THE 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, Circuit Court Judge

Case No. 2000-CP-01-210
Appellate Case Number: 2010-170387

John Kennedy Hughey, Respondent/Petitioner

v.

The State, Petitioner/Respondent.

Respondent/Petitioner's Brief of Respondent

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Statement of Case

On December 4, 1995 Hughey murdered Tasheka Jackson and Luvenia Harris. The state charged Hughey with two counts of murder, first degree burglary, grand larceny of a motor vehicle, and possession of a firearm during the commission of a violent crime. The Court appointed Robert Tinsley and Billy Garrett to represent Hughey. Beginning on October 13, 1997, the state tried Hughey before the Honorable J. Derham Cole and a jury. On October 27, 1997, the jurors convicted Hughey of all counts. On October 30, 1997, Judge Cole imposed two death sentences in accordance with the jury's recommendation.

Hughey appealed his convictions and sentences. This Court affirmed the convictions and sentences on March 27, 2000. *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000). The United States Supreme Court denied *certiorari* on October 16, 2000. *Hughey v. South Carolina*, 531 U.S. 946 (2000).

On October 25, 2000, Hughey filed his initial application for PCR. Hughey filed amended PCR applications on September 15, 2006 and December 15, 2006. The second amended PCR application asserted four grounds for relief.[1] Ground III alleged ineffective assistance of trial counsel for failing to object to a jury instruction that precluded consideration of mercy evidence. Ground IV alleged ineffective assistance of appellate counsel for failing to properly brief this jury instruction issue and not citing controlling South Carolina precedent that existed at the time of Hughey's capital trial.

[1] Grounds I and II alleged ineffective assistance of trial counsel and are the subject of Hughey's cross-appeal.

The Honorable Alexander S. Macaulay conducted an evidentiary hearing on the second amended PCR application on October 13-15, 2008 and requested post-hearing briefs upon conclusion of the hearing. Hughey served his post-hearing brief on June 8, 2009. By letter dated June 29, 2009, Hughey supplemented his post-hearing brief because this Court overruled part of the opinion in *Hughey* in *Rosemond v. State*, 383 S.C. 320, 680 S.E.2d 5 (2009). The state served its post-hearing brief on August 31, 2009. Hughey served his reply brief on December 11, 2009.

By order dated May 7, 2010 the PCR court granted Hughey post-conviction relief and ordered a new sentencing hearing based on Grounds III and IV of the second amended PCR application. Based on *Rosemond*, the PCR Court ruled, "Because the jury was instructed that they 'may recommend a sentence of life imprisonment for any reasons or no reason at all **other than as an act of mercy,**' (emphasis supplied [by PCR Court]), the Applicant has established his entitlement to a new sentencing phase of his trial." PCR Order App 5928. Hughey was denied the other relief sought in Grounds I and II. Judge Macaulay signed the judgment on May 11, 2010 and was subsequently filed with the Abbeville County Clerk of Court on May 14, 2010. Counsel received written notice of entry of the PCR Order on May 19, 2010.

On May 28, 2010 both parties timely served motions to alter or amend the judgment, pursuant to Rule 59(e), SCRCP. App. 5929-68. By order dated July 22, 2010 the PCR Court denied both motions. App. 5969-71. On August 25, 2010 the state served a notice of intent to appeal. Hughey filed a notice of intent to cross-appeal on August 26, 2010.

The state filed its petition for *certiorari* on January 12, 2011. This Court granted the cross petitions for *certiorari*. The State served it Brief of Petitioner on May 16, 2014. This Brief of Respondent follows.

Detailed Statement of Facts

This section will review the relevant trial record, appellate record, and evidence presented at the PCR hearing.

A. The Trial Record

During sentencing, Hughey called his sister Gloria Harrison to ask for mercy, and she testified she loved her brother and wanted to keep him. App. 3880-81. The state acknowledged Harrison's testimony was "an apparent plea for the jury to safe [sic] her brother." Respondent's Post-Hearing Brief App. 5335.

Hughey's trial counsel submitted Defendant's Request to Charge Number 16, requesting the trial judge "instruct the Jury regarding mercy or sentencing the defendant to life for no reason at all." This request included the language, "You may consider whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all. This is what has been traditionally referred to as a 'sentence of mercy.'" The request concluded, "In other words, you may choose to sentence the defendant to life imprisonment if you find a mitigating circumstance, or you may choose to sentence him to life imprisonment for no reason at all, that is, as an act of mercy." App. 4128-29.. During the charge conference, the trial judge stated, "My general instruction covers that, Mr. Tinsley." App. 4018.

Relying on the court's assurance that mercy would be properly covered in the charge, counsel specifically pleaded for mercy for Hughey in closing argument. He argued "this is not a death penalty case compared" to other cases. He told the jurors, "It's not a question so much of in motion [sic] as it is logic." App. 4036-37. He then argued, "I also point out that life in prison is no picnic – and he can be sentenced with a

recommendation of life, consecutive life, consecutive life, and then whatever on the larceny ***should you decide to recommend a sentence of mercy***." App. 4038 (emphasis added). Counsel later argued, "If you don't believe death's appropriate in this case, don't sign the death warrant; don't let anybody make you sign that death warrant." He concluded, "I ask you to spare my client's life." App. 4045.

Contrary to the discussion during the charge conference, the trial judge instructed the jurors not to consider mercy as a reason for a life sentence. He charged:

> Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do existence [sic]. Simply stated, 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. 4062 (emphasis added).

The trial judge called for any "exceptions or additions" to the jury instructions. Counsel made several objections because the trial court chose "not to charge a couple of our requests." The primary objection was, "The language referring to the defendant contends on the non-statutory mitigation I felt should have been characterized as the law allows and provides whatever the case may be in that language." When the trial judge expressed confusion about the objection, Edward McCallum, Garrett's associate, responded:

> Your Honor, my recollection of your statement was that a non-statutory mitigating circumstance is one which the defendant contends serves the same purpose as the statutory mitigating circumstance. And I don't think that's an appropriate comment.
>
> I think that the law provides that a . . . mitigating non-statutory circumstances . . . is a basis for them to reach the decision. It is not something the defendant contends.

App. 4066-67.

The trial judge explained what he intended to charge: "Non-statutory mitigating circumstances, by definition, are those that are not set forth in the statute." The judge added, "And so those non-statutory mitigating circumstances that I referred to in that part of the instruction are those that the defendant contends should be considered as non-statutory mitigating circumstances." McCallum responded, "I don't believe that was what came across." The judge agreed to note trial counsel's exception. App. 4067-68.

Counsel added, "Your honor, beyond that I would just merely refer the Court to our Request to Charge eleven through eighteen, renew all the prior motions at this time in the case, and sit down." App. 4068. Trial counsel never specifically objected to the trial judge incorrectly telling the jurors they could ***not*** consider mercy as a reason for a life sentence.

B. The Appellate Record

During direct appeal, Bob Dudek, appellate counsel, asserted as error:

> Whether the judge erred by instructing the jury that non-statutory mitigating circumstances were those "the defendant contends serve the same purpose [as statutory mitigating circumstances]." The instruction improperly implied that these were not circumstances the law provides a jury to consider.

Final Brief of Appellant App. 4180. This argument was based on trial counsel's objection. Although trial counsel did not specifically base the objection on the judge's instruction that the jurors could impose a life sentence for any reason "other than as an act of mercy," appellate counsel argued:

> Further, the judge's instruction did not allow the jury to impose a life sentence for any reason at all. The judge, as seen, told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all ***other than as an act of mercy***." This confusing instruction

> suggested that an act of mercy would have been an invalid reason for a life vote.

Final Brief of Appellant App. 4182 (citation to record admitted). Appellate counsel continued to argue the confusion of this instruction by stating, "A reasonable juror would have interpreted the trial judge's charge to mean that non-statutory mitigating circumstances were not on equal par with statutory mitigating circumstances." Final Brief of Appellant App. 4182.

Appellate counsel then argued:

> Further, considering the charge as a whole, the jury was plainly instructed that they could not impose a life sentence as an act of mercy. This made the importance of mitigating circumstances, and here specifically non-[statutory] mitigating circumstances, all the more important, since the jury could not sentence appellant to life imprisonment as an act of mercy.

Final Brief of Appellant App. 4183. Appellate counsel appeared to use the "other than as an act of mercy" instruction to argue that Hughey was prejudiced by the confusing instruction on non-statutory mitigating factors.

The state briefed the non-statutory mitigating circumstances argument presented by appellate counsel. The state ***did not*** discuss the portion of Hughey's brief addressing the trial court's instruction that the jurors disregard mercy. Respondent's Brief App. 4239-42.

This Court considered appellate counsel's argument on non-statutory mitigating circumstances. *See State v. Hughey*, 339 S.C. 439, 458, 529 S.E.2d 721, 731 (2000). This Court reviewed the trial judge's instruction on non-statutory mitigating factors and held, "Considering the jury charge as a whole, a reasonable juror would understand that either a statutory or a non-statutory mitigating circumstance could reduce the sentence to life imprisonment." 339 S.C. at 458-59, 529 S.E.2d at 731. This Court rejected the

argument that the phrase "the defendant contends" reduced the legal significance of non-statutory mitigating circumstances holding: "The jury charge adequately apprised the jury of the function of non-statutory mitigating circumstances because it repeatedly emphasized that both statutory and non-statutory circumstances should be considered when forming a recommendation." *Id.* This Court then stressed that "the judge instructed the jury that they could recommend life imprisonment for **'any reason or no reason at all.'**" *Id.* (emphasis added). This Court dispensed with appellate counsel's position that the "other than as an act of mercy" portion of the instruction made the instruction on non-statutory mitigating factors confusing. This Court noted in *dicta*:

> Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote. The trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy." This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error.

Id. 339 S.C. at 460, 529 S.E.2d at 732 (internal citations omitted). This Court did not address its precedent allowing a capital defendant to call witnesses in mitigation to ask for mercy.

