STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JUL 25 2014
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Capital PCR 06-CP-23-7719
The Honorable D. Garrison Hill, Circuit Court Judge
Appellate Case No. 2011-188687

Kamell Delshawn Evans,

Respondent/Petitioner,

-vs-

State of South Carolina,

Petitioner/Respondent.

RESPONDENT'S BRIEF ON BEHALF OF RESPONDENT/PETITIONER

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

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

ATTORNEYS FOR RESPONDENT/
PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

ISSUE PRESENTED

I

Whether probative evidence supports the PCR court's finding that trial counsel's failure to object to a charge which precluded the jury from considering the evidence and utilizing mercy as a vehicle for expressing its reasoned moral response to the evidence was both deficient and prejudicial under *Strickland v. Washington*, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

STATEMENT OF THE CASE

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

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

On direct appeal the issue raised was whether the trial judge committed reversible error by not charging S.C. Code Ann. § 16-3-20(C)(b)(6), a statutory mitigating circumstance that applies where "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." The issue was framed by this Court as follows: "Is Appellant entitled to a new sentencing proceeding because the trial judge failed to *sua sponte* charge the jury on a statutory

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

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

Mr. Evans filed a Petition for Stay of Execution on November 13, 2006 and subsequently an application for postconviction relief. App. 1856; see App. 1896 (first amended petition); App. 1903 (second amended petition). On December 6, 2006 this Court granted the stay and designated the Honorable D. Garrison Hill to conduct the proceedings. App. 1865. Thereafter, Mr. Evans served and filed an Initial Trial Brief (Supp. App. 1). An evidentiary hearing commenced June 1 through 5, 2009, and concluded from October 12 through 14, 2009. At the conclusion of the evidentiary hearing, Judge Hill issued a briefing order, and post-hearing briefs were filed by Mr. Evans on October 4, 2010 (App. 3906), by the State on November 10, 2010 (App. 4104), and Evans's Reply was filed on November 19, 2010 (App. 4217).

On December 9, 2010, Judge Hill requested additional briefing regarding trial counsel's ineffectiveness with respect to the prejudice prong on one of the issues raised—namely, whether Mr. Evans was denied effective assistance of counsel as a consequence of counsel's failure to object to an erroneous sentencing charge instructing jurors that a life sentence could not be returned as an act of mercy (see *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009)). On the issue of whether counsel's failure to object to the erroneous charge was prejudicial, the court asked the parties to brief the following questions:

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

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

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

On February 24, 2011, Judge Hill issued a final order granting Mr. Evans a new sentencing trial on this jury charge issue, finding that Mr. Evans was indeed denied effective assistance of counsel as a consequence of counsel's failure to object to the erroneous jury charge instructing jurors that a life sentence could not be returned as an act of mercy. App. 4254. Relief was granted in part on the authority of *Rosemond v Catoe*. On April 1, 2011, the State filed its Notice of Appeal. Thereafter, Mr. Evans filed a cross appeal pursuant to S.C.R.A.P. Rule 203(c) and, by subsequent order of this Court, was designated the Respondent-Petitioner. On April 16, 2014, this Court granted both the State's and Mr. Evans's Petitions for Certiorari and the matter is now before the Court.[2]

RESPONDENT/PETITIONER'S STATEMENT OF FACTS

The issue(s) presented in the State's Brief address trial counsel's failure to object to a sentencing instruction, which this Court held in *Rosemond v. Catoe* falsely instructs a jury

[2] Mr. Evans filed a Brief of Respondent/Petitioner in this matter on June 5, 2014. Therein, Mr. Evans challenged the PCR court's decisions on seven issues: (1) Trial counsel were ineffective by failing to pursue and investigate substantial and significant mitigation of which they were or should have been aware, including evidence of brain damage and abuse. (2) Trial counsel were ineffective in failing to object to aggravating factor S.C. Code Ann. § 16-3-20(C)(a)(7) as applied to victim Antonio J. Sapinoso, when no evidence supported the suggestion that the offense occurred "during or because of the performance of his official duties." (3) Trial counsel were ineffective by failing to object to the testimony of Lewis O'Cain, who compared general living conditions of those sentenced to life without parole to those sentenced to death, and in failing to object to the Solicitor's argument on the same. (4) Trial counsel were ineffective by failing to object to the testimony of Mr. O'Cain regarding alleged gang affiliation of Mr. Evans based solely upon Mr. Evans's tattoos and a homemade poster, and the Solicitor's highly inflammatory and ungrounded summation, which characterized this domestic incident as the shooting of a law enforcement officer for the purpose of gang status. (5) Trial counsel were ineffective by failing to make a motion to change the venue of the trial where one of the victims served as a security officer in the courthouse where the trial was held. (6) Trial counsel were ineffective by failing to object to victim impact testimony. (7) Trial counsel were ineffective by failing to object to the Solicitor's summation, which exceeded the bounds limiting argument in multiple respects.

