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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

CA No. 2000-CP-01-210
Appellate Case No. 2010-170387

JOHN KENNEDY HUGHEY*Respondent/Petitioner,*

v.

STATE OF SOUTH CAROLINA*Petitioner/Respondent.*

BRIEF OF SOUTH CAROLINA RELIGIOUS LEADERS AND SCHOLARS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT/PETITIONER

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I. Introduction and Statement of Interest

We, the undersigned amici, are people of faith. We are people of diverse faiths, and, in many respects, our beliefs differ. In fact, we differ even in our support for or opposition to capital punishment. These differences reflect the great variety of religious practices enjoyed by the citizens of South Carolina, a harbor for religious freedom since its earliest days of colonization. Despite our theological differences, we understand our faiths as compelling us to affirm a society that is both just and merciful. Our interest in this case stems from our dedication to these principles and their vital role in upholding the dignity of all humankind.¹

In our view, mercy plays an indispensable role in capital sentencing, so jurors must be permitted to act mercifully, if they so choose, in response to the evidence presented. Accordingly, we submit this brief in support of Respondent's position. We specifically ask this Court to reaffirm its prior recognition of mercy as an appropriate consideration in the capital sentencing process. As will be shown herein, such a ruling is consistent not only with our faith commitments but also with secular notions of justice, generally, and Eighth Amendment jurisprudence, more specifically.

¹ "The whole notion of a public realm radically opposed to or separate from religion falls apart in the evidence of comparative studies in religion, which demonstrates that religion is usually a whole way of life, not merely a private set of ideas that do not spill over into everyday life." Gross, Rita M., "Buddhist Contributions to the Civic and Conscientious Public Forums," in Taking Religious Pluralism Seriously: Spiritual Politics on America's Sacred Ground, McGraw, Barbara, and Rene Formicola, eds., Baylor University Press: Waco, Texas, 2005.

II. The Duty of Humans to be Merciful Generally

A. The Role of Mercy in the Abrahamic Faiths

Mercy lies at the heart of the Abrahamic faiths.² Our theologians and sacred texts recognize mercy as one of God's principal attributes. We affirm with Trappist monk and spiritual writer Thomas Merton that God is "mercy within mercy within mercy,"³ and that mercy is "the manifestation of [God's] presence."⁴

The mercy of God touches humankind in two primary ways. First, of course, we are *objects* of God's mercy. Second, because humans are made in the image of God, humans are called to *act* mercifully. That is, we reflect God's image and achieve our fullest humanity in our capacity for and exercise of compassion and mercy. Our traditions call us to cultivate merciful hearts toward all. These selfsame traditions also recognize that justice – including criminal justice – must be tempered with mercy.

1. Christianity

Mercy is the central theme of the Christian story. Both in his short earthly ministry and in his self-sacrificial death, Jesus taught his followers to be people of mercy.⁵ Jesus' sermons and parables repeatedly counsel mercy. For example, the Beatitudes single out the merciful for blessing: "Blessed are the merciful, for they will receive mercy."⁶ *Matthew 5:7; see also Luke*

² Christianity, Judaism, and Islam are the major Abrahamic religions.

³ Thomas Merton, *Fire Watch: July 4 1952*, in *Thomas Merton: Spiritual Master* 119 (Lawrence S. Cunningham ed., Paulist Press 1992).

⁴ Thomas Merton, *New Seeds of Contemplation* 91 (New Directions Press 1961).

⁵ The term "mercy" can refer narrowly to forgiveness and more broadly to compassion, empathy, lovingkindness.

⁶ Notably, this blessing immediately follows a blessing for those who hunger and thirst for righteousness, suggesting a close relationship between righteousness—justice—and mercy.

