ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Alexander S. Macaulay, PCR Circuit Judge
2000-CP-01-212
J. Derham Cole, Trial Circuit Judge

Appellate Case No. 2010-170387

JOHN KENNEDY HUGHEY, #5055

Respondent/Petitioner,

V.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent,

RESPONSE BRIEF OF STATE OF SOUTH CAROLINA TO BRIEF OF SOUTH CAROLINA RELIGIOUS LEADERS AND SCHOLARS AS AMICUS CURIAE

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INTRODUCTION

The State of South Carolina, through the Attorney General's Office, respectfully makes a response to the Amicus Curiae Brief of South Carolina Religious Leaders and Scholars. In the three cases pending before this Court involving the sentences of Kamel D. Evans, Jonathan Kyle Binney and John Kennedy Hughey, the State is not asserting that consideration of mercy should be precluded. To the extent the amicus curiae assume otherwise, they are incorrect. Rather, it is the position of the State that in each one of the trials, the instruction given by the trial judge read as a whole, rather than parsed, would have lead a reasonable juror to understand that they could sentence the defendant to a life sentence for any reason or no reason at all, i.e., an act of mercy apart from evidence based upon South Carolina law. These particular instructions by Judge Derham Cole were consistent with the notions of mercy that are presented within the *amicus* brief. The jurors were not precluded from acting mercifully, if they chose to do so in response to the evidence presented.

ARGUMENT

In their brief, the *amicus curiae* assert the following:

1. Mercy plays an indispensable role in capital sentencing, so juries must be permitted to act mercifully, if they chose, in response to the evidence presented. Brief, p. 1.
2. The amicus curiae seek to "re-affirm" "mercy" as an appropriate consideration in the capital sentencing process.
3. The role of mercy in sentencing is consistent with the religious beliefs expressed by the amicus curiae and require humans to act mercifully.
4. The amicus curiae contend that this consideration is consistent with the Eighth Amendment.

In Rosemond v. Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 10-11 (2009), this Court recognized its prior precedent supports that it is proper to instruct a jury in a capital sentencing

phase that it may recommend a life sentence for any reason or no reason at all,[1] 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." citing 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). [2]

These conclusions do not evolve from the Eighth Amendment, but prior state court precedent from the earlier statutory "recommendation of mercy" cases.[3] See State v. White, 246

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[1] The State notes that in State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989), the Supreme Court *rejected* a request that the capital defendant was entitled to an instruction that the jury could impose a life sentence for "any reason or no reason at all," but held adequate the judge's instruction that the jury could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found, citing State v. Lucas, 285 S.C. 37, 328 S.E.2d 63 (1985). Accord, State v. Green, 301 S.C. 347, 359-360, 392 S.E.2d 157, 163-164 (1990) (same); State v. Hicks, 330 S.C. 207, 218–19, 499 S.E.2d 209, 215 (1998) (same). However, the Supreme Court had also approved a set of instructions that conveyed the following concepts: (1) it could recommend life imprisonment even if it found the existence of one or more statutory aggravating circumstances beyond a reasonable doubt; (2) it need not find a mitigating circumstance in order to impose life imprisonment; and (3) it could recommend a life sentence for any reason or no reason at all. State v. Cain, 297 S.C. 497, 377 S.E.2d 556 (1988); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). Also, State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) ("We note the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.").

[2] "We have interpreted this State's Death Penalty Statute to require the trial judge instruct the jury that it could effectively impose life imprisonment instead of death even if it found one or more statutory aggravating circumstance(s). Failure to so charge may require a death penalty sentence to be vacated." State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979); State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980).

[3] S. C. Code Section 16-52 (1962) provided as follows:

> 'Punishment for murder—Whoever is guilty of murder shall suffer the punishment of death; Provided, however, that in any case in which the prisoner is found guilty of murder *the jury may find a special verdict recommending him to the mercy of the court,* whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner.'

See State v. Speights, 263 S.C. 127, 134, 208 S.E.2d 43, 47 (1974) (emphasis added).

S.C. 502, 507, 144 S.E.2d 481, 483 (1965) (noting that "[i]n view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict").

As stated in the respective briefs of the State in these cases, the State submits that the PCR Court has erred and overlooked the following points that:

1. The State agrees [and have always agreed] that state law authorized consideration of "mercy" by a capital sentencer, although the federal constitution did not require it.
2. Viewing the penalty phase instructions as a whole, it is clear that the trial judge, as well as counsel at the time of the trial, was aware that consideration of mercy was proper for the jury in its sentencing consideration - but also that the jury was not limited to "mercy" in its life sentence consideration.
3. In Hughey, Judge Cole had previously declared that: "my general instruction covers that." App. 4018-19. The Applicant is now suggesting that Judge Cole's own instruction was contrary his own expressed understanding and interpretation of the law that mercy was a valid consideration and a sentence of mercy could be given.
4. Viewing the instructions as a whole and not this challenged sentence in isolation, a reasonable juror would have known it had the ability to consider mercy in determining the sentence. See Boyde v. California, 494 U.S. 370 (1990) (Eighth Amendment satisfied where there is not a reasonable likelihood that the penalty phase instructions would preclude consideration of relevant mitigating evidence offered by the petitioner).
5. Since the PCR Courts erred in apparently interpreting the challenged sentence in isolation, the Court cannot overlook the ameliorating language within the remainder of the instruction which clarified the ability of the jury to sentence the defendants to a life sentence as an act of mercy. First, it is reasonable that the trial judge intended that the instruction tells the jury, "you may recommend a sentence of life imprisonment for ... no reason at all other than as an act of mercy." The phrase "other than as an act of mercy" modifies the phrase "for no reason at all," not the phrase "for any reason."
6. The problem with the Applicant's assertion is that he fails to recognize that Judge Cole was using the term "other than" as an adverb, not as an adjective. As an adverb, the phrase means "besides" and defined as "in addition to" or "as well". See Roget's 21st Century Thesaurus, Third Edition (2009). Also "other than" can be a preposition for "besides" and defined as in addition to with synonyms of "added to, along with, as well as , beside, beyond, together with. Id. Instead, the defendant is limiting the phrase "other than" as an adjective meaning barring and defines as "except for." Id.

