Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 26, 2015

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED
OCT 29 2015
S.C. SUPREME COURT

Re: South Carolina
v. Kamell D. Evans
Application No. 15A456
(Your No. 2011-188687)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on October 26, 2015, extended the time to and including January 3, 2016.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Michael Duggan
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Donald J. Zelenka
Senior Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Clerk
Supreme Court of South Carolina
Post Office Box 11330
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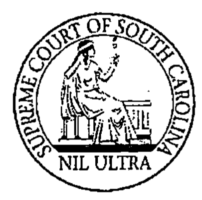

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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August 6, 2015

The Honorable Paul B. Wickensimer
Clerk of Court, Greenville County
305 E North St
Greenville SC 29601-2121

REMITTITUR

Re: Kamell D. Evans v. State
Lower Court Case No. 2006-CP-23-07719
Appellate Case No. 2011-188687

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Brenda F. Shealy

CHIEF DEPUTY CLERK

cc:
South Carolina Religious Leaders and Scholars
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Donald J. Zelenka, Esquire
Christopher Seeds, Esquire
John Christopher Mills, Esquire
The Honorable D. Garrison Hill

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

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ON WRIT OF CERTIORARI

Appeal from Greenville County
The Honorable D. Garrison Hill, Circuit Court Judge

Memorandum Opinion No. 2015-MO-027
Heard December 9, 2014 – Filed May 13, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

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 Melody J. Brown, all of Columbia, for Petitioner/Respondent.

William H. Ehlies, II, of Greenville, and Christopher W. Seeds, of Ithaca, New York, for Respondent/Petitioner.

J. Christopher Mills, of Columbia, 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. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: I would reverse the post-conviction relief (PCR) court's finding that Respondent-Petitioner Kamell D. Evans is entitled to a new sentencing hearing because his trial counsel[1] failed to object to the trial court's erroneous jury instruction.[2]

FACTUAL/PROCEDURAL HISTORY

Evans was convicted of two counts of murder, two counts of possession of a weapon during the commission of a violent crime, two counts of kidnapping, and one count of first degree burglary for the events leading up to and death of Greenville County Sheriff's Deputy Antonio J. "Joe" Sapinoso and his father, Antonio L. "Tony" Sapinoso.

The material facts at trial were undisputed, and Evans admitted to killing the two victims—the father and brother of Evans's ex-girlfriend Christina Roderiguez. The evidence established that on April 1, 2003, Evans arrived at the Sapinoso home at nighttime, dressed in all-black clothing and wearing gang insignia, with three guns, over forty rounds of ammunition, and a knife. Evans parked his vehicle in an unoccupied neighboring lot, and hid in the woods while he waited for Joe to arrive home after his shift with the Sheriff's Department. Upon Joe's arrival, Evans held the still-uniformed officer at gunpoint, relieved him of his service weapon, and forced him into the home. A four-hour hostage situation ensued, during which Evans engaged in negotiations with a hostage negotiator from the local police department and heard pleas for the release of the victims by his friends and family. Marcia Sapinoso (Tony's wife and Joe's mother) and Christina's minor son were locked in a closet upstairs.

The situation ended tragically when Evans shot the two victims in the head—one of whom (Joe) was shot "execution style"—killing them. Forensic evidence established that Evans shot Joe four times in the back of the head at close range while Joe's head was on the floor. Further, Evans shot Tony twice in the head and once in the arm, which was considered a defensive wound. Evans

[1] At trial and during the subsequent capital sentencing hearing, Evans was represented by Steven W. Sumner and James Lee Goldsmith, Jr. (collectively, trial counsel).

[2] However, I agree that the remaining issues raised by Evans should be dismissed as improvidently granted.

testified that he shot Joe when he tried to reach for Evans's gun, and that he shot Tony because he stood up at the same time Joe reached for the gun.

During the sentencing phase of Evans's trial, the State presented evidence of three aggravators with respect to the murder of Tony Sapinoso, and four aggravators with respect to the murder of Joe Sapinoso.[3] Marcia Sapinoso, Cheri Jones (Joe's longtime girlfriend), and one of Joe's fellow police officers and friends provided victim impact testimony. The State sought to capitalize on evidence presented during trial that painted Evans as a gang member, and presented testimony that he would likely pose a threat to the general prison population.