that mercy, as a reasoned moral response to the evidence, is an impermissible basis for a sentencing decision. The facts necessarily pertinent to the question before the Court, accordingly, concern that instruction.[3]

During the sentencing trial, counsel presented evidence and argument to the jury that Mr. Evans's life should be spared as an act of mercy. The jury heard brief testimony from a series of sports mentors and friends concerning Evans's positive attributes and the bonds he built between adults and children alike. App. 1651-53, 1645-47, 1648-50, 1642-44, 1655-58, 1660-62. The jury also heard Evans's sister testify that Kamell was a father figure to her children, even in prison. App. 1672. Evans's father offered an emotional plea praising his son's positive attributes and stating that, while Kamell's actions caused the family pain, "he is still my friend, he will always be my friend." App. 1669.[4]

---

[3] The State's Brief's statement of facts offers no account of the sentencing proceeding in Mr. Evans's case or of the testimony of trial counsel during the postconviction hearing that pertained to counsel's failure to object at sentencing to the erroneous instruction. Rather, the State offers, in some detail, an account of the tragic crime. It is important to recognize (i) that certain assertions the State presents as fact *have instead been contested throughout the proceedings and never established by evidence.* For instance, the State infers that a nylon bag holding ammunition and a knife found at the Sapinoso home belonged to Evans (State's Brief at 12); however, Evans throughout has contested such an assertion and no evidence was presented at trial on this or to the effect that the bag or contents were carried to the house by Mr. Evans (App. 2779-2780; see App. 1364-66). It is also important to recognize (ii) that certain materials upon which the State relies in its account of the crime were *not before the jury*, and are instead based on attorney Sumner's recollection of privileged communications between he and Evans, presented as evidence during the postconviction hearing (these are labeled as 'File Notes' under "PCR Hearing Exhibits, Respondent's Exhibits" beginning at App. 3752 and continuing through App. 3841). For example, there was no testimony or evidence at trial that Mr. Evans was trying to reload a weapon when arrested (State's Brief at 10). Further, it is important to recognize that the assertions with which the State concludes its statement of facts—the State's version of how the shootings occurred—was contested by expert testimony at the postconviction hearing (see App. 4079-90).

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

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

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

App. 1770.

The Court's sentencing instruction included the charge—identical to that found improper in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) (overruling *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000))—that "you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy." R. 1785. Despite the emphasis of the defense on mercy, counsel did not object when the trial court instructed the jury. Nor did trial counsel object during deliberations, when this instruction was submitted to the jury with the rest of the charge in writing, although trial

---

was the reason for the shootings (App. 1717-18), but who, contrary to Dr. Evans, testified that Kamell lacked any neuropsychological symptoms that would call for further study of brain abnormality. See Brief of Respondent/Petitioner, Point 1.

counsel knew in advance that the judge would give the charge and that this would occur.[5] The trial court instructed the jury to consider all the evidence presented, and informed the jurors that they could return a life sentence whether or not they found a statutory or nonstatutory mitigating factor and for any reason. App. 1784-85. No statement in the trial court's jury instruction, however, mentioned mercy—except the erroneous instruction precluding it as a springboard for a decision for life.

During the postconviction hearing (the "PCR hearing"), trial counsel Goldsmith and trial counsel Sumner both emphasized that the "primary element" (App. 3270), the "key highlight" (App. 3271), a "major part" (App. 3259), of the mitigation case was mercy. Goldsmith testified that he "built" the closing argument "around" mercy. App. 3271. Counsel testified that they had hoped to convince the jury, in the face of substantial evidence presented by the State in aggravation, that Evans was a good person who, as April 1 passed to April 2, 2003, had a very bad night. In counsel's view, mercy was the keystone of this approach. Trial counsel offered as a reason for failing to object that they thought the erroneous instruction emphasized to jurors that they should consider mercy. App. 3262, 3279. Attorney Goldsmith remembered the instruction as "sort of an expansive charge." App. 3272. Attorney Sumner stated that because the instruction "use[d] the word mercy" it was preferable to a charge that merely tracked the statute's text. App. 3264; see App. 3261.

SUMMARY OF ARGUMENT

Mr. Evans's case is one of a small number of cases in which a single trial judge provided the jury with an instruction that uniquely infringed upon the decisionmaking

[5] Counsel did not object when Judge Cole reviewed the proposed jury charge verbally with counsel in chambers prior to instructing the jury. App. 3271-72, 3261-62. Counsel did not submit any proposed jury charges. App. 3264-65.

demanded of capital jurors by this State and the United States Constitution (see *Rosemond*, *supra*; *Hughey v. State*, 2000-CP-01-0212, Abbeville Cty (PCR Order, May 14, 2010) (Macaulay, J.); *Binney v. State*, 2000-CP-06-11-223, Cherokee County (PCR Order, Sept. 1, 2011) (Baxley, J.)). The jury charge given in this case—"[Y]ou may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" (App. 1785)—contradicts long-standing State precedent and statutory authority as well as the Federal Constitution. The postconviction court ("the PCR court") correctly held that counsel's failure to object to the erroneous instruction constituted deficient performance and was prejudicial under *Strickland v. Washington*, 466 U.S. 688 (1984). The PCR Order recognizes both the harm that this rare and idiosyncratic instruction presents as a general matter under state and federal law *and* the unique harm that counsel's failure to object to the erroneous instruction wrought in Mr. Evans's sentencing proceeding, where mercy played the central and keystone role. Indeed, the exclusion of mercy was profoundly prejudicial in this capital sentencing trial where counsel positioned mercy as the crux of their mitigation argument; where the case was tried in the courthouse where the victim worked; and where one of the victim's former coworkers testified as others actively served the needs of the jury that heard evidence and deliberated on Mr. Evans's sentence.

