

No. _____

In the Supreme Court of the United States

•

STATE OF SOUTH CAROLINA,

Petitioner,

vs.

JONATHAN KYLE BINNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
CHEROKEE COUNTY COURT OF COMMON PLEAS
AFTER DISMISSAL OF CERTIORARI AS
IMPROVIDENTLY GRANTED BY THE SUPREME
COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

•

ALAN WILSON
South Carolina Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

*DONALD J. ZELENKA
Sr. Asst. Deputy Attorney General
dzelenka@scag.gov

WILLIAM EDGAR SALTER, III
Sr. Asst. Attorney General
agesalter@scag.gov
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

**Counsel of Record*

* CAPITAL CASE *

QUESTIONS PRESENTED

I.

Whether the Post-Conviction Relief judge erroneously found deficient performance under *Strickland v. Washington* based on trial counsel's failure to object to the phrasing of one jury instruction in the penalty phase regarding mercy when state law did not disapprove of the phrasing until an observation in *obiter dictum* in an opinion issued over six years after Respondent Binney's trial and two years after the PCR hearing?

II.

Whether the post-conviction relief judge erred in finding *per se* prejudicial error in the jury instruction regarding mercy thereby avoiding a proper *Strickland v. Washington* prejudice analysis?

III.

Whether the Post-Conviction Relief judge erroneously found a federal constitutional right to a mercy charge because federal precedent, without exception, does not support the existence of such a federal constitutional right?

IV.

Whether the Post-Conviction Relief judge's factual finding that the charge regarding mercy prevented jurors from exercising mercy is wholly without factual support in the record where no person ever testified that the charge was intended or heard to limit jurors' exercise of mercy, and trial counsel were focused on the exercise of mercy in their penalty phase presentation and closing?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	vi
PETITION FOR WRIT OF CERTIORARI	1
CITATION TO OPINIONS BELOW	2
JURISDICTIONAL STATEMENT.....	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	4
STATEMENT OF THE CASE	4
A. Facts of the Crime	4
B. The Trial and Appeal.....	6
C. The PCR Proceedings	6
D. The PCR Appeal	7
REASONS CERTIORARI SHOULD BE GRANTED	18
I. The PCR Judge Erroneously Found Deficient Performance Under <i>Strickland v. Washington</i> Based Upon <i>Rosemond v. Catoe</i> Which Was Decided Over Six	

Years After Trial And Two Years After The PCR Hearing	19
II. The PCR Judge Erred In Finding <i>Per Se</i> Error Thereby Avoiding a Proper <i>Strickland</i> Prejudice Analysis	24
III. The PCR Judge Erroneously Found A Federal Constitutional Right To a Mercy Charge Because Federal Precedent, Without Exception, Does Not Support The Existence Of Such A Federal Constitutional Right?.....	30
IV. The PCR Judge's Factual Finding That The Charge Regarding Mercy Prevented The Exercise of Mercy Is Wholly Without Factual Support in The Record Where No Person Ever Testified That The Charge Was Intended Or Heard To Limit Jurors' Exercise Of Mercy, And Trial Counsel Was Focused On The Exercise Of Mercy In Their Penalty Phase Presentation and Closing	32
CONCLUSION	38
APPENDIX	App. 1

- A. Letter from the Honorable J. Michael
Baxley dated July 6, 2010 App 2
- B. Order Denying Relief, PCR action ... App. 8
- C. Order Granting Applicant's Motion
To Reconsider the Denial of Post-
Conviction Relief and Granting Post-
Conviction Relief as to
Sentencing..... App. 137
- D. Order, Supreme Court of South
Carolina Granting Certiorari..... App. 147
- E. Order, Supreme Court of South
Carolina Dismissing as
Improvidently Granted..... App. 149
- F. Order, Supreme Court of South
Carolina Denying Petition\
for Rehearing App. 160

TABLE OF AUTHORITIES

Cases

<i>Boyde v. California</i> , 494 U.S. 370 (1990).....	28, 34
<i>Burger v. Kemp</i> , 483 U.S. 776 (1987).....	18
<i>California v. Brown</i> , 479 U.S. 538 (1987).....	31
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637 (1974).....	9
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....	31
<i>Ellison v. State</i> , 382 S.C. 189, 676 S.E.2d (2009)	3
<i>Enmund v. Florida</i> , 458 U.S. 782, 102 S.Ct. 3368 (1982).....	37
<i>Estelle v. McGuire</i> , 502 U.S. 62 (1991).....	26, 28
<i>Evans v. State</i> , 2015 WL 2230263 (S.C. S.Ct., May 13, 2015)	9, 18
<i>Gilmore v. State</i> , 314 S.C. 453, 445 S.E.2d 454 (1994)	19
<i>Haggins v. State</i> , 377 S.C. 135, 659 S.E.2d 170 (2008)	3
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	22, 25
<i>Johnson v. Texas</i> , 509 U.S. 350 (1993).....	32
<i>Kansas v. Marsh</i> , 548 U.S. 163 (2006).....	32, 37

<i>Kimmelman v. Morrison</i> ,	
477 U.S. 365 (1986).....	18
<i>Knowles v. Mirzayance</i> ,	
556 U.S. 111 (2009).....	25
<i>Lockett v. Ohio</i> ,	
438 U.S. 586 (1978).....	31, 32
<i>Lockhart v. Fretwell</i> ,	
506 U.S. 364 (1993).....	18, 23, 24
<i>Lusk v. Singletary</i> ,	
976 F.2d 631 (11th Cir. 1992).....	30
<i>Maryland v. Kulbicki</i> , ___ U.S. ___, ___	
136 S.Ct. 2 (2015).....	18, 22, 23, 38
<i>Patterson v. State</i> ,	
359 S.C. 115, 597 S.E.2d 150 (2004)	19
<i>People v. Ochoa</i> ,	
966 P.2d 442 (Cal. 1998).....	34
<i>Plath v. South Carolina</i> ,	
484 U.S. 1022 (1988).....	4
<i>R.J. Reynolds Tobacco Co. v. Durham Cty., N.C.</i> ,	
479 U.S. 130, 107 S.Ct. 499, 93 L. Ed. 2d 449	
(U.S. 1986).....	3, 4
<i>Robinson v. State</i> ,	
308 S.C. 74, 417 S.E.2d 88 (1992)	19
<i>Rompilla v. Beard</i> ,	
545 U.S. 374 (2005).....	18
<i>Rosemond v. Catoe</i> ,	
383 S.C. 320, 680 S.E.2d 5 (2009)	passim
<i>Saffle v. Parks</i> ,	
494 U.S. 484 (1990).....	31, 32
<i>Sears v. Upton</i> ,	
561 U.S. 945 (2010).....	24, 25
<i>State v. Atkins</i> ,	
303 S.C. 214, 399 S.E.2d 760 (1990)	20

<i>State v. Bell</i> ,	
305 S.C. 11, 406 S.E.2d 165 (1991)	16
<i>State v. Binney</i> ,	
362 S.C. 353, 608 S.E.2d 418 (2005)	6
<i>State v. Dickerson</i> ,	
395 S.C. 101, 716 S.E.2d 895 (2012)	33
<i>State v. Hicks</i> ,	
330 S.C. 207, 499 S.E.2d 209 (1998)	16, 27
<i>State v. Hughey</i> ,	
339 S.C. 439, 529 S.E.2d 721 (2000)	passim
<i>State v. Johnson</i> ,	
338 S.C. 114, 525 S.E.2d 519 (2000)	33
<i>State v. Torrence</i> ,	
305 S.C. 45, 406 S.E.2d 315 (1991)	33
<i>State v. Wise</i> ,	
359 S.C. 14, 596 S.E.2d 475 (2004) ...	32, 33, 34
<i>Stein v. New York</i> ,	
346 U.S. 156 (1953)	18
<i>Strickland v. Washington</i> ,	
466 U.S. 668 (1984)	passim
<i>Stromberg v. California</i> ,	
283 U.S. 359 (1931)	28
<i>Thornes v. State</i> ,	
310 S.C. 306, 426 S.E.2d 764 (1993)	19
<i>Walton v. Arizona</i> ,	
497 U.S. 639, 110 S.Ct. 3047 (1990)	37
<i>Weeks v. Angelone</i> ,	
528 U.S. 225 (2000)	26
<i>Wiggins v. Smith</i> ,	
539 U.S. 510 (2003)	18
<i>Wong v. Belmontes</i> ,	
558 U.S. 15 (2009)	25

Rules

Rule 203 (d)(A)(i), South Carolina Appellate
Court Rules 8

Rule 220, South Carolina Appellate Court
Rules.....9

Rule 243 (j), *South Carolina Appellate Court*
Rules.....3, 8

Rule 243(a), *South Carolina Appellate Court*
Rules.....3, 8

PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of South Carolina respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Cherokee County post-conviction relief ("PCR") judge. The grant of relief in this case – and two (2) other capital cases which are simultaneously presented with this petition – constitutes an unprecedented and erroneously granted windfall to three (3) capital defendants. The legal error at issue is plain. Each case reflects the *Strickland v. Washington* error found was based upon *obiter dictum* in an opinion issued years after each of the trials in question that questioned the clarity of one sentence in a penalty phase instruction. This unquestionably violates the contemporaneous evaluation this Court established in 1984 in *Strickland*. Further, the state circuit courts simply presumed prejudice for reversal. This again is unquestionably error under *Strickland*. Yet, the majority of the Supreme Court of South Carolina, in contravention of the court's own rules, refused to issue opinions correcting this error in these three cases after granting certiorari review. In short, the State of South Carolina, having properly sought review on a procedurally sufficient issue was inexplicably denied review. The State now must seek review from this Court to avoid the windfall sanctioned by the Supreme Court of South Carolina's intentional inaction in these three (3) capital cases: *State of South Carolina v. Jonathan Binney*; *State of South Carolina v.*

Kamell Evans; State of South Carolina v. John Kennedy Hughey.

CITATION TO OPINIONS BELOW

On September 8, 2011, the PCR judge entered an Order Denying Post Conviction Relief. That decision is unreported but is reproduced in the Appendix at App. pp. 8-136. The PCR judge's May 11, 2012 "Order Granting Applicant's Motion To Reconsider The Denial Of Post Conviction Relief And Granting Post Conviction Relief As To Sentencing" is unreported but is reproduced in the Appendix at App. pp. 1376-146. The Order of the Supreme Court of South Carolina that granted certiorari review is unpublished, as is the May 13, 2015 opinion dismissing certiorari as improvidently granted. The Order and Opinion are reproduced in the Appendix at App. pp. 147-148 and pp. 149-159, respectively. Finally, the August 6, 2015 Order denying the timely petition for rehearing is unpublished and also reproduced in the Appendix at App. pp. 160-161.

JURISDICTIONAL STATEMENT

The Supreme Court of South Carolina, over vigorous dissent by two Justices, dismissed certiorari as improvidently granted on May 13, 2015 and denied rehearing on August 6, 2015. The Attorney General of the State of South Carolina sought and received one extension from the Chief Justice allowing this petition to be filed on or before January 3, 2016. The action is timely

filed, and this Court has jurisdiction under 28 U.S.C. § 1257(a).

Certiorari is properly directed to the Cherokee County Court of Common Pleas as the majority opinion from the Supreme Court of South Carolina provides “positive assurance” that the dismissal was not a ruling on the merits but a refusal to accept the matter for decision.¹ See *R.J. Reynolds Tobacco Co. v. Durham Cty., N.C.*, 479 U.S. 130, 138, 107 S.Ct. 499, 506, 93 L. Ed. 2d 449 (U.S. 1986) (“In the absence of positive assurance

¹ In South Carolina, state court rules provide that orders from PCR cases “shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari, according to the procedure set forth in this Rule.” Rule 243(a), *South Carolina Appellate Court Rules*. Only if two or more justices of the five member court agree to hear the matter will full briefing be initiated. Rule 243 (j), *South Carolina Appellate Court Rules*. The Supreme Court of South Carolina considers this initial question of whether to grant certiorari review in PCR appeals a matter of discretion and not a ruling on the merits. See generally *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170 (2008) (in non-capital review by court of appeals: “A decision by the Court of Appeals to grant or deny a writ of PCR certiorari is a matter committed to that court’s discretion”); *Ellison v. State*, 382 S.C. 189, 676 S.E.2d 71 (2009) (*Haggins* logic applies to cases where certiorari review is granted then later dismissed as improvidently granted). Cf. *State v. Rucker*, 321 S.C. 552, 553, 471 S.E.2d 145, 145 (1996) (“The denial of a petition for a writ of certiorari to the Court of Appeals does not dismiss or decide the underlying appeal; it simply determines that, as a matter of discretion, this Court does not desire to review the decision of the Court of Appeals.”).

to the contrary from the North Carolina Supreme Court, we consider that court's dismissal of Reynolds' appeal to be a decision on the merits....").²

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to counsel as secured by the Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence." U.S. Const. amend VI.

STATEMENT OF THE CASE

A. Facts of the Crime.

The PCR judge's Order sets forth a detailed statement of the facts presented by the State at Binney's trial. App. pp. 18-127. Succinctly, Binney was out on bond for sexually assaulting his three month old daughter in early June of 2000, and faced a possible sentence of thirty years imprisonment if convicted of that offense. On June 6, he purchased a pistol from a friend. Thereafter, he "hid his moped in a wooded area approximately one-quarter mile from the

² This is consistent with a prior South Carolina capital case requesting certiorari to the circuit court after denial of a petition for writ of certiorari from the Supreme Court of South Carolina in the PCR appeal. See *Plath v. South Carolina*, 484 U.S. 1022 (1988).

rural Cherokee County residence of Judy Southern, his victim. Mrs. Southern lived at this residence with her husband, Allen, and her young son." App. pp. 18-20.

After conducting surveillance on the residence on the 6th and the morning of June 7th, he broke into the Southern's residence after the victim and her husband had left. "After entering the residence, he cut all the phone lines in the house and hid kitchen knives and other possible weapons so that they would be out of reach. He remained in the house all day." When the victim came home that afternoon, and found him in the bathroom. "When he saw Mrs. Southern in the bathroom doorway, he shot her. He then chased her through the residence and outside the home, firing more shots at her as she fled the home and ran into a nearby field." App. pp. 20-21.

"Mrs. Southern called Roy Chapman, an employee of her husband's bowling alley, on her cell phone and reported the attack. She told [Chapman] that the man who attacked her had been waiting on her inside the bathroom of the house. [Chapman] called Allen Southern, who was on the way home at the time, and reported the attack. Mr. Southern arrived home, searched for his wife, and eventually found her several hundred yards from the home in a pasture. He carried his wife back to his vehicle and ultimately transported her to the closest hospital but she died from her wound. App. pp. 21-22.

B. The trial and appeal.

Respondent, Jonathan Kyle Binney, is presently confined in the South Carolina Department of Corrections, as the result of his Cherokee County murder and first degree burglary convictions. Binney received a bifurcated jury trial on November 4-14, 2003. Trent N. Pruett and Samuel "Mitch" Slade, Jr., Esquires, represented him. The jury convicted him of both crimes. The sentencing phase jury found the statutory aggravating circumstance that the murder was committed while in commission of burglary in any degree, S.C. Code Ann. §16-3-20(C)(a)(1)(c) (2003), and recommended a death sentence, which the trial judge imposed. Binney received life without parole for burglary.

The Supreme Court of South Carolina affirmed Binney's conviction and death sentence on direct appeal and this Court denied certiorari. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005), 546 U.S. 852 (2005).

C. The PCR proceedings.

Through counsel, Binney filed a PCR Application on March 1, 2006, which he amended on May 1, 2007 and on May 21, 2007. The PCR judge held an evidentiary hearing on May 29-June 1, 2007, at the Cherokee County Courthouse. Binney was present at the trial, and represented by three attorneys.

On September 8, 2011, the PCR judge entered an Order denying relief: App. pp. 8-136. Binney moved the court to alter or amend the judgment on September 16, 2011. On May 21, 2012, the PCR judge filed an "Order Granting Applicant's Motion to Reconsider The Denial Of Post Conviction Relief And Granting Post Conviction Relief As To Sentencing," in which he found that trial counsel was ineffective in failing to object to the trial judge's sentencing phase instruction that the jury could recommend life "for any reason or for no reason at all other than as an act of mercy." App. pp. 137-146.

Specifically, the PCR judge found trial counsel ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for not objecting to the instruction even though it accurately stated state law at the time and no basis to challenge it existed until over six years after Binney's trial and over two years after the PCR hearing. App. pp. 140-146.

D. The PCR appeal.

On April 16, 2014, the Supreme Court of South Carolina granted certiorari to review the PCR judge's decision granting relief and for the issues of the cross-petition. App. pp. 147-148. On January 13, 2015, the Court heard oral

argument.³ No issue was raised or found as to procedural deficiency for the State's issue: "Whether the PCR judge's finding that trial counsel were ineffective in failing to object to the sentencing phase instruction was controlled by errors of law and lacks support in the record, where (1) the jury instruction accurately stated South Carolina law when given, (2) counsel was not required to anticipate a change in the law that did not occur until more than five years and eight months after Binney's November 2003 trial, and (3) there was no basis for trial counsel to object on the ground that the instruction violated the United States Constitution?" However, contrary to the court's own rules, a majority of the Supreme Court of South Carolina refused to issue an opinion. App. pp. 149-150.⁴

³ Oral arguments in the Supreme Court of South Carolina are recorded. The *Binney* argument is archived and is available for review on the South Carolina Judicial website, listed in the Supreme Court Video Portal section. <http://www.judicial.state.sc.us/SCvideo/termSearchVideo.cfm>.

⁴ In South Carolina, appeals from capital case proceedings are restricted to the Supreme Court of South Carolina. Rule 203 (d)(A)(i), South Carolina Appellate Court Rules. The Supreme Court of South Carolina will review PCR decisions through a certiorari process. Rule 243 (a), South Carolina Appellate Court Rules. "Upon the concurrence of any two justices, the petition will be granted on any question presented." Rule 243(j), South Carolina Appellate Court Rules. The "Rule of Two" for certiorari directly conflicts with the three justice opinion dismissing as improvidently granted. Two justices remain in dissent, which should require an opinion, for or against either party.

The dissent, written by Justice Kittredge (the author of the *dictum* at issue in *Rosemond*)⁵ and joined by the Chief Justice, found relief was not warranted. Justice Kittredge incorporated the dissent in *Evans* and added that:

I add the following comments.
In 2009, I authored this Court's

Cf. Donnelly v. DeChristoforo, 416 U.S. 637, 648 (1974) (J. Stewart concurring) (this Court's similar "Rule of Four" dictates since "the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court."). Further, Rule 220, South Carolina Appellate Court Rules, provides that reasons for the opinion must be set out. There is no provision in that rule to announce retreat to a discretionary decision where certiorari has already been granted by the appropriate number of justices.

Despite these clear rules, the Supreme Court of South Carolina failed to issue an opinion, and failed to give fair review to the people of South Carolina and the victims in these cases.

⁵ Justice Kittredge authored the dissent in *Hughey*, while Chief Justice Toal wrote the dissent in *Evans*. The Chief Justice in *Evans* noted that counsel did not have the benefit of *Rosemond*, but resolved that, the question of deficient performance aside, there was no *Strickland* prejudice. *Evans v. State*, 2015 WL 2230263, *4-5 (S.C. S.Ct., May 13, 2015) (Toal, C.J., dissenting).

unanimous opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). Rosemond was granted a new sentencing hearing based on trial counsel's failure to present any mental health mitigation evidence. *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10. Rosemond also asserted the mercy 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"—as a basis for post-conviction relief. *Id.* We did not grant relief based on the mercy charge, but clarified in dictum that the "other than as an act of mercy" language not be charged on resentencing. *Id.* at 330, 680 S.E.2d at 10–11. This court never addressed the challenged mercy instruction in *Rosemond* in the context of the *Strickland v. Washington* test. *Id.* at 329–30, 680 S.E.2d at 10–11. I view the challenged instruction, in isolation, as confusing, for it is susceptible to more than one interpretation. Yet, we have never sanctioned an analytical framework that focuses narrowly on disputed language in a jury charge to the exclusion of the charge as a whole.

I would not find deficient representation in failing to object to this charge. In any event, assuming deficient representation, Binney cannot satisfy the prejudice prong of *Strickland*. The trial court's instruction in Binney was as follows:

Now, in arriving at your decision as to what the appropriate sentence shall be in this case, you are instructed that you must also consider any statutory mitigating circumstances.

And as I have indicated to you, Mr. Foreman, those statutory mitigating circumstances that you may—that you and your fellow jurors my [sic] consider are also set forth on the statutory instructions form.

Now, a statutory mitigating circumstance is a fact, an incident, a detail, or an occurrence which the State legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder. It is a circumstance which may be considered as mitigating or extenuating the degree of moral

culpability of the defendant for the commission of the crime of murder.

Mitigating circumstance is neither a justification nor an excuse for the crime of murder. It is simply a fact or a circumstance which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable.

Now, as is reflected in the statutory instructions form, in making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you shall consider the following statutory mitigating circumstances:

One is the murder was committed while the defendant was under the influence of mental or emotional disturbance.

Two is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

And, three, the age or mentality of the defendant at the

time of the commission of the crime of murder.

Now, you shall consider any nonstatutory mitigating circumstances which have been shown to exist by the evidence in the case.

Now, a nonstatutory mitigating circumstance is one which may serve the same purpose as a statutory mitigating circumstance; that is, to lessen or to reduce the degree of the defendant's guilt in the commission of the crime of murder.

Now, while there must be some evidence which supports a finding by you of the existence of any mitigating circumstance, it is not necessary that you find the existence of such circumstance or circumstances beyond a reasonable doubt. You must simply find that in your view such is supported by the evidence in the case.

You are not, however, at any time asked to indicate any mitigating circumstances that you might find exist in the evidence on

any form that you will have in the jury room.

I do emphasize to you, however, that you are permitted under the law to impose a sentence of life imprisonment, whether or not you find the existence of any statutory or nonstatutory mitigating circumstance.

In making your determination as to which sentence to recommend in this case, you shall consider the statutory aggravating circumstance, as well as the statutory and nonstatutory mitigating circumstances in arriving at your decision.

Now, as I have previously stated, while you must find the existence of the statutory aggravating circumstance beyond a reasonable doubt before you are permitted to make any recommendation as to sentence, once such a finding is made, you are permitted to recommend a sentence of death, even though you may also find the existence of one, or more, of the mitigating circumstances.

The existence of any statutory and/or nonstatutory mitigating circumstances is not a bar to the recommendation of a death sentence, so long as you have found the existence of the statutory aggravating circumstance beyond a reasonable doubt and your decision to impose the death sentence is a unanimous decision of the jury.

Conversely, you may also recommend a sentence of life imprisonment, even though you did find the existence of the statutory aggravating circumstance beyond a reasonable doubt and you find no mitigating circumstances to be supported by the evidence in the case.

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.FN2

FN2/ The transcript includes a comma between the word "all" and the word "other." The insertion of the comma reflects a pause as the sentence is read to the jury. I would find that the use of the comma, and hence the pause in the sentence,

supports the construction of the sentence advanced by the State—that is, the jury was told it may recommend a life sentence merely as an act of mercy. This is entirely consistent with the balance of the charge, which made it unmistakably clear that there was no limitation on the jury's ability to recommend a life sentence.

In my judgment, the analysis here is no different than Chief Justice Toal articulated in *Evans*:

[T]he ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the entire jury instruction. *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991); see also, e.g., *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction must be viewed in the context of the overall charge.").

Here, *Evans* contests one sentence of a lengthy charge that instructed the jury to consider all statutory and non-statutory mitigating factors in arriving at their verdict. In my opinion, the rest

of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective instruction; consequently, his *Strickland* argument must fail.

Evans v. State, Supra. (Toal, C.J., dissenting).

I agree with Chief Justice Toal's dissenting opinion in *Evans*, and I would reverse the grant of post-conviction relief to Binney.

App. pp. 150-59 (footnote omitted).⁶

⁶ Justice Kittredge also wrote in *Hughey* of a uniquely troubling aspect of the strained construction argument at issue. *Hughey v. State*, 2015 WL 2231252, at * n. 2 (Kittredge, J., dissenting).

REASONS CERTIORARI SHOULD BE GRANTED

“The people of the State are also entitled to due process of law.” *Stein v. New York*, 346 U.S. 156, 197 (1953). As firmly pointed out in the dissenting opinion in this case and the companion dissenting opinions in *Hughey v. State*, 2015 WL 2231252 (S.C. S.Ct., May 13, 2015) and *Evans v. State*, 2015 WL 2230263 (S.C. S.Ct., May 13, 2015), the circuit courts in South Carolina have ordered unnecessary and costly re-sentencing proceedings in these three capital cases where there is no error to correct. Simply, new sentencing proceedings are not warranted by any fair reading of state or federal law.

