

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Court of Common Pleas Case No. 2011-CP-26-3907
(Capital PCR Action)
Appellate Case No. 2014-000904

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S.C. Supreme Court

LOUIS MICHAEL WINKLER, JR.,

Respondent/Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

APPENDIX

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1 responses.

2 You want to have the sheriff do it?

3 MRS. HUGGINS: Well, I, I -- it would, it would be nice
4 if I could just give you a total of the whole 500, the
5 status of that.

6 THE COURT: Okay.

7 MRS. HUGGINS: The nine we're waiting from the
8 Sheriff's Office. I have five medical that would like to be
9 excused. I have 169 that's coming in. We have 317 that
10 either's been excused, transferred, or affidavit.

11 THE COURT: All right. So, have you shared this with
12 Mr. Wilson and Mr. Humphries?

13 (No response.)

14 THE COURT: Mrs. Huggins?

15 MRS. HUGGINS: Yes, sir.

16 THE COURT: Have you shared this with Mr. Humphries and
17 Mr. Wilson?

18 MRS. HUGGINS: Yes, we have.

19 THE COURT: Now, counselor, can y'all hear me also?

20 UNIDENTIFIED PERSON: We can hear you, judge.

21 THE COURT: Mr. Humphries, you have any response to the
22 service of the juror notices so far?

23 SOLICITOR HUMPHRIES: Satisfactory with the State.

24 THE COURT: Speak louder for me, sir.

25 SOLICITOR HUMPHRIES: Satisfactory with the State.

1 THE COURT: Okay. Satisfactory to the State.

2 Mr. Wilson, Mr. Rathburn, what about you-all?

3 MR. WILSON: Judge, I've looked at all of them and I
4 have no objection. There were three that I think that we
5 had, that we have, that we're probably going to have a
6 concern about. That's probably gonna be down to one.

7 THE COURT: All right. You have three you have concern
8 about?

9 MR. WILSON: I got three that I got -- well, I got one
10 that I think that I had an issue with.

11 THE COURT: All right. So, you have one then you have
12 concern with.

13 All right. Mrs. Huggins, do you know the one he's
14 talking about?

15 MRS. HUGGINS: No, sir.

16 THE COURT: All right. Mr. Wilson, speak as loud as
17 you can and tell us which one you're talking about.

18 MR. WILSON: Juror Number 211, which is a person who is
19 deaf, is partially deaf, deaf in one ear and partially deaf
20 in the second ear, and I was just wondering if we might can
21 get an interpreter for her. Well, otherwise she couldn't be
22 able to serve because she is partially deaf.

23 THE COURT: Okay. You have someone who's partially
24 deaf, saying they're deaf in one ear and then very much have
25 restricted hearing in the next.

1 And you want them to show up, and even if they don't
2 want to, you want them to be on the jury and the Court to
3 have an interpreter for them?

4 MR. WILSON: Yes, sir.

5 THE COURT: Did the person request to be relieved,
6 Mrs. Huggins?

7 MRS. HUGGINS: Yes, sir.

8 THE COURT: And Mr. Wilson, you do not, you do not
9 doubt the, the truth of the physical problem?

10 MR. WILSON: I do not doubt the significant physical
11 problem. There, there is medical -- I think there's a
12 medical statement to that effect. I have no problem
13 recognizing an individual who does have, is deaf. But my
14 main, my, my, ample thought in my mind, it's a legitimate
15 conclusion.

16 THE COURT: All right. Mr. Humphries, you have a
17 response?

18 SOLICITOR HUMPHRIES: I'd like her to be excused. In
19 the, in the request for excusal, it indicates that she can
20 only read by reading lips. She has to be within three or
21 four feet of the speaker in order to do so. If this were a
22 case that was only going to last one or two days, I wouldn't
23 have any significant problems with an interpreter for a
24 minor case. But in a case that's gonna last potentially, at
25 least to the jury, seven days, I just believe that would be

1 physically very difficult and we don't object to her being
2 excused.

3 THE COURT: If the person says they only can understand
4 what has been said by reading lips, that they do not
5 understand sign language, then, practically speaking, I'm
6 not sure how we would be able to do it anyway because if the
7 person has to be within three feet of the individual, that's
8 further than a witness is, and, therefore, someone would
9 have to repeat what the witness says within three feet of
10 the juror, which means then she's got to look at the person
11 away from the witness, and other jurors would be distracted
12 also at that close range I would think. Plus the person
13 would be making additional noise that would very much
14 distract all of the jurors by repeating what the witness
15 says.

16 And it would be kind of inappropriate to move the
17 witness right there next to that particular juror because
18 that would, I think, not be fair to the other jurors. I
19 don't know how, how practically you could do that anyway
20 because the witness box in Horry County is much further than
21 three feet from the jury box.

22 So, Mr. Wilson, how would that person be able to, to,
23 to be able to tell what the witness is saying without having
24 someone repeat it out loud within three feet of her?

25 MR. WILSON: Judge, I'm not, I'm not certain that, that

1 she says that she can't sign. But what she said is, what I
2 read, what I understood was that she can't read lips more
3 than -- and that would be a problem and I would agree at
4 that time and I think that that's a potential problem. But
5 if she can sign and then I don't think that that, that much
6 happens, but it could come and it could occur if it's a
7 reason. Now, I would agree with the Court that if she can
8 not sign, then you're gonna have to have an interpreter to
9 have everything interpreted.

10 THE COURT: Mrs. Huggins, does the, does, does the
11 statement say one way or the other on that?

12 MRS. HUGGINS: I have a statement from the doctor's
13 office. I would read it to you if you'd like to hear it.

14 THE COURT: Well, I'm, I'm just concerned about reading
15 that long amount of verbiage over the phone. Y'all don't
16 come in that loud as it is.

17 Is it a paragraph or what?

18 MRS. HUGGINS: It's a paragraph.

19 THE COURT: All right. Go ahead.

20 MRS. HUGGINS: Mrs. Amanda Bonner Haynes has been a
21 patient of mine for hearing loss since she was a child.

22 THE COURT: Says what?

23 MRS. HUGGINS: She was a child.

24 THE COURT: Okay.

25 MRS. HUGGINS: Mrs. Bonner has a profound hearing loss

1 in the left ear, a severe hearing loss in the right ear.
2 She currently wears a hearing aid in the right ear to
3 amplify sound. However, the left ear can not be aided and
4 she is essentially deaf. Without direct eye contact, being
5 within three to four feet of the speaker, Mrs. Bonner can
6 not understand conversations. It is, it is my professional
7 opinion that she would be unable to participate as a juror
8 due to her hearing loss. If you have any questions or would
9 like to speak with me in regard to this matter, please do
10 not hesitate to call my office.

11 THE COURT: To me, that sounds definitive, Mr. Wilson.

12 MR. WILSON: Well, not to me. Unfortunately, it
13 doesn't, it doesn't. In fact, I -- in fact, the, the fact
14 that she has been deaf from childhood -- the whole problem
15 is -- I have a very good friend who has been deaf since
16 childhood or not. And so, that would enhance my argument in
17 that, that an interpreter ought to be brought in and a
18 prequalification made and let's see. We may not need to
19 make this past that. But I, I can't accept the fact that
20 there's no mention of it in this letter whether she signs
21 adequately or hear something. That would be a question.
22 But I agree with the Court and, and the solicitor that if
23 she can not sign and I agree that, that it's gonna be too
24 much to ask the person who can't to read---

25 THE COURT: You're breaking up there.

1 But your essence of your argument is that you want to
2 find out whether or not she can understand sign language?

3 MR. WILSON: That's correct. And if she can, then I
4 would ask for, make her bring an interpreter with her at the
5 time.

6 THE COURT: Is the doctor a local doctor, Mrs. Huggins?

7 MRS. HUGGINS: It is, from Myrtle Beach.

8 THE COURT: Well, Mrs. Huggins, if you would, call his
9 office and, and, and have him write down whether he, he, he
10 understands she can do sign language or not. If she can, I
11 may just, I still think I'm gonna excuse her, but I may ask
12 her just to come by Monday morning and I may talk with her
13 myself. But if she can not understand sign language, and
14 he's, would just supplement his statement, written statement
15 to say that, then you can go ahead and excuse her. But make
16 sure it's in writing from him.

17 All right?

18 MRS. HUGGINS: Yes, sir.

19 THE COURT: All right. What's -- any other ones?

20 MRS. HUGGINS: We have five medical excuses, five that
21 would like to be excused for medical reasons.

22 THE COURT: Mr. Wilson, any objection?

23 I think Mr. Humphries says he has no objection.

24 MR. WILSON: We have no objection.

25 THE COURT: All right. So, that's everybody,

1 Mrs. Huggins, Huggins, other than the nine you haven't
2 found?

3 MRS. HUGGINS: Yes, sir.

4 THE COURT: All right. Sheriff Thompson?

5 SHERIFF THOMPSON: Yes, sir.

6 THE COURT: What is the likelihood of, of those nine
7 getting done between now and Monday?

8 I would assume a hundred percent.

9 SHERIFF THOMPSON: Yes, sir, we'll have you an answer
10 on those nine definitely by Monday.

11 THE COURT: All right. Now, sheriff, just so there be
12 no misunderstanding, you and your officers who are involved
13 in this case, as well as Mrs. Huggins and anyone in her
14 office who's involved in this case, any, you-all are, are on
15 the same gag order that I have the lawyers on. I want no
16 one from the Sheriff's Department or the Clerk's Office
17 talking to the press regarding this matter.

18 SHERIFF THOMPSON: Yes, sir. I understand.

19 MRS. HUGGINS: Yes, sir.

20 THE COURT: All right. Mrs. Huggins has a -- what is
21 the extra courtroom you have for us on Monday, Mrs. Huggins?

22 MRS. HUGGINS: That would be Courtroom 3-D.

23 THE COURT: 3-D.

24 What time are the jurors reporting?

25 MRS. HUGGINS: They will report at ten o'clock to

1 Courtroom 3-D.

2 THE COURT: All right. At 9:00 a.m. -- 3-D at ten
3 o'clock?

4 MRS. HUGGINS: Yes, sir.

5 THE COURT: At 9:00 a.m. I will have a meeting in
6 Courtroom 3-D. 9:00 a.m. Monday morning everyone will be in
7 Courtroom 3-D. We'll get the, the remaining nine reports
8 and any other matters we need to cover before we go in to
9 start qualifying the jury.

10 Now, sheriff, let's make sure, and Mr. Wilson, let's
11 make sure that we have appropriate clothing for Mr. Winkler.

12 Is that all taken care of?

13 MR. WILSON: Yes, sir, judge, his father has his
14 clothes and I have them, and I'll have them brought over.

15 THE COURT: Okay. You said that his family members
16 have clothing and you have them with you?

17 MR. WILSON: Yes, sir, and I will deliver them to the
18 Sheriff today.

19 THE COURT: All right. And so, sheriff, what is your
20 plan for bringing Mr. Winkler in the building and also when
21 he's in the courthouse?

22 SHERIFF THOMPSON: Okay. We'll be bringing him in via,
23 also bringing him in the sally port area of the detention
24 area. I'll let him change clothes there and then we'll go
25 to the detention area between the courtrooms that the trial

1 is in, the trial's going on in the courtroom.

2 THE COURT: All right. So, therefore, you need to have
3 him there I would think around eight o'clock then to make
4 sure he can change clothes and all.

5 SHERIFF THOMPSON: That, that's no problem.

6 THE COURT: Okay.

7 SHERIFF THOMPSON: Thank you.

8 THE COURT: Sheriff, once we get there Monday morning,
9 how about please get with my, myself and the law clerk. I
10 need to make sure we have a, a cell number for you Monday so
11 during the course of the trial, if we need to communicate
12 after court hours, we can do so.

13 SHERIFF THOMPSON: No problem. I'll have that for you
14 Monday morning.

15 THE COURT: Okay. And I've got yours, Mrs. Huggins.

16 And Mr. Wilson, Mr. Humphries, I think I have those for
17 you-all. But just -- I'll get those Monday also.

18 Now, any there other matters that we need to take up
19 right now we can't take up Monday morning?

20 SOLICITOR HUMPHRIES: Yes, sir.

21 THE COURT: Yes, sir, Mr. Humphries.

22 SOLICITOR HUMPHRIES: One issue, and Mr. Wilson, and
23 Mr. Rathburn and I have spoken about this. It's a question
24 of how we want to qualify the jury as to the witness list,
25 and what, what we propose, I think jointly, is that the

1 State will give you, in Word format, a list of our potential
2 witnesses both in the guilt and penalty phase, and
3 Mr. Wilson and Mr. Rathburn will give you, in Word format, a
4 list of their potential witnesses in both phases. We will
5 not share the list with each other, but will provide them to
6 the Court, which will then allow your law clerk to merge the
7 list on to one without any designation as to the State or
8 the defense.

9 And what we've done in the past is we found to be --
10 you know, we've, I've done it a number of ways and I've
11 talked about this, about this with Mr. Wilson. We've had
12 all the names called out in general qualification. That,
13 that, in, in my experience, has not been a very accurate
14 means of folks identifying witnesses they know cause they
15 hear so many names.

16 THE COURT: Well, I normally do it in, in groups of
17 five.

18 SOLICITOR HUMPHRIES: Right. What we propose, what,
19 what I, we propose and what we've done in the past is we've
20 created this list. We put it in a number of copies, which
21 we, we keep just a certain number of copies, and provide
22 them to those jurors who are in the waiting area before they
23 come in for, for individual qualification. And then once
24 they come in for individual qualifications, one of the
25 questions of the Court is have you been provided a witness

1 list, do you know of, do you have any close relationship, or
2 however you want to form the question, with any of those
3 people indicated on that list.

4 And then we only have to deal with those that they
5 indicate -- they can indicate it by number, and then, of
6 course, the Court will know who that is, and then we can, we
7 can take them up like that. That way they've got a written
8 list in front of them and they'll have time to review it
9 without the, the rush of general qualification.

10 THE COURT: I've done -- I did that in the last case I
11 had.

12 Mr. Wilson, you have any problem with that?

13 MR. WILSON: I don't have any problem with that. But
14 just, just obviously I don't---

15 THE COURT: Speak, speak louder for me.

16 MR. WILSON: I don't have any problem at all with that
17 procedure. The only thing that I would ask for though
18 obviously is a ruling that I have to give up the names of my
19 witnesses. I'm -- obviously I don't want to give them up.

20 THE COURT: Well, now, wait a minute now. What I hear
21 Mr. Humphries saying is that he will not have your list of
22 witnesses. The jurors will. But he would not have them and
23 then when they have a person they know, they will respond
24 to, to that by number.

25 MR. WILSON: Well, I understand. I'm just saying what

1 our position is is that I don't want to give up my, my
2 witness list until I absolutely have to. As far as I'm
3 concerned, that would be at the end of the case.

4 THE COURT: You, you're concerned about what, sir?

5 MR. WILSON: What, what I'm saying, judge, is, what I'm
6 saying is that I would want to hold on to my jurors, I'm, my
7 witnesses, my list of witnesses until the end of the State's
8 case, and, and, and, and produce them at that time.

9 Now, if -- I don't -- if, if the Court rules that I got
10 to give them up earlier, I don't have any problem with that
11 procedure because I think that that's a, a fair procedure.
12 I don't have a problem with it except that I don't want to
13 give up my witnesses at this point in time.

14 THE COURT: Well, my concern is that, at that point in
15 time, we've got the jury set. And if I would end up with
16 too many jurors that may otherwise be disqualified, then,
17 then we're, we're sort of in a mess. I think that the
18 procedure proposed, which I've done before, is a reasonable
19 procedure. And so, I plan to do that.

20 SOLICITOR HUMPHRIES: And, Your Honor, you're -- just
21 as an, an additional sustaining ground, in support of the
22 Court's discretion, State versus Benji Fowler, that
23 procedure was done, and, in fact, that was wherein Ralph
24 King Anderson required, over the defendant's objection, to
25 the defendant's provide their list at the, at general

1 qualification. And in that case, the Court found that there
2 were a number of witnesses who would of been disqualified,
3 who were disqualified as a result of the list and they
4 wouldn't, we would not have known about that, that had they
5 not. We could of gotten in trouble with that.

6 THE COURT: Well, I mean fine then. I'm glad Judge
7 Anderson's procedure agrees with mine. But I -- we're,
8 we're gonna do it that way. Just basically get me the list,
9 both, both of you.

10 And now, Mr. Humphries, and you too really, Mr. Wilson,
11 this is no way, this is no way means you don't have to
12 comply with Rule 5. So, anything you need to reveal in Rule
13 5 format, either one of you make sure the other side has it.

14 MR. WILSON: Yes, sir.

15 SOLICITOR HUMPHRIES: Yes, sir.

16 THE COURT: Now, any other matters?

17 SOLICITOR HUMPHRIES: Well, let me just, just in terms
18 of logistics, what we intend to do is give you that list on
19 a disk, and if Mr. Wilson can do the same thing, then your
20 law clerk should be able to easily merge those without any
21 reference to the State or the defense.

22 MR. WILSON: And we can do that, judge.

23 THE COURT: I think my law clerk should have that
24 computer knowledge, abilities. If he doesn't, I'll get
25 another law clerk. He's laughing cause I, obviously he does

1 have that ability.

2 Now, did we agree on, and we can discuss this further
3 on Monday morning, but did we agree on the size of the
4 panels?

5 SOLICITOR HUMPHRIES: I think five is where we ended up
6 judge.

7 MR. WILSON: And that, that sounds about reasonable to
8 me.

9 SOLICITOR HUMPHRIES: Typically I mean -- typically --
10 I don't know how long you provide for each panel. But it's
11 always been an hour and fifteen minutes or an hour and a
12 half per five. That's what we've done.

13 THE COURT: Okay. I'll probably go with that. That's
14 fine. That's gonna be a lot of panels. But I'm gonna have
15 to get the logistics to work out.

16 I'm assuming that we're gonna be able to start
17 impaneling the jury as far as groups of five some time
18 Monday afternoon, and hopefully we can start going through
19 the first groups some time Monday, and we'll go from there.

20 Now -- and everyone understands, cause everyone's done
21 this before, that, in doing this, once these people are
22 selected at random through the, at random computer process
23 that the clerk has, then when they're put on this group of
24 five, then once they're qualified, that juror becomes that
25 number juror as in, in line with his or her qualification.

1 So, therefore, the first juror qualified will end up being
2 the first juror to which you-all have a, a choice of, of, of
3 presenting or excusing.

4 Does everyone understand that procedure?

5 MR. WILSON: Yes, sir.

6 SOLICITOR HUMPHRIES: Yes, sir.

7 THE COURT: Did you say yes, Mr. Wilson?

8 MR. WILSON: Yes, sir, I understand that.

9 THE COURT: And Mr. Humphries?

10 SOLICITOR HUMPHRIES: Yes, sir.

11 THE COURT: All right. So, I don't -- and one time I
12 had a question a couple years ago where somebody thought
13 that there would be another drawing after the qualification.
14 But the only drawing is gonna be the drawing of putting them
15 on panels.

16 Mrs. Huggins, you understand that too?

17 MRS. HUGGINS: Yes, sir.

18 THE COURT: All right. Okay. Any other matters?

19 MRS. HUGGINS: Yes, sir.

20 THE COURT: What's that, Mrs. Huggins?

21 MRS. HUGGINS: At the last meeting we had three jurors
22 that were questioned as far as affidavits. Two of them were
23 parents. They worked, they worked outside of the home. One
24 of them was a bus driver that also worked at Santee-Cooper.

25 THE COURT: He worked also where?

1 MRS. HUGGINS: At Santee-Cooper.

2 THE COURT: Okay. Bus driver worked at Santee-Cooper,
3 and we have two parents that maybe also worked outside the
4 home.

5 MRS. HUGGINS: But now we do have affidavits on both of
6 the ones with preschool children who say they do not work
7 outside the home, and we also have a letter from Horry
8 County School District stating that he did, is a bus driver
9 with the school.

10 THE COURT: All right. Any objection to they being,
11 the two parents being excused and the bus driver being
12 transferred?

13 SOLICITOR HUMPHRIES: No, sir.

14 MR. WILSON: No, sir.

15 THE COURT: All right. Anything else?

16 MRS. HUGGINS: That's all.

17 THE COURT: All right. Then I will see everyone at
18 nine o'clock Monday morning.

19 MR. WILSON: Judge?

20 THE COURT: Yes.

21 MR. WILSON: Before you go, I'm -- there's a thing that
22 I need to do, but I need to do it without Mr. Humphries.

23 THE COURT: And is this something we can't do Monday
24 morning?

25 We need to do it now?

1 SOLICITOR HUMPHRIES: You need to do it now.

2 MR. WILSON: We need to do it now I think.

3 THE COURT: All right. Step out of the room,
4 Mr. Humphries.

5 SOLICITOR HUMPHRIES: But I'm not gonna go far.

6 MRS. HUGGINS: Judge, one more thing before
7 Mr. Humphries leaves. On the lady that asked to be excused
8 because of her hearing loss, if I can get the letter from
9 the doctor stating that she does not know sign language, do
10 you want to, me to inform the attorneys?

11 MRS. HUGGINS: Well, you can if you wish. You can do
12 it Monday morning. But if you got that in writing, then
13 there is no objection to her being excused. If the only way
14 she can hear appropriately is through reading lips, then
15 she's excused. And she may be excused anyway. But you
16 don't need to call anybody. Just have that in writing and
17 let me see it Monday morning.

18 MRS. HUGGINS: Okay. If, if she does know sign
19 language, do you want me to call her and tell her to come to
20 talk to you?

21 THE COURT: Yes, if there's any doubt about that, I'd
22 like to talk to her myself.

23 MRS. HUGGINS: And bring an interpreter with her or do
24 you want the Court to try to get one?

25 THE COURT: No, just bring her up Monday morning.

1 MRS. HUGGINS: Okay. Thank you. That's all.

2 (Whereupon, the following takes place outside the
3 hearing of Solicitor Humphries.)

4 THE COURT: All right. Now, Mr. Wilson?

5 MR. WILSON: Yes, sir, Your Honor.

6 THE COURT: Mr. Wilson, please understand that when you
7 speak, make sure you continue to speak towards wherever your
8 speaker is so we can hear you appropriately, appropriately.
9 Sometimes you're fading out.

10 MR. WILSON: All right, sir.

11 THE COURT: All right. Yes, sir.

12 MR. WILSON: Judge, Mr. Winkler wants to be heard and
13 so I want to, to hear him.

14 DEFENDANT: Your Honor?

15 THE COURT: Mr. Winkler, make sure that you are close
16 so I can hear you.

17 And Mr. Wilson, I'm expecting you, as an attorney, if
18 you see any comments going towards prejudicial affect to
19 Mr. Winkler on these charges, you immediately stop it. I
20 have no problem with, with that.

21 MR. WILSON: Yes, sir.

22 THE COURT: All right.

23 DEFENDANT: Your Honor, can you hear me?

24 THE COURT: Yes, sir.

25 DEFENDANT: Thank you. Mr. Winkler.

1 Now, first of all, I'd like to ask that, that the
2 jailhouse know that I should be able to shave everyday.

3 THE COURT: Is the sheriff still in the room?

4 MR. WILSON: Yes, sir.

5 SHERIFF THOMPSON: Yes, sir.

6 THE COURT: Mr. Sheriff, make sure he's able to shave
7 everyday.

8 SHERIFF THOMPSON: That's no problem.

9 THE COURT: All right.

10 DEFENDANT: Thank you.

11 Yesterday me and Mr. Wilson had an altercation at the
12 jailhouse. It came up over the last meeting that we had
13 when I had told, asked him if he told me that I was going to
14 be convicted. I asked him if he had told any of my family.
15 He said when he was in Ohio that he had told every one of
16 them.