The State challenges the PCR Order for (1) misapplying *Strickland*'s first prong on deficient performance, (2) misapplying *Strickland*'s second prong on prejudice, (3) misconstruing the federal issue involved, and, finally, (4) making an erroneous factual finding with respect to the meaning of the language of the mercy charge. None of these claims have merit. Each depends on ignoring either the precedent of this Court or federal and state constitutional law.

First, in arguing against the finding of deficient performance and that the PCR court made an erroneous factual finding with respect to the meaning of the mercy charge, the State simply ignores (or rejects) this Court's decision in *Rosemond v. Catoe*. There is only one possible understanding of the charge's words and it is that given by the South Carolina Supreme Court, condemning them, in *Rosemond*. As such, the PCR court properly found that counsel's failure to object was not reasonable under *Strickland*; and, further, the PCR court's finding of fact with respect to the meaning of the charge—which simply mirrors this Court's own—was not erroneous. The first and fourth challenges offered by the State, then, defy this Court's determination in *Rosemond* as well as common sense.[6]

The primary question before the Court, rather, is whether counsel's failure to object to the erroneous instruction prejudiced Evans under *Strickland*. In *Rosemond*, this Court did not decide the issue of prejudice with respect to the mercy instruction, reversing and remanding for a new sentencing proceeding on other grounds. 383 S.C. at 329, 680 S.E.2d at 10. The State argues, contrary to the PCR court's finding of *Strickland* prejudice, that, even if the mercy charge was erroneous, there was no constitutional violation because "the charge[] as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the evidence presented..." State's Brief at 37. Yet, as discussed in what follows, the State's argument misses the point as well as the law: the erroneous mercy charge violates state law and the federal constitution not only because it disallows consideration of evidence but also because it limits the jurors' ability to provide mercy as a reasoned moral response to that evidence—it prevents jurors from giving effect, by rationally choosing a life

[6] It is not clear whether the State simply refuses to acknowledge this Court's specific condemnation of the *Hughey* charge in *Rosemond* or whether it is attempting to argue against that precedent. Nonetheless, S.C.R.A.P. Rule 217 does allow for arguing against precedent in the brief but requires specific permission from the Court to argue against precedent if oral argument is determined necessary.

sentence as a matter of mercy, to the evidence the defendant presents as mitigation. No language in the trial court's charge abated these errors.

The PCR court's ruling properly applies the law and is well supported by evidence of probative value in the record. The grant of sentencing relief, therefore, should be affirmed.

ARGUMENT

I.

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

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

The grant of sentencing relief in Mr. Evans's case is firmly grounded in the evidence in the record and in the law. Evans alleged that trial counsel provided ineffective assistance of counsel by failing to object to a sentencing charge that instructed the jury "you may recommend a sentence of life imprisonment for any reason or for no reason at all *other than*

as an act of mercy." App. 1785 (emphasis added). The same trial judge used an identical jury charge in the case of *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). This Court found the charge contradicts state law that invites and allows jurors to rely on properly admitted evidence inviting a mercy-based response, because, in contrast, it instructs jurors to discount such evidence. *See id. (*overruling in part *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000)). It informs jurors that a reasoned moral response to the evidence finding mercy as a basis for a sentence of life without parole is prohibited.

In Mr. Evans's case, trial counsel testified during postconviction proceedings that mercy was the "primary element" of the mitigation plea. App. 3270. Accordingly, counsel stated, they would have objected to any charge that operated to limit the jury from utilizing mercy as a basis for returning a verdict of life imprisonment without parole. Yet counsel did not object when the charge cited above was read to them in chambers; nor did they object when the same charge was delivered to the jury, first orally and then in writing.

Like *Rosemond*, Mr. Evans's case is one of a handful in which the trial court gave this erroneous instruction. See App. 1785; see also *Hughey, supra*; *Binney, supra.* The postconviction court, applying *Strickland v. Washington,* 466 U.S. 668 (1984), to the facts in the record, correctly found that counsel's failure to object to the charge was deficient performance: the instruction prevented the jury from using mercy as a basis from which they could individually and collectively view and evaluate the evidence and express a morally reasoned sentencing decision. In doing so, the charge violated state law and federal law. Particularly given trial counsel's overriding focus on mercy in the mitigation case, counsel had no reasonable basis for not objecting to the charge that precluded mercy. Applying *Strickland*'s prejudice prong, the PCR court also determined that but for counsel's failure to

object to the charge there was a reasonable probability that the outcome of the sentencing proceeding would have been different. For Mr. Evans, the impact of counsel's failure to object was that the jury deliberated on sentence without being able to use "mercy," the crux of the mitigation case, in making its decision.