C. Evidence presented at PCR hearing

During the PCR hearing, Tinsley reviewed Request to Charge Number 16, the trial judge's instructions, and the transcript from the charge conference. According to Tinsley, the purpose of Request to Charge Number 16 was "trying to get a – a life [sentence] for no reason at all." He testified he was requesting the jurors be allowed to consider mercy as the basis of their verdict. He agreed the instruction actually given was contrary to the instruction he requested and that he did not make "a specific objection to

the other than as an act of mercy instruction." When asked whether he thought the charge should have been objected to, Tinsley responded:

> If it was – if it was charged that way I didn't catch it like that. I would have – I would object to that because it should have been for no reason at all **and even as an act of mercy, not as an opposite of that as – other than as an act of mercy**. But I just did not hear it like that.

App. 4767-70. (emphasis added).

Tinsley agreed that criminal defense lawyers frequently ask for mercy in sentencing. He knew capital defendants are allowed to call witnesses to ask for mercy. He thought the charge in this case was "like a comment on the testimony" and tantamount to the judge instructing the jurors to disregard a reason for deciding to impose a life sentence. App. 4770-71.

During the PCR hearing, counsel asked Garrett if he was present during Tinsley's testimony about the "no mercy" instruction. Garrett quickly responded, "Looking back, I know it it's there, it's in the record. I missed it." He explained the requests to charge were put together "by myself, Mr. [Edward] McCallum and Mr. Tinsley." Garrett agreed the purpose of Request to Charge Number 16 was to allow the jurors to sentence based on mercy. He explained that McCallum's "sole function was to come and listen to those instructions to help us not miss anything." Garrett admitted, "All three [lawyers] were there listening intently to that charge. And somehow we all three missed it." App. 4875-76.

On cross-examination the Attorney General inquired, "When you heard those instructions overall from your perspective while you were sitting there, did you think you were deprived of a right to argue mercy in that case?" Garrett reiterated his previous testimony:

> You know, I – I look at the – the cold transcript and it – and it's glaring in my opinion. And it's awful that all three of us missed it. But the truth of the matter is I missed it, you know. I just didn't see it. I don't know, you know, how we – I don't know how we all three missed it, but the truth of the matter is, we did.
>
> I, you know, did I feel like the overall charge was okay? You can see that when I saw something I didn't like in that case, I was generally on my feet complaining. I just didn't catch it.

App. 4929.

Appellate counsel, Bob Dudek, testified at the PCR hearing. He explained he relies heavily on the objections made at trial in deciding which issues to brief because South Carolina is a "preservation state." An issue must be adequately preserved in order to be raised on appeal. A proper objection needs to be contemporaneous and specific, state the proper grounds and "hopefully it's accompanied by a correct argument on the law." App. 4960-61.

Dudek acknowledged trial counsel did not make a specific objection to the improper mercy instruction. When he was asked if he thought the charge was an important issue, he answered, "Yes, I did because frankly I think that was the first time I'd ever seen that instruction that you cannot sentence a defendant to life imprisonment as an act of mercy. And, quite frankly, it just kind of jumped out at me as a – as an issue." Since it was not specifically objected to, he attempted to "blend" this issue with the properly preserved issue concerning the "defendant contends" language in the judge's charge on non-statutory mitigating circumstances. App. 4967-68.

Dudek testified that his plan "was trying to set the issue up to be procedurally barred where the court would say, you're arguing this as an improper mercy instruction. That was never raised on appeal. This issue is not preserved for appellate review[,]"

leaving the issue to be addressed in post-conviction relief. He admitted he should have briefed the incorrect mercy instruction as a stand-alone issue, saying it was "improper and prejudicial." If he had briefed it as such, he would have distinguished mercy from passion "or those type things" and described it as "you can look at John Kennedy Hughey as a human being and as an act of mercy give him a life sentence rather than a death sentence." App. 4969-70.

Applicable Legal Standards

This case involves allegations of ineffective assistance of trial and appellate counsel.

In determining whether trial counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688.

> Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides.

Id. at 688-89. The prevailing professional standards include American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); and *Weik v. State*, 2007-060700, 2014 WL 3610954 (S.C. July 23, 2014).

Due process of law also requires that a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under the same test as other ineffectiveness claims. *Smith v. Robbins*, 528 U.S. 259 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984). Certainly, appellate counsel has no constitutional duty to raise every nonfrivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990). In most cases, the reason for abandoning one issue is to enable counsel to focus

on the more meritorious issues, since a "brief that raises every colorable issue runs the risk of burying good arguments." *Jones*, 463 U.S. at 752-53. Appellate counsel, however, is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999) (appellate counsel provided ineffective assistance of counsel that required a new capital sentencing trial by failing to assert, as trial counsel had, that the defendant was entitled to a charge that life is to be understood in its "ordinary and plain meaning," pursuant to *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985)). *See also Carter v. Bowersox*, 265 F.3d 705 (8th Cir. 2001) (appellate counsel was ineffective in failing to assert as error that the trial court failed to instruct the jury, as required by state law, that if it failed to make a unanimous finding that the death penalty was warranted by evidence in aggravation of punishment, it was required to return a life sentence); *Commonwealth v. Chambers*, 807 A.2d 872 (Pa. 2002) (appellate counsel ineffective for failing to assert as error the trial court's instruction that once the jurors "have unanimously found an aggravating circumstance, before they can weigh aggravating circumstances against any mitigating circumstances, they must all find the existence of at least one mitigating circumstance. This is not a correct articulation of the law").

Arguments.

I.

The PCR Court found ineffective assistance of both trial and appellate counsel.

The PCR Court found both trial and appellate counsel ineffective. PCR Order App. 5926-28. The State, however, argues "the PCR Court erred in addressing the 'other than as an act of mercy' issue as a free-standing claim." The State, nevertheless, acknowledges Hughey raised two separate Sixth Amendment violations of ineffective assistance of trial and/or appellate counsel." State's Brief of Petitioner 14. The PCR record confirms both Sixth Amendment arguments were argued, and the PCR judge, in fact, granted relief based on both.

The state also argues the PCR Court "failed to apply an appropriate standard of review for jury instruction analysis." State's Brief of Petitioner 17. The order granting relief, however, reveals the PCR judge did, in fact, apply the proper analysis.

A. The pleadings

Hughey's second amended PCR application, filed on December 17, 2006, alleged four grounds for relief. Grounds III and IV are involved in the State's appeal. Ground III alleged ineffective assistance of trial counsel for failing "to object to the trial court's improper instruction that the jury could 'recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy.'" Ground IV alleged ineffective assistance of appellate counsel for failing "to properly brief the trial court's improper instruction." For both claims, Hughey alleged, "This instruction is contradictory to state law," and cited *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519

(2000) and *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). App. 4406-08 (paragraphs 10(a), 10(b), 11(a)(iii), and 11(b)).

Hughey served his pre-hearing brief on March 31, 2008, which included a discussion of PCR Grounds III and IV. The brief relied, in part, on *Torrence*, which was decided by this Court well before Hughey's capital trial. The brief also distinguished mercy from "sympathy," "prejudice," "passion," and "public opinion." App. 4507-15.

At the beginning of the PCR hearing, Hughey referred to his pre-trial brief when the PCR judge asked counsel to summarize the grounds for relief. After summarizing Grounds I and II, counsel advised the Court, "The third and fourth issues. . . . both involve what we're referring to as the no mercy instruction" because it precluded the jurors from recommending a life sentence as an act of mercy; counsel "believe[d] that [instruction] is contrary to South Carolina law. Counsel explained the third issue alleged "ineffective assistance of counsel for not objecting to that [instruction] and properly preserving it." The fourth issue is because "appellate counsel did not brief it correctly." The PCR Court then reiterated the issues and obtained a copy of the second amended application from counsel. App. 4660-63.

At the conclusion of the hearing, the judge asked for post-hearing briefs. App. 5184. Hughey's post-hearing brief traced "the permissible role of mercy in capital sentencing in the country and in South Carolina" from English Common Law, through colonial times, to the present day.[2] Hughey reviewed South Carolina's murder statute of 1894 permitting "the jury [to] find a special verdict recommending [the defendant] to the

[2] *See also*, Section II(A) *infra*, for a discussion of the historical role of mercy in capital sentencing.

mercy of the Court, whereupon the punishment shall be reduced" to life imprisonment. Hughey directed the PCR court to *State v. King*, 158 S.C. 251, 155 S.E. 409, 425-26 (1930) and *State v. Blackely*, 158 S.C. 304, 155 S.E. 408, 409 (1930), which addressed the proper jury instruction on mercy. The brief, once again, cited *Torrence*. App. 5731-57.

B. The PCR Order

In the Order granting a new sentencing hearing, the PCR judge recognized the "amended application for post-conviction relief (PCR) filed by applicant dated December 17, 2006." The order acknowledges the testimony of trial and appellate counsel. The PCR judge summarized the post-hearing briefing process. PCR Order App 5922. The PCR Court then ruled:

> The jury instruction regarding mitigation that jurors "may recommend a sentence of life for any reason or no reason at all other than as an act of *mercy*," *State v. Hughey*, 339 S.C. 439, 460 529 S.E.2d 721, 732 (2000) (emphasis that of the Court), is so inimical to the laws of the state and the United States in capital cases as to entitle the applicant to a new trial.

In reaching this conclusion, the PCR judge tied his ruling to Grounds III and IV of the second amended PCR application. PCR Order App 5926.

In addition to recognizing this Court's holding in *Rosemond*, the PCR judge observed that South Carolina, for over a century prior to Hughey's trial, allowed jurors to consider mercy as the basis for a life sentence. Judge Macaulay wrote:

> It has long been the law of South Carolina "as to the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reached the conclusion that the appellant was guilty of murder." *State v. Blackely*, 158 S.C. 304, 155 S.E. 408, 409 (1930). Prior to enactment of Act No. 530, 21 Stat. at L. 785 (1894), the punishment for the crime of murder was death only. *See* Act No. 91, 14 Stat. at L. 175 (1869), "gave the petit jury the right, when it found a defendant guilty of murder, to recommend him to the mercy of the court, and that the effect of such a

> recommendation will be to save the accused from death, and cause him to be sentenced to life imprisonment at hard labor. The presiding judge was in error in stating to the jury repeatedly that they had nothing to do with mercy, and he committed error in telling the jury some of the instances in which they should recommend mercy. *State v. King*, 158 S.C. 251, 155 S.E. 409, 425-26 (1930).

