STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
NOV 21 2011
S.C. Supreme Court

---

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Capital PCR 06-CP-23-7719
The Honorable D. Garrison Hill, Circuit Court Judge

---

Kamell Delshawn Evans,

Respondent/Petitioner,

-vs-

State of South Carolina,

Petitioner/Respondent.

---

# RESPONDENT/PETITIONER'S RETURN TO THE STATE'S PETITION FOR WRIT OF CERTIORARI

---

WILLIAM HARRY EHLIES, II
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
hank@ehlieslaw.com

CHRISTOPHER WARREN SEEDS
Post Office Box 3931
Ithaca, New York 14852

ATTORNEYS FOR RESPONDENT/
PETITIONER

## TABLE OF CONTENTS

## QUESTION PRESENTED

## STATEMENT OF THE CASE

This is a capital murder post-conviction relief action filed by Respondent-Petitioner Kamell Evans after he was convicted of two counts of murder and sentenced to death. App. 1802-13.[1] The shooting arose out of a domestic depute between Mr. Evans and his girlfriend Christina Rodriquez; the victims were the brother and father of Rodriquez. App. 1420-32.

Mr. Evans was indicted for the murders of Antonio L. Sapinoso and his son Antonio J. Sapinoso (App. 1802-13), which occurred inside the Sapinoso home. The State filed a Notice of Intent to Seek the Death Penalty (App. 1814), alleging three aggravators as applied to Antonio L. Sapinoso and the same three factors as to Antonio J. Sapinoso, with the additional aggravator that the killing of Antonio J. Sapinoso was during or because of the performance of his official duties as a law enforcement officer. The jury found all aggravating circumstances beyond a reasonable doubt and returned a verdict of death. App. 1794-95. The trial judge found and certified in writing that the sentencing proceeding and jury findings were not a result of prejudice, passion or any other arbitrary factor. App. 1799.

On direct appeal the issue raised was whether the trial judge committed reversible error by not charging S.C. Code Ann. § 16-3-20(C)(b)(6), a statutory mitigating circumstance: "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." This issue was framed by this Court as follows: "Is Appellant entitled to a new sentencing proceeding because the trial judge failed to *sua sponte* charge the jury on a statutory mitigating

---

[1] Mr. Evans, Respondent-Petitioner, cites the Appellate Appendix ("App."), the Supplemental Appellate Appendix ("Supp. App."), and the State's Petition for Writ of Certiorari ("State's Petition").

circumstance?" The conviction and sentence were affirmed on November 6, 2006. *State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). See App. 1858-63.

Mr. Evans filed a Petition for Stay of Execution on November 13, 2006 and subsequently an application for postconviction relief (App. 1856). See App. 1896 (first amended petition); App. 1903 (second amended petition). On December 6, 2006 this Court granted the stay and designated the Honorable D. Garrison Hill to conduct the proceedings. App. 1865. Thereafter, Mr. Evans served and filed an Initial Trial Brief (Supp. App. 1), and an evidentiary hearing commenced June 1 through 5, 2009, and concluded from October 12 through 14, 2009. At the conclusion of the evidentiary hearing, Judge Hill issued a briefing order, and post-hearing briefs were filed by Mr. Evans on October 4, 2010 (App. 3906), by the State on November 10, 2010 (App. 4104), and Evans's Reply was filed on November 19, 2010 (App. 4217). On December 9, 2010, Judge Hill requested additional briefing regarding trial counsel's ineffectiveness with respect to the prejudice prong of the *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009), jury charge question. On the issue of whether counsel's failure to object to the erroneous charge was prejudicial, the court asked the parties to brief the following questions:

(a) Whether the improper charge requires *per se* reversal, or whether the defense of "harmless error" can apply. See *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008).

(b) Whether the analysis of *Boyde v. California*, 494 U.S. 370 (1990), applies to Mr. Evans' ineffectiveness and 8th amendment and 14th amendment claims related to the erroneous jury instruction on mercy.

The State submitted its brief on December 14, 2010 (App. 4238) and Mr. Evans submitted his on December 16, 2010 (App. 4245).

On February 24, 2011, Judge Hill issued a final order granting Mr. Evans a new sentencing trial, finding that Mr. Evans was denied effective assistance of counsel as a consequence of counsel's failure to object to the erroneous jury charge instructing jurors that a life sentence could not be returned as an act of mercy. App. 4254. The relief was granted in part on the authority of *Rosemond v Catoe*. On April 1, 2011, the State filed its Notice of Appeal. Thereafter, Mr. Evans filed a cross appeal pursuant to S.C.R.A.P. Rule 203(c) and, by subsequent order of this Court, was designated the Respondent-Petitioner. Mr. Evans opposes the State's Petition for a Writ of Certiorari. The State's Petition should be denied for the reasons set forth herein.

## THE STATE'S PETITION FOR WRIT OF CERTIORARI AND KAMELL EVANS'S BRIEF IN OPPOSITION[2]

The grounds upon which the State seeks a Writ of Certiorari allege that the PCR judge erred by finding trial counsel ineffective for failing to object to the charge that a life sentence could not be returned as an act of mercy. Kamell Evans, in his Brief in Opposition, argues