17 I contacted my sister and she said no to me he never
18 said anything about you being convicted. Yesterday I
19 brought a picture of my sister, of her husband, and her four
20 children into the -- it was the courthouse being set up for
21 the time of trial. Asked him if Mr. Wilson---

22 THE COURT: Now, Mr. Winkler, I'm -- I didn't hear you
23 just then.

24 DEFENDANT: I said to Mr. Wilson, I said did you see,
25 do you see my sister here in this picture, and he said which

1 one. I pointed it out to him. I said that's the one you
2 called a liar. I said please do not ever call my sister or
3 anyone in my family a liar again.

4 He turned towards me, put his finger in my face,
5 touched my face, and said she is a f'ing liar. At that time
6 I swatted his hand away from my face, officers came in, and
7 they acted like it was my fault. But it was Mr. Wilson's.
8 And there's no way I can see where I'm gonna get a fair
9 trial with this man, my attorney, when he is called me and
10 my family liars over the past month.

11 One thing, I hadn't seen him in over a week. Now, we
12 don't even know if I'm taking the stand yet or not, and I
13 hadn't seen him for a solid week. And he's telling me I'm
14 going to be convicted.

15 This is a very -- I mean this matter here is, is -- I
16 mean I was with Mr. Wilson at the time that that happened.
17 He's, he's the one that lost his temper and stuck his finger
18 in my face and used the F word concerning my sister, who's a
19 teacher in Ohio.

20 None of my family is down here right now, and I
21 couldn't get a hold of any of them last night on the phone
22 through the phone system we have at, at the jailhouse.

23 I contacted Corporal Neal, who was in my pod last
24 night, directed me to Major Johnson. Relayed my, my message
25 that I'd like to press charges on Mr. Wilson, and he said

1 back to her -- I did not speak to Major Johnson. I spoke
2 to, I spoke to Craig that, that, at the jailhouse, did not
3 permit me to do that. I needed a written statement from you
4 in order to do an in-house assault charge.

5 THE COURT: A couple things, Mr. Winkler.

6 It is not uncommon for attorneys to give their clients
7 their opinions. You make the choice obviously about
8 matters. But if a lawyer gives you his or her opinion, the
9 fact you may agree with it or not agree with it, that's
10 neither here nor there. But you, you're the one who, who's
11 basically involved here and you decide the issues regarding
12 that.

13 As far as any criminal charges for what you alleged to
14 have occurred or, that day, if somebody that -- I don't
15 really, from what you say, I don't really understand how
16 that could emanate from that. But, but those matters can be
17 addressed at a later date. There's no urgency about that.

18 Mr. Wilson, I -- with what occurred yesterday, does
19 that, in anyway, affect your, your ability to fully
20 represent Mr. Winkler?

21 Does it, in anyway, affect your demeanor regarding Mr.
22 Winkler and his rights and to fully represent him
23 aggressively and as best you can in the courtroom during the
24 course of this trial?

25 MR. WILSON: Absolutely not, judge. I have every

1 belief that I can continue to represent him just as I have
2 throughout this process. Whether or not he and I see eye to
3 eye, which we have not from the very beginning of this, and
4 I have absolutely no problem with representing him.

5 The other thing is, is that I was not in the room with
6 him alone when this occurred. Captain Rathburn and my
7 cocounsel with me was there. And so was the paralegal,
8 Mrs. DePursio. So -- and the officers came in and I don't
9 know whether there was video or not of it. I hope there
10 was.

11 THE COURT: Well, whatever happened there, my question
12 is, and also, Mr. Winkler, stating your opinion, your
13 opinion whether it is or is not, that, in no way, affects
14 your efforts to fully attempt to succeed in an effort to
15 have Mr. Winkler acquitted, would it?

16 MR. WILSON: No, sir, not at all. And, and judge, at,
17 at no time, at no time did I ever, have I ever told him you
18 will be convicted. But I have told him, and I'm gonna say
19 this---

20 THE COURT: No, no, I don't want to hear anymore about
21 that. I don't need to hear anymore about that. I just want
22 to make sure that, that your, your demeanor, your ability,
23 your desire to do your best and has not, in anyway, been
24 compromised by any comments or, or disagreements you and
25 Mr. Winkler have had.

1 MR. WILSON: No, sir.

2 THE COURT: All right. Mr. Winkler, I'm sorry that you
3 and Mr. Wilson had the time that you had yesterday. But
4 that, in, in my mind, does not, in anyway, interfere with
5 your getting a fair trial with an aggressive attorney who's
6 gonna work hard for your rights and work hard for your
7 acquittal.

8 DEFENDANT: Yes, sir, Your Honor. But the thing is we,
9 we were in all for three days awaiting for jury selection,
10 and he, you know, he, as had this last couple months, to go
11 over things. We met several times. We still don't know
12 whether I'm taking the stand.

13 THE COURT: No, no, Mr., Mr. Winkler, I don't want to
14 get too much into it. But let me just tell you this. That
15 is not uncommon, Mr. Winkler, for those decisions to be made
16 based on what occurs in the State's case.

17 So, those decisions are not uncommon for attorneys and
18 clients to make once the trial is, is going on and many
19 times its not made until, until, in fact, the time for
20 decision is, is there. And you're not gonna be required to
21 make that decision one way or the other until well after the
22 State's, till after the State's case.

23 So, so, whether you do or not is up to you in, in your
24 discussion with Mr. Wilson. But, but it's not uncommon for
25 those things to be made after you view the evidence

1 presented by the State. I don't want to get anymore into
2 that. But I'm just saying that.

3 So, what else you want to say?

4 What else?

5 DEFENDANT: Oh, I don't, I don't see how we can get
6 along. We have to -- we have to go through a mock trial and
7 that this man is just now called me a liar, and there is no
8 way we can get along. I've asked him to be, to be removed.
9 I can't get along with the man. He obviously is just called
10 me a liar again, and, and there's no way that I can get
11 along with him in order to, to get a fair trial out of this,
12 out of this as to what he did tell me.

13 He did tell me that I was gonna be convicted. He
14 called me a liar again. I'm not -- I can't work with the
15 man, and, and go about how I'm gonna be approached to be on
16 the stand. So, I don't see it. I don't see how it's gonna,
17 how, how that, in any way, is gonna give me a fair trial
18 with a man that's already come to a conclusion.

19 THE COURT: Mr. Winkler, if, if, if your request is to
20 have another attorney appointed, from what you've told me,
21 that request is denied. I feel Mr. Wilson will represent
22 you as well if not better than any attorneys I, I know
23 around the State of South Carolina. And if you wish to
24 address this further, we can do it Monday morning when I'm
25 there.

1 But from what you've told me, although y'all have a
2 disagreement, and whether or not he has a different opinion
3 than you do about the State's case and evidence against you,
4 that is not sufficient for him being replaced by another
5 attorney. And I'll be glad to address it further on Monday.
6 But I would advise everyone to, to make sure you do your
7 best this weekend to prepare for the trial beginning on
8 Monday.

9 From what I can hear from Mr. Wilson, he's ready to, to
10 do that and to not be affected by what occurred yesterday.
11 I would hope, in your own best interest, Mr. Winkler, you
12 would do that also. But I would rather we address anything
13 further about this Monday, and you-all just prepare in your
14 best efforts this weekend.

15 So, I'm, I'm ready to go back on the record with you,
16 Mr. Wilson, and Mr. Humphries to come back in.

17 MR. WILSON: All right, sir. Thank you.

18 THE COURT: I'll address this again if we need to
19 Monday morning.

20 MR. WILSON: They're gone to get him now.

21 (Whereupon, the following takes place within the
22 hearing of Solicitor Humphries.)

23 SOLICITOR HUMPHRIES: I'm back.

24 THE COURT: All right. Do we need anything else before
25 we meet Monday in Courtroom 3-D at 9:00 a.m?

1 SOLICITOR HUMPHRIES: I can't think of a thing.

2 MR. WILSON: Nothing from us.

3 THE COURT: All right. Mrs. Huggins, tell me this,
4 Mr. McCloud, is he gonna be there Monday?

5 MRS. HUGGINS: My understanding from him, I spoke to
6 him earlier, that, you know, he would be here Monday.

7 THE COURT: Well, I mean I don't know -- I couldn't
8 hear exactly what you said. But I don't think we need him
9 Monday. If there's any -- I really don't need him till I
10 would think Wednesday at the earliest. But I guess if he
11 wants to come, we can organize and, and discuss it we can.
12 But I don't really see where we're gonna need them until
13 Wednesday. But, anyway, we'll find out on Monday whether
14 he's there or not.

15 Listen, everybody, have a productive weekend and I will
16 see you 9:00 a.m. Monday morning Courtroom 3-D.

17 SOLICITOR HUMPHRIES: Thank you, judge.

18 MRS. HUGGINS: Thank you, judge.

19 THE COURT: All right. And everybody -- and Mr.
20 Humphries, Pam Green is the court reporter, and she's out of
21 Spartanburg County.

22 SOLICITOR HUMPHRIES: I'm writing it down right now.

23 THE COURT: Okay. Thank you.

24

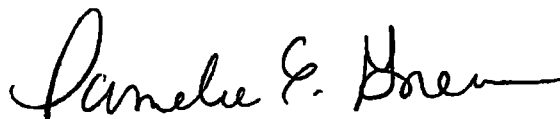
25 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Horry County, South Carolina, on the 24th day of January, 2008.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 20th, 2008

A handwritten signature in cursive script, reading "Pamela E. Green", is written over a horizontal line.

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA	)	CASE NO: 2006-GS-26-2101
	)	
COUNTY OF HORRY	)	
	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
-versus-	)	
	)	
LOUIS M. WINKLER	)	
	)	
	)	

ORIGINAL

**A SPECIAL MEETING OF THE COUNSEL FOR
LOUIS M. WINKLER**

Saturday, January 26, 2008
11:57 a.m. --- 12:29 p.m.

A Special Meeting of the Counsel for Louis M. Winkler, taken at the J. Reuben Long Detention Center, located at 4150 J. Reuben Long Avenue, Conway, South Carolina, on Saturday, January 26, 2008.

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APPEARANCES:

Ralph J. Wilson, Esquire
Attorney at Law
1411 1st Avenue
Post Office Box 1827
Conway, South Carolina 29528

Paul E. Rathbun, Esquire
Horry County Public Defender
Senior Trial Attorney
Family Court Division
Post Office Box 1666
Conway, South Carolina 29528

ALSO PRESENT:

Carolyn Graham, Mitigation Specialist
Louis M. Winkler

COURT REPORTER:

Alice S. Nelson
Verbatim Court Reporter

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A SPECIAL MEETING OF THE COUNSEL FOR LOUIS M. WINKLER
CASE NO: 2006-GS-26-2101

Page No: 3

1 Mr. Wilson: This is The State versus
2 Louis Winkler, and this is a death penalty case
3 which is supposed to start on Monday, which will
4 be the 28th, and we are at a meeting, and present
5 at this meeting is Carolyn Graham, Mitigation
6 Specialist, Paul Rathbun, who is second chair
7 counsel, and Ralph Wilson and Louis Michael
8 Winkler, the Defendant.

9 Mr. Rathbun: 11:57 in morning.

10 Mr. Wilson: It's 11:57 a.m. The first
11 thing I want to put on, so we can deal with this
12 whole issue about your getting into max. I found
13 out that you were in max on Thursday afternoon, I
14 think it was. When did we come, Friday?

15 Mr. Rathbun: Thursday afternoon.

16 Mr. Wilson: Thursday afternoon, when I
17 came out here, and you told me that they'd put
18 you in max, and you asked me to contact the jail
19 administration, to check with them to find out
20 why you were in max, and I talked to the jailer,
21 who told me that he didn't know why. So I then
22 went and talked with Captain Grate.

23 Captain Grate met me in the hallway of
24 the lobby and told me that he had gotten his
25 orders directly from Tom, Tom Fox, who is the

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1 director of the jail, and that Tom Fox told him
2 that the sheriff had directed him to put you in
3 max after the court hearing that we had had
4 earlier on Thursday with Judge Lockemy and that
5 the reason had absolutely nothing to do with the
6 incident that took place on Wednesday, ---

7 Mr. Rathbun: Wednesday afternoon.

8 Mr. Wilson: --- which was the
9 altercation that you and I had on Wednesday, that
10 had nothing to do with it, that the sheriff
11 ordered it and the reason that the sheriff
12 ordered it was that, he understood, was that they
13 were concerned about you and about whether or not
14 you were going to do anything to yourself between
15 now and the trial, and that that was what their
16 concern was. That's what ---

17 Mr. Winkler: Where did y'all come up
18 with that concern?

19 Mr. Wilson: I don't know. That's what
20 I was told. You asked me to find out. That's
21 what I was told by ---

22 Mr. Winkler: You didn't ask them? You
23 didn't asks them ---

24 Mr. Wilson: No, no, because I had ---

25 Mr. Winkler: --- why they came up with

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1 that concern?

2 Mr. Wilson: No. I did not ask them why
3 they came up with that concern. That's what they
4 shared with me, and I have no authority and no
5 control over what the jail does administratively
6 and how they handle prisoners. There's nothing
7 that I can do about that. I was simply checking
8 to find out why they had put you in max so that
9 if it was necessary, then I can go back to the
10 judge and explain it to the judge.

11 Now, on Monday, you know, when we have
12 another hearing with the judge, I will be happy,
13 if you want, to raise that issue with the judge
14 and have him make a determination as to whether
15 or not it's appropriate or inappropriate, but I
16 have no authority to change Tom Fox or the
17 sheriff's decision about how they do prisoners.
18 So I wanted to ---

19 Mr. Winkler: Okay. Now I'll go on
20 record.

21 Mr. Wilson: Go ahead.

22 Mr. Winkler: We can get any of the
23 nurses, any of the C.O.'s that ever talk to me or
24 are in the pods with me, any C.O., which is the
25 corrections officer, any of the nurses, they all

1 said, "I can't believe that you're down here,"
2 when they gave me my med yesterday and last
3 night. They said, "Why are you in here?"

4 I said I, "I guess it's because I'm
5 already convicted," and it is, it just seems like
6 they put me there because I'm already convicted.
7 My lawyers have told me that I'm pretty much
8 going to be convicted, and that seems to be the
9 consensus around here, that I'm going to be
10 convicted.

11 They don't put anyone in max that hasn't
12 been in a fight or something like that. I
13 haven't done anything wrong. No one knows why
14 I'm in max. I've been here two days. They
15 haven't told me why I'm in max. They have not
16 told me why I'm in max.

17 I need to know -- I can't get out on a
18 phone. They told them, they ordered them to let
19 me use the phone, but the C.O. on the night shift
20 said he don't have nothing to do with that phone,
21 that was Jacobs, and they, they just don't.
22 there's no reason why I should be in max. They
23 only put them in max when they've been convicted.
24 I am not convicted. It's weeks from being, it's
25 a week and a half from being convicted, if I'm

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1 convicted, and if they're doing that, it's just
2 because the solicitor told the sheriff to do it,
3 and you know, and it's just everything's fighting
4 against me.

5 Now I don't have people representing me,
6 you know. I've gotten in an altercation with him
7 (indicating Mr. Wilson), and the judge says he
8 has to be my lawyer. So I have nobody backing me
9 now. I'm here by myself. They won't take calls
10 from my family up North, and I can't get through
11 to anyone on the phone, and they gave me a chance
12 to use the phone, but the phone wasn't working,
13 and I told them the phone wasn't working. So
14 they have me in max because of Ralph or some
15 other reason.

16 It's, it's not because I'm hostile or
17 they're afraid -- well, if you remember, the
18 state's witness says that I am not suicidal, and
19 it was under his testimony that they put me, they
20 put me, they said that I am capable of trial at
21 the Blair hearing. He said I was not suicidal.
22 He is an expert. Now, the jailer's going to tell
23 me that I'm suicidal? That's what they told you,
24 right?

25 Mr. Wilson:

No.

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1 Mr. Winkler: That they're afraid of what
2 I'm going to do to myself?
3 Mr. Wilson: That's right. That they're
4 ---
5 Mr. Winkler: And what am I going to do
6 to myself? That's, that's a suicidal statement.
7 Mr. Wilson: Nobody said that you were
8 suicidal. What they ---
9 Mr. Winkler: Then why am I -- Then I
10 shouldn't be in max, and I should be able to talk
11 to the person who put me in here and get a real
12 explanation.
13 Mr. Wilson: I'm not going to justify in
14 any way why you're in max because I don't know
15 beyond what I was told by Captain Grate, and as I
16 told you, I talked with Captain Grate, and that's
17 what he told me. When you ---
18 Mr. Winkler: Well, Carolyn, will you
19 talk to Major Johnson for me?
20 Ms. Graham: I will. I will make some
21 effort to call him, if you would like.
22 Mr. Wilson: The only person ---
23 Mr. Winkler: You can probably get a hold
24 of him today in here.
25 Mr. Wilson: The only person who can

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1 change this decision would be ---

2 Mr. Rathbun: Sheriff Thompson.

3 Mr. Wilson: --- Sheriff Thompson. This
4 does not come from Major Grate. Major Grate has
5 no.-- Major Johnson has no authority to change
6 the sheriff's decision. So the only person that
7 we can talk to about this is the sheriff himself,
8 and when, Monday, we will present that to the
9 judge and ---

10 Mr. Winkler: Monday's too late. I'm
11 already in max.

12 Mr. Wilson: I understand you're in max,
13 but you've been in max now since Thursday
14 evening.

15 Mr. Winkler: Well, you know you put me
16 in max.

17 Mr. Wilson: Anyway, the other thing
18 that I want to talk about is that you have said
19 repeatedly that we told you that you're going to
20 be found guilty, and I want to make the record
21 clear. That is not what I have said. What I
22 have said is, to you, Mick, repeatedly, ---

23 Mr. Winkler: So you got a court reporter
24 just to, just for this?

25 Mr. Wilson: Repeatedly, I have said to

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1 you that the evidence against you is overwhelming
2 and that if we proceed in the way that you're
3 having us to proceed, that there is a great
4 likelihood that you're going to be convicted. I
5 have said that. I stand by that. I believe
6 that, and I ---

7 Mr. Winkler: Oh, if I take the stand,
8 you're saying.

9 Mr. Wilson: Not just take the stand but
10 your theory of this case. What you have told us
11 about what you say happened is wholly
12 inconsistent with every fact that we are aware
13 of.

14 Mr. Winkler: So you don't believe me.

15 Mr. Wilson: What I'm saying, it's
16 inconsistent with the physical evidence that is
17 present, and I have tried to explain that to you.

18 Mr. Winkler: Okay. So in the 14 months
19 that you've been my lawyer, what is your defense
20 as far as if I don't take the stand?

21 Mr. Wilson: If you don't take the
22 stand, then what I intend to do is to do the best
23 I can to discredit the evidence and testimony
24 that the state intends to present.

25 Mr. Winkler: And you've already told me

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1 that that's not going to be enough.
2 Mr. Wilson: Because the physical
3 evidence is, ---
4 Mr. Winkler: Okay.
5 Mr. Wilson: --- is overwhelming against
6 you and ---
7 Mr. Winkler: Okay. If I don't take the
8 stand, who will the jury believe shot Becky? If
9 I don't take the stand, who's the jury going to
10 think shot Becky, if it wasn't me?
11 Mr. Wilson: If you take the stand and
12 you testify to the things that you have said to
13 me that you're going ---
14 Mr. Winkler: That's not answering my
15 question.
16 Mr. Wilson: --- to testify to -- I
17 can't answer to you what a jury's going to think.
18 I don't know. I can tell you what the physical
19 evidence is. I can tell you what the evidence is
20 that I have received from the state. I can tell
21 you what the evidence is that we have been able
22 to generate on our own, and what I am telling
23 you, in no uncertain terms and am trying to be as
24 clear and concise as I possibly know how, is that
25 that physical evidence, the physical evidence,

1 which we cannot change, the angle of the bullet,
2 the fact that the bullet matches the gun, ---
3 Mr. Winkler: I haven't seen the angle of
4 the bullet.
5 Mr. Wilson: --- the fact that the gun
6 is a gun that was found on your person, ---
7 Mr. Winkler: Okay.
8 Mr. Wilson: --- the fact that you gave
9 ---
10 Mr. Winkler: Let me stop you there. I
11 haven't seen the angle of the bullet. Nobody --
12 We're, we're two days away from jury selection.
13 I have not seen an angle of a bullet, and you
14 can't sit there and explain the angle of a bullet
15 to me when I haven't seen it.
16 Mr. Wilson: I have told you, and Jeff
17 Naylor has also told you this, ---
18 Mr. Winkler: No. I've seen Jeff Naylor
19 one time. He didn't say anything about no
20 bullet.
21 Mr. Wilson: You've seen Jeff more than
22 one time, and you have seen Jeff more ---
23 Mr. Winkler: I've seen him once.
24 Mr. Wilson: --- than one time, and Jeff
25 ---

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1 Mr. Winkler: We're going to look on the
2 log books right now ---
3 Mr. Wilson: I don't have to look on the
4 log books. Jeff has been out here more than once
5 because he came twice with me. So I know he's
6 been ---
7 Mr. Winkler: He only came to see me one
8 time.
9 Mr. Wilson: No. He's been here more
10 than once. Jeff has been here more than one
11 time.
12 Mr. Winkler: Not with me.
13 Mr. Wilson: Yes, he has. He's been
14 here more than one time, and he will handle that
15 himself, but he's been here more than once, and
16 Jeff has explained to you that, and I'll let him
17 tell what his explanation of it is, but the
18 bottom line is this. One of the things that you
19 have said to me is that you want to testify and
20 that you want to bring up all this stuff about
21 2005 and about how all the things in 2005
22 occurred, which is the kidnapping, the criminal
23 sexual conduct, the sodomy, and the assault
24 charges from 2005.
25 Mr. Winkler: What's sodomy, where are

1 you coming up with sodomy?
2 Mr. Wilson: Sodomy is anal penetration.
3 Mr. Winkler: That is not on the charge.
4 Mr. Wilson: You are charged with having
5 ---
6 Mr. Winkler: Now you're adding things
7 on.
8 Mr. Wilson: You were charged in 2005
9 with having anal sex with her, and that was a
10 part of the criminal sexual conduct. That was a
11 part of that. And what I am simply saying to
12 you, Mick, is that if you do that, ---
13 Mr. Winkler: So what you're saying is
14 it's not your fault I'm going to be convicted,
15 but you're going to ---
16 Mr. Wilson: No. What I'm trying to
17 explain to you is so that you can make a decision
18 about whether or not you should testify or
19 whether you shouldn't testify, that's what I'm
20 trying to do here. You know, you decide. You
21 will ultimately decide if you're going to testify
22 and if you're not going to testify or what you're
23 going to say when you do testify. That is your
24 call.
25 What I am simply trying to do is advise

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1 you that, in my opinion as your lawyer, a lawyer
2 who has done this for 30 years and who has done
3 probably more than almost 20 death penalty trials
4 in those 30 years, as your lawyer, I am telling
5 you, and I believe with all my heart, that if you
6 testify to the things that you have suggested and
7 you raise those issues in the trial phase of this
8 case, that that's going to prejudice you in the
9 sentencing phase of the case and may end up
10 getting you the death penalty.

11 Mr. Winkler: So you're just covering
12 your butt by having the court reporter here.

13 Mr. Wilson: I am wanting you, I am
14 wanting you to understand that I'm ---

15 Mr. Winkler: I want a new lawyer.

16 Mr. Wilson: --- saying these things to
17 you, I want you to understand that I am saying
18 those things to you and ---

19 Mr. Winkler: So you're just -- And
20 that's the only reason you have the court
21 reporter here, is to cover your own butt, right?