6:36-37 (“Be merciful, just as your Father is merciful. . . . Forgive, and you will be forgiven.”). The Lord’s Prayer, a version of which is found in Matthew 6, requires human forgiveness – a cousin to mercy – as a condition of divine forgiveness: “For if you forgive others their trespasses, your heavenly Father will also forgive you.” *Matthew* 6:14. Still later in the Book of Matthew, Jesus acknowledges the place of mercy in the Mosaic law, and affirms the duty to show mercy: “Woe to you, scribes and Pharisees, hypocrites! For you tithe mint, and dill and cumin, and have neglected the weightier matters of the law: justice and mercy and faithfulness.” *Matthew* 23:23. (Note the juxtaposition of justice and mercy in Jesus’ description of “matters of the law.”) When confronted by those who questioned the company he kept, Jesus only said, “Go and learn what this means, ‘I desire mercy, not sacrifice.’” *Matthew* 9:13. When Peter asked Jesus how many times Peter should forgive someone who wronged him, questioning whether seven times was enough, Jesus counseled a far more expansive reach for forgiveness, telling Peter, “Not seven times, but seventy times seven.” *Matthew* 18:21-22. Familiar parables, such as that of the servant who refused to forgive another servant’s debt, *see Matthew* 18:23-35, also show the divine expectation that humans be merciful to one another.

In each of his best-known encounters with the law and with legal authorities, Jesus modeled mercy and forgiveness. First, in the famous story of the woman caught in adultery, Jesus did not deny the law that allowed her to be stoned but nonetheless urged empathy and self-examination: “Let anyone among you who is without sin be the first to throw a stone at her.” *John* 8:7. Jesus then refused to condemn her. *John* 8:10. Second, Jesus’ act of self-sacrifice – that is, his crucifixion – is the paradigmatic act of mercy for Christians. For Christians, not only is the fact of Jesus’ crucifixion a manifestation of God’s mercy to sinful humanity, but the manner in which Jesus faced death models the merciful and forgiving spirit his followers should imitate. Even when subject to

the brutality and humiliation of the cross, Jesus saw the humanity of his killers and mockers and implored his father to forgive them. See Luke 23:34 (“Then Jesus said, ‘Father, forgive them, for they do not know what they are doing.’”).

Beyond scripture, the official teachings of the various denominations recognize the centrality of mercy – and not merely God’s mercy to humans, but humans’ duties of mercy and compassion to one another. For example, a 1980 papal encyclical, *Dives in Misericordia*, is devoted entirely to the subject of mercy.⁷ In it, Pope John Paul II notes that “Christ, in revealing the love-mercy of God, at the same time demanded from people that they also should be guided in their lives by love and mercy. This requirement forms part of the *very essence of the messianic message, and constitutes the heart of the Gospel ethos.*” In the same encyclical, Pope John Paul II refers to “call to mercy” as “one of the essential elements of the Gospel ethos.”

The Christian duty to be merciful and to act mercifully finds expression not only in Christian scripture and doctrine, but in the entire cultural heritage of Christianity. Various ministries (health ministries, prison ministries, etc.), entire religious orders (e.g. the Sisters of Mercy), poems, plays, and hymns all testify to the primacy of mercy and compassion in the Christian imagination. We humans always stand in need of mercy from God and our fellow men and women; to be fully human, we also need to show mercy and compassion to others. Anything less denies our full humanity.

2. Judaism

Mercy also occupies a prominent position within Judaism. The very names of G-d continually keep before us the juxtaposition of justice and mercy, reinforcing the necessity of both values in a healthy society. As Jewish philosopher Louis Newman has noted, the “prophetic

⁷ See John Paul II, *Dives in Misericordia*, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp_ii_enc_30111980_dives-in-misericordia_en.html (accessed Oct. 20, 2014).

literature is full of passages depicting G-d as endlessly merciful.”⁸ For example, the Book of Isaiah repeatedly depicts G-d as turning from anger and toward mercy for his people and those who turn to him. *See, e.g., Isaiah 55:7* (“Let them turn to the Lord, and he will have mercy on them . . . for he will freely pardon.”); *Isaiah 30:18* (“And therefore will the Lord wait for you, that he may have mercy on you, and therefore will he be exalted having mercy upon you: for the Lord is a God of judgment: blessed are all those that wait for him.”).