[2] Mr. Evans has contemporaneously filed a Petition for Writ of Certiorari challenging the PCR court's erroneous decisions on seven issues, some of which are subject to recur at a new sentencing trial: (1) Trial counsel were ineffective to the prejudice of Mr. Evans by failing to pursue and investigate substantial and significant mitigation of which they were or should have been aware, including evidence of brain damage and abuse. (2) Trial counsel were ineffective in failing to object to the aggravating factor S.C. Code Ann. § 16-3-20(C)(a)(7) as applied to the victim Antonio J. Sapinoso, when no evidence supported the suggestion that the offense occurred "during or because of the performance of his official duties." (3) Trial counsel were ineffective to the prejudice of Mr. Evans by failing to object to the testimony of Lewis O'Cain, who compared general living conditions of those sentenced to life without parole to those sentenced to death, and in failing to object to the Solicitor's argument on the same. (4) Trial counsel were ineffective to the prejudice of Mr. Evans by failing to object to the testimony of Mr. O'Cain regarding alleged gang affiliation of Mr. Evans based solely upon Mr. Evans's tattoos and a homemade poster, and the Solicitor's highly inflammatory and ungrounded summation, which characterized this domestic incident as the shooting of a law enforcement officer for the purpose of gang status. (5) Trial counsel were ineffective to the prejudice of Mr. Evans for failing to make a motion to change the venue of the trial where one of the victims served as a security officer in the courthouse where the trial was held. (6) Trial counsel were ineffective to the prejudice of Mr. Evans by failing to object to victim impact testimony. (7) Trial counsel were ineffective to the prejudice of Mr. Evans for failing to object to the Solicitor's summation, which exceeded the bounds of fair testimony in multiple respects. App. 1756-1757.

that the PCR judge correctly found a violation of *Strickland v. Washington*, 466 U.S. 688 (1984). The jury charge given in this case, "[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" (App. 1785) contradicts long-standing State precedent and statutory authority as well as the Federal Constitution. Counsel's failure to object to the charge constituted deficient performance under *Strickland*, and was also prejudicial under *Strickland*, especially so since the crux of the defense at sentencing was mercy.

## I.

**THE PCR COURT PROPERLY APPLIED *STRICKLAND v. WASHINGTON*, AND PROBATIVE EVIDENCE SUPPORTS THE COURT'S FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO A CHARGE WHICH PRECLUDED THE JURY FROM UTILIZING MERCY AS A VEHICLE FOR EXPRESSING ITS MORALLY REASONED RESPONSE TO THE EVIDENCE WAS BOTH DEFICIENT AND PREJUDICIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW.**

Under state law in South Carolina, the ruling of a postconviction court is entitled to great deference. *See Burnett v. State*, 352 S.C. 589, 576 S.E.2d 144 (2003); *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000). The appellate court must uphold a postconviction ruling if supported by "any evidence of probative value" in the record. *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010); *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984); *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517. The appellate court will only reverse the postconviction determination when it is controlled by an error of law. *Kolle*, 386 S.C. at 589, 690 S.E.2d at 79; *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000).

The grant of sentencing relief in Mr. Evans's case is firmly grounded in the evidence in the record and in the law. Evans alleged that trial counsel provided ineffective assistance of counsel by failing to object to a sentencing charge that instructed the jury "you may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*." App. 1785 (emphasis added). The same trial judge used an identical jury instruction in the case of *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), and this Court found the charge contradicts state law because it informs the jury that a morally reasoned response to the evidence finding mercy as a basis for a sentence of life without parole is prohibited. *See id.* (overruling in part *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000)). In Mr. Evans's case, trial counsel testified during postconviction proceedings that mercy was the "primary element" of the mitigation plea. App. 3270. Accordingly, counsel stated, they would have objected to any charge that operated to limit the jury from utilizing mercy as a basis for returning a verdict of life imprisonment without parole. Yet counsel did not object when the charge cited above was read to them in chambers; nor did they object when the same charge was delivered to the jury, first orally and then in writing.

Like *Rosemond*, Mr. Evans's case is one of handful in which the trial court gave this erroneous instruction. See App. 1785; see also *Hughey, supra*; *Binney v. State*, 2000-CP-06-11-223, Cherokee County (PCR Order, Sept. 1, 2011) (Baxley, J.). The postconviction court (the "PCR court"), applying *Strickland v. Washington,* 466 U.S. 668 (1984), to the facts in the record, correctly found that counsel's failure to object to the charge was deficient performance: the instruction prevented the jury from using mercy as a moral perspective from which the jurors could individually and collectively view and evaluate the evidence

and express a morally reasoned sentencing decision. In doing so, the charge violated state law and federal law. Particularly given trial counsel's overriding focus on mercy in the mitigation case, counsel had no reasonable basis for not objecting to the charge that precluded mercy. Applying *Strickland*'s prejudice prong, the PCR court also determined that but for counsel's failure to object to the charge there was a reasonable probability that the outcome of the sentencing proceeding would have been different. For Mr. Evans, the impact of counsel's failure to object was that the jury deliberated on sentence without being able to use "mercy," the crux of the mitigation case, in making its decision.

The State has raised four questions in its petition: none merit granting certiorari. Question I and Question II unsuccessfully challenge the PCR court's careful application of the first and second prongs of *Strickland v. Washington*, respectively. Question III challenges one of the bases underlying the PCR court's finding of a *Strickland* violation—counsel's failure to recognize and object to the erroneous instruction on Eighth Amendment grounds. This argument lacks merit, as it misconstrues and misunderstands the federal law as well as the PCR court's decision. Finally, Question IV also lacks merit as it simply faults the PCR court for making a finding of fact with respect to the plain meaning of the erroneous instruction that flows directly from this Court's decision on the very same language in *Rosemond*.

**A. Evidence Presented at the Sentencing Trial and Postconviction Proceedings**

1. The Sentencing Trial

Trial counsel's mitigation presentation during the capital sentencing proceeding consisted principally of brief testimony from a series of family members, coaches, and friends. The presentation began with Mr. Evans's high school football coach (App. 1651-

53), his high school basketball coach (App. 1645-47), his community college football coach (App. 1648-50), and the high school football team chaplain (App. 1642-44), who testified, each for less than three transcript pages, that Evans was respectful, courteous, and a team leader. A friend with whom Mr. Evans coached little league football testified that Mr. Evans developed a positive relationship with he and his son. App. 1655-58. Another friend, who worked with Mr. Evans in a youth football and basketball association, testified that Evans had been a positive role model for his twenty-two year old son. App. 1660-62. A coworker testified briefly that Evans was a hard worker, who had not been involved in problems on the job. App. 1664-65. Evans's sister said that Kamell was a father figure to her children, even in prison (App. 1672), and Evans's father offered an emotional plea in two transcript pages, praising his son's positive attributes and stating that, while Kamell's actions caused the family pain, "he is still my friend, he will always be my friend" (App. 1669).