PCR Order App. 5927-28. The judge's ruling, therefore, was based on the precedent existing prior to Hughey's capital trial. The PCR Court, in fact, cited many of the same South Carolina authority addressed in Hughey's brief. App. 5731-57.

C. The PCR Court applied the appropriate jury instruction analysis.

The state also argues the PCR Court "failed to apply an appropriate standard of review for jury instruction analysis." State's Brief of Petitioner 17. The state's argument seems to be that the PCR judge did not review the penalty phase instruction as a whole.[3] A close reading of the Order granting relief, however, reveals the PCR judge did, in fact, apply the correct analysis. The proper standard is:

> Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. The substance of the law is what must be instructed to the jury, not any particular verbiage.

State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (internal citations omitted). Here, as discussed in Subsection B, *supra*, the PCR Court found the trial court's instruction that precluded the jurors from recommending a life sentence based on mercy to be contrary to long-standing South Carolina precedent. The PCR Court also cited this

[3] The state relies on *State v. Sims*, 304 S.C. 409, 422, 405 S.E.2d 377, 384 (1991). Factually, *Sims* is distinguishable. This Court in *Sims* actually found that the instruction given by the trial court properly stated the law and complied with existing precedent. *Id.* 304 S.C. at 421-22, 405 S.E.2d at 384 ("The trial judge clearly explained to all prospective jurors that 'whatever you recommend, will be the sentence that will be given to a defendant.' In *State v. Middleton,* 295 S.C. 318, 368 S.E.2d 457 (1988), a similar instruction given to potential jurors was held sufficient to satisfy the [*State v. Bellamy*, 293 S.C. 103, 359 S.E.2d 63 (1987)] requirement.").

Court's decision in *Rosemond*. *Rosemond* addresses an identical instruction, and this Court observed:

> During the sentencing phase, the testimony of two family friends was properly admitted and these witnesses asked the jury for mercy. In contrast, **the trial court then instructed the jury to discount such pleas by instructing the jury that it could not recommend a life sentence based on the evidence of mercy.**

Rosemond, 383 S.C. at 330, 680 S.E.2d at 10 (emphasis added). *Rosemond* also noted, "[O]ur case law requires a trial court to instruct a jury it may impose a life sentence even if it finds a statutory aggravating circumstance." *Id.* 383 S.C. at 329-330, 680 S.E.2d at 10. This Court, therefore, implicitly considered the comprehensive instruction that must be given during a capital sentencing procedure. The instruction to disregard mercy, accordingly, renders the entire instruction legally inadequate. *See also* Section II(B), *infra*, for a discussion of the Constitutional requirement that sentencing jurors be allowed to consider all available mitigation evidence.

D. The State's inconsistent interpretation of the instruction.

The State argues that the sentencing juries in *Hughey* and *Rosemond* "would have properly considered 'mercy' evidence and that neither instructions [sic] 'precluded a capital jury's consideration of mercy evidence in the sentencing phase," because any reasonable jury would have read the term as an adverb and as an adjective." State's brief of Petitioner, 18-19. This argument must be rejected for three reasons.

First, this Court overruled "*Hughey* to the extent it approved and sanctioned the charge given here" as inconsistent with allowing the jurors to consider mercy evidence *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10.

Second, the State's current argument—that the instruction allows the jurors to consider mercy—is contrary to the arguments it made in Hughey's case prior to this Court's decision in *Rosemond*. In its return to Hughey's first PCR application, the State argued that capital defendants are not entitled to an instruction allowing sentencing jurors to consider mercy. A. 4348-54. The State renewed this argument in its return to Hughey's amended PCR application and pre-trial brief on application for post-conviction relief. A. 4448-66, 4623-30. The State should be judicially estopped from asserting this position as: (1) the State has taken inconsistent positions in Hughey's direct appeal and PCR application; (2) the direct appeal and PCR application are related proceedings in Hughey's capital case; (3) the State's prior position was successful in Hughey's direct appeal because of appellate counsel's ineffectiveness, and the State obtained the benefit of the Court affirming Hughey's death sentence; (4) the State's new position is an intentional effort to mislead this Court about the meaning of the jury instruction; and (5) the two positions are totally inconsistent in that it first argued that instructing jurors to disregard mercy evidence is appropriate and now argues that the same instruction allows consideration of the same evidence. *See Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 631-32 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.").

Third, the State's argument about "any reasonable juror" understanding the difference "the term as an adverb and not as an adjective" must be considered in the context of our state's requirement that jurors only possess "a sixth grade education or its equivalent." S.C. Code Ann. §14-7-810. As this Court recognized in *Rosemond*, the

average juror would interpret this instruction as requiring them to reject consideration of mercy evidence. The State's own inconsistent interpretation of the instruction is additional evidence that the average juror would not understand the State's current interpretation.

E. Summary

The PCR judge, applying the proper standard for jury instructions, found ineffective assistance of both trial and appellate counsel, and his Order so reflects. As discussed in Arguments II and III, *infra*, the record supports the PCR Court's conclusions regarding ineffective assistance of both trial and appellate counsel. Because the PCR Court properly found such ineffectiveness, this Court should the PCR court ordering a new sentencing hearing.

II.

In the penalty phase, Hughey called a witness to ask for mercy, and trial counsel argued for mercy. Trial counsel testified they should have objected, but did not object, to a jury instruction that precluded the jurors from considering mercy. Hughey was denied effective assistance of counsel when trial counsel failed to object to a jury instruction that precluded the jurors from considering properly admitted mercy evidence and the pleas for mercy made in counsel's closing arguments.

A. The role of mercy in capital sentencing.

In determining the permissible role of mercy in capital sentencing in the country and in South Carolina, in particular, it is helpful to consider the historical context prior to the Supreme Court's decision in *Furman v. Georgia,* 408 U.S. 238 (1972) and then afterwards.

Under English common law, capital punishment was mandatory for virtually any homicide and there was no mechanism in the legal system for dispensing mercy. *McGautha v. California*, 402 U.S. 183, 198 (1971). The American colonies, including South Carolina, followed this tradition, *Furman*, 408 U.S. at 335 (Marshall, J., concurring), but from the beginning in this country, "there was rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." *McGautha*, 402 U.S. at 199. The practice of jury sentencing in non-capital cases also arose in this country during the colonial period as a reaction to harsh punishments imposed by judges and the "distrust of governmental power." *Id.* at n.10.

Even in capital cases, it was clear that "jurors on occasion took the law into their own hands and would simply refuse[] to convict of the capital offense" in order to avoid the imposition of the death penalty. "In order to meet the problem of jury nullification, legislatures . . . . adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." *Id.* Beginning with Tennessee, around 1832, the states

permitting capital punishment and the federal government changed the laws to require a sentence of death for murder unless the jury made a "recommendation of mercy." *Id.* at 200.

The ability of jurors to dispense mercy as they saw fit was jealously guarded by the courts. For example, in *Calton v. Utah*, 130 U.S. 83 (1889), the United States Supreme Court reviewed a case prosecuted under the Utah statute requiring the death penalty for first degree murder except "upon the recommendation of the jury," which would then result in a life sentence. The Court found reversible error in the trial court's failure to inform the jurors "as to their right, under the statute, to recommend imprisonment for life at hard labor in the penitentiary in place of the punishment of death." *Id.* at 88.

South Carolina, like other jurisdictions, changed its law from a mandatory death penalty for a murder conviction in order to allow the jury discretion to dispense mercy in 1894. That statute, as amended, provided:

> Whoever is guilty of murder shall suffer the punishment of death: Provided, however, That in each case where the prisoner is found guilty of murder, the jury may find a special verdict recommending him or her 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.

In *Winston v. United States*, 172 U.S. 303 (1899), the United States Supreme Court reviewed three cases prosecuted under the federal statute adopted in 1897. The statute required capital punishment for murder or rape unless the jury qualified the guilty verdict "by adding thereto 'without capital punishment,'" in which case the sentence imposed was life imprisonment. In each case, the trial court instructed the jury that it should not add 'without capital punishment' to its verdict unless there were "mitigating"

or "palliating" circumstances based on the facts of the case. *Id.* at 307-08. The Court found error in the limitation of the jurors' discretion.

> The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right, but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court or the jury is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of congress to the sound discretion of the jury, and of the jury alone.

Id. at 215.

This Court followed suit. In *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930), the trial court gave instructions similar to those in *Winston* that limited the jurors' recommendation of mercy to cases involving "extenuating circumstances surrounding the killing." 155 S.E. at 418. This Court found error because, under the statute, "[it] is clear that . . . a jury may, for any reason whatever appearing to them, refuse to have the accused put to death, but may spare his life." Thus, the trial court should "simply inform the jury that . . . they may recommend the defendant to the mercy of the court, and that the effect of such recommendation will be to save the accused from death, and cause him to be sentenced for lifetime imprisonment at hard labor." *Id.* at 426. Similarly, in *State v. Blakely*, 158 S.C. 304, 155 S.E. 408 (1930), the trial court instructed the jury that it could recommend mercy "if you find extenuating circumstances in this case . . . . otherwise you have nothing to do with mercy, and the most merciful thing you can do is to abide by

your oath and find the truth." *Id.* at 408. Based on *King*, the court found reversible error in this charge.

The ability of even a single juror to exercise mercy was also closely guarded. For example in *Andres v. United States*, 333 U.S. 740 (1948), the trial court instructed the jury on its "right to qualify a verdict of guilty by adding the words 'without capital punishment'" following the language of the Court's decision in *Winston* quoted above. *Id.* at 744 n.3. The Court found no error in the failure to further "explain to the jury the scope of their discretion in granting mercy to a defendant," *id.* at 742, because the court properly "left the question of the punishment to be imposed – death or life imprisonment – to the discretion of the jury." *Id.* at 744. *Andres* was reversed, however, because the trial court instructed the jury that a recommendation of mercy must be unanimous. In essence, the requirement of unanimity did not apply to the recommendation of mercy because "[t]his construction [of the statute] is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system" than a finding that a recommendation of mercy must be unanimous. *Id.* at 749.