Likewise, Evans presented a full mitigation case, emphasizing his good character and his mental health issues. Various family members, friends, a co-worker, and former coaches of Evans testified to his positive attributes as a leader on the football field, a loving brother and uncle, a friend and mentor to children in need, and a solid and dependable employee. Evans's trial counsel also presented expert testimony to refute the State's expert's testimony that Evans would likely perpetrate gang violence while in prison. Finally, Evans's defense counsel presented testimony by a neuropsychologist that Evans had certain cognitive deficiencies indicative of brain dysfunction that would have impaired his decision-making during the hostage situation, and a psychiatrist, who diagnosed Evans with "major depressive disorder, single episode." In sum, during the sentencing phase of the trial, Evans's trial counsel sought to capitalize on their guilt-phase strategy of emphasizing Evans's good qualities; portraying the killings as a horrible, one-time mistake; and focusing on a theme of "no excuses."

By doing so, defense counsel hoped that the jury would show Evans mercy and spare him the death penalty by recommending a life sentence. After the trial judge explained mitigation and aggravation to the jury, Goldsmith then delivered his opening remarks during the sentencing phase:

---

[3] The following statutory aggravating circumstances were presented to the jury with respect to the murder of Joe Sapinoso: (1) the murder was committed during the commission of first degree burglary; (2) the murder was committed during the crime of kidnapping; (3) Evans murdered two or more persons pursuant to one course of conduct; and (4) Evans murdered a law enforcement officer during or because of the performance of his official duties. The same aggravating circumstances were presented to the jury with respect to Tony Sapinoso, with the exception of the law enforcement aggravator.

> And part of what we are going to try to show you is that first and foremost, and this may seem simplistic, but . . . Evans is a human being. And you are being asked whether you will kill or sentence to life imprisonment a fellow human being, granted a human being capable of great evil. And I'm not going to diminish that. But what we hope to show you also is a human being capable of some good, perhaps even great good, a human being who in one 10-second episode of his life made a horrible decision, a tragedy, and inflicted much pain on people during that ten seconds and afterwards.

Goldsmith reiterated:

> Even if the state proves every aggravating factor that they prove, that they present to you, even if you find aggravation, you still without question can sentence him to life imprisonment without the possibility of parole.
>
> You can, as I have always said, show mercy. You can always choose life.

Goldsmith again focused on mercy during his closing argument, stating:

> Ladies and gentlemen, we do not repay evil with evil. The solicitor is correct. I am going to ask for mercy for [Evans]. But I disagree with what the solicitor said is the definition of mercy. He said mercy is something that you deserve. I strenuously disagree, ladies and gentlemen.
>
> If we deserved it, if we could earn it, then we probably wouldn't need it. Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway. . . . We don't repay evil for evil. And mercy is appropriate in this case.
>
> You can show mercy and you can choose life regardless of who deserves it and who does not. We all need mercy, but none of us have earned it and none of us deserve it.[4]

---

[4] On the other hand, the Solicitor told jurors not to "feel sorry" for Evans.

The trial judge then delivered the following jury instruction:

> Now, in making your determination as to which sentence to recommend in this case you should consider the statutory aggravating circumstances, the statutory mitigating circumstances and any nonstatutory mitigating circumstances in arriving at your decision.
>
> . . . .
>
> The existence of any statutory or nonstatutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. Conversely, you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt.
>
> 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.*

(Emphasis added). Trial counsel did not object.

The jury recommended Evans be sentenced to death for the murders, and the trial judge imposed the death sentence for both counts of murder, and lifetime imprisonment for the first degree burglary charge.[5] This Court ultimately affirmed Evans's convictions and sentence on direct appeal. *See State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006).

Subsequently, Evans filed an application for PCR. Evans's PCR hearing was held on June 1–5, 2009. On June 25, 2009, this Court issued an opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), in which it admonished the bench that the specific phrasing of the same jury charge delivered in Evans's case not be used again. Evans subsequently moved to amend his application, arguing that his trial counsel was ineffective for failing to object to the condemned charge.

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[5] The trial court declined to impose sentences for the kidnapping and weapon convictions pursuant to sections 16-3-490(A) and -910 of the South Carolina Code. *See* S.C. Code Ann. §§ 16-3-490(A), -910 (2003).

At the PCR hearing, Evans's trial counsel maintained that they did not understand the instruction to preclude the jury's consideration of mercy. Instead, they claimed they did not object to the jury instruction because they believed the instruction emphasized to the jurors that they *could* consider mercy. Sumner testified he "liked" the charge because it was "brief," it "use[d] the word mercy," and it "seem[ed] to get across what [trial counsel] were trying to do." Goldsmith testified he thought the charge "pretty much tracked with what [trial counsel] thought should be charged," and he believed the charge "was sort of an expansive charge." Both testified that had they believed the charge limited the jury's "use of mercy," they would have objected because mercy was the "primary element," "key highlight," and the "major part" of their mitigation case, and because Goldsmith had "built [his] closing argument around mercy."