The error of law shared in these cases presents a compelling reason for a grant of certiorari as the decisions are in clear and direct conflict with the *Strickland v. Washington*, 466 U.S. 668 (1984) mandates (1) that a court view counsel’s conduct in context of the time the case was tried, *id.* at 690-91, and (2) that prejudice be assessed on the trial record. *Id.* at 693-95. The *Strickland* error found by the state lower courts is not only legally incorrect,⁷ but also extremely

⁷ Since its 1984 decision in *Strickland*, this Court has consistently applied the rule of contemporary assessment of counsel’s conduct. E.g., *Maryland v. Kulbicki*, ___ U.S. ___, ___ 136 S.Ct. 2, 3 (2015); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *Burger v. Kemp*, 483 U.S. 776, 789 (1987); *Kimmelman v. Morrison*,

costly – costly in judicial resources; costly in excessive time for resolution; and, most importantly, costly to the integrity of the judicial system and resolution on behalf of the victims. There is no basis for re-sentencing relief for these three unrelated capital defendants. The unexplained avoidance of the necessary error correction of the undisputed misapplication of this Court's decision in *Strickland* is shocking and an affront to the public sense of justice and the victims in these cases. Further, such avoidance by a three member majority of the Supreme Court of South Carolina is particularly disturbing in these difficult and compelling capital cases.

I. The PCR Judge Erroneously Found
Deficient Performance Under

477 U.S. 365, 384 (1986). Except for the three capital cases at issue, South Carolina courts have also consistently applied this standard. *E.g.*, *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004) (“An attorney is not required to anticipate potential changes in the law, which are not in existence at the time of the conviction”); *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grds.*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993) (counsel not ineffective for encouraging defendant to plead guilty although counsel never interviewed the victim (because he had her written statement against defendant), *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial).

Strickland v. Washington Based Upon *Rosemond v. Catoe* Which Was Decided Over Six Years After Trial And Two Years After The PCR Hearing.

It has long been accepted in South Carolina that the trial judge may charge a capital jury that it may return a life sentence “for any reason or no reason at all.” See, e.g., *State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990). Binney’s jury was similarly charged. St. App. p. 3609. At issue is merely the additional phrase “other than as an act of mercy.”

The Supreme Court of South Carolina, in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), reviewed the very phrasing at issue and rejected the defendant’s argument that the charge was “confusing because it suggested that an act of mercy would have been an invalid reason for a life vote” was “without merit....” *Id.* at 460, 529 S.E.2d at 732. *Hughey* was decided on March 27, 2000. The jury was sworn and Binney’s trial began on November 9, 2002. St. App. p. 2190. Therefore, *Hughey* was good law, it was controlling at time of Binney’s 2002 trial, and counsel were objectively reasonable in relying upon it, without anticipating a change in the law that occurred over six years after the trial, which the PCR judge’s Order granting relief necessarily ignores. See App. pp. 140-146.

In 2009, in *Rosemond v. Catoe*, 383 S.C.

320, 680 S.E.2d 5 (2009), the Supreme Court of South Carolina noted in *obiter dictum* that though the instruction was found proper in *Hughey* the language could be found confusing and should not be used. *Rosemond* overruled *Hughey* to this extent.

Counsel may reasonably rely on the law in existence at the time of trial to provide proper representation. In the Order Denying Post-Conviction Relief, the PCR judge found that a jury instruction virtually identical to the charge in this case was expressly approved of by the Supreme Court of South Carolina in *Hughey*. He further found that “counsel is not deficient [under *Strickland*] for failing to anticipate a change in the law and argue such at trial.” App. pp. 128-130. To avoid this bar to finding deficient performance, the PCR judge’s Order granting relief ignored that the instruction had been approved of in *Hughey*, found that the PCR judges in *Hughey* and *Evans* had granted relief on this issue, found that “[t]he ... Court’s statement in *Rosemond* is not a new rule” and that “it has long been the law in this State that a jury may properly consider mercy and may impose a life sentence for any reason or no reason at all.” He then found that counsel was ineffective for not objecting to the “inherently prejudicial” instruction as erroneous under state law “because it prevented the jury from carrying out one of its core responsibilities, *i.e.*, to determine whether the defendant should be sentenced to life as an

act of mercy.” App. pp. 140-146.⁸ However, the judge’s confusion in interpreting essentially state law preference in language is without moment here; there could not be deficient performance under *Strickland*. Accordingly, Petitioner is not entitled to any relief under *Strickland*. See, e.g., *Strickland*, 466 U.S. at 690-91; *Kulbicki*, ___ U.S. at ___, 136 S.Ct. at 3 (summarily reversing the Court of Appeals of Maryland for failing to view counsel’s representation as of the time of trial); *Harrington v. Richter*, 562 U.S. 86, 107 (2011) (finding error where “the Court of Appeals failed to ‘reconstruct the circumstances of counsel’s

⁸ The PCR judge’s refusal to acknowledge *Hughey* creates a paradox. If the state supreme court had always read the challenged instruction as precluding mercy, then *Hughey* changed the law of the state and approved a charge precluding the jury’s consideration of mercy. As the charge in *Hughey* is the same as the one given here, there could be no deficient performance on a matter of state law in this pre-*Rosemond* case and Binney is not entitled to any relief under *Strickland*. On the other hand, if the court did not always read the charge as precluding mercy, then the court interpreted the contested phrase in *Hughey* as allowing juror’s to consider mercy and found that it was not inconsistent with the charge that the jury may not rely on mere unfettered emotion in sentencing. Again, Binney is not entitled to relief. This second interpretation bears the least strain to the fit in light of all circumstances, not the least of which is the *Hughey* opinion, itself, see *Hughey*, 339 S.C. at 460, 529 S.E.2d at 732, as well as the Court’s acknowledgment in *Rosemond* that “We overrule *State v. Hughey* to the extent it approved the instruction that precluded a capital jury’s consideration of mercy evidence in the sentencing phase.” *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 11.

challenged conduct” and “evaluate the conduct from counsel’s perspective at the time.”).

This Court recently reversed a state appellate court’s grant of post-conviction relief for violating this fundamental teaching of *Strickland* in *Kulbicki*, where the state appellate court found that trial counsel was constitutionally ineffective for failing to identify a “methodological flaw” in comparative bullet lead analysis (“CBLA”) and mounted a challenge to the evidence presented at trial. However, “[a]t the time of Kulbicki’s trial in 1995, the validity of CBLA was widely accepted, and courts regularly admitted CBLA evidence until 2003.” *Id.*, at 4. Adhering to the *Strickland* test, this Court reversed the Maryland appellate court finding no deficient performance. *Id.* at 5.

Even more troubling here, the state court opinion issued relied upon for deficient performance and prejudice *did not even find error and reverse on an incorrect instruction*. As the Justice authoring the dissenting opinion in this case noted, the *dictum* was meant to alert the bench and bar of possibility of confusion. When viewed in context, there was no error and no confusion. 2015 WL 2230848 at 3. To allow re-sentencing in the complete absence of *Strickland* error is against the principles of justice, *accord Strickland*, 466 U.S. at 695 (“A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed”), and would grant Binney “a windfall to which [he is] not entitled.” *Fretwell*,

506 U.S. at 366.

Binney's jury was instructed that a life sentence could be returned regardless of the presence of aggravating circumstances, and regardless of whether mitigating circumstances were proven. St. App. pp. 3607-3609. In short, life could be recommended for any reason or no reason. The exercise of mercy was not prohibited. Even if counsel were deficient in failing to object to an isolated phrase in one sentence of the charge, there was no prejudice. However, Binney is certainly not entitled to relief based on repudiated *dictum* in light of a review of the actual charge given. Cf. *Fretwell*, 506 U.S. at 366.

II. The PCR Judge Erred In Finding
Per Se Error Thereby Avoiding a
Proper *Strickland* Prejudice
Analysis.

The PCR judge incorrectly relieved Petitioner of the burden of showing prejudice by finding that "[t]he improper instruction was inherently prejudicial because it prevented the jury from carrying out one of its core responsibilities, *i.e.*, to determine whether the defendant should be sentenced to life as an act of mercy." App. p. 144. The PCR judge did not reference *Strickland* in the Order granting relief. App. pp. 140-146. More egregiously, while ostensibly applying the two-pronged *Strickland* standard, he "did not correctly conceptualize how that standard applies to the circumstances of this

case.” *Sears v. Upton*, 561 U.S. 945, 952 (2010).

First, “*Strickland* places the burden on the defendant, not the State, to show a ‘reasonable probability’ that the result would have been different.” *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (emphasis added). “The likelihood of a different result must be substantial, not just conceivable.” *Harrington*, 562 U.S. at 112. And, Sixth Amendment prejudice under *Strickland* is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the all of the aggravating circumstance evidence. *Belmontes*, 558 U.S. at 26; *Strickland*, 466 U.S. at 695-96. The PCR judge’s ruling on prejudice contradicts this precedent.

Second, to tie unfettered emotion to the sentencing phase in such a broad manner would make review of any finding of deficiency a guarantee of a new proceeding. For example, under the PCR judge’s reasoning, because South Carolina allows the jury to return a life sentence for any reason or no reason, the *Strickland* prejudice prong would always be met whenever any mitigation evidence was erroneously omitted, or evidence in aggravation erroneously admitted. There would be no limitation as it could be said anything could have affected the exercise of mercy. Such reasoning mirrors the “nothing to lose” standard rejected in *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009), and is equally disturbing in the breath of relief.

Third, in concluding that *Rosemond* requires reversal where the trial judge gives instructions similar to those in *Rosemond* and *Hughey*, the PCR judge failed to apply the appropriate standard of review for analyzing jury instructions. He found that “[t]he language used is, at best, ambiguous, and certainly capable of being construed as a limitation; thus, trial counsel should have objected.” App. p. 145. However, it is not enough that there is some “slight possibility” that the jury misapplied the instruction. *Weeks v. Angelone*, 528 U.S. 225, 236 (2000). The pertinent question “is ‘whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,’” *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). A reasonable juror would not have interpreted the instruction at issue as precluding consideration of the mitigation evidence in deciding whether to exercise mercy. The trial judge emphasized the jury’s duty to consider all statutory and non-statutory mitigating circumstances shown by the evidence, and emphasized the opportunity to exercise mercy:

... while there must be some evidence which supports a finding by you of the existence of any mitigating circumstance, it is not necessary that you find the existence of such circumstance or circumstances beyond a reasonable doubt. You must simply find that in your view such is supported by the

evidence in the case.

... you are permitted under the law to impose a sentence of life imprisonment, whether or not you find the existence of any statutory or nonstatutory mitigating circumstance.

... you may also recommend a sentence of life imprisonment, even though you did find the existence of the statutory aggravating circumstance beyond a reasonable doubt and you find no mitigating circumstances to be supported by the evidence in the case.

St. App. pp. 3607-3609.

As noted, only one portion of the charge could possibly preclude the consideration of mercy (the phrase "other than an act of mercy"), and that according to dictum in *Rosemond* decided over six years after the trial. The remaining charge clearly instructed the jury that it could return a life sentence for any reason or no reason at all. Thus, the charge as a whole was not deficient as a matter of state law as it certainly allowed for the exercise of mercy in the penalty phase. *Accord State v. Hicks*, 330 S.C. 207, 218-219, 499 S.E.2d 209, 215 (1998) ("the trial

judge is not required to instruct the jury it could impose a life sentence 'for any reason or no reason at all' where the jury is informed, as it was here, it could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found").

The *Boyde v. California*, 494 U.S. 370 (1990) standard is proper in review of the instruction here as the instruction is not clearly erroneous as a whole, but contains a potentially ambiguous phrase in one sentence that seemly could contradict the remaining clear and correct language. Compare *Stromberg v. California*, 283 U.S. 359 (1931) (reversing where charge included unconstitutional ground for conviction). See also *Griffin v. United States*, 502 U.S. 46, 53 (1991) ("This language, and the holding of *Stromberg*, do not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."). See also *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991) (applying *Boyde*): The proper inquiry "is whether there is a reasonable likelihood the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. Applied to the instant case, in considering the charge as a whole, a reasonable juror would not have thought he was precluded from considering considered

any of the mitigation evidence presented in the instant case.

Additionally, in *Rosemond*, the trial judge tied the propriety of the consideration of mercy to the receipt of "proper evidence of mercy." 680 S.E.2d at 10 (emphasis added). It is this consideration of mercy, based on the evidence presented, that makes the charge consistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *Id.* In short, the charge is not intended to promote unreasoned reaction. Rather, the charge is meant to preserve the exercise of mercy based on consideration of the evidence submitted. However, to attempt to tie the charge here to evidence in order to prompt federal constitutional protection is incorrect.

Moreover, Binney could not prove actual prejudice under *Strickland* because he cannot show that "there is a reasonable probability that ... the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. There was overwhelming evidence presented that Binney is guilty of murder and the statutory aggravating circumstance. The State incorporates the facts as found by the PCR judge, App. pp. 18-27, as amended in the Order on Binney's motion to alter or amend, App. pp. 139-140. These facts show a calculated,

premeditated murder that he planned well in advance. Additionally, it was motivated by Binney's desire to avoid going to prison for sexually assaulting his three-month-old daughter, by vaginally penetrating her with a vibrator. Moreover, the evidence was that Binney did not know either the victim or her husband. This point was confirmed in the PCR hearing.

III. The PCR Judge Erroneously Found A Federal Constitutional Right To a Mercy Charge Because Federal Precedent, Without Exception, Does Not Support The Existence Of Such A Federal Constitutional Right?

Mercy is an act – not evidence. *See* Black's Law Dictionary (9th ed. 2009). *See also* *Lusk v. Singletary*, 976 F.2d 631, 632 (11th Cir. 1992) (rejecting appellant's argument that the judge evidenced a "refus[al] to consider and give effect to mitigating evidence" based on the "court's statement that '[t]he law of this State does not permit this Court to extend mercy to this Defendant or others convicted of a capital felony.'"). Evidence of mercy would be evidence of an act of the jury; thus, a charge regarding mercy does not impact on consideration of any sentencing phase evidence and does not implicate federal constitutional protections.

A capital defendant is allowed, pursuant to the Eighth and Fourteenth Amendments of the Constitution, to submit evidence in mitigation of

“any aspect of [...his...] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death” to enable the jury to make an “individualized decision” in sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). Also, this Court has determined that a state may not create “limitations” on the consideration of properly admitted mitigation evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). “These two cases place clear limits on the ability of the State to define the factual bases upon which the capital sentencing decision must be made.” *Saffle v. Parks*, 494 U.S. 484, 490 (1990). However, there is a difference between the presentation and consideration of evidence (*i.e.* *Lockett* and *Eddings*), and the exercise of unfettered sympathy or mercy. “Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror’s own emotions than on the actual evidence regarding the crime and the defendant.” *Id* at 493. This Court has rejected challenges to instructions that the jury “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling,” *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be “rooted in the aggravating and mitigating evidence introduced during the penalty phase.” *Id* at 542.

Contrary to the finding of the PCR judge (App. p. 142), the change in the law in *Rosemond*

is purely a change in state law, since the United States Constitution does not require the consideration of mercy by jurors in capital cases. *See Kansas v. Marsh*, 548 U.S. 163, 173 (2006).⁹ *See also Saffle*, 494 U.S. at 492-493; *Johnson v. Texas*, 509 U.S. 350, 371-72 (1993) (“we have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant”). Thus, the PCR judge erred in finding that counsel should have objected to the charge as violating the Constitution.

IV. The PCR Judge’s Factual Finding That The Charge Regarding Mercy Prevented The Exercise of Mercy Is Wholly Without Factual Support in The Record Where No Person Ever Testified That The Charge Was Intended Or Heard To Limit Jurors’ Exercise Of Mercy, And Trial Counsel Was Focused On The Exercise Of Mercy In Their Penalty Phase Presentation and Closing.

In South Carolina, “a capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf.” *State v. Wise*, 359 S.C. 14, 27-28, 596 S.E.2d 475, 481

⁹ Unlike the PCR Order in *Evans*, the grant of relief here was based upon counsel’s ineffectiveness for not objecting to the charge as contrary to state law.

(2004). *See also State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2012) (*citing Wise*). While not a constitutional right, a plea for mercy is uniformly accepted in South Carolina under our evidence rules. *Id.* *See also State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000); *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991) (finding error in limitation on questioning but no prejudice where defendant's mother was allowed to make "a general plea for mercy for the life of her son").

Yet, pleas for mercy are not unlimited under state law. *See Dickerson, supra* (family member pleading for mercy may not weigh in on what the appropriate sentence should be). *See also State v. Johnson*, 338 S.C. at 126-127, 525 S.E.2d at 525 ("the defense did not seek to elicit the opinion of Johnson's sister about what verdict the jury 'ought' to reach. Defense counsel merely proposed to ask her whether she wanted Johnson to die" which "did not address the ultimate issue to be decided by the jury"). Thus, the basis for admissibility of the plea for mercy is the plea's value as evidence of the shared bond which itself is a reflection of the defendant's character in that he is able to maintain that bond. Otherwise, there would be no reason to draw a distinction between 1) a plea for mercy and an opinion on which sentence is appropriate; and 2) allowing only "defense witnesses who know the defendant well" to so plead, not even a victim who would arguably have an interest in the disposition. *Dickerson, supra; Johnson, supra; Torrence,*

supra; *Wise supra*. Cf. *People v. Ochoa*, 966 P.2d 442, 505-506 (Cal. 1998) ("A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character").

The State submits that if the PCR judge had applied the correct standard, as discussed, Binney's jury would not have construed the particular instructions in a manner to prevent or preclude mercy. Instead, viewing the instructions as a whole - and not considering this challenged phrase in isolation - a reasonable juror would have known that it had the ability to consider mercy in determining the sentence. *See Boyde*, 494 U.S. at 380 (the defendant must show both that the instruction was ambiguous and that there was "a reasonable likelihood" that the jury applied the instruction in a way that precluded consideration of mitigating evidence). *Accord Hughey*. Further, it is clear that the trial judge, as well as counsel at the time of the trial, was aware that consideration of mercy was proper for the jury in its sentencing consideration - *but also that the jury was not limited to "mercy" in its life sentence consideration*, since counsel presented mitigating evidence and argument that was based upon a plea for mercy, Binney's expression of remorse in his closing (St. App. p. 3580), as well as other statutory and non-statutory mitigating circumstances. *E.g.*, St. App. pp. 3381-3552;

3581-94.¹⁰ Likewise, it was not lost on the

¹⁰

As found by the PCR judge in the original Order denying relief:

Unlike *Sears* [...], this is not a case where PCR counsel uncovered and presented significant mental and psychological impairments that trial counsels' investigation failed to uncover. Instead, the evidence that [Binney] presented at PCR supported the same three theories that trial counsel had presented: that [Binney] was suicidal at the time of the murder; that he suffered from Fetal Alcohol Spectrum Disorder or Fetal Alcohol Effects; and, to a lesser extent than argued by trial counsel, that he suffers from several sexual disorders.

App. p. 76.

In rejecting the claim of ineffectiveness from failure to present Binney's family history through a social worker, such as Dr. Andrews who testified on Binney's behalf in PCR, the PCR judge found that:

With the exception of Dr. Andrews' testimony about Ms. Dove's family suicides and her VA records, virtually every point to which Dr. Andrews testified concerning [Binney's] background was presented to the sentencing-phase jury through either Rev. Binney [Binney's father] or Dr. Schwartz-Watts [the defense forensic psychiatrist who diagnosed him with fetal alcohol syndrome and several sexual disorders]. Thus, ... the information to which Dr. Andrews testified was largely cumulative to the evidence that trial counsel presented. Additionally, counsel was able to present this information through a respected family member, as opposed to a paid expert. Rev. Binney was not cross-examined, whereas Dr. Andrews'

Solicitor that mercy was a matter that the defense would argue. *E.g.*, App. pp. 3575-77.

The jury was instructed that they could return a life sentence *regardless of whether they accepted or rejected the mitigation evidence*, and *regardless of whether circumstances of aggravation* were proven beyond a reasonable doubt. See St. App. p. 3607, line 20 – p. 3609, line 11. Thus, there was no limitation on the expression of leniency in sentencing.

The instruction that the jury was to consider all statutory and non-statutory mitigation rebuts the PCR judge's finding that the instruction allowed mitigation evidence to be disregarded. The PCR judge completely missed the point of the *Hughey* conclusion: "The jury charge, reviewed in its entirety, is not confusing because it advises the jurors to consider all mitigating circumstance[s] in making their recommendation." *Hughey*, 339 S.C. at 460, 529 S.E.2d at 732. In other words, the jury was adequately charged in accordance with then-existing state law. *Id.*

After receiving adequate and proper

testimony was impeached and undermined through cross-examination, exposing her personal opinion against capital punishment and critical weaknesses in the manner that the information she relayed was gathered.

App. pp. 78-79.

instructions that they could return a life sentence whether they accepted *or rejected* any of the evidence offered in mitigation, the jury found that the death sentence was appropriate based on the particulars of the defendant and his crime. See *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378 (1982) (“For purposes of imposing the death penalty, Enmund’s criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.”). The jury was not precluded from the consideration of evidence or the exercise of mercy in reaching this decision.

Thus, the jury’s reasoned moral assessment of Binney and his crime in sentencing him was not restricted or limited in their consideration of his mitigating evidence and his request for leniency: the jury was clearly instructed they could recommend a life sentence with or without findings regarding the mitigation and even with a finding statutory aggravating circumstances existed. This allowed – without objection or contest – even more discretion for leniency than required for the constitutional protections. See *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378 (“punishment must be tailored to his personal responsibility and moral guilt.”). See also *Kansas v. Marsh*, 548 U.S. at 171, 126 S.Ct. at 2523 (citing *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990) (“The Court also pointedly observed that while the Constitution requires that a sentencing jury have discretion, it does not

mandate that discretion be unfettered” however, “the States are free to determine the manner in which a jury may consider mitigating evidence.”).

CONCLUSION

For these reasons, the State asks this Court to grant certiorari, vacate the judgment of the state PCR court and either reverse, *see Kulbicki*, or remand with instructions to properly apply *Strickland*.

Respectfully submitted,

ALAN WILSON

South Carolina Attorney General

JOHN W. MCINTOSH

Deputy Attorney General

*DONALD J. ZELENKA

Sr. Asst. Deputy Attorney General

dzelenka@scag.gov

WILLIAM EDGAR SALTER, III

Sr. Asst. Attorney General

agesalter@scag.gov

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

**Counsel of Record*

January 4, 2016.
Columbia, South Carolina.

APPENDIX

- A. Letter from the Honorable J. Michael
Baxley dated July 6, 2010 App. 2
- B. Order Denying Relief, PCR action ... App. 8
- C. Order Granting Applicant's Motion
To Reconsider the Denial of Post-
Conviction Relief and Granting Post-
Conviction Relief as to
Sentencing..... App. 137
- D. Order, Supreme Court of South
Carolina Granting Certiorari..... App. 147
- E. Order, Supreme Court of South
Carolina Dismissing as
Improvidently Granted..... App. 149
- F. Order, Supreme Court of South
Carolina Denying Petition
for Rehearing App. 160

APPENDIX A

**SOUTH CAROLINA
ANIMIS OPIBUSQUE PARATI**

DUM SPIRO SPERO

**State of South Carolina
The Circuit Court of the Fourth Judicial Circuit**

**J. Michael Baxley 531 East Carolina
Avenue Judge Hartsville, South
Carolina 29550-4311**

Telephone: (843)

383-4114

Fax: (843) 383-4116

E-Mail:

jbaxleyj@scjd.state.sc.us

July 6, 2010

**William Edgar Salter, III, Esquire
Senior Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211**

App. 2

John H. Blume, III, Esquire
Attorney at Law
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, South Carolina 29211

Re: Jonathan K. Binney v. State of South
Carolina

C/A No: 2006-CP-11-223 (Capital PCR)

Gentlemen:

Thank you for your patience while this matter has been pending under advisement. After considering all the submitted evidence, the record, the arguments of counsel, and the applicable law in this case, I have determined that Mr. Binney's Post Conviction Relief application must be denied. In addition, Mr. Binney's recent motion for relief under the Rosemond decision is also denied.

As pointed out by Mr. Blume in his opening at the PCR trial on May 29, 2007, trial counsel had a three pronged defense for Mr. Binney: (1) Applicant's entry onto the premises was for the purpose of committing suicide, not committing a crime; (2) the victim's husband was culpable in the murder; and, (3) in the sentencing phase, Mr. Binney suffered from

sexual disorders and fetal alcohol syndrome. With regard to these defenses, PCR counsel argued (1) the investigation of these theories was deficient; (2) no fetal alcohol expert testimony was presented; (3) the suicide evidence was not presented in the guilt phase of the case; (4) there was a failure to call witnesses on the third party guilt of the victim's husband; (5) there was a failure to investigate mitigating evidence such as producing school records or early life witnesses; (6) no persistence in a request for funding a jury expert; (7) a failure to sufficiently protest false jailhouse snitch evidence; (8) failure to object to inappropriate closing arguments by the solicitor; and (9) failure to sufficiently object/react to an issue involving a juror. This list is not intended to be exhaustive and complete, but is representative of Applicant's arguments.