There is probative evidence in the record to support the PCR court's finding of ineffective assistance of counsel on this issue. This Court must affirm the postconviction court's ruling. See *Kolle v. State*, 386 S.C. at 589, 690 S.E.2d at 79 (2010); *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517.

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

The ineffective assistance of counsel standard established in *Strickland v. Washington* requires a showing that an attorney's representation "fell below an objective standard of reasonableness," 466 U.S. at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. *Strickland* itself was a capital case, and over the past twenty-five plus years the Court has developed a jurisprudence focused on representation in capital sentencing trials.[7] The Supreme Court follows a number of principles in applying *Strickland*'s test for deficient performance (the first prong) and prejudice (the second prong), which this Court has followed in its capital precedents (see, e.g., *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004)).

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

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

- Counsel's performance must be assessed according to standards of performance that prevailed at the time of the trial. See *Van Hook*, 130 S.Ct. at 16-17; *Council*, 380 S.C. at 173, 670 S.E.2d at 363; see also *Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008) (citing *Strickland*, 466 U.S. at 690).[8]

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

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

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

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

Applying the United States Supreme Court's ineffective assistance of counsel jurisprudence under *Strickland,* the PCR court held that trial counsel's failure to object to the challenged instruction fell below an objective standard of reasonableness. The PCR court also held there was a reasonable probability that, but for counsel's errors, the result of the

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

proceeding would have been different. App. 4485-4493. Before turning to counsel's failure to object to the mercy instruction under *Strickland*, however, the PCR court began by addressing two prior cases in which this Court faced the very same jury instruction at issue here: *Rosemond v. Catoe* and *State v. Hughey*. Understanding what these cases did and did not hold is significant for interpreting the deficient performance and prejudice prongs in the current case.

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

The petitioner in *Rosemond* had argued that trial counsel were ineffective for failing to object to the "other than as an act of mercy" instruction because it precluded the jury from utilizing a sentencing factor authorized by State law. This Court agreed that the plain meaning of the charge told jurors that mercy was not a proper basis upon which to deliver a life sentence and thus erroneously contravened long-standing South Carolina law. Granting relief on another ground, however, this Court did not address the prejudice from the erroneous instruction. *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10.

The *Rosemond* Court also revisited its prior decision in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), which indirectly addressed the same instruction nine years prior. The question presented to the Court in *Hughey* was whether a jury charge properly informed jurors that they were required to consider non-statutory as well as statutory mitigating circumstances. The *Hughey* Court held the jury charge in its entirety was not erroneous "because it advise[d] the jurors to consider all mitigating circumstances in making their recommendation" and "instructed the jury that they could recommend life imprisonment for 'any reason or no reason at all.'" 339 S.C. at 460, 529 S.E.2d at 732. In dicta, the Court also noted the mercy instruction was unobjectionable because it was

consistent with the common law "no sympathy" rule affirmed in cases such as *State v. Singleton*, 284 S.C. 388, 326 S.E.2d 153 (1985), and *State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984): specifically, the Court found Hughey's argument—that "the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote"—to be "without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion or public opinion is not reversible error." See *id.*

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

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

undecided the issue of whether a charge that removes mercy as a sentencing consideration violates constitutional commands." App. 4478.

The relevance of this to the PCR court's evaluation of trial counsel's representation in Mr. Evans's case is two-fold. First, the PCR Court interpreted the "no mercy" instruction in *Hughey* to *preclude* mercy, just as this Court did in *Rosemond*. So *Rosemond* does not present a new interpretation of the language of the instruction itself. Second, the *Hughey* Court's statement about the mercy component of the instruction was *in tension with, but did not change,* existing law. The mercy instruction was therefore a proper and necessary ground for objection by trial counsel—particularly in a strongly aggravated penalty proceeding where counsel placed enormous weight on mercy as a basis for a life sentence.

2. The PCR Court's Determination on Deficient Performance

Turning to *Strickland*'s first prong, the PCR Order found that counsel should have known that the charge—"you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy" (App. 1785)—violated long-standing South Carolina law and the Eighth Amendment to the United States Constitution. Looking to *Rosemond*, the PCR court recognized that "the plain meaning of the words of the charge given is that mercy is precluded as a consideration for a sentence of life." App. 4481. The PCR court continued, "As the Supreme Court understood, the last clause of the instruction plainly reads as a limitation on and qualification of the previous sentence, not a reiteration." App. 4481.