The PCR court found that Evans was entitled to PCR on the sole basis that Evans's trial counsel failed to object to the trial court's jury instruction regarding mercy, and found that prejudice to Evans resulted. The PCR court rejected Evans's other arguments.

The State petitioned this Court for a writ of certiorari,[6] and we granted review pursuant to Rule 243, SCACR.

ANALYSIS

The State argues that the PCR court erred in finding Evans's trial counsel ineffective for failing to object to the trial court's jury instruction regarding mercy during the sentencing phase of Evans's trial. I agree and would reverse the PCR court's decision granting Evans relief on this basis.

On appeal in a PCR action, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In other words, the "PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (citing *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626).

A criminal defendant is guaranteed the right to effective assistance of

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[6] Evans also appealed the PCR court's order. As stated, *supra*, I agree that those grounds for appeal should be dismissed as improvidently granted.

counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland,* 466 U.S. at 686).

As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 668). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688).

Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Rosemond*, we granted relief to the PCR applicant on the basis that he established his entitlement to a new sentencing hearing as a result of trial counsel's failure to present any mental health mitigation evidence in the sentencing phase. 383 S.C. at 330, 680 S.E.2d at 11. However, in dictum we said:

> We nevertheless elect to address [the applicant's] challenge to trial counsel's failure to object to the trial court instructing the jury not to recommend a sentence of life based on mercy: "you 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). We agree with [the applicant] and hold that if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it.

Id. at 329, 680 S.E.2d at 10. Further, we explained:

> 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. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion . . . ."

Id. at 330, 680 S.E.2d at 10–11 (quoting *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In *Rosemond*, we did not analyze the condemned jury instruction in the context of *Strickland*; instead, we alerted the bench and bar to the potential for confusion resulting from its continued use. Thus, in analyzing this same instruction here, we must do so using the ineffectiveness paradigm.

Regardless of whether trial counsel was deficient in failing to object to the instruction here,[7] I would hold that Evans cannot satisfy the prejudice prong of *Strickland*. In that regard, the 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

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[7] I note that trial counsel did not have the benefit of the *Rosemond* ruling at the time of trial or even at the initial PCR hearing. *See Wilds v. State*, 407 S.C. 432, 442–43, 756 S.E.2d 387, 392 (Ct. App. 2014), *cert. granted*, Nov. 20, 2014 (finding that trial counsel was not deficient where the case on which the PCR applicant relied had not yet been decided by this Court).

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.

Accordingly, I would reverse this portion of the PCR court's decision.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ORDER

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

______________________________ J.

______________________________ J.

______________________________ J.

I would grant the Petition for Rehearing.

______________________________ C.J.

______________________________ J.

Columbia, South Carolina
August 6, 2015

cc:
Melody Jane Brown, Esquire
William Harry Ehlies, II, Esquire
Donald J. Zelenka, Esquire
Christopher Seeds, Esquire
John Christopher Mills, Esquire

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 28 2015
S.C. Supreme Court

May 28, 2015

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: Kamell D. Evans v. State of South Carolina
Appellate Case No. 2011-188687

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Petitioner/Respondent State of South Carolina Petition for Rehearing** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosures

cc: William H. Ehlies, II, Esquire
Christopher Seeds, Esquire
Trisha Allen, Victim Assistance

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 28 2015

S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, PCR Circuit Judge
2006-CP-23-7719
J. Derham Cole, Trial Circuit Judge

Appellate Case No. 2011-188687
Memorandum Opinion No. 2015-MO-027
Filed May 13, 2015

KAMELL D. EVANS,

Respondent/Petitioner,

V.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent,

PETITION FOR REHEARING

ALAN WILSON
Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General
DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
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COUNSEL FOR
PETITIONER/RESPONDENT

The Petitioner-Respondent State of South Carolina, through the Attorney General of South Carolina, hereby makes a Petition for Rehearing to the opinion of May 13, 2015 in which three members of the Court in a *per curiam* opinion concluded that the writ of certiorari, which was issued on April 16, 2014 on the State's petition for writ of certiorari, was improvidently granted, and two members of the Court dissented concerning the writ of certiorari and would have reversed the post-conviction relief court granting of resentencing and would have further reinstated Kamell D. Evans's Greenville County death sentence. For all reasons set forth below, the State submits that the extraordinary action of the Court—when two members of the Court who granted the writ of certiorari and entered opinions concluding the post-conviction relief was improperly granted and the authorized sentence of death should be reinstated—requires rehearing in the interest of justice pursuant to SCACR Rule 221 and Rules 200 and 243(j) and S. C. Code Ann. § 17-27-100. "The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law." *Stein v. New York*, 346 U.S. 156, 197 (1953).