As to appellate counsel, Applicant alleged there was a failure to attack the state's indictment amendment at the end of trial; (2) a failure to raise 5th and 6th amendment violations other than in a Miranda context, as well as a failure to assert other constitutional violations; and, (3) a failure to pursue relief under Supreme Court rulings prohibiting the execution of a mentally ill person.

On any and all of the issues raised at PCR, I find that there has been a failure to meet either

prong of the Strickland test. Mr. Binney was represented by capable and experienced trial counsel at both the jury trial and on appeal, and each of the complaints now asserted at PCR were the result of either an articulable and reasonable trial strategy or were not raised due to a lack of meritorious proof or supporting law. The fetal alcohol, mental health, and social issues were appropriately put forward by trial counsel, and I find no lack of diligence in their investigation of the case, nor do I find their performance deficient in any particular. I further find that appellate counsel was not deficient in the representation of Applicant. Finally, there has been no evidence whatsoever and a complete failure of proof of any prejudice to Applicant as a result of trial and appellate counsels' representation, and speculation on this point is not sufficient to carry the burden. In summary, counsel at trial was confronted by overwhelming evidence of Applicant's guilt, both objectively and by his own admissions, and also with the fact that Applicant provided to them unreliable and changing core facts as to the events of the crime. This Court finds that counsel did the best they could under very difficult circumstances.

With regard to Applicant's recent Rosemond motion, it is denied for several reasons. First, there is no general holding that

the overruling of Hughey requires vacating the result in all cases in which the charge in question was used, and no indication that the dicta in Rosemond should receive retroactive application to Mr. Binney. Second, because the present case is one for PCR, counsel is not deficient for failing to anticipate a change in the law and argue such at trial; thus, there is no ineffective assistance. Finally, I am not convinced that the language of the charge used in Binney, even with this one sentence considered in isolation, was such that a reasonable juror would have perceived that he/she did not have the ability to consider mercy in determining the sentence.

Attorney Salter is requested to prepare a proposed Order and forward the same to Mr. Blume. Mr. Salter is requested to cover all issues raised in the trial, not just those detailed in this letter. Attorney Blume is not asked to agree or consent to the Order, but is requested to review it for mistake of fact or misstatement of your party's position; thereafter, Attorney Salter is asked to forward the finalized Order to the Court. Attorney Salter is requested to send an electronic copy in Word format via email to law clerk Carli Wilcox (jbaxleylc@sccourts.org) in my office which will then be finalized, signed, and returned to Attorney Salter for filing and formal service on the parties. This order is requested within thirty

(30) days, please advise if additional time is needed.

In closing, please accept my gratitude for the professional and capable way in which this matter has been litigated and presented to the Court. I look forward to working with you in the future.

Sincerely yours,

S/ J. Michael Baxley

J. Michael Baxley

JMB/cjw

cc: Honorable Brandy W. McBee (for filing)

APPENDIX B

STATE OF SOUTH CAROLINA)	
COUNTY OF CHEROKEE	)IN THE
	)COURT OF
Jonathan Kyle Binney	)COMMON
	)PLEAS
Applicant,	) C.A. NO.
	) 06-CP-11-223
	)
v.	) ORDER
State of South Carolina,	) DENYING
	) POST
Respondent.	) CONVICTION
	) RELIEF
_____	)

This death penalty Post-Conviction Relief (PCR) action is before the Court pursuant to an April 7, 2006 application filed on behalf of Jonathan Kyle Binney (hereafter Applicant), as amended. The Court conducted an evidentiary hearing on the Application from May 29 to June 1, 2007, at the Cherokee County Courthouse. Applicant was present at the hearing, and attorneys John H. Blume, III, Sheri Lynn Johnson, and Emily C. Paavola represented him in the trial. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General

Anthony Mabry represented the State. After full review, the Court denies relief and dismisses the Application for the reasons stated herein.

I. PROCEDURAL HISTORY

Applicant is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC), as the result of his Cherokee County murder and first degree burglary convictions and death sentence. The Cherokee County Grand Jury indicted him in July 2000 for murder (2000-GS-11-526) and burglary in the first degree (2000-GS-11-525). The State timely served a Notice of Intent to Seek the Death Penalty.

Don A. Thompson, Esquire, initially represented Applicant; however, he was relieved as counsel following a July 11, 2001 pretrial hearing before the Honorable J. Derham Cole. Thereafter, attorneys Trent N. Pruett and Samuel "Mitch" Slade, Jr. were appointed to represent Applicant in all other proceedings in the trial court. Seventh Circuit Solicitor Harold W. Gowdy, III, and Deputy Seventh Circuit Solicitor J. Donald Willingham, II, represented the State.

After pretrial hearings on March 25, and October 25, 2002, Applicant received a jury trial

before Judge Cole on November 4-14, 2003. The jury convicted him of murder and burglary in the first degree. The sentencing phase was conducted following Applicant's exercise of the twenty-four hour waiting period for the presentation of penalty evidence to the jury, pursuant to S.C. Code Ann. §16-3-20(B).

In the sentencing phase, the State relied upon the statutory aggravating circumstance that the murder was committed while in commission of burglary in any degree.¹ §16-3-20(C)(a)(I)(c). Judge Cole also charged the jury on the three statutory mitigating circumstances found in §16-3-20(C)(b)(2), & (6)-(7). The jury found the alleged statutory aggravating circumstance and recommended a death sentence. Judge Cole sentenced Applicant to death for murder, and to life without parole for burglary in the first degree. **R. pp. 3491-94; 3499-3501.**

Applicant timely perfected a direct appeal. Joseph L. Savitz, III, of the South Carolina Office

¹ The trial judge granted the defense's directed verdict motion on the statutory aggravating circumstance of larceny while armed with a deadly weapon, and the State voluntarily abandoned the aggravator that "[t]he offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value." See § 16-3-20(c)(a)(4).

of Appellate Defense, represented him on direct appeal.² The South Carolina Supreme Court affirmed Applicant's convictions and sentences in a published Opinion filed on September 21, 2004. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005). The Court denied a timely petition for rehearing on February 17, 2005, and sent the Remittitur to the Cherokee County Clerk of Court on the same date.

Applicant, again through Mr. Savitz, filed a Petition for Writ of Certiorari to the South Carolina Supreme Court in the United States Supreme Court on May 18, 2005. The State filed a Brief in Opposition dated July 5, 2005. Certiorari was denied on October 3, 2005. *Binney v. South Carolina*, 546 U.S. 852 (2005).

² Applicant raised the following issue on direct appeal:

The judge erred by admitting into evidence a statement Applicant gave to the police, in which he confessed that he was guilty of murder and first degree burglary and requested "the death penalty" because "[t]he crime I committed definitely warrants it" because this statement was the product of police-initiated custodial interrogation, undertaken after Applicant had invoked his Fifth Amendment right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981).

On November 3, 2005, the South Carolina Supreme Court granted a Stay of Execution so that Applicant could pursue PCR remedies pursuant to *In Re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). Initially, Circuit Judge John C. Few was appointed to preside over the PCR proceeding; however, Chief Justice Jean H. Toal filed an Order on November 10, 2005, finding that Judge Few must recuse and vesting the undersigned with exclusive jurisdiction to complete the case. This Court filed an Order appointing Mr. Blume and Ms. Johnson to represent Applicant on March 15, 2006. Mr. Blume was designated to act as lead counsel. Ms. Paavola was appointed later in the proceedings.

Through counsel, Applicant's March 1, 2006 Application raised the following grounds for relief:

1. Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.

2. Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.
3. Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the appellate phase of his trial.

Respondent submitted its Return on May 5, 2006.

On May 1, 2007, Applicant served Respondent with an amended PCR Application. Based upon information that Respondent's counsel had been provided a copy of Attorney Pruett's trial file, Mr. Blume moved to disqualify Respondent's counsel because Mr. Pruett's disclosure of his file to Respondent allegedly violated the attorney-client privilege. On May 21, 2007, this Court held a hearing on Applicant's

motion. Mr. Blume was present on Applicant's behalf, and Mr. Salter represented Respondent. Following arguments by counsel, including an *ex parte* argument by Mr. Blume, the Court issued a bench order denying Applicant's motion on the basis that Applicant had waived all attorney-client privilege in filing his PCR claim due to the broad nature of the PCR allegations. Additionally, because both sides had received a copy of the trial file, the State had not gained some unfair advantage in obtaining the file.

Applicant then filed an Amended Application dated May 21, 2007. He also served and filed a notice of appeal from this Court's refusal to disqualify Respondent's counsel and require the State to surrender the trial file. The South Carolina Supreme Court initially dismissed this appeal in an Order filed May 22, 2007.

The PCR trial began on May 29, 2007, at the Cherokee County Courthouse, with the State making motions to deny Applicant's request to amend his application on May 21 as untimely, which was denied; to require Applicant to disclose the affidavit of Dr. David Bachman, neurologist and consulting expert for Applicant, which was granted; and to exclude the affidavit of Juror Henry Viquez proffered by Applicant, which was excluded as not sworn and unreliable. Both sides

were then allowed opening statements. Thereafter, Applicant presented his case, in which the following live witnesses were called, in order: Dr. Leroy Riddick (forensic pathologist); Dr. Arlene Bowers-Andrews (professor of social work); James E. Aiken (prison consultant); Dr. Natalie Novick-Brown (forensic psychologist); Tonya Brown (friend of victim); John Purvis (jail employee); Allison Haygood (cousin of Applicant); Sandra Applicant (adoptive mother of Applicant); Teresa Lynn Norris, Esquire (in reply, attorney in Mr. Blume's office); and Jill Rider (in reply, paralegal in Mr. Blume's office). After the close of testimony, as discussed below, Applicant presented three additional witnesses by affidavit: Melanie Binney, Dr. Fred Bookstein, and Dr. Ronald W. Maris.

After the close of Applicant's case, Respondent presented the following witnesses/evidence: Harold W. "Trey" Gowdy, III (Seventh Circuit Solicitor, lead prosecutor in trial below); publication of 911 tapes; S. Mitchell Slade, Esquire (trial defense counsel, second chair); Trent N. Pruett (lead trial defense counsel); Dr. Donna Schwartz-Watts (forensic psychiatrist); J. Donald Willingham, II, Esquire

(prosecutor, second chair); and Joseph L. Savitz, III, Esquire³ (Applicant's appellate counsel).

The record before this Court also contains numerous affidavits, reports, and documents submitted by both sides. Additionally, at the conclusion of the hearing, upon request of Applicant, the Court left the record open for thirty (30) days so that Applicant's counsel could take depositions of three witnesses: Melanie Binney, Dr. Fred Bookstein, and Dr. Ronald W. Maris. **PCR Tr. pp. 465; 827-29.** Without objection, the Court later permitted Respondent to supplement the current record with Applicant's sworn testimony from his January 12, 2005 Spartanburg County PCR hearing (arising from his criminal sexual conduct conviction). After the passage of substantial time without Applicant's counsel attempting to take the depositions, this Court closed the testimony and announced an intention to deny the PCR application.

After the PCR trial, Applicant filed a petition for rehearing of the South Carolina Supreme Court's dismissal of his appeal over this Court's denial of the motion to disqualify Respondent's counsel. In a June 21, 2007 Order,

³ This witness was taken out of order to accommodate his schedule.

the Supreme Court granted rehearing and reinstated the appeal. Petitioner filed a Petition for Writ of Certiorari, dated September 4, 2007. The Supreme Court granted supersedeas in an Order filed on December 5, 2007, and that Order vacated this Court's earlier Order closing the record and its statement of intention to deny PCR relief. The Supreme Court's Order also stayed the taking of the remaining depositions and any final ruling on the merits while the appeal was pending. After briefing and arguments by the parties, the Supreme Court affirmed this Court's ruling on Applicant's disqualification motion on September 21, 2009, finding that "[t]he breadth of three particular allegations constituted a complete waiver of Petitioner's attorney-client privilege." *Binney v. State*, 384 S.C. 539, 545, 683 S.E.2d 478, 481 (2009). The Supreme Court Order also lifted the Stay as to further PCR proceedings, and remitted the case to this Court.

This Court then held a telephone status conference on January 28, 2010.⁴ At that time, the Court agreed with Mr. Blume's proposal for Applicant to submit affidavits from the remaining three witnesses under *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712

⁴ Mr. Blume represented Applicant, while Mr. Salter and Mr. Mabry represented the State in this phone conference

(2006). Applicant submitted affidavits from Dr. Bookstein, Melanie Binney, and Dr. Janet Grossman on February 24, 2010. Respondent took Dr. Bookstein's deposition on June 7, 2010. With all testimony complete, the matter was re-submitted to the Court for a decision. The Court notified the parties of its ruling denying PCR in a July 6, 2010 letter, requesting that Respondent's counsel prepare a proposed Order in this matter. Several extensions were granted to Respondent in the preparation of the proposed Order.

In addition to the evidence and exhibits discussed above, this Court has reviewed the various exhibits introduced in the original trial (PCR Tr. p. 408), the parties' briefs, the Record on Appeal, the South Carolina Supreme Court's Opinion, the Order of the United States Supreme Court denying certiorari from Applicant's direct appeal; the various pleadings, Orders, and opinions filed in the PCR case; the Cherokee County Clerk of Court's file; and, Applicant's SCDC records. PCR Tr. pp. 23-24.

II. STATEMENT OF FACTS IN THE UNDERLYING CASE

By the close of evidence in the sentencing phase of Applicant's capital trial, the prosecution

had established the following facts. In early June of 2000, Applicant was facing thirty years in prison for sexually assaulting his three-month-old daughter, Mikayla, by vaginally penetrating her with a vibrator device, requiring her to have surgical repair and a hysterectomy. He confessed to this crime, and admitted he had been viewing child pornography on the internet before the assault occurred. He had been released on bond after his arrest on this charge, but could not reside with his wife and children because of the nature of this charge. Although he lived with his biological mother for a short period of time, she eventually asked him to leave her residence. As a result, he was living at the Villager Lodge Inn, in Spartanburg, on June 6, 2000. **R. pp. 2344-55; 2332-33; 3100-57; 3163; 3311-12; State's Exhibit 119.**

On June 6, Applicant purchased a pistol from a friend. After completing the transaction at Melanie Binney's (his wife's) residence, Applicant drove back to the Villager Lodge Inn. Later that evening, he drove to a Big K department store in Spartanburg and purchased bulbs for his flashlight. He then drove from the department store to Cowpens on his moped. He eventually hid his moped in a wooded area approximately one-quarter mile from the rural Cherokee County residence of Judy Southern, his

victim. Mrs. Southern lived at this residence with her husband, Allen, and her young son. **R. pp. 2344-50; 2252-53; 2570-92.**

Applicant then hiked to the victim's residence and conducted surveillance on the home from the nearby woods for the remaining nighttime hours of June 6 and the early morning of June 7, 2000. He had brought with him his black flashlight, black gloves, the 9mm pistol he had purchased, and a police scanner. During the night, he listened to the police scanner, and by his own admission, pondered whether he should go into the house "to commit suicide or rape someone, or just shoot all of them and kill [himself]." **R. pp. 2344-50; 3339; 3312.**

After sunrise, Applicant moved closer to the Southern residence and hid inside a barn, which gave him a better view of the residence. He waited there until Judy Southern and her husband left their home for work. He then went up to the residence and rang the doorbells to ensure that no one was home. Once he was convinced no person was inside, he entered the residence through an unlocked back door. **R. pp. 2344-50.**

After entering the residence, he cut all the phone lines in the house and hid kitchen knives and other possible weapons so that they would be

out of reach. He remained in the house all day.
R. pp. 2344-50.

Judy Southern returned home late that afternoon and found Applicant in the bathroom. Applicant later claimed that she had startled him because he did not hear her come into the house. When he saw Mrs. Southern in the bathroom doorway, he shot her. He then chased her through the residence and outside the home, firing more shots at her as she fled the home and ran into a nearby field. **R. pp. 2344-50.**

Mrs. Southern called Roy Chapman, an employee of her husband's bowling alley, on her cell phone and reported the attack. She told the employee that the man who attacked her had been waiting on her inside the bathroom of the house. The employee called Allen Southern, who was on the way home at the time, and reported the attack. Mr. Southern arrived home, searched for his wife, and eventually found her several hundred yards from the home in a pasture. He carried his wife back to his vehicle and arrived at the residence about the same time as the employee, who had rushed to the home from the bowling alley. **State's Exhibit # 72 (911 tape), R. pp. 2229-34.**

Mr. Southern immediately drove his wife to Mary Black Hospital, the closest hospital to the Southern residence. The employee called 911 and

told the operator what had occurred. As Mr. Southern was driving his wife to the hospital, 911 staff reached him by cell phone. He explained what he had been told by the employee and his wife before she lost consciousness. Mr. Southern told the 911 operator that the perpetrator had left "a note." When Mr. Southern reached Mary Black Hospital, his wife was in cardiac arrest. She had lost a significant amount of blood, her pupils were fixed and dilated, and there was neither blood pressure nor pulse. Hospital staff re-established a heart rate through electro-cardiac shock. Surgery was later performed in an attempt to save her life; however, Judy Southern died after more than five hours of surgery. The cause of death was loss of blood as a result of a through-and-through gunshot wound to the abdomen. **State's Exhibit # 72 (911 tape), R. pp. 2229-34; 2252-73; 2657-65; 2668.**

After shooting Judy Southern, Applicant fled into the woods. He buried the murder weapon under some leaves and hid from police for several hours. He eventually ended up in the basement of his wife's home, located a few miles from the Southern residence. **R. pp. 2344-50.**

When police arrived at the crime scene, the employee to whom Mrs. Southern had reported the attack was waiting for them. Outside the home, officers found a note, later determined to

have been written by Applicant and addressed to his wife. The note stated in part, "Honey, I did this first of all because I will not let them send me to prison. Second, they think I was a horrible person . . . Well, I decided to prove them right."

Further, the note contained directions to the location of his moped and included instructions leaving all of Applicant's worldly goods to his wife. He also stated that he knew from his attorney that he was going to get at least ten years in prison for the sexual assault of his infant daughter. He signed the note "Jonathan Binney," and his fingerprint was found on it. A SLED handwriting expert later opined Applicant had indeed written the note. **R. pp. 2218-21; 2227-28; 2322; 2544-45; 2648-54.**

Police found two fired 9 mm shell casings inside the crime scene. One was on the bathroom floor, and the other was located in the living room of the home. They also found a fired 9 mm casing on a side porch and two fired 9 mm bullets inside the home. Applicant's DNA was found on cigarette butts located inside the home and on more cigarette butts found in the wood-line surrounding the victim's home. Applicant's flashlight and gloves were also found in the woods near the victim's home. **R. pp. 2464; 2468-94; 2499-2500; 2557-65; 2599-2602.**

Police arrested Applicant in the basement of his wife's home on the morning of June 8. They also found Applicant's police scanner in the basement. As he was being arrested, Applicant turned to a Cherokee County deputy and said, "She's dead, isn't she?" The Deputy replied "Who?" Applicant responded, "The woman I shot." **R. pp. 2327; 2301-10.**

Police seized a pair of Applicant's pants in a search of his hotel room. In a pocket, they discovered one unfired 9 X 18 Makarov bullet, which is the same bullet as the fired shell casings recovered at the crime scene. **R. p. 2563.**

On June 16, after Applicant initiated contact with law enforcement, he gave a detailed statement about the burglary and murder. He also told police that he did not know Judy Southern before her death. After giving the statement, he led investigators to the moped and the murder weapon hidden in the woods. Police recovered the murder weapon, a 9 mm Makarov pistol, exactly where Applicant said he buried it. Forensic examination matched the fired 9 mm shell casings and bullets found inside the victim's home to this weapon. Applicant also requested the death penalty in his June 16 statement, saying that the crime he committed definitely warranted it. **R. pp. 2344-50; 2495-97.**

Applicant subsequently asked to meet with law enforcement again, and gave another voluntary statement to investigators on June 19. This statement provided more details of why he had burglarized the home and killed Judy Southern. He explained that he was feeling anxious and nervous that day, and that he would go out and commit a burglary, or do what he called "snooping," whenever he felt that way. He explained that he was very angry and frustrated about his criminal sexual conduct charge involving the sexual assault of his daughter, the loss of his family, the lack of money, and the time he was facing in prison. He said that he chose the Southern residence because it was in a secluded location and was an affluent home.

He stated he had entered the home after determining that there was a man and woman living there. He again stated that he did not know Mrs. Southern before he burglarized her home and shot her, and that he had no connection to her.

Applicant also wrote a letter to Mr. Southern, dated June 19, 2000, in which he told Mr. Southern that, if Mr. Southern had come home, Applicant would have murdered the entire family and attempted suicide, robbed Mr. Southern or committed suicide, or he would have

raped or killed Judy Southern.⁵ He apologized and stated he never knew the Southernns and he did not have any grudge against them. Finally, he told Mr. Southern he wished to receive the death penalty and that the death penalty was warranted not only by man's law but by God's law. **R. pp. 2387-88.**

Applicant also confessed to a fellow inmate and gave the inmate a map of the victim's home while he was in the Cherokee County Detention Center. Among other things, he told this inmate he had "scoped out" the victim's home a few days prior to the murder; he went there on his moped and burglarized the home; he was in the bathroom using the bathroom when the victim came in; they saw each other about the same time; and, he pulled out a 9mm pistol and shot the lady. He also said, when the victim ran, he ran after her and shot again. He said he ran out of the home and went behind the house and into the woods. Helicopters were after him and hovering over him, but he was able to make it back to his house. When he got home, he hid in

⁵ Applicant further explained that he "had a lot of anger, frustration, bitterness, and resentment inside of me and had decided not to control his actions" on the day of the burglary and murder. He also stated that he did not hear the victim when she came in the house, and that he had hoped he only wounded her, instead of killing her.

the basement, where officers found him behind some boxes. A SLED handwriting expert opined that Applicant, in fact, drew the map given to the inmate. R. pp. 2618-21; 2642-56.

III. OVERVIEW OF ALLEGATIONS AND DEFENSES

In opening statements, Applicant's lead counsel, John Blume and Respondent's lead counsel, Edgar Salter, set forth the primary allegations upon which Applicant's case is grounded and the primary defenses upon which the State relies. This recitation is not intended to be an exhaustive listing of each and every fact the parties raised, but rather provides an overview of the issues raised in the trial.

In his opening for Applicant, Attorney Blume recognized that trial counsel had a three pronged defense in the trial below, as follows: (1) Applicant's entry into the residence was for the purpose of committing suicide, which is not a crime in this state, and thus there was no burglary nor aggravating factor warranting the death penalty; (2) the victim's husband had a role in her death motivated by marital discord, and the victim lived in fear of her husband; and, (3) in the sentencing phase, Applicant, relying upon the testimony of Dr. Donna Schwartz-Watts, argued

that his sexual disorders led to the commission of the crime.

With regard to allegations of trial counsel's deficient performance within the parameters of these case theories, Attorney Blume argued that counsel's investigation was deficient in the following ways: (1) Applicant was a fetal alcohol syndrome baby, which ultimately caused his mental health abnormalities and behavioral problems leading to this crime, yet no fetal alcohol expert was called as a witness; (2) counsel failed to adequately prove the suicide attempt, and did not present evidence of the suicide issue in the guilt phase, instead waiting until the penalty phase; (3) counsel failed to adequately determine and call to trial witnesses regarding the husband's culpability in the death of his wife; and, (4) counsel failed to adequately produce, analyze, and offer at trial mitigating evidence such as school records, early life witnesses, and other available sources showing Applicant's dysfunction from an early age.

Attorney Blume also raised other alleged procedural and substantive errors by trial counsel and the Court that had the effect of depriving Applicant of his constitutional due process rights. These include: (1) counsels' general failure to follow ABA guidelines for performance of defense counsel in the

representation of death penalty defendants; (2) counsel's failure to adequately protest the introduction of allegedly false jailhouse snitch evidence from inmate Danny Ray Edwards, who specifically lied about his prior assistance to law enforcement; (3) failure to adequately challenge testimony from inmate witness Jerry Johnson who was allegedly untruthful about whether he received a benefit to testify against Applicant; (4) failure to persist in obtaining funding for a jury consultant; (5) failure to adequately challenge improper closing arguments by the solicitor; and, (6) failure to adequately pursue the issue of coercion raised to PCR counsel by juror Henry Viquez.

With regard to appellate counsel, Attorney Blume raised three main points: (1) failure to attack an indictment amendment at the end of trial; (2) failure to raise Fifth and Sixth Amendment rights other than in a Miranda context; and, (3) failure to pursue prohibitions against execution of a mentally ill individual pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002).