22 Mr. Wilson: I'm having the court
23 reporter here because ---

24 Mr. Winkler: That's why, right?

25 Mr. Wilson: --- I'm explaining these

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1 things to you, and even though I have explained
2 these things to you time and time again, either
3 you do not understand me or you refuse to ---

4 Mr. Winkler: I do not understand you.

5 Mr. Wilson: Well, and I ---

6 Mr. Winkler: You're supposed to be on my
7 side.

8 Mr. Wilson: And that's why I am doing
9 it this way now, so that you do get ---

10 Mr. Winkler: So you can let the judge
11 hear that you're not backing me anymore.

12 Mr. Wilson: --- an opportunity to
13 understand me. No. This record will be sealed.
14 When this court reporter types this, she will put
15 it in a sealed envelope. It will be sealed, and
16 the only time it will be opened is if you are
17 convicted. If you are convicted, then it will be
18 opened at the appellate level, but it will not be
19 opened at trial. Nobody else other than the
20 people in this room will be privy to this
21 conversation whatsoever. But I do want that to
22 be made a part of this record. And so that it is
23 clear that if you do these things that you're
24 doing them against my advice and over my
25 objections, but that I am your lawyer, and if you

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1 decide that you're going to do it, then I'm going
2 to facilitate you in every way I know how to make
3 sure that you are allowed to do it, and we'll do
4 it as effectively and in the best manner that we
5 know how to represent you.

6 Mr. Winkler: All right. Are you done?

7 Mr. Wilson: Now, if you want to say
8 anything, you're more than welcome to put it in
9 the record.

10 Mr. Winkler: Well, I'm going to. If I
11 don't take the stand, like your saying, "Don't
12 take the stand and bring up that," ---

13 Mr. Wilson: No. That's not what I
14 said. I did not say, "Don't take the stand."
15 What I have said to you is is that it is not -- I
16 do not advise you to take the stand ---

17 Mr. Winkler: Okay, all right.

18 Mr. Wilson: --- because I don't think
19 it's in your best interest.

20 Mr. Winkler: All right.

21 Mr. Wilson: I am not telling you not to
22 take the stand. That is your call. I am simply
23 saying I don't think it's wise. I think it's
24 counterproductive.

25 Mr. Winkler: Okay.

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1 Mr. Wilson: I think it will hurt you.
2 Mr. Winkler: Okay, all right. So you're
3 suggesting that I don't take the stand or I'm
4 going to be, more or less, found -- convicted.
5 You can't have it both ways, Ralph.
6 Mr. Wilson: I've just explained what
7 I'm saying, and I stand by what I've just said.
8 Mr. Winkler: Okay. If I don't take the
9 stand, like you're advising me not to take the
10 stand, right? You're advising me, if I take the
11 stand, the chances are real bad that I'll get
12 convicted, correct?
13 Mr. Wilson: No. Listen to what I'm
14 saying.
15 Mr. Winkler: Well, wait a minute. Did
16 he just not say that just now, Carolyn?
17 Mr. Wilson: What I'm saying is, listen
18 to what I'm saying. I'm saying that ---
19 Mr. Winkler: You can't have it both
20 ways, Ralph.
21 Mr. Wilson: What I'm saying, Mick, to
22 you is this. If you take the stand and you
23 testify about all of these things that you say
24 happened in 2005 with the criminal sexual conduct
25 and what you say happened out in the woods that

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1 night or didn't happen out in the woods that
2 night and you raise all those issues, in the
3 sentence, in the trial phase of this case, that
4 that is going to prejudice you, in my opinion, in
5 the sentencing phase of ---

6 Mr. Winkler: Okay.

7 Mr. Wilson: --- this trial.

8 Mr. Winkler: Okay. He's already said
9 that. So you're saying I shouldn't take the
10 stand as far as that goes?

11 Mr. Wilson: My advice to you is that
12 you probably shouldn't take the stand.

13 Mr. Winkler: Okay.

14 Mr. Wilson: Now, whether you take it or
15 not is up to you.

16 Mr. Winkler: All right. Now, if I don't
17 take the stand about all that, who is the jury
18 going to think shot Becky? That's a simple
19 question. There's no one else there but J [REDACTED] and
20 I. Who shot Becky? Who are you going to let
21 across to the jury that shot Becky?

22 Mr. Wilson: There is no -- If you're
23 asking me whether or not there's ---

24 Mr. Winkler: It's a simple question.
25 Don't try and dodge it.

1 Mr. Wilson: I'm answering you. If
2 you're asking me whether or not there's any
3 physical evidence or any testimonial evidence
4 beyond what you say, that Roger Grainger in any
5 way participated in the killing of Rebekah
6 Winkler, the answer to that is no. There is no
7 physical evidence which suggests that. There is
8 no testimony ---

9 Mr. Winkler: I didn't bring Roger
10 Grainger up.

11 Mr. Wilson: There is no testimonial
12 evidence which suggests that ---

13 Mr. Winkler: He's dodging my question.

14 Mr. Wilson: --- other than what you
15 say.

16 Mr. Winkler: He's dodging my question.
17 It's a simple question. Who is the jury going to
18 believe shot Becky, if it wasn't me, on your
19 defense for me if I don't take the stand?

20 Mr. Wilson: I don't know who they're
21 going to believe shot her.

22 Mr. Winkler: So the chances are that if
23 I, if I don't testify that Roger Grainger was
24 there and all this other stuff happened, who is
25 the jury going to believe shot Becky?

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1 Mr. Wilson: If you're asking me, Mick.
2 ---
3 Mr. Winkler: It's an easy question, who?
4 It's a very easy question.
5 Mr. Wilson: I can tell you who.
6 J [REDACTED] says you shot her.
7 Mr. Winkler: Well, I'm saying -- Yeah --
8 And is that your defense?
9 Mr. Wilson: Is that what you're asking
10 me?
11 Mr. Winkler: Is that your defense for
12 me?
13 Mr. Wilson: If you're asking me ---
14 Mr. Winkler: That J [REDACTED] says that I
15 shot her. See, he's dodging this.
16 Mr. Wilson: Your question to me was who
17 would the jury think shot her, and what I said to
18 you is ---
19 Mr. Winkler: He's dodging it.
20 Mr. Wilson: --- J [REDACTED] says, which is
21 the only other witness present, as you just said,
22 the only other person who was present at the time
23 that she was shot was ---
24 Mr. Winkler: I didn't just say that. I
25 said Roger was there, all along, ever since day.

1 one.

2 Mr. Wilson: Just a minute ago, you just
3 said that you and J [REDACTED] were the only two
4 present and who were they going to think had shot
5 her.

6 Mr. Winkler: Wait a minute. See, this
7 is all lawyer talk here. I did not say that,
8 period. I said, if I don't testify that Roger
9 Grainger was there, who is going to, who are the
10 jury going to believe shot Becky.

11 Mr. Wilson: If there's nobody else
12 other than you there, who else would they believe
13 shot her?

14 Mr. Winkler: That's your defense to me?

15 Mr. Wilson: You asked me the question
16 who else would they believe, and I'm ---

17 Mr. Winkler: See, all this, this is just
18 lawyer lingo here.

19 Mr. Wilson: --- I'm asking you, I'm
20 trying to answer you now.

21 Mr. Winkler: He hasn't gave me a
22 straight answer on it. The question is is if I
23 don't take the stand and let them know that Roger
24 Grainger shot her, and this is the third time I'm
25 going to ask you, and it's very easy and simple

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1 question, your defense, okay, if I don't say
2 Roger Grainger was there, who's the jury going to
3 believe? There's no one else to believe. Who
4 they going to say ---

5 Mr. Wilson: If they believe, if they
6 believe J [REDACTED], they're going to believe you
7 did it.

8 Mr. Winkler: All right. Well, what's
9 your defense in that?

10 Mr. Wilson: I will cross examine
11 J [REDACTED] to the best of my ability. I will cross
12 examine the experts who are going to testify from
13 SLED and from ---

14 Mr. Winkler: So you don't have an answer
15 to that question.

16 Mr. Wilson: That's the answer. That is
17 the answer.

18 Mr. Winkler: So they're going to believe
19 that it was me. So how can you defend me then?

20 Mr. Rathbun: This goes to the
21 overwhelming evidence against you, physical
22 evidence and testimonial ---

23 Mr. Winkler: Well, let me go on record,
24 and you know, by the time, by the time that this
25 comes out, I want a new lawyer. I mean, in 16

1 months, we don't have a single defense on my
2 behalf at all.

3 Mr. Wilson: Mick, what we have said to
4 you is this. Yes, are there, are there a lot of
5 inconsistencies in the way the evidence was
6 gathered, yes. Are there inconsistencies and
7 mistakes in the police reports that were done,
8 yes. Is there conflicts in some testimony that's
9 being given, yes. The bottom line, though, is
10 that there is physical evidence that we cannot
11 change.

12 Mr. Winkler: So you're going to say,
13 you're saying I'm going to be convicted.

14 Mr. Wilson: No. What I am saying is
15 that the evidence against you is substantial and
16 overwhelming and that there is a likelihood that
17 you will get convicted, yes. If you ask me am I
18 saying that, I am saying that.

19 Mr. Winkler: And that's why I'm in max.
20 That's pretty much why I'm in ---

21 Mr. Wilson: One has absolutely ---

22 Mr. Winkler: They never put anybody in
23 max until after they've been convicted.

24 Mr. Wilson: All right, okay. That's
25 what I wanted ---

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1 Mr. Winkler: He still, he dodged my
2 whole question there. and, and in, you know, the
3 lawyer lingo. He never answered a simple, it was
4 a simple question, and it comes down to the same
5 thing every time. There's no -- He has no
6 defense set up, not that I know of. He hasn't
7 ever told me what he's going to say as opening
8 arguments or anything. He told me not to take
9 the stand, "Don't take the stand," you know. I
10 have to take the stand ---

11 Mr. Wilson: I've never told you not to
12 take the stand. I have never told you don't take
13 the stand.

14 Mr. Winkler: In order to bring up Roger
15 Grainger, who, the one who actually shot Becky,
16 Becky Winkler, my wife, I have to take the stand
17 to bring it up. He says that there's no way of
18 bringing his name up unless I take the stand.

19 Mr. Wilson: That's not true either.
20 What I said ---

21 Mr. Winkler: Whoa, whoa, whoa.

22 Mr. Wilson: What I said ---

23 Mr. Winkler: Well, then this is new,
24 then.

25 Mr. Wilson: What I said, no, what I

1 said is there is no way for me to suggest to the
2 jury that Roger Grainger killed Becky if you do
3 not take the stand.

4 Mr. Winkler: That's exactly what I just
5 said.

6 Mr. Wilson: No, no. You said ---

7 Mr. Winkler: Is that what I just said?

8 Mr. Wilson: No. You said that there's
9 no way for me to bring up Roger's name without
10 your testifying, and I never said that.

11 Mr. Winkler: That's just a bunch of
12 lawyer ---

13 Mr. Wilson: I never said that, because
14 there's a huge difference between bringing up his
15 name and saying that he killed Becky.

16 Mr. Winkler: Right. Well, that's what I
17 mean. Okay, so that's a little technicality in
18 there.

19 Mr. Wilson: No. That's not a
20 technicality. That's a huge thing.

21 Mr. Winkler: Yeah.

22 Mr. Wilson: Because I can talk about
23 Roger Grainger all day long. What I can't do is
24 stand up there and say he killed Becky when I
25 have no proof of that and there's nothing in the

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1 record to suggest that.

2 Mr. Winkler: So you can't say anything
3 about who, that he killed Roger -- Becky Winkler
4 unless I take the stand, ---

5 Mr. Wilson: That's correct.

6 Mr. Winkler: --- correct?

7 Mr. Wilson: That's correct.

8 Mr. Winkler: So I really don't have a
9 choice to take the stand and let the truth be
10 known, correct?

11 Mr. Wilson: You have a choice. You may
12 not have a viable alternative, but you have a
13 choice.

14 Mr. Winkler: Wait, wait.

15 Mr. Wilson: And that choice is you can
16 either choose to testify and subject yourself to
17 cross examination from the prosecutor in great
18 detail and, or you can not testify, ---

19 Mr. Winkler: Okay.

20 Mr. Wilson: --- which is your call.

21 Mr. Winkler: So there's no way to bring
22 up the fact that Roger Grainger killed her unless
23 I take the stand.

24 Mr. Wilson: That is correct.

25 Mr. Winkler: Okay. And you're advising

1 me not to take the stand?

2 Mr. Wilson: I believe that it's a huge
3 mistake for you to take the stand.

4 Mr. Winkler: So in order -- So let's get
5 it all real straight right now. If I don't take
6 the stand, the person who shot Becky Winkler, my
7 wife, will not be brought up as far as the one
8 who shot her, if I don't take the stand?

9 Mr. Wilson: If you do not take the
10 stand, I am not aware of any way to get to the
11 jury that Roger Grainger, in your mind, killed
12 Becky.

13 Mr. Winkler: Okay. So to bring up Roger
14 Grainger, who shot her, in the sense that he's
15 the one that shot her, I have to take the stand?

16 Mr. Wilson: That's correct. The only
17 way ---

18 Mr. Winkler: Okay.

19 Mr. Wilson: And I will repeat that.
20 Yes, the only way to get that story in before the
21 jury is for you to take the stand and testify.
22 There is no other way for me to get that story
23 in.

24 Mr. Rathbun: It's a double pronged
25 attack. If you take the stand, ---

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A SPECIAL MEETING OF THE COUNSEL FOR LOUIS M. WINKLER
CASE NO: 2006-GS-26-2101

Page No: 29

1 Mr. Winkler: You guys are just covering
2 your own butt ---
3 Mr. Rathbun: If you take the stand ---
4 Mr. Winkler: --- is all it is.
5 Mr. Rathbun: --- and testify about the
6 murder of Rebekah, that's one thing. If you take
7 the stand and testify about that and bring in the
8 October 2005 incident, that is going to be even
9 worse on you in the sentencing phase.
10 Mr. Winkler: Because you can't back it
11 up, back me up with anything. You have no
12 experience to back me up.
13 Mr. Wilson: Back you up on what, what
14 is it that you ---
15 Mr. Winkler: Well, I want, I want
16 everybody to know that that was a total lie, the
17 whole thing, and I probably will bring that up.
18 I'm going to bring it up. And you're saying that
19 even if I don't bring Roger Grainger up and the
20 10/10 incident, that I'm going to be convicted
21 anyway.
22 Mr. Wilson: What I'm saying is this.
23 Mr. Winkler: So what do I have to lose?
24 Mr. Wilson: What I'm saying, Mick, is
25 this. If you don't take the stand and you don't

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1 testify in the trial phase of this case, yes, is
2 there still a substantial likelihood that you
3 might get convicted? The answer to that question
4 is yes.

5 Mr. Winkler: Well, so what do I have to
6 lose?

7 Mr. Wilson: Hear me out. Hear me out.
8 What I am saying though is, on the other hand, if
9 you do take the stand and you do testify and all
10 this stuff comes out, then what I am afraid of is
11 is that it will prejudice us so much in the
12 sentencing phase of the trial that it will end up
13 getting you the death penalty in addition to your
14 having gotten convicted in the trial phase of the
15 case, and that is what my concern is.

16 Mr. Winkler: So you have no, I mean, you
17 have no confidence at all that, you know, either
18 way it goes, I'm going to be convicted, and now
19 I'm going to be put to death, death, on death
20 row, right? Is that what you just said?

21 Mr. Wilson: No, no.

22 Mr. Winkler: Chances are, I'm going to
23 be put to death.

24 Mr. Wilson: No. That's not what I
25 said.

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1 Mr. Winkler: What the hell have I got to
2 lose?
3 Mr. Wilson: That's not what I said.
4 What I'm saying, Mick, is if you ---
5 Mr. Winkler: You wouldn't mind at all if
6 I went to death row, Ralph. We just got into a
7 fight the other day. You had me put in max, and
8 now you bring a court reporter in here to show
9 that, you know, ---
10 Mr. Wilson: I didn't have you put in
11 max.
12 Mr. Winkler: You're bouncing words
13 around and jumbling them up so I'm confused about
14 it. You, you can't answer a straight question.
15 Mr. Wilson: I've answered every
16 question you've asked me, Mick.
17 Mr. Winkler: Yeah. You went around the
18 questions.
19 Mr. Wilson: I've answered everything
20 you've asked me. I don't know how else you want
21 me to answer. I'm not giving you the answers
22 that you want, but I'm giving you the truthful
23 answers, and that's all I can do.
24 Mr. Winkler: Then I'm going -- Okay, so
25 I'm going to be convicted. So we're just what,

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1 wasting time?

2 Mr. Wilson: That's not what I said, and
3 you know, ---

4 Mr. Winkler: Well, if you can't come up
5 and, I don't know, how long have you been my
6 lawyer, 16 months?

7 Mr. Wilson: A good while.

8 Mr. Winkler: Without any defense at all,
9 I mean, and this is what, we're two days from
10 trial now, and we still haven't decided whether
11 I'm taking the stand or not.

12 Mr. Wilson: Mick, the only person who
13 can decide ---

14 Mr. Winkler: No. Have we decided I'm
15 taking the stand or not?

16 Mr. Wilson: The only person who can
17 decide whether you're going to take the stand is
18 you.

19 Mr. Winkler: And if I don't, I'm going
20 to death row. If I don't, we can't bring up
21 Roger Grainger's name.

22 Mr. Wilson: That's correct.

23 Mr. Winkler: Okay.

24 Mr. Wilson: We cannot, we cannot assign
25 -- Let me finish. We cannot assign the homicide

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1 to Roger Grainger if you do not take the stand.
2 Mr. Winkler: Okay. So that's
3 understood, and, and how can I not bring up Roger
4 Grainger? That means that I did it. That, that
5 just means I did it, like you said. It's only
6 J [REDACTED] and me. So how could I not bring up
7 Roger Grainger's name? And in the meantime, let
8 me put in that there's two C.O.'s right outside
9 the door listening to every word we're talking
10 about, and that goes, that goes to, you know,
11 putting in, and that'll be in the paper,
12 probably. Has anybody seen anything in the paper
13 yesterday or the night before about our hearing?
14 Because every time we have a hearing, it goes
15 right to the paper.
16 Mr. Wilson: There are two C.O.'s
17 outside the room. We're in a sealed room with
18 both ---
19 Mr. Winkler: It's not sealed.
20 Mr. Wilson: --- doors closed.
21 Mr. Winkler: Can you hear me, Roscoe?
22 Mr. Wilson: With both doors closed and
23 ---
24 Mr. Winkler: Can you hear me?
25 Mr. Wilson: With both doors closed.

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1 Mr. Winkler: They can hear me, and it'll
2 be in the paper, just like the rest of the stuff.
3 You know, the judge -- and I've, I've told the
4 judge, let's go on the record, too. The judge
5 said that they're not supposed to have any, any
6 cameras having me above, below the chin, with my
7 uniform and stuff on. That very day, outside the
8 courtroom there, they had me in full, full
9 uniform and shackles and chains, had it on the
10 news that night.

11 Mr. Wilson: You're referring to ---

12 Mr. Winkler: And I told my lawyer that,
13 and it was on the news, and my lawyer has still
14 to bring that up to the judge. Now, I've said
15 that also.

16 Mr. Wilson: That's not true. In fact,
17 we have brought it up to the judge and have
18 talked with the judge about it.

19 Mr. Winkler: When?

20 Mr. Wilson: At the hearing over at the
21 Horry County courthouse. What was that hearing,
22 Paul?

23 Mr. Winkler: You said that the other
24 day? You said ---

25 Mr. Wilson: No, not, not Thursday.

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1 Mr. Winkler: --- you're not bringing
2 that up.
3 Mr. Rathbun: No.
4 Mr. Wilson: This is before Thursday.
5 Mr. Rathbun: A couple weeks.
6 Mr. Wilson: This was some weeks ago.
7 We met with the judge and brought it up to him
8 and explained to him what happened, and the
9 judge's order at that hearing in Dillon was that
10 they not take video of you while you were in the
11 courtroom, and ---
12 Mr. Rathbun: It was December the 11th.
13 Mr. Wilson: -- the video that was taken
14 December the 11th, ---
15 Mr. Winkler: You never told me this.
16 Mr. Wilson: I did tell you, too, that
17 we talked to the judge about it. You asked me to
18 talk to him about it, and I told you I would, and
19 I did.
20 Mr. Rathbun: The hearing was December
21 11th in Dillon, and then I saw him on the news,
22 on the evening news that night, and I let you
23 know that.
24 Mr. Wilson: Right.
25 Mr. Winkler: That's what I'm talking

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1 about.

2 Mr. Rathbun: We talked to the judge

3 about it. The ---

4 Mr. Winkler: When did you talk to the

5 judge about it?

6 Mr. Rathbun: I don't have ---

7 Mr. Wilson: I don't know the date of

8 ---

9 Mr. Winkler: You did ---

10 Mr. Wilson: We did. Both Paul and I

11 were present when we did it.

12 Mr. Rathbun: And the judge, because the

13 taping took place outside of the courthouse,

14 outside of the courtroom, on public sidewalk, the

15 judge had no jurisdiction over what they did

16 there.

17 Mr. Winkler: Okay. So in the courtroom,

18 the cameras being banned, I'd have a good, a fair

19 trial. Outside the courtroom, I'd have a fair

20 trial. See, the reason he banned them is because

21 he didn't want the public seeing me in shackles

22 and chains.

23 Mr. Wilson: That's ---

24 Mr. Winkler: Let me finish.

25 Mr. Wilson: Okay.

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1 Mr. Winkler: And he said, "Okay, we want
2 him to have a fair trial." So I step out of the
3 courtroom, and they put me on film and show me on
4 the news. Now, how is that different, how in the
5 world is that different than being in the
6 courtroom or outside the courtroom, when they're
7 going to see me anyway?

8 This is the general public he was
9 concerned about seeing me in shackles and chains.
10 So, and my lawyers, who's supposed to be
11 representing me, hasn't brought up the fact that,
12 "Well, look, if it's going to be a fair trial
13 because they don't show him in the courtroom," is
14 it going to be a fair trial because they show me
15 outside the courtroom? That's, that does not
16 make any sense at all.

17 Mr. Wilson: The judge has no authority
18 to order the press not to take pictures, ---

19 Mr. Winkler: The judge said he wanted me
20 to have a fair trial.

21 Mr. Wilson: --- not to take pictures of
22 someone who is in the public domain. This was in
23 the courtroom, and what he ordered them to do,
24 they abided by his order. There were no pictures
25 of you on the news from the neck down showing

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1 your chains or anything when you were in the
2 courtroom. What they did was, when you came
3 outside and you were in the public domain, on the
4 public area, they videotaped you getting in the
5 police car.

6 Mr. Winkler: And that's going to be a
7 fair trial?

8 Mr. Wilson: Now, that, any ---

9 Mr. Winkler: Why would ---

10 Mr. Wilson: Any ---

11 Mr. Winkler: Why would he be concerned
12 about seeing me inside?

13 Mr. Wilson: When we, when we do our
14 motion for a change of venue, what we will argue,
15 obviously, to the jury is is that any exposure,
16 any exposure, news exposure to you prior to trial
17 is prejudicial to you. That will be just one of
18 the many videotapes or news articles that were
19 done about your case from its inception two years
20 ago till now. That's all I'm going to put in.
21 You got anything you want to put in?

22 Ms. Graham: No, I don't.

23 Mr. Wilson: Paul, you got anything ---

24 Mr. Rathbun: I just want to say that I
25 concur with what Ralph said, that we have tried

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413 Paul Street
Conway, South Carolina 29526
(843) 248-5252

1 to get across to Mick what the strategy is and
2 how his testifying could hurt the mitigation
3 phase and that we are trying desperately to save
4 Mr. Winkler's life.