Counsel also called two witnesses who testified that Evans would adjust positively in prison. See App. 1624 (corrections expert); App. 1615 (Greenville County Detention Center corrections officer). And counsel called two mental health experts: first, Dr. James Evans, a neuropsychologist who testified that the results of a test battery he conducted on Mr. Evans were "indicative of mild brain dysfunction" (App. 1696), but who conceded that he had not "actually seen the [brain] damage," for which more testing and brain imaging would be needed (App. 1701-02; see App. 1684); second, Dr. Elin Berg, a psychiatrist, who stressed that the relationship between Evans and Christina Rodriguez was the reason for the shootings (App. 1717-18), but who, contrary to Dr. Evans, testified that Kamell lacked any neuropsychological symptoms that would call for further study of brain abnormality.

Throughout the sentencing testimony, no allusion whatsoever was made to the difficulties in Mr. Evans's life, be it in Cleveland in his formative years or as a young adult and adult in South Carolina.

The prosecutor argued in closing argument that "[t]he defense evidence was not mitigation[,] [i]t didn't mitigate anything. It was designed to make you feel sorry for him and create sympathy." App. 1754. Defense counsel James Goldsmith in summation then asked: "How does someone from a good background for ten seconds of their life just blow it off . . . ?" App. 1526. His only answer was this: "There are two Kamell Evanses. That's the only way you can explain it." App. 1769. Ultimately, the defense case for a life sentence rested on mercy, as these words from Goldsmith's closing argument made clear:

> Ladies and gentlemen, we do not repay evil with evil. The solicitor is correct. I am going to ask for mercy for Kamell Evans. But I disagree with what the solicitor said is the definition of mercy. He said mercy is something that you deserve. I strenuously disagree, ladies and gentlemen. If we deserved it, if we could earn it, then we probably wouldn't need it.
>
> 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. You can show mercy and you can choose life regardless of who deserves it and who does not. We all need mercy, but none of us have earned it and none of us deserve it.

App. 1770.

2. The Postconviction Hearing

During the postconviction hearing (the "PCR hearing"), trial counsel Goldsmith and Sumner both explained that the "primary element" (App. 3270), the "key highlight" (App. 3271), a "major part" (App. 3259), of the mitigation case was mercy. Goldsmith testified that he "built" the closing argument "around" mercy. App. 3271. Counsel testified that they had hoped to convince the jury, in the face of substantial evidence presented by the State in

aggravation, that Evans was a good person who, as April 1 passed to April 2, 2003, had a very bad night. In counsel's view, mercy was the keystone of this approach.

In striking irony, however, despite having been present for the trial court's review of the jury instruction in chambers before it was charged to the jury, counsel allowed the court to charge the jury in a way that precluded jurors from giving effect to the keystone of the defense. The charge given on mercy was identical to that which this Court rejected in *Rosemond*: "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. 1785 (emphasis added). See *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10-11; see also *State v. White*, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) (noting the "absolute discretion of the jury with regard to the issue of mercy"). The same charge was provided to the jurors in writing during deliberations.

During the PCR hearing, trial counsel offered as a reason for failing to object that they thought the instruction emphasized to jurors that they should consider mercy. Attorney Goldsmith remembered the charge as "sort of an expansive charge." App. 3272. Attorney Sumner stated that because the instruction "use[d] the word mercy" it was preferable to a charge that merely tracked the statute's text. App. 3264; see App. 3261. Both testified that if they had thought the instruction limited or precluded mercy, they would have objected to it. App. 3262, 3279. The possibility that the instruction shut off the key avenue of reasoned moral response that their case depended on—or that the charge, in so doing, contravened state law as well as federal law—it seems, never crossed their minds.

### B. Ineffective Assistance of Counsel under *Strickland v. Washington,* and the PCR Court's Order Granting Sentencing Relief

The ineffective assistance of counsel standard established in *Strickland v. Washington* requires a showing that an attorney's representation "fell below an objective

standard of reasonableness," 466 U.S. at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. *Strickland* itself was a capital case, and over the past twenty-five plus years the Court has developed a jurisprudence focused on representation in capital sentencing trials.[3] The Supreme Court follows a number of principles in applying *Strickland*'s two-prong test for deficient performance (the first prong) and prejudice (the second prong), which this Court has followed in its capital precedents (see, e.g., *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004)).

The principles that guide a court's consideration of the *deficient performance* prong include, significantly, the following:

- Counsel's performance must be assessed according to standards of performance that prevailed at the time of the trial. See *Van Hook*, 130 S.Ct. at 16-17; *Council*, 380 S.C. at 173, 670 S.E.2d at 363; see also *Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008) (citing *Strickland*, 466 U.S. at 690).[4]

- Counsel's tactical decisions are entitled to great deference—but only if based on thorough and reasonable investigation. As *Strickland* states, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 690-91.

---

[3] See *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000)); see also *Harrington v. Richter*, 131 S.Ct. 770 (2011); *Sears v. Upton*, 130 S.Ct. 3259 (2010); *Porter v. McCollum*, 130 S.Ct. 447 (2010); *Wong v. Belmontes*, 130 S.Ct. 383 (2009); *Bobby v. Van Hook*, 130 S.Ct. 13 (2009)). This Court has applied that precedent repeatedly. See, e.g., *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004)).

[4] In this regard, professional norms such as the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1023-26 (2003), are important guides, but nevertheless only guides. Recently, in both *Council* and *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (S.C. 2007), this Court found ineffective assistance of counsel, and recognized and applied as guides the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

In assessing whether counsel's deficient performance *prejudiced* the defendant, the following principles are key:

- The impact of all of counsel's failures on the outcome must be considered *cumulatively* in the context of the totality of the circumstances. *Strickland*, 466 U.S. at 694-96; see *Porter*, 130 S.Ct. at 452; *Wiggins*, 539 U.S. at 534-38; *Williams*, 529 U.S. at 395-97; cf. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

- Along the same lines, in determining whether a single juror could have been influenced by counsel's deficient performance, the impact of counsel's error must be considered in light of both the mitigating evidence that could have been investigated and presented as well as the aggravating evidence. See, e.g., *Belmontes*, 130 S.Ct. at 390-91; *Van Hook*, 130 S.Ct. at 20.