South Carolina also continued to safeguard the power of the jury to exercise mercy. "The discretion of the jury as to recommending mercy [was] an unlimited one. . . . [A] recommendation to mercy [did] not have to be based on evidence." *State v. Chasteen*, 228 S.C. 88, ___, 88 S.E.2d 880, 887 (1955) (murder case). *See also State v. Worthy,* 239 S.C. 449, 123 S.E.2d 835 (1962) (rape case) (if requested, the trial judge must charge that a recommendation of mercy may be given for any reason at all). "[W]hether or not mercy was recommended upon a finding of guilt, and thereby the death penalty avoided, rest[ed] within the sole discretion of the jury. The duty of the court in

that regard [was] to see that such discretion [was] left with the jury, free as reasonably possible of influences which would prevent its fair and impartial exercise." *State v. White*, 246 S.C. 502, 506, 144 S.E.2d 481, 483 (1965) (reversing rape conviction and death sentence because the prosecutor asked the jurors to consider the case as if the victim was their daughter, wife, sister, or mother).

When *Furman* was decided, 41 states and the federal government authorized death for at least one crime, with murder, followed by kidnaping and treason, being the most common. Rape was a capital offense in 16 states and the federal system. 408 U.S. at 341 (Marshall, J., concurring). "All . . . jurisdictions [allowing for capital punishment] had replaced their automatic death penalty statutes with discretionary jury sentencing." *Woodson v. North Carolina*, 428 U.S. 280, 292 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.). Of the executions since 1930, 90% were based on murder convictions. *Furman*, at 348. There were "3,859 persons . . . executed since 1930, of whom 1,751 were white and 2,066 were Negro." *Id.* at 364. "455 persons, including 48 whites and 405 Negroes, were executed for rape." *Id.*

In *Furman*, the Court reviewed an Eighth Amendment challenge to the death penalty in a Georgia murder case, a Georgia rape case, and a Texas rape case. Five Justices in five different concurrences concluded that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Only two of the Justices (Brennan and Marshall) concluded that the death penalty was *per se* unconstitutional. Thus, the way was left open for legislatures to "fix" the problems identified in the capital punishment system as then applied. The two narrowest opinions (those of Justices Stewart and

White) have subsequently been viewed as the actual holdings of *Furman*. *Gregg v. Georgia*, 428 U.S. 153, 170 n.15 (1976).

Justice Stewart focused only on whether the death penalty was constitutionally applied in the cases before the Court. He noted that under Georgia law, the jury in a rape case could choose death, life imprisonment, or one to twenty years in confinement. *Id.* at 309 n.8. In a murder case, the Georgia jury could choose between death or life imprisonment. *Id.* at n.9. In a Texas rape case, the sentencing choices were death, life imprisonment, or not less than five years in confinement. *Id.* at n.8. He found that the death sentences imposed were "'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary." *Id.* at 309. They were also "'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare." *Id.*

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. at 309-10.

Justice White also observed:

> [T]he death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

Id. at 313.

Given these opinions, it was clear that there needed to be a "meaningful basis" for determining in which cases the death penalty would be authorized, but nothing in these opinions hinted that the jury should not be allowed to continue, as it had for almost 80 years in South Carolina, to exercise mercy even in those cases in which the death penalty was authorized.

Subsequently, in *Gregg* this need became even more clear. In the controlling opinion of Justice Stewart, joined by Justice Powell, and Justice Stevens, the Court reviewed a death sentence for murder under Georgia's statutes, which were amended in 1972. 428 U.S. at 163. The statutes, as amended, are very similar to South Carolina's current statute, which was drafted largely following the Georgia provisions approved in *Gregg*. *State v. Shaw*, 273 S.C. 194, 199, 255 S.E.2d 799, 802 (1979).

In *Gregg*, the Court noted that, after *Furman*, 35 States and the federal government had amended statutes in an "attempt[] to address the concerns" expressed by the Court in *Furman*. *Id.* at 180. The Court then turned to the specific concerns of *Furman* that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Id.* at 188.

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.
>
> It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that "(f)or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender."

Id. at 189 (citation omitted).

"[W]here discretion is afforded" to a jury, by definition, the jury has the "freedom to act or judge on one's own," http://www.thefreedictionary.com/discretion, which means that unless the death penalty is required by statute in some instances, the jury is authorized to make a "free decision" rejecting the death penalty for any reason, no reason, or as an exercise purely of mercy.

In addition to "fair procedural rules," the Court observed that the problem of ensuring that the relevant "information will be properly used in the imposition of punishment" is best "alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Id.* at 192.

> While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary.

Id. at 193-95.

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.

Id. at 195. Again, the essence was that "the sentencing authority is given adequate information and guidance," but there was no constitutional requirement that the ability of the jury to exercise its free discretion to reject the death penalty and impose a life sentence for any reason, no reason, or even as an exercise of mercy be removed.

With respect to the specific challenges to the Georgia statute before it, which again are similar to those in South Carolina, the Court reiterated that the amendments:

> [N]arrow[ed] the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death

> sentence can ever be imposed. In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. *The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court*, but it must find a Statutory aggravating circumstance before recommending a sentence of death.
>
> These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime. . . . In addition, the jury's attention is focused on the characteristics of the person who committed the crime. . . . As a result, while some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application."

Id. at 197-98 (citations and footnotes omitted; emphasis added). As Justice White stated in concurring: "The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute." *Id.* at 222. At bottom, "[o]n their face these procedures seem to satisfy the concerns of *Furman*." *Id.* at 198.

By definition, a statute designed so that "[t]he jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court" is one that allows for the jury to reject the death penalty and impose a life sentence for any reason, no reason, or simply as an act of mercy. Indeed, in *Gregg*, there was actually a *challenge* to the jury's ability to arbitrarily grant mercy, which the Court rejected.

> [T]he isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

Id. at 203. At bottom, the Court held that the Georgia statutes alleviated the "basic concern" of *Furman*, which was that defendants "were being condemned to death capriciously and arbitrarily" or "in a way that could only be called freakish." *Id.* at 206.

In *Woodson v. North Carolina,* 428 U.S. 280 (1976), decided the same day as *Gregg*, the Court (again in the opinion of Justices Stewart, Powell, and Stevens) reviewed North Carolina's amended statute. Following the decision in *Furman*, the North Carolina legislature "enacted a new statute that was essentially unchanged from the old one [prior to *Furman*] except that it made the death penalty mandatory" for a first degree murder conviction. The petitioner challenged this statute under the Eighth Amendment.

Although a number of states had reenacted mandatory death penalty statutes following *Furman*, the Court found this to "reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing." *Id.* at 298. Thus, "North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.'" *Id.* at 301.

The Court also found the North Carolina statute to be unconstitutional due to "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular

> offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 304.

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 304-05.

By definition, if the jury must be allowed to consider "compassionate *or* mitigating factors stemming from the diverse frailties of humankind," the jury is allowed to consider compassion: "Deep awareness of the suffering of another coupled with the wish to relieve it." http://www.thefreedictionary.com/compassion. Thus, again, unless the statute requires the death penalty in some instances (in a manner consistent with the Eighth Amendment), the jury is free to reject the death penalty and impose life for any reason, or no reason, or simply as an act of mercy.

In *Roberts v. Louisiana,* 428 U.S. 325 (1976), also decided on the same day as *Gregg* and *Woodson*, the Court (again in the opinion of Stewart, Powell and Stevens) reviewed the amended Louisiana statutes, which also required a mandatory death sentence for first-degree murder. In each case, the jury would be instructed on the lesser

included offenses of second-degree murder and manslaughter, whether or not raised by the evidence or requested by the defendant. If convicted of first degree murder, the death penalty was mandatory. The Court found the same constitutional deficiencies identified in *Woodson* due to the mandatory nature of the death penalty, the "standardless jury discretion," and "[t]he constitutional vice of mandatory death sentence statutes lack of focus on the circumstances of the particular offense and the character and propensities of the offender." *Id.* at 333. Allowing the jury to consider lesser included offenses did not resolve the deficiencies.

> This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's de facto sentencing discretion.

Id. at 335.

South Carolina, like North Carolina and Louisiana, had also returned to a mandatory death penalty system, which was found to be unconstitutional in light of *Woodson*. *State v. Rumsey*, 267 S.C. 236, 226 S.E.2d 894 (1976). South Carolina again amended its capital statute in 1977 "patterned after the death penalty statutes of our sister state Georgia" that were approved by the Supreme Court in *Gregg*. *Shaw*, 273 S.C. at 199, 255 S.E.2d at 802.

Meanwhile, the burglary statute still required a life sentence unless the jury recommended mercy at the time of its guilty verdict. And, the court continued to recognize that "[t]he failure to allow the jury to determine whether to recommend mercy

cannot be regarded as harmless error." *State v. McGee*, 268 S.C. 618, 621, 235 S.E.2d 715, 716 (1977). *See also Watson v. State*, 287 S.C. 356, 338 S.E.2d 636 (1985) (counsel's failure in burglary case to inform his client of his right to request the impaneling of a jury to consider the question of a recommendation of mercy constituted ineffective assistance).

This Court found the 1977 statute, patterned after Georgia's capital punishment scheme to be constitutional in *Shaw*. Like Georgia's scheme, our statute allows the jury to recommend life imprisonment even if it finds the existence of one or more statutory aggravating circumstances beyond a reasonable doubt and the jury must be informed of this power. *State v. Goolsby,* 275 S.C. 110, 268 S.E.2d 31 (1980); *State v. Tyner,* 273 S.C. 646, 258 S.E.2d 559 (1979). Indeed, "[u]nder the South Carolina statute, a jury is not required to state its reasons for failing to recommend a sentence of death." *State v. Copeland,* 278 S.C. 572, 591, 300 S.E.2d 63, 74 (1982). And, cases where juries reject the death penalty and impose a life sentence, are cases that "represent acts of mercy which have not yet been held to offend the United States Constitution." *Id.*

In addition to having the authority to commit "acts of mercy," capital juries in South Carolina were (and are) also routinely instructed that mitigating circumstances are those that "in fairness and *mercy*, may be considered as extenuating or reducing the degree of moral culpability or punishment." *Coker v. Georgia,* 433 U.S. 584, 589 (1977). *See Shafer v. South Carolina,* 532 U.S. 36, ___ (2001); *State v. Charping,* 313 S.C. 147, ___, 437 S.E.2d 88, ___ (1993); *State v. Bell,* 305 S.C. 11, ___, 406 S.E.2d 165, ___ (1991). This "fairness and mercy" language was also used in State v. William Dickerson,

which was the most recent capital trial in South Carolina at the time of Hughey's post-hearing briefing process. *See* Appendix A. 5836-39.