5 Mr. Winkler: See, so in order, in other
6 words, they've give up on that. Now they just
7 want to concentrate on, on trying to get the life
8 or death. No one in this whole thing has
9 mentioned acquittal. They've said life and
10 death, but they've never once said acquittal.
11 They already know I'm going to be convicted. The
12 jail already knows I'm going to be convicted, and
13 I believe that this whole thing has been set up,
14 because nobody ever once, and the judge himself
15 said one day in court that it's either life or
16 death as far as the capital murder goes. He did
17 not mention acquittal. Neither one of my lawyers
18 have ever mentioned acquittal to me.

19 What kind of chance do I have when
20 they're not working towards acquittal, all
21 they're working for is, I don't know, you know,
22 backing themselves. I ask questions. They dodge
23 them. They lawyer me to death on it. But I have
24 no support. All they're doing with the court
25 reporter here is covering their own butts, and

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(843) 248-5252

1 that's the only thing I can get out of this, and
2 he just said, you know, Mr. Rathbun says that he
3 concurs with, with Mr. Wilson. So, you know,
4 that's both lawyers, and neither one of them have
5 said anything about an acquittal, nobody.

6 Mr. Wilson: That concludes all we need.

7 Mr. Rathbun: 12:29.

8 (The Special Meeting Concluded at 12:29 p.m.)
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Prestige Court Reporting, Inc.

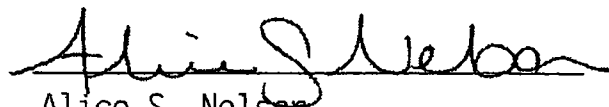
413 Paul Street
Conway, South Carolina 29526
(843) 248-5252

CERTIFICATE

This is to certify that the foregoing transcript of the SPECIAL MEETING OF THE COUNSEL FOR LOUIS M. WINKLER, consisting of FORTY-ONE (41) pages is a true and correct transcript of the said meeting. The meeting was reported by method of stenomask with backup.

I further certify that I am neither employed by nor related to any of the parties in this matter; nor do I have any interest, financial or otherwise, in the outcome of the same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 28th day of JANUARY, 2008.



Alice S. Nelson
Verbatim Court Reporter
Notary in and for the
State of South Carolina
My Commission Expires: 7-26-16

ORIGINAL***Prestige Court Reporting, Inc.***

413 Paul Street
Conway, South Carolina 29526
(843) 248-5252

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) INDICTMENT

At a Court of General Sessions convened on May 25, 2006, the Grand Jurors of Horry County hereby present upon their oath:

COUNT ONE: MURDER
CDR: 0116 16-03-0010 / Common Law

That LOUIS M. WINKLER did in Horry County, on or about March 6, 2006, willfully, feloniously, and intentionally, with malice aforethought, kill the victim, Rebecca Winkler, by means of shooting her in the head, and the victim did die as a proximate result thereof in Horry County on or about March 6, 2006, in violation of Section 16-03-0010, Code of Laws of South Carolina, 1976, as amended, and the Common Law of South Carolina.

COUNT TWO: BURGLARY, 1ST DEGREE
CDR: 0079 16-11-0311(A)(1)(a),(b),(c), (d) and or (A)(3)

That LOUIS M. WINKLER did in Horry County on or about March 6, 2006, enter the dwelling of the victim, Rebecca Winkler, without consent and with the intent to commit a crime in the dwelling, to wit: Murder and/or Assault and Battery, and when, in effecting entry or while in the dwelling or in immediate flight, he:

- (1) was armed with a deadly weapon or explosive, to wit: a semi-automatic handgun;
- (2) caused physical injury to a person who was not a participant in the crime, to wit: defendant shot and killed the victim, Rebecca Winkler;
- (3) used or threatened the use of a dangerous instrument, to wit: a semi-automatic handgun;
- (4) displayed what was a pistol, or other firearm; and /or
- (5) entered into or remained in the dwelling in the nighttime,

in violation of Section 16-11-0311(A)(1)(a), (b), (c), (d) and/or (A)(3), Code of Laws of South Carolina, 1976, as amended.

COUNT THREE: ASSAULT AND BATTERY
HIGH AND AGGRAVATED NATURE

CDR: 0013 C/L, 17-25-0030

That LOUIS M. WINKLER did in Horry County on or about March 6, 2006, commit an assault and battery upon the victim, J. [REDACTED] G. [REDACTED], constituting an unlawful act of violent injury to the person of the said victim, accompanied with circumstances of aggravation, including but not limited to: to wit:

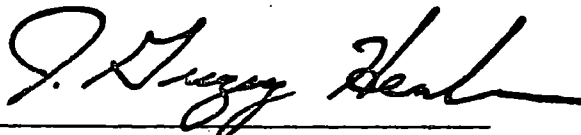
- (1) Defendant committed the Assault and Battery upon the victim while in the commission of a Burglary, a felony; and
- (2) there exists a great disparity in the ages and/or physical conditions of the parties, to wit: the defendant was a forty-five (45) year old adult male and the victim was a fourteen (14) year old child,

in violation of the Common Law Crime of Assault and Battery of a High and Aggravated Nature.

COUNT FOUR: ESCAPE
CDR: 2527 24-13-0410

That LOUIS M. WINKLER in Horry County, on or about March 6, 2006, while lawfully confined upon the Public Works of a County, to wit: the J. Reuben Long Detention Center, or while in the custody of a superintendent, guard, or officer, to wit: Defendant was in lawful custody of the J. Reuben Long Detention Center on house arrest and electronic monitoring pursuant to a lawful order of the Circuit Court, did escape, to wit: Defendant failed to return to his residence at 6:00 p.m. on March 6, 2006, as required by the Court Order amending his conditions of Bond, in violation of Section 24-13-0410(A), Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

WITNESSES

Boyd/HCPD

The State of South Carolina,

County of HORRY

80744

FAH

COURT OF GENERAL SESSIONS

MAY

TERM

2006

THE STATE

vs.

LOUIS M. WINKLER

ARREST WARRANT NO.

1. 1252573 CDR: 0116-3-18-03-0010

2. 1746892 CDR: 0079 16-11-0311(A)

3. 1746891 CDR: 0013 17-25-0030, C/L

4. J315089 CDR: 2527 24-13-0410

DOA: 3/21/06

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreman of Grand Jury

MAY 25 2006

VERDICT

Indictment for

COUNT 1: MURDER

COUNT 2: BURGLARY, 1ST DEGREE

COUNT 3: ASSAULT AND BATTERY

HIGH AND AGGRAVATED NATURE

COUNT 4: ESCAPE

J. GREGORY HEMBREE, SOLICITOR

CERTIFIED COPY

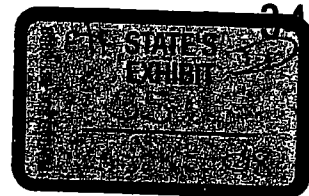
2009 JAN -2 PM 2:11

62#

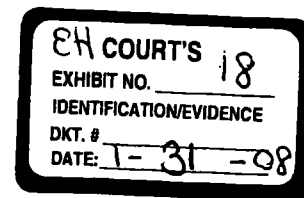
3460
Foreman of Petit Jury

Date:

911 CALL



2461



OPERATOR: 9-1-1. Where is your emergency?

G [REDACTED]: Okay. I'm at [REDACTED].

OPERATOR: Okay. What's going on?

G [REDACTED]: Okay. My step-dad is like crazy and he just broke in and he shot my mom and I'm here alone.

OPERATOR: He shot your mom.

G [REDACTED]: Yes. And she's dead.

OPERATOR: Okay. [REDACTED]?

G [REDACTED]: Yes. We're apartment -- hold on.

OPERATOR: What is the address there?

G [REDACTED]: It is [REDACTED] -

OPERATOR: It's [REDACTED]?

G [REDACTED]: [REDACTED], [REDACTED], [REDACTED].

OPERATOR: And what's your telephone number?

G [REDACTED]: The - the telephone's out. I have my cell phone.

OPERATOR: What's your cell number?

G [REDACTED]: [REDACTED].

OPERATOR: I want you to stay on the line with me. What apartment are you in?

G [REDACTED]: I'm in -- I think it's [REDACTED].

OPERATOR: Just stay on the line with me. Are you okay?

G [REDACTED]: Yes. I'm fine.

OPERATOR: And your name?

G [REDACTED]: It's J [REDACTED] G [REDACTED].

OPERATOR: J [REDACTED] G [REDACTED]?

G [REDACTED]: J [REDACTED].

OPERATOR: J [REDACTED] And your step-father?

G [REDACTED]: Is Mick Winkler. Louis Michael.

OPERATOR: Came in and shot your mother?

G [REDACTED]: Yes. He broke through the door.

OPERATOR: Is she dead?

G [REDACTED]: Yes.

OPERATOR: Okay. And where is he, and what is his name?

G [REDACTED]: Louis Michael Winkler.

OPERATOR: And where is he now?

G [REDACTED]: He ran out of the door. He just ran down the street and ran away.

OPERATOR: And what does he look like? Is he a white male?

G [REDACTED]: Yes.

OPERATOR: Okay. And how tall is he?

G [REDACTED]: He's about five, five.

OPERATOR: Five foot five?

G [REDACTED]: Five, nine.

OPERATOR: Five, nine. And what does he have on? Do you know, Michael?

J [REDACTED].

G [REDACTED]: He had on a blue jeans and a grey sweat shirt, and he has on white tennis shoes.

OPERATOR: White tennis shoes. And does he have a car out there?

G [REDACTED]: I don't believe so. No.

OPERATOR: And what is your mom's name?

G [REDACTED]: Becky, or Rebecca Winkler.

OPERATOR: And how old is your mom?

G [REDACTED]: She's fifty.

OPERATOR: And where is she?

G [REDACTED]: She's on the floor.

OPERATOR: In the kitchen?

G [REDACTED]: On the living room, right beside the kitchen.

OPERATOR: Okay. Did you check to see if she had a pulse?

G [REDACTED]: No. But he shot her in the head and she's on the ground and she's not moving.

OPERATOR: Do you want to see if she does have a pulse? Can you do that or are you okay with that or—

G [REDACTED]: No. I'm not. I would not like to do that.

OPERATOR: Okay. And how old are you, J [REDACTED]?

G [REDACTED]: Fourteen.

OPERATOR: Okay. Stay on the line with me, J [REDACTED]. I want you to stay on the line until they get there. Okay?

G [REDACTED]: Okay.

OPERATOR: All right. Just stay with me. And have they been arguing or anything?

G [REDACTED]: No. They've — they were getting divorced and we moved out and he just — I don't know. They don't even talk or anything.

OPERATOR: Okay. Do you see — did you see — did you — were you there when it happened?

G [REDACTED]: Yes.

OPERATOR: You're doing okay, huh?

G [REDACTED]: Uh-huh (yes).

OPERATOR: Now I've got police and EMS in route to you, okay?

G [REDACTED]: Okay.

OPERATOR: Do you know what kind of car that he does drive usually?

G [REDACTED]: He has a silver Isuzu, but she has it. He doesn't have a car that I know of.

OPERATOR: He does not have a car? Does he -- does he stay around there? Do you know of anywhere that he's staying?

G [REDACTED]: He stay at Stone's Edge. [REDACTED].

OPERATOR: Okay. At Stone Hedge. And what is that address?

G [REDACTED]: It's [REDACTED].

OPERATOR: [REDACTED]?

G [REDACTED]: [REDACTED]. No. [REDACTED].

OPERATOR: [REDACTED]? And, and that's in Stone Hedge and that's in Little River?

G [REDACTED]: Uh-huh (yes). Stone's Edge.

OPERATOR: Stone's Edge. I'm sorry.

G [REDACTED]: Right by Bell and Bell.

OPERATOR: Stone's Edge. You're doing a good job, [REDACTED]. Does he have a telephone number there? Do you know what that is?

G [REDACTED]: No, ma'am. He got the number changed.

OPERATOR: And do you know -- and you didn't see which direction he was heading or anything?

G [REDACTED]: No, ma'am.

OPERATOR: And you're there by yourself. Okay. I have them in route. Okay. Stay with me. All right?

G [REDACTED]: Yes, ma'am.

OPERATOR: Can you go outside?

G [REDACTED]: I'm out on the balcony.

OPERATOR: Okay. The apartment is [REDACTED]?

G [REDACTED]: [REDACTED].

OPERATOR: [REDACTED].

G [REDACTED]: [REDACTED].

OPERATOR: [REDACTED]? [REDACTED] [REDACTED]

G [REDACTED]: Yes.

OPERATOR: And it's [REDACTED], [REDACTED].

G [REDACTED]: Uh-huh (yes).

OPERATOR: Okay. Did you get home from school?

G [REDACTED]: Yes.

OPERATOR: Did you have school today?

G [REDACTED]: Uh-huh (yes).

OPERATOR: Okay. And she – was she – was he there when you got home?

G [REDACTED]: No. I came home and we were sitting there and I was sitting at the table eating and she was sitting on the couch and was like – Okay. I see the cops. And he liked kicked the door once and we didn't know what it was. And then he kicked it again and it broke and he came in and he punched me. I fell out of the chair and he walked over and shot her. Then he was going to shoot me but I talked him out of it and he just ran and found the door and ran out, and then I called you.

OPERATOR: Okay. They are there. What building are you in?

G [REDACTED]: It's -- the one -- you have to go upstairs.

OPERATOR: Let me just make sure.

G [REDACTED]: If this phone dies. I haven't seen them in the parking lot yet.

OPERATOR: Do you see it? You don't see them yet?

G [REDACTED]: No. I saw them like on the road but you have to like turn in.

OPERATOR: Okay. You have to turn in? And do you know what the building is?

G [REDACTED]: It is kind of like -- it's like I, J and G.

OPERATOR: It's in building I, J, G? Does that make I, J, G? It should be a number on that building. Do you have like a land line phone number?

G [REDACTED]: Yes, we do.

OPERATOR: What is that?

G [REDACTED]: It is [REDACTED].

OPERATOR: [REDACTED]?

G [REDACTED]: [REDACTED].

OPERATOR: It looks like Unit [REDACTED] Check Unit [REDACTED]. Just let me know when you see them, okay? You there? You okay? [REDACTED]?

G [REDACTED] R: I'm here.

OPERATOR: Okay. Just let me know when someone is there. Okay?

G [REDACTED]: Okay.

OPERATOR: Are they there with you?

G [REDACTED]: Not yet. Okay. They're here.

OPERATOR: They're there? And who's there? The police?

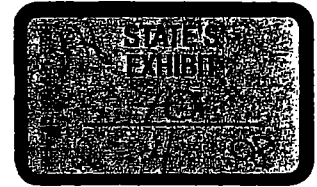
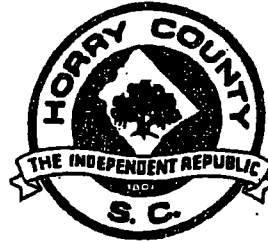
G [REDACTED]: Yeah.

OPERATOR: Okay. The police are there. Well, good luck, J [REDACTED]

G [REDACTED]: Okay. Thank you.

OPERATOR: All right. Bye.

Horry County Central Jury Court
 1201 Third Avenue
 Conway, South Carolina 29526
 Phone 843-907-5065
 Fax 843-907-6065



Form S-438
 REV. 10-89

STATE OF SOUTH CAROLINA
 UNIFORM TRAFFIC TICKET

CITY OR COUNTY OF		Horry		VERSION	
FIRST NAME	MIDDLE NAME	LAST NAME			
LOUIS	MICHAEL	WINKLER			
STREET AND NO.		CITY		STATE	
[REDACTED]		L.R.		SC	
STATE LICENSE	[REDACTED]		DRI. LIC. CLASS		
SC	[REDACTED]		D		
VEH. LIC. NO.	STATE	MAKE OF VEH.	YEAR	COMM. VEH.	AUTO. TRUCK COMB.
NP	SC				
		HAZ. MT.	MOPED	MTRCYCL	OTHER
YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL OFFICER					
NAME OF TRIAL OFFICER		STREET AND NO.			
Whitley		107 Hwy 57 N			
DATE OF TRIAL	TIME OF TRIAL	CITY	STATE	ZIP CODE	
2/19/04	2:00 PM	L.R.	SC	29526	
VIOLATION - COURT APPEARANCE REQUIRED YES NO		VIOLATION SECTION NO.			
Simple Assault + Battery		22-3-560			
OWNER OF VEHICLE		DATE OF ARREST			
NP		1/28/04			
ADDRESS OF OWNER		DATE OF VIOLATION			
		1/28/04			
BAIL DEPOSITED	NAME OF ARRESTING OFFICER		RANK		
SAIL	S. Cauble		PPE		
RACE	SEX	HAIR	EYES	COUNTY	NUMBER
W	M	BRN	BLU	Horry	26
DATE BAIL REC'D	BY	BADGE	DISTRICT		
20		576	5		
CASE BEFORE		MAGISTRATE		MUN. COURT	
		☒		☐	
CIRCUIT COURT		FAMILY COURT		FEDERAL COURT	
☐		☐		☐	
NAME OF TRIAL OFFICER IF DIFFERENT FROM ABOVE		TIME OF VIOLATION		WEATHER	
		A.M.-1			
		P.M.-2			
DEFENDANT DID NOT APPEAR		APPEARED		DISTANCE IN FEET FROM INTERSECTION	
☒		☐		Hwy 9	
DISPOSITION		AND			
FORFEITED BOND		NOLO CONTENDERE			
☒		☐			
TRIAL BY:		JURY			
TRIAL OFFICER		☐			
VERDICT OF TRIAL IF ANY		GUILTY		DATE OF TRIAL IF ANY	
☐		NOT GUILTY		☐	
JAIL	SUSPENS	FINE	AMT. COLLECTED	AMT. SUSPENDED	
		300	300		
COMMITTED TO:		Arrest as Result of Accident		DATE	
[Signature]		[Signature]		2/20/04	
TRIAL OFFICER'S COPY		22489 CN			

CERTIFIED A TRUE
 AND CORRECT COPY
 [Signature]
 HORRY COUNTY
 CENTRAL JURY COURT
 4/27/07

6 300 mls
 SEE JUDGE

State of South Carolina
Office of the Solicitor
Fifteenth Judicial Circuit

3469

REPLY TO ☐

P.O. BOX 1276
CONWAY, SC 29526
843-248-1309



REPLY TO ☐

P.O. BOX 1688
GEORGETOWN, SC 29442
843-546-3751

J. GREGORY HEMBREE
Solicitor

6-14-04

Central Jury Court
Attn: Susan Johnson
Old Horry County Courthouse
1201 Third Avenue
Conway, S. C. 29526

DEFENDANT: Louis M. Winkler

Please be advised that the charge(s) on the above-named defendant has been disposed of as follows:

<u>WARRANT #</u> <u>TICKET #</u>	<u>CHARGE</u>	<u>DISPOSITION</u>	<u>DATE</u>
<u>2004-22489CN</u>	<u>Simple A+B</u>	<u>Forfeit Bond - \$300.00</u>	<u>6-14-04</u>

OFFICER: J. Cauble- HCPD

SOLICITOR: Lisa Hatley

DEFENSE ATTORNEY: Louis Cook

VICTIM: _____



STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
)
 COUNTY OF HORRY) WARRANT NOS: I-762363, I-762364,
 & I-762365

STATE OF SOUTH CAROLINA,)
)
 vs.)
)
 LOUIS M. WINKER,)
)
 Defendant.)

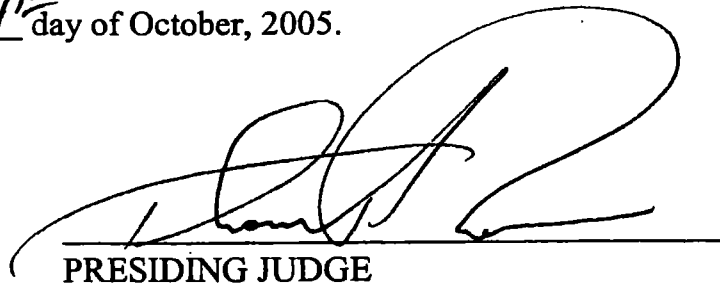
ORDER

HORRY COUNTY
 05 OCT 24 PM 2:03
 DEBRA HUGGINS
 CLERK OF COURT

NOW COMES THE DEFENDANT, by and through his attorney, G. Scott Bellamy and moves the Court to set a surety bond of One Hundred Fifty Thousand Dollars (\$150,000.0) as to the above referenced warrant numbers.

The Defendant will wear an electronic monitor while out on bond, is to have no contact with the victim, and must be present for any and all court appearances as scheduled.

IT IS SO ORDERED this 24th day of October, 2005.


 PRESIDING JUDGE

Conway, South Carolina



STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY) WARRANT NOS: I-762363, I-762364,
& I-762365

STATE OF SOUTH CAROLINA,)
vs.)
LOUIS M. WINKLER,)
Defendant.)

**ORDER AMENDING BOND
CONDITIONS**

HORRY COUNTY
05 DEC 30 AM 10:36
FILED BY HUGGINS
CLERK OF COURT

THE DEFENDANT, by and through his attorney, G. Scott Bellamy, appeared before this Court on Tuesday, December 6, 2005 requesting an Order amending the bond conditions previously set on this Defendant on to the above referenced warrant numbers.

IT IS HEREBY ORDERED that the Defendant, Louis M. Winkler, will be allowed to be off of the electronic monitor that he presently wears for a period of two (2) hours on a daily basis to seek employment while out on bond. As was stated in the original Order, he is to have no contact with the victim, and must be present for any and all court appearances as scheduled.

IT IS SO ORDERED this 15th day of December, 2005.

The Honorable Thomas A. Russo
Presiding Judge

Conway, South Carolina



Horry County Police Department
Criminal Investigations Division
Chain of Custody

~~WHITE OX ID~~
Whm. A-
10-B

Case Number: 06010298

Incident Type: Murder

Victim: Grainger, Rebecca

Location.

Suspect: Louis Michael winkler

Date: 3-22-06

Officer: Detective Toby Boyd

Item(s):

- 1. 1) hand written letter on yellow legal paper, written by Louis Winkler to Jill Shelley.**

2 //Last Item////////////////////////////////////



1 of 3

Hey Jill

Its a shame a few Bruises on your mothers arm led to her death. You know if you wouldn't of stuck your fat Ass in our business, she would be alive to see her 51st Birthday and her granddaughters.

Becky never did like you, she told me many times that you were the only Grainger in the family. Haley + J had her build, you didn't, thats why your the only one overweight. She said also that you cried and were unhappy all the time Just like your daddy. You called almost every night to cry about your cheating Husband and she always told J and I Not to Answer the phone if it was you. Its also obvious your own Grandmother did not like you either, I was wondering who you cry to Now. I guess you know that the Shelleys' are not such big shots in this County like you were hoping, seeing how I got out of Jail so easily. I Loved seeing J Shelleys' face when I got bond. You really should mind your own business "ILL TILL" Thats what J called you. - your a pitifull - stuck in the country - Fat Girl - and when cam finally wises up and leaves you and you need your Mommy - Just think, if only I wouldn't of stuck my nose In her marriage.

As for your mother who ended up Fucking everyone, I want you to know that word got to me, because of your mouth, you told the wrong people.

Also, for the little stunt you had the prosecutors poll, before I got My Lawyer paid, at the (Death Penalty Hearing) I thought you should know that I have several copies of Dups of Home Videos of me and your mom, You have heard of Pamela and Tommy Lee, Well your mother and I made that look like an amateur Video.

2 hours over 2 years of her Sucking my fat Cock, after all she was a real whore in bed, she even says on one segment (I Love Your Peter Micks) Don't worry you will see it on the Internet Just like I was on TV and in the Newspapers, You can ask Detective (Toby Boyd) who has the copies I had on me when I was arrested. I'm sure he enjoyed seeing me fucking your mom my, then into her mouth every time she liked to Swallow, IS that what you want to see when you always came into my bedroom, Did your mom tell My Cock was huge, all you have to do is look on the Video

By the way, You know as well as Jon that I did not Shoot my Wife.