Applying the United States Supreme Court's ineffective assistance of counsel jurisprudence under *Strickland,* the PCR court held that trial counsel's failure to object to the challenged instruction fell below an objective standard of reasonableness. The PCR court also held there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. App. 4485-4493. Before turning to counsel's failure to object to the mercy instruction under *Strickland*, however, the PCR court began by addressing two prior cases in which this Court faced the very same jury instruction at issue here: *Rosemond v. Catoe* and *State v. Hughey*. Understanding what these cases did and did not hold is significant for interpreting the deficient performance and prejudice prongs in the current case.

1. *Rosemond v. Catoe* and *State v. Hughey*

The petitioner in *Rosemond* had argued that trial counsel were ineffective for failing to object to the "other than as an act of mercy" instruction because it precluded the jury from utilizing a sentencing factor authorized by State law. This Court agreed that the plain meaning of the charge told jurors that mercy was not a proper basis upon which to deliver a

life sentence and thus erroneously contravened long-standing South Carolina law. Granting relief on another ground, however, this Court did not address the prejudice from the erroneous instruction. *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10.

The *Rosemond* Court also revisited its prior decision in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), which indirectly addressed the same instruction nine years prior. The question presented to the Court in *Hughey* was whether a jury charge properly informed jurors that they were required to consider non-statutory as well as statutory mitigating factors. Hughey had also argued that, considering the jury charge as a whole, the instruction precluding mercy added to the confusion "because it suggested that an act of mercy would have been an invalid reason for a life vote." This Court held that the jury charge, in its entirety, was not confusing "because it advise[d] the jurors to consider all mitigating circumstances in making their recommendation." *Hughey*, 339 S.C. at 460, 529 S.E.2d at 732. The Court also dismissed the *Hughey* Court's criticism of the 'mercy' charge, which had found the argument "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 *id.* In sum, *Hughey* concerned whether a jury instruction properly informed jurors that they could consider non-statutory mitigating evidence, and finding the instruction provided jurors with that information the court upheld it. In dicta, the court noted the mercy instruction was unobjectionable because it was consistent with the common law "no sympathy" rule affirmed in cases such as *State v. Singleton*, 284 S.C. 388, 326 S.E.2d 153 (1985), and *State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984). The *Hughey* decision, however, did not address the constitutionality of the mercy instruction under state or federal law.

In *Rosemond*, this Court recognized that what it stated in dicta in *Hughey* was wrong and "overrul[ed] *Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase." 383 S.C. at 330, 680 S.E.2d at 11. The discussion in *Hughey* conflated (a) juror use of mercy as a reasoned moral response to the evidence presented with (b) sentencing verdicts unhinged from the evidence and motivated solely by sympathy, prejudice, or passion. The law of South Carolina has long championed the jury's ability to apply the former, while steadfastly precluding the latter.

As the PCR court's Order explains, "It is important to realize that *Hughey* did not discuss or decide the issue of whether the 'other than as an act of mercy' charge infringed on a capital defendant's constitutional right to present mitigating evidence. Instead, *Hughey* only went so far as to uphold the charge on the basis that it was consistent with the common law rule that a jury can properly be instructed that its verdict cannot be swayed by sympathy or prejudice." App. 4477-4478. The PCR court continued, therefore, that *Hughey* cannot be read to mean that this State's long-standing use of mercy as an instrumental basis for a reasoned moral decision suddenly disappeared. As the PCR court explained, *Hughey* "left undecided the issue of whether a charge that removes mercy as a sentencing consideration violates constitutional commands." App. 4478.

The relevance of this to the PCR court's evaluation of trail counsel's representation in Mr. Evans's case is two-fold. First, the PCR Court interpreted the "no mercy" instruction in *Hughey* to *preclude* mercy, as this Court did in *Rosemond*. So *Rosemond* does not present a new interpretation of the language of the instruction itself. Second, the *Hughey* Court's statement about the mercy component of the instruction was *in tension with, but did not*

*change,* existing law. The mercy instruction was therefore a proper and necessary ground for objection by trial counsel—particularly in a strongly aggravated penalty proceeding where counsel placed enormous weight on mercy as a basis for a life sentence.

2. Finding Deficient Performance

Turning to *Strickland*'s first prong, the PCR order found that counsel should have known that the charge—"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. 1785)—violated long-standing South Carolina law and the Eighth Amendment to the United States Constitution. Looking to *Rosemond*, the PCR court recognized that "the plain meaning of the words of the charge given is that mercy is precluded as a consideration for a sentence of life." App. 4481. The PCR court continued, "As the Supreme Court understood, the last clause of the instruction plainly reads as a limitation on and qualification of the previous sentence, not a reiteration." App. 4481.

The PCR court further recognized that the reason trial counsel offered for not objecting to the charge—that in their view it emphasized the jury's ability to grant a life sentence based on mercy—was not only inconsistent with *Rosemond*, but incongruous with common sense and, significantly, with long-standing South Carolina law. This Court's precedent has long held that a capital defendant is entitled to offer evidence asking "for mercy on his behalf," *State v. Torrence*; 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); that defense counsel may properly "appeal to the jury's sense of mercy," *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993); and that counsel may "address the jury and ask for mercy," PCR at 98 (citing *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004)). Moreover, mercy is "embraced" in the statutory directive of S.C. Code Ann. § 16-3-20(C) that "the

judge shall consider or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law." App. 4481. In addition, South Carolina does not require juries to weigh aggravating circumstances against mitigating circumstances: South Carolina is a non-weighing state, in which it has long been the rule that a jury may return a life sentence for any reason. See App. 4482. "[T]he law [of South Carolina]," the PCR court summarized, "has always been that a capital jury can consider mercy. Indeed the law used to be that one convicted of murder was sentenced to death *unless* the jury recommended mercy." App. 4482 (emphasis in original) (citing *State v. Harper*, 251 S.C. 379, 162 S.E.2d 712 (1968), and S.C. Code Ann. § 16-52). In light of this long-standing state law, and given that *Hughey* "left undecided... whether a charge that removes mercy as a sentencing decision violates constitutional commands," reasonable counsel would not have "accept[ed] on faith that *Hughey* insulated the 'other than as an act of mercy' language from any challenge." App. 4478. Rather, reasonable counsel would have raised an objection to the erroneous and damaging instruction based on state law.