In his opening statement for the Respondent, Attorney Salter argued that Applicant's allegations and proof fail to meet the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), requiring that Applicant's

counsels' representation at trial fell below the standards required of criminal defense attorneys, and that Applicant was prejudiced thereby. Our courts have defined prejudice as meaning that, but for counsels' unprofessional errors, the outcome of the trial would have been different. Counsel opined that Applicant's evidence with regard to deficient performance was without merit, and the evidence concerning prejudice was speculative at best. In fact, counsel pointed out that Applicant's trial attorneys were two longstanding, experienced members of the criminal Bar, and that they did not hire multiple investigators because they chose to do the investigative "legwork" themselves to be more familiar with the factual nuances of the case.

With respect to certain pivotal issues that Respondent believed would be raised at trial, counsel argued the following: (1) Applicant's psychiatric witness at trial, Dr. Donna-Schwartz-Watts, did in fact testify at trial about fetal alcohol syndrome, and thus that issue was brought forth to the jury; (2) there was no credible evidence of the victim's husband's guilt in this case, either directly or indirectly, particularly in light of the overwhelming evidence of Applicant's guilt; (3) counsel made a strategic decision for Applicant to wear jail clothes during the trial because he was in

custody and counsel wished to allay jury concerns over his possible release; and, (4) counsel did not object to evidence of Applicant's previous CSC with a minor charge in the penalty phase because it was coming into evidence anyway, regardless of their objections, and they did not wish to highlight the issue. Attorney Salter's conclusion of his opening statement was that each action or non-action at the trial below now complained of by Applicant was the result of a trial tactic or strategy employed in an effort to save the life of the Applicant against very strong state's evidence in both the guilt and penalty phase of the trial.

IV. DISCUSSION OF THE LAW

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "[E]very effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective at the time." *Id* at 689. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's

representation was within the 'wide range' of reasonable professional assistance." *Id.*, at 689, 104 S.Ct. 2052. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687, 104 S.Ct. 2052. *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*).⁶

The inmate must also demonstrate that he was prejudiced by his attorneys' ineffectiveness. *Strickland*, 466 U.S. at 691. In other words, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, "[c]ounsel's errors must be so serious as

⁶ "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id.* at 787 (citation omitted).

to deprive the defendant of a fair trial, a trial whose result is reliable." *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687).

Applying these well-established legal principles to the present case, this Court finds that Applicant has failed to meet either prong of the *Strickland* test as to any and all of the issues that he has raised. The record reflects that he was represented by capable and experienced counsel at both the jury trial and on appeal, and that each of the complaints now asserted at PCR were the result of either an articulated and reasonable trial strategy, or they were not raised due to a lack of meritorious proof or supporting law. Further, Applicant has not established prejudice under *Strickland*, as there has been no showing of proof or argument that would have changed the outcome of this case.

As a threshold issue, this Court does not accept Applicant's counsels' argument that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases establish *the appropriate standard* for counsel's investigation and presentation of mitigating evidence in the penalty phase of a capital trial, and that all capital defense counsel must fully comply with those standards. **PCR Tr. p. 66.** The United States Supreme Court re-emphasized in *Bobby v. Van Hook*, 130 S.Ct. 13,

17 (2009), that these are, at best, merely guidelines, and that trial counsel need not comply with them to render objectively reasonable representation. *See also id* at 20 (Alito, J., concurring). Moreover, it appears to this Court that the Guidelines did not exist at the time of this trial. Indeed, Attorney Pruett testified that he did not consult the ABA's 2003 Guidelines because they did not yet exist. Rather, they were in the process of being revised at the time that of Applicant's trial. PCR Tr. p. 735.

V. APPLICANT'S GROUND 11(a) - GUILT PHASE

Applicant's Ground 11(a), set forth in his amended petition for PCR, forms the crux of his case with respect to the **guilt phase** of the trial below and presents allegations of ineffective assistance of trial counsel in the guilt phase. The Court has divided these arguments into six (6) specific points, each discussed individually below. Both of Applicant's trial attorneys testified at the PCR hearing. The Court specifically finds that counsels' testimony and supporting evidence is credible as to all of the allegations of ineffectiveness raised by Applicant, and the Court accepts counsels' testimony in ultimately denying those allegations.

V. (1) - VOIR DIRE ISSUES

Applicant's **Ground 11(a)(1)** challenges trial counsel's conduct of *voir dire* and their failure to employ a jury selection expert. Respondent asserts that counsel made a reasonable determination not to employ a jury consultant and that Applicant did not prove either deficient performance or prejudice resulting from counsel's handling of *voir dire*.

Effective assistance of counsel is required during the *voir dire* process. *Brown v. Jones*, 255 F.3d 1273, 1279-80 (11th Cir.2001). However, the conduct of *voir dire* is particularly within the control of counsel and *voir dire* techniques are vastly different for each attorney. *Cf. Strickland*, 466 U.S. at 689. Therefore, the review of counsel's performance in *voir dire* is "highly deferential," and any *voir dire* error must be egregious and obvious. *E.g., Yeatts v. Angelone*, 166 F.3d 255, 265 (4th Cir. 1999).

The Court finds that Applicant's Application does not allege any specific juror whose *voir dire* was supposedly inadequate, or any specific juror who was erroneously accepted to serve, or any specific juror who was erroneously removed for cause because of counsel's allegedly ineffective performance

during *voir dire*. The PCR record reflects that Applicant's counsel during examination did not ask any questions of either Mr. Slade or Mr. Pruett about trial counsel's *voir dire* of any potential juror (PCR Tr. pp. 548-93; 679-735), and counsel did not present any evidence that any seated juror should have been removed for any reason.

Applicant also challenges trial counsels' decision not to hire a jury expert. The evidence at PCR is that trial counsel made an effort to obtain funding for a jury consultant in accordance with S.C. Code Ann. § 16-3-26(C)(1) (Supp. 2002), but the trial judge refused to approve funding for the expert because he found that counsel should be able to select the jury without the assistance of an expert, given counsels' level of experience.

The evidence before the Court reveals that, after the trial judge's adverse ruling, counsel took steps to familiarize themselves with the type of information that a jury selection expert would have provided. Both attorneys contacted another defense attorney who had utilized the services of a jury consultant in a capital case tried within a year of Applicant's trial, and they acquired and reviewed the materials the jury consultant had provided to counsel in that case. Given the variety of circumstances faced by defense counsel and the range of legitimate decisions regarding

how best to represent a criminal defendant, this Court finds that counsels' assistance in *voir dire* was reasonable considering all the circumstances.

Both trial attorneys had substantial criminal felony trial experience; they had obtained and reviewed jury selection information that a jury consultant had provided to another attorney in a recent capital trial, and they had both participated in the capital *voir dire* process as attorneys in other cases. Also, Cherokee County has a relatively small population, Mr. Pruett had practiced criminal defense work in Gaffney for roughly six years at the time of trial, and he knew the community well. Thus, this Court finds Applicant has failed to prove deficient performance under *Strickland* with regard to the jury consultant issue.

Applicant has also failed to prove any prejudice resulting from counsels' failure to utilize a jury consultant because Applicant did not present a jury consultant at the PCR hearing to testify as to specific prejudice resulting from the failure to employ a jury consultant at trial. Nor was any other evidence presented showing that a particular juror should have been removed or seated by counsel. As a result, Applicant has failed to establish how the utilization of a jury consultant would have created a reasonable

probability of a different result, as required for relief under *Strickland*. See also *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999). This absence of prejudice is supported by Applicant's failure to specifically allege which jurors he contends should have been struck for cause but were not, or which jurors were improperly removed for cause when they could have been rehabilitated but were not.

Finally, it was argued at PCR that counsel was deficient for failing ensure that their *ex parte* funding request for a jury consultant was transcribed and preserved for appellate review. The Court is not persuaded by this argument because the leading Supreme Court case on this point does not require funding for a defense jury consultant. *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Constitution only requires that indigent defendants be provided with "[m]eaningful access to justice," so that they receive the "basic tools of an adequate defense or appeal." *Id.*, 470 U.S. at 77; and federal courts have consistently rejected the idea that *Ake* requires such funding. *Moore v. Johnson*, 225 F.3d 495, 502-04 (5th Cir. 2000). Thus, even if the issue had been preserved and appealed, Applicant could not have demonstrated on appeal that the trial court's decision to deny the motion was constitutional error. Further, assuming *arguendo* that the failure to preserve

the issue was deficient performance, Applicant failed to demonstrate at PCR that such failure was prejudicial.

V. (2) - JURY CHARGE ON BURGLARY

Ground 11(a)(2) alleges that counsel erroneously failed to request a jury charge "stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in this case. Trial counsel further failed to seek an instruction stating the specific elements of the crime named in the burglary charge."

As correctly stated by trial counsel Slade when explaining why he did not request such a charge (**PCR Tr. pp. 588-91**), South Carolina law does not require the State to prove that the defendant intended to commit a specific crime at the time he entered a dwelling. *Accord Pinckney v. State*, 368 S.C. 502, 504-05, 629 S.E.2d 367, 369 (2006).⁷ Thus, this Court finds that Applicant's

⁷ In *Pinckney*, the Court rejected an almost identical argument to the allegation raised by Applicant. The first degree burglary jury instructions in *Pinckney* were very similar to the instructions given to Applicant's jury. The Supreme Court found "[t]his charge adequately instructed the jury that the State must prove that the intent to

counsel were "not ineffective for failing to request a more emphatic or specific charge since the charge adequately stated the elements of first degree burglary." *Id* at 504-05, 629 S.E.2d at 369.

Reviewing the federal cases raised on this point by Applicant, this Court further finds that neither *Ring v. Arizona*, 536 U.S. 584 (2002), nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), require a different result. This is because neither decision mandates a change in state substantive criminal law. Stated differently, these cases do not require our courts to charge that there must be one, specific crime in the mind of the defendant at the time of entry. The case of *Ring*, like *Apprendi*, was a rule of procedural due process. See *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004).⁸ See also *id* at 353-58 [because the

commit a crime existed at the time of entry." *Id* at 504, 629 S.E.2d at 369.

⁸ In *Apprendi*, the Court "interpreted the constitutional due-process and jury-trial guarantees to require that, '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' In *Ring*, we applied this principle to a death sentence imposed under the Arizona sentencing scheme at issue here. We concluded that, because Arizona law authorized the death penalty only if an aggravating factor was present,

Court's decision in *Ring* was properly classified as procedural rather than substantive and because *Ring* did not announce a watershed rule of criminal procedure, retroactive application of the holding in *Ring* to death penalty cases already final on direct review is barred by *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion)].

V. (3) - ISSUE OF THIRD-PARTY GUILT

In Ground 11(a)(3), Applicant alleges *inter alia* that counsel was ineffective for not adequately investigating and presenting evidence of the possibility that the victim's husband had direct involvement in procuring the murder of his wife, or was so intentionally or grossly negligent in assisting the victim after her injury, that he thereby contributed to her death.

In reviewing this allegation, the Court is aware that the holding in *Strickland* explains that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to

Apprendi required the existence of such a factor to be proved to a jury rather than to a judge." *Schriro*, 542 U.S. at 351 (citations omitted).

the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690-691. See also *Wiggins*, 539 U.S. at 521-22. Further, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691.

The PCR and trial records reflect that trial counsel conducted an extensive investigation into Mr. Southern's possible involvement in his wife's murder. First, counsel repeatedly discussed the matter with Applicant, who gave law enforcement differing accounts that he later admitted were false, before he ultimately and repeatedly denied that there was any connection between him and Mr. Southern at all. Outside of Applicant's conflicting statements, counsel further investigated whether or not there was a connection between Mr. Southern and Applicant. Counsel also investigated whether the actions of

Mr. Southern, or his employee Roy Chapman's actions after he received the victim's calls for help, amounted to a superseding or intervening cause that was capable of breaking the chain of causation triggered by the shooting.

The record before this Court reflects that, with regard to this issue, trial counsel: (1) obtained and reviewed the prosecutor's file; (2) interviewed Tonya Brown and at least one other friend of the victim; (3) interviewed the Southern's marriage counselor; (4) obtained and reviewed the counseling records; (5) obtained the Southern's cell phone records; (6) obtained, listened to, and had transcriptions of Mr. Southern's recordings of Mrs. Southern's calls on her home phone; (7) listened to the tape of the 911 call; (8) learned of employee Chapman's financial dependence on Mr. Southern; (9) determined the length of time it would take to drive from the bowling alley to the Southern residence, as well as the time it would take to drive from the residence to Mary Black Hospital, and ascertained that these times were consistent with Mr. Southern's subsequent trial testimony; (10) ascertained that Upstate Carolina Medical Hospital was further away from the Southern residence than Mary Black Hospital; (11) visited and walked through the Southern residence and the surrounding area; (12) obtained the relevant

medical records related to the victim's treatment; (13) were aware that Mr. Southern's truck was not processed by law enforcement and that the home computer had not been seized; (14) spoke to the pathologist about her findings; (15) were aware of the delay by Roy Chapman in calling 911 and that Mr. Southern did not call 911; (16) were aware that Mr. Southern failed to stop at an EMS substation on the highway; (17) were aware that only Applicant's blood was drawn for testing against evidence found at the crime scene and around the Southern property; (18) were aware that Mr. Southern owned a small caliber weapon; and, (19) were aware both that Applicant's fingerprints were the only prints found on the suicide note and that an identifiable print, inconsistent with Applicant, had been lifted from one of the knives recovered from the house, but that there was no known standard with which to compare the print.

Counsel testified that in spite of their thorough investigation, they were unable to develop credible evidence supporting a third-party guilt theory that Allen Southern had killed his wife, or to develop any link between their client and Mr. Southern. Without establishing a link between the men, they could not establish the existence of a conspiracy, a

murder for hire scenario,⁹ or that the actions of Mr. Southern (or Chapman) after the shooting were a superseding, intervening cause of the victim's death. The Court finds that counsel made a reasonable strategic decision to present much of the information that they had uncovered as part of the surrounding circumstances of the crime, and to keep that door open if during the trial Applicant credibly told counsel that there was a connection between him and Mr. Southern. The Court further finds that it was reasonable for counsel not to pursue a theory of third-party guilt because they did not have evidence that satisfied the requirements of *State v. Gregory*, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534-35 (1941). *See also Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). The evidence of Mr. Southern's behavior in the months leading up to the shooting, as well as his actions on that day or in the days that followed, simply did not "raise a reasonable inference or presumption as to [Applicant's] own innocence" and did not constitute "such a train of facts or circumstances, as tends clearly to point out [Mr. Southern] as the guilty party," *see*

⁹ The State was unaware of the precise defense that trial counsel would present, but had anticipated that the defense might present evidence of third-party guilt if they could establish some connection between Applicant and Mr. Southern. PCR Tr. pp. 471-72; 482-83.

Gregory, 16 S.E.2d at 534-35. This is because, to present date there is no direct, admissible evidence that Mr. Southern, in fact, played a role in his wife's death, or that he and Applicant were somehow connected. The only evidence of a connection between Applicant and Mr. Southern was in a statement that Applicant had given to his first attorney, Donald Thompson; however, he later admitted to both trial counsel and Mr. Thompson that this statement was fabricated. Counsel clearly were not deficient in failing to present evidence that their client and his previous attorney had both confirmed was untrue.¹⁰

While the evidence that counsel elicited was only admissible for purposes other than suggesting that Mr. Southern was responsible for his wife's death, it still permitted counsel to argue that the State had "to improve the evidence a little bit to get it to fit their theory" of the case. It likewise allowed counsel to leave the door open to more fully develop Mr. Southern's culpability. **R. pp. 2235-48; 2273-90; 2292-93; 2319-20; R.**

¹⁰ The Court notes that the State did not object to the evidence that was presented, even though it contemplated and was concerned that the defense would present evidence of third party guilt. **PCR Tr. pp. 471-74; 482-83.**

pp. 2503-07; 2510-17; 2546-47; 2550-51; 2665-66; 2676-80.¹¹ The Court finds that counsel reasonably determined that, absent a "smoking gun" implicating Mr. Southern that Applicant did not and apparently could not provide, they could not go further with this issue than they later did at trial.

The need for a smoking gun was especially important because of other evidence that counsel was aware that the jury would hear, and ultimately did hear, that was inconsistent with a theory that Allen Southern was involved in his wife's death, such as the 911 call. This Court listened to the 911 tape and the conversation between the dispatcher and Mr. Southern when it was published by the State at the PCR hearing. Mr. Southern's emotional demeanor and the information that he provided in the call do not appear to be consistent with the theory that he was involved in the shooting of his wife. His voice and actions reflect a genuine concern for his wife. Also, he explained the circumstances surrounding the calls he received from employee Chapman, where he was when he spoke to

¹¹ This explains why Mr. Slade's closing argument stopped short of suggesting that Mr. Southern actually killed his wife or was otherwise responsible for her death. R. pp. 2761-68.

Chapman, as well as how and why he first looked for his wife in their house. He further explained his delay in getting her to his truck after finding her in the pasture some 300 yards from the house, that his wife told him that her assailant was waiting on her in the bathroom, and that the assailant left a note that was in the yard. More importantly, he provided information that the Court concludes is inconsistent with his own culpability and tends to refute any connection between him and Applicant. Specifically, even though Mr. Southern owned a small caliber handgun, he told dispatch that there appeared to be two wounds that were caused by a small caliber weapon. Further, he said that although his wife was not very coherent, she told him that the assailant's name was Berry and that he lived near the Southern.

Also, the Court finds that counsel correctly viewed the scenario later posited by PCR counsel as implausible-that Applicant had not actually shot Judy Southern and that Mr. Southern had shot her. Nothing in the record supports this theory, other than PCR counsel's conjecture, and such speculation does not satisfy the strict requirements of *Gregory* and *Holmes*.

On the issue of third-party guilt, Applicant asserts that counsel should have called Tonya Brown as a witness at trial. This witness was a

friend of the victim and testified at the PCR hearing that the Southernns were experiencing marital difficulties, that a breakup was coming, and that the victim felt she was going to die that very day of the murder (presumably at the hands of her husband). This Court finds that testimony was potentially inadmissible as hearsay at trial. But even if it passed muster under the hearsay rules, it was likely inadmissible under *Gregory* and *Holmes*, since it did not raise a reasonable inference or presumption as to Applicant's own innocence, nor constitute such a train of facts or circumstances that tends clearly to point out Mr. Southern as the guilty third party. Moreover, calling this witness may have opened the door on admissibility of Applicant's conflicting statements about a link between Mr. Southern and Applicant, depicting him as a non-credible individual.

Assuming *arguendo* that counsel's performance was deficient in not calling Brown as a witness, Applicant has not proved any prejudice resulting therefrom. Applicant admitted that he killed the victim and apologized to the sentencing-phase jury in his final statement. While this statement to the jury does not bar the present PCR claim, see *Johnson v. Catoe*, 336 S.C. 354, 520 S.E.2d 617 (1999), it is relevant to whether he was prejudiced by the failure of his

trial attorneys to further advance the theory of Mr. Southern's involvement in his wife's murder. Further, this Court finds that Ms. Brown is not a credible witness, as evidenced by her conduct before the murder and her testimony in PCR.¹² Also, the jury had the benefit of receiving from other sources evidence of the Southern's marital discord, including the fact they were supposed to attend marriage counseling on the day of the shooting.

Finally, Applicant cannot establish prejudice resulting from any of the supposed deficiencies claimed in this allegation because

¹² Brown socialized with the victim and the victim's paramour while their affair was ongoing, shortly before the murder; she actively encouraged Mrs. Southern to leave Mr. Southern, and she concealed the affair from Mr. Southern. Yet, she denied disliking Mr. Southern on cross-examination. She also reluctantly admitted that she now has a prejudice against the Seventh Circuit Solicitor's Office and the Gaffney Police Department, stemming from the prosecution of her daughter. While she could not have been impeached with the law enforcement bias at the time of Applicant's trial because her daughter was not charged until 2006, it is proper for this Court to consider that bias in assessing whether her PCR testimony was truthful, and that it negatively impacts upon her credibility. Also, any subsequent fact-finder would be presented with this same evidence if she is called as a witness.

there was overwhelming evidence proving that Applicant is guilty of murder and the aggravating circumstance of burglary. *See Strickland*, 466 U.S. at 694.¹³ In light of this overwhelming evidence of guilt, Brown's lack of credibility and

¹³ The State introduced the June 16th statement (State's Ex. 3), his letter to Mr. Southern (State's Ex. 6) and the suicide note left at the scene (State's Ex. 34). The State corroborated most details of the statement and the information he provided to fellow inmate Danny Edwards, *see Ground 11(c)(4)*. For instance, Applicant's DNA was found on cigarette butts in the victim's residence, as well as on evidence found in a trash can in the victim's master bathroom. His DNA was also found on cigarette butts located in the woods along the fence line of the victim's residence. Officers found a pair of gloves and a flashlight in one of these locations. R. pp. 2478-90; 2599-2602. Also, police tied the murder weapon to Applicant, and shell casings and projectiles that were found in the areas of residence described by Applicant to Edwards (and in State's Exhibit #3) were also positively determined to have been fired by the murder weapon. R. pp. 2332-33; 2468-75; 2491; 2552-64. Further, the "suicide note" was in his handwriting and his fingerprint was found on it; his moped was found where the note indicated that he had hidden it; Applicant fled the scene after the killing; and he hid in the woods at night, before being arrested as he hid under his wife's residence. Additionally, Applicant took officers to where he had hidden the murder weapon, which may not have otherwise been found.

the finding that her testimony is likely inadmissible, the Court finds that Applicant has failed to establish that there is a reasonable probability that, but for counsel's failure to call Brown as a witness, the result of the proceeding would have been different. *See Strickland, Id.* at 694.

As a last comment on this issue, the Court would be remiss in failing to note that the entire argument of third-party guilt may be of no consequence. The evidence in this case clearly proves that Applicant was the shooter in the murder. Even if evidence could be adduced that Mr. Southern somehow procured Applicant's services in a murder for hire scheme, this would in itself be an aggravating circumstance warranting a capital prosecution against Applicant pursuant to S.C. Code Ann 16-3-20(C)(a)(4).

The Court finds Applicant has not proven either deficient performance or resulting prejudice from counsel's investigation into and presentation of evidence concerning the allegation that Mr. Southern had some direct or indirect involvement in his wife's death.

V. (4) - FAILURE TO HIRE A PRIVATE INVESTIGATOR

Ground 11(a)(3), also alleges that counsel was ineffective for "failing to retain the services of a private investigator to assist in the investigation of the case." In reviewing this allegation, the Court is aware that Applicant's trial attorneys had almost forty years of practice experience between them, both were skilled criminal lawyers at the time they were appointed, and both had used the services of investigators in the past. The evidence reveals that counsel discussed whether or not they should hire an investigator before ultimately deciding in the negative because they felt that the primary reason to retain one would be to pursue issues of third-party guilt and murder for hire; but the extensive information that they had uncovered about Mr. Southern's potential involvement, although raising some suspicion, did not provide them with a sufficient factual basis to warrant further pursuit of these theories.

More importantly, the possibility of third-party guilt was completely inconsistent with the evidence in the case and information that Applicant was providing to them. The Court finds that counsels' decision not to request funds for the use of a private investigator, based upon Applicant's statements to them, was objectively reasonable and in the best interests of the appropriate use of resources and the

representation of their client at the time, and not deficient under *Strickland*. See *Stevens v. Delaware Correctional Center*, 295 F.3d 361, 373 (3^d Cir. 2002).

As to the second prong of ineffectiveness on this point, Applicant has not shown any prejudice arising from the failure to employ an investigator. Because Applicant did not present a private investigator at the PCR hearing, he has failed to establish what additional information a private investigator might have been able to uncover or how counsel's use of one would have otherwise created a reasonable probability of a different result, as required for relief under *Strickland*. E.g., *Bannister*, 509 S.E.2d at 809.

V. (5) - FAILURE TO HIRE A FORENSIC PATHOLOGIST OR SUICIDOLOGIST

VI.

Ground 11(a)(3) also alleges that trial counsel was ineffective for failure to investigate, develop, and present all available evidence from a forensic pathologist and/or suicidologist, or other appropriate expert, in support of the defense that Applicant entered the Southern residence with the intent to commit suicide.