More importantly here, though, the Hebrew scriptures stress the human duty to show mercy and compassion. One of the most famous passages in the Tanakh is the statement in the Book of Micah that G-d requires of us only that we “do justice, love mercy, and [] walk humbly with [our] G-d.” *Micah 6:8*. The prophet Hosea also emphasizes God’s will that people be merciful: “I [G-d] desire mercy and not sacrifice, the knowledge of God rather than burnt offerings.” *Hosea 6:6*. G-d urges his people to “[h]old fast to mercy and justice.” *Hosea 12:6*; *see also, e.g., Zechariah 7:9-10* (“Execute true justice, show compassion and mercy everyone to his brother. Do not oppress the widow or the fatherless, the alien or the poor.”). Significantly, the Hebrew prophets see justice and mercy as complementary: we are called to be both just and merciful, not simply one or the other.

The rabbinic writings also emphasize mercy, including the notion of mercy as a necessary companion to justice. In discussing G-d’s creation of earth, the rabbis argue that justice and mercy both are necessary to make the world sustainable:

A parable of a king who had cups made of delicate glass. The king said: If I pour hot water into them, they will [expand and] burst; if cold water, they will contract [and break]. What did he do? He mixed hot and cold water, and poured it into them, so that they remained unbroken. Likewise, the Holy One said: If I create the world

⁸ Louis E. Newman, *Balancing Justice and Mercy: Reflections on Forgiveness in Judaism*, 41.3 *Journal of Religious Ethics* 435, 443 (2013).

with the attribute of mercy alone, its sins will be too many; if with justice alone, how could the world be expected to endure? So I will create it with both justice and mercy, and may it endure! (Genesis Rabbah 12:15)

Newman, *Balancing Justice and Mercy*, 41.3 *Journal of Religious Ethics* at 454 (citing story).

As is true in the Tanakh, mercy is not merely an attribute of G-d but a trait and attitude humans should manifest. The Talmud notes that “[j]ust as it is G-d’s way to be merciful and forgiving to sinners, and to receive them in their repentance, so do you be merciful to one another.”⁹ In fact, scholar Jonathan Rosen describes this bent toward divine and human mercy as the general view of mainstream Judaism.¹⁰

3. Islam

The very prayer recited five times daily by observant Muslims makes clear the intrinsically merciful nature of Allah: “In the name of Allah, the Merciful, the Compassionate, Praise be to Allah, Creator of the Worlds, The Merciful, the Compassionate, Ruler of the Day of Judgment.” Huston Smith, *THE WORLD’S RELIGIONS* 242-43. Two of the primary names that Muslims use for God are derivatives of the word “mercy.” For Muslims, God (Allah) sent Muhammed, “as a mercy for all creation.”¹¹

Thus, Islam depicts Allah as infinitely merciful and enjoins humans to emulate His example by practicing mercy in their earthly communities. Religion scholar Karen Armstrong notes in her history of Islam that the opening of the Muslim daily prayers refers to God’s mercy:

⁹ Louis E. Newman, *The Quality of Mercy: On the Duty to Forgive in the Judaic Tradition*, 15.2 *Journal of Religious Ethics* 155, 163-64 (1987).

¹⁰ Jonathan Rosen, *Grace, Punishment, and the Torah*, 71.1 *American Scholar* 61 (Winter 2002).

¹¹ Shaykh Muhammad Hisham Kabbini, *Understanding Islamic Law*.

a *muslim* was a man or a woman who had made this submission of their entire being to Allah and his demand that human beings behave to one another with justice, equity and compassion.

Armstrong, Karen, *ISLAM*, 5, The Modern Library: New York, 2000.

In addition to being one of Allah's attributes, mercy is a central tenet of Shariah: "The *ulema* [scholars of Islam] have, thus, generally considered *Ramah* [Mercy] to be the all-pervasive objective of the Shariah." *Id.* In fact, Armstrong details the radical change in legal codes that Islam brought to the 7th-century world, displacing the old "eye for an eye" ethic with one that both strives for justice and demonstrates mercy. Importantly, "[s]ince Mercy is the Shariah's primary goal, it is clear that this cannot be achieved if the believers who implement it are not imbued with this essential quality." *Id.*