In *Zant v. Stephens*, 462 U.S. 862 (1983), the Court again reviewed the Georgia capital sentencing scheme to determine whether reversal of a death sentence imposed based on three aggravating factors was required when the Georgia Supreme Court held one of the aggravating factors to be invalid. The Court initially observed:

> In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.

Id. at 873-74. "An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.* at 877. Thereafter, however:

> [T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances, and Georgia has not adopted such a system. Under Georgia's sentencing scheme, and under the trial judge's instructions in this case, no suggestion is made that the presence of more than one aggravating circumstance should be given special weight.

Id. at 890-91. Because the jury was entitled to consider the evidence of the defendant's prior criminal record as non-statutory aggravation evidence anyway, it was irrelevant that the evidence was presented in the context of an invalidated statutory aggravating circumstance.

While some other states imposed more limitations on the jury's discretion, the Georgia Supreme Court made it clear that it was improper to instruct the jury that it could not consider mercy or sympathy. Specifically, in *Legare v. State*, 302 S.E.2d 351, 354 (Ga. 1983), the court disapproved of instructions that the jury could not consider "sympathy."

> [T]his jury was charged to consider in mitigation all circumstances which in fairness or mercy offer a basis for not imposing the death penalty, a charge the substance of which is constitutionally required. But the jury was also charged not to base their verdict on sympathy for the defendant. Since the evidence in mitigation might well evoke sympathy, we find these charges in irreconcilable conflict. Because the charge complained of might well confuse the jury and limit their constitutionally required consideration of evidence in mitigation, we hereby disapprove it.

Id.

This Court, on the other hand, found no error in a trial court's instruction that "you must decide the issues involved in this proceeding without bias and without prejudice to any party. You cannot allow yourselves to be governed by sympathy, by prejudice, by passion, or by public opinion." *State v. Chaffee,* 285 S.C. 21, 32, 328 S.E.2d 464, 470 (1984). Because the trial court first raised the issue in response to the defendant's objection during the state's closing argument that the argument was "prejudicial and . . . inflamed the passions of the jury," the appellate court declared, without citation to any case, statute, or rule:

> Whether the judge was referring to sympathy for the dead woman and her family or for the defendants is not clear. In either event, we find no error.

Id. See also State v. Singleton, 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985); *State v. Elmore,* 286 S.C. 70, 332 S.E.2d 762 (1985), *rev'd in part and remanded,* 476 U.S. 1101 (1986); *State v. Plemmons,* 286 S.C. 78, 332 S.E.2d 765 (1985), *rev'd in part and remanded,* 476 U.S. 1102 (1986).

In *California v. Brown*, 479 U.S. 538 (1987), the United States Supreme Court also considered whether an instruction informing jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a capital murder trial violates the Eighth and Fourteenth Amendments. *Id.* at 539. The Court held that it did not but did not mention, in the opinion, the fact that the California statue required death if the jury concluded that aggravating factors outweighed mitigating factors.

Unlike the Georgia and South Carolina schemes where the jury is not instructed to "weigh" aggravating circumstances against mitigating circumstances, but rather the jury is instructed to "consider" any mitigating circumstances as well as any aggravating circumstances, *State v. Bellamy*, 293 S.C. 103, 359 S.E.2d 63 (1987), the California statute required that the jury "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances" and "shall impose" a sentence of life without possibility of parole if the mitigating circumstances outweigh the aggravating circumstances. *California v. Ramos*, 463 U.S. 992, 994 n.3 (1983).

The Court in *Brown* held that the California Supreme Court, which had found constitutional error, had erred in focusing "solely on the word 'sympathy' to determine that the instruction interferes with the jury's consideration of mitigating evidence," because "the question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." *Id.* at 541 (quoting *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985).

> To determine how a reasonable juror could interpret an instruction, we "must focus initially on the specific language challenged." *Francis v. Franklin*, 471 U.S., at 315, 105 S.Ct., at 1971. If the specific instruction fails constitutional muster, we then review the instructions as a whole to

> see if the entire charge delivered a correct interpretation of the law. *Ibid.* In this case, we need not reach the second step of analysis because we hold that a reasonable juror would not interpret the challenged instruction in a manner that would render it unconstitutional.

Id. at 541-42. The only word of the instruction challenged was "sympathy" and the Court doubted "that a rational juror could parse the instruction in such a hypertechnical manner." *Id.* at 542. The Court also noted that the jury was instructed to avoid "*mere* sympathy." *Id.* "Even a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* In reaching this conclusion, the Court noted that 13 defense witnesses had been called over three days in sentencing. "We think a reasonable juror would . . . understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." *Id.*

> We also think it highly unlikely that any reasonable juror would almost perversely single out the word "sympathy" from the other nouns which accompany it in the instruction: conjecture, passion, prejudice, public opinion, and public feeling. Reading the instruction as a whole, as we must, it is no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty.

Id. at 542-43.

> An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him.

Id. at 543.

In her concurrence, Justice O'Connor noted "the tension that has long existed between the two central principles of our Eighth Amendment jurisprudence": the need to suitably direct and limit discretion and the need to allow the sentencer to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense. *Id.* at 544.

> In my view, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion. . . . [H]owever, one difficulty with attempts to remove emotion from capital sentencing through instructions such as those at issue in this case is that juries may be misled into believing that mitigating evidence about a defendant's background or character also must be ignored.

Id. at 545-46.

In *McCleskey v. Kemp,* 481 U.S. 279 (1987), another Georgia case, the Court summarized the two guiding principles of its prior decisions, as follows:

> In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.

Id. at 304. In short, when the state statute does not "decree the death penalty, absolutely and categorically, . . . the jury must always be given the option of extending mercy." *Morgan v. Illinois,* 504 U.S. 719, 751 (1992) (Scalia, J., dissenting).

The Court in *McCleskey* also noted that the discretion allowed to juries generally weighs in favor of the defendant.

> Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable.

481 U.S. at 311. By definition, "leniency" is being "mercifulness as a consequence of being lenient or tolerant." http://www.thefreedictionary.com/leniency. Thus, allowing the jury to dispense mercy is not prohibited.

The South Carolina Supreme Court, however, continued its *carte blanche* rejection of challenges to instructions not to consider "sympathy," apparently without any recognition that the California "weighing" statute involved in the *Brown* decision imposed far greater restrictions on juror discretion to impose life than South Carolina's and Georgia's "consider" statutes. *See, e.g., State v. Owens,* 293 S.C. 161, 359 S.E.2d 275 (1987) (citing *Plemmons* and *California v. Brown*); *State v. Cain,* 297 S.C. 497, 377 S.E.2d 556 (1988) (same); *State v. Jones,* 298 S.C. 118, 378 S.E.2d 594 (1989) (citing *California v. Brown and Owens*); *State v. Bell,* 302 S.C. 18, 393 S.E.2d 364 (1990).

Subsequently, in *Boyde v. California,* 494 U.S. 370 (1990), the Court again considered the constitutionality of the California scheme and the trial court's instructions. The specific instruction challenged was, as follows:

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you *shall impose* a sentence of confinement in the state prison for life without the possibility of parole.

Id. at 374. In reviewing this challenge, the Court noted that California no longer used this instruction and that after *Brown*, California had abandoned its instruction not to consider "sympathy." *Id.* at 374 n.2. Boyde challenged the statute and instruction

asserting that "the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances 'outweigh' the mitigating circumstances." *Id.* at 377. The Court held: "But there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Id.*

In *Saffle v. Parks*, 494 U.S. 484 (1990), the Court was again presented with a claim challenging an instruction in the penalty phase "telling the jury to avoid any influence of sympathy." *Id.* at 486. Because the case was one brought in federal habeas, however, and would require a new constitutional rule, relief was barred based on *Teague v. Lane,* 489 U.S. 288 (1989). *Saffle*, 494 U.S. at 490 ("Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence").

> At the very least, nothing . . . prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a 'reasoned *moral* response,' rather than an emotional one. The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice.

Id. at 493.

States such as South Carolina and Georgia do, of course, allow the jury to reject imposition of the death penalty even when no mitigating circumstances are found simply as an act of mercy. Indeed, the Georgia Supreme Court continued its explicit recognition that, under the Georgia statute (on which South Carolina's is patterned), mercy and sympathy are proper considerations for the jury in capital sentencing. *Isaacs v. State*, 386

S.E.2d 316, 334 (Ga. 1989) (holding that trial court did not err by telling the jury that although it could properly consider "feelings of sympathy and mercy for the defendant," but it should not act on "whim or caprice"). Nonetheless, the South Carolina Supreme Court continued in its rejection of claims that the trial court committed error in instructing the jury not to be influenced by sympathy. *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991) (citing *Bell*, *Cain*, *Owens*, *California v. Brown*, and *Saffle v. Parks*).

At the same time, however, the South Carolina Supreme Court followed the Georgia Supreme Court and explicitly held that it is proper for the defendant to present witnesses in sentencing to ask for mercy for the defendant.

> [A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, a defendant may not present witnesses to testify merely to their religious or philosophical attitudes about the death penalty. . . . Nor is a defendant entitled to present the opinion of a witness about what verdict the jury "ought" to reach.

State v. Torrence, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991) (quoting *Childs v. State*, 357 S.E.2d 48, 60 (1987). *See also State v. Johnson*, 338 S.C. 114, 126-27, 525 S.E.2d 519, 525 (2000) ("Johnson's sister was able to make a general plea for mercy on her brother's behalf.").