In defense of Applicant at trial, it is admitted that counsel did not retain the services of a forensic pathologist or an expert in the area

of suicide. On this point, Attorney Slade testified that he reviewed the findings of state pathologist Dr. Ross with her roughly one month to six weeks prior to trial. She told him at that time in her opinion the victim had suffered a contact wound caused by a small caliber weapon. Because these findings were consistent with the planned defense and inconsistent with the State's theory of what had occurred, counsel was not deficient in retaining an independent forensic pathologist. Further, it is clear from the Record on Appeal that Dr. Ross subsequently changed her opinion, and did not alert counsel that she had amended her findings to say that the wound was a distant wound (as opposed to a contact wound), since she did not issue an amended report. **R. p. 2679.**

Viewing this evidence in light of the global evidence, however, one is mindful that Applicant admitted to counsel he had shot the victim, that there was no connection between him and Mr. Southern, and that Mr. Southern was not involved. Under these circumstances, trial counsel were reasonable in relying upon cross-examination of Dr. Ross as opposed to incurring costs of retaining their own forensic pathologist. See *Strickland*, 466 U.S. at 690; *Smith v. Angelone*, 111 F.3d 1126, 1132-33 (4th Cir. 1997). The relevant inquiry is not what could have been pursued but whether the choices that

were made were reasonable. Here, the Court finds counsel's choice on this point was reasonable.

On the second prong of ineffectiveness, Applicant failed to establish any prejudice from the failure to call a forensic pathologist as a witness at trial. The jury received the benefit of counsel's challenge to Dr. Ross at trial through the use at cross-examination of the initial report of Dr. Ross, which was not changed until after she met with the prosecution, stating that the wound could have been caused by a small or medium caliber bullet. **R. pp. 2672-80.** At PCR, Applicant's counsel called Dr. Riddick on these points. A review of the trial record shows that counsel presented the jury with the similar information about the type of bullet used as that presented in PCR through Dr. Riddick. Dr. Riddick disputed the trial testimony of Dr. Ross that the victim's injuries were caused by "a distant gunshot wound . . . consistent with a medium caliber weapon," such as a .357 caliber bullet, a .38 caliber bullet, or a 9 mm bullet. He opined that the wound could have been caused by a small or medium caliber bullet: a 9 mm bullet, a .22 caliber, or a .38 caliber bullet. **PCR Tr. pp. 87-88; 91-92.** Although trial counsel did not create a battle between two competing experts, counsel effectively exploited Dr. Ross' amended

findings as part of the defense's theme that the State was forced to "change" the evidence to fit its theory of the case.

Dr. Riddick further opined at PCR, based on his review of the medical records, that the victim could have survived "with very rapid medical intervention." However, this Court finds counsel's failure to present expert testimony to this effect was neither deficient performance nor prejudicial to Applicant. Counsels' investigation revealed that they could not establish that either Mr. Southern's actions upon finding his wife after the shooting or the subsequent treatment by the hospital staff was a superseding, intervening cause of death. Nevertheless, counsel elicited on cross-examination of the emergency room surgeon that the victim bled to death; that he "would hope" that "there is always a point at which someone can be saved or resuscitated, whenever someone bleeds to death;" and he did not know what time she was wounded. **R. pp. 2665-66.** The Court finds that Dr. Riddick's testimony does not establish that either Mr. Southern's actions or the subsequent medical treatment was a superseding, intervening cause of death. *See State v. Jenkins*, 276 S.C. 209, 211, 277 S.E.2d 147, 148 (1981); 40 CJS Homicide, § 11.

Dr. Riddick's main concern was not the time it took for Mr. Southern to get his wife to the hospital. Instead, his chief concern was the delay of almost an hour between her arrival at the ER and the time that she went into surgery. **PCR Tr. pp. 88-90.** Thus, his testimony does not support Applicant's allegation that counsel were ineffective for not presenting evidence of Mr. Southern's potential involvement. His testimony also fails the test for admissibility of evidence of third-party guilt under *Gregory*. Likewise, his testimony does not establish that the subsequent medical treatment was grossly negligent. Rather, the State's cross-examination established that the victim had lost seven of the ten to fourteen units of blood that were in her system before she was shot, and that *only the surgeon* could answer whether it was necessary to stop the bleeding before surgery could have been performed. Also, Dr. Riddick's opinion was only that the victim would have had a better chance of surviving if there had been a rapid response time, but he could not assign any figure to a real chance of saving the victim if she had been taken into surgery within thirty minutes of being shot. **PCR Tr. pp. 90-96.** Similarly, the surgeon opined at trial that it was uncertain he would have been able to save her "if she had been shot in the waiting room of Mary Black Hospital"

because "there is a lot of injury, a lot of bleeding, and a lot to go through to try to be saved, even at that point." **R. pp. 2663-64.**

Therefore, based on all the foregoing, this Court finds that Applicant has failed to establish there is a reasonable probability that, but for counsel's efforts, the result of the proceeding would have been different if counsel had retained the services of a forensic pathologist. See *Strickland*, 466 U.S. at 694.

Applicant further maintains that counsel were ineffective for failing to present a suicidologist or "other appropriate expert" to support the defense's position that Applicant entered the Southern residence with the intent to commit suicide, and that he therefore lacked the intent to commit a burglary.

The evidence reveals that counsel did consider presenting expert testimony, through either Dr. Morton or Dr. Schwartz-Watts, to support their guilt phase defense that Applicant's intent when he entered the Southern house was to commit suicide, and that he therefore lacked the intent to commit a crime for purposes of the burglary charge. However, counsel testified that they decided not to introduce such expert testimony in the guilt phase because (1) they were reasonably concerned that the presentation of any expert opinion of a suicidal mental state

would open the door for the State to present evidence of the CSC and negative mental diagnoses, such as the diagnosis that Applicant is a sexual sadist, consistent with the State's theory that Applicant broke in the home to rape and kill Judy Southern; and (2) the State was unaware of how the defense planned to utilize evidence of Applicant's suicidal intent, and counsel wanted to avoid alerting the State to the defense's intended strategy. By following this strategy, Counsel testified that they hoped the State would be unprepared to respond to the defense's position that suicide is no longer a crime, contrary to *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1819). The Court thus finds no deficient performance in this trial strategy.

Further, Applicant has not shown any prejudice on this point. Solicitor Gowdy confirmed that the State was unprepared for the defense that counsel presented. Also, there was extensive evidence presented in the guilt phase that supported the defense's theory that Applicant was suicidal at the time of the murder, even without the benefit of expert testimony.¹⁴

¹⁴ For instance, the witness who found the note he left at the scene (*State's Ex. 34*) and the parties referred to this note as a "suicide note;" he was placed on "suicide watch" at the jail; and he was not taken off of suicide watch until he gave his June 16, 2000 statement. **R. pp.**

To the extent that counsel's performance may be deemed deficient because they predicated this defense on a position contrary to older precedent from the South Carolina Supreme Court, any deficiency was not prejudicial, since the trial judge instructed the jury in accordance with trial counsel's position that suicide is not a crime.

Moreover, if the defense had chosen in the guilt phase of the trial to present expert testimony regarding Applicant's depression and suicidal intent—or the evidence in the February 22, 2010 PCR affidavit of Dr. Janet A. York, PhD (a psychologist and professor in the College of Nursing and a Psychiatric Mental Health Track Coordinator at the Medical University of South Carolina)—this, too, would open the door for damaging responsive evidence as discussed

2358; 2362-64; 2366; 2368-69; 2389-91. Further, he said in his June 16, 2000 statement that "[b]etween the hours of 12 mid night & 7 am on June the 7th, ... I wasn't sure if I just wanted to go in the house to commit suicide, or to rape someone, or to just shoot all of them [and] then kill myself." **R. pp. 2345-46; State's Ex 3, R. pp. 3617-21.** He also stated that he intended to commit suicide when he later broke into the Southern residence (**R. p. 3618**), and he asked to be given the death penalty because "the crime I committed definitely warrants it." His letter to Mr. Southern, **State's Ex. 6, R. pp. 3624-25**, also expresses his intent to commit suicide. *See R. p. 2387.*

above. The presentation of any such evidence would ultimately have been damaging to Applicant and such prejudice would greatly outweigh the minimal benefit gained through expert testimony that he was suicidal. The Court rejects Applicant's current implication that counsel could have presented this evidence in some limited form that would not have opened the testimonial door for damaging reply consistent with the prosecution's theory of the case. This would potentially include the type of information that the State elicited on cross-examination of Dr. Morton about Applicant's depression at sentencing, **R. pp. 3378-92**, as well as Applicant's statement to Agent Prodan that he contemplated committing a "mass murder" before he committed suicide, or raping his brother-in-law's wife and killing his brother-in-law before he committed suicide. **R. pp. 3161-62.**

The Court finds that counsel's determination that they did not want the guilt-phase jury to hear such evidence was reasonable and not prejudicial. Further, because there was overwhelming proof of guilt of murder and burglary, Applicant has failed to establish a reasonable probability of a different result but for counsel's failure to present this expert testimony. *Strickland* at 687.

V. (6) - APPLICANT WEARING PRISON CLOTHES/RESTRAINTS AT TRIAL

Ground 11(a)(4) raised by Applicant is that counsel were ineffective because they failed to ensure that jurors did not see Applicant in prison clothes in the guilt phase. **Ground 11(b)(7)** asserts the same error in the penalty phase.

The evidence on this issue in the record reveals that this decision was made only after counsel had (1) researched the applicable law; (2) discussed the proposed strategy with other attorneys experienced in trying capital cases, who agreed with the strategy; (3) thoroughly explained their proposed strategy to both Applicant and his parents; (4) informed Applicant and his parents that counsel would not follow the strategy if they objected to it; and (5) obtained Applicant's consent to the strategy.¹⁵ Although Applicant's consent to trial strategy does not, alone, vitiate all ineffective assistance claims, his

¹⁵ The Record on Appeal corroborates counsel's testimony because the trial judge conducted an on-the-record waiver of Applicant's right not to appear in prison garb, and Applicant confirmed that he consented to jurors seeing him so attired. **R. pp. 43-44. See also R. pp. 44-45.**

consent is probative both of the reasonableness of the chosen strategy and of counsel's performance. *Strickland*, 466 U.S. at 689; *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

Counsel testified that they adopted this strategy to impress upon jurors that, regardless of the sentence he received for murder, Applicant was already incarcerated, he would not be going home, and he was not a public threat. They also sought to avoid any juror backlash from their strategy of not putting information of the CSC before the jury in the guilt phase, based upon their decision to attack the prosecution's evidence of burglary and thereby attempt to undermine the State's ability to obtain a death sentence. The Court finds this part of counsels' strategy complemented their sentencing phase strategy of how to best deal with the evidence that Applicant committed CSC on his infant daughter, because the jury would have already seen the visual reminder that Applicant was already being punished for the CSC. Also, trial counsel opined that his appearance in prison garb might potentially have a positive effect upon the jury's sentence, based upon the inference that incarceration for life imprisonment would be rough for someone looking as youthful as Applicant did at the time of trial. See *Estelle v. Williams*, 425 U.S. 501, 507-08 (1976); *Humbert*

v. State, 345 S.C. 332, 337-38 & n. 4; 548 S.E.2d 862, 865 & n. 4 (2001) (acknowledging that this may be sound trial strategy). It appears to this Court that the decision to wear prison garb at trial was part of a reasonable trial strategy, undertaken with the consent of Applicant, who should not now be allowed to claim this decision was deficient performance.

Nor has Applicant proven any prejudice on this issue. There was overwhelming evidence Applicant was guilty of murder and burglary in the first degree. See *Humbert*, 548 S.E.2d at 865-66. Also, he did not object to counsel's chosen strategy when the trial judge gave him the opportunity to do so in chambers, **R. pp. 42-45**, or at any point in either phase of his trial. Finally, at PCR he neither presented any evidence nor alleged that he disagreed with counsel's chosen strategy, or that the State compelled him to stand trial while dressed in prison attire. For these reasons, this allegation lacks merit.

In **Ground 11(a)(5)**, Applicant contends that counsel were ineffective in the guilt phase because they failed to ensure that jurors did not see him in restraints. In **Ground 11(b)(8)**, he raises the same claim with respect to the penalty phase. Both allegations lack merit because Applicant has failed to present *any* evidence that, in fact, jurors saw him in visible restraints. The

Court has reviewed the Record on Appeal, and there is no indication that Applicant was in restraints in the jury's presence at any time during his trial.

To the contrary, during the pre-trial in chambers hearing, the trial judge addressed the question of whether counsel wanted Applicant shackled or handcuffed in the jury's presence. Mr. Pruett stated that counsel wanted the restraints and handcuffs removed. The trial judge then stated that "[t]hey will be removed before the defendant is brought into the courtroom." **R. p. 46, ll. 11-19.** There is no indication in the remaining portions of the record that this directive was disobeyed or that any juror witnessed Applicant in handcuffs or restraints.

Also, Applicant did not present any evidence to support this claim at the PCR hearing. Mr. Slade testified that he did not recall Applicant ever appearing in leg irons or shackles at trial (**PCR Tr. p. 587, ll. 15-21**) and Mr. Pruett testified that Applicant did not wear leg irons or shackles in front of the jury. **PCR Tr. p. 733, ll. 3-9.** Because there is no evidence to support Applicant's conclusory allegation, he has failed to prove either deficient performance by his attorneys or any prejudice under *Strickland*. See *Fountain v. United States*, 211 F.3d 429, 434-35

(7th Cir. 2000); *Marquard v. Secretary for D.O.C.*, 429 F.3d 1278, 1310 (11th Cir. 2005).

Therefore, for all of the foregoing reasons cited above in discussion of the law and facts of the case on all of Applicant's claims of ineffective assistance of counsel relating to the guilt phase of Applicant's trial, this Court finds there has been no showing of deficient performance or resulting prejudice on the part of trial counsel, nor constitutional violations in the proceeding below. Applicant has failed to meet the necessary burden of proof entitling him to relief at PCR on guilt-phase issues; thus, Applicant's claims relating thereto are denied.

VI. APPLICANT'S GROUND 11(b) - PENALTY PHASE

Applicant's **Ground 11(b)**, set forth in his amended petition for PCR, forms the crux of his case with respect to the **penalty phase** of the trial below and presents allegations of ineffective assistance of trial counsel in the penalty phase. The Court discusses these allegations in six specific topic areas. Some of these issues were also raised with respect to the guilt phase of the trial. Each of these issues will be discussed individually below. As stated previously, both of Applicant's trial attorneys testified at the PCR

hearing. The Court specifically finds that counsels' testimony and supporting evidence on the issues relating to the penalty phase of the trial are credible as to all of the allegations of ineffectiveness raised by Applicant, and the Court accepts their testimony in ultimately denying those allegations.

VI. (1) FAILURE TO PRESENT ADEQUATE MITIGATING EVIDENCE

Applicant claims in Ground 11(b)(1) of his amended petition that trial counsel "failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence," and "failed to retain a mitigation specialist or social history investigator to conduct a mitigation investigation and develop an adequate social history." The Court recognizes "it is trial counsel's responsibility to adequately investigate and present evidence in mitigation of guilt." *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir.2003). However, counsel is only required to make a reasonable investigation for possible mitigating evidence. *Id.*

On this point, counsel testified that after consideration, they decided not to retain a social worker or mitigation specialist because they were

able to effectively present most of their case in mitigation through witnesses Reverend James Dale Binney (Applicant's adoptive father) and Dr. Donna Schwartz-Watts (forensic psychiatrist). According to counsel, they did not hire a social worker or mitigation investigator simply to assist with their investigation because counsel, who had at the time almost forty years of experience practicing law between them, decided that they could do the investigative work themselves and retain a closer focus on the issues of the case.

From a review of the entire record, the credible evidence is that counsel made a reasonable investigation into and presentation of mitigating evidence under prevailing professional norms. *Strickland*, 466 U.S. at 686. This Court finds that the decision to conduct mitigation investigation and presentation in this way was reasonable under *Strickland*.

Attorney Pruett has a great deal of experience in gathering the types of records that a mitigation specialist would gather, both in his former work as a prosecutor and from obtaining family court records while in private practice. Also, Attorney Slade has years of experience in conducting an investigation to prepare for trial. Counsel discussed the case with Applicant a number of times prior to trial, with greater frequency as the trial date approached. Counsel's

various discussions with Applicant covered everything, including his relationship with his adoptive parents, with his natural mother, and with his wife. The uncontroverted testimony reveals that counsel spent a lot of time discussing Applicant's relationship to his wife and whether she should be presented as a witness.

Further, counsel met with Rev. and Mrs. James Binney on six occasions, for a number of hours each visit. They also met separately with Rev. Binney to prepare him as a witness at trial. Counsel testified that Rev. and Mrs. Binney gave counsel a complete social history of Applicant from the date they adopted him at the age of four days until the time of the trial. Anything about his history that his adoptive parents could not tell counsel, counsel obtained directly from Applicant. Counsel also obtained background information from Melanie Binney. Mr. Slade discussed the case with Melanie Binney "between six and ten times," according to his testimony, either in person or by telephone. Counsel spoke to a Mr. Bolt, a former employer of Applicant, who had some positive things to say about Applicant, but also said he ultimately had to fire Applicant for engaging in criminal activities at the car dealership where they worked. Counsel obviously contacted Mr. Noel Swain, who testified as a sentencing phase witness.

Further, counsel contacted various places where Applicant had been hospitalized and several schools that he attended to gather relevant records, such as the Alpha Facility Aftercare. Counsel also obtained records from Spartanburg Regional Hospital, Upstate Carolina Medical Center, and Patrick Harris Psychiatric Hospital by either writing these institutions or personally going to them; counsel had a copy of an evaluation of Applicant by Dr. Geoffrey McKee, who had evaluated Applicant in connection with the CSC charge; Mr. Slade spoke to Applicant's former attorney on the CSC case; counsel had a copy of the trial transcript from the CSC case; and, counsel had Applicant's records of his prior convictions for larceny and related crimes, the Spartanburg jail records, and the records from the Gaffney County Detention Center.

Counsel's investigation showed that Applicant did not come from a dysfunctional family where the parents may be responsible for abuse that resulted in his behavior. Rather, no evidence was uncovered of any physical or sexual abuse by Applicant's adoptive family; to the contrary, they are clearly loving and supportive adoptive parents who provided a nurturing environment for their son during his childhood,

and had continued to advocate for him all of his life, including at the PCR proceeding.

Counsel presented the results of their investigation to their retained experts, Drs. Schwartz-Watts and Morton. Neither Dr. Schwartz-Watts nor Dr. Morton told them that more information or records were needed to accurately form a mitigation opinion. The defense eventually called five sentencing phase witnesses in mitigation of punishment: Capt. Rocky Jones from the Cherokee County Detention Center, Dr. Donna Schwartz-Watts, Dr. William A. Morton, Jr., Mr. Noel Swain, and Rev. James Dale Binney.

Counsel considered hiring a social worker to assist them in presenting the background information at trial, but ultimately made a strategic decision to present information about Applicant's background through Rev. Binney. Counsel testified that the experience of both attorneys was that for the most part, social workers are ineffective, since the social worker's only connection with the defendant is as a retained expert. On the other hand, Rev. Binney, a well-educated and articulate man, "was a good person to make that kind of contact that we needed . . . with the jury" because of his background and because he had a good way of presenting himself. Also, Mr. Slade wanted Rev.

Binney to have a prominent role in the trial. Counsel did not interview any other biological or adoptive family members, such as Ms. Haygood who testified at PCR, but did not perceive such was necessary or helpful.

More importantly, counsel had uncovered more than enough evidence to support the theories to which the defense experts testified – including a history of multiple sexual disorders, a diagnosis of Fetal Alcohol Syndrome, and evidence of his suicidal intent. In light of all of the evidence that counsel unearthed from those closest to Applicant's upbringing and from Drs. Schwartz-Watts and Morgan, who had reviewed Applicant's history, it was reasonable for counsel not to identify and interview every other living family member or every therapist who had once treated Applicant's biological mother, as argued by PCR counsel (See *Van Hook*, 130 S.Ct. at 19). Further, trial counsel made a reasonable presentation of their case in mitigation to the sentencing-phase jury.

The testimony in the case reveals that counsel considered but decided against calling Applicant's adoptive mother, Mrs. Sandra Binney, in the sentencing phase because counsel did not think that she would be a very good witness. In the judgment of both attorneys, she was extremely focused on the sole issue of Fetal

Alcohol Syndrome. In the words of counsel, this "made her appear that she was trying to distance herself from [Applicant's] problems," as if to say that he was "very flawed" when adopted. Further, she was overwhelmingly emotional in pretrial preparation and during the trial.

The testimony reveals that counsel also strongly considered using Melanie Binney as a witness in the penalty phase because Mr. Slade thought that she could humanize Applicant.¹⁶ However, counsel testified that "there was a downside to her testimony." In particular, a prosecution witness was prepared to testify that, when Melanie Binney went to the hospital in connection with the CSC case, she said words to the effect of "can't we keep this in the family? . . . Do we have to make a police matter out of this?" Whether or not that witness testified, the State would question her about these remarks, and Mr. Slade reasonably felt this would degrade her in jurors' eyes because jurors would want to know how a wife could stay with the man who had raped her infant daughter. Mr. Slade was also worried that the State might potentially

¹⁶ Mr. Slade thought that Melanie Binney could do this because she was "a likeable person." Also, counsel hoped that she might potentially lessen the negative impact of the CSC case.

cross-examine her about bizarre or unusual sexual practices in which she and Applicant engaged. While this information was not in Dr. Schwartz-Watts' report and she did not later testify to it, counsel was aware that the State had an independent evaluation undertaken.

Given the numerous sexual disorders that Dr. Schwartz-Watts did find and the various things that Applicant had told the State's examiner, the Court finds that this was a reasonable concern and strategic response by Mr. Slade. Mr. Slade discussed his concerns with Melanie Binney and, by the time of the sentencing phase, she was reluctant, if not completely unwilling, to testify. For these reasons, the Court finds that Applicant has failed to prove deficient performance in either counsel's investigation into or presentation of mitigating evidence.

Further, Applicant has not met his burden of proving that he was prejudiced by counsels' failure to employ a social worker or mitigation specialist or by their failure to call Sandra Binney, Melanie Binney, or Ms. Haygood at trial. To establish prejudice in a capital sentencing proceeding, Applicant must prove that "there is a reasonable probability that ... the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have

concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Wong*, 130 S.Ct. at 386 (to determine whether there was prejudice, "it is necessary to consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path—not just the mitigation evidence [counsel] could have presented, but also the negative information that would have come in with it"). This Court finds that Applicant has not met this burden.

Unlike *Sears v. Upton*, 130 S.Ct. 3259, 3261-63, 3267 (2010), this is not a case where PCR counsel uncovered and presented significant mental and psychological impairments that trial counsels' investigation failed to uncover. Instead, the evidence that Applicant presented at PCR supported the same three theories that trial counsel had presented: that Applicant was suicidal at the time of the murder; that he suffered from Fetal Alcohol Spectrum Disorder or Fetal Alcohol Effects; and, to a lesser extent than argued by trial counsel, that he suffers from several sexual disorders.

PCR counsel introduced a voluminous amount of Gayle Dove's (Applicant's birth mother) VA medical records as **Applicant's Ex. 3** in furtherance of the argument that trial

counsel should have had assistance in investigating mitigating evidence. A review of these records by the Court reveals that these documents mostly reflect her treatment for migraine headaches and post-traumatic stress disorder as the result of being sexually assaulted after she had given Applicant up for adoption, and these are irrelevant to the issues before this Court. The best and most credible evidence that Gayle Dove drank while she was pregnant was presented at trial through Dr. Schwartz-Watts—that Ms. Dove admitted to Mrs. Sandra Binney that she drank alcohol while she was pregnant. Dr. Andrews also claimed that the VA records reflect that Ms. Dove admitted to a suicide attempt when she was sixteen. However, the suicide information in this record was already before the sentencing-phase jury, which heard testimony that Ms. Dove had committed suicide. The jury also heard other evidence that Applicant was suicidal at the time of the murder, including Dr. Schwartz-Watts' extensive testimony about Applicant's "history of suicide attempts, suicidal ideation that you commonly see when he's been under stress." She further testified that he has a history of depression, that he had been diagnosed with various forms of depression, and that he had previously been hospitalized for treatment of depression. See **Ground 11(b)(2)**.

Moreover, Applicant offered as an exhibit a group of records that he claims PCR counsel were able to locate but that were not in the file of either attorney, as **Applicant's Ex. 15**. Even assuming that these records were not uncovered until PCR, for the reasons more fully discussed, *infra*, Applicant did not establish that this evidence, when considered in connection with the totality of the available mitigation evidence adduced at trial and in the PCR proceeding, was such for the Court "to conclude that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Thus, the PCR evidence produced by witness Dr. Andrews (professor of social work) on behalf of Applicant that Ms. Dove's family had a history of suicide attempts would not have greatly added to the information that was uncovered and presented by trial counsel. It would merely have provided additional information to corroborate the opinions of Drs. Schwartz-Watts and Morton.

