infirmity "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."); *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384-385 (1991) (applying *Boyde* in direct appeal).

The PCR judge clearly erred in determining that mercy is a constitutionally protected sentencing consideration tied to evidence. (See App. p. 4481; pp. 4482-4483). The United States Supreme Court has soundly rejected defense 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*, 494 U.S. at 492-493 ("It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that 'the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, not an emotional response to the mitigating evidence.'") (internal citations omitted) (brackets in original); *Johnson v. Texas*, 509 U.S. 350, 371-72 (1993) ("There might have been a juror who, on the basis solely of sympathy or mercy, would have opted against the death penalty had there been a vehicle to do so under the Texas special issues scheme. But we have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant. Indeed, we have said that '[i]t would be very difficult to

reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary.'"). The Court has been very definite in separating the consideration of evidence and a response to the evidence: "We also reject Parks' contention that the antisympathy instruction runs afoul of *Lockett* and *Eddings* because jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether. This argument misapprehends the distinction between allowing the jury to consider mitigation evidence and guiding their consideration." *Saffle*, 494 U.S. at 492.

Further, as noted above, the Supreme Court held in *Kansas v. Marsh* that "Kansas' death penalty statute, ***consistent*** *with the Constitution, may direct imposition of the death penalty* when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." 548 U.S. 173 (emphasis added). If there is no Eighth Amendment violation in *requiring* imposition of death where the jury unanimously finds circumstances in aggravation and the circumstances in aggravation and mitigation weighed equally, there could be no Eighth Amendment violation here based on the state charge regarding the exercise of mercy.

Consequently, the PCR judge also erred in finding counsel was ineffective in failing to object to the charge on the basis of an Eighth Amendment violation in the "restriction on a capital defendant's ability to present any relevant mitigating evidence" and have such evidence considered. (App. pp.4482-4483). Accord *Saffle*, 494 U.S. at 493 ("Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant.").

To the extent a plea for mercy may be considered mitigation evidence, there was no actual plea for mercy in this case, but there was general testimony from the defendant's family and friends. Again, the trial judge specifically charged the jury to consider *all* mitigation – a fact that the PCR judge found persuasive in another part of the Order regarding the solicitor's argument that Petitioner asserted "limited" consideration of mitigation evidence. (See App. p. 4450). Consequently, there was no limitation on the consideration of that evidence.

In sum, while the PCR judge consistently returned concentration to the one phrase referencing the exercise of mercy, (see App. pp. 4483-4484; pp. 4486-4490), it is undisputed that the jury was clearly instructed to consider the statutory and non-statutory mitigating *evidence*. (App. p. 1783). Moreover, there was no limitation whatsoever on the jury's ability to return a life sentence for any reason, either based on mitigation evidence or not based on mitigation evidence. (See App. p. 1784-1785). There was, in short, no limitation on the jury's ability to consider the evidence or to *exercise* mercy, whether so referenced as "mercy" or not. The PCR judge's conclusion to the contrary is unsupported in law and fact.

IV.

The PCR Judge's Factual Finding That The Charge Regarding Mercy Disallowed The Exercise of Mercy Is Wholly Without Factual Support in The Record Where No Person Ever Testified That The Charge Was Intended Or Heard To Limit The Exercise Of Mercy, And Trial Counsel Was Focused On The Exercise Of Mercy In Their Penalty Phase Presentation and Closing.

The PCR judge placed emphasis on, and was apparently guided by, the fact that another circuit court judge determined "prejudice" in regard to the mercy charge in *Hughey v. State*, 2000-CP-01-0212. (See App. pp. 4492-4493). First, *Hughey* is not settled, and is in fact on appeal to this Court. Second, the *Hughey* circuit court decision reflects a ruling on a free-standing claim, not ineffective assistance of counsel. If one would compare this case to other circuit court rulings, this case would more closely align with the ineffective assistance of counsel claim as raised in *Binney v. State*, 2000-CP-06-11-223 (also now on appeal in this Court). In *Binney*, the PCR judge initially rejected such a claim that was based, as is the instant one, on the subsequent disapproval of the charging language in *Rosemond v. Catoe*, 383 S.C. 439, 529 S.E.2d 721 (2000). On reconsideration, the judge reversed and granted relief. Upon information and belief, the reversal was based, in part, on the grant of relief in the instant case. However, proper review of the facts in the correct legal framework shows relief is not warranted, in great part due to the *Strickland* mandate that counsel's performance not be assessed through the "distorting effects of hindsight." 466 U.S. at 689.

Moreover, the logic remains that it is virtually inconceivable that defense counsel would argue for the exercise of mercy; the trial judge would allow argument on the exercise of mercy; but, the trial judge would intend to instruct the jury that they were not allowed to return a verdict based on mercy. This is especially so when the remainder of his charge so clearly instructed the jury a life sentence may be imposed for based on the mitigation or not. (App. pp. 1784-1785). Without question, both trial counsel testified

that they did not hear the charge as preventing the exercise of mercy. (See App. pp. 3258-3261; pp. 3271-3273; pp. 4479-4480).

Additionally, the facts in the instant case do not cleanly fit within the *Rosemond* dictates for prompting the charge, *i.e.* "evidence of mercy" having been submitted, if one considers "evidence of mercy" a plea for mercy from one or more family members or close friends. Mercy was a "primary element" of the defense argument in closing. (App. p. 4478).(See also App. p. 3270). Here, however, there was no specific plea for mercy in the penalty phase, but friends and family did testify as to Evans' good qualities and their emotional bond. (See, for example, App. pp. 1677-1678). Nothing in the charge, though, precluded the jury from considering this evidence. Thus, the charge, as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the mitigation evidence presented. And, because no free-standing plea was admitted, *Rosemond* was not directly implicated.

Again, mercy, by definition an act (not "evidence"), is always a possibility in sentencing – the State does not contend otherwise. The State maintains that the intent of the charge here was to allow the exercise of mercy. The most that may be said is that the one phrase in the one sentence at issue is misleading *in isolation*. When viewed as a whole, however, the jury instructions correctly and plainly charged that the jury could return a life sentence for any reason, based on mitigation evidence or not, or for no reason at all, whether or not an actual plea for mercy was entered. Evans is not entitled to a new sentencing proceeding.

CONCLUSION

For all the foregoing reasons, the State submits that this Court should reverse the grant of relief.

Respectfully submitted,

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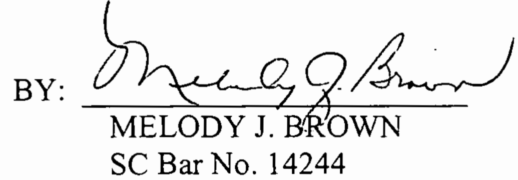
BY: 
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May 16, 2014.
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STATE OF SOUTH CAROLINA
In The Supreme Court

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

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No: 2011-188687

PROOF OF SERVICE

I, Melody J. Brown, hereby certify that the State's *Brief of Petitioner/Respondent* 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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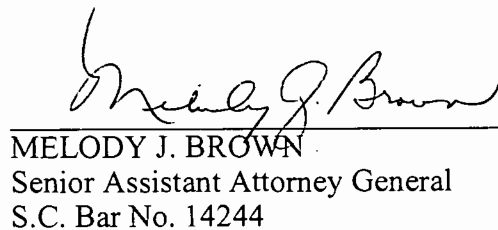

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