My family unlike your pitifull Loser family. will see to it that the truth comes out.

I'm sure they have told you that the evedence is in on the 1st Charges, Clearly shows that your Mother was driving and did wreck your car. She was So afraid to tell you that becouse your such a bitch, She lied to the police then it all took off.

She also did not tell you she spent the night several times behind your back during the seperation (You see, If it wasn't for you, She would be Alive)

In the Long run Becky told me that those 1st dyrs with me were the best of her life, everyone knew that but you. We loved each other.

Jill, people do fight and have problems those are facts of life. If you would not of Butted in and called the police, (Which I heard Becky tell you not to) This whole tragedy could have been avoided.

AS for J. and Haley I did love them,
See you on the Internet.

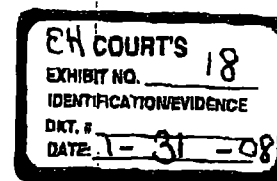
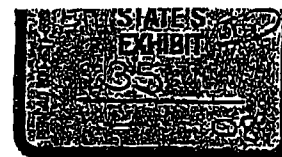
Your Mothers Husband.

P.S. Noone wins, me and my Wife both loose

Fuck You Jill! Little Fat Girl.

34.73

911 CALL



OPERATOR: 9-1-1. Where is your emergency?

G [REDACTED]: Okay. I'm at [REDACTED].

OPERATOR: Okay. What's going on?

G [REDACTED]: Okay. My step-dad is like crazy and he just broke in and he shot my mom and I'm here alone.

OPERATOR: He shot your mom.

G [REDACTED]: Yes. And she's dead.

OPERATOR: Okay. [REDACTED] [REDACTED] [REDACTED]?

G [REDACTED]: Yes. We're apartment - hold on.

OPERATOR: What is the address there?

GR [REDACTED]: It is [REDACTED] -

OPERATOR: It's [REDACTED]?

G [REDACTED]: [REDACTED].

OPERATOR: And what's your telephone number?

G [REDACTED]: The - the telephone's out. I have my cell phone.

OPERATOR: What's your cell number?

G [REDACTED]: [REDACTED].

OPERATOR: I want you to stay on the line with me. What apartment are you in?

G [REDACTED]: I'm in -- I think it's [REDACTED].

OPERATOR: Just stay on the line with me. Are you okay?

G [REDACTED]: Yes. I'm fine.

OPERATOR: And your name?

G [REDACTED]: It's [REDACTED] G [REDACTED].

OPERATOR: J [REDACTED] G [REDACTED]?

G [REDACTED]: [REDACTED].

OPERATOR: [REDACTED]. And your step-father?

G [REDACTED]: Is Mick Winkler. Louis Michael.

OPERATOR: Came in and shot your mother?

G [REDACTED]: Yes. He broke through the door.

OPERATOR: Is she dead?

G [REDACTED]: Yes.

OPERATOR: Okay. And where is he, and what is his name?

G [REDACTED]: Louis Michael Winkler.

OPERATOR: And where is he now?

G [REDACTED]: He ran out of the door. He just ran down the street and ran away.

OPERATOR: And what does he look like? Is he a white male?

G [REDACTED]: Yes.

OPERATOR: Okay. And how tall is he?

G [REDACTED]: He's about five, five.

OPERATOR: Five foot five?

G [REDACTED]: Five, nine.

OPERATOR: Five, nine. And what does he have on? Do you know, Michael?

G [REDACTED]: [REDACTED].

G [REDACTED]: He had on a blue jeans and a grey sweat shirt, and he has on white tennis shoes.

OPERATOR: White tennis shoes. And does he have a car out there?

G [REDACTED]: I don't believe so. No.

OPERATOR: And what is your mom's name?

G [REDACTED]: Becky, or Rebecca Winkler.

OPERATOR: And how old is your mom?

G [REDACTED]: She's fifty.

OPERATOR: And where is she?

G [REDACTED]: She's on the floor.

OPERATOR: In the kitchen?

G [REDACTED]: On the living room, right beside the kitchen.

OPERATOR: Okay. Did you check to see if she had a pulse?

G [REDACTED]: No. But he shot her in the head and she's on the ground and she's not moving.

OPERATOR: Do you want to see if she does have a pulse? Can you do that or are you okay with that or—

G [REDACTED]: No. I'm not. I would not like to do that.

OPERATOR: Okay. And how old are you, J [REDACTED]?

G [REDACTED]: Fourteen.

OPERATOR: Okay. Stay on the line with me, J [REDACTED]. I want you to stay on the line until they get there. Okay?

G [REDACTED]: Okay.

OPERATOR: All right. Just stay with me. And have they been arguing or anything?

G [REDACTED]: No. They've — they were getting divorced and we moved out and he just — I don't know. They don't even talk or anything.

OPERATOR: Okay. Do you see — did you see — did you — were you there when it happened?

G [REDACTED]: Yes.

OPERATOR: You're doing okay, huh?

G [REDACTED]: Uh-huh (yes).

OPERATOR: Now I've got police and EMS in route to you, okay?

G [REDACTED]: Okay.

OPERATOR: Do you know what kind of car that he does drive usually?

G [REDACTED]: He has a silver Isuzu, but she has it. He doesn't have a car that I know of.

OPERATOR: He does not have a car? Does he — does he stay around there? Do you know of anywhere that he's staying?

G [REDACTED]: He stay at Stone's Edge. [REDACTED] [REDACTED] [REDACTED] [REDACTED].

OPERATOR: Okay. At Stone Hedge. And what is that address?

G [REDACTED]: It's [REDACTED] [REDACTED].

OPERATOR: [REDACTED]?

G [REDACTED]: [REDACTED]. No. [REDACTED].

OPERATOR: [REDACTED]? And, and that's in Stone Hedge and that's in Little River?

G [REDACTED]: Uh-huh (yes). Stone's Edge.

OPERATOR: Stone's Edge. I'm sorry.

G [REDACTED]: Right by Bell and Bell.

OPERATOR: Stone's Edge. You're doing a good job, [REDACTED]. Does he have a telephone number there? Do you know what that is?

G [REDACTED]: No, ma'am. He got the number changed.

OPERATOR: And do you know — and you didn't see which direction he was heading or anything?

G [REDACTED]: No, ma'am.

OPERATOR: And you're there by yourself. Okay. I have them in route. Okay. Stay with me. All right?

G [REDACTED]: Yes, ma'am.

OPERATOR: Can you go outside?

G [REDACTED]: I'm out on the balcony.

OPERATOR: Okay. The apartment is [REDACTED]

G [REDACTED]: [REDACTED]

OPERATOR: [REDACTED]

G [REDACTED]: Just [REDACTED]

OPERATOR: [REDACTED]? [REDACTED], [REDACTED]?

G [REDACTED]: Yes.

OPERATOR: And it's [REDACTED] [REDACTED]

G [REDACTED]: Uh-huh (yes).

OPERATOR: Okay. Did you get home from school?

G [REDACTED]: Yes.

OPERATOR: Did you have school today?

G [REDACTED]: Uh-huh (yes).

OPERATOR: Okay. And she - was she - was he there when you got home?

G [REDACTED]: No. I came home and we were sitting there and I was sitting at the table eating and she was sitting on the couch and was like - Okay. I see the cops. And he liked kicked the door once and we didn't know what it was. And then he kicked it again and it broke and he came in and he punched me. I fell out of the chair and he walked over and shot her. Then he was going to shoot me but I talked him out of it and he just ran and found the door and ran out, and then I called you.

OPERATOR: Okay. They are there. What building are you in?

G [REDACTED]: It's - the one - you have to go upstairs.

OPERATOR: Let me just make sure.

G [REDACTED]: If this phone dies. I haven't seen them in the parking lot yet.

OPERATOR: Do you see it? You don't see them yet?

G [REDACTED]: No. I saw them like on the road; but you have to like turn in.

OPERATOR: Okay. You have to turn in? And do you know what the building is?

G [REDACTED]: It is kind of like - it's like I, J and G.

OPERATOR: It's in building I, J, G? Does that make I, J, G? It should be a number on that building. Do you have like a land line phone number?

G [REDACTED]: Yes, we do.

OPERATOR: What is that?

G [REDACTED]: It is [REDACTED].

OPERATOR: [REDACTED]?

G [REDACTED]: [REDACTED].

OPERATOR: It looks like Unit [REDACTED]. Check Unit [REDACTED]. Just let me know when you see them, okay? You there? You okay? [REDACTED]?

G [REDACTED]: I'm here.

OPERATOR: Okay. Just let me know when someone is there. Okay?

G [REDACTED]: Okay.

OPERATOR: Are they there with you?

G [REDACTED]: Not yet. Okay. They're here.

OPERATOR: They're there? And who's there? The police?

G [REDACTED]: Yeah.

OPERATOR: Okay. The police are there. Well, good luck, [REDACTED].

G [REDACTED]: Okay. Thank you.

OPERATOR: All right. Bye.

J [REDACTED] G [REDACTED] INTERVIEW

PITTS: It's March 6th, 2006. This is Detective Anne Pitts. Present with me is J [REDACTED] G [REDACTED]. J [REDACTED] if you could give me your date of birth?

G [REDACTED]: [REDACTED].

PITTS: Okay. And J [REDACTED] where do you currently live?

G [REDACTED]: [REDACTED]

PITTS: And the unit number?

G [REDACTED]: [REDACTED].

PITTS: In Little River, right?

G [REDACTED]: Uh-huh (yes).

PITTS: And if you will just try to speak up just a little bit for me, okay? I'll try to move this a little bit closer to you so we can hear it. Today, Monday, did you go to school?

G [REDACTED]: Yes, Ma'am.

PITTS: And what school was that?

G [REDACTED]: Myrtle Beach High School. Or North Myrtle Beach High.

PITTS: North Myrtle Beach High School. Okay. How did you get to school? How did you get to school today?

G [REDACTED]: I walked.

PITTS: And what grade are you in, J [REDACTED]?

G [REDACTED]: Ninth.

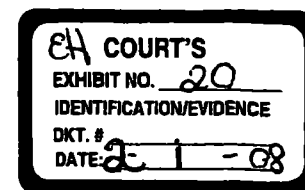
PITTS: Do you remember about what time you went, got to school today?

G [REDACTED]: About seven-thirty.

PITTS: And your mother is Becky Winkler and that's who you live with, right?

G [REDACTED]: Yes, Ma'am.

PITTS: Okay. And your sister, Haley, also lives there?



G [REDACTED]: Uh-huh (yes).

PITTS: Okay. And Haley is Grainger?

G [REDACTED]: Uh-huh (yes).

PITTS: Is it H-A-L-E-Y?

G [REDACTED]: H-A – yeah.

PITTS: Okay. When you left home this morning were both Haley and your mom at home?

G [REDACTED]: No. Haley was at Scott's house.

PITTS: And who is Scott?

G [REDACTED]: Scott is her boyfriend.

PITTS: Okay. Did you see your mother when you left for school this morning?

G [REDACTED]: Yes, Ma'am.

PITTS: Okay. How did she seem to you?

G [REDACTED]: She was in the bed asleep.

PITTS: She was asleep?

G [REDACTED]: Uh-huh (yes).

PITTS: And how many bedrooms are in that apartment?

G [REDACTED]: There are two.

PITTS: Okay. Where is her bedroom located?

G [REDACTED]: It is the downstairs bedroom.

PITTS: And your bedroom is upstairs?

G [REDACTED]: Uh-huh (yes).

PITTS: Okay. When you – what time did you come home from school today?

G [REDACTED]: I got home at about three-thirty.

PITTS: Who was home when you got home?

G [REDACTED]: My mom.

PITTS: And starting from three-thirty when you got home, I need you to walk through every single thing that happened until the police got there tonight. You think you can do that?

G [REDACTED]: Uh-huh (yes).

PITTS: Okay. Start from three-thirty and I don't care how small a thing it is - like washed dishes or, you know, anything. Try to go from three-thirty to exactly what took place at home until the police came tonight. Okay?

G [REDACTED]: Okay. I left school.

PITTS: Okay.

G [REDACTED]: And I walked home.

PITTS: Okay.

G [REDACTED]: And when I got home I got on the computer for about an hour and then I got up and I called L [REDACTED], my friend. And I got dinner and I was sitting eating.

PITTS: "L [REDACTED]" Is that who you said?

G [REDACTED]: L [REDACTED] L [REDACTED].

PITTS: Okay.

G [REDACTED]: I started eating. It was about five minutes and like we heard like a kick at the door.

PITTS: Now who? It was just you and your mom home?

G [REDACTED]: Uh-huh (yes).

PITTS: Okay. Had you talked to your mom at all when you got home or --

G [REDACTED]: Uh-huh (yes).

PITTS: What kind of stuff were y'all talking about? Do you rememnber?

G [REDACTED]: Just what happened today...

PITTS: Okay.

G [REDACTED]: ...and what I was going to do this evening.

PITTS: Did she tell you about her day?

G [REDACTED]: Yeah. She just said she stayed home and worked, and slept.

PITTS: Okay. And you started eating. Who fixed the meal?

G [REDACTED]: Mom.

PITTS: Okay. Did she cook something or –

G [REDACTED]: Uh-huh (yes). Yeah.

PITTS: Was she sitting down eating too?

G [REDACTED]: No. She was sitting on the couch, watching T.V.

PITTS: But she wasn't eating?

G [REDACTED]: Huh-uh (no).

PITTS: Okay. And what, what took place next?

G [REDACTED]: There was a kick at the door and like – she said, "What was that?" And I started to get up and then there was another kick and it flew open and he walked in.

PITTS: When you say "he," I need you to be very specific and tell me who exactly he was.

G [REDACTED]: Louis Michael Winkler.

PITTS: And you saw him and know him?

G [REDACTED]: Yes.

PITTS: Okay. There was no doubt in your mind that's who that was?

G [REDACTED]: It was exactly him.

PITTS: Okay. What was he wearing?

G [REDACTED]: He was wearing a grey like sweater and blue jeans and white tennis shoes.

PITTS: White tennis shoes?

G [REDACTED]: Uh-huh (yes).

PITTS: Okay. And well, did you get up or did your mom stand up to go toward the door or what? Tell me exactly what took place.

G [REDACTED]: I watched him walking in because I was still on the phone.

PITTS: Uh-huh (yes).

G [REDACTED]: And I didn't know what he was doing because he -- like going very fast and he --

PITTS: Where were you in the house?

G [REDACTED]: I was sitting at the edge of the bar in a bar stool.

PITTS: Okay. So one of those green bar stools?

G [REDACTED]: Uh-huh (yes). That swivel.

PITTS: And your mom was still on the couch?

G [REDACTED]: Yes, Ma'am.

PITTS: Okay. So you started to stand up or -- Don't put words in my mouth. I'm just trying to find out what took place?

G [REDACTED]: Yeah. And I was sitting there and he walked over. He goes -- and at first he didn't have a gun, but then he pulled it out of his waistband.

PITTS: Okay. So you saw him pull a gun out?

G [REDACTED]: Uh-huh (yes).

PITTS: Do you know what color it was?

G [REDACTED]: It was a like chrome, silver, shiny nine millimeter, automatic.

PITTS: How would you know it was a nine?

G [REDACTED]: Because I have seen it before and he's told me about me when we --

PITTS: How would you have seen it before?

G [REDACTED]: Because when we used to live with him, he said that there was a gun in the house just in case a person would ever break in or some type of safety issue.

PITTS: So you saw it before?

G [REDACTED]: Uh-huh (yes).

~~PITTS: So you think it was the same gun that you had seen before?~~

G [REDACTED]: Exact same gun.

PITTS: So a chrome nine millimeter?

G [REDACTED]: Uh-huh (yes).

PITTS: Okay. Did you say anything, or did he say anything? What happened next?

G [REDACTED]: I said, "What are you doing?" He goes, "I'm here now, M.Fer's." And was cussing and he just kept saying, "I'm here now. I'm here now." And he walked over and he punched me in the face and then he hit me again and I fell over and I --

PITTS: Where did he hit you?

G [REDACTED]: --

PITTS: On the forehead? What did he hit you with?

G [REDACTED]: His fist. He just hit me and I fell over, and the bar stool. And the phone dropped and broke.

PITTS: Where on your body did he hit you?

G [REDACTED]: Like right, right below my eye. Right on it.

PITTS: Okay. On your right eye?

G [REDACTED]: Uh-huh (yes). And then he hit me right below the left one, I think. Or again on the right side.

PITTS: Later when we get some - I want to take a picture of you. I can see a little red spot right there.

G [REDACTED]: Uh-huh (yes).

PITTS: After he hit you and you fell over, what took place next?

G [REDACTED]: I was sitting on the floor and he was leaning over me. He's like, "You're gonna - you told people you were going to kick my butt" or whatever. And I'm like, "No. I never said that." And then he just walked over to mom and she stood up off the couch and he shot her and then she fell down; and he walked back over to me and he just kept looking at me and acting like he was going to shoot me. And I just said, "Don't shoot me. Don't shoot me."

PITTS: Now when he - I know this is hard for you, J [REDACTED]

G [REDACTED]: No. This is fine.

PITTS: But it's very important that I get every single detail. Okay? When he walked up to your mom, did your mom say anything? Did he say anything to her?

G [REDACTED]: Huh-uh (no). Not a thing. He just walked up and just shot her.

PITTS: Did your mom make any movement or -

G [REDACTED]: No. She didn't even - she was just barely even up. She just started to get up.

PITTS: She was starting to stand?

G [REDACTED]: Uh-huh (yes).

PITTS: And then - how—explain to me what took - did he already have the gun up or did he kept that down. I mean what - how?

G [REDACTED]: He walked over with it in his hands.

PITTS: Uh-huh (yes).

G [REDACTED]: He walked up to her and pulled it up right beside her head and shot her.

PITTS: Okay. So you saw him shoot like the side of her head? You're doing really good. Okay. Was your mom able to say anything after that or...

G [REDACTED]: No.

PITTS: What, what took place next?

G [REDACTED]: He walked back over to me and he acted like he was gonna shoot me. Like – over and over he just kept walking like back and forth. And I said, "Just don't. Don't do anything crazy or don't shoot me or don't kill me." And he just walked out and I sat there and later until I heard the door downstairs close to make sure he was gone. And I heard it close and then I got up and I picked up the phone and tried – to see if it was working. And it wasn't because the battery had fallen out. It was like broke in the wire.

PITTS: Okay. Well, he came – after he kicked in the door did you call the police at all?

G [REDACTED]: Huh-uh (no.).

PITTS: Okay. Not until after he left.

G [REDACTED]: Uh-huh (yes).

PITTS: Okay.

G [REDACTED]: And then I walked over and closed the door and tried to lock it as best I could in case he came back and then I got my cell phone and I walked onto the balcony and I called the police.

PITTS: Did you see which way he went?

G [REDACTED]: No, Ma'am.

PITTS: Okay. And as far as you know he walked on foot?

G [REDACTED]: Huh-uh (yes). He was on foot. I didn't hear a car or anything.

PITTS: Do you know if he had any vehicles because the silver truck he had to give to your mom?

G [REDACTED]: Yeah. He didn't take that. It was still there.

PITTS: Okay.

G [REDACTED]: I didn't hear an engine or anything.

PITTS: Okay. So you didn't hear a car?

G [REDACTED]: Huh-uh (no.) He was dressed in a sweater so I take it he walked or ran over or something because it was kind of cold.

PITTS: Did he say anything else while he was there?

G [REDACTED]: He just said, "Y'all thought I wasn't gonna come back, but I'm here."
_____ He just said it over and over.

PITTS: J [REDACTED], is there anything that I didn't ask you or we haven't covered about what happened?

G [REDACTED]: I don't think so.

PITTS: Okay. Let me ask you this. After you called the police on your cell phone did you touch or move anything in the house?

G [REDACTED]: Huh-uh (no.)

PITTS: Did you, did you approach or touch your mom at all?

G [REDACTED]: No.

PITTS: Do you know if she was still breathing while you were on the phone or --

G [REDACTED]: I'm pretty sure she wasn't. I didn't check her.

PITTS: Okay. That's okay. I'm just checking. Okay. I'm just -- I just want to know whether or not you were going to have any blood on your hands. I just needed to know whether or not you went over and touched your mom. Okay? Now are you still wearing the same clothes that you had on when this happened?

G [REDACTED]: Yes, Ma'am.

PITTS: Okay. And you didn't move anything and touch anything in the apartment?

G [REDACTED]: Huh-oh (no). Only -- I closed the door.

PITTS: You closed the door. Okay. Is there anything else you can tell me? Had your mom mention him or anything like that today or --

G [REDACTED]: We thought he was just at his house. We had no idea.

PITTS: Okay.

G [REDACTED]: Not at all.

PITTS: Okay. Let me ask you this. When you came home did you think it was like every other day?

G [REDACTED]: Uh-huh (yes).

PITTS: Did your mom seem normal when --

G [REDACTED]: Everything was normal.

PITTS: Okay. Do you think we've covered everything, J [REDACTED]?

G [REDACTED]: Uh-huh (yes).

PITTS: And what number did you call the police from? What's your cell phone number?

G [REDACTED]: [REDACTED].

PITTS: Uh-huh (yes).

G [REDACTED]: [REDACTED].

PITTS: [REDACTED]?

G [REDACTED]: Uh-huh (yes).

PITTS: Okay. Is there anything else? You mentioned earlier to me that there was a gun in the house.

G [REDACTED]: Uh-huh (yes).

PITTS: That your mom kept.

G [REDACTED]: Uh-huh (yes).

PITTS: That -- you told me that gun was still there. Did you check after this happened? Or how did you know that gun was still there?

G [REDACTED]: Because I had seen it before. Because -- like she used to like keep it on the bed or beside her.

PITTS: Okay. And to the best of your knowledge that's still in your mom's room?

G [REDACTED]: Uh-huh (yes).

PITTS: But she didn't make any mention of Louis Winkler today or anything like that?

G [REDACTED]: Huh-uh (no). Nothing about him.

PITTS: So as far as you know she hadn't heard from him or talked to him?

G [REDACTED]: Huh-uh (no.)

PITTS: Okay. Did the grey sweater he was wearing, did it have any kind of pattern to it, or was it solid grey like I'm wearing?

G [REDACTED]: I think it was just solid grey.

PITTS: Okay. Anything else about his appearance? Is he still clean shaven or—

G [REDACTED]: Yeah. He was just like he always was. He's tanned. Really tanned and bald - and like he has like brown hair from here.

PITTS: Right.

G [REDACTED]: He likes to wear a hat. He did have a hat but it fell off.

PITTS: Okay. When he came into the apartment he had a hat on or —

G [REDACTED]: Yeah. When he kicked the door in like — when I closed the door I saw it on the floor. His hat.

PITTS: Okay. So you saw a hat?

G [REDACTED]: Uh-huh (yes).

PITTS: What color was that?

G [REDACTED]: It was black and red.

PITTS: But when he walked in the apartment you saw him have a hat on or--

G [REDACTED]: Uh-huh (yes).

PITTS: Okay. Did he take the gun with him or did he leave it then?

G [REDACTED]: Huh-uh (no.)

PITTS: He took it with him. And he didn't say anything after he left?

G [REDACTED]: Huh-uh (no).

PITTS: I mean when he was leaving or when he leave -- Y'all didn't have any kind of words?

G [REDACTED]: Huh-uh (no).

PITTS: Now were you still on the floor at this point...

G [REDACTED]: Uh-huh (yes).

PITTS: ...or had you moved somewhere else?

G [REDACTED]: No. I was on the floor the whole time.

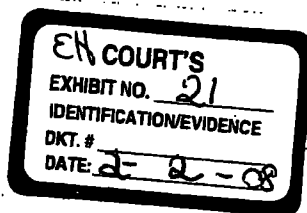
PITTS: Okay. You stayed on the floor after you fell. Okay. J [REDACTED], you did a really good job. Is there anything that we haven't covered?