Also, this Court finds counsel's failure to present the evidence of Applicant's background through a social worker, instead of or in addition to Rev. Binney, was not prejudicial. With the exception of Dr. Andrews' testimony about Ms. Dove's family suicides and her VA records, virtually every point to which she testified concerning Applicant's background was

presented to the sentencing-phase jury through either Rev. Binney or Dr. Schwartz-Watts. Thus, the Court finds the information to which Dr. Andrews testified was largely cumulative to the evidence that trial counsel presented. Additionally, counsel was able to present this information through a respected family member, as opposed to a paid expert. Rev. Binney was not cross-examined, whereas Dr. Andrews' testimony was impeached and undermined through cross-examination, exposing her personal opinion against capital punishment and critical weaknesses in the manner that the information she relayed was gathered.

Likewise, there was no prejudice from the failure to call either Sandra Binney or Melanie Binney at trial because there is no credible evidence that either woman would have testified at trial. Sandra Binney's contrary PCR testimony (PCR Tr. p. 447) is both inconsistent with the testimony of both trial attorneys and with Rev. Binney's testimony that "I speak for . . . his mother, . . . this is more difficult for her, I believe, as a mother, and – [that] is why I have opted to speak for her on her behalf in this setting." R. p. 3423, ll. 7-11. Likewise, Melanie Binney's representation in ¶ 8 of her affidavit that she was willing to testify, but that counsel did not call her, is inconsistent with her failure to

be deposed and subject herself to cross-examination. Further, neither woman would have presented the jury with any additional information "of value," see *Van Hook*, 130 S.Ct. at 19, because every important point in the evidence presented from these women was presented to Applicant's sentencing-phase jury. Also, Melanie Binney would be subject to impeachment with her comments and efforts at the hospital to prevent Applicant's arrest for sexually assaulting her daughter; with evidence of her willingness to violate a court order by allowing her husband to live under her house, where he was found by police and arrested; and potentially by evidence of the unusual sexual practices in which she and Applicant engaged. See *Wong*, 130 S.Ct. at 386. Similarly, there was no prejudice from the failure to present Ms. Haygood. As the Court's synopsis of her testimony reflects, she also "would have added nothing of value." *Id.*

Thus after review, this Court finds that trial counsel did not in this case present a superficial mitigation theory during the penalty phase. Further, the evidence and records Applicant presented in PCR were largely cumulative to the evidence presented at trial. As a result, he presented, at best, "a fancier mitigation case," *Jones*, 332 S.C. at 339, 504

S.E.2d at 827; *see also* *Sears*, 130 S.Ct at 3266 ("there is no prejudice when the new mitigating evidence would barely have altered the sentencing profile presented to the decisionmaker") (citing *Strickland*, 466 U.S. at 700). This Court has weighed the totality of the mitigating evidence presented, both at trial and in PCR, against the State's extremely strong case proving Applicant guilty of murder and the statutory aggravating circumstance of burglary, and the Court cannot "conclude that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

VI. (2) FAILURE TO PRESENT A SUICIDE EXPERT

Applicant's **Ground 11(b)(2)** is that counsel were ineffective for not retaining "an expert in suicide to support their theory that [Applicant] had entered the Southern residence with the intent to commit suicide." As in the guilt phase, the Court finds this allegation to be without merit in the penalty phase. Because of counsels' need for a means to mitigate the CSC charge and because counsels' investigation had uncovered possible evidence of FAS, trial counsel made a reasonable decision to employ Dr. Schwartz-Watts. She is a forensic psychiatrist

with substantial expertise in diagnosing and treating persons who have sexually-related mental health issues. Also, she testified extensively about Applicant's suicidal intent at the time of the crimes and past evidence of suicide intent and attempts.¹⁷

Nor has Applicant shown prejudice resulting from counsel's failure to retain and present a suicidologist. All salient points in Dr. York's affidavit were extensively covered by either Dr. Schwartz-Watts or Dr. Morton, and Dr. Schwartz-Watts was able to testify about her diagnoses of Applicant's various sexual disorders, unlike Dr. York. Also, considering the totality of the evidence presented, including the overwhelming evidence of guilt of murder and the statutory aggravating circumstance, Applicant failed to establish "that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

¹⁷ She also has a great deal of experience in conducting forensic evaluations of an accused's competency to stand trial and criminal responsibility. Further, her training and experience make her more than competent to testify about whether Applicant was suicidal at the time of the murder, and she is as qualified as a psychologist to render such an opinion. Thus, the Court cannot find that it was unreasonable for counsel not to employ a suicidologist.

VI. (3) FAILURE TO PRESENT A FETAL ALCOHOL EXPERT

Applicant 's Ground 11(b)(3) is that counsel were ineffective for not retaining an expert in Fetal Alcohol Spectrum Disorder, also known as Fetal Alcohol Syndrome or Fetal Alcohol Effects, although they knew Applicant 's birth mother drank alcohol during her pregnancy. Applicant also claims that counsel further failed to obtain his medical, school, and other records, as well as his birth mother's medical and other records to document that he suffered from Fetal Alcohol Spectrum Disorder.

The evidence before this Court reflects that trial counsel pursued Fetal Alcohol Syndrome (FAS) through a neurologist and a forensic psychiatrist who had treated numerous individuals suffering from FAS. Dr. Schwartz-Watts, the forensic psychiatrist, represented to counsel that she had expertise in this area. She found that Applicant suffered from FAS. Neurologist Dr. David Bachman of MUSC reviewed an MRI, PET scan, and EEG of Applicant, as well as early childhood photographs of Applicant. He did not find any organic brain abnormality, nor could he determine Applicant had FAS. Counsel did not call Dr. Bachman as a

witness, and only presented Dr. Donna Schwartz-Watts in the penalty phase.

She opined that Applicant met all of the criteria for FAS known in the medical literature at that time. Specifically, she testified that Applicant had: (1) a history of heavy alcohol ingestion by the mother during pregnancy; (2) failure to thrive as a child; (3) facial dysmorphism as a child; and (4) documented developmental brain dysfunction. She also testified extensively about FAS, the characteristics, developmental problems, and resulting impulsive behavior.¹⁸ The Court concludes that counsel reasonably relied on their expert's representations and diagnosis and that their performance was not deficient in this regard. See *Walton v. Angelone*, 321 F.3d 442, 466 (4th Cir.2003); *Poyner v. Murray*, 964 F2d 1404 (4th Cir. 1992).

The Court further finds that Applicant has not proved any prejudice from counsels' chosen strategy. Dr. Natalie Novick-Brown's testimony regarding whether Applicant met the criteria for FAS was cumulative to Dr. Schwartz-Watts' and

¹⁸ Rev. Binney also testified to Applicant's developmental problems, school problems, impulsive criminal behavior as a teenager, and his inability to hold a job as an adult. Rev. Binney attributed many of Applicant's lifelong problems to FAS.

Rev. Binney's trial testimony. In fact, Dr. Novick-Brown, a psychologist, admitted that Dr. Schwartz-Watts informed the jury that Applicant met the criteria for FAS.

Further, Dr. Novick-Brown's testimony that Applicant's behavior on the date of the murder was consistent with FAS is not persuasive. She testified that approximately 50% of persons diagnosed with any fetal alcohol syndrome condition exhibit sexually inappropriate behavior that can range from inappropriate remarks, a brief inappropriate touch, up to sexual assault behavior. However, she did not attempt to relate Applicant's sexual assault of his three-month-old daughter or his thoughts of raping Judy Southern to FAS, and she never opined those actions were the result of FAS. Dr. Bookstein briefly mentions in his report that individuals with FAS often have special difficulties with inappropriate sexual behaviors; however, Dr. Bookstein did not opine that Applicant sexually assaulted his three-month-old daughter or considered raping Mrs. Southern as a result of FASD. Dr. Bookstein also admitted that he did not know anything about the facts of this particular case.

At PCR, Dr. Novick-Brown's opinions were impeached by the facts and evidence in this case, including Applicant's own admissions. The

evidence suggests that Applicant's actions on the evening before and the day of the murder were planned and methodical, and not the impulsive result of FAS. Further, her attempt to relate Applicant's overall plan to impulsiveness was cumulative to Dr. Schwartz-Watts' trial testimony. More importantly, Dr. Schwartz-Watts testified at the PCR hearing that she remained firm in her original conclusion that Applicant entered the victim's home as a result of his sexual sadism.

Dr. Schwartz-Watts also testified at PCR that there was no medical study showing that sexual sadism is linked to FAS. She further testified that the studies cited in Novick-Brown's affidavit were unreliable,¹⁹ and that Dr. Schwartz-Watts would need to see more studies before she would accept a theory that fetal alcohol exposure is a separate risk factor for sexual paraphilias. Dr. Schwartz-Watts is a nationally recognized expert on sexual deviant behaviors and disorders, and the Court finds that her testimony is highly credible on this issue. As a result of all the foregoing, this Court finds

¹⁹ One citation is not a scientific study. Dr. Schwartz-Watts testified that she conducted an extensive search and could not find any studies that replicated what the study in the citation found.

Applicant has failed to show deficient performance or resulting prejudice in failing to call Dr. Novick-Brown or any other forensic psychologist at trial.

VI. (4) FAILURE TO PRESENT A STATISTICAL EXPERT

Likewise, counsel was not deficient in failing to identify or call Dr. Fredrick Bookstein, a statistician, at trial in 2003. As stated previously, counsel had a neurologist review Applicant's MRI and PET scans who determined that the results of these tests were normal. The neurologist also reviewed childhood photographs of Applicant and could not determine he had FAS. Counsel had Dr. Schwartz-Watts examine Applicant. Her testimony about her findings, discussed above, was premised on the same diagnostic criteria Dr. Bookstein's findings support, and she opined that Applicant had FAS.

Dr. Bookstein is not a radiologist, neurologist, nor neuro-radiologist. He is not licensed to review an MRI, issue an MRI report, or diagnose an individual with FAS. Thus, his testimony about what he saw reviewing an MRI film is not credible. Dr. Bookstein measured the corpus collosum of a 3-D image of Applicant's brain generated by a computer program Dr.

Bookstein wrote, which used MRI films from MUSC, and compared it to measurements of a Seattle study group. However, Dr. Bookstein was engaged in frontier research science at the time of Applicant's trial. During Dr. Bookstein's deposition, Respondent impeached him about a paper that he wrote in 2005 complaining that the medical community would not accept or recognize his pioneering work or research. **Dep. pp. 66-133, Respondent's Deposition Exhibit 2.**²⁰ Dr. Bookstein admitted that he wrote this paper, and he admitted that his scientific research attempting to demonstrate fetal alcohol damage to the center of the brain—the corpus collosum—through 3-D MRI study and measurement, was not accepted by the fetal alcohol and psychiatric communities until 2005 *and after*, long after Applicant's trial. **Dep. pp. 66-133, Respondent's Deposition Exhibit 2.** He also admitted that, after many diverse rejections of his work, he was only able to get the work published in 2002 in a journal about brain anatomy, not a journal about alcohol damage (**Dep. pp. 106-08**); that this particular work was not replicated until after 2005, at another

²⁰ This paper was published in 2006, in the very first issue of a new journal called *Biological Theory*. **Dep. p. 67, ll. 2-15.**

university (**Dep. p. 108**); and that, prior to 2005, no one was accepting his research team's work except neuro-imaging researchers, not fetal alcohol researchers or psychiatric researchers. **Dep. pp. 121-22.** He likewise admitted he moved into the field of neuro-imaging research to get his work published and read. **Dep. p. 122.**

Further, he did not begin testifying in FAS cases until 2004, because the Center for Disease Control did not publish the standardized criteria for diagnosis of FAS until 2004. He also admitted fetalalcoholexperts.com, of which Dr. Novick-Brown is a member, stated in its own publication that it did not begin the systematic forensic diagnosis of FAS until 2007 and that diagnosis of FAS prior to 2004 was "hit or miss." His methodology employed in this case was not yet accepted, even by other fetal alcohol research groups. Thus, Applicant has not proven deficient performance or resulting prejudice in failing to call Dr. Bookstein or similar expert as a witness. *Strickland, Id.*

Further, counsel was not deficient in failing to obtain Applicant's personal records to show he suffered from FAS. While counsel did not introduce Applicant's school and medical records, Dr. Schwartz-Watts summarized what was in the records, and she testified that their contents were consistent with FAS. She based

much of her opinion on the contents of Applicant's school and medical records, and she related the same to the jury.²¹

Dr. Schwartz-Watts testified Applicant met all of the criteria for FAS, including cognitive deficits based on his school records and psychological testing. Thus, the admission of the records would have been cumulative to evidence actually presented to the sentencing jury. Again, this Court has weighed the totality of the mitigating evidence presented, both at trial and in PCR, against the State's extremely strong case proving Applicant guilty of murder and the statutory aggravating circumstance of burglary, and the Court cannot "conclude that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

²¹ Dr. Schwartz-Watts testified at trial that she reviewed Applicant's school records, that he had many difficulties in learning and paying attention, and that he clearly had documented neuro-developmental problems. She further testified that Applicant suffered from attention deficit disorder (ADD), and that the records show his ADD was resistant to medication, which she opined consistent with FAS. Also, there was no record of any medical illness or anything in his history that would explain his failure to thrive, except FAS. Rev. Binney also informed jurors that Applicant had difficulties in school from the time he enrolled and that Applicant failed to gain any weight as a child.

Likewise, this Court finds that trial counsel was not deficient in not locating and introducing Applicant's mother's records to document that he had FAS. While Applicant introduced voluminous records of his birth mother, only a few mention her drinking while she was a teen. Also, none are contemporary with her pregnancy. The records were self-reports, some made 20 to 25 years after the fact. The records also conflict. Even Dr. Novick-Brown admitted that one of the two best indicators Applicant's mother drank while she was pregnant was the report to Applicant's adoptive mother that was before the sentencing jury.²² The records are at most cumulative to the evidence before the jury. *Id.*

Had Applicant's or his mother's records been introduced, this Court finds there has been no showing that the result of the sentencing proceeding would have been different. *Id.* The record does not support a finding that FAS caused Applicant to murder Judy Southern or to sexually assault his own daughter. Dr. Schwartz-Watts testified at trial and at PCR that Applicant was motivated by sexual sadism when

²² Dr. Novick-Brown agreed that the best evidence that Applicant's mother drank while pregnant was the mother's report to the adoptive mother.

he burglarized Mrs. Southern's home. This Court finds that Dr. Schwartz-Watts' testimony is credible on the point that there is no relation between sexual sadism and FAS. Her testimony on what motivated Applicant with regard to this crime is consistent with the evidence in this case. Applicant admitted he considered raping Judy Southern when entering her home. He admitted he did not enter the home until after he knew a man and a woman lived there. Also, he admitted he had fantasized about raping his brother-in-law's wife and then killing his brother-in-law. Dr. Schwartz-Watts opined that he raped his daughter because of a different sexual paraphilia, pedophilia. This diagnosis is supported by the credible facts and evidence in this case.²³ Therefore, the Court concludes that Applicant has not proven deficient performance or prejudice in **Ground 11(b)(3)** with regard to FAS issues.

VI. (5) FAILURE TO PRESENT AN EXPERT IN PRISON ADAPTABILITY

²³ Prior to sexually assaulting his daughter, Applicant had been viewing child pornography on his computer. Select portions of this pornography were admitted in the penalty phase of Applicant's trial.

Applicant alleges in **Ground 11(b)(4)** that counsel were ineffective for not retaining an expert in adaptability to prison life and for not presenting any evidence about Applicant's adaptability to prison or his lack of violent or aggressive history during his prior incarcerations. The Court finds that counsels' performance was not deficient because counsel considered presenting such testimony but made an objectively reasonable strategic decision under *Strickland* not to do so.

Mr. Slade correctly surmised that the State was not seeking the death penalty based on Applicant's future dangerousness. The correctness of his assessment is supported by the State's closing argument in the sentencing phase. **R. pp. 3439-55.** The State sought death as retribution for Judy Southern's murder based upon the circumstances of the offense and his character, as well as his motive, which was to avoid punishment and possible danger to himself because of his prior CSC involving his infant daughter. The State did not argue that Applicant would pose a danger to other inmates and staff in prison, or that he would pose a danger to the community if not sentenced to death. *Contra Simmons v. South Carolina*, 512 U.S. 154 (1994). As a result, Attorney Slade reasonably concluded

that evidence of adaptability to prison would not be as effective in mitigating punishment.

Attorney Pruett's reason for not wanting to present evidence of adaptability to prison was also objectively reasonable. At the time of Applicant's November 2003 sentencing hearing, prosecutors were routinely introducing evidence to rebut expert testimony in a fashion as described by Mr. Pruett, and there was no change in the law until years after Applicant's trial. See *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005) (disapproving of this evidence). Thus, Mr. Pruett could reasonably determine that he did not want the final evidence heard by jurors to be that life in prison is not harsh. The Court further finds that Applicant has failed to prove any prejudice resulting from counsels' performance on this issue because trial counsel presented an extensive and reasonable case in mitigation of punishment at Applicant's trial; there was overwhelming proof of murder and burglary; and, because the point of PCR prison adaptability witness Aiken's opinion is that the level of security in the SCDC institutions where Applicant would be housed if he received a life sentence is such that only inmates who engage in escape attempts or violently disruptive behavior (such as taking hostages or assaulting staff) are not adaptable to life in prison. Thus, this Court

finds that the testimony of witness Aiken, even if presented at trial, would not have altered the outcome of the proceeding.

VI. (6) FAILURE TO OBJECT TO CLOSING ARGUMENT

Ground 11(b)(4) is that that counsel were ineffective for not objecting to the State's improper comments in closing argument, in three particulars: "failing to object to the State's suggestion that the jury should impose death for the victim of the unrelated [CSC] conviction, failing to object to the State's argument that the mitigating evidence had to have a nexus to the crime to be considered by the jury, and failing to object to the State's argument that the State was speaking on behalf of the victim in the case." Although Mr. Slade was primarily responsible for objecting to the Solicitor's closing, neither lawyer at PCR recalled any objectionable comments.

The Court finds that Applicant cannot show deficiency or prejudice from counsel's failure to object to the State's closing argument (**R. pp. 3439-55**) because he did not prove that any of the three challenged portions of the closing argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637

(1974). The Court specifically rejects the claim that the State urged death based upon evidence of the CSC case; rather, these remarks and the other challenged comments were fair comment on the record evidence and made in anticipation of the defense closing. *Id.* Applicant's contrary PCR position ignores that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Id.* at 647.

In the remarks that Applicant now challenges, this Court finds the Solicitor was merely urging jurors to accept the State's position that its evidence established that the CSC charge and Applicant's fear of the consequences of punishment for that offense provided the motive for him to murder Judy Southern, someone whom he had never met. These remarks were fair comment upon evidence that had been introduced in either the guilt or sentencing phases of Applicant's trial. Although the Solicitor was properly focusing upon what he contended the State had shown was a circumstance of the crime, the evidence commented upon was also relevant to prove Applicant's character.

Likewise, the Solicitor did not argue that the mitigating evidence had to have a nexus to

the crime to be considered by the jury. Rather, he was merely urging jurors to accept the State's position that Applicant had not sought help for any of the various mental illnesses that he may have had until he was arrested and faced incarceration, and that none of his mental illnesses caused him to murder Judy Southern. **R. pp. 3452-53.** Again, this argument is supported by the evidence and it was made in anticipation of the Mr. Slade's closing. **R. pp. 3456-69.**

Finally, the Court recognizes that a solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." *Von Dohlen v. State*, 360 S.C. 598, 609-610, 602 S.E.2d 738, 744 (2004). The Solicitor's argument here did not constitute a "Golden Rule" argument, as Applicant's allegation suggests. He did not urge jurors to abandon their impartiality and view the evidence from the victim's viewpoint, which was the basis for reversal of the petitioner's death sentence in *Von Dohlen*. Also, he did not tell jurors that they spoke for the victim with their verdict, as did the deputy solicitor in the non-capital case of *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006).

To the contrary, the Solicitor stated that he spoke for the victim's family; he specifically told jurors that he was not asking for vengeance; and, he asked them "on behalf of the State of South Carolina and the county of Cherokee to conclude that the only appropriate punishment for a man that can do what he's done is to forfeit his life." **R. pp. 3454-55.**

As with all of the challenged remarks, his comments were brief and the record is voluminous. For these reasons, the Court finds that the Solicitor's argument did not so infect the sentencing proceeding with unfairness as to make the sentence imposed a denial of due process, nor has Applicant proved either deficient performance or resulting prejudice with respect to trial counsels' failure to object to portions of Solicitor's closing argument.

Therefore, for all of the foregoing reasons cited above in discussion of the law and facts of the case on all of Applicant's claims of ineffective assistance of counsel relating to the penalty phase of Applicant's trial, this Court finds there has been no showing of deficient performance or resulting prejudice on the part of trial counsel, nor constitutional violations in the proceeding below. Applicant has failed to meet the necessary burden of proof entitling him to relief at PCR on

penalty phase issues; thus, Applicant's claims relating thereto are denied.

VII. APPLICANT'S GROUND 11(c) - APPELLATE COUNSEL

Applicant's **Ground 11(c)** raises five allegations of ineffective assistance of appellate counsel that the Court discusses individually below. Applicant's appellate attorney, Joseph L. Savitz, III, testified at the PCR hearing. The Court specifically finds that appellate counsel's testimony on the issues relating to the appeal of Applicant's conviction is credible as to all of the allegations of ineffectiveness raised by Applicant, and the Court accepts his testimony in deciding those allegations.

VII. (1) FAILURE TO RAISE ISSUE OF PREJUDICIAL PHOTOGRAPHS

Applicant's **Ground 11(c)(1)** is that appellate counsel provided ineffective assistance because he did not raise, as an issue on appeal, the trial judge's denial of Applicant's motion to suppress inflammatory photographs of the victim of a prior crime. **State's Exs. 120 and 121.**

A defendant is constitutionally entitled to the effective assistance of appellate counsel.

Evitts v. Lucey, 469 U.S. 387 (1985). "[R]eviewing courts must accord appellate counsel the presumption that he decided which issues were most likely to afford relief on appeal." *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir.1993). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, since "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). To obtain relief, a PCR applicant must prove that his counsel was objectively unreasonable in failing to identify and argue significant and obvious issues on appeal, and must also show a reasonable probability that, but for his counsel's unreasonable failure, he would have prevailed on his appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citation omitted).²⁴

²⁴ *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal"). See also *Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention

The Supreme Court in *Robbins* recognized that, "[n]otwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim" on direct appeal, but Applicant faces a difficult burden of proof. *Robbins*, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome." *Id* (quoting *Gray*, 800 F.2d at 646. See also *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc).

The Court finds that Applicant did not show prejudice under *Strickland* and *Robbins* resulting from appellate counsel's failure to raise this adverse ruling on direct appeal because the trial judge did not abuse his discretion by admitting the two photographs (R. pp. 3043-45) over counsel's earlier objection. R. pp. 3111-12 (State's Ex. 120); 3192 (State's Ex. 121).²⁵ To

from what [counsel] felt were stronger claims").

²⁵ Counsel argued that the photograph would not convey any additional information about Applicant's character and that the fact the crime involved his infant daughter was sufficient evidence to demonstrate his character. Also, counsel argued that "surely at some point the inflammatory nature of and the graphic nature of the pictures that they intend to present and in the testimony that they intend to present far outweigh[s] the intellectual or factual weight of the information that needs to be

the contrary, the trial judge determined that the photographs were probative of Applicant's character and that the expanded scope of their probative value was not outweighed by their prejudicial effect under Rule 403, SCRE.

S. C. Code Ann. 16-3-20(B) requires that "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment" during the sentencing phase of a capital trial. Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979). Cf. *Woodson*, 428 U.S. at 304. The scope of the probative value of evidence in the sentencing phase is much broader than in the guilt phase. *State v. Rosemond*, 335 S.C. 593, 596-97, 518 S.E.2d 588, 589 (1999) (citing *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185-86 (1986)). "The purpose of the bifurcated proceedin in a capital case is to permit the

conveyed and the information that they have a right to convey about the [defendant's] character." **R. pp. 2982-84.** Further, counsel argued that the evidence at issue was character evidence and did not support a statutory aggravating circumstance. Thus, less of it needed to be introduced. **R. pp. 2984-85.**

introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase." *Id.*

Unquestionably, evidence of other crimes is admissible at the sentencing phase of a capital trial, including photographs of victims of the other offenses. *E.g.*, *State v. Bennett*, 369 S.C. 219, 230 n. 2, 632 S.E.2d 281, 287 n. 2 (2006) (*Bennett II*); *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984); *Skipper*, *supra*. Cf *State v. Bell*, 302 S.C. 18, 32, 393 S.E.2d 364, 371-72 (1990). Here, **State's Ex. 120** was introduced during the testimony of Det. Dianne Lestage, the lead detective investigating the CSC case. Det. Lestage testified that it accurately depicted how Applicant's daughter appeared when Lestage saw her at the hospital in 1999. **R. pp. 3110-12**. This Court finds that **State's Ex. 120** shows the helplessness of the victim, and therefore was both probative and relevant to issues being considered by the jury.