B. Buddhism

At the core of Buddhist practice is the precept to avoid the killing of any living thing. The Buddha (Siddhartha Gautama) advocated living a life in which one shows compassion, expressing mercy to others rather than wishing evil for them. One component of Buddhist spirituality is to practice the meditation of loving-kindness, wishing for love to extend to someone whom one dislikes. Buddhists remind us that there are consequences for all of our actions, but advocate rehabilitation rather than retribution

C. Native American and Other Earth Based Spiritualities

While Native Americans do not share a common religion, central to what we may refer to as "Native American spirituality" is the idea that life is sacred, and that all living things have the

right to live because they are inherently sacred.¹² Chief Will Moreau Goins, Ph.D., of the Eastern Cherokee and Southern Iroquois & United Tribes of South Carolina explains:

In the great ancient religious and ethical traditions of Native American Indian Spirituality we find the directive: You shall not kill, unnecessarily! Or in positive terms: have respect for life! Humankind has not woven the web of life. We are but one thread within it.¹³

Characteristically devoted to community bonds, Native Americans hold sacred the ability to forgive, and so support the need for those who have done wrong to make amends to society, as well as the community's responsibility to provide rehabilitation. To show mercy is to honor this ethic.¹⁴

About 2,000 people in South Carolina follow some form of reconstructionist earth-based spirituality, including Druidry, Wicca, Heathenry, Kemeticism, as well as African Diaspora religions like Yoruba, Santeria, Voudoun and others. As with Native Americans, these religions begin with the premise that all life is inherently sacred and worthy of respect, therefore worthy of the consideration of mercy.

In addition to earth-based spiritualities, there are numerous New Thought, meditation and other so-called "New Religious Movements" [a term used by scholars, for example, the American Academy of Religion, to denote religions which have emerged in the past hundred years], leaders

¹² "A key to understanding indigenous cultures is that they are holistic in the sense that culture – beliefs, norms, spirituality, and values – are not sharply separated from human social life or the organization of the universe. In many ways, indigenous cultures permeate the whole of life and define a way of life that often looks like a religious ethic from a Western point of view. This cultural holism is a defining characteristic that distinguishes Indigenous Peoples from contemporary modern worldviews and nationality." Champagne, Duane, "Understanding Holistic Indigenous Cultures," Indian Culture Today, October 18, 2014.

¹³ Interview on file with author.

¹⁴ "Whatever we do to the web, we do to ourselves. All things are bound together. All things connect." Chief Seattle, Duwamish (1780-1866).

for some of which have signed this document as amici. The Unity Church, for example, teaches that humans are all expressions of God, and therefore inherently good and essentially divine.

D. Hinduism

Hindu religious thought has devoted a great deal of thought to the concept of mercy or compassion, discerning several varieties. *Daya* is the principle of treating others as one wishes to be treated, much like the western notion of the “Golden Rule.” Compassion may be shown towards those who have suffered and are deserving, but mercy may also be shown to individuals who have committed a great wrong, such as murder. For Hindus, the exercise of justice need not preclude compassion.

Mohandas Gandhi believed compassion to be the foundation for his law practice and, later, the development of his nonviolent resistance principles, also embraced by Rev. Dr. Martin Luther King. “It ill becomes us to invoke in our daily prayers the blessings of God, the Compassionate, if we in turn will not practice elementary compassion toward our fellow creatures.” – *Mohandas Gandhi*

E. Unitarian Universalism

While Unitarian Universalism is a non-creedal faith, members share a set of seven principles which unite their common spiritual journey. The Second Principle directly addresses the need for mercy: “Justice, equity and compassion in human relations.” Rev. Emily Gage of Unity Temple in Chicago expands on the Second Principle in her book *THE SEVEN PRINCIPLES IN WORD AND WORSHIP*:

Justice, equity, and compassion in human relations points us toward something beyond inherent worth and dignity. It points us to the larger community. It gets at collective responsibility. It reminds us that treating people as human beings is not simply something we do one-on-one, but something that has systemic implications and can

inform our entire cultural way of being. Compassion is something that we can easily act on individually. We can demonstrate openness, give people respect, and treat people with kindness on our own. But we need one another to achieve equity and justice. Justice, equity, and compassion are all part of the same package. Just as the second Principle overlaps with the first, so it is related to the seventh Principle—the interdependent web of all existence.