The PCR court further recognized that the reason trial counsel offered for not objecting to the charge—that in their view it emphasized the jury's ability to grant a life sentence based on mercy—was not only inconsistent with *Rosemond*, but incongruous with

common sense and, significantly, with long-standing South Carolina law. This Court's precedent has long held that a capital defendant is entitled to offer evidence asking "for mercy on his behalf," *State v. Torrence*; 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); that defense counsel may properly "appeal to the jury's sense of mercy," *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993); and that counsel may address the jury and ask for mercy, see *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). Moreover, mercy is "embraced" in the statutory directive of S.C. Code Ann. § 16-3-20(C) that "the judge shall consider or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law." App. 4481. In addition, South Carolina does not require juries to weigh aggravating circumstances against mitigating circumstances: South Carolina is a non-weighing state, in which it has long been the rule that a jury may return a life sentence for any or no reason. See App. 4482. "[T]he law [of South Carolina]," the PCR court summarized, "has always been that a capital jury can consider mercy. Indeed the law used to be that one convicted of murder was sentenced to death *unless* the jury recommended mercy." App. 4482 (emphasis in original) (citing *State v. Harper*, 251 S.C. 379, 162 S.E.2d 712 (1968), and S.C. Code Ann. § 16-52).

In light of this long-standing state law, and given that *Hughey* "left undecided... whether a charge that removes mercy as a sentencing decision violates constitutional commands," reasonable counsel would not have "accept[ed] on faith that *Hughey* insulated the 'other than as an act of mercy' language from any challenge." App. 4478. Rather, reasonable counsel would have raised an objection to the erroneous and damaging instruction based on state law. For Evans's trial counsel, however, the possibility that the

instruction shut off the key avenue of reasoned moral response that their case depended on, it seems, never crossed their minds.

Further, the PCR court held that counsel should have recognized that by contradicting state law, a charge precluding a reasoned moral response based on mercy in a capital sentencing proceeding also gave rise to a federal constitutional violation under well-established Eighth Amendment precedent. The Eighth Amendment doctrine following *Lockett v. Ohio*, 438 U.S. 586 (1978), demands that "a capital sentencing jury must be able to consider *and give effect* to mitigating evidence, for it is only when a jury is provided a vehicle for expressing its reasoned moral response to such evidence that 'we can be sure the jury...has made a reliable determination that death is the appropriate sentence.'" App. 4483 (emphasis in original) (quoting *Penry v. Johnson*, 532 U.S. 782, 797 (2001)); see generally *Lockett v. Ohio*, 438 U.S. 586 (1978). Because "[t]he South Carolina legislature has decided to allow mercy as a sentencing consideration, encompassed in the language 'for any reason or no reason at all,' and the South Carolina Supreme Court has so interpreted the statute" (App. 4483), a capital jury must be able to utilize mercy as a response to the evidence under *Lockett*. "Because *Hughey* neither addressed nor ruled upon the issue of whether precluding a capital jury from considering mercy comported with *Lockett* and its progeny," the PCR court concluded that reasonable counsel would also have objected to the charge as a violation of federal law. App. 4483.

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

3. The PCR Court's Determination on Prejudice

Evaluating prejudice under *Strickland*, the PCR court first set out the *Strickland* standard for prejudice, by which it would consider whether counsel's failure to object to the "other than as an act of mercy" charge was prejudicial to Mr. Evans such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." App. 4484 (quoting *Strickland*, 466 U.S. at 694). The PCR court then noted that this Court in *Rosemond*, reversing and remanding for a new sentencing proceeding on other grounds, did not address prejudice in relation to the mercy charge. App. 4484 (citing *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10). The PCR court therefore noted that, "as a preliminary matter," it would consider whether (a) harmless error analysis such as this Court applied in *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008), or (b) *Boyde v. California*, 494 U.S. 370 (1990), are part of the *Strickland* prejudice analysis. App. 4484.

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

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

App. 4487-88.

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

The PCR court also determined that *Boyde v. California* contributed little under the circumstances because *Boyde* applies to ambiguous instructions, not clearly erroneous ones like the mercy charge. App. 4489. As *Rosemond* reiterated, there is nothing ambiguous about the instruction at issue; it is clearly wrong. App. 4489-90.

Regardless, the PCR court carefully considered the impact of the erroneous charge in the context of the jury instruction as a whole. The court found the word "mercy" was mentioned only once—that was in the erroneous charge. No other language in the overall instruction abated the error. While the trial court did instruct the jury to consider all nonstatutory or statutory mitigating circumstances, this Court's precedent holds that language that "does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." App. 4490-91 (quoting *Lowry*, 376 S.C. at 507-08, 657 S.E.2d at 764). The jury was told, orally and in writing, to follow the law as instructed by the judge, and that instruction told jurors not to utilize mercy in reaching a reasoned moral response.

App. 4492. "To find otherwise," the PCR court held, "would be to conclude that the jury not only violated its oath and ignored the judge's flawed charge on mercy, but that they were coincidentally armed with such a workable understanding of *Lockett* and its accompanying constitutional jurisprudence that they unilaterally chose to consider Evans's plea for mercy." App. 4492.