Further, **State's Ex. 121** depicts his daughter's injuries. It therefore shows precisely the wounds Applicant inflicted upon her in a more descriptive way than words could describe. Also, **State's Ex. 121** was introduced during the testimony of Dr. Andrea Mainman, the board certified Obstetrics and Gynecology physician

who treated Applicant's daughter in the emergency room of Mary Black Hospital in December of 1999, immediately after Dr. Mainman had described her findings with respect to the daughter's injuries. **R. pp. 3188-92.** It thus corroborated her findings.

Moreover, the expanded scope of the photographs' probative value was not substantially outweighed by their prejudicial effect under Rule 403, SCRE, and Applicant has not shown that the photographs created a "tendency to suggest a decision on an improper basis." *See Franklin*, 318 S.C. at 55, 456 S.E.2d at 361. Both photographs were directly probative of Applicant's true character because they corroborate and visually demonstrate the evidence related to the CSC conviction. They are thus probative of disproving Applicant's initial claims to authorities that his daughter's injuries were accidental. Also, the Court finds that they corroborate the evidence of the motive for Judy Southern's murder, as well as provide the reason underlying the defense and PCR counsels' arguments of Applicant being suicidal at the time of the murder.

The Court further finds that Applicant has not shown the jury's sentence was improperly influenced by the photographs. *See Ray v. State*, 330 S.C. 184, 188, 498 S.E.2d 640, 641-42 (1998).

The trial judge gave a limiting instruction that precluded the jury from considering the photos as proof of the statutory aggravating circumstance. **R. p. 3474, l. 15-p.3475, l. 3.** This Court presumes the jurors obeyed his instruction, as the Record on Appeal contains no contrary evidence. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Further, while **State's Ex. 121** is unpleasant to view, it was not "staged" or altered to produce a shock value. Also, Applicant was able to attempt to minimize the prejudicial impact of this evidence through Dr. Schwartz-Watts' expert testimony of her diagnoses of Fetal Alcohol Syndrome and various sexual disorders, including pedophilia, as well as her explanation for Applicant's failure to be straightforward in admitting what he had done to his daughter when questioned by law enforcement. **R. pp. 3274-88; 3288-3305. See also Ground 11(b)(3).**

Further, and assuming *arguendo* that these photographs were improperly introduced, Applicant did not show prejudice in appellate counsel's failure to raise this issue on appeal because any alleged error was harmless beyond a reasonable doubt. First, there was overwhelming evidence proving Applicant guilty of murder and the statutory aggravating circumstance of burglary. *See Strickland*, 466 U.S. at 694. Second, the photos were cumulative to the other

evidence that Applicant committed the crime of CSC with a minor in the first degree. **R. pp. 3099-3100; 3189-93; 3104-08; 3110-20; 3110-13; 3124-29; 3132-38); State's Ex. 117** (a taped statement) and **State's Ex. 124** (the vibrator device found during the search of his residence). Third, the trial judge gave the limiting instruction. Fourth, Applicant was able to minimize the prejudicial impact of this evidence through Dr. Schwartz-Watts' expert testimony. As a result, he has not proven "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." *Robbins*, 528 U.S. at 285.

VII. (2) FAILURE TO RAISE ISSUE OF PORNOGRAPHIC MATERIALS

In **Ground 11(c)(2)**, Applicant alleges that appellate counsel was ineffective for not raising on appeal the trial judge's denial of Applicant's motion to suppress the child pornographic images taken from his computer, introduced by the State in the sentencing phase as **State's Ex. 123**. Upon review, the trial judge's finding that Melanie Binney provided consent for officers to seize the computer and its contents (**R. p. 2971**) was correct. Both Det. Lestage's testimony (**R. pp. 2875-96**) and the

consent forms executed by Melanie Binney (Ct.'s Exs. 5-6) support the finding that she voluntarily gave her consent. Also, the trial judge's determination that her consent authorized the seizure of the computer and its contents is supported by the United States Supreme Court's decision in *United States v. Matlock*, 415 U.S. 164 (1974).

In *Matlock*, the Court noted that its then-recent authority "clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id* at 170. The Court went on to hold that third-party consent may validly be given by one "who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id* at 171. Common authority does not require common ownership, but merely mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for the searching officers to believe that the person granting consent had the authority to do so. *State v. Moultrie*, 271 S.C. 526, 528, 248 S.E.2d 486, 487 (1978) (quoting *Matlock*, 415 U.S. at 171 n. 7). See also *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (suppression not warranted if

officers had an erroneous but reasonable belief of authority to consent).

The prosecution has the burden of satisfying the test. *Matlock*, 415 U.S. at 171-72. See also *State v. Brockman*, 329 S.C. 115, 121-122, 494 S.E.2d 440, 443 (Ct.App. 1997). Here, the record of the officers' *in camera* testimony and the signed consent forms clearly support the trial judge's ruling.

The Court also finds that *Georgia v. Randolph*, 547 U.S. 103 (2006) does not compel a different result. It is unnecessary for this Court to decide whether *Randolph* applies retroactively to this case or is barred by the non-retroactivity principles announced in *Teague v. Lane*, 489 U.S. 288, 310-13 (1989),²⁶ since trial counsel never argued in the lower court that Melanie Binney lacked the authority to give consent to seize the computer and search its contents. **R. pp.**

²⁶ Applicant's conviction became final when United States Supreme Court denied certiorari on October 3, 2005, and *Randolph* was not decided until March 2006. The Court notes that at least one other court to consider the issue has applied a *Teague v. Lane* analysis and determined that *Randolph* does not apply retroactively to cases that were final before *Randolph* was decided. *Curtis v. Com.*, 2007 WL 1192070, *4 7 n. 5 (Ky.App., Apr. 6, 2007) (unpublished). Cf *People v. Olmo*, 18 Misc.3d 307, 309-311, 846 N.Y.S.2d 568, 570-71 (N.Y.Supp. 2007).

2963-65. Also, the Court finds that *Randolph* is factually distinguishable from the search at issue in this case. Unlike *Randolph*, there was no evidence in the present case that the police had removed Applicant from the premises for the sake of avoiding a possible objection. 547 U.S. at 121-22. Therefore, the officers here were not required "to take affirmative steps to find Applicant before acting on the permission they had already received." *Id.* at 122.²⁷

²⁷ In *Randolph*, both the defendant and his estranged wife were at the threshold of the residence when police arrived. The officers first asked Randolph for consent to search. When he objected, the officers turned to his wife, and she consented. The Supreme Court found that defendant had "unequivocally refused" consent to a warrantless search of the premises. 547 U.S. at 107. It concluded that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." It therefore found that the search violated the defendant's Fourth Amendment rights. *Id.* at 123-24. See also *Id.* at 106-08.

However, the Court in *Randolph* carefully distinguished and preserved the holdings in *Matlock* and *Rodriguez*. The Court explained it was "drawing a fine line" and that its holding was that, "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not

Because this issue is not clearly stronger than the appellate issues presented, Applicant has not overcome the presumption of effective assistance of appellate counsel. *Robbins*, 528 U.S. at 288. Likewise, he has not proven "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." *Id* at 285.

VII. (3) FAILURE TO RAISE ISSUE OF LATE INDICTMENT AMENDMENT

Addressing **Ground 11(c)(3)**, Applicant alleges he received ineffective assistance by appellate counsel's failure to challenge on appeal

suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Id* at 121. The Court also explained that "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand; the other according dispositive weight to the fellow occupant's contrary indication when he expresses it." *Id* at 121-22. See also *United States v. Reed*, 539 F.3d 595, 598 (7th Cir. 2008).

the trial judge's alleged error in allowing the State to amend the indictment charging Applicant with burglary in the first degree (**R. pp. 3604-05**), after the jury had been instructed on the law.

Following the jury charge (**R pp. 2796-97**),²⁸ Mr. Pruett objected to the first degree burglary instruction, arguing that the trial judge had "charged several statutory aggravators that were not alleged in the [burglary] indictment."

²⁸ The trial judge charged jurors that:
A person is guilty of burglary in the first degree if that person enters a dwelling without consent and with the intent to commit a crime therein;

And, either, when effecting the entry, or while in the dwelling, or in immediate flight therefrom, he is armed with a deadly weapon;

Or, causes physical injury to the person of another person who is not a participant in the crime;

Or, he uses, or threatens to use, a dangerous instrumentality;

Or, he displays what appears to be a pistol or other type of firearm.

R pp. 2796-97.

The burglary indictment had only alleged the statutory aggravator that Applicant was armed with a deadly weapon, and Mr. Pruett argued that this was the only statutory aggravator that Applicant was called upon to defend. **R. pp. 2809-10.**

The State argued that S.C. Code Ann. § 17-19-100 (2003) permitted motions to amend indictments either before or during the trial, in order to conform the indictments to the evidence that had been presented. Also, under *State v. Quarles*, 261 S.C. 413, 2005 E.2d 384 (1973), amendments not changing the nature of the offense charged should be permitted. **R. p. 2811.**

In response, Mr. Pruett stated that he was not arguing that the trial court lacked subject matter jurisdiction. Rather, he was asserting that the burglary indictment did not support the additional aggravators that were charged and that it was too late to amend the indictment. He, therefore, asked the trial judge to instruct the jury that it should disregard the aggravators that were not supported by the indictment. **R. pp. 2811-12.**

The trial judge found that the motion to amend the indictment was not untimely and the amendment would not change the nature of the charge against Applicant. He further found that "there is no prejudice, because clearly the

defendant has been aware and counsel has been aware all along that those allegations were present in this case, and those allegations have been made against the defendant, and you have been aware of that. And that evidence, of course, has been introduced, without objection, during the course of the trial." He therefore granted the motion to amend. **R. p. 2812, ll. 5-12.**

Appellate counsel's testimony supports the conclusion that his performance was not deficient, in spite of his lack of memory of this allegation, since it can be inferred from his testimony that he did not perceive this issue to be "clearly stronger than the issue presented." *Robbins*, 528 U.S. at 288. The Court finds that the record is insufficient to overcome the presumption of effective assistance.

Moreover, Applicant has not established that appellate counsel's failure to raise this issue on appeal was prejudicial. Applicant's trial pre-dated *State vs. Gentry*, 363 S.C. 93, 100-01, 610 S.E.2d 494, 498-99 (2005) and *State v. Means*, 367 S.C. 374, 382, 626 S.E.2d 348, 353 (2006). However, *Gentry* and its progeny are the correct law to apply in analyzing Applicant's claim. Otherwise, the Court would be granting him "a windfall to which [he is] not entitled." *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993).

Although the objection was cleverly argued by trial counsel, counsel's position was not correct under state law. In contrast to the indictment's purpose of providing a defendant with notice of the charges against him, the main "purpose of jury instructions is to tell the jury what facts they have to find and who has the burden of proving or disproving those facts." *Harris v. State*, 861 So.2d 1003, 1016 (Miss.2003). After review, this Court finds the trial judge did not abuse his discretion by charging the first degree burglary aggravators at issue because the evidence supported them. *Cf State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010).

Addressing the propriety of the trial judge's ruling on the motion to amend the indictment, in *State v. Lynch*, 344 S.C. 635, 641, 545 S.E.2d 511, 514 (2001), which was pre-*Gentry*, the Supreme Court reversed the defendant's conviction because the trial judge allowed the aggravating circumstance in the first-degree burglary indictment to be changed from entering during the darkness to causing physical injury. On appeal the Court held that the amendment changed the nature of the offense charged because the proof required for each aggravating circumstance was materially different. 344 S.C. at 641, 545 S.E.2d at 514.

This Court finds that, unlike *Lynch*, the trial judge here correctly determined that the amendment of the indictment did not change the nature of the offense charged. To the contrary, between the indictments, the notice of evidence in aggravation, the notice of statutory aggravating circumstances, and the State's discovery responses, Applicant received notice that the State's theory and evidence showed that he caused physical injury to Mrs. Southern, who was not a participant in the crime, by shooting and killing her while in the commission of the burglary; that Applicant had used a dangerous instrumentality; and, that he had displayed a pistol or other type of firearm." See § 16-11-311(A)(1)(b)-(d).

The Court further finds that the amendment did not require counsel either to engage in additional investigation or change their strategy that Applicant had only entered the dwelling to commit suicide, which the trial judge instructed jurors was not a crime. **R. p. 2798.** *Contra Levelle, supra.* Rather, the amendment merely conformed the indictment to the evidence presented by the State. Therefore, for all the above-stated reasons, the Court finds that the trial judge did not abuse his discretion by allowing the prosecution to amend the indictment, [see *Means*. See also *Neal v. State*, 15

So.3d 388, 396-398 (Miss. 2009); *Goldman v. State*, 9 So.3d 394, 397-98 (Miss.App. 2008)], and thus appellate counsel was not deficient in failing to raise it.

VII. (4) FAILURE TO RAISE ISSUE OF APPLICANT'S CONFESSIONS

Applicant also alleges that appellate counsel was ineffective for not challenging the admissibility of Applicant's statements "on all viable legal theories including the Sixth Amendment to the United States Constitution." See **Ground 11(c)(4)**.

First, the Supreme Court on direct appeal in *Binney I* made detailed factual findings as to the events surrounding his statement, *Binney I*, 362 S.C. at 355-58, 608 S.E.2d at 419-21,²⁹ and it rejected his Fifth Amendment claim. *Id* at 359-61, 608 S.E.2d at 42-22. *Res judicata* bars Applicant from re-litigating the issue of whether

²⁹ The Court in *Binney I* erroneously referred to the custodial statements as occurring on Friday June 14th and Monday June 17th. However, the record and a review of a calendar for the year 2000 reflect that the correct dates are Friday June 16 and Monday June 19th. They typographical errors may have occurred, at least in part, as a result of evidence that Mr. Thompson was appointed to represent Applicant on June 14th.

the June 16th statement was taken in violation of his Fifth Amendment right to counsel, and the Court finds that collateral estoppel bars re-litigation of the Supreme Court's findings made in connection with Applicant's Fifth Amendment challenge to the introduction of **State's Ex. 3**.

This is important to Applicant's current allegation because the United States Supreme Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986) (forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding) in *Montejo v. Louisiana*, 129 S.Ct. 2079, 2085, 2091 (2009). In light of *Montejo*, the Sixth Amendment challenge to **State's Ex. 3** fails for the reasons set forth in *Binney I*. Thus, Applicant has not proven either deficient performance or that appellate counsel's failure to raise this issue on appeal was prejudicial because he has not proven "a reasonable probability that, but for his counsel's unreasonable failure, he would have prevailed on his appeal." *Robbins*, 528 U.S. at 285.

Likewise, the Court finds that the failure to challenge the admissibility of the June 19th statement was not deficient performance. The Court finds that the trial judge's factual findings are not clearly erroneous, and that he did not

abuse his discretion by denying trial counsel's motion to suppress because the totality of the circumstances surrounding the June 19th statement support the trial judge's findings, by a preponderance of the evidence. **R. p. 2172-77.** In light of Applicant's failure to specifically allege error relating to the admissibility of the letter that Applicant wrote to the victim's husband (**State's Ex. 6**), the Court finds that he has waived a challenge to the introduction of the letter and its contents.

Finally, an *Edwards* violation is subject to harmless error analysis. See *Shea v. Louisiana*, 470 U.S. 51, 59 n. 4 (1985). Here, the Court finds that any admission in either the June 16th or June 19th statements must be deemed as harmless in both the guilt and penalty phases of Applicant's trial because they were merely cumulative to other statements made by him and other evidence presented by the State, which is set forth in the "Statement of Facts" and **Ground 11(a)(3)**, *supra*. As a result, he has not proven either deficient performance or that appellate counsel's failure to raise this issue on appeal was prejudicial because he has not proven "a reasonable probability that, but for his counsel's unreasonable failure . . . , he would have prevailed on his appeal." *Robbins*, 528 U.S. at 285.

VII. (5) FAILURE TO RAISE ISSUE OF APPLICANT'S MENTAL ILLNESS

Applicant's **Ground 11(c)(5)** is based on counsel's failure to argue "that a sentence of death imposed upon persons with mental illness constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution" under *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court finds that Applicant cannot meet either prong for relief under *Strickland* and *Robbins* for multiple reasons. First, there was no authority to support trial counsel's motion at the time of Mr. Savitz's representation of Applicant, and counsel cannot be ineffective for failing to "anticipate a change in the law." See *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994); *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993). See also *Jameson v. Coughlin*, 22 F.3d 427, 429-30 (2nd Cir. 1994); *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990). But even more important, there is no evidence before this Court that Applicant is "mentally retarded" or intellectually disabled within the meaning of *Atkins*.

To date, the Court is unaware of any majority decision by any state or federal court in America that would support such a motion by trial counsel. See, e.g., *State v. Irick*, 320 S.W.3d

284, 297-98 (Tenn. 2010); *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim.App. 2010); *Johnston v. State*, 27 So.3d 11, 26-27 (Fla. 2010). See also, e.g., *Shislnday v. Quarterman*, 511 F.3d 514 (5th Cir.2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir.2006) (citing *In re Woods*, 155 Fed.Appx. 132, 136, 2005 WL 3087882, *3 (5th Cir., Nov. 17, 2005) (unpublished); *State v. Ketterer*, 111 Ohio St.3d 70, 855 N.E.2d 48 (2006); *Matheney v. State*, 833 N.E.2d 454 (Ind.2005); *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008); *Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 WL 118696 (Tenn.Crim.App., Jan.13, 2010) (unpublished).

Further, Applicant cannot demonstrate a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally disabled offenders. *Mays*, 318 S.W.3d at 379 & n. 25; *Irick*, *supra*; *Johnston*, 27 So.3d at 26-27. ³⁰ Finally, Applicant has failed to show that whatever mental impairment he may have had at the time of the murders was so severe that he is necessarily and categorically less

³⁰ The Court in *Irick* pointed out that "Connecticut appears to be the only state that has adopted a statute barring the execution of offenders who, at the time of the offense, had a 'significantly impaired . . . ability to conform [their] conduct to the requirements of law.' Conn. Gen. Stat. Ann. 53a-46a(h)."

morally culpable than those who are not mentally disabled. ³¹ *Mays, supra*. Thus, he cannot show deficiency or prejudice.

Therefore, for all of the foregoing reasons cited above in discussion of the law and facts of the case on all of Applicant's claims of ineffective assistance of appellate counsel, this Court finds there has been no showing of deficient performance or resulting prejudice on the part of appellate counsel, nor constitutional violations in the appellate proceedings below. Applicant has failed to meet the necessary burden of proof entitling him to relief at PCR on appellate issues; thus, Applicant's claims relating thereto are denied.

VII. APPLICANT'S REMAINING DUE PROCESS CLAIMS

Applicant raises claims in his **Ground 11(d)**, which he maintains demonstrate that "his conviction and death sentence were obtained in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law." In **Ground 11(e)**, he maintains

³¹ Applicant has not presented any evidence that he is insane or guilty but mentally ill.

that errors by the trial judge "violated the Eighth, Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law." Each of these allegations will be discussed individually below.

VIII. (1) IMPROPER SUPPRESSION OF EVIDENCE BY STATE

Applicant's **Ground 11(d)(1)** claims that the State violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by improperly suppressing evidence that inmate prosecution witnesses Jerry Johnson and Danny Edwards "were improperly influenced to testify or received undisclosed benefits for doing so." Applicant further asserts that Edwards testified falsely regarding his "history of cooperation with law enforcement," and that the State failed to correct this testimony.

The Court finds that the testimony of Solicitor Gowdy, Deputy Solicitor Willingham, and trial counsel are all credible on these issues. Based upon the testimony of these witnesses, the Court finds that Johnson came forward about two weeks before trial on his own volition and without notifying the lawyer who was representing him on his then-pending charges. The State thereafter located Edwards. Although Applicant did make an incriminating statement to

Edwards, the primary importance of these witnesses to the prosecution was to establish the chain of custody for the map prepared by Applicant and as possible witnesses to negate a potential defense of third-party guilt involving Mr. Southern. The PCR testimony reveals that the State did not make any promises to either witness in exchange for his cooperation, and Johnson was expressly told not to expect any consideration for his testimony.

The Court further finds that neither Edwards nor Johnson received any improper influence to testify, nor any undisclosed benefits in exchange for testimony. Thus, there was no *Brady* violation because the claim of failing to disclose any improper influence or benefit is unsupported. The Court also rejects Applicant's claim based on the State's failure to disclose that Edwards had cooperated in other criminal prosecutions outside of the Seventh Judicial Circuit, by providing law enforcement with information implicating others, in an effort to receive a lesser sentence. The only credible evidence is that Solicitor Gowdy was unaware of any cooperation by Edwards in other, prior cases outside of the Seventh Circuit, and that he did not make any inquiry of Edwards about Edwards' cooperation in those other cases because this is not something that he would ask a witness in

preparing the witness for trial. Further, knowledge of any cooperation by Edwards in those other cases cannot be imputed to the Seventh Circuit Solicitor's Office because Applicant did not establish that the law enforcement agencies in those other cases were part of the "prosecution team" in Applicant's case. *Accord Lovitt v. True*, 403 F.3d 171, 185-86 (4th 2005); *United States v. Merlino*, 349 F.3d 144, 154 (3^d Cir.2003); *Moon v. Head*, 285 F.3d 1301, 1310 (11th Cir. 2002). Likewise, Applicant has failed to establish that the evidence of Edwards' cooperation in those other cases was "material" under *Brady* and its progeny because he failed to prove that "the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict." *Strickler v. Greene*, 527 U.S. 263, 290 (1999). There was overwhelming evidence of guilt, separate and apart from the map (**State's Ex. 6**) or Edwards' testimony of Applicant's admissions to him about the CSC case (that was not presented until the sentencing phase). Thus, Edwards was not a necessary or even a "key" witness in the State's prosecution of Applicant's for murder or burglary in the first degree.

Moreover, Edwards' credibility was thoroughly and vigorously impeached by Mr. Slade's cross-examination. Given the abundance

of other evidence and argument impeaching Edwards' credibility, counsel's cross-examination fully set forth enough information for the jury to properly assess his credibility and for defense counsel to demonstrate the supposed lack of it. *See Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998). Further, because the additional impeachment at issue would have been merely cumulative, it was not material under *Brady*. *State v. Gunn*, 313 S.C. 124, 136-38, 437 S.E.2d 75, 82 (1993). Particularly in light of the overwhelming evidence of guilt, further impeachment of an individual who was not a key witness by presenting evidence of his cooperation in other cases outside of the jurisdiction in which he was testifying could not "put the case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290. Nor has there been a showing that the State knowingly used perjured testimony in violation of *Napue v. Illinois*, 360 U.S. 264, 269 (1959), because Applicant failed to prove either that the prosecution knew the evidence was false or that "there is a reasonable likelihood that the false testimony could have affected the judgment of the jury." *Kyles*, 514 U.S. at 433 n. 7.

VIII. (2) DUE PROCESS CLAIMS FOR ISSUES RAISED IN OTHER CONTEXTS

The Court finds that Applicant's allegations Grounds 11(d)(2)-(4) & 11(e)(3)-(4)³² are not properly before it in PCR. These same allegations were raised within other contexts of the PCR application, but are now argued under a constitutional framework, as opposed to ineffective assistance of counsel. The jurisdiction of this Court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985). Post-Conviction Relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton*, 430 S.E.2d at 520. *See also Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983); *Humbert*, 548 S.E.2d at 866. For these reasons, these allegations are not cognizable in this proceeding; moreover, the Court finds no merit in these claims.

³² **Grounds 11 (d)(2)-(4)** allege, respectively, that the trial judge violated *Ake v. Oklahoma*, 470 U.S. 68(1985), by not approving funding for a jury selection expert; that his death sentence violates due process because it was, at least partially based "upon an invalid prior conviction or convictions;" and that his "death sentence was obtained, at least in part, as a result of the State's" improper closing argument. **Grounds 11(e)(3)-(4)** assert constitutional error because jurors saw him in prison garb and restraints.

VIII. (3) DUE PROCESS CLAIMS RELATING TO THE JUDGE'S CHARGE

Applicant's **Ground 11(e)(1)** challenges the jury charge on mitigating circumstances (**R. p. 3482, l. 12-p. 3484, l. 14**) based on the inclusion of the phrase "other than as an act of mercy." His **Ground 11(b)(6)** asserts ineffectiveness in not objecting to this portion of the charge. He is not entitled to relief on either allegation.

First, this free-standing, substantive claim of trial court error is not properly before this Court in PCR. *Id.* Second, it is clear that the challenged portion of the trial judge's charge does not offend the United States Constitution. The Supreme Court has rejected challenges to instructions that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," *California v. Brown*, 479 U.S. 538, 540 (1987), and emphasized that for a rational and reliable sentencing proceeding, the decision must be "rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* at 542. See also *Saffle v. Parks*, 494 U.S. at 484, 492-493 (1990) (O'Connor. J. concurring) ("It would be very difficult to reconcile a rule allowing

the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities without our longstanding recognition, that, above all, capital sentencing must be reliable, accurate, and nonarbitrary").