Id. at 21-22.

F. Society of Friends

While historically rooted in Christian faith, Quakers have no formal statements of belief and have, from their founding, emphasized the practice of Christian virtue above any theology or dogma. Therefore, when Christ says, “Blessed are the merciful, for they shall obtain mercy,” (Matthew 5:7), Quakers would take that as a command to refrain from any form of vengefulness. For that reason, Friends have long opposed capital punishment and actively campaigned for its abolition. For a jury to be prohibited from considering the option of mercy in sentencing is certainly a grave injustice.

III. The Role of Mercy in Criminal Justice and Capital Sentencing

Importantly, in the view of South Carolina religions generally – and in our view specifically – the human duty to be merciful can and should find expression everywhere, including in the criminal justice process. This is particularly true concerning capital sentencing. Regardless of whether we as people of faith generally favor or oppose the death penalty, we believe those entrusted with the awesome responsibility of deciding between life or death for a capital defendant must be permitted to act mercifully in light of the evidence presented, if they so choose.

For example, religious groups – including some to which some of us belong – that are either retentionist (favor retention of capital punishment) or neutral have advocated frequently for greater mercy in the criminal justice system. The National Association of Evangelicals (NAE), which is

comprised of more than forty Christian denominations including the Assemblies of God and the Presbyterian Church in America, issued a statement in 1973 strongly supporting capital punishment.¹⁵ Despite this official statement, however, the NAE has more recently promoted criminal justice reform and has affirmed that those convicted of crimes are “fellow human beings made in God’s image” and has committed “never [to] give up on people.”¹⁶ Given this recognition of the human dignity of those convicted of crimes, the NAE has called for a “top to bottom review of the whole criminal justice system,” including “all sentences in the criminal code,” and also has insisted “on a prison environment that promotes rehabilitation.”¹⁷ Although these statements do not directly address capital sentencing, the principles espoused in these statements make clear that evangelical Christians highly value mercy and human dignity in the criminal justice system.

On Capital Punishment, the official statement of the Southern Baptist Convention, dating from 2000, favors the “just and equitable” use of capital punishment, but notes that “those guilty of capital crimes are created in the image of God and should be treated with dignity.”¹⁸ Similarly, a 1980 statement from the Lutheran Church—Missouri Synod affirms the Synod’s support for capital punishment on the grounds that government has the authority to apply the death penalty.¹⁹ However, the same statement cautions that the government’s power should be “tempered by

¹⁵ See Capital Punishment 1973, <http://www.nae.net/government-relations/policy-resolutions/95-capital-punishment-1973> (accessed October 20, 2014).

¹⁶ See Galen Carey, *An Evangelical Perspective on Criminal Justice Reform*, <http://www.nae.net/government-relations/for-the-health-of-the-nation/human-rights/843-an-evangelical-perspective-on-criminal-justice-reform> (accessed October 20, 2014).

¹⁷ See *id.*

¹⁸ See On Capital Punishment, <http://www.sbc.net/resolutions/299> (accessed October 20, 2014).

¹⁹ See Lutheran Church—Missouri Synod, Report on Capital Punishment, *located at* <http://www.deathpenaltyinfo.org/capitalpunishment.pdf> (accessed October 20, 2014).

principles of justice, equity, and in certain instances, of *charity*.” The statement also notes that “the concept of justice . . . has been affected by the church’s teaching and practice of mercy.”²⁰

Not surprisingly, religious organizations – including some of those to which some of us belong – that generally oppose capital punishment agree with retentionist groups that mercy has a place within the criminal justice system and, in particular, in capital sentencing.²¹ For example, in its 1991 Social Statement on the Death Penalty, the Evangelical Lutheran Church in America (ELCA) notes that “[r]enewed by the Gospel, Christians, as salt of the earth (Matthew 5:13) and light of the world (Matthew 5:14), are called to respond to violent crime in the restorative way taught by Jesus (Matthew 5:38-39) and shown by his actions (John 8: 3-11).”²² The South Carolina Christian Action Council, a powerful coalition of denominations, specifically notes that their position against the death penalty is based on the religious admonition to demonstrate mercy.²³ The 1980 Bishops’ Statement on Capital Punishment from the United States Conference of Catholic Bishops points to a variety of Christian values that are relevant when considering the death penalty.