1. **When two Justices continue to agree that certiorari is appropriate, the Court erred in the issuance of a *Per Curiam* opinion that certiorari Should Be dismissed as improvidently granted pursuant to SCACR Rule 243(j).**

"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Payne v. Tennessee*, 501 U.S. 808, at 827 (1991) (*quoting Snyder v. Mass.*, 291 U.S. 97, 122 (1934)).

"The Rule of Two" Misapplication

It was improvident and in contravention of the South Carolina Appellate Court Rules under SCACR Rule 243(j) for three members of the Court to issue a *per curiam* order dismissing a granted writ of certiorari and deeming it to be improvidently granted when two justices concluded that certiorari was appropriate.[1] SCACR Rule 243(j) is clear and unambiguous: "upon the concurrence of any two justices, the petition may be granted on any question presented."[2] The "Rule of Two" for certiorari in Rule 243(j) remains applicable in this case because Chief Justice Toal entered a dissenting opinion from the three justices' dismissal of the writ certiorari as improvidently granted and Justice Kittredge concurred in the dissent, each indicating that they would reverse the grant of post-conviction relief to Hughey. Where this Rule was overlooked or misapprehended, rehearing under Rule 221 is proper. The merits must be addressed.

In an analogous action in the United States Supreme Court addressing their "Rule of Four" concerning the grant of certiorari and the requirement to address the merits, two members of the Court stated:

> We are bound here, however, by the 'Rule of Four.' That rule ordains that 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**

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1 S.C.Code Ann. § 17-27-100 ("[F]inal judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules.").

2 See South Carolina Constitution, Art. V, § 4 (The Supreme Court shall makes rules governing the administration of all the courts of the state. Subject to statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.); Art. V, § 4A (submission of Supreme Court rules to the judiciary committee). S.C. Code Ann. § 14-3-640 (promulgation of rules); § 17-27- 100 (final judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules').

> **that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court.** *See Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 559, 77 S.Ct. 459, 478, 1 L.Ed.2d 515 (separate opinion of Harlan, J.).

Donnelly v. DeChristoforo, 416 U.S. 637, 648 (1974) (concurring opinion of Justices Stewart and White). Similarly, in this action two justices remained so minded after oral argument that certiorari and error correction of the granting of post-conviction relief was required. The silent three members of the Court should be required to address the merits of the matter. In the *per curiam* opinion, the three members of this Court may have overlooked the effect of Rule 243(j) concerning the fact that two members of the Court continue to find the appropriateness of their grant of certiorari who seek to address the merits. The full Court, including the silent three members, under Rule 243 should be required to address the merits of the proceeding.

SCACR Rule 220 Misapplication

The three members of the Court may have also overlooked the requirement under SCACR Rule 220 that the Court issue a decision on the merits with the required explanation of the reasons for the decision rather than a discretionary conclusion that certiorari was improvidently granted when two members dissent. The three members may have also overlooked Rule 220(b) only authorizes a memorandum opinion:

> "dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when**, in unanimous decision,** the Supreme Court determines that a published opinion would have no precedential value and any one or more of the following circumstances exist and is dispositive of the issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact that are or are not clearly erroneous; . . . (D) that no error of law appears."

None of those provisions apply to authorize a memorandum opinion in this case. When two members are still of the opinion that certiorari is proper, Rule 220 has not been followed unless the majority issues an opinion "every point distinctly stated in the case which is necessary to the decision," [Rule 220(b)] because it is not a "unanimous decision."

WHY THE APPLICATION OF THESE RULES IS IMPORTANT

Here, the interest of justice demands the litigants and the public be provided with the basis for the decision because the failure to do so has societal consequences. Under the discrete circumstances in this case, absent a reason for the inaction, our faith in the justice system for error correction of an undisputed erroneous judgment by the PCR court is questioned. As firmly pointed out in the dissenting opinion in this case and the companion dissenting opinions in *Hughey v. State*, 2015 Westlaw 2231252 (S.Ct.S.C. May 13, 2015); *Binney v. State*, 2015Westlaw 2230848 (S.Ct.S.C. May 13, 2015); and *Evans v. State,* 2015 Westlaw 2230263 (S.Ct.S.C. May 13, 2015), the actions of the circuit courts in ordering unnecessary and costly re-sentencing proceedings in these three cases, which the dissent cogently points out, are not authorized by a fair and appropriate reading of the opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), according to Justice Kittredge, the author of that opinion.