G [REDACTED]: Huh-uh (no).

PITTS: That's it. You stayed inside the apartment until the police showed up?

G [REDACTED]: Uh-huh (yes).

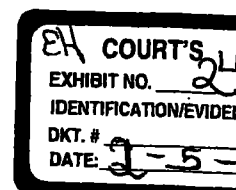
PITTS: Okay. The time is approximate nineteen twenty-four. The interview is ending.



Could we please read over the
all transcripts?

As I stated to you earlier, you
may come out and hear the tape and
have the transcript in front of you.

James E. Kelly



INTERVIEW WITH LOUIS MICHAEL "MICK" WINKLER

BOYD: You get finished eating? All you can handle, huh?

WINKLER: I think so.

BOYD: You want to save some of that? I'm going to slide this to the side, Mick.

WINKLER: Okay.

BOYD: You finished with it altogether?

WINKLER: Well, I think.

BOYD: We'll just sit it over in case you want to maybe get on it in a little bit. How about that? I've got bad news about Ohio State. They're out.

WINKLER: First round?

BOYD: I don't know.

WINKLER: They couldn't have lost the first round.

BOYD: Who did they have to open?

WINKLER: I don't -- I don't know.

BOYD: I'm going to start right here, Mick. Okay? Follow along with me as I read aloud. You have the right to remain silent. Anything you say can and will be used against you in a court of law. Do you understand that?

WINKLER: Uh-huh (yes).

BOYD: Initial right there. You have the right to talk to a lawyer and have him present with you while you're being questioned. You understand that? If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you so desire. And the last one -- if you make a statement or answer any questions you have the right to stop at any time. Understanding your -- No. The first one. Do you understand your rights as I have read them to you?

WINKLER: Yes.

BOYD: Understanding your rights, do you wish to waive them and make a statement or answer questions at this time?

WINKLER: I don't know if I need a lawyer or what. I don't know. What, what are the charges?

BOYD: It's just --

WINKLER: Understanding?

BOYD: Understanding your rights, do you wish to waive them and make a statement or answer questions at this time?

WINKLER: Yeah.

BOYD: Okay. Sign right here. How far did you get in school?

WINKLER: Graduated.

BOYD: Twelfth grade?

WINKLER: Yeah.

BOYD: Any alcohol tonight?

WINKLER: Any what? Pardon?

BOYD: Alcohol tonight, have you had any?

WINKLER: No.

BOYD: Any drugs?

WINKLER: No.

BOYD: And no medication. Right?

WINKLER: No.

BOYD: All right. Lu-- Mick. I want to talk to you obviously about what happened at Becky's house on the sixth. Is that the right date?

WINKLER: The sixth? Yeah.

BOYD: Monday, or two weeks ago today. Right?

WINKLER: What's today? Monday?

BOYD: Yeah. Two weeks ago. Why don't you just kind of give me an idea at the time. Give me your side of the story. Let me hear what you've got. What you have to say. What you were thinking. What you did. Whatever, whatever you want to tell I'm here to listen.

WINKLER: I've been for two weeks trying to go over it in my head and trying to think about what happened and I - to tell you the truth, I don't - I don't even remember hearing the gun go off. Just like that.

BOYD: Okay.

WINKLER: I don't even remember the gun going off.

BOYD: Can you tell me what happened leading up to it, early that morning, that day?

WINKLER: A normal day.

BOYD: Okay.

WINKLER: Just a normal day like any other day.

BOYD: What time did you get up?

WINKLER: Oh, geeze. I don't know.

BOYD: You normally get up real early?

WINKLER: Yeah.

BOYD: Seven? Six?

WINKLER: Seven o'clock.

BOYD: Does anything stand out in your mind on that day? Were you mad? Were you worried about anything or -

WINKLER: That was the forty-fifth day according to - to pay that thousand dollars to her lawyer.

BOYD: Uh-huh (yes).

WINKLER: But I had called dad and he said he was sending it. And I called Mr. Norton, my family court lawyer, and his paralegal told me that they wouldn't do anything for ten days. They'd probably ask for it back, you know, for ten days.

BOYD: Okay. How much did you have to pay her?

WINKLER: A thousand dollars. Her, her lawyer.

BOYD: And your father was going to send that for you?

WINKLER: Yeah.

BOYD: Okay. So you talked to your dad and you got up normally, the forty-fifth day that family court had given you to pay it. I mean – can you kind of give me. Do you remember what happened after that?

WINKLER: No. It was just a normal day. I went on about my business like I always did.

BOYD: Uh-huh (yes).

WINKLER: I ate. That's about it, really. Just watched T.V. and did my work around the house there. I forget if it was cold or not. I was outside and fished a little bit.

BOYD: Okay. How about – well, after – okay, after lunch. How about that? Afternoon? Does that help at all?

WINKLER: No.

BOYD: So you pretty much stayed at home all day after you got up

WINKLER: I had a electronic monitor on.

BOYD: Okay. So you were close by until—

WINKLER: I couldn't go nowhere.

BOYD: Okay. So there's a certain time in the afternoon when you can leave? Right?

WINKLER: Four to six I had ---

BOYD: Okay. Let's go to that time. What about four o'clock? What, what was in your head? Where were you going?

WINKLER: I went and shot baskets on the court, and it was right there at the street...

BOYD: Yeah.

WINKLER: ...with the neighbor's boys. I gave the neighbor's dog a ham bone. It was a normal day.

BOYD: Okay. Well, at some point you left, right? What time was that, approximately? Any idea?

WINKLER: No. I always have to go by when my rides can take me now.

BOYD: Right.

WINKLER: I don't know. Four, five o'clock. About a quarter after. Five-thirty.

BOYD: And who, who drove you up - away?

WINKLER: A neighbor.

BOYD: What's his name, or her name?

WINKLER: Jeff something. I don't even know his last name.

BOYD: Which house does he live in? Straight - was it straight across or beside your house?

WINKLER: Straight across. Excuse me.

BOYD: Is he a white guy? Okay. What did you tell him?

WINKLER: He had nothing about it. He knew nothing about it.

BOYD: What did you tell him that you needed? Where did you tell him that you had to go?

WINKLER: I told him I had to go to my buddies' house or something like that.

BOYD: Okay. So he said all right. Let's go?

WINKLER: Right. I had somewhere I told him.

BOYD: Okay. So you guys did what, jumped in his car?

WINKLER: Yeah.

BOYD: And where did he take you?

WINKLER: To [REDACTED]

BOYD: Into the complex or—

WINKLER: Uh-huh (yes).

BOYD: Where did you actually get out?

WINKLER: Right there beside my car.

BOYD: Okay. So right outside the apartment where she was living, right?

WINKLER: That's right.

BOYD: Did you have a gun with you then?

WINKLER: Yeah.

BOYD: You did? And it was one you brought with you?

WINKLER: Yeah.

BOYD: Did he know you had a gun?

WINKLER: No, or he probably wouldn't have taken me over there.

BOYD: What time would you say you got there?

WINKLER: I couldn't' really tell you. I know it was all before six. But I was always right on that monitor thing.

BOYD: Okay. What happened then? You got out the car and Jeff drove away, right?

WINKLER: Uh-huh (yes).

BOYD: Okay. What did you do?

WINKLER: I went inside the apartment to talk with Becky and the rest of it is a blank really. Like I said, I don't even remember the gun going off.

BOYD: Did you knock on the door?

WINKLER: No noise, sound or anything.

BOYD: Do you remember going up the steps to the apartment?

WINKLER: I honestly think I knocked.

BOYD: Okay. Nobody – nobody answered.

WINKLER: No.

BOYD: And then what did you do?

WINKLER: The rest is all just like a blank to me. The events after that, I don't even know what happened. Like Wednesday or something I tried to start thinking about what it was.

BOYD: So you don't recall actually what happened while you were there?

WINKLER: Huh-uh (No).

BOYD: Well what were you going there to –

WINKLER: Everything's a blur.

BOYD: What were you going there to do?

WINKLER: I was going to talk to Becky. I had a restraining order on her and I just needed to talk to her.

BOYD: She had a restraining order on you?

WINKLER: She had one on me. That's bad because, you know, you got to try and work things out and you can't do it.

BOYD: Well, what do you think you did once you were there? I mean do you know what happened?

WINKLER: I know that she – I know that she was shot. As far as I know.

BOYD: Do you know who shot her?

WINKLER: No.

BOYD: You don't know?

WINKLER: I think there was a guy there with J [REDACTED] and her, but I don't know who. I heard a noise. It might have been a neighbor. Just a voice, that's all.

BOYD: Where did you hear them at? Upstairs or –

WINKLER: _____ Where she lives in a up-- she lives up --

BOYD: Well, I know that there's a loft. Where did you hear the voice coming from?

WINKLER: It was behind me. I don't really know. That's what I was trying to figure out.

BOYD: Do you remember leaving?

WINKLER: No. I don't even know how I left there. I ended up in the woods.

BOYD: Okay. Lets, lets - when you walked out the front of the apartment, the front door of the apartment, do you remember which way you went? Which way? Did you make a left toward the highway or right towards the golf course?

WINKLER: A right.

BOYD: Okay.

WINKLER: It had to have been because if I ended up in the woods it would have to have been to the right.

BOYD: What were you wearing?

WINKLER: Basically what I have on now. Well exactly what I have on now.

BOYD: Anything else?

WINKLER: A pullover hood.

BOYD: A what?

WINKLER: A pullover hood, hoody - a sweatshirt.

BOYD: What color was it?

WINKLER: Grey.

BOYD: It had your Ohio State Buckeyes on it? Right?

WINKLER: Yeah. It did.

BOYD: Okay.

VOLUME EIGHT OF EIGHT
STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY.

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

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WINKLER: I just lost that today as a matter of fact.

BOYD: All right. Where – at what point did your memory come back, Mick? Do you – you just recall making a right towards the golf course and then all of a sudden you remember what happened then, I mean after that?

WINKLER: I tried to go over it in my head and try to figure out what it was that I actually did because there was nothing in that day that was any different than any other day.

BOYD: Was there any –

WINKLER: Like what?

BOYD: Were you drinking alcohol?

WINKLER: No.

BOYD: Using any kind of drugs or do -- Do you use drugs? No?

WINKLER: I don't use drugs.

BOYD: You just – you just take a drink now and then when you have it hard.

WINKLER: Every now and then.

BOYD: It would, would be kind of hard to believe, Mick, that that two or three minutes, I mean that you just can't remember anything about that, you know? You remember going in and you basically remember having sit down.

WINKLER: I'm telling you it's -- just all of sudden it – I just – everything was a blur. I don't and I can't figure it out. It's just I don't.

BOYD: Okay. Did you – where was the gun at? In your pocket? When you got out of the car to walk into the building did you have a gun in your pocket? Was it in your hand?

WINKLER: It was in my pocket.

BOYD: In your, in your jeans pocket. Okay. You walked up the steps and it stayed in your pocket pretty much the whole time, right? Once you got inside, at some point it had to have come out, right? Do you recall it coming out and at what point?

WINKLER: No. I remember talking to J[REDACTED].

BOYD: Uh-huh (yes).

WINKLER: I remember talking to him.

BOYD: Did he -- he finally came and opened the door or --

WINKLER: I don't -- I don't know how I got in the house. I know I knocked.

BOYD: Okay. You knocked a time or two and nobody answered. At some point you had to go inside. Did he -- did he come or did she come to the door?

WINKLER: I don't remember how they got to the door.

BOYD: Okay. So we'll just skip that. That's no -- You walk in the door. You're inside. Bam. There's J [REDACTED] and there's Becky. Right?

WINKLER: I think they were both there. Right there.

BOYD: Okay. Where, where was --

WINKLER: Like I said, it's still a blur to me and I've been sitting here. You know I sat there in the woods trying to think, and I'm by myself.

BOYD: Well, why would you be running if you don't remember? Because you know -- I mean you've been on the go for two weeks, sleeping in the woods, drinking and eating what you could, right?

WINKLER: Right.

BOYD: I mean obviously there's -- you've got a reason in your head why you don't want to talk to us or why you didn't want to encounter the police.

WINKLER: Well, actually I'm glad it's over.

BOYD: I'm glad, too.

WINKLER: I mean I don't know what -- I don't know what, what to think about it or anything. I tried to think about well what happened. Because the next day I seen -- I got a newspaper and I don't even remember how I got a newspaper. And there was a little clip in there and it just said -- it was a small, little article.

BOYD: What did it say?

WINKLER: And it said, "Little River. Woman fifty shot and killed in condo." And it was a little, two paragraph thing about Becky.

BOYD: And when you saw that, what did you think?

WINKLER: I thought, "Damn, Becky's dead." I read it two or three times a day...

BOYD: Did you ever think...

WINKLER: ...sitting there crying.

BOYD: ...I've, I've killed my wife, my best friend? Do you ever think that? Did that run through your mind at all?

WINKLER: I kept wondering if I did it or not.

BOYD: Well, what do you think now? At this point, two weeks later, having had plenty of time to think about it, and run it through your mind?

WINKLER: Well, with all the investigation I'm taking it that it was my, my responsibility.

BOYD: Well, I mean -- you know I certainly wasn't there. I wasn't there.

WINKLER: Right.

BOYD: And you were, right?

WINKLER: Yeah.

BOYD: Well did you pull the trigger or not?

WINKLER: I don't know who else was there or not? I don't remember pulling the trigger or nothing. I seriously don't. I don't remember pulling the trigger.

BOYD: Okay. So you went out and spent a night or two. Where did you spend your first night? Do you remember which, which woods?

WINKLER: Right there where we passed. Remember I told you there was an old truck sitting there. A big truck.

BOYD: So out next to Eagle's Nest Golf Course?

WINKLER: No. It wasn't Eagle's Nest there.

BOYD: Or River Oak?

WINKLER: Well, see I don't know where the woods are at Eagle's Nest there. I don't know exactly where – it was behind – if you go behind Baytree I guess. I don't know.

BOYD: At any point did you ever go back to your house?

WINKLER: No.

BOYD: And at any point did you ever go back to her house, to her apartment?

WINKLER: No.

BOYD: No. Did you ever call anybody?

WINKLER: Did I –

BOYD: Ever call any friends, any family and say, "Look. I've got to have some help. I'm hunger" or whatever?

WINKLER: No. I didn't have a phone.

BOYD: Okay. Did you ever go to anybody's house?

WINKLER: Peggy Conner's. At Peg Conner's.

BOYD: Okay. That was what? When was that?

WINKLER: That was recently.

BOYD: Where does she live?

WINKLER: That was recently. She lives in North Myrtle.

BOYD: You knocked on her door?

WINKLER: Yeah.

BOYD: Was it daytime or night?

WINKLER: P.M. Evening.

BOYD: And what did she say?

WINKLER: She said, "Oh, Mick. I'll be right back." And the next thing I knew the alarm went off in the house.

BOYD: And you, you hit the road?

WINKLER: So I guess it was a bad idea.

BOYD: Okay. Whose gun was that that was with you today when we, when we, when we encountered out in the woods? Was that yours?

WINKLER: That was Becky's gun.

BOYD: That was Becky's gun. Something she had for awhile? You guys had together or -

WINKLER: I guess.

BOYD: Don't know.

WINKLER: I guess she had had it for awhile. I don't know how long.

BOYD: Okay. So it was at your house, right? It stayed at your house where you live in Stone's Edge?

WINKLER: Yeah.

BOYD: Okay. When you left that day and you went to her house you had it in your pocket, right? And you had a monitor on your foot?

WINKLER: Yeah.

BOYD: Where is that monitor now? At some point you had to take it off, right? Do you know where it's at?

WINKLER: No. I don't.

BOYD: How'd you get it off? Because like you said, you pretty - you were pretty ___ about making sure your times were right. You know. I know you were. I just wanted to see - I mean where's it at and how'd you get it off?

WINKLER: Where the monitor is, I don't even know where the monitor is.

BOYD: Is it laying in the woods somewhere?

WINKLER: Huh?

BOYD: Is it in the woods somewhere?

WINKLER: I don't – I don't remember if it's in the woods or not.

BOYD: Did you get it off?

WINKLER: I seriously don't.

BOYD: What did you take it off with?

WINKLER: I don't remember taking it off. I remembered it the next day. I said, "The monitor is gone."

BOYD: That was when you woke up in the woods?

WINKLER: Yeah. Toby, my stomach is about to tear up here.

BOYD: You need to take a break and go to the bathroom?

WINKLER: If I could.

BOYD: Absolutely.

WINKLER: Damn. I knew this was gonna happen.

GRAHAM: Yes, sir.

BOYD: That's all right. Come on back.

WINKLER: That's why I didn't want to try and finish that thing.

BOYD: Huh?

WINKLER: That's why I didn't want to try and finish that thing.

BOYD: Yeah. You make, you make some room for the rest of it?

WINKLER: I don't know.

BOYD: There you go. You need anything else or are you all right?

WINKLER: No, thanks. I appreciate that.

GRAHAM: Yes, sir.

BOYD: Okay. Why don't you tell me what exactly you can recall because maybe if you could go through it in your head and you go step by step with it. Maybe you can -- you know, maybe you -- I don't know maybe it will start coming back to you.

WINKLER: I've been doing that for two weeks.

BOYD: Well, let's do it. Do it out loud and that way you can maybe start putting some things together in your head. Start with when you got out the car. Jeff locked -- you closed Jeff's door and he drove off. Let's go just slowly and step by step and see what you recall as you tell me. And take your time.

WINKLER: I remember knocking on the door is one thing I remember.

BOYD: Uh-huh (yes).

WINKLER: And seriously, everything else is a blur. There's a -- I remember talking to -- J. [REDACTED] and I had talked and I heard somebody say something and I spun -- turned around, but I don't know if that was a neighbor or somebody up in the loft. I don't know. But -- and then I was trying to think of everything else that could have happened there and I just can't. It won't come back.

BOYD: Mick, you run. You're running from us for a reason, buddy. And you know -- I mean you know. You know what you were running for. I mean right? It wasn't like a trespassing or it wasn't something that -- you were running for a reason. You're sleeping in the woods for two weeks. You know. You're eating whatever you can and drinking whatever you can and doing things that people don't do unless they're fleeing or trying, trying to evade. And there's a reason for that and it's something serious.

WINKLER: Well, I knew I wasn't supposed to be over there.

BOYD: Okay. So you weren't supposed to be at her house.

WINKLER: I didn't ____ at the jail.

BOYD: Do you remember? Was there -- let's get back to how you got in. I know you knocked a couple of times but at some point you walked through the door, right? You entered that threshold somehow.

WINKLER: Uh-huh (yes).

BOYD: Put – go back in your mind. Think hard. I knocked a couple of times and then what? How did it actually – how did you actually walk across that threshold and into the house?

WINKLER: I had to have walked across it.

BOYD: Well, I know that but the door was closed. How did you get the door open? And it's okay. Tell me. It's all right. This is the time right now –

WINKLER: Yeah.

BOYD: This is the time –

WINKLER: I'm trying to think about it. Right now.

BOYD: Yes, sir. It's the time for reckoning.

WINKLER: That's what I'm trying to think of.

BOYD: Because to make, to make it right we've got to first admit to what we did, you know? And you've – you've done a fabulous job so far. You're man enough to say ---

WINKLER: When read that in the paper. I seen that in the paper and I kept saying to myself, "Did I do that?"

BOYD: And what did you answer to yourself?

WINKLER: I didn't. There wasn't one.

BOYD: I mean surely you must have answer now, right?

WINKLER: I was shaking and – what am I charged with?

BOYD: Well, I mean what, what do you think you're charged with? You're charged with – the charge is going to be murder.

WINKLER: Murder? They're saying I did it? I killed her?

BOYD: Well, I'm trying to hear your side.

WINKLER: I wish I knew.

BOYD: Okay. How did the door get open?

WINKLER: Like I said, I know I walked through it but I don't know if it was open or -

BOYD: Did you check the lock? Did you turn it to see? Well, maybe it's unlocked and I can just walk in?

WINKLER: I don't know.

BOYD: Do you -- do you remember -- did you have a key?

WINKLER: No.

BOYD: So you had no key and you don't remember if you turned the lock. Did you kick the door in or use your shoulder or your, your leg or anything to get that door open?

WINKLER: I can't remember.

BOYD: I know you've got a bad shoulder so that's probably out of the question, right? That one's bad.

WINKLER: This one is bad.

BOYD: I mean you could have thrown the right shoulder into it or a foot, right?

WINKLER: But I don't remember if they answered the door...

BOYD: Okay. Let's -- well let's --

WINKLER: ...or who let me in.

BOYD: So you walk in the door. To the right is the -- you walk in and make a right. The kitchen is right there and straight ahead is the living area, right?

WINKLER: Yeah.

BOYD: Okay. Where was J [REDACTED]?

WINKLER: This is the things I've been trying to walk through.

BOYD: Well, maybe it will start jogging you, coming back. Where was J [REDACTED]? He's probably the first one you saw. Probably. Right? Because you said, "I talked to J [REDACTED] for a while. I talked to J [REDACTED]."

WINKLER: Yes. But I don't even know what I talked to J [REDACTED]. I remember him saying something and I said something back.

BOYD: Well, what was he doing?

WINKLER: You know what? I don't even remember what that was.

BOYD: What was he doing? Was he, was he – he had to have been doing something. Was he standing there looking? Was he, you know, playing a trombone? What was he doing?

WINKLER: I don't know. I don't remember him. I don't remember who I talked to first.

BOYD: Think, Mick. Think. Think big.

WINKLER: I've been trying to think of it for two weeks what the events that happened. It just wouldn't come back. You know, I'm sitting there by myself, Toby, and I'm telling you the truth.

BOYD: You're trying to get it to come out and you just can't get it, huh? Okay.

WINKLER: It said in that article and this is what really got me.

BOYD: Uh-huh (yes).

WINKLER: Shot. And I don't even remember the gun, the noise, the shot –

BOYD: Well, it was in your hand then, right?

WINKLER: I don't remember that. I'm just saying I don't even remember a shot. Period. The noise of a shot.

BOYD: Okay. Well, at some point...

WINKLER: I couldn't even remember that.

BOYD: ...you must have come in confrontation with Becky. If we don't recall exactly what happened with J ■■■, Becky was the one you came to see. She was the one you came to talk to. That was who you came to see. What did you want to talk to her about?

WINKLER: I was gonna ask her if she – I was gonna tell her to take, to try and take some of the pressure off me because all we were doing was costing my dad money.

BOYD: Okay. So you, you basically come to talk the money?

WINKLER: Well, no. To get something settled. Just --

BOYD: Did you still love her?

WINKLER: I'll always love her.

BOYD: And -- I mean was it your intention to maybe talk to her about coming back or let's work this out or what? I mean that's the whole reason you went was to talk to Becky?

WINKLER: Right.

BOYD: Right?

WINKLER: I believe so.

BOYD: Had you, had you played it over in your mind before you left and you said, "Well, here's what we're going to talk about."

WINKLER: No. Because I didn't have a ride. I know there wasn't no ride available. And that guy got home and I had never even got a ride from him before.

BOYD: Uh-huh (yes). Did you have to pay him money or he just ran you up there?

WINKLER: Just ran me up there.

BOYD: All right.

WINKLER: I told. As a matter of fact, I told him I'd give him money the next time he gave me a ride somewhere. And he said that's okay. I don't even know his last name.

BOYD: So you went. You went to talk to Becky. Maybe you spoke to J [REDACTED] maybe you didn't. At some point there she is. She's standing there in front of you. We're about to talk money. We're about to talk. Baby, let's get back together. Let's work things out. Whatever. Right? Do you remember? Tell me what you said to her. What's the first thing? Hey, Becky, it's me. What did you say? The first thing you said to her was what?