Further, the PCR court held that counsel should have recognized that by contradicting state law, a charge precluding a morally reasoned response based on mercy in a capital sentencing proceeding also gave rise to a federal constitutional violation under well-established Eighth Amendment precedent. The Eighth Amendment doctrine following *Lockett v. Ohio*, 438 U.S. 586 (1978), demands that "a capital sentencing jury must be able to consider *and give effect* to mitigating evidence, for it is only when a jury is provided a vehicle for expressing its reasoned moral response to such evidence that 'we can be sure the jury...has made a reliable determination that death is the appropriate sentence.'" App. 4483 (emphasis in original) (quoting *Penry v. Johnson*, 532 U.S. 782, 797 (2001)); see generally

*Lockett v. Ohio*, 438 U.S. 586 (1978). Because "[t]he South Carolina legislature has decided to allow mercy as a sentencing consideration, encompassed in the language 'for any reason or no reason at all,' and the South Carolina Supreme Court has so interpreted the statute" (App. 4483), a capital jury must be able to utilize mercy as a response to the evidence under *Lockett*. "Because *Hughey* neither addressed nor ruled upon the issue of whether precluding a capital jury from considering mercy comported with *Lockett* and its progeny," the PCR court concluded that reasonable counsel would also have objected to the charge as a violation of federal law. App. 4483.

The PCR court found counsel's omission, in sum, "permitted a charge not only contrary to capital jurisprudence and the state statute as it existed at the time of [Evans's] trial, but contrary to the theory and thrust of the mitigation case counsel presented to the jury." App. 4484.

3. Finding Prejudice

Evaluating prejudice under *Strickland*, the PCR court first set out the *Strickland* standard for prejudice, by which it would consider whether counsel's failure to object to the "other than as an act of mercy" charge was prejudicial to Mr. Evans such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." App. 4484 (quoting *Strickland*, 466 U.S. at 694). The PCR court then noted that this Court in *Rosemond*, reversing and remanding for a new sentencing proceeding on other grounds, did not address prejudice in relation to the mercy charge. App. 4484 (citing *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10). The PCR court therefore noted that, "as a preliminary matter," it would consider whether (a) harmless error analysis such as this Court applied in *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008),

or (b) *Boyde v. California*, 494 U.S. 370 (1990), are part of the *Strickland* prejudice analysis. App. 4484.

The PCR court determined that harmless error analysis was incongruous in this circumstance because, like other errors that "deprive the jury of a 'vehicle for expressing its reasoned moral response to the defendant's background, character, and crime,'" App. 4486 (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)), the "other than as an act of mercy" charge eliminated a fundamental aspect of the jury's sentencing decision.

> The type of evidence balancing applied in *Lowry* ... is incongruous with a jury's consideration of mercy under South Carolina law, because under South Carolina law mercy serves as a basis for a vote for life based on consideration of the evidence presented at sentencing, yet despite the weight of that evidence. This is true when considering the role mercy plays in a highly aggravated sentencing case. A strong case in aggravation renders many instructional errors moot. By contrast, the mercy option becomes even more important to a capital defendant's chance for a life sentence in a highly aggravated case.

App. 4487-88.

Importantly, the PCR court *also* found that counsel's failure to object to the instruction precluding mercy was especially damaging under *Strickland* given the *particular circumstances of this case*. Even if harmless error analysis was instructive for *Strickland* prejudice, the challenged instruction was not harmless here because "as trial counsel testified at the postconviction hearing, mercy played the central role in the defense of the death penalty and in the mitigation presentation." App. 4488. "Even if harmless error applies," the PCR court held, "there is a reasonable probability that, but for counsel's failure to object to the unconstitutional charge, the outcome of the trial would have been different." App. 4489 (citing *Strickland*, 466 U.S. at 694-96).

The PCR court also determined that *Boyde v. California* contributed little under the circumstances because *Boyde* applies to ambiguous instructions, not clearly erroneous ones like the mercy charge. App. 4489. As *Rosemond* reiterated, there is nothing ambiguous about the instruction at issue; it is clearly wrong. App. 4489-90. Regardless, the PCR court carefully considered the impact of the erroneous charge in the context of the jury instruction as a whole. The court found the word "mercy" mentioned only once—that was in the erroneous charge. No other language in the overall instruction abated the error. While the trial court did instruct the jury to consider all nonstatutory or statutory mitigating circumstances, this Court's precedent holds that language that "does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." App. 4490-91 (quoting *Lowry*, 376 S.C. at 507-08, 657 S.E.2d at 764). The jury was told, orally and in writing, to follow the law as instructed by the judge, and that instruction told jurors not to utilize mercy in reaching a morally reasoned response. App. 4492. "To find otherwise," the PCR court held, "would be to conclude that the jury not only violated its oath and ignored the judge's flawed charge on mercy, but that they were coincidentally armed with such a workable understanding of *Lockett* and its accompanying constitutional jurisprudence that they unilaterally chose to consider Evans's plea for mercy." App. 4492.

Having found that prejudice from the erroneous instruction was not offset by the jury charge as a whole, and that the aggravating factors only served to enhance its impact, the Court held under *Strickland* that there was a reasonable probability that but for counsel's failure to object to the instruction the outcome of the sentencing trial would have been different. The violations of state and federal law wrought by the erroneous charge were highly prejudicial. App. 4492. Particularly so in Evans's case because mercy was "the crux

of the mitigation case" pitted "against substantial aggravating evidence." App. 4493. Under *Strickland*, because trial counsel's failure to object to the charge precluding consideration of mercy was prejudicial, Evans was entitled to a new sentencing trial.