Clearly, re-sentencing relief was improvidently ordered by the circuit court by a misreading of this Court's mandate in *Rosemond.* The circuit court's errors of law are an even more compelling reason for error correction, particularly when placed against the fabric of its misapplication of United States Supreme Court precedent of *Strickland v.*

Washington, 466 U.S. 668 (1984) and its constitutional requirement to view counsel's conduct when the case was tried. As the *Strickland* Court itself observed, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689, 104 S.Ct. 2052. Here, where the underlying, so-called *Rosemond* error found by the PCR court evaporates in light of its author's repudiation of the PCR judge's interpretation, there is no basis for re-sentencing relief to be given based upon the non-error by the trial judge and the lack of deficient performance or prejudice—even in hindsight.

Simply put, the decision by the PCR judge had no basis in law, was an undisputed misinterpretation of the limited holding by this Court in *Rosemond*, and created through the unexplained (in)action by the three members of the Court, a windfall to the properly convicted and sentenced inmate. The unexplained failure of the three members of the Court to act in the certiorari action before this Court without the error correction appropriate allowing these unnecessary re-sentencing proceedings, is a defeat of fundamental fairness to the litigants and unnecessary use of limited judicial and prosecutorial resources. Such unexplained avoidance of the necessary error correction of the undisputed misapplication of this Court's precedent and the decision in *Strickland v. Washington*, 466 U.S. 668(1984), may be considered "shocking to the universal sense of justice" to the public and survivors of the victims in these cases. Such avoidance by the three members of this Court to address the error as implicitly required under its own Rules, specifically Rule 243(j) and Rule 220, is particularly disturbing in a capital case.

Here, transparency requires the basis for the unexplained inaction by the three members in light of the salient factors against that action, as reflected in the opinions of Justice Kittredge and Chief Justice Toal. This is why the requirements of Rule 220 are necessary.

It has recently been stated concerning the fact that "death is different" and that "trial courts must do everything legitimately in their power to ensure that these trials are fair and that the proceedings and verdict are especially reliable." *State v. Barnes*, 407 S.C. 27, 48, 753 S.E.2d 545, 556 (2014) (Toal, C.J., dissenting). A retrial without a reason for it can only be considered a defeat for justice. As this Court stated in *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), "[I]t would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial." It would do well for three silent members of the Court to remember that and to act properly under its rules to prevent the misapplication of its own decisions and the negative effect that such inaction has on justice. *See Stein v. New York*, 346 U.S. 156, 197 (1953) ("The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law.").

II. Rehearing is appropriate under Rule 221 where the decision under review demands error correction where the underlying precedent was misapplied by the circuit court which undermines any entitlement to a new sentencing proceeding.

Rehearing is appropriate where the three members of the court may have misapprehended that the PCR court's basis for relief in Kamell Evans' case was a misapplication of this Court's mandate in *Rosemond v. Catoe* which undermines any conclusions related to deficient performance and prejudice. Simply put, the entire lower court order related to the resentencing judgment is an unsupportable error of law.

First, it is undisputed now that *Rosemond* did not require the action by Judge Hill. As Justice Kittredge stated in his dissent in Hughey *v. State* about the *Rosemond* opinion that he authored:

> 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 PCR based on the mercy charge,** but clarified in dictum that the "other than as an act of mercy" language not be charged. Id. at 330, 680 S.E.2d at 10–11. I view the challenged instruction, in isolation, as potentially confusing, for it is susceptible to more than one interpretation.
>
> **This court never addressed the challenged mercy instruction in Rosemond in the context of the Strickland v. Washington test.**

Hughey v. State, supra.

However, even more telling of the misapplication of this Court's precedent is the fact that the "mercy charge" was raised and rejected for relief in Hughey's direct appeal. As Justice Kittredge noted:

> Given that the charge in this case was affirmed on direct review fifteen years ago, I cannot fathom how it is proper for this Court to uphold the post-conviction relief court's finding of deficient representation. *See State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 732 (2000) (reviewing the charge on mitigating circumstances, including the mercy charge, and concluding "a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment"). The finding of deficient representation is clear legal error. In any event, even were I to indulge in the fiction of deficient representation, Hughey cannot satisfy the prejudice prong of *Strickland.*

Hughey v. State, supra.