WINKLER: I don't even remember what she looked like.

BOYD: Okay. You don't remember what she looked --

WINKLER: I don't even remember because she had long hair the last time I had actually seen her to confront, talk to her. Real long hair.

BOYD: Right. Did it look different that day?

WINKLER: Looked like a stranger.

BOYD: So she looked -- she looked like she had changed?

WINKLER: I mean it's like I didn't even know her.

BOYD: Did her appearance had changed drastically then? Would you say that? Since then and the last time you say her?

WINKLER: I can't remember if it, if it--

BOYD: What, what were you trying -- what were you trying to do?

WINKLER: If it's like -- because I'm trying, getting visions in my head. I seen her one day in Family Court and her hair was still real short then. And this was just a couple of weeks or, I don't know, a month ago maybe.

BOYD: Yeah.

WINKLER: Just -- I don't remember if it was -- I don't know. I'm telling you, Toby, it's still a blur to me.

BOYD: Well, at some point the door was opened. And at some point a woman was shot. That's what we've gathered so far.

WINKLER: That's what I read.

BOYD: And then there's a little boy in there. A young man that was also there and present at the time and he was obviously scared to see this going on. I mean if I put--

WINKLER: See I don't even remember how I left the apartment.

BOYD: If we put ourselves in his shoes we would have to say, yes, he probably was scared, right? I mean shine? To see an altercation like this? To see his mother --

WINKLER: I imagine so.

BOYD: To see his mother take this kind of -- a final breath. Apparently, he was standing there when she took her final breath. When she died. J [REDACTED]

was standing there. He saw it. Saw it all. You know? And this boy – I mean regardless of what you think of him. And I don't know how your relationship was. If you guys got along well; if you were – if you were – Were you like this at each other.

WINKLER: We were buddies.

BOYD: Okay. That's great.

WINKLER: We were.

BOYD: Why? Why then – I mean why can't you tell us what happened so we can bring it, so we can corroborate what he saw and bring it to a close? Because you wouldn't believe how much work we've got in it at this point. We want to bring it to a close. Be over and done with this. But I just -- I mean you've got to step, you've got to step up. And the thing that "I don't remember," Mick, that's not – I mean you know.

WINKLER: Right. It's not that I don't remember. It's a blur.

BOYD: Okay. Well, how about –

WINKLER: It's like I didn't even come for sure –

BOYD: Well tell me –

WINKLER: That day is like --

BOYD: Okay. What kind of blurred visions do you remember?

WINKLER: I don't remember what it was that I can --

BOYD: But there's a blurry vision in your head, right?

WINKLER: That I can tell you. I know you want me to say I shot her. And I don't remember if I did or not.

BOYD: I want you to tell me what you did.

WINKLER: I don't remember. I'm assuming.

BOYD: Don't assume. Let's don't do that.

WINKLER: Well, what do you want me to say, Toby?

BOYD: I want you to tell me what you did, Mick. I want to know what you did. I want to know. If you remember it, I want you to say, "Yes. I did. I shot her."

WINKLER: I don't remember shooting at Becky.

BOYD: But I don't want you to assume.

WINKLER: I read it in the paper.

BOYD: I don't want you to say you know what the paper said. I shot her. So I must have.

WINKLER: I know that's what you want me to say, Toby.

BOYD: No. I don't. I want – I want what you remember.

WINKLER: I'm trying to tell you. And I keep telling you it's still a blur.

BOYD: Do you need some more time? Do you need another drink?

WINKLER: No.

BOYD: Do you need to relax a minute? Or what do you need? What can I do to help you get it out.

WINKLER: It's really not. It's just I've been trying to think about this for two weeks.

BOYD: Okay. When you left your house with, with Jeff, and you said Jeff, give me a ride to Mick – to Becky's house over in Baytree. I loaded the gun and put it in my pocket. What was your intent when you left your house?

WINKLER: I don't know.

BOYD: Did you intend to shoot her when you got there?

WINKLER: It was her gun.

BOYD: Well, regardless of whose gun it was. That's, that's kind of irrelevant really. When – when you put that gun in your pocket, you said I'm gonna arm myself because when I get there if there's any resistance I'm gonna take care of this? Was that something that –

WINKLER: No. I would never think that.

BOYD: Well why would you arm yourself before you leave home to go, to go speak to your wife simply about money, or about –

WINKLER: I know that don't sound right, but it's just I don't know.

BOYD: It doesn't. It really doesn't.

WINKLER: Armed myself.

BOYD: We arm ourselves. We arm ourselves when we think there's going to be confrontation or when we go to do harm. I mean surely you didn't think you were going to have to protect yourself from her, did you? I mean we arm ourself also maybe to protect ourself from somebody. I'm scared of this guy and I know I'm going to be confronted by him I may have something here to protect myself from him. And I don't think you would worry about protecting yourself from her. Right?

WINKLER: Well I don't know whether she had a boyfriend or not. I don't know. See I don't even know.

BOYD: I don't know either.

WINKLER: I have never called her. Never seen her.

BOYD: Well why did you put that gun in your pocket to start with?

WINKLER: I really don't know why I put the gun in my pocket.

BOYD: Was it common for you to arm yourself before you left the house?

WINKLER: No.

BOYD: Every time you leave to go, for those two hours in the afternoon, did you put a gun in your pocket and say, well I better have this with me?

WINKLER: No.

BOYD: No. But on this one particular day you did?

WINKLER: Yeah.

BOYD: And there had to be a reason for that.

WINKLER: Well I don't know if she – like I said, I don't know if she had a boyfriend or he would be there or whatever. No idea.

BOYD: Did you leave your house to go to [REDACTED] to kill Becky?

WINKLER: No.

BOYD: That wasn't in your mind?

WINKLER: Not at all.

BOYD: Okay. Well at some point you had to make a conscious decision in your head that this is the way it's got to go. That things have gone bad and we've got to take - directions have got to change and I find it necessary to shoot my ex-wife.

WINKLER: I would never. I'm not. I would never think that.

BOYD: Well, we don't do things only - I mean I guess we could do things like this by reflex but it would have to be when we're in a position where we feel like that's the end. There's nothing else we can do. Was there some point where you -

WINKLER: There's plenty I could have done. I mean I - just like my lawyer said in Family Court. He said, "Well, we lost the car. That's only temporary" and this and that.

BOYD: Did you feel so badly -

WINKLER: In fact, it wasn't even over as far as that goes. Any of that.

BOYD: Why? What's the purpose of it?

WINKLER: Any of it.

BOYD: It seems so senseless for it to have happened like this.

WINKLER: Well it does. That's why it baffles me and I've been thinking and trying to think what in the world happened. It is senseless.

BOYD: Did you snap?

WINKLER: I have no idea.

BOYD: Had you been getting angry or -

WINKLER: To the sense of snap, I don't know exactly what that definition is. But I mean snap. And if I could remember, I could make that assumption.

- BOYD: Had you been getting angrier, and angrier through the days? As the days got longer and it got closer to this date that you had to pay your money were you thinking, "Man, I'm in a desperate spot here. Dad's gonna send me the money because I don't have it."
- WINKLER: No. Because I had called the lawyer.
- BOYD: You called. Oh, your Family Court lawyer?
- WINKLER: Uh-huh (yes). His paralegal said that they wouldn't do that today.
- BOYD: Uh-huh (yes).
- WINKLER: And I called Dad and he said that the check would be in the mail and coming. Hell, that had just slipped my mind. The judge's order.
- BOYD: Was there a sense of desperation? Were you thinking, oh, my gosh. I've got to pay this or I'm gonna be in contempt of court, or I'm gonna have problems with Family Court?"
- WINKLER: No.
- BOYD: Okay.
- WINKLER: I mean I -- I went on -- that day was just a normal day and all of sudden I, you know ---
- BOYD: Well, at what point -- at what point during that morning or that afternoon, early afternoon, did you say I need to go over and talk to Becky?
- WINKLER: Well I guess --
- BOYD: You had been thinking about it?
- WINKLER: Because I didn't know -- nobody had -- I didn't have a ride. I never have a ride unless there's a ride available.
- BOYD: Uh-huh (yes). So this guy was going and you said can you give me a ride to my -- what did you say? My friends in [REDACTED]
- WINKLER: Uh-huh (yes).
- BOYD: Okay. At that point, what were you thinking when you left there? I'm going to go talk to Becky and let's get this worked out?
- WINKLER: Go talk to Becky. I guess. That's all I would think you know.

BOYD: But at some point a loaded gun went in your pocket, Mick.

WINKLER: That's, that's something I can't tell you.

BOYD: Okay. Well if it's -- I mean if it's not there, it's not there. And I --

WINKLER: I wish I could tell you.

BOYD: I would love -- I would love to hear your side.

WINKLER: That's why I agreed to talk to you because I don't -- If it was there, Toby, I'd tell you.

BOYD: Okay. Give us just a few minutes. You want some more of your burger?

WINKLER: No. Not after what just happened.

BOYD: Mick, what -- what did a -- what did Becky do to drive you to go over there with a loaded gun to confront her about something?

WINKLER: Right.

BOYD: You said you needed to re -- you needed to relieve pressure. I'm going over there to relieve some pressure from her. Isn't that kinda what --

WINKLER: I was going to ask to --

BOYD: Relieve the pressure on you.

WINKLER: .. relieve the pressure on me.

BOYD: But you leave home with a load--

WINKLER: To see if we can just talk.

BOYD: You, you leave home with a loaded gun.

WINKLER: I didn't know if she -- I already said I didn't know if she had a boyfriend over there or not.

BOYD: Well is that -- are you saying that you went over there with a loaded gun so you could protect yourself from a boyfriend?

WINKLER: To protect myself if someone was there.

BOYD: Okay. So you – the whole deal in the house is a blur. You leave out and you spend two weeks in the woods, but I don't know why. What am I doing in these woods? Why am I running from these police?

WINKLER: The monitor thing maybe. I know –

BOYD: Mick. Mick. Mick. Mick. Mick.

WINKLER: Six o'clock they'd...

BOYD: Mick.

WINKLER: ...come and get me.

BOYD: This thing – this isn't – I know you might think –

WINKLER: They told me that several times.

BOYD: I know you might think this is my first day, but it's not. You're not running from the police –

WINKLER: I'm not trying to pull anything on you.

BOYD: Yes, you are. Yes, you are.

WINKLER: Seriously, Toby. I'm not.

BOYD: You – how can you – how can a grown man not remember three minutes of his life and you can remember everything leading up to it and everything after?

WINKLER: Three minutes?

BOYD: Or four or two? I don't know. How long you were in the house I have no idea. Maybe you spent the afternoon with her. I don't know that either. But it, it's just not. I mean it doesn't comprehend. It's incomprehensible to think that a man can't remember. And I realize it had to have been traumatic. It really had to be traumatic for everybody there. Especially the woman lying on the ground that was shot in the face, and the boy that was sitting there.

WINKLER: It wasn't J. [REDACTED]

BOYD: And the boy that sat there and watched his mother be killed by his step-father. But you can't tell me that it's so traumatic that you can't remember the two or three minutes that you were there at that house. And

you can't say, "You know what? I'm man enough to tell you yes. I kicked the door down."

WINKLER: I --

BOYD: Yes. I went in...

WINKLER: I would definitely...

BOYD: ...and I shot her in the face.

WINKLER: In the face? Is that where she was shot?

BOYD: Yes, sir.

WINKLER: Well see, I didn't know that. It didn't say anything in the paper about it.

BOYD: But that's irrelevant too.

WINKLER: But you said shot.

BOYD: And that's irrelevant too. She was shot through the foot.

WINKLER: Well that's the first time I've heard of where she was shot.

BOYD: She's dead. She was murdered in her home. Where she was shot was irrelevant. Yeah. She took one right in the face.

WINKLER: See I didn't know that.

BOYD: How could you not know that?

WINKLER: Because I didn't know. All it said in the paper was shot. And I tried to think of what happened there at that condo.

BOYD: And then you leave. And, and you know you stay in the woods in the shape you're in right now. You probably lost fifteen pounds or twenty pounds. You're eating God knows what. You're drinking what little bit of water you can. You're nasty. You've got a beard. For what? Because your ankle bracelet? Hell, no.

WINKLER: I would have been in the same position I'm in right now.

BOYD: No. You wouldn't. You think a ankle bracelet violation will put you in the same boat you're in right now, Mick?

WINKLER: I'd be - I'd be in -

BOYD: Because you're on the hook for murder right now.

WINKLER: All right.

BOYD: And that little ankle bracelet thing would be - that pales in comparison.

WINKLER: Well. Well I don't even remember when I left.

BOYD: Tell me what happened?

WINKLER: When I left there I don't even remember leaving there.

BOYD: When you got to the top of those stairs, you knocked twice. You remember that? Okay. I knocked. Nobody answered. I knock again.

WINKLER: I think I knocked twice.

BOYD: Okay. Well say you knocked once. Whatever.

WINKLER: I mean - Yeah.

BOYD: Okay. You knocked twice. We pretty well agree with that. What happened after that?

WINKLER: That's what's a blur.

BOYD: No, it's not.

WINKLER: Everything goes around in a circle with me.

BOYD: I tell you what -

WINKLER: I don't even know.

BOYD: Well we're gonna go on one side of the story then. If that's the way you want. We've got a dead lady there with a round in her face. We've got autopsy. We've got photos. We've got a boy that saw it. I mean there's a reason.

WINKLER: I didn't say that.

BOYD: Maybe you've got a good one. Did she push you to it? What did she do to make you do this?

WINKLER: No. I didn't.

BOYD: What did she say? What did she do? Something.

WINKLER: If I could remember what she said, I would tell you.

BOYD: Could you not live with that?

WINKLER: Huh?

BOYD: Did you feel like I just can't live without Becky? She's the one I've got to have?

WINKLER: Well there were times. But heck it had been five months I didn't -- you know there had been times that I would think that but after five months I just let it go really.

BOYD: But you didn't let it go, Mick.

WINKLER: No. I meant her. Let her go.

BOYD: You went -- you went -- you went a step further than, than -- You went four or five steps further than anybody else, than most people would do. And to kill somebody on these grounds --

WINKLER: I still can't believe -- I mean you're saying that I killed her. That's what I knew after I seen that in the paper, but I don't know how or what happened.

BOYD: Well I'm going ahead -- I'm going to go on record as saying "bull shit."

GRAHAM: You, you remember leaving the house with a gun. Remember getting in the car with Jeff going to Baytree.

WINKLER: Uh-huh (yes).

GRAHAM: You remember going knocking on the door. You remember talking to J [REDACTED]. You don't remember nothing else?

WINKLER: I don't remember what I said.

GRAHAM: And then you remember going. Leaving out the apartment going to get a newspaper the next day, reading that.

WINKLER: I didn't get a newspaper. I found a newspaper.

- GRAHAM: You found a newspaper. You remember reading the newspaper, reading the article in there?
- WINKLER: Yeah. It wasn't on the front page or nothing. It was -- I said well -- and you know it was -- the front there wasn't nothing. It was some other story and it was a back little space about that big.
- GRAHAM: But you remember that little space in the newspaper but you can't remember what took place in that apartment?
- WINKLER: No. I don't. And that's why when I seen that at first I'm thinking, "Well, okay. Ain't no big deal." Because there was a big picture of somebody else on the front page of that and I'm saying okay. And then I got going back thru --
- BOYD: Who? Who was on the front page?
- WINKLER: I don't know. It was some story about somebody that did something.
- BOYD: That was -- that was Tuesday, right?
- WINKLER: That would --
- BOYD: You said the following day. Maybe Tuesday. Maybe Wednesday. Did your days -- maybe your days are running together.
- WINKLER: It would be Tuesday. I think.
- BOYD: So -- are you going to stand fast with that? You just -- we're going to go on one side the story. They're going to prosecute me for my life on something without even hearing my side. That's foolish. That's plumb foolish.
- WINKLER: My side? I didn't follow you.
- BOYD: Without me having had the benefit -- or you having had the benefit of having told me your side of the story I'm going to turn in a case file to the Solicitor's office regarding the murder without having heard your side of the story.
- WINKLER: I still can't believe murder.
- BOYD: That's just --
- WINKLER: I just don't. I don't.

BOYD: It's foolish for me.

WINKLER: Toby, if I knew. If I knew I would tell you right now. I've always been a man of my word and I tell – I just tell the truth. I don't know.

BOYD: Okay. I – and believe me I've tried my best to hear your side.

WINKLER: And I've – I've listened to myself go over this for the last two weeks.

BOYD: Okay. Tell me what you told yourself and I won't say a word. I'm just going to listen.

WINKLER: What – what happened?

BOYD: Uh-huh (yes). And you --

WINKLER: I wanted to know what happened and it just wouldn't come back.

BOYD: So you think --

WINKLER: Seems like I knew I had talked to J [REDACTED] just a little. That's all I can remember. Knocking on the door. I know I had words with J [REDACTED] right there talking. But I don't know what it was we talked about. I don't remember leaving. I don't remember what happened with Becky. I don't know.

BOYD: Do you remember smelling gun smoke, gun powder?

WINKLER: No. That's like when I said it said shot in the paper, I didn't even remember hearing the shot. A shot. One shot.

BOYD: Okay. Did something lead you – did something lead you to believe that they were talking about you in the paper?

WINKLER: Well, yeah.

BOYD: What? What was it?

WINKLER: It was like well, dang, they were thinking – it said --

BOYD: Because it didn't say your name, right?

WINKLER: No.

BOYD: It didn't say Louis Michael Winkler:

WINKLER: Monday – it said Monday night they were looking for – they were looking for the person they believed responsible.

BOYD: And you're thinking oh, hell, I'm in the woods.

WINKLER: And I read that thing like three times a day and I'm going, shot and killed.

BOYD: So you –

WINKLER: I know I had the gun with me but I – Toby, I'm telling you.

BOYD: Mick.

WINKLER: I wish I could tell, Toby.

BOYD: Mick, listen. You wake up pretty much in the woods. You've got a paper that says...

WINKLER: I wish I could tell you.

BOYD: ...my wife's dead. She's shot. And we're looking for the person responsible, right?

WINKLER: Uh-huh (yes).

BOYD: And you assume it's you. Is that what you're saying?

WINKLER: Uh-huh (yes).

BOYD: I mean don't you think this is foolish?

JONES: What you getting from brother Mick?

WINKLER: Pardon?

BOYD: Mick is telling us pretty much that he leaves his house on the day of. He remembers taking a weapon, a gun, arming himself, and asking the neighbor for a ride. The neighbor takes him over to the house. He leaves. Jeff, right? Mick goes upstairs, knocks on the door twice. Bam. Memory is gone. He remembers being outside, running towards the golf course, and at this point his memory starts coming back. So the minute or two, or three minutes, basically –

JONES: Is that right, Mick?

WINKLER: I don't even remember leaving the apartment.

JONES: Is that right? Is that right, what he's telling me? That's what you remember?

WINKLER: I said I don't remember anything. There's certain things I remember. Talking to J [REDACTED].

JONES: Mick. Mick. You've got selective memories, right?

WINKLER: No, sir.

JONES: What, what kind you got?

WINKLER: I can't even tell you where I was staying the last every night.

JONES: You stayed in hotels?

WINKLER: No.

JONES: So you stayed – you was in the woods?

WINKLER: But I mean where at. Here and there.

JONES: But you were in the woods.

WINKLER: It's not selective, to answer your question.

JONES: It's not selective. That's what I'm getting at. Okay? And you're not stupid, is you, Mick?

WINKLER: No. I'm not.

JONES: You've got good sense, don't you, Mick?

WINKLER: Yes, sir.

JONES: All right. Intelligent?

WINKLER: I'd like to believe I do.

JONES: You finish high school, Mick?

WINKLER: Yes.

JONES: Some college too, huh?

WINKLER: Pardon?

JONES: Some college?

WINKLER: Right.

JONES: Yeah. And you build things. You do construction work __

WINKLER: Yeah.

JONES: You can build things, right?

WINKLER: Yeah.

JONES: So you can remember things. You can remember a hell of a lot, Mick. Okay? So you don't have selective memories on one hand?

WINKLER: This I tell you. I can't remember exactly what happened in that condo though. I just don't remember. It's a blur.

JONES: Well, okay. It's a blur.

WINKLER: I know he wants me to tell him...

JONES: Listen. Listen at me, Mick.

WINKLER: ...and I've been trying to tell him.

JONES: Hold – hold on a minute, Mick. Listen at me. It's a blur you said after you got in the condo. So your memories was good until you got in there, right? It had to be.

WINKLER: Leading up to it?

JONES: Yeah. It had to be. You had to have a perfect damn memories to get in there. Okay? You had to have, you had to be perfect because you know what time your bracelet would allow you to be away from home. Correct?

WINKLER: I had four to six.

JONES; Four to six. In between that hour four to six you knew that didn't you, Mick?

WINKLER: Yeah.

JONES: You knew you was supposed to be in that house all day long until that time, right?

WINKLER: Uh-huh (yes).

JONES: All right. From four to six you do – your memories now, your memories. You hire somebody. You ask somebody to take you somewhere.

WINKLER: Uh-huh (yes).

JONES: Is that correct?

WINKLER: Uh-huh (yes).

JONES: All right. Who did you ask to carry you somewhere?

WINKLER: The neighbor there.

JONES: Your neighbor. Memory is good, right? You remember that? All right. Now where did you asked your neighbor to take you?

WINKLER: To Baytree.

JONES: To Baytree. Memory is still good. Everything – you're still remembering everything. All right. Once you got to Baytree, then what happened?

WINKLER: I know you want me to say it but...

JONES: No. No. No. No, sir. No, sir. I don't want you to say --

WINKLER: ...it's a blur to me, Toby.

JONES: Listen. Listen at me, Mick. Mick, listen at me right now. I don't want you say anything. Just tell me what I ask you. Okay?

WINKLER: Okay.

JONES: All right. What happened when you got your neighbor to take you to Baytree? You remember that?

WINKLER: Uh-huh (yes).

JONES: All right. What happened?

WINKLER: I just got out of the car.

JONES: Got out the car. What did you have with you?

WINKLER: I went to talk to Becky and –

JONES: Whoa. Wait a minute. You're taking me too fast now, Mick. You're taking me too fast. All right. Once you got out the car, Mick, what did you have with you, and what was you wearing?

WINKLER: I was wearing this right here.

JONES: You were wearing that right there.

WINKLER: I had the gun with me.

JONES: Well what, where was the gun at?

WINKLER: I had it in my pocket.

JONES: What pocket, Mick?

WINKLER: I think it was my –

JONES: Front? Right? Back? What?

WINKLER: I think it was the front right.

JONES: Front right. That's where – you right-handed, Mick?

WINKLER: Uh-huh (yes).

JONES: That's where the gun was at, front right. Correct?

WINKLER: Uh-huh (yes).

JONES: All right. Then what happened then, Mick?

WINKLER: I remember knocking on the door.

JONES: You knocked on the door. No one came. And Mick knocked on the door and no one came to the door.

WINKLER: Not real hard or nothing.

JONES: Knocked.

WINKLER: But I don't know if I did once or twice or –

JONES: Okay. All right. Once or twice, Mick. And then what happened then, Mick?

WINKLER: That -- and that was -- and that's what I've been trying to draw up in my mind.

JONES: All right. Well, okay, Mick. Your memories -- your memories left you after that knock?

WINKLER: Yes, sir.

JONES: You don't remember nothing else?

WINKLER: Yes sir.

JONES: That's when it left, Mick? When you knocked?

WINKLER; Yeah.

JONES: It left you knocking.

WINKLER: You know I can't even tell you...

JONES: It left you knocking?

WINKLER: ...if she let me in or J [REDACTED] let me in, or if the door was open. I don't even remember.

JONES: Well you don't because you left there knocking. That's the only thing you remember? That's the last thing you remember?

WINKLER: Uh-huh (yes).

