

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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MAY 28 2015

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

J. Michael Baxley, PCR Circuit Judge  
J. Derham Cole, Trial Circuit Judge

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**Appellate Case No. 2012-212107**  
**Memorandum Opinion No. 2015-MO-028**  
**Filed May 13, 2015**

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JONATHAN KYLE BINNEY, #6009,

Respondent/Petitioner,

V.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent,

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PETITION FOR REHEARING

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The 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 Jonathan Binney’s Cherokee 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.<sup>1</sup> SCACR Rule 243(j) is clear and unambiguous: “upon the concurrence of any two justices, the petition may be granted on any question presented.”<sup>2</sup> The “Rule of Two” for certiorari in Rule 243(j) remains applicable in this case because Justice Kittredge entered a dissenting opinion from the three justices’ dismissal of the writ certiorari as improvidently granted and Chief Justice Toal concurred in the dissent, each indicating that they would reverse the grant of post-conviction relief to Binney. 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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<sup>1</sup> 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.”).

<sup>2</sup> See South Carolina Constitution, Art. V, § 4 (The Supreme Court shall make 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*, 2015 Westlaw 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 Jonathaan Binney’s 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 *Evans 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. **This court never addressed the challenged mercy instruction in *Rosemond* in the context of the *Strickland v. Washington*** I view the challenged instruction, in isolation, as potentially 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.**

*Evans v. State, supra.* (emphasis added).

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 Binney was tried. The Court may have misapprehended that that case had not been decided when it was tried and that trial counsel did not have the benefit of the *Rosemond* ruling at the time of trial or even at the initial PCR hearing. *Hughey* was controlling precedent at the time of Binney's trial. Indeed, it was still controlling precedent, at the time of the May 29-June 1, 2007 PCR hearing, and Mr. Slade testified that he would have objected to any instruction given that he thought was inaccurate. **App. pp. 4538-39.**<sup>3</sup>

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

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<sup>3</sup> Ironically, proceedings in the PCR court would have concluded in 2007, but for the interlocutory appeal in *Binney II*, and *Hughey* would have still been controlling precedent on certiorari.

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”). Secondly, the PCR judge granted relief based upon a fundamental misapplication of the *Strickland* standard because the grant of Post-Conviction Relief is based upon counsel’s failure to anticipate a change in the law that did not occur until almost six years after Binney’s November 2003 sentencing proceeding and two years after the PCR hearing. However, this was not deficient performance or prejudicial under *Strickland*. Again, *Rosemond* is inconsistent with the result reached in *Hughey*, which this Court recognized in *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 11. (“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”).<sup>4</sup>

The Court may have misapprehended that the PCR judge’s Order ignores that *Hughey* was binding precedent at the time of trial and, in essence, granted relief based

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<sup>4</sup> Further, and contrary to the PCR judge’s finding that this “Court’s statement in *Rosemond* is not a new rule,” **Order, p. 4, App. p. 3603**, *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. Therefore, retroactive application of *Rosemond* would violate *Teague v. Lane*, 489 U.S. 288 (1989) and *State v. Jones*, 312 S.C. 100, 439 S.E.2d 282 (1994). *See also Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) (“In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court’s decisions on retroactivity”). *Cf. State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (decision that jury charge on inference of malice from use of a deadly weapon “represents a clear break from our modern precedent, today’s ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved” and specifically providing “[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief”). In light of *Hughey*, it cannot fairly be said that all reasonable jurists would have agreed that the rule set forth in *Rosemond* existed before it was decided.

upon counsel's failure to utilize a crystal ball or have Periclean foresight. This type of standard is inconsistent with *Strickland* because an attorney is never required to anticipate or discover changes in the law or facts that did not exist at the time of trial. *See Strickland*, 466 S. at 689 ("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"); *see also Richter*, 131 S.Ct. at 787; *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (although *Skipper v. South Carolina*, 476 U.S. 1 (1986) was on appeal to the Supreme Court at the time of Kornahrens' trial and trial counsel "testified that he was aware of that fact, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law"); *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004); *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, even though victim changed her mind by the time of the PCR hearing and testified for 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); *United States v. McNamara*, 74 F.3d 514, 515-17 (4<sup>th</sup> Cir. 1996) (counsel cannot be considered ineffective for failing to anticipate changes in law). Under *Strickland*, trial counsel were reasonably entitled to rely upon this Court's decision in

*Huey* and they were not ineffective for failing to anticipate that this Court would subsequently reverse *Hughey*, as it did in *Rosemond*.

Also, the State submits that Binney cannot show prejudice resulting from counsel's failure to object 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. See also *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Sixth Amendment prejudice under *Strickland* is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. *Wong v. Belmontes*, 558 U.S. 15 (2009).

As Chief Justice Toal stated in *Evans v. State* herein with applicability to Binney'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. See *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 844 (1993) (“Ineffective-assistance-of-counsel claims will be raised only in those cases where a defendant has been found guilty of the offense charged, and from the perspective of hindsight there is a natural tendency to speculate as to whether a different trial strategy might have been more successful. We adopted the rule of contemporary assessment of counsel’s conduct because a more rigid requirement ‘could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.’ *Ibid.*”) (citing to *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066).

Respondent respectfully submits that rehearing is warranted.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT-PETITIONER

By: 

May 28, 2015

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CERTIFICATE OF SERVICE

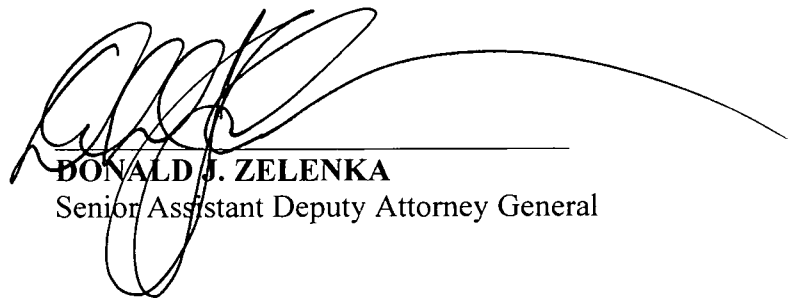
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*I, Donald J. Zelenka*, hereby certify that I have served Petition for Rehearing by depositing one copy in the United States mail, postage prepaid, to each of his attorneys of record, addressed as follows by depositing copies of same in the United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

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This 28<sup>th</sup> day of May, 2015.



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**DONALD J. ZELENKA**  
Senior Assistant Deputy Attorney General