Other states have also explicitly recognized that "[t]he law permits mercy [in capital jury sentencing], but does not require it." *State v. Rhines*, 548 N.W.2d 415, 456 (S.D. 1996). For example, the Washington Supreme Court, while rejecting sympathy as a consideration does not reject consideration of mercy. *State v. Brett*, 892 P.2d 29, 58 (Wash. 1995) ("mercy, as opposed to sympathy, is a proper mitigating circumstance"

because sympathy is an Aemotional consideration[], while mercy is based on reason").[4] Indeed, the court has explicitly held that "mercy is a proper circumstance which a capital case jury may consider." *State v. Gentry*, 888 P.2d 1105, 1151 (Wash. 1995). Sympathy is rejected because "sympathy can be directed toward either the defendant or the victim whereas mercy can only be directed toward the defendant." *Id.* at 50. This observation, of course, echoes the observations of this Court in *Chaffee*, 285 S.C. at 32, 328 S.E.2d at 470 ("Whether the judge was referring to sympathy for the dead woman and her family or for the defendants is not clear").

The Georgia Supreme Court also continued its explicit holding, followed by South Carolina in *Torrence* and subsequent cases, that "[i]t is reversible error to prevent a friend or relative of the defendant from taking the stand and pleading with the jury for mercy." *Barnes v. State*, 496 S.E.2d 674, 688 (Ga. 1998). The Georgia court also explained the reasoning behind its holding in *Childs*: "mercy for the individual defendant is, by itself, a valid reason for a jury to decline to impose a death sentence: a jury can withhold the death penalty for any reason or no reason at all." *Barnes*, 496 S.E.2d at 688. *See also Jenkins v. State*, 498 S.E.2d 502, 515 (Ga. 1998) (no error in the trial court's instructions to jurors "that they could consider mitigating evidence or any circumstances in mitigation; that they could return a life sentence for any reason or no reason at all; and that they could consider 'feelings of sympathy and mercy that flow from the evidence'"). At bottom, the Georgia court recognizes that it is proper during a *capital trial* to charge the jurors "not be swayed in your deliberations by mere sentiment, conjecture, sympathy,

[4] "Mercy" is "compassionate treatment" or "to be kind and forgiving." The American Heritage College Dictionary 852 (3rd ed. 1993). "Sympathy," on the other hand, implies a "relationship or an affinity between people or things in which whatever affects one correspondingly affects the relationship." *Id.* at 1375.

passion, prejudice, public opinion, or public feeling," but that it is "error to charge [the] jury in [the capital] penalty phase not to consider sympathy when determining sentence." *Heidler v. State*, 537 S.E.2d 44, 54 (Ga. 2000).

As noted previously, in this case, *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000), however, in rejecting the challenge to the language "other than as an act of mercy," this Court simply reverted in *dicta* to its case law approving "no sympathy" instructions.

> This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error. *See Singleton*, 284 S.C. at 393, 326 S.E.2d at 156; *State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984).

Hughey, 339 S.C. at 460, 529 S.E.2d at 732. In doing so, this Court apparently did not recognize the contradiction in its own holdings that a defendant is entitled to present witnesses to explicitly ask for mercy. *Torrence*, 305 S.C. at 51, 406 S.E.2d at 318 ("a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf"). This Court has continued to follow the rule of *Torrence* even after *Hughey*. *See, e.g., Johnson, State v. Wise*, 359 S.C. 14, 596 S.E.2d 475 (2004); *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005). This Court also continued to recognize in the context of burglary cases, where the sentence was automatically life unless the jury recommended mercy, that "[a] recommendation of mercy rests entirely in the discretion of the jury and may be exercised independently of whether the evidence warrants it." *Chubb v. State*, 303 S.C. 395, 397, 401 S.E.2d 159, 160 (1991) (trial counsel ineffective for failing to present mitigation evidence or argue for mercy during the guilt phase because of her erroneous expectation that a separate sentencing proceeding would be held); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002)

(counsel ineffective in burglary case for failing to request mercy from jury and prejudice was presumed).

Aside from Georgia and Washington, some other states explicitly recognize that "[m]ercy is a relevant factor for consideration at a death sentencing hearing, to be considered within the context of all factors in aggravation and mitigation." *People v. Caffey*, 792 N.E.2d 1163, 1209 (Ill. 2001). Because mercy is a relevant consideration, "a prosecutor's argument suggesting that the jury could not consider mercy as a mitigating factor, or that mercy differed from other mitigating factors, constitutes error." *Id.* at 1212. *See also Jones v. State*, 43 So. 3d 1258, 1286 (Ala. Crim. App. 2007) (trial court in sentencing order declared: "this Court recognizes that a non-statutory mitigating circumstance can include . . . mercy for the defendant"); *State v. Kleypas*, 40 P.3d. 139 (Kan. 2001) ("it is proper for the prosecutor to argue that the defendant is not deserving of the jury's mercy because of the defendant's actions, as long as the prosecutor does not improperly state the law by arguing to the jury that it is prohibited from granting mercy to the defendant"); *People v. Harlan*, 109 P.3d 616 (Colo. 2005) (trial court instructed the jury that it must not base its decision on passion, prejudice, or some other arbitrary response, but that it could consider mercy or sympathy); *Zink v. State*, 278 S.W.3d 170, 188 (Mo. 2009) ("Prosecutors may discuss the concept of mercy in their closing arguments [in capital case] because mercy is a valid sentencing consideration, and in that connection may argue that the defendant should not be granted mercy").

Where mercy is not allowed as a consideration by other states it is generally because of the structure of the state statutes. For example, in Pennsylvania, because the death penalty statute provides that if the jury finds at least one aggravating circumstance

and no mitigating circumstances the verdict must be death, "a jury may consider mercy or sympathy when weighing specific aggravating and mitigating factors, but it may not exercise its sense of mercy or sympathy in a vacuum." *Commonwealth v. Powell*, 956 A.2d 406, 426 (Pa. 2008).

Even some weighing states explicitly allow for the consideration of mercy. For example in *Kansas v. Marsh*, 548 U.S. 163 (2006), the Court reviewed the constitutionality of the Kansas statute, which provides:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the [statutory] aggravating circumstances . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise the defendant shall be sentenced as provided by law.

Id. at 166. Despite the mandatory nature of this statute, under Kansas law, the jury is still explicitly allowed and instructed that it can consider mercy:

> A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, although it does not justify or excuse the offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.
>
> The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

Id. at 176.

In sum, under the Eighth Amendment, capital sentencing schemes are required to meet "twin objectives:" to be "at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). The process required by the Eighth Amendment must "guide the discretion of the

sentencer" while at the same time "allow mitigating evidence to be considered," *Johnson v. Texas*, 509 U.S. 350, 373 (1993), so the jury can reach a "reasoned *moral* response," *California v. Brown*, 479 U.S. at 545 (1987) (O'Connor, J., concurring) (emphasis in original). These are the constitutional requirements.

The United States Supreme Court has, on the other hand, never construed the Eighth Amendment to require that a jury "be able to dispense mercy on the basis of a sympathetic response to the defendant." *Johnson*, 509 U.S. at 371. To the contrary, the Court has declared that the states are free "to structure the consideration of mitigating evidence." *Id.* at 373. The states may require imposition of a death sentence if a jury unanimously finds at least one aggravating circumstance and no mitigating circumstances or finds that the aggravating circumstances outweigh the mitigating circumstances as long as the jury is able to consider and give effect to all relevant mitigating evidence. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990)). Likewise, the states are free to give no special weight to aggravating circumstances once at least one aggravating circumstance is found to "narrow[] the class of persons convicted of murder who are eligible for the death penalty." *Zant v. Stephens*, 462 U.S. at 874. The states are free to allow the jury to freely "consider" aggravating and mitigating circumstances without any requirement that aggravating circumstances be weighed against mitigating circumstances. *Id.* at 273-74. At the same time, the states are free to "permit[] the jury to dispense mercy on the basis of factors too intangible to write into a statute." *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989) (quoting *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring)). The states are free to construct a system where "[t]he jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on

the trial court, . . . but it must find a statutory aggravating circumstance before recommending a sentence of death." *Zant v. Stephens,* 462 U.S. at 875 n.13.

In South Carolina, like Georgia, it is proper for a defendant to present witnesses "to ask for mercy on his behalf," *Torrence*, 305 S.C. at 51, 406 S.E.2d at 318 (quoting *Childs v. State*, 357 S.E.2d 48, 60 (Ga. 1987)); *Johnson,* 338 S.C. at 126, 525 S.E.2d at 525; *State v. Sapp*, 366 S.C. at 283, 621 S.E.2d at 883, proper for defense counsel to "endeavor[] to appeal to the jury's sense of mercy," *Drayton v. Evatt,* 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993), and proper for a defendant to address the jury and ask for mercy, *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004).

B. Trial counsel's ineffectiveness.

Given these prior decisions, it was improper for the trial court to instruct the jury that it could not impose a life sentence "as an act of mercy." Counsel's failure to object to the erroneous charge was both deficient and prejudicial. The judge's instruction eliminated mercy as a permissible reason to sentence Hughey to life imprisonment. This limitation affected whether the mitigation evidence could be considered by the jury. *See e.g. Torrence, supra.* This Court has recently reaffirmed its adherence to the Constitutional standard requiring that jurors be allowed to consider all available mitigation evidence. *Weik, supra*; *State v. Rivera*, 402 S.C. 225, 250, 741 S.E.2d 694, 707 (2013) ("remind[ing] the State and the bench that due process requires that defendants be accorded considerable latitude in the presentation of mitigation evidence") (citing *Porter v. McCollum,* 558 U.S. 30 (2009); *Eddings v. Oklahoma,* 455 U.S. 104, (1982); *Skipper v. South Carolina,* 476 U.S. 1, (1986); and *Lockett v. Ohio,* 438 U.S. 586, (1978)).