The PCR Court was plainly wrong in its conclusion that *Rosemond* alone mandated the decision to require resentencing of Evans without any analysis. This reading of Rosemond demands vacation.

Importantly, the direct appeal in *Hughey* was still good law when Evans was tried. The Court may have misapprehended that that case had not been decided when it was tried. note that trial counsel did not have the benefit of the Rosemond ruling at the time of trial or even at the initial PCR hearing. Trial counsel cannot be deemed deficient for not anticipating the change in *Rosemond. See Wilds v. State*, 407 S.C. 432, 442–43, 756 S.E.2d 387, 392 (Ct.App.2014), cert. granted, Nov. 20, 2014 (finding that trial counsel was not deficient where the case on which the PCR applicant relied had not yet been decided by this Court). *See also Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) ("The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052. Accordingly, we must be wary of second-guessing trial counsel's tactics. *Whitehead v. State,* 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)"). *Also, Bell v. Cone*, 535 U.S. 685, 698, 122 S.Ct. 1843, 1852 (2002) ("In Strickland we said that '[j]udicial scrutiny of a counsel's performance must be highly deferential' and that 'every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' 466 U.S., at 689, 104 S.Ct. 2052").

As Chief Justice Toal stated herein with applicability to Evans's case concerning the challenged instruction:

> 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.

It is undisputed that the order granting resentencing was an error of law due to the misapplication of *Rosemond.* It is additionally undisputed that counsel cannot be deemed ineffective where deficient performance cannot be shown by failure to anticipate the change in the law in Rosemond. It is further undisputed that when a correct assessment under *Strickland* is completed, the capital defendant has failed under both prongs of *Strickland v. Washington* and the windfall of resentencing is inappropriate and an error of law.

Respondent respectfully submits that rehearing is warranted.

Respectfully submitted,

ALAN WILSON
Attorney General

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Senior Assistant Attorney General

ATTORNEYS FOR PETITIONER-RESPONDENT

By: ______________________

May 28, 2015

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Petition for Rehearing by depositing one copy in the United States mail, postage prepaid, to each of his attorneys of record, addressed as follows:

William H. Ehlies, II, Esquire
Building A, Suite 201
310 Mills Avenue
Greenville, SC 29605

Christopher Seeds, Esquire
Post Office Box 3931
Ithaca, NY

This 28th day of May, 2015.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

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

Kamell D. Evans, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2011-188687

ON WRIT OF CERTIORARI

Appeal from Greenville County
The Honorable D. Garrison Hill, Circuit Court Judge

Memorandum Opinion No. 2015-MO-027
Heard December 9, 2014 – Filed May 13, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

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 Melody J. Brown, all of Columbia, for Petitioner/Respondent.

William H. Ehlies, II, of Greenville, and Christopher W. Seeds, of Ithaca, New York, for Respondent/Petitioner.

J. Christopher Mills, of Columbia, 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. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: I would reverse the post-conviction relief (PCR) court's finding that Respondent-Petitioner Kamell D. Evans is entitled to a new sentencing hearing because his trial counsel[1] failed to object to the trial court's erroneous jury instruction.[2]

FACTUAL/PROCEDURAL HISTORY

Evans was convicted of two counts of murder, two counts of possession of a weapon during the commission of a violent crime, two counts of kidnapping, and one count of first degree burglary for the events leading up to and death of Greenville County Sheriff's Deputy Antonio J. "Joe" Sapinoso and his father, Antonio L. "Tony" Sapinoso.

The material facts at trial were undisputed, and Evans admitted to killing the two victims—the father and brother of Evans's ex-girlfriend Christina Roderiguez. The evidence established that on April 1, 2003, Evans arrived at the Sapinoso home at nighttime, dressed in all-black clothing and wearing gang insignia, with three guns, over forty rounds of ammunition, and a knife. Evans parked his vehicle in an unoccupied neighboring lot, and hid in the woods while he waited for Joe to arrive home after his shift with the Sheriff's Department. Upon Joe's arrival, Evans held the still-uniformed officer at gunpoint, relieved him of his service weapon, and forced him into the home. A four-hour hostage situation ensued, during which Evans engaged in negotiations with a hostage negotiator from the local police department and heard pleas for the release of the victims by his friends and family. Marcia Sapinoso (Tony's wife and Joe's mother) and Christina's minor son were locked in a closet upstairs.