²⁰ *Id.*

²¹ For a summary of religious groups’ official positions on capital punishment, see <http://www.pewforum.org/2009/11/04/regious-groups-official-positions-on-capital-punishment/> (last accessed October 5, 2014). Notably, the National Council of Churches, which includes thirty-seven member communions ranging from the Greek Orthodox Archdiocese of America to the Presbyterian Church (U.S.A.) to the Reformed Church in America, has long condemned capital punishment.

²² See Evangelical Lutheran Church in America, *A Social Statement on: The Death Penalty*, http://download.elca.org/ELCA%20Repository/Death_PenaltySS.pdf (accessed October 20, 2014).

²³ See (May 17, 1984, Executive Board, South Carolina Christian Action Council):

We declare our conviction that our Judeo-Christian tradition affirms that God has revealed Himself in love and mercy and lays upon us the ministry of reconciliation. Because the God of love, mercy, and justice is also the God of new beginnings and new life, we believe that no one is ever beyond God’s redemptive reach and the possibility of reconciliation. Therefore, we vigorously oppose the death sentence and its accompanying act, capital punishment, as morally wrong and contrary to our best understanding of the Biblical witness. However, we acknowledge that some of our constituent denominations do not share this position.

In addition to observing the inherent dignity of all human beings, the Bishops focus on “the example of Jesus, who both taught and practiced the forgiveness of injustice and who came ‘to give his life as a ransom for many.’”²⁴

The 1990 Statement on the Death Penalty by the World Council of Churches Central Committee notes the tension between “Christian love as revealed in the New Testament” and the “institutionalized taking of human life.”²⁵ Finally, in its social statement on capital punishment, the Union for Reform Judaism points to its cherishing of “God’s *mercy* and love” as one of its reasons for calling into question the death penalty.²⁶

All of the undersigned amici – whether we favor, oppose, or are neutral with regard to capital punishment – recognize the awesome task set before capital jurors. Capital jurors are asked to sit in judgment – the ultimate temporal judgment – of a fellow human being made in God’s image. We believe those making this life-and-death decision must be permitted to bring their whole and best selves to the decision. We affirm that our best selves always include our capacity for compassion and mercy.

IV. The Proper Role of Mercy in Capital Trials in Secular Courts

Our position is rooted in sacred principles; the divine is reflected in each of us, calling us to temper justice with compassion and mercy. However, these beliefs find a secular analogue in

²⁴ See Bishops’ Statement on Capital Punishment, 1980, <http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment.cfm> (accessed October 20, 2014)(emphasis added).

²⁵ See WCC Central Committee, *Statement on the Death Penalty*, located at <http://www.fiacat.org/principal-statements-from-the-world-council-of-churches-concerning-the-death-penalty> (accessed October 20, 2014). Also in the 1990 Statement, the Central Committee notes that all human beings are “created in God’s image [and] have inherent dignity.” *Id.*

²⁶ See *The Death Penalty and Jewish Values*, http://www.rac.org/Articles/index.cfm?id=1665&pge_prg_id=8089&pge_id=2396 (accessed October 20, 2014)(emphasis added).

Eighth Amendment jurisprudence and in American legal history. Differently put, we believe there are wholly secular reasons for this Court to disallow the instruction given by the trial court in this case.

Underlying the Eighth Amendment’s prohibition on Cruel and Unusual Punishment is a “fundamental respect for humanity,” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), and a concern for “human dignity.” See *Furman v. Georgia*, 408 U.S. 238, 270 (1972)(Brennan, J., concurring).²⁷ These bedrock principles are pertinent in at least two ways here. First, of course, the United States Supreme Court has granted a very wide berth for the introduction and consideration of mitigating circumstances. See *Lockett v. Ohio*, 438 U.S. 586 (1978). The roots of the *Lockett* rule lie in the principle recognized in *Woodson* that the Eighth Amendment requires individualized sentencing in capital cases so as not to exclude from jurors’ consideration “the possibility of *compassionate* or mitigating factors stemming from the diverse frailties of humankind.” *Woodson*, 428 U.S. at 304 (emphasis added). This very language, as well as the logic of the *Lockett-Woodson* principle, suggest considerations of mercy—at least when based on a reaction to the details of the defendant’s life or character—are not only permissible but are constitutionally required as part of capital sentencing.