Having found that prejudice from the erroneous instruction was not offset by the jury charge as a whole, and that the aggravating factors only served to enhance the impact of the erroneous instruction, the Court held under *Strickland* that there was a reasonable probability that but for counsel's failure to object to the instruction the outcome of the sentencing trial would have been different. The violations of state and federal law wrought by the erroneous charge were highly prejudicial. App. 4492. Particularly so in Evans's case because mercy was "the crux of the mitigation case" pitted "against substantial aggravating evidence." App. 4493. Under *Strickland*, because trial counsel's failure to object to the charge precluding consideration of mercy was prejudicial, Evans was entitled to a new sentencing trial.

B. The State Offers No Legitimate Basis for Reversing the PCR Court's Grant of a New Sentencing Trial

The State challenges the PCR Order for (1) misapplying *Strickland*'s first prong on deficient performance, (2) misapplying *Strickland*'s second prong on prejudice, (3) misconstruing the federal issue involved, and, finally, (4) making an erroneous factual finding with respect to the meaning of the language of the mercy charge. None of these claims provide a basis for reversing the PCR court's grant of a new sentencing trial.

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

To establish ineffective assistance of counsel, a defendant must first demonstrate that his attorney's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Counsel's representation must meet an objective standard of reasonableness, which is measured as "reasonableness under prevailing professional norms" taking into account "counsel's perspective at the time." *Id.* at 688, 689. As set forth above, trial counsel testified during the postconviction hearing that they did not object to the "no mercy" instruction because they believed that the instruction emphasized mercy. The State now offers an additional explanation for counsel's failure to object: although trial counsel never testified that they were aware of or considered this Court's decision in *Hughey*, the State asserts that *Hughey* effected a change in law and provided a reasonable basis for counsel not objecting. Both the rationale offered by trial counsel at the PCR hearing and the rationale offered *post hoc* by the State fail to establish adequate performance under *Strickland*, as the PCR court properly recognized, for multiple reasons.

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

Contrary to the State's assertion, the fact that trial counsel or the trial court may have subjectively understood or intended the instruction differently (see State's Brief at 17, 29) is

of no matter. If the acts of all well-meaning actors were defined by good intentions—rather than by their real-world impact—then there may be no judicial errors or *Strickland* violations. As the United States Supreme Court recognized in *Harrington v. Richter*, *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." 131 S.Ct. at 790 (citing *Strickland*, 466 U.S. at 688). The only objectively reasonable interpretation of the charge given here, as this court recognized in *Rosemond*, is that it precludes mercy as a basis for a reasoned moral response to the evidence; as such, counsel's failure to object to the charge was unreasonable.

Second, counsel's failure to object to the charge was not reasonable because the charge refuted long-standing state law supporting mercy as a basis for returning a life sentence. See *State v. Torrence*; 305 S.C. at 51, 406 S.E.2d at 318; *Drayton v. Evatt*, 312 S.C. at 12, 430 S.E.2d at 522; S.C. Code Ann. § 16-3-20(C). As the PCR court recognized, *Hughey* did not effect a change in long-standing state law. Accordingly, reasonable counsel faced with the *Hughey* decision, and seeking to rely on mercy as Evans's counsel did, would have objected to the charge as an infringement of long-standing South Carolina precedent supporting mercy as a basis for a reasoned moral response to sentencing evidence. Likewise, after *Hughey*, a judge giving the charge would have reasonably believed that in doing so he or she was eliminating juror consideration of mercy. This Court's decision in *Rosemond* is a resounding example in fact of just such recognition of error.

The third reason counsel's failure to object to the charge was unreasonable is that the charge, by removing from the jury a basis for a life sentence authorized by the state legislature, also violated the Eighth Amendment to the United States Constitution, which demands that jurors not be precluded from considering and giving effect to mitigation. See

App. 4482-83 (PCR Order, citing *Lockett v. Ohio*). The State's argument throughout simply overlooks or ignores a significant part of the federal *Lockett* doctrine. According to the State, as long as jurors are instructed to consider all the evidence that is sufficient. The State asserts: "Nothing in the charge precluded the jury from consideration of this evidence. Thus, the charge, as a whole did not interfere with either the constitutional right to present mitigation evidence, or consideration of the evidence presented..." State's Brief at 37. But this fails to address half of what United States Supreme Court precedent deems crucial under the Eighth Amendment: jurors must not only (i) consider but also (ii) *give effect* to mitigation. The State emphasizes the first of these mandates, but entirely ignores the second.

The State misleadingly asserts, "the State's jurisprudence does not show a pristine historical consistency for allowance of the complete disregard of the evidence in favor of an act of mercy." State's Brief at 25. Of course South Carolina has never allowed "complete disregard" of the evidence. But South Carolina has *always* held that mercy is legitimate—and that a life sentence may be given for any reason or no reason at all—when that decision is a reasoned moral judgment and not one incited by prejudice, passion and sympathy. This is as true of cases before *Furman v. Georgia*, 408 U.S. 238 (1972), as it is of cases since. And in a state that upholds mercy as a relevant basis for a life sentence such as South Carolina, "giving effect" under the federal *Lockett* doctrine means being able to reach a reasoned moral response that mercy calls for a life sentence based on the evidence presented. The language of *Hughey* created a disconnect with well-established state law that implicated the United States Constitution. Reasonable capital counsel would have recognized this.