The situation ended tragically when Evans shot the two victims in the head—one of whom (Joe) was shot "execution style"—killing them. Forensic evidence established that Evans shot Joe four times in the back of the head at close range while Joe's head was on the floor. Further, Evans shot Tony twice in the head and once in the arm, which was considered a defensive wound. Evans

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[1] At trial and during the subsequent capital sentencing hearing, Evans was represented by Steven W. Sumner and James Lee Goldsmith, Jr. (collectively, trial counsel).

[2] However, I agree that the remaining issues raised by Evans should be dismissed as improvidently granted.

testified that he shot Joe when he tried to reach for Evans's gun, and that he shot Tony because he stood up at the same time Joe reached for the gun.

During the sentencing phase of Evans's trial, the State presented evidence of three aggravators with respect to the murder of Tony Sapinoso, and four aggravators with respect to the murder of Joe Sapinoso.[3] Marcia Sapinoso, Cheri Jones (Joe's longtime girlfriend), and one of Joe's fellow police officers and friends provided victim impact testimony. The State sought to capitalize on evidence presented during trial that painted Evans as a gang member, and presented testimony that he would likely pose a threat to the general prison population.

Likewise, Evans presented a full mitigation case, emphasizing his good character and his mental health issues. Various family members, friends, a co-worker, and former coaches of Evans testified to his positive attributes as a leader on the football field, a loving brother and uncle, a friend and mentor to children in need, and a solid and dependable employee. Evans's trial counsel also presented expert testimony to refute the State's expert's testimony that Evans would likely perpetrate gang violence while in prison. Finally, Evans's defense counsel presented testimony by a neuropsychologist that Evans had certain cognitive deficiencies indicative of brain dysfunction that would have impaired his decision-making during the hostage situation, and a psychiatrist, who diagnosed Evans with "major depressive disorder, single episode." In sum, during the sentencing phase of the trial, Evans's trial counsel sought to capitalize on their guilt-phase strategy of emphasizing Evans's good qualities; portraying the killings as a horrible, one-time mistake; and focusing on a theme of "no excuses."

By doing so, defense counsel hoped that the jury would show Evans mercy and spare him the death penalty by recommending a life sentence. After the trial judge explained mitigation and aggravation to the jury, Goldsmith then delivered his opening remarks during the sentencing phase:

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[3] The following statutory aggravating circumstances were presented to the jury with respect to the murder of Joe Sapinoso: (1) the murder was committed during the commission of first degree burglary; (2) the murder was committed during the crime of kidnapping; (3) Evans murdered two or more persons pursuant to one course of conduct; and (4) Evans murdered a law enforcement officer during or because of the performance of his official duties. The same aggravating circumstances were presented to the jury with respect to Tony Sapinoso, with the exception of the law enforcement aggravator.

And part of what we are going to try to show you is that first and foremost, and this may seem simplistic, but . . . Evans is a human being. And you are being asked whether you will kill or sentence to life imprisonment a fellow human being, granted a human being capable of great evil. And I'm not going to diminish that. But what we hope to show you also is a human being capable of some good, perhaps even great good, a human being who in one 10-second episode of his life made a horrible decision, a tragedy, and inflicted much pain on people during that ten seconds and afterwards.

Goldsmith reiterated:

Even if the state proves every aggravating factor that they prove, that they present to you, even if you find aggravation, you still without question can sentence him to life imprisonment without the possibility of parole.

You can, as I have always said, show mercy. You can always choose life.

Goldsmith again focused on mercy during his closing argument, stating:

Ladies and gentlemen, we do not repay evil with evil. The solicitor is correct. I am going to ask for mercy for [Evans]. But I disagree with what the solicitor said is the definition of mercy. He said mercy is something that you deserve. I strenuously disagree, ladies and gentlemen.

If we deserved it, if we could earn it, then we probably wouldn't need it. Mercy is unmerited favor. You can't earn it; you don't deserve it; but you give it to him anyway. . . . We don't repay evil for evil. And mercy is appropriate in this case.

You can show mercy and you can choose life regardless of who deserves it and who does not. We all need mercy, but none of us have earned it and none of us deserve it.[4]

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[4] On the other hand, the Solicitor told jurors not to "feel sorry" for Evans.