Third, there is no general holding that the Supreme Court's decision in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), which explicitly overruled the earlier holding in *State v. Hughey*, 339 S.C. 439, 458-59, 529 S.E.2d 721, 731 (2000), requires PCR relief. Indeed, it was not the basis for relief in *Rosemond*. Rather, the Court concluded that PCR relief was warranted on a separate ground of ineffective assistance of counsel based upon trial counsel's failure to present evidence of defendant's alleged paranoid schizophrenia as mitigating factor in the sentencing phase. *Rosemond*, 680 S.E.2d at 8-10. *Rosemond* also does not address whether the remainder of the charge was sufficient to cure any deficiency. The Court focused only on the isolated phrase, not its relationship to the remaining charge, or the remaining charge itself absent the phrase. This Court finds that, reviewing the charge as a whole, a reasonable juror would not have thought he was precluded from considering the mitigation evidence presented in the instant case. See *Boyde v. California*, 494 U.S. 370 (1990).

Fourth, *Rosemond* unquestionably established a new rule of law that cannot be applied retroactively to this case because this case became final before that rule was announced, and it cannot fairly be said that all reasonable jurists would have agreed that the rule set forth in *Rosemond* existed before it was decided. *Teague v. Lane*, 489 U.S. 288 (1989). To the contrary, Applicant's trial was held on November 4-14, 2003. Thus, the charge given was proper at the time of the sentencing proceeding, and *Hughey* was still controlling precedent, even as late as the May 29-June 1, 2007 PCR hearing.

In *Hughey*, the Court held on direct appeal that the same trial judge, Judge Cole, had not erred in his sentencing-phase instruction on the jury's consideration of non-statutory mitigating circumstances. The Supreme Court in *Hughey* **expressly approved** a jury instruction that was virtually identical to the charge given in Applicant's case, *Hughey*, 529 S.E.2d at 731; and the Court rejected an argument virtually identical to Applicant's, noting that this jury instruction was similar to other charges of non-statutory mitigating circumstances upheld by the Court because it authorized the jury to recommend life imprisonment even if they did not find the existence of mitigating circumstances. *Id*

at 732. Also, the South Carolina Supreme Court had not given any indication that it was allegedly improper. Therefore, the rule in *Rosemond* was a new rule that cannot be applied retroactively under *Teague*.

Fifth, Applicant's position fails to recognize that the trial judge was using the term "other than" as an *adverb*, not as an *adjective*. As an adverb, the phrase means "besides" and is defined as "in addition to" or "as well." See *Roget's 21st Century Thesaurus, Third Edition* (2009). As a result, the sentence is reasonably interpreted as the jury can return a recommendation of life (1) for any reason or (2) for no reason, (3) in addition to just as an act of mercy.

This Court agrees with the Supreme Court in *Rosemond* that "if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it" as a matter of state law. *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10. Beyond that, the Court finds, as a matter of state law, that the jury can consider a life sentence as an act of mercy, even if no plea from witnesses for mercy is given. The problem with the Supreme Court's *obiter dicta* opinion in *Rosemond* and Applicant's reliance upon it, is that it ignores that the sentencing juries in *Rosemond*, *Hughey* and in this case, would have properly considered "mercy"

evidence and that none of the challenged instructions "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 not as an adjective as Applicant's isolated parsing suggests. Here, the plain meaning of the instruction in this setting demands that the jury would have reasonably interpreted the language to allow mercy, not exclude it.

Also, because the present case is one for PCR, counsel is not deficient for failing to anticipate a change in the law and argue such at trial; thus, there is no ineffective assistance. *Gilmore*, 314 S.C. at 457, 445 S.E.2d at 456; *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992). See also *Strickland*, 466 U.S. at 689 (a reviewing court must eliminate the effects of hindsight and evaluate the conduct from counsel's perspective at the time). Further, the Court is not convinced that the language of the charge used in Applicant's case, when this one sentence is considered in context of the charge as a whole,³³ was such that a reasonable juror would

³³ Applicant's argument that *Rosemond* requires summary reversal where the trial judge gives instructions similar to those in *Rosemond* and *Hughey* fails to properly view the jury charge as a whole, to determine whether it is constitutional. See *Boyde*, *supra*.

have perceived that he/she did not have the ability to consider mercy in determining the sentence.

Additionally, the Court finds that Applicant cannot show prejudice resulting from counsel's failure to object because he cannot show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that . . . the sentence – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *See also Wiggins v. Smith*, 539 U.S. 510, 537 (2003). The Court finds that he did not meet this burden.

VIII. (4) DUE PROCESS CLAIMS RELATED TO JUROR VIQUEZ

Finally, for the reasons stated at the hearing, the Court rejects Applicant's **Ground 11 (e)(2)**, wherein he claims Juror Henry Viquez was inappropriately threatened and pressured by other jurors to vote for death. **PCR Tr. pp. 43-56.**

The Court excluded the "affidavit" of juror Viquez offered as evidence by Applicant's counsel because the juror was then in Mexico and not available for cross-examination or impeachment, the statement was unsworn, the statement was contradicted by deposition testimony, the statement appeared unreliable on its face, and this type of collateral attack on a jury decision is allowed in only very limited circumstances, none of which were not met here.

Therefore, for all of the foregoing reasons cited above in discussion of the law and facts of the case on all of Applicant's due process claims relating to Applicant's trial, this Court finds there has been no showing of a due process constitutional violation; thus, Applicant's claims relating thereto are denied.

CONCLUSION

Counsel for Jonathan Kyle Binney were confronted with an extremely difficult case. The evidence of their client's guilt on the charges of murder and burglary was overwhelming. Forensic evidence proved: (1) Defendant had been conducting surveillance at the Southern residence; (2) Defendant had traveled to the scene carrying items useful to commit burglary and a weapon necessary to commit murder; (3)

Defendant owned the murder weapon, eventually took the police to where the weapon was hidden, and an unspent round matching the fatal bullet was found in Defendant's pants pocket; (4) Defendant's fingerprint was found on a note left at the scene; (5) Defendant's culpability was evidenced by his flight and hiding after the murder; (6) Defendant, upon arrest, inquired of officers about whether the victim was deceased, admitting he had shot her; (7) Defendant formally confessed the crimes to police in two separate interviews, in a letter of apology to the victim's husband, and to cellmates at the Detention Center; (7) Defendant had recently committed the rape with a vibrator device of his infant biological daughter, requiring her to have reconstructive surgery and a hysterectomy; and, (8) Defendant requested the death penalty. Counsel capably undertook the representation of Jonathan Kyle Binney, and in an effort to save his life, employed objectively reasonable investigation methods, trial tactics, and appellate strategies. This Court finds that counsel provided the best defense possible for Jonathan Kyle Binney under the circumstances, well within the standards required of counsel practicing criminal trial and appellate law in this state. Even though the trial and appeal outcome was not favorable for Mr. Binney, this Court finds

that Mr. Binney was not prejudiced in any way by the actions of counsel at any stage of the proceedings. Counsel at this level of criminal prosecution is expected to provide highly professional services and extremely competent representation, which this Court finds was provided to Mr. Binney. Counsel cannot be expected to produce a miracle or accomplish the impossible, and the fact that Mr. Binney was convicted of murder while in the commission of a burglary, that he was sentenced to death for these crimes, and that these convictions were upheld on appeal is not the fault or responsibility of counsel. Thus, this Court denies this application for Post-Conviction Relief.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief in this matter is denied and dismissed, with prejudice; and
2. That Applicant must remain in the custody of Respondent for the completion of his sentence.

IT IS SO ORDERED this 1st day of September, 2011.

S/ J. Michael Baxley
J. MICHAEL BAXLEY
Presiding Circuit Court
Judge

Hartsville, South Carolina

APPENDIX C

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)IN THECOURT

)COURT OF

)COMMON.

Jonathan K. Binney)PLEAS

)

Applicant,)Case No.

)06-CP-11-223

v.)

)ORDER

State of South Carolina,)GRANTING

)APPLICANT'S

Respondent.)MOTION TO

)RECONSIDER

)THE DENIAL

) OF POST

CONVICTION

RELIEF AND

GRANTING

POST

-CONVICTION

RELIEF AS TO

SENTENCING

This death penalty Post-Conviction Relief (PCR) action is before the Court pursuant to an April 7, 2006 application filed

on behalf of Jonathan Kyle Binney, as amended. This Court held an evidentiary trial into the matter on May 29-June 1, 2007, at the Cherokee County Courthouse. Applicant was present at the trial, and John H. Blume, III, Sheri Lynn Johnson and Emily C. Paavola, Esquires, represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Anthony Mabry represented the State. On September 8, 2011, this Court entered an Order denying post-conviction relief. The passage of time between the trial and the issuance of a final Order occurred in part because of an interlocutory appeal over issues of attorney/client privilege that arose during the pendency of the case. After the final judgment was issued by this Court denying PCR, Applicant moved the Court to alter or amend the judgment on September 16, 2011 (hereafter, "Motion to Alter"). On December 9, 2011, the Court held a telephonic hearing regarding the issues raised in Applicant's Motion to Alter. Applicant was represented during this hearing by Mr. Blume and Ms. Paavola. Mr. Salter and Mr. Mabry participated on behalf of the State.

After considering the arguments made by counsel for both parties, this Court determines

that the facts as stated in its original Order filed September 8, 2011, must be altered in two instances. Moreover, the Court amends its original Order by granting a new sentencing hearing based on an ambiguous jury charge about mercy given by the trial judge. The reasons for these amendments are stated herein.

I. FACTUAL AMENDMENTS

The original Order found that Applicant's daughter, Mikayla Binney, was required to have a hysterectomy as a result of the sexual assault against her. See September 8th Order at p.7. Applicant has noted that this factual assertion is incorrect and that Dr. Mainman testified at trial that Mikayla suffered primarily internal injuries, her uterus was not damaged, and she was not expected to have any difficulties bearing children. Record on Appeal p.3193. After review of the record, this Court agrees that this factual finding was incorrect and hereby strikes this factual assertion from the original Order.

Second, in its September 8th Order, the Court found that Applicant's PCR witness, Ms. Tonya Brown, was biased against the Seventh Circuit Solicitor's Office and the Gaffney Police department because these entities were prosecuting her daughter. See September 8th

Order at p.26, n.12. Applicant points out that Ms. Brown did not testify at the PCR hearing that her daughter was being prosecuted. Rather, she testified that her daughter had been molested by her landlord and the authorities told her that they could not do anything about this. Ms. Brown stated that she felt this was unfair, but that she did not "have anything against all them." PCR Hearing Transcript p.391. While the Court still finds Ms. Brown to be biased, the reason given was incorrect. Thus, the original Order is hereby altered in this regard. The Court denies the remainder of Applicant's allegations of factual error as either lacking merit or harmless.

II. AMENDMENT GRANTING POST-CONVICTION RELIEF

Applicant alleges that his trial counsel was ineffective in failing to object to the trial court's sentencing-phase instruction that the jury could not give life as an act of mercy. See PCR Application, Ground 10 & 11(b)(6). This instruction is identical to the one that the South Carolina Supreme Court found erroneous in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). In addition, two other circuit courts

have recently granted post-conviction relief on the basis of this erroneous instruction. *Hughey v. South Carolina*, 2000-CP-01-0212, Order Granting Post-Conviction Relief dated May 14, 2010; *Evans v. South Carolina*, 2006-CP-23-7719, Order dated August 29, 2011. After full review, this Court determines that Applicant is likewise entitled to relief on this claim and orders that Applicant is, therefore, entitled to a new sentencing trial.

The South Carolina Supreme Court, while granting relief based on a finding of ineffective assistance due to counsel's failure to present evidence of the defendant's mental illness, chose nevertheless to address an additional issue. Rosemond claimed that trial counsel was also ineffective for failing to object to the trial court's instruction to jurors 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*." *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10 (emphasis in original). The Court found that the trial court's instruction prevented jurors from considering mercy as part of their sentencing decision. This, the Court emphasized, ran contrary to state law, under which a defendant is entitled to present evidence of mercy (see *State v. Torrence*,

305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991)) and state law requiring that jurors be instructed that they can return a life sentence "for any reason or no reason at all." *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10; *see also, id.* ("It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy.").

Here, as in *Rosemond*, the trial judge instructed Applicant's jury: "[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.*" (emphasis added). Trial counsel's failure to object to the erroneous charge was both deficient and prejudicial. Trial counsel should have known that the charge was inconsistent with long-standing South Carolina law and the United States Constitution. The South Carolina Supreme Court's statement in *Rosemond* is not a new rule. It has been the rule for decades that mercy can be considered by a South Carolina capital jury. *See, e.g., State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991); *Drayton v. Evatt*, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993); *State v. Johnson*, 339 S.C. 114, 126, 525 S.E.2d 519, 525 (2000); *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004); *State v. Sapp*, 366 S.C. 283, 292-94,

621 S.E.2d 883, 887-88 (2005). Under S.C. Code Ann. § 16-3-20(C), "[t]he 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..." Mercy is embraced within this statutory directive as a basis for returning a life sentence. This is also supported by the fact that the statute does not require the jury to "weigh" aggravating circumstances against mitigating circumstances; rather, South Carolina is a non-weighing state, meaning the jury can return a verdict of life for any reason "otherwise authorized or allowed by law." S.C. Code Ann. § 16-3-20(C).

Given this precedent, of which trial counsel should have been aware, it was not proper for the trial court in Applicant's case to issue an instruction to the jury that it could not return a life sentence "as an act of mercy." Trial counsel's failure to object to the charge was deficient. Moreover, trial counsel's failure prejudiced Applicant because it permitted the jury to operate under the false belief that they could not consider mercy as a reason to impose a life sentence when, in fact, it has long been the law in this State that a jury may properly consider mercy and may impose a life sentence

for any reason or no reason at all. The improper instruction was inherently prejudicial because it prevented the jury from carrying out one of its core responsibilities, i.e., to determine whether the defendant should be sentenced to life as an act of mercy. See, e.g., *State v. Blakely*, 158 S.C. 304, 304, 155 S.E. 408, 409 (1930) (holding a trial court's instructions cannot impede "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. Chasteen*, 228 S.C. 88, 104, 88 S.E.2d 880, 887 (1955) ("The discretion of the jury as to recommending mercy is an unlimited one. . . . [A] recommendation to mercy does not have to be based on evidence; [rather], it [is] sufficient to simply inform the jury that they may recommend the defendant to mercy, the effect of which is to reduce the punishment to life imprisonment."); *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930) (same); *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387 (1942) (same); *State v. Tyner*, 273 S.C. 646, 660, 258 S.E.2d 559, 566 (1979) ("the trial judge failed to charge the jury that it could recommend life imprisonment even if it found the existence of one or more statutory aggravating circumstances beyond

a reasonable doubt. The omission of this instruction to the jury was an "arbitrary factor," also requiring reversal of the death penalty") (citing S.C. Code § 16-3-25(C)). Applicant is, therefore, entitled to a new sentencing trial.

In making this decision, this Court is aware of Respondent's argument that this Court is misconstruing the words of the trial judge, and that the charge read in its entirety informed the jury that a life sentence can be given as an act of mercy. Moreover, Respondent argues that within the specific sentence from the charge of which Applicant complains, the phrase "other than as an act of mercy," is not intended to limit the preceding phrase "for any reason, or for no reason at all," but to actually expand it. The language used is, at best, ambiguous, and certainly capable of being construed as a limitation; thus, trial counsel should have objected.

IT IS THEREFORE ORDERED:

1. That the Court's original Order is altered in two factual respects as stated above; and,

2. That Applicant is granted a new sentencing hearing based on the trial court's ambiguous jury charge regarding the jury's consideration of mercy.

IT IS SO ORDERED this 11th day of May, 2012.

S/ J. Michael Baxley
J. MICHAEL BAXLEY
Presiding Circuit Court Judge

APPENDIX D

THE SUPREME COURT OF SOUTH CAROLINA

Jonathan Kyle Binney, Petitioner/Respondent,

v.

State of South Carolina, Respondent/Petitioner

Appellate Case No. 2012-212107

Lower Court Case No. 2006-CP-11-00223

ORDER

This matter is before the Court by way of cross-petitions for a writ of certiorari. The petitions for a writ of certiorari are both granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

S/ Jean Hoefer Toal C.J.

S/ Costa M. Plecoines J.

S/ Donald W. Beatty J.

S/ John W. Kittredge J.

App. 147

S/ Kaye G. Hearn J.

Supreme Court of South Carolina
Nil Ultra

Columbia, South Carolina

April 16, 2014

cc: Emily C. Paavola, Esquire
W. Edgar Salter, III, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
Donald J. Zelenka, Esquire
The Honorable J. Michael Baxley
The Honorable Brandy W. McBee

APPENDIX E

**THIS OPINION HAS NO PRECEDENTIAL
VALUE, IT SHOULD NOT BE CITED OR
RELIED ON AS PRECEDENT IN ANY
PROCEEDING EXCEPT AS PROVIDED BY
RULE 268(D)(2), SCACR.**

THE STATE OF SOUTH CAROLINA In The Supreme Court

Jonathan Kyle Binney, Petitioner/Respondent,

v.

State of South Carolina, Respondent/Petitioner
Appellate Case No. 2012-212107

Appeal from Cherokee County
The Honorable J. Michael Baxley,
Circuit Court Judge

Memorandum Opinion No. 2015-MO-028
Heard January 13, 2015 – Filed May 13, 2015

**CERTIORARI DISMISSED
AS IMPROVIDENTLY GRANTED**

App. 149

John J. Blume, of Ithaca, New York, and Emily C. Paavola, of Columbia, for Petitioner/Respondent.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General William E. Salter, III, all of Columbia, for Respondent/Petitioner.

J. Christopher Mills, for Amicus Curiae, South Carolina Religious Leaders and Scholars.

PER CURIAM: After careful review of the record, appendix, and briefs, the writs of certiorari are dismissed as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, BEATTY and HEARN, JJ., concur. KITTREDGE, J., concurring in part and dissenting in part in a separate opinion in which TOAL, C.J., concurs.

JUSTICE KITTREDGE: I concur in part

and dissent in part. I concur as to the dismissal of Jonathan Kyle Binney's certiorari petition. I dissent with respect to the dismissal of the State's certiorari petition, which, in effect, upholds the post-conviction relief court's grant of a new sentencing hearing based on the erroneous mercy charge. I would reverse the post-conviction relief court and reinstate Binney's death sentence. I incorporate the well-reasoned opinion of Chief Justice Toal in *Evans v. State*, Op. No. 2015-M0-027 (S.C. Sup. Ct. filed May 13, 2015) (Toal, C.J., dissenting).

I add the following comments. In 2009, I authored this Court's unanimous opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). Rosemond was granted a new sentencing hearing based on trial counsel's failure to present any mental health mitigation evidence. *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10. Rosemond also asserted the mercy 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" - as a basis for post-conviction relief. *Id.* We did not grant relief based on the mercy charge, but clarified in dictum that the "other than as an act of mercy" language not be

charged on resentencing. *Id.* at 330, 680 S.E.2d at 10-11. This court never addressed the challenged mercy instruction in *Rosemond* in the context of the *Strickland v. Washington*¹ test. *Id.* at 329-30, 680 S.E.2d at 10-11. I view the challenged instruction, in isolation, as confusing, for it is susceptible to more than one interpretation. Yet, we have never sanctioned an analytical framework that focuses narrowly on disputed language in a jury charge to the exclusion of the charge as a whole.

I would not find deficient representation in failing to object to this charge. In any event, assuming deficient representation, Binney cannot satisfy the prejudice prong of *Strickland*. The trial court's instruction in *Binney* was as follows:

Now, in arriving at your decision as to what the appropriate sentence shall be in this case, you are instructed that you must also consider any statutory mitigating circumstances.

And as I have indicated to you, Mr. Foreman, those statutory mitigating circumstances that

¹ 466 U.S. 668 (1984).

you may -- that you and your fellow jurors my [sic] consider are also set forth on the statutory instructions form.

Now, a statutory mitigating circumstance is a fact, an incident, a detail, or an occurrence which the State legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder. It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability of the defendant for the commission of the crime of murder.

Mitigating circumstance is neither a justification nor an excuse for the crime of murder. It is simply a fact or a circumstance which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable.

Now, as is reflected in the statutory instructions form, in

making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you shall consider the following statutory mitigating circumstances:

One is the murder was committed while the defendant was under the influence of mental or emotional disturbance.

Two is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

And, three, the age or mentality of the defendant at the time of the commission of the crime of murder.

Now, you shall consider any nonstatutory mitigating circumstances which have been shown to exist by the evidence in the case.

Now, a nonstatutory mitigating circumstance is one which may serve the same purpose as a

statutory mitigating
circumstance; that is, to lessen or
to reduce the degree of the
defendant's guilt in the
commission of the crime of
murder.

Now, while there must be some
evidence which supports a
finding by you of the existence of
any mitigating circumstance, it is
not necessary that you find the
existence of such circumstance or
circumstances beyond a
reasonable doubt. You must
simply find that in your view
such is supported by the evidence
in the case.

You are not, however, at any time
asked to indicate any mitigating
circumstances that you might
find exist in the evidence on any
form that you will have in the
jury room.

I do emphasize to you, however,
that you are permitted under the
law to impose a sentence of life
imprisonment, whether or not

you find the existence of any statutory or nonstatutory mitigating circumstance.

In making your determination as to which sentence to recommend in this case, you shall consider the statutory aggravating circumstance, as well as the statutory and nonstatutory mitigating circumstances in arriving at your decision.

Now, as I have previously stated, while you must find the existence of the statutory aggravating circumstance beyond a reasonable doubt before you are permitted to make any recommendation as to sentence, once such a finding is made, you are permitted to recommend a sentence of death, even though you may also find the existence of one, or more, of the mitigating circumstances.

The existence of any statutory and/or nonstatutory mitigating circumstances is not a bar to the

recommendation of a death sentence, so long as you have found the existence of the statutory aggravating circumstance beyond a reasonable doubt and your decision to impose the death sentence is a unanimous decision of the jury.

Conversely, you may also recommend a sentence of life imprisonment, even though you did find the existence of the statutory aggravating circumstance beyond a reasonable doubt and you find no mitigating circumstances to be supported by the evidence in the case.

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 mercy².

² The transcript includes a comma between the word "all" and the word "other." The insertion of the comma reflects a pause as the sentence is read to the jury. I would find that the use of the comma, and hence the pause in the sentence, supports the construction of the sentence

In my judgment, the analysis here is no different than Chief Justice Toal articulated in *Evans*:

[T]he ultimate test to determine the propriety of the trial judge's charge is "what a reasonable juror would have understood the charge to mean" in the context of the *entire* jury instruction. *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991); *see also, e.g., State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("A jury instruction must be viewed in the context of the overall charge.").

Here, *Evans* contests one sentence of a lengthy charge that instructed the jury to consider all statutory and non-statutory mitigating factors in arriving at their verdict. In my

advanced by the State—that is, the jury was told it may recommend a life sentence merely as an act of mercy. This is entirely consistent with the balance of the charge, which made it unmistakably clear that there was no limitation on the jury's ability to recommend a life sentence.

opinion, the rest of the instruction, the emphasis placed on mercy by both the State and the defense, the trial judge's general opening explanation of mitigation and aggravation to the jury, and the unremarkable position of the condemned instruction in the context of the overall charge, all combine to preclude a finding of prejudice. Under these facts, a reasonable juror unquestionably would have been aware that he or she could recommend life as an act of mercy. Thus, it is my opinion that Evans has not proven that he was prejudiced by the defective instruction; consequently, his *Strickland* argument must fail.

Evans v. State, *Supra* (Toal, C.J., dissenting).

I agree with Chief Justice Toal's dissenting opinion in *Evans*, and I would reverse the grant of post-conviction relief to Binney.

Toal, C.J., concurs.

APPENDIX F
THE SUPREME COURT OF
SOUTH CAROLINA

Jonathan Kyle Binney, Petitioner/Respondent

v.

State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2012-212107

ORDER

The Petition for Rehearing filed on behalf of the respondent/petitioner in the above entitled matter is denied.

S/ Costa M. Plecoines J.

S/ Donald W. Beatty J.

S/ Kaye G. Hearn J.

I would grant the Petition for Rehearing.

S/ Jean Hoefer Toal C.J.

S/ John W. Kittredge J.

SUPREME COURT OF SOUTH CAROLINA
NIL ULTRA

Columbia, South Carolina

August 6, 2015

cc:

John H. Blume, III, Esquire

Emily C. Paavola, Esquire

W. Edgar Salter, III, Esquire

Donald J. Zelenka, Esquire

John Christopher Mills, Esquire