It should be emphasized that the State erroneously conflates two legally distinct concepts: sympathy and mercy. Throughout its brief, the State mistakenly regards mercy as "unfettered emotion" and identifies mercy and sympathy as identical species. See, e.g., State's Brief at 27. The two are different, however, and the legal distinction is quite important. Under South Carolina law, mercy is a reasoned moral response to the evidence presented in a capital sentencing proceeding that is authorized by state law. See *State v. Dickerson*, 396 S.C. 101, 716 S.E.2d 895 (2011) (distinguishing mercy, a proper aspect of capital jurors' reasoned moral response to the evidence, from an "unguided emotional response" such as that based, for example, on execution impact testimony). Sympathy, by contrast, is an unauthorized, emotional sentencing response that is not tethered to the evidence but rather motivated by whim, passion, or prejudice. See *Singleton*, *supra*; *Chaffee*, *supra*; see generally *Saffle v. Parks*, 494 U.S. 484 (1990); *California v. Brown*, 479 U.S. 538 (1987). The State conflates these two distinct concepts, and this error skews its assessment of deficient performance and prejudice.

For the reasons found by the PCR court and discussed above, under *Strickland* trial counsel had no reasonable basis for not challenging the instruction. The PCR court's finding of deficient performance is solidly grounded in the record, in the law of South Carolina, and in the federal constitution.

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

To show prejudice under *Strickland*, a party must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 446 U.S. at 694; *see Wiggins*, 539 U.S. at 534. A "reasonable probability" is one

"sufficient to undermine confidence in the outcome." *Id.* at 694. In assessing *Strickland*'s second prong, the prejudice arising from all of defense counsel's errors is considered cumulatively in light of the totality of the evidence. *Id.* at 695.

The State argues "the PCR judge erred in finding per se error in the jury instruction regarding mercy, thereby avoiding a proper *Strickland v. Washington* prejudice analysis." State's Brief at 27. In addition, the State argues that the erroneous charge made little difference in Mr. Evans's case because, in the context of the instruction as a whole, any prejudice arising from it was cured. See State's Brief at 31. Accordingly, the State posits, there is no reasonable probability that counsel's error was prejudicial under *Strickland.*

The first assertion follows a skewed reading of the PCR court's opinion, and the second assertion is refuted by the PCR court's analysis. The PCR court's assessment of prejudice under *Strickland* was thorough. First, the court considered the impact of the erroneous charge in the context of the entire jury instruction and found that the remainder of the court's directions to the jury did not cure the error. In doing so, the court noted that *Boyde v. California* offered little assistance in assessing prejudice because *Boyde* concerns ambiguous charges, not clearly erroneous charges. In any event, *Boyde* was easily met here because nothing in the jury charge cured the mistaken instruction: under *Boyde* and under *Lowry*, inconsistent instructions don't cure erroneous ones.

Second, the PCR court also considered the impact of the "other than as an act of mercy" charge in the context of the evidence before the jury and the totality of the circumstances under *Strickland*, and found a reasonable likelihood that but for counsel's failure to object to the charge there is a reasonable probability that the outcome would have been different. In doing so, the PCR court found that *Lowry*'s harmless error analysis did

not apply and, alternatively, the error was not harmless. One reason for this, the court noted, was that the prejudice of the erroneous instruction affected the jury's ability to consider and give effect to the mitigating evidence.[9] Another reason was that telling jurors they cannot apply mercy as a basis for a life sentence, as a reasoned moral response to properly admitted evidence, is an error that only gains in importance as the aggravating evidence grows stronger. Here, the aggravating evidence was substantial: two homicides accompanied by a finding of four aggravating factors for one victim and three aggravating factors for the other. In these circumstances, rather than offset the impact of counsel's failure to object, the weight of aggravating evidence only made the impact of counsel's failure worse. Under these circumstances, the PCR court concluded that the charge precluding mercy created a "structural error." But none of these findings dispensed with the *Strickland* evaluation; rather, they were integral to it.[10]

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

---

[9] The State's Brief asserts, "there was no specific plea for mercy in the penalty phase, though friends and family did testify as to Evan's good qualities and their emotional bond to him." "Nothing in the charge," the State continues, "precluded the jury from consideration of this evidence." State's Brief at 36-37. Again, the State overlooks this Court's finding in *Rosemond* that the challenged instruction does preclude consideration of evidence, and also overlooks the fact that the charge precludes jurors from making a reasoned moral determination that mercy supports a life sentence based on the evidence. The evidence here included the testimony of Evans's sister and Evans's father. But as a matter of state law, even if no plea from witnesses for mercy is given, the jury can return a life sentence as an act of mercy.