### C. The State's Petition Offers No Legitimate Basis for Certiorari and Should be Denied

The State's petition challenges the PCR Order for (a) misapplying *Strickland*'s first prong on deficient performance, (b) misapplying *Strickland*'s second prong on prejudice, (c) misconstruing the federal issue involved, and, finally, (d) making an erroneous factual finding with respect to the meaning of the language of the mercy charge. None of these questions have merit. There is probative evidence in the record to support the PCR court's finding of ineffective assistance of counsel on this issue. This Court must affirm the postconviction court's ruling. See *Kolle v. State*, 386 S.C. at 589, 690 S.E.2d at 79 (2010); *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517.

#### 1. Probative evidence in the record supports the finding of deficient performance under *Strickland*.

To establish ineffective assistance of counsel, a defendant must first demonstrate that his attorney's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Counsel's representation must meet an objective standard of reasonableness, which is measured as "reasonableness under prevailing professional norms" taking into account "counsel's perspective at the time." *Id.* at 688, 689. As set forth, trial counsel testified during the postconviction hearing that they did not object to the "no mercy" instruction because they believed that the instruction emphasized mercy. The State has also offered an additional explanation for counsel's failure to object: although trial counsel never testified that they were aware of or considered this Court's decision in *Hughey*, the State

asserts that *Hughey* effected a change in law and provided a reasonable basis for counsel not objecting. Both the rationale offered by trial counsel at the PCR hearing and the rationale offered *post hoc* by the State in its briefing fail to establish adequate performance under *Strickland*, on several counts.

First, trial counsel's interpretation of the plain language of the "no mercy" charge is peculiar and untenable. This court has already stated in *Rosemond* that the "other than as an act of mercy" clause plainly informs jurors that they may not return a life sentence based on a morally reasoned response of mercy to the unique circumstances of the case. This Court stated with equal clarity that the terms of the directive run contrary to state law. The instruction, by its plain language, should have appeared objectionable to reasonable capital defense counsel—especially in circumstances, as here, where mercy was the crux of the sentencing case.[5]

Second, counsel's failure to object to the charge was not reasonable because the charge refuted long-standing state law that supports mercy as a basis for returning a life sentence. Counsel provided no testimony to the effect that they considered the *Hughey* decision. Regardless, as the PCR court set forth, *Hughey* did not effect a change in long-standing state law. If, as the State acknowledges, *Hughey* only addressed "the mercy charge issue in dicta" (State Petition at 19), how could it? Accordingly, reasonable counsel faced with the *Hughey* decision, and seeking to rely on mercy as Evans's counsel did, would have

[5] Contrary to the State's assertion, the fact that trial counsel or the trial court may have subjectively understood or intended the instruction differently (see State's Petition at 22) is of no matter. If the acts of all well-meaning actors were defined by good intentions—rather than by their real-world impact—then there may be no judicial errors or *Strickland* violations. As the United States Supreme Court recognized in *Harrington v. Richter*, *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." 131 S.Ct. at 790 (citing *Strickland*, 466 U.S. at 688). The only objectively reasonable interpretation of the charge given here, as this court recognized in *Rosemond*, is that it precludes mercy as a basis for a morally reasoned response to the sentencing evidence.

objected to the charge as an infringement of long-standing South Carolina precedent supporting mercy as a basis for a reasoned moral response to sentencing evidence. Likewise, after *Hughey*, a judge giving the charge would have reasonably believed that in doing so he or she was eliminating juror consideration of mercy. This court's decision in *Rosemond* is a resounding example in fact of just such recognition of error.

The third reason that counsel's failure to object to the charge was unreasonable is that the charge, by removing from the jury a basis for a life sentence authorized by the state legislature, also violated the Eighth Amendment to the United States Constitution, which demands that jurors not be precluded from considering and giving effect to mitigation. See App. 4482-83 (PCR Order, citing *Lockett v. Ohio*). The state's petition simply overlooks or ignores a significant part of the federal *Lockett* doctrine. According to the State, as long as jurors are instructed to consider all the evidence, that is sufficient. The State asserts: "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..." State's Petition at 30-31. The circularity of the State's assertion notwithstanding, that is not what the United States Supreme Court's precedent says: jurors must not only consider but also *give effect* to mitigation. In a state that upholds mercy as a relevant basis for a life sentence, such as South Carolina, "giving effect" means being able to reach a morally reasoned response that mercy calls for a life sentence based on the evidence presented. The language of *Hughey* created a disconnect with well-established state law that implicated state law as well as the United States Constitution.[6] Reasonable capital counsel would have recognized this.

[6] The State misleadingly asserts, "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."

A word should also be said about the State's erroneous conflation of two legally distinct concepts: sympathy and mercy. Throughout its petition, the State mistakenly regards mercy as "unfettered emotion" and identifies mercy and sympathy as identical species. See, e.g., State's Petition at 11. The two are different, however, and the legal distinction is quite important. Under South Carolina law, mercy is a morally reasoned response to the evidence presented in a capital sentencing proceeding; it is authorized by state law. See *State v. Dickerson* (No. 27048), __ S.C. __, 2011 S.C. LEXIS 312 (Oct. 3, 2011) (distinguishing mercy, a proper aspect of capital jurors' reasoned *moral* response to the evidence, from an "unguided emotional response" such as that based, for example, on execution impact testimony). Sympathy, by contrast, is an unauthorized, emotional sentencing response that is not tethered to the evidence but rather motivated by whim, passion, or prejudice. See *Singleton*, *supra*; *Chaffee*, *supra*; see generally *Saffle v. Parks*, 494 U.S. 484 (1990); *California v. Brown*, 479 U.S. 538 (1987). The State's conflates these two distinct concepts, and this error skews its assessment of deficient performance and prejudice, just as it blindly drives the third Question Presented (State's Petition at 31-32).