The trial judge then delivered the following jury instruction:

> Now, in making your determination as to which sentence to recommend in this case you should consider the statutory aggravating circumstances, the statutory mitigating circumstances and any nonstatutory mitigating circumstances in arriving at your decision.
>
> . . . .
>
> The existence of any statutory or nonstatutory mitigating circumstance is not a bar to the recommendation of a death sentence so long as you have found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. Conversely, you may also recommend a sentence of life imprisonment even though you find at least one of the statutory aggravating circumstances beyond a reasonable doubt.
>
> 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.*

(Emphasis added). Trial counsel did not object.

The jury recommended Evans be sentenced to death for the murders, and the trial judge imposed the death sentence for both counts of murder, and lifetime imprisonment for the first degree burglary charge.[5] This Court ultimately affirmed Evans's convictions and sentence on direct appeal. *See State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006).

Subsequently, Evans filed an application for PCR. Evans's PCR hearing was held on June 1–5, 2009. On June 25, 2009, this Court issued an opinion in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), in which it admonished the bench that the specific phrasing of the same jury charge delivered in Evans's case not be used again. Evans subsequently moved to amend his application, arguing that his trial counsel was ineffective for failing to object to the condemned charge.

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[5] The trial court declined to impose sentences for the kidnapping and weapon convictions pursuant to sections 16-3-490(A) and -910 of the South Carolina Code. *See* S.C. Code Ann. §§ 16-3-490(A), -910 (2003).

At the PCR hearing, Evans's trial counsel maintained that they did not understand the instruction to preclude the jury's consideration of mercy. Instead, they claimed they did not object to the jury instruction because they believed the instruction emphasized to the jurors that they *could* consider mercy. Sumner testified he "liked" the charge because it was "brief," it "use[d] the word mercy," and it "seem[ed] to get across what [trial counsel] were trying to do." Goldsmith testified he thought the charge "pretty much tracked with what [trial counsel] thought should be charged," and he believed the charge "was sort of an expansive charge." Both testified that had they believed the charge limited the jury's "use of mercy," they would have objected because mercy was the "primary element," "key highlight," and the "major part" of their mitigation case, and because Goldsmith had "built [his] closing argument around mercy."

The PCR court found that Evans was entitled to PCR on the sole basis that Evans's trial counsel failed to object to the trial court's jury instruction regarding mercy, and found that prejudice to Evans resulted. The PCR court rejected Evans's other arguments.

The State petitioned this Court for a writ of certiorari,[6] and we granted review pursuant to Rule 243, SCACR.

ANALYSIS

The State argues that the PCR court erred in finding Evans's trial counsel ineffective for failing to object to the trial court's jury instruction regarding mercy during the sentencing phase of Evans's trial. I agree and would reverse the PCR court's decision granting Evans relief on this basis.

On appeal in a PCR action, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In other words, the "PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (citing *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626).

A criminal defendant is guaranteed the right to effective assistance of

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[6] Evans also appealed the PCR court's order. As stated, *supra*, I agree that those grounds for appeal should be dismissed as improvidently granted.

counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland,* 466 U.S. at 686).

As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 668). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688).

Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Rosemond*, we granted relief to the PCR applicant on the basis that he established his entitlement to a new sentencing hearing as a result of trial counsel's failure to present any mental health mitigation evidence in the sentencing phase. 383 S.C. at 330, 680 S.E.2d at 11. However, in dictum we said:

> We nevertheless elect to address [the applicant's] challenge to trial counsel's failure to object to the trial court instructing the jury not to recommend a sentence of life based on mercy: "you 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). We agree with [the applicant] and hold that if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it.

Id. at 329, 680 S.E.2d at 10. Further, we explained:

> 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. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion . . . ."

Id. at 330, 680 S.E.2d at 10–11 (quoting *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In *Rosemond*, we did not analyze the condemned jury instruction in the context of *Strickland*; instead, we alerted the bench and bar to the potential for confusion resulting from its continued use. Thus, in analyzing this same instruction here, we must do so using the ineffectiveness paradigm.

Regardless of whether trial counsel was deficient in failing to object to the instruction here,[7] I would hold that Evans cannot satisfy the prejudice prong of *Strickland*. In that regard, the 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

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[7] I note that trial counsel did not have the benefit of the *Rosemond* ruling at the time of trial or even at the initial PCR hearing. *See Wilds v. State*, 407 S.C. 432, 442–43, 756 S.E.2d 387, 392 (Ct. App. 2014), *cert. granted*, Nov. 20, 2014 (finding that trial counsel was not deficient where the case on which the PCR applicant relied had not yet been decided by this Court).

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.

Accordingly, I would reverse this portion of the PCR court's decision.

KITTREDGE, J., concurs.