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

whole, or to assess the prejudice arising from counsel's failure to object to the charge in the context of the totality of the aggravating and mitigating evidence and circumstances at trial. As such, the State's narrative that "the PCR judge's errors may all be tracked to an erroneous belief that relief was *mandated* by...*Rosemond*" (State's Brief at 14 (emphasis added); see *id.* at 27) is fictitious. The PCR court knew well that *Rosemond* did not address prejudice. Further, the court did not presume that *Rosemond* mandated reversal, and that is precisely why the court requested specific briefing by the parties on the *Strickland* prejudice issue and emphasized the pivotal role of mercy *in this case*. See App. 4484, 4488-89, 4490-92, 4493.

Finally, it bears noting that the PCR court reached a determination on prejudice that differs from the State's in large part because the PCR court followed this Court's interpretation of the mercy instruction in *Rosemond*; whereas the State remains attached to a conflicting interpretation of the charge. If the charge's plain meaning holds, as this Court read that plain meaning in *Rosemond*, the adverse impact of the charge on the jury is much greater than if one adopts the State's alternative reading.

The PCR court's *Strickland* prejudice determination was firmly grounded in the record. Here, a keystone of South Carolina law was taken from a defendant in a case where the defendant and his counsel relied heavily upon it.

3. The third and fourth issues presented by the State offer no legitimate basis for reversing the PCR court's grant of a new sentencing trial.

For the reasons discussed in the previous sections, neither the State's challenge to the PCR court's ruling on deficient performance nor the State's challenge to the PCR court's ruling on *Strickland* prejudice is availing. The latter two issues presented by the State fare no better.

The third issue presented in the State's Brief is rooted entirely in two misunderstandings of federal law, both of which have been discussed above to the extent that they skew the State's argument with respect to deficient performance and prejudice. First, there is a distinction between (i) a morally reasoned mercy response, which South Carolina demands a jury be able to do, and which the federal Constitution sanctions and supports via the Eighth and Fourteenth Amendments, and (ii) a response based on emotional whim and sympathy, which the precedent of this Court and of the United States Supreme Court, interpreting the federal Constitution, prohibit. Second, there is a distinction between (i) considering mitigation evidence and (ii) giving effect to mitigation evidence under Eighth Amendment jurisprudence. The PCR court was straightforwardly applying capital case precedent that demands that jurors be able to provide a reasoned moral response to the evidence by means of mercy, not making up a "federal constitutional right to a mercy charge" as the State suggests. With these misunderstandings clarified, the third issue presented has no basis in law.

The fourth issue presented in the State's Brief, to the extent it raises an issue not addressed in the other three questions, distills to an objection by the State to this Court's decision in *Rosemond* with respect to the plain meaning of the mercy instruction. In finding that, as a matter of fact, the "other than as an act of mercy" phrase precluded the jury from utilizing mercy as a reasoned moral response, the PCR court in Mr. Evans's case did no more than apply this Court's precedent in *Rosemond*. If the PCR court's interpretation of the charge "wholly lacks support" (State's Brief at 17), then the State has 'wholly' rejected this Court's statements in *Rosemond*. Relying on *Rosemond*, the PCR court had a firm basis for finding that the instruction precluded mercy. The State's fourth issue has no merit.

CONCLUSION

The PCR court's decision to grant a new sentencing trial on the basis of counsel's failure to object to the charge precluding mercy involves a straightforward application of *Strickland v. Washington.* The State asserts no more than what it erroneously deems to be misapplication of a properly stated rule of law and its objection to a finding of fact that faithfully tracked this Court's finding in *Rosemond v. Catoe.* For these reasons, and those set forth above, this Court must affirm the well-reasoned decision of the Circuit Judge granting Mr. Evans a new sentencing hearing.

July 16, 2014

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

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable D. Garrison Hill
Circuit Court Judge
C. A. No. 06-CP-23-7719
App C.A. No. 2011-188687

Kamell Evans — Respondent/Petitioners,

-vs-

State of South Carolina

Respondents/Respondent.

PROOF OF SERVICE

I, William H. Ehlies, hereby certify that I served the Return of the Respondent/Petitioner upon counsel by mailing it USPS First Class mail to the following:

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

On the 16th day of July, 2014

WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
1-864-232-3503
1-864-232-4854(f)
hank@ehlieslaw.com

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable D. Garrison Hill
Circuit Court Judge
C. A. No. 06-CP-23-7719
App C.A. No. 2011-188687

Kamell Evans Respondent/Petitioners,

-vs-

State of South Carolina

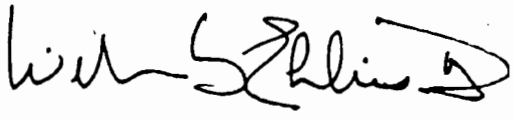
Respondents/Respondent.

PROOF OF SERVICE

I, William H. Ehlies, hereby certify that I served the Cover Page with Corrected Caption of the Respondent's Brief on Behalf of Respondent/Petittioner upon counsel by mailing it USPS First Class mail to the following:

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

On the 22nd day of July, 2014



WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
1-864-232-3503
1-864-232-4854(f)
hank@ehlieslaw.com