Second, given the Eighth Amendment’s concern for human dignity, the Court’s Eighth Amendment jurisprudence has embraced historical practices that have humanized the capital sentencing process. For example, in *Woodson*, the Court found North Carolina’s mandatory death penalty statute violated the Eighth Amendment because mandatory statutes disallow individualized consideration of defendants. 428 U.S. 280. In so holding, the Court relied heavily on the history

²⁷ In our view, the justices’ assertions about human dignity and respect for humanity are secular analogues for our belief that humans are made in God’s image and therefore are imbued with a dignity no one can take from them.

of discretionary sentencing in capital cases. *Id.* at 289-94. Over the course of American history, states moved from mandatory death penalty sentencing – i.e., death as an automatic sentence for certain crimes – to discretionary sentencing. *Id.* The Court characterized this evolution as a “progressive and humanizing development,” *id.* at 304, and concluded that society’s “evolving standards of decency” had squarely rejected mandatory sentencing.²⁸ *Id.* at 301.

Importantly, the historical evolution from mandatory to discretionary sentencing speaks directly to the relevance of mercy in the capital sentencing process. The discretionary statutes enacted in the nineteenth and twentieth centuries (until *Furman*) expressly contemplated the granting of mercy by juries: typically a verdict of death was “guilty without recommendation of mercy,” and a verdict of life was “guilty with recommendation of mercy.” *See, e.g., McGautha v. California*, 402 U.S. 183, 199-202 (1971)(describing some discretionary statutes). Given this explicit prior recognition of the humanizing role of mercy in the capital sentencing process – indeed, the possibility of mercy was part and parcel of individualized sentencing in the pre-*Furman* era – it would be ironic and even perverse for this Court to find that this “progressive and humanizing development” is somehow inappropriate.

V. Conclusion

Rev. Matthew Fox has said, “[c]ompassion is not sentiment but is making justice and doing works of mercy. Compassion is not a moral commandment but a flow and overflow of the fullest human and divine energies.” Matthew Fox, *A SPIRITUALITY NAMED COMPASSION: UNITING MYSTICAL AWARENESS WITH SOCIAL JUSTICE* 30. We amici stand by mercy as a hallmark of our various religious values. Mercy is also an American value. Its inclusion in the capital sentencing

²⁸ Of course, the Court condemned wholly discretionary statutes in *Furman v. Georgia*, 408 U.S. 238 (1972).

process is, at the very least, appropriate, and likely is constitutionally indispensable. Accordingly, we ask this Court to affirm the PCR court's grant of post-conviction relief to Mr. Hughey and to affirm its prior rulings condemning the trial court's erroneous instruction.

Respectfully submitted,

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South Carolina Religious Leaders and Scholars

November 17, 2014.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

CA No. 2000-CP-01-210
Appellate Case No. 2010-170387

STATE OF SOUTH CAROLINA*Petitioner/Respondent,*

v.

JOHN KENNEDY HUGHEY*Respondent/Petitioner.*

CERTIFICATE OF SERVICE

I, J. Christopher Mills, hereby certify that one (1) copy of the South Carolina Religious Leaders and Scholars' Petition for Leave to File a Merits Brief as *Amicus Curiae* and its provisional brief has been served upon counsel for petitioner and respondent by depositing same in the United States Mail, first class postage pre-paid, addressed as follows:

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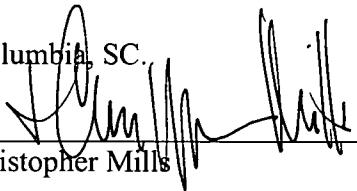
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This the 17th day of November, 2014, in Columbia, SC.



J. Christopher Mills