For the reasons found by the PCR court and discussed above, under *Strickland* trial counsel had no reasonable basis for not challenging the instruction. The PCR court's finding of deficient performance is solidly grounded in the record, in the law of South Carolina, and in the federal constitution. Question I of the petition does not present an issue that merits this Court's review.

---

(State's Petition at 19; see id. at 20). Of course South Carolina has never allowed complete disregard of the evidence. But South Carolina has *always* held that mercy is legitimate—that a life sentence may be given for any reason or no reason at all—when that decision is a morally reasoned judgment and not one incited by prejudice and passion and sympathy. This is as true of cases before *Furman v. Georgia*, 408 U.S. 238 (1972) (cf. State's Petition at 20) as it is of cases since.

2. Probative evidence in the record supports the PCR court's finding of prejudice under *Strickland*, that but for counsel's error there is a reasonable probability that the outcome of the sentencing proceeding would have been different.

To show prejudice under *Strickland*, a party must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 446 U.S. at 694; *see Wiggins*, 539 U.S. at 534. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* at 694. In assessing *Strickland*'s second prong, the prejudice arising from all of defense counsel's errors is considered cumulatively in light of the totality of the evidence. *Id.* at 695.

The State's petition argues "the PCR judge erred in finding per se error in the jury instruction regarding mercy, thereby avoiding a proper *Strickland v. Washington* prejudice analysis." State's Petition at 21. In addition, the State's petition argues that the erroneous charge made little difference in Mr. Evans's case because, in the context of the instruction as a whole, any prejudice arising from it was cured, and its damage offset by substantial evidence in aggravation. See State's Petition at 26 (citing *Boyde v. California*). Accordingly, the State posits, there is no reasonable probability that counsel's error was prejudicial under *Strickland*.

The first assertion is a skewed reading of the PCR court's opinion, and the second assertion is refuted by the PCR court's analysis. The court's assessment of prejudice under *Strickland* was thorough. On the one hand, the court considered the impact of the erroneous charge in the context of the entire jury instruction and found that the remainder of the court's directions to the jury did not cure it. In doing so, the court noted that *Boyde v. California* offered little assistance in assessing prejudice because *Boyde* concerns ambiguous charges, not clearly erroneous charges. In any event, *Boyde* was easily met here

because nothing in the jury charge cured the mistaken instruction: under *Boyde* and under *Lowry*, inconsistent instructions don't cure erroneous ones.

On the other hand, the PCR court also considered the impact of the "other than as an act of mercy" charge in the context of the evidence before the jury and the totality of the circumstances under *Strickland*, and found a reasonable likelihood that but for counsel's failure to object to the charge there is a reasonable probability that the outcome would have been different. In doing so, the PCR court found that *Lowry*'s harmless error analysis did not apply and, alternatively, the error was not harmless. One reason for this, the court noted, was that the prejudice of the erroneous instruction affected the jury's ability to give effect to the mitigating evidence. Another reason was that telling jurors they cannot apply mercy as a reasoned moral response to evidence is an error that only gains in importance as the aggravating evidence grows stronger. Here, the aggravating evidence was substantial: two homicides accompanied by a finding of four aggravating factors for one victim and three aggravating factors for the other. In these circumstances, rather than offset the impact of counsel's failure to object, the weight of aggravating evidence only made the impact of counsel's failure worse. Under these circumstances, the PCR court concluded that the charge precluding mercy created a "structural error." But none of these findings dispensed with the *Strickland* evaluation; rather, they were integral to it.[7]

The entire prejudice discussion in which the PCR court engages is a *Strickland* analysis: simply because the court considers harmless error and *Boyde* does not mean that *Strickland* is not the overarching framework. If the PCR court had indeed applied a *per se* reversal test, rather than *Strickland*, as the State would have it, the court would have had

[7] Failure to object to even a structural error still demands *Strickland* prejudice review. See, e.g., *Purvis v. Crosby*, 451 F.3d 734, 740-43 (11th Cir. 2006) (noting prejudice must be shown under *Strickland* even where counsel's ineffectiveness results in a structural error).

little need to assess the impact of the erroneous charge in the context of the instruction as a whole, or to assess the prejudice arising from counsel's failure to object to the charge in the context of the totality of the aggravating and mitigating evidence and circumstances at trial. As such, the State's narrative that "the PCR judge's errors may all be tracked to an erroneous belief that relief was mandated by...*Rosemond*" (State's Petition at 9; see *id.* at 21-22), is fictitious. The PCR court knew well that *Rosemond* did not address prejudice. Further, the court did not presume that *Rosemond* mandated reversal, and that is precisely why the court requested specific briefing by the parties on the *Strickland* prejudice issue and emphasized the pivotal role of mercy *in this case*. See App. 4484, 4488-89, 4490-92, 4493.

The PCR court reached a determination on prejudice that differs from the State's view in large part because the PCR court followed this Court's interpretation of the mercy instruction in *Rosemond*; whereas the State remains attached to a conflicting interpretation of the charge. If the charge's plain meaning holds, as this Court read that plain meaning in *Rosemond*, the adverse impact of the charge on the jury is much greater than if one takes the State's alternative reading. See State's Petition at 23. The PCR court's *Strickland* prejudice determination was firmly grounded in the record. The fact that the State differs with this Court on its perspective of the plain meaning of the language at issue does not change that.

Here a keystone of South Carolina law was taken from a defendant in a case where the defendant and his counsel relied heavily upon it. Question II of the petition does not present an issue meriting this Court's review.

3. No Question Presented by the State Justifies a Grant of Certiorari.

For the reasons discussed in the previous sections, neither the State's challenge to the PCR court's ruling on deficient performance (Question #1) nor the State's challenge to the

PCR court's ruling on *Strickland* prejudice (Question #2) is availing. The latter two questions presented by the State—Question #3 and Question #4—fare no better.