But for counsel's failure to object to the improper mercy instruction, there is a reasonable probability the outcome of the sentencing phase would have been different. *See, e.g., Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002) (counsel ineffective in burglary case for failing to request mercy from jury and prejudice was presumed); *Chubb v. State*, 303 S.C. 395, 397, 401 S.E.2d 159, 160 (1991) (trial counsel ineffective for failing to present mitigation evidence or argue for mercy during the guilt phase because of her erroneous expectation that a separate sentencing proceeding would be held).

Trial counsel made no specific objection to the court's charge that the jury could "recommend a sentence of life imprisonment for any reason or for no reason at all **other than as an act of mercy.**" Tr. 4062 (emphasis added). To the extent, the issue was not preserved, counsel's conduct was deficient. Trial counsel offered no strategic reason for the failure. Trial counsel's failure to object to the instruction prejudiced Hughey. *Wiggins, supra; Strickland, supra.*

The record shows the PCR Court correctly found trial counsel ineffective. PCR Order App. 5926-28. The state concedes the "no mercy" jury instruction "issue was not presented to the trial judge and therefore was not technically preserved for direct appeal." Brief of Petitioner 39. Because the issue was not preserved, trial counsel's conduct was deficient. Trial counsel offered no strategic reason for the failure. Their failure to object to the instruction prejudiced Hughey. *See Wiggins, supra; Strickland, supra.*

Hughey's case is very similar to *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001).[5] In *Jones*, the trial judge held a charge conference prior to closing arguments. "[N]either appellant nor the State objected to the trial judge's indication that he planned

[5] Rosemond's PCR counsel also relied on *Jones*. *See Rosemond* Brief of Appellant App. 5892.

to give the reasonable doubt charge outlined in *State v. Manning,* 305 S.C. 413, 409 S.E.2d 372 (1991)." *Id.* 343 S.C. at 576, 541 S.E.2d at 820. Jones' lawyer structured his closing argument around the *Manning* "hesitate to act" reasonable doubt instruction, even to the point of predicting the language the trial judge would use to instruct the jurors. After closing arguments, the solicitor asked the trial judge to remove the "hesitate to act" language from the jury instruction. The Supreme Court observed, "The *Manning* charge, although not required, is a correct statement of South Carolina law." *Id.* 343 S.C. at 578, 541 S.E.2d at 821. Because Jones reasonably relied on the trial judge charging the "hesitate to act" language, "[t]he decision to alter the charge, after the argument, was fundamentally unfair." *Id.*

In *Jones*, there was no claim the instruction ultimately given was incorrect, but rather, the trial judge, essentially, substituted one correct instruction for another correct instruction. This Court found prejudice because "[t]he effect of the judge's after the fact decision to excise the hesitate to act language from his charge was to diminish appellant's attorney's credibility in the eyes of the jury." *Id.*

In Hughey, the same thing happened. The trial judge held a charge conference prior to closing arguments in sentencing, where he told trial counsel he would give the requested, correct instruction. Counsel relied on the judge's assurances and asked the jurors to sentence based on mercy, but the trial judge then replaced a correct instruction with an **incorrect** one. Hughey was prejudiced by this for three reasons. First, like in *Rosemond*, the trial judge instructed the jurors to disregard the witness who asked for mercy. Second, the trial judge instructed the jurors to disregard Hughey's counsel's plea for mercy. Third, like in *Jones*, the incorrect instruction diminished trial counsel's

credibility in the eyes of the jury. In fact, the prejudice to Hughey is greater than the prejudice in *Jones* because rather than substituting a correct instruction with a different, yet correct instruction, the trial judge replaced a correct instruction with an incorrect one.

As discussed in Argument I, *supra*, the PCR judge agreed with Hughey that the "no mercy" instruction given at his trial was contrary to long-standing South Carolina law, and trial counsel was ineffective by failing to object and preserve the issue for appeal.

III.

Hughey was denied effective assistance of counsel when appellate counsel inadequately briefed the trial court's jury instruction that precluded the jurors from considering mercy evidence and failed to cite then-existing, controlling precedent?

The record shows the PCR Court correctly found appellate counsel ineffective. PCR Order App. 5926-28. The State, however, now claims it did not assert the procedural bar. State's Brief of Petitioner 32.[6]

Dudek had a duty to raise this issue on appeal and fully brief it. Instead, he interjected it into the argument on a separate issue regarding the judge's charge on mitigating circumstances. Dudek erred in not fully briefing the "no mercy" instruction because he knew the trial judge's instruction was contrary to well settled law. He was familiar with cases allowing the defendant to call witnesses to ask for mercy for a capital defendant. App. 4980-81. Yet, Dudek did not cite these cases. By not raising the

[6] At the conclusion of the PCR hearing, the state alleged it "didn't assert a procedural bar" and "sought to address the issue in the South Carolina Supreme Court." App. 5207. The state argues, since it "did not assert the procedural bar due to the lack of objection, the appellate court was free to address the merits of the claim." State's Brief of Petitioner 40. This claim is dubious. The state's brief during the direct appeal did not discuss the "no mercy" instruction. App. 4239-42. Assuming *arguendo* the state actually made an affirmative decision not to assert the procedural bar, the state's conduct was a blatantly opportunistic effort to capitalize on appellate counsel's inadequate brief and failure to cite the relevant controlling precedent. If believed, then the state was aware South Carolina law authorized consideration of mercy and did not call this Court's attention to the then-existing, controlling precedent. *See* State's Brief of Petitioner 18 ("The State agrees ***and has always agreed*** that state law authorized consideration of mercy by a capital sentencer." (emphasis added)).

erroneous mercy charge as a stand-alone issue, he failed to provide this Court with the authority necessary to reach the correct decision, as it did in *Rosemond*.[7]

Dudek testified the issue jumped out at him because it was the first time he had ever seen a judge address mercy in this way. In short, the instruction given by the trial judge, that mercy was not an appropriate reason for handing down a life sentence in Hughey's case, cuts against precedent by instructing the jurors to disregard mercy evidence. The charge was both erroneous and prejudicial. Had Dudek briefed the mercy charge separately, he would have had the opportunity to fully explore the improper nature of the charge and argue precedent as was done in Arguments III and IV of Hughey's Post-Hearing Brief. App. 5726-65. *See also* Argument II(A) *supra*.

The state argues the Supreme Court's holding in Hughey's direct appeal is the law of the case. State's Brief of Petitioner 45-46. The state's position, generally, ignores the law of ineffective assistance of appellate counsel. *Evitts v. Lucey*, *supra*; *Smith v. Robbins*, *supra*; and *Strickland v. Washington*, *supra*.

More specifically, the state's position ignores *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002). Patrick claimed "trial and appellate counsel [were] ineffective in failing to properly raise the issue of prosecutorial retaliation at trial and on appeal." *Id.* 349 S.C. at 206, 562 S.E.2d at 610-11. After Patrick was granted a new trial in PCR, the state re-indicted him on charges that had been dismissed prior to the original trial. Patrick's trial counsel moved to quash the re-indictments because it was improper for the state to revive "those charges . . . simply because [Patrick] was successful in PCR." *Id.*

[7] Further, Dudek's failure is in violation of Guideline 11.9.2 of the 1989 ABA Guidelines, which requires appellate counsel to pursue every issue regardless of how well it is preserved and also to attack restrictive appellate rules.

349 S.C. at 207, 562 S.E.2d at 611. Trial "counsel never cited specific law to the court, but instead merely stated there was a 'general philosophy ... you can't punish a guy for appealing his case.' The trial judge denied the motion to quash, noting he was 'without anything to base it on.'" *Id.* This Court, nevertheless, held this general objection was sufficient to preserve a due process violation for appeal.

This Court then held "counsel was ineffective for failing to properly address this same issue on appeal." *Id.* 349 S.C. at 208, 562 S.E.2d at 611. "In his brief to the Court of Appeals, counsel devoted three short paragraphs to this issue, did not give any useful analysis, and only cited one case." *Id.* The Court of Appeals did not address prosecutorial retaliation and decided the issue on other grounds. Even though counsel did not raise this issue in the petition for rehearing, the Court of Appeals *sua sponte* instructed the parties to address the issue. The state objected. The Court of Appeals denied the petition for rehearing noting, "The issue was argued in a conclusory fashion in [petitioner's] final brief" and "the issue was not stated with particularity in [petitioner's] petition for rehearing." *Id.* 349 S.C. at 209, 562 S.E.2d at 612. The Supreme Court held, "As evidenced by counsel's briefs and the Court of Appeals' statement above, counsel was deficient in failing to adequately raise or address the merits of the issue of prosecutorial retaliation." *Id.* Prejudice was found because "[i]f counsel had properly argued the issue, the Court of Appeals would have" ruled differently. *Id.* 349 S.C. at 212, 562 S.E.2d at 612.

Here, *Patrick* controls. Although Hughey's trial counsel requested the correct instruction, they did not object when the trial judge gave the improper instruction. Appellate counsel did not adequately raise or address the merits of this issue, did not

distinguish "mercy" from "sympathy," "prejudice," "passion" and "public opinion," or trace the history of the role of mercy in capital sentencing. *See* Applicant's Post-Hearing Brief App. 5731-57. Appellate counsel did not even cite *Torrence* as the controlling authority. Just as in *Patrick*, had counsel properly argued the issue, including citing *Torrence*, the Supreme Court would have ruled differently in Hughey's direct appeal.

But for the deficiencies of appellate counsel, there is a reasonable probability the outcome of the appeal would have been different and this Court would have decided the issue in the same way it later did *in Rosemond*.

IV.

There is minimal effect to Hughey's PCR as a result of this Court's opinion in *Rosemond v. Catoe*, holding that a jury instruction identical to the one given in Hughey's capital trial is contrary to South Carolina precedent, when that precedent also existed at the time of Hughey's trial but was not cited to this Court during Hughey's direct appeal.

Between the time Hughey filed his post-hearing brief and the time the state filed its post-hearing brief, this Court decided *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), which overruled *Hughey* "to the extent it approved and sanctioned the charge given here." *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10. As seen, in overruling *Hughey*, *Rosemond* relied on *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), a case decided prior to Hughey's trial. *Rosemond*, 383 S.C. at 329-30, 680 S.E.2d at 10-11.