The State agrees with the *amicus curiae*, Judge Cole and the Court that "if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it" as a matter of state law. Rosemond v. Catoe, 680 S.E.2d 5 (S.C. 2009). Beyond that, we would affirmatively assert as a matter of state law that even if no plea from witnesses for mercy is given the jury can consider a life sentence as an act of mercy. The problem with the Supreme Court's intervening new opinion in Rosemond v. Catoe, albeit in *obiter dicta*, and the PCR Courts' and the Applicants' reliance upon it, is that it ignores that the jury in Rosemond's sentencing, as well as the jury in State v. Hughey, 339 S.C. 439, 459, 529 S.E. 2d 721, 731 (2000), and Mr. Evans' and Mr. Binney's juries would have properly considered "mercy" evidence presented to them and that the none of the instructions "precluded a capital jury's consideration of mercy evidence in the sentencing phase." As the Supreme Court has consistently stated, jury instruction must be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Sims, 304 S.C. 409, 422, 405 S.E.2d 377, 384 (1991) (implausible that jury would have interpreted mitigation instruction to preclude consideration of mitigation evidence of Sims background and character).

In passing, however, the State disagrees with the contention of the amicus that consideration of "mercy" in capital cases is grounded in the Eighth Amendment of the United States Constitution. A state is "free to determine the manner in which a [sentencer] may consider mitigating evidence" so long as those who impose the sentence have the discretion to consider the mitigating evidence. Kansas v. Marsh, 548 U.S. 163, 171, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) (citing Walton v. Arizona, 497 U.S. 639, 652, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled on other grounds by Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). The amicus curiae's position has been rejected by various court which have addressed

the issue. The Sixth Circuit in Durr v. Mitchell, 487 F.3d 423, 447 (6th Cir. 2007) concluded "an instruction that the jury should not be swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling' was not only unobjectionable ... it 'served the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on [irrelevant,] extraneous emotional factors.' " *quoting* California v. Brown, 479 U.S. 538, 542-43, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987)). See Johnson v. Texas, 509 U.S. 350, 371–72, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (holding that the constitution does not require that a capital jury be able to dispense mercy solely on the basis of a "sympathetic response to the defendant"). In Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), the Court drew the "distinction between allowing the jury to consider mitigating evidence and guiding their consideration. 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, and not an emotional response to the mitigating evidence.' " Id. at 492–93, 110 S.Ct. 1257 (citing California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987)) (internal citations omitted). "Petitioner was not entitled to a "mercy instruction." While a State cannot prevent the consideration of mitigating evidence, "it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice." Id. at 493, 110 S.Ct. 1257. The Constitution does not require a particular structuring of the way in which juries consider mitigating evidence. See Buchanan v. Angelone, 522 U.S. 269, 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). The relevant constitutional principle is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of relevant evidence." Id. (citing Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108

L.Ed.2d 316 (1990)). Similarly, state courts have rejected this constitutional basis. See Corrothers v. State, 148 So.3d 278, 318 (Miss. 2014) ("Defendants do not have a right to a mercy instruction" citing Saffle v. Parks, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). "In Saffle, the United States Supreme Court stated that the giving of a mercy instruction results in a decision based on whim and caprice." Ladner v. State, 584 So.2d 743, 761 (Miss.1991).

There is no federal constitutional prohibition against an anti-sympathy instruction, nor is a capital defendant constitutionally entitled to a mercy instruction. See, e.g., Johnson v. Texas, 509 U.S. 350, 371, 113 S.Ct. 2658, 2671, 125 L.Ed.2d 290 (1993) ("[W]e 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."); Saffle, 494 U.S. at 492-93, 110 S.Ct. at 1262 (determination regarding appropriateness of death penalty is inquiry into culpability and not emotional response to mitigating evidence).

CONCLUSION

The jurors in each of the cases were not precluded from acting mercifully, if they chose to do so in response to the evidence presented. Wherefore, the State of South Carolina has made a response to the Amicus Curiae Brief of South Carolina Religious Leaders and Scholars.

Respectfully submitted,

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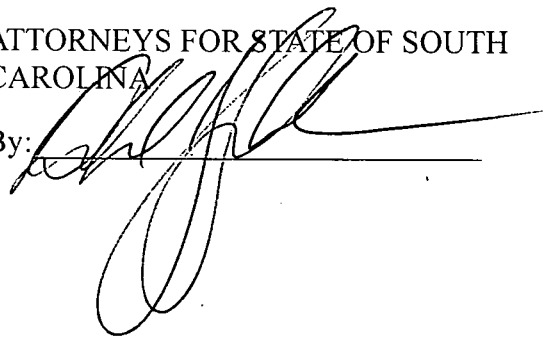
By: 

December 3, 2014

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Appeal from Abbeville County
Honorable Alexander S. Macaulay

Case No. 2000-CP-01-212

JOHN KENNEDY HUGHEY,

Respondent/Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent

CERTIFICATE OF SERVICE

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