Question 3 is rooted entirely in two misunderstandings of federal law, both of which have been discussed above to the extent that they skew the State's argument with respect to deficient performance and prejudice. First, the distinction between (i) a morally reasoned mercy response, which South Carolina demands a jury be able to do, and which the federal Constitution sanctions and supports via the Eighth and Fourteenth Amendments where states so choose, and (ii) a response based on emotional whim and sympathy, which the United States Supreme Court has held the Constitution prevents. Second, the distinction between (i) consideration and (ii) giving effect to mitigation under Eighth Amendment jurisprudence. With both misunderstandings clarified, Question #3 has no basis in law.

Question 4, to the extent it raises an issue not addressed in the other three questions, distills to an objection to this Court's decision in *Rosemond* with respect to the plain meaning of the mercy instruction. In finding as a matter of fact that the "other than as an act of mercy" phrase precluded the jury from utilizing mercy as a morally reasoned response, the PCR court in Mr. Evans's case did no more than apply this Court's precedent in *Rosemond*. Relying on *Rosemond*, the PCR court, had a firm basis for finding that the instruction precluded mercy. Question #4 has no merit.[8]

---

[8] The State argues that "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" because "there was no specific plea for mercy in the penalty phase, but friends and family did testify as to Evans's good qualities and their emotional bond." State's Petition at 34-35. "Nothing in the charge, though," the State continues, precluded the jury from considering this evidence." State's Petition at 35. Again, the State overlooks the fact that the great harm from the charge was that *it precluded jurors from making a reasoned moral determination that mercy supports a life sentence based on and by considering and giving effect to the evidence*, such as testimony of the character witnesses, including Evans's sister and Evans's father. Regardless, as another PCR court addressing the same instruction has recently noted, "as a matter of state law, [] the jury can consider a life sentence as an act of

4. The Small Universe of Cases Involving the Erroneous Instruction, and the Uniquely Prejudicial Impact of the Charge in this Case, Do Not Support a Grant of Certiorari.

As the PCR court recognized, Mr. Evans's case, like the cases of *Hughey* and *Rosemond*, is one of a small number of cases in which a particular judge provided the jury with a particular instruction that uniquely infringed upon the decisionmaking demanded of jurors by this State and the United States Constitution. Recently, another PCR court granted relief on the basis of the erroneous instruction on mercy. Looking to long-standing South Carolina and to this Court's *Rosemond* decision, the circuit judge handling Hughey's postconviction case held that the instruction was "so inimical to the laws of the state and the United States in capital cases as to entitle the applicant to a new trial." Assessing the erroneous instruction as a freestanding claim—not a claim of ineffective counsel—the *Hughey* PCR court held that the instruction itself warranted a new sentencing proceeding. *Hughey v. State*, 2000-CP-01-0212, Abbeville County (PCR Order, May 14, 2010) (Macaulay, J.).

Even more recently, rounding out the small universe of cases, a third PCR court denied relief on an ineffective assistance claim based on failure to object to the same mercy instruction at issue in *Hughey*, *Rosemond*, and Mr. Evans's case. *Binney v. State*, 2000-CP-06-11-223, Cherokee County (PCR Order, Sept. 1, 2011) (Baxley, J.). The *Binney* PCR court found no prejudice arising from counsel's failure to object to the instruction. The *Binney* court's assessment of the prejudice arising from the mercy instruction turns on an analysis of the instruction in light of the evidence presented and the entire charge given in that particular case, just as the question of whether there was a *Strickland* error in Mr.

---

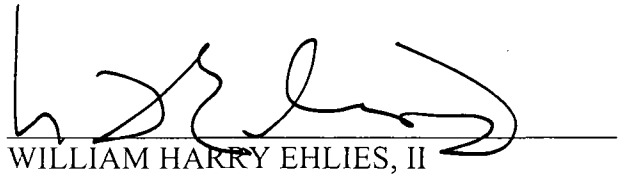
mercy, even if no plea from witnesses for mercy is given." *Binney v. State*, 2000-CP-06-11-223, Cherokee County (PCR Order, Sept. 1, 2011) (Baxley, J.) at 75.

Evans's case turns on an assessment of the instruction given the evidence presented, the entire charge given, and the totality of the circumstances presented in Mr. Evans's case. The PCR court in Mr. Evans's case made such an assessment and the fact that a different judge came to a different conclusion in a different case has no bearing on whether the PCR court in Mr. Evans's case was correct. The PCR order in Mr. Evans's case recognizes both the harm that the rare and idiosycratic instruction presents as a general matter under state and federal law *as well as* the unique harm that counsel's failure to object to the erroneous instruction wrought in Mr. Evans's sentencing proceeding, where mercy played the central and keystone role.

## CONCLUSION

The PCR court's decision to grant a new sentencing trial on the basis of counsel's failure to object to the charge precluding mercy involves a straightforward application of *Strickland v. Washington*. The State's Petition asserts no more than what it erroneously deems to be misapplication of a properly stated rule of law and its objection to a finding of fact that faithfully tracked this Court's finding in *Rosemond v. Catoe*. For these reasons, and those set forth above, this Court should deny the State's Petition for Writ of Certiorari.

November 18, 2011.



WILLIAM HARRY EHLIES, II
CHRISTOPHER WARREN SEEDS
ATTORNEYS FOR THE RESPONDENT/
PETITIONER

STATE OF SOUTH CAROLINA
In the Supreme Court



APPEAL FROM GREENVILLE COUNTY
Court of Common Please (PCR)
The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2006-CP-23-7719
(Capital Post Conviction Relief Action)

Kamell Delshawn Evans,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent

**PROOF OF SERVICE**

I, William H. Ehlies, II hereby certify that a true copy of Respondent/Petitioner's Return to the State's Writ of Certiorari has been served upon opposing counsel by mailing first class mail, postage pre-paid to:

Melody Jane Brown
Assistant Attorney General
Post Office Box 11549
Columbia South Carolina 29211

This the 18 day of November, 2011

WILLIAM H. EHLIES II
ATTORNEY FOR THE RESPONDENT