The state acknowledges *Rosemond* but argues this Court's decision should not have any impact on Hughey being entitled to a new sentencing hearing. State's Brief of Petitioner 39-45. The state then argues, "The law of the case doctrine precludes reconsideration of the holding in *Hughey* for Hughey. State's Brief of Petitioner 45-46. Finally, the state argues, "retroactive application of *Rosemond* is not required." State's Brief of Petitioner 46-49. Each of these arguments will be addressed below.

A. The Procedural Impact of *Rosemond*.

No doubt, this Court's opinion in *Rosemond* was a dramatic development in Hughey's favor. The decision confirmed, as Hughey alleged throughout his PCR, that the trial judge's instruction to disregard mercy evidence was contrary to long-standing

South Carolina law. *Rosemond*, however, had little procedural impact on Grounds III and IV of the second amended PCR application.[8]

As outlined in Section I, *supra*, Hughey's legal argument was essentially the same analysis this Court adopted in *Rosemond*. In fact, Hughey and Rosemond were simultaneously presenting almost identical legal arguments. *Compare* Hughey's Second Amended Application (App. 4407-08) and Pre-Hearing Brief (App. 4507-14) with Rosemond's Brief on Appeal (App. 5890-92). *Rosemond*, therefore, is entirely consistent with the relief granted by the PCR Court. Although he cited *Rosemond*, the PCR judge conducted his own review of the South Carolina precedent that existed at the time of Hughey's trial. The relief ordered by the PCR Court, furthermore, would have been required even if this Court had not decided *Rosemond* during the briefing process. As discussed in more detail in Section III, *supra*, and Section IV(C), *infra*, the adverse decision in Hughey's direct appeal resulted from ineffective assistance of appellate counsel, rather than the precedent existing at the time.

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[8] The state also reasserts its argument about reviewing the jury instruction as a whole "as no analysis was made as to the charge as a whole in *Rosemond*." State's Breif of Petition 41-42. The state later suggests, "The only constitutional issue that could arise under these facts would be if the charge at issue *precluded* consideration of the *evidence* that the state allowed." State's Brief of Petitioner 44 (emphasis in original). The trial court's instruction in Hughey's case, in fact, precluded consideration of properly admitted mercy evidence because the trial court "instructed the jury to discount such pleas by instructing the jury that it could not recommend a life sentence based on the evidence of mercy." *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10.

Additionally, the state also recycles its argument that mercy equates to "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." State's Brief of Petition 43-44. This Court rejected that argument in *Rosemond* by holding, "[C]onsideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *Rosemond*. 383 S.C. 330, 680 S.E.2d at 10-11 (emphasis added).

The procedural impact of *Rosemond*, therefore, is minimal. Based on the legal precedent existing at the time of Hughey's trial, the PCR Court was obligated to reach the same conclusion even if this Court had not decided *Rosemond*.

B. The Supreme Court's opinion in *Hughey* is not the law of the case.

The state argues the Supreme Court's holding in the direct appeal is the law of the case. State's Brief of Petitioner. 45-46. This argument is addressed in detail in Section III, *supra*. Also as discussed in Section III, *supra*, and Section IV(C), *infra*, the result in Hughey's direct appeal resulted from ineffective assistance of appellate counsel, rather than the precedent existing at the time of his trial. Had appellate counsel properly argued the issue and cited the precedent existing at the time, this Court would have ruled in *Hughey* as it did in *Rosemond*.

Finally, it would simply be absurd to apply *Hughey* as the "law of the case" and binding on Hughey when the Supreme Court explicitly held in *Rosemond* that *Hughey* is "overruled to the extent it approved and sanctioned the charge given." *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10-11.

C. Hughey's grounds for relief are based on ineffective assistance of trial and appellate counsel, rather than retroactive application of *Rosemond*.

According to the state, "Retroactive application [of *Rosemond*] to collateral cases is not required." The state then, incredibly, argues, "The change represented by *Rosemond* was plainly not dictated by the precedent at the time of Hughey's case because *Hughey* expressly decided otherwise." State's Brief of Petitioner 46, 48.[9] Hughey,

[9] The state also argues, "An attorney is not required to anticipate or discover changes in the law or facts, which did not exist at the time of trial." State's Brief of Petitioner 40, fn. 8. As seen, this issue does not involve anticipating a change in law, but

however, is not seeking retroactive application of the decision in *Rosemond.* Hughey, in fact, was raising ineffective assistance of his trial and appellate counsel long before this Court handed down *Rosemond.* Simply stated, the trial judge's "no mercy" instruction was contrary to South Carolina law existing at the time of Hughey's trial and direct appeal.

The state's attempt to portray *Rosemond* as a change in the law is refuted in three important ways. The first is this Court's reliance on *Torrence* in *Rosemond. Torrence* was decided in 1991, a full six years before Hughey's jury trial. Second, prior to *Rosemond,* Hughey cited the relevant precedent existing before his trial. Hughey's Post-Hearing Brief App. 5731-57. Third, even after the decision in *Rosemond,* the PCR judge conducted his own review of this relevant precedent. PCR Order App. 5926-28

As discussed in Sections II and III, *supra,* the result in Hughey's direct appeal was the product of ineffective assistance of trial and appellate counsel, rather than the precedent existing at the time. Had trial counsel made the proper objection and had appellate counsel properly argued the issue, including citing the precedent existing at the time of Hughey's trial, this Court would have ruled the same way it did in *Rosemond.*

Because the PCR Court granted relief based on long-standing South Carolina precedent, rather than a retroactive application of *Rosemond,* the state's contention to the contrary must be rejected.

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rather from appellate counsel's failure to cite this Court's precedent existing at the time of Hughey's trial and direct appeal.

V.

Hughey was prejudiced by the cumulative error.

This Court should apply a cumulative error analysis for two reasons.

First, the State seeks unfair benefit from the combination of trial and appellate counsel's ineffectiveness. On one hand, the State argues, "[A]ppellate counsel could not be deemed deficient because trial counsel did not object to the penalty phase instruction. . . . Appellate counsel is not deficient for failing to raise on appeal an issue that was not preserved for review." State's Brief of Petitioner 29. On the other hand, the State argues, "In the *Final Brief of Respondent* on this issue [during the direct appeal, the State] did not assert any procedural bar." State's Brief of Petitioner 32. The State cannot have it both ways—excuse trial counsel from deficient performance for not objecting to the improper instruction because the State did not assert the procedural bar and also excuse appellate counsel from deficient performance for ineffectively briefing the issue because it was not preserved by trial counsel. *See also* fn. 6, *supra*. Such a result would be fundamentally unfair.

Second, as set forth in Hughey's Brief of Petitioner, trial counsel was deficient for not investigating, developing, and presenting available mitigation evidence. Rather, trial counsel relied heavily on mercy as a reason for sentencing Hughey to life imprisonment, only for the trial judge to remove that issue from the jurors consideration. Hugehy was prejudiced by these failures combined with the failure to object to the "no mercy" instruction.

This Court has never before explicitly applied a cumulative prejudice analysis. *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002). This Court declined to do so in

Green, however, because Green failed to meet the threshold requirement of showing error. Specifically, the Court held that, "[m]ultiple errors do not exist in this case to form any cumulative prejudicial effect." 351 S.C. at 197, 569 S.E.2d at 325. Here, however, Hughey has shown the existence of numerous errors by trial counsel.

In light of the multiple error committed by Hughey's trial and appellate counsel, this Court must apply a cumulative prejudice analysis. *Kyles v. Whitley*, 514 U.S 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"). The United States Supreme Court's opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered "the entire postconviction record...as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. "[A]s a whole" implies a cumulative analysis.[10] Likewise, in *Strickland*, the Court stated, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional **errors** the result of the proceeding would have been different." 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of "individual error" or error-by-error evaluation instead of formulating the prejudice test in light of counsel's "errors."[11]

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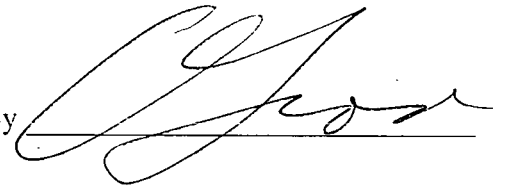
[10] *See also Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) (rejecting a prejudice analysis that "separately considered each category of mitigating evidence"); *Wong v. Belmontes*, 130 S. Ct. 383 (2009) (rejecting a prejudice analysis that considered the mitigating evidence not presented without considering the aggravation evidence that would have been presented in rebuttal).

[11] Numerous courts, relying on Strickland, have held that a cumulative prejudice analysis is appropriate. *See e.g., Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001); *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006); *Martin v. Grosshans*, 424 F.3d. 588 (7th Cir. 2005);; *Turner v.*

Conclusion

For the foregoing reasons, this Court should affirm the PCR court's order granting Hughey a new sentencing hearing.

Respectfully submitted,

By 

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Duncan, 158 F.3d 449 (9th Cir. 1998); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Guiets v. Kirkpatrick*, 618 F. Supp. 2d 193 (E.D.N.Y. 2009); *Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008); *United States ex rel. Madej v. Schomig*, 223 F.Supp.2d 968 (N.D. Ill. 2002); ; *In re Gay*, 968 P.2d 476 (Cal. 1998); *McIntosh v. State*, 941 So. 2d 1 (Fla. Dist. Ct. App. 2006); *People v. Davis*, 879 N.E.2d 996 (Ill. App. Ct. 2007); *Ross v. State*, 954 So. 2d 968 (Miss. 2007); *State v. Echols*, 941 A.2d 599 (N.J. Super. Ct. App. Div. 2008); *State v. Gondor*, 860 N.E.2d 77 (Ohio 2006); *Mata v. State*, 141 S.W.3d 858 (Tex. Ct. App. 2004); *State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

Case No. 2000-CP-01-210
Appellate Case Number: 2010-170387

John Kennedy Hughey, Respondent/Petitioner

v.

The State, Petitioner/Respondent.

Certificate of Service

I certify that I have served a copy of the Respondent/Petitioner's Brief of Respondent on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

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