JONES: About this whole incident, Mick?

WINKLER: Yeah.

JONES; Right?

WINKLER: Yes, sir.

JONES: And the next thing you said that you remembered is reading a newspaper. Right?

WINKLER: No. I don't -- I wouldn't say it was the next thing.

JONES: All right. What was the next thing you remember, Mick?

WINKLER: Being out – something in the woods behind Baytree there.

JONES: And you know the reason why you was in the woods?

WINKLER: Yeah. I knew that something happened. I was in trouble.

JONES: You was in trouble, Mick. That's it, Mick. You was in trouble.

WINKLER: Yeah.

JONES: Right?

WINKLER: Uh-huh (yes).

JONES: That's what you remember? Right? Okay. All right, when you remembered that you were in trouble, what, what kind of trouble was you in?

WINKLER: Over what, I don't remember.

JONES: You don't remember?

WINKLER: No. I don't.

JONES: You knew you was supposed to be back home by six o'clock. Right, Mick?

WINKLER: Uh-huh (yes).

JONES: Because you - you done fucked up. You got – you're out there with your bracelet –

WINKLER: I didn't even know how long I was there at the condo.

JONES: Your bracelet was off, right?

WINKLER: Yeah.

JONES: Your bracelet was gone. You needed to be somewhere because they was monitoring you, right?

WINKLER: Uh-huh (yes).

JONES: You had to take that thing off some way or another, right?

WINKLER: Uh-huh (yes).

JONES: All right. Do you remember that?

WINKLER: No. I don't remember how I did that.

JONES: Well, Mick, you done gone back. Don't get stupid on me now, Mick. You're not stupid.

WINKLER: I'm trying to think about it.

JONES: I know you're not stupid. Okay? Stupid. That jailhouse is full of stupid people but I know Mick is not stupid. Okay? So I – what happened then, Mick? The next day? You said after that knocking at the door, what happened? You was knocking. What happened?

WINKLER: The next day?

JONES: No. The day you was knocking.

WINKLER: I told you like four times already.

JONES: Yeah.

WINKLER: That I don't remember. It's all blurry in my head.

JONES: It's blurry?

WINKLER: I don't even know. Hell, I might not even knocked. As far as I know I remember knocking.

JONES: Okay. You might didn't knock.

WINKLER: I don't know if I knocked once or twice, three times.

JONES: And they didn't come to the door.

WINKLER: I don't remember that.

JONES: They didn't come to the door?

WINKLER: It's a blur to me.

JONES: They didn't – could not come to the door. Nobody came to the door, Mick.

WINKLER: I know what you want me to say.

JONES: No. I don't want you to say anything but the truth. If you don't remember I don't want you to say nothing.

WINKLER: I tell you what right now. That is the truth. I've said it four, five times here and I've told him at least that many times. I know you want me...

JONES: Mick, you –

WINKLER: ...to say that but I don't remember.

JONES: But I'm trying to help you, Mick.

WINKLER: And I'm not going to repeat it again.

JONES: I'm trying to help you remember it.

WINKLER: I swear if I knew I'd tell you.

JONES: Okay.

WINKLER: If I knew what happened I probably would have went the next day or..

JONES: Mick, you not getting upset on me.

WINKLER: ...called them and said, "Look. I did this."

JONES: Go ahead.

WINKLER: I would have came in the next day. I have been out there for two weeks. I don't even know what happened.

JONES: So you've been out there in the woods two weeks?

WINKLER: That's what scares me.

JONES: What? Let me ask you something.

WINKLER: That's what scares me.

JONES: Because you've been in the woods for two weeks?

WINKLER: And I don't even know what happened.

JONES: Okay.

WINKLER: That's it.

JONES: Let me -- if I show you some photographs of different things you might can jog your memories?

WINKLER: I -- was -- did I see her?

JONES: Huh?

WINKLER: Did I see her? I can't tell you if I saw her or not.

JONES: Well if I see -- if I show you some photographs you think --

WINKLER: I don't want to see no picture of my wife dead.

JONES: I'm not going to show you a picture of your wife dead, Mick. How about if I show you some stuff in the apartment itself without showing you your wife dead? Would you remember?

WINKLER: What do you mean remember?

JONES: Would you remember about that door?

WINKLER: I've been in that apartment a hundred times.

JONES: You've been in that apartment a hundred times?

WINKLER: Yeah. Her daughter, Hailey, lived there while me and her is at our house.

JONES: Okay.

WINKLER: I did a lot of work in that apartment.

JONES: But you ain't been there since you and your wife separated?

WINKLER: No. Once I went there and knocked on the door, this was just when we had separated.

JONES: When you first separated?

WINKLER: Yeah. And -- she left something at that -- she came over to see me one night I think.

JONES: Who? Becky did?

WINKLER: Uh-huh (yes). Our house, and then she left something there and I took it to her house.

JONES: You took it back?

WINKLER: It was a ____ I don't know. A ____ game or something. But anyways, I've been there a lot. I did a lot of work for Hailey there.

JONES: Okay. All right. All right. But going back, you ain't been there in months though, right? Since y'all were separated? Can you remember that?

WINKLER: Right.

JONES: Okay. All right. All right. But once you got there and taking you again to my question. If I show you certain photographs, you think they will bring back your memories?

WINKLER: I have no idea.

JONES: Well let's try it.

WINKLER: What can I tell you? How can I tell you if something's going to bring it back when I've been trying to do that.

JONES: Well I'm going to help you. I'm going to help you jog your memory. Let's get some photographs.

WINKLER: I'd tell you, Toby. I swear I would.

JONES: You think that – you willing to do that for me, Mick?

WINKLER: Sure.

JONES: Okay. All right, Mick. Hold. Sit tight.

WINKLER: If I could tell you, I would. But I don't know.

JONES: Mick. You said you remember certain things, right? Right? Look at that, Mick? What are them pictures of there, Mick? What's that?

WINKLER: The stairwell.

JONES: Okay.

WINKLER: That is the outdoors.

JONES: That's the outdoors there. Ain't it, Mick? All right. What is that right there, Mick?

WINKLER: That's the stairwell.

JONES: That's the stairwell. All right. What is this one, Mick?

WINKLER: That's the door.

JONES: What – what's that number on that door there, Mick? Can you see that?

WINKLER: [REDACTED].

JONES: And who live at [REDACTED], Mick?

WINKLER: Hailey Grainger.

JONES: Huh?

WINKLER: Hailey Grainger.

JONES: And who was living there on the night you went there, Mick? Who was there?

WINKLER: Becky and J [REDACTED].

JONES: Okay. And where – when you went to this door here where was Becky and J [REDACTED] at?

WINKLER: I don't remember.

JONES: I need to get you another shot.

WINKLER: What's this stuff here?

JONES: Huh?

WINKLER: What's this stuff here?

JONES: That's part of the door, Mick. That's part of the door.

WINKLER: Well it looks like it's in tack.

JONES: Huh? It's in tack?

WINKLER: It looks like it's in tack.

JONES: Well was it supposed to be in tack, Mick?

WINKLER: Well I guess. I don't know. I'm just asking him what that was.

JONES: Well it's part of the door. Do you remember that down there, Mick?

WINKLER: No. I don't.

JONES: Okay. What kind of hat was you wearing, Mick?

WINKLER: I had on my Dale Earnhardt hat. I think.

JONES: Dale Earnhardt hat. What happened to that hat?

WINKLER: I think that was the one I had on.

JONES: Huh? What happened to it?

WINKLER: I don't know.

JONES: You don't have it. You got it with you now, Mick?

WINKLER: Unless I didn't -- unless -- I don't know. Unless I left it at home, in the car, there.

JONES: There at the apartment?

WINKLER: I don't know.

JONES: But you could have left it at the apartment.

WINKLER: I could of.

JONES: You could have done that, couldn't you, Mick? Okay. Mick, you also could have kicked in this door here too, couldn't you?

WINKLER: Is that what they're saying? I kicked the door in?

JONES: Well I'm asking you. You said you don't remember. I'm asking you, could you do that?

WINKLER: I don't remember.

JONES: You don't remember that at all?

WINKLER: I've been telling you that. I don't remember how I got in the door. Did they let me in?

JONES: Well I'm asking you. You tell me.

WINKLER: You tell me what J [REDACTED] said and that's probably what happened.

JONES: J [REDACTED] who?

WINKLER: Did he let me in?

JONES: Whatever J [REDACTED]? Who is J [REDACTED]?

WINKLER: J [REDACTED] or Becky, did they let me in the door?

JONES: Who is J [REDACTED], Mick?

WINKLER: My step-son.

JONES: Okay. Whatever J [REDACTED] said, that's what happened?

WINKLER: Well, I'm just saying what - whatever he said that's probably what happened.

JONES: That's what I'm asking?

WINKLER: Did he let me in the door?

JONES: Well, Mick. Mick, talk to me.

BOYD: Looking at this what would you think?

WINKLER: Well that's the door but that's why I asked what this is. I don't know. I'm telling you.

JONES: What is that, Mick?

WINKLER: That looks like a door that's busted.

JONES: Okay. That looks like a door that is busted, ain't it, Mick?

WINKLER: I know what you're getting at here but I just can't remember.

JONES: What, what —

WINKLER: Okay. It's a door that's busted. I'm guaranteeing you Scott is going to be mad at me for letting me do this this far.

JONES: Scott who?

WINKLER: Bellamy.

JONES: He's mad with you.

WINKLER: He's going to be mad with me for even letting you go this far. I'm been truthful with you and I don't remember.

JONES: Okay. But what, what, what he got to do with this, this right here, Mick?

WINKLER: I swear.

JONES: Mick, look at me. Mick.

WINKLER: Yeah.

JONES: Mick, me and you got to look at one another. Okay? Okay. All right. What, why do you say?

WINKLER: Is that their door?

JONES: I'm asking you that?

WINKLER: Is that their door?

JONES: Huh?

WINKLER: I don't want to see no pictures of Becky.

JONES: Huh? This is part of...

WINKLER: I don't want to see no picture.

JONES: ...the house, Mick.

WINKLER: No, it's not.

JONES: This is part of what happened in that house.

WINKLER: It is?

JONES: This is what happened in that house.

WINKLER: Well okay. What – you tell me --

JONES: I'm trying to jog your memory.

WINKLER: You tell me what happened.

JONES: You said you didn't have no memories of what happened. Right?

WINKLER: Right.

JONES: All right. I'm trying to get to your memories and get you right because I done told you earlier you're not stupid, Mick?

WINKLER: I know.

JONES: Huh?

WINKLER: I know.

JONES: Okay. So you going to sit here and go through this stuff with me. You want to do that, Mick?

WINKLER: Not really.

JONES: You don't want to do that, Mick?

WINKLER: Because the door thing I don't even know if that's their door.

JONES: Okay. Well do you know who that is, Mick?

WINKLER: I'm not looking at that picture.

JONES: Well you don't know—

WINKLER: I don't want to see my wife dead.

JONES: Okay. All right.

WINKLER: I don't want to see my wife dead.

JONES: Now listen, Mick. Mick.

WINKLER: I'm not looking at my wife dead.

JONES: Mick.

WINKLER: It's just not something I want to do.

JONES: If you don't know if this the apartment. So she's in the wrong apartment then? Because she's in this apartment where that door is at.

WINKLER: Yeah.

JONES: Okay.

WINKLER: Okay. Well –

JONES: Okay. Well let's assume that's the same apartment you went to.

WINKLER: Assuming?

JONES: Assuming.

WINKLER: Is that their apartment? That door?

JONES: Well she lives there, Mick. You said you've been there. What number on that door?

WINKLER: You can't see this part of it. You can't see that part in that picture.

JONES: Okay. What –

WINKLER: Don't you remember I asked you what was that on the floor.

JONES: What is this right here, Mick?

WINKLER: [REDACTED].

JONES: [REDACTED]. And I – we done – done said who lived there, right?

WINKLER: Are we going to argue the –

JONES: We're not arguing.

WINKLER: Like we're in court or something here?

JONES: Mick.

WINKLER: I don't remember. I know this is – there outside of the door. That could or could not be their stairwell right there.

JONES: That number –

WINKLER: That could or could not be.

JONES: Mick. Mick.

WINKLER: And I want to see my lawyer because he keeps trying to put them in front of me and I do not want to see those pictures of my wife that is dead.

JONES: He want to see who?

WINKLER: I can't. I don't know how that happened.

BOYD: What did you say?

WINKLER: I don't remember.

BOYD: Before that?

WINKLER: If he keeps doing that then I can't talk about it no more. I mean I told you everything I can.

BOYD: Mick, this is, this is part of the crime scene. This is what happened.

WINKLER: I know it is.

BOYD: He's showing you these for a reason.

WINKLER: I know he is and I don't want to see a picture of my wife dead.

BOYD: A lady was killed and we're trying to get to the bottom of it.

WINKLER: My wife was killed.

BOYD: You're exactly right. Somebody that you loved very much and you told me you did.

WINKLER: Very much.

JONES: Well, Mick, we've got to get to the bottom before – so she can rest. We've got to get to the bottom of it so your wife can rest. You want her to rest, and we're trying to get to it so she can rest.

WINKLER: I'd love for her to rest.

JONES: There you go. There you go, Micky. And if Mick don't remember a damn thing she ain't gonna rest, Mick. She's not gonna rest.

WINKLER: You know it's not -- it may not even be a memory. If I remember it or not it's just a blur. I told you. Bits and pieces of it come back but I don't even know what was said.

JONES: Mick.

WINKLER: I'm telling you right now...

JONES: Mick.

WINKLER: ..that is the truth. I can remember speaking with him but I don't know what we discussed.

BOYD: Where was he? Sitting or standing when you talked to him?

WINKLER: That's the thing. I don't. I remember seeing J[REDACTED]'s face and me and him conversing.

BOYD: Was it -- was it a civil conversation or was it a yelling back and forth?

WINKLER: I don't -- I don't know.

BOYD: You don't remember if it was civil?

WINKLER: No.

BOYD: Were you telling him, "Get out of my way. I want to talk to your mother?" Or were you saying, "Hey, J[REDACTED], how you doing?"

WINKLER: That's what I just said. I don't remember what was said. I know we were like conversing.

BOYD: Uh-huh (yes).

WINKLER: That's it.

BOYD: And on -- do you remember it was on a level like this, or were you up here yelling and he was down here.

WINKLER: I didn't -- he's as tall as I am.

BOYD: Did he get hit?

WINKLER: How could I know.

BOYD: Was he perhaps pushed down out of a chair? Was he punched in the eye?

WINKLER: Well --

BOYD: Maybe not?

WINKLER: I don't really -- Look, I don't know because I told you me and him were talking.

BOYD: Uh-huh (yes).

WINKLER: And that's all I remember. But I don't even remember what we said to each other. I don't.

BOYD: Well you know this is a shame. It really is with what she went through. I'm going to take these up because it was an awful death. You know. It was an awful death. Luckily it was quick and I think she felt very little because she took one in her brain.

JONES: Mick. Mick, I'm getting some more photographs you want to continue to look at them?

WINKLER: No. I don't want to see any more pictures.

JONES: You ain't seen the ones I got here, Mick.

WINKLER: I don't want to.

JONES: But you don't remember, Mick.

WINKLER: See -- well --

JONES: You've got to remember something. You said you wanted her to rest. You wanted this to end.

WINKLER: I do want her to rest.

JONES: You want it to stop. You want it to stop, right? That's the only way it's gonna stop. You've got to get it off your chest, Mick.

WINKLER: And if I could, I would. Believe me...

JONES: I believe you could.

WINKLER: ...I'd get it right off my chest.

JONES: I believe you really could if you wanted to.

WINKLER: If I remembered.

JONES: You remember, Mick.

WINKLER: No. I don't remember.

JONES: You remember.

WINKLER: I don't remember what happened except what I've told you at least a dozen times now, the two of you. I don't know. I don't know.

JONES: You know what happened, Mick.

WINKLER: No. I don't.

BOYD: Mick, you had mentioned a mom- a few minutes ago about a lawyer.

WINKLER: Yeah.

BOYD: What's your position on that? Do you want me to stop so you –

WINKLER: Well Scott's probably going to be mad if I hire him –

BOYD: Well you understand –

WINKLER: He's gonna get real mad if I --

BOYD: Well hold on just a minute. I read you your rights and I want you to understand that you – what is your position? Do you want to go ahead and stop? Because you have the right.

WINKLER: Well I agreed to talk to you and I have, but I've been telling you the truth but it's not what you want to hear so I don't know what to do now.

BOYD: Well that's, that's what I'm asking you? I need to ask if, if, if – did you want to stop? Because you have the right to an attorney or do you want to continue?

WINKLER: Well I'm gonna get an attorney either way. But I wanted to talk to you because you are a straight up. You told me that from the beginning.

BOYD: Do you –

WINKLER: I've been straight with you.

BOYD: Okay. So you want to stop.

WINKLER: I'm not really saying. I'm just saying if there's other questions, but I...

BOYD: I just need you to answer that for me.

WINKLER: ...am not. If I could answer "don't you remember this or that," I would.

BOYD: Mick.

WINKLER: Right off the bat. I would.

BOYD: For the sake of being legal I need you to tell me.

WINKLER: What?

BOYD: Do you want a lawyer at this point? Do you want to stop until you talk to your lawyer?

WINKLER: Yes, sir.

BOYD: Okay. All right.

GRAHAM: Mick, stand up and let me put this – fix these cuffs for you. That's fine. All right. The belt. Yes, sir.

JONES: Put it behind the back now.

GRAHAM: Do what now?

JONES: Put them behind the back.

GRAHAM: Okay.

WINKLER: See how things change.

JONES: Take the belt off of him.

GRAHAM: Okay. All right.

JONES: You got the other cuffs?

GRAHAM: I got it.

WINKLER: See how quick it changes?

GRAHAM: Yes, sir.

JONES: Mick?

WINKLER: Yes, sir.

JONES: I hope you good luck, Buddy. I hope you get some rest, okay? You got your tape off?

GRAHAM: Hold on just a second. Let me tighten – get these where they don't tighten up on you.

WINKLER: All right.

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY)

THE STATE OF SOUTH CAROLINA)

ORDER

vs.)

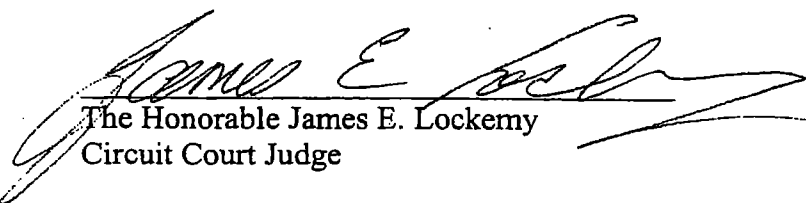
LOUIS WINKLER)
_____)

This capital murder case was originally set for trial on July 16, 2007. A hearing was held prior to July 16, 2007 at which time the defendant informed the Court that he was having trouble with a material witness and requested a continuance. After the hearing, the State reluctantly joined in the motion for continuance. The Court then granted a continuance.

Another hearing was held on Tuesday, August 14, 2007, where the defense informed the Court that the witness situation had been remedied, and the Court set a new date for trial.

All parties agree that the trial will begin on January 28, 2008 at the Horry County Courthouse.

IT IS SO ORDERED.


The Honorable James E. Lockemy
Circuit Court Judge

August 20, 2007
Dillon, South Carolina

FILED
HORRY COUNTY
2007 AUG 23 AM 7:57
MELANIE JOHNS
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

IN THE COURT OF GENERAL SESSIONS
 2006-GS-26-2101

STATE OF SOUTH CAROLINA)
)
 Versus)
)
 LOUIS M. WINKLER,)
)
 Defendant.)

ORDER GRANTING CONTINUANCE

HORRY COUNTY
 07 JUL 16 PM 12:00
 JELM HUGGINS
 CLERK OF COURT

This matter came before the Court on Friday, July 13, 2007, on the motion of the defendant requesting a continuance in the above captioned matter. The State was represented by J. Gregory Hembree, Solicitor of the Fifteenth Circuit, and Francis A. Humphries, Jr., Deputy Solicitor for the Fifteenth Circuit. The defendant was present and represented by his appointed counsel, Ralph Wilson and Paul Rathbun. After hearing statements of the attorneys and sworn testimony of the witness, Paige Munn Tarr, the Court makes the following findings of fact:

1. This Court has exclusive jurisdiction over this matter pursuant to the Order of the South Carolina Supreme Court;
2. The trial of this case was scheduled to begin Monday, July 16, 2007;
3. On Thursday, July 12, 2007, this Court was notified by a conference call involving all counsel that counsel for the defendant were having difficulty communicating with their mitigation investigator, Paige Munn Tarr, and had been having such trouble since late May of 2007; further, they were concerned that little or no work in preparation for mitigation had been done by this investigator;
4. The Court authorized an employee of the Horry County Sheriff, Lieutenant Steve Parker, to facilitate service of a subpoena upon Ms. Tarr to require her to appear before the Court on Monday, July 16, 2007;
5. Ms. Tarr was served at her home in Columbia, South Carolina, within four (4) hours of the Court's authorization of Lieutenant Parker;
6. At the request of the State, the Court scheduled a hearing in this matter on Friday, July 13, 2007, at 3:00 p.m., and required Ms. Tarr to appear to address, in advance of the trial date, the concerns expressed by counsel for the defendant;
7. The hearing was commenced shortly after 3:00 p.m. at which time counsel for the defendant, Ralph Wilson, stated to the Court that Ms. Tarr had done very little to no substantial work in preparation for the mitigation phase of the trial;
8. Mr. Wilson stated that she had provided him no written reports since contracting with her in February of 2007;

- 
9. Mr. Wilson stated that Ms. Tarr had done little else than meet with the defendant several times; have brief telephonic contact with certain family members and friends of the defendant; and meet with the three (3) sisters of the defendant in Mr. Wilson's office;
 10. Mr. Wilson stated that Ms. Tarr had gathered no records pertaining to the defendant's birth, health, and schooling;
 11. Mr. Wilson stated that he became concerned about the lack of productivity of Ms. Tarr and his lack of contact with her as early as late May of 2007;
 12. Mr. Wilson stated that he enlisted the assistance of his "trial phase" investigator in attempting to contact Ms. Tarr who met with no success;
 13. Mr. Wilson stated he received a communication from Ms. Tarr on June 29, 2007, promising that she would forward written reports of her work in the case immediately; no such reports were received by Mr. Wilson;
 14. Mr. Wilson stated that Ms. Tarr was going through a very difficult domestic situation that has impacted her ability to perform the work required of her in this case; he further stated that this domestic situation has impaired Ms. Tarr's ability to work on behalf of the defendant given the similarity of the nature of the allegations in this case;
 15. Mr. Wilson stated that he could not go forward with the trial and provide adequate representation for the defendant given the almost complete lack of preparation in mitigation on behalf of the defendant;
 16. Ms. Tarr testified under oath essentially confirming the statements of Mr. Wilson;
 17. Under questioning by the Court, Ms. Tarr advised that she was also retained to assist in another capital trial pending in Edgefield County and in a capital PCR in which this Court was the assigned Judge; she stated that she had not been able to work on these cases over the last five (5) to six (6) weeks for the same reasons present in this case, but testified that the counsel in those cases were aware of her situation;
 18. She testified she had not billed, nor had she been paid for any work done in the present case; under questioning by the Court, she testified that her normal practice was to bill as she incurred costs and earned fees and that failure to request payment and reimbursement should have been notice to counsel for the defendant that all was not going well;
 19. Ms. Tarr testified that she had in her immediate possession her field notes in this case which she would turn directly over to counsel for the defendant;
 20. Ms. Tarr testified that she had not engaged in investigation of the mitigation on behalf of the defendant in the manner that has been her practice over the last twelve (12) years she has been engaged in this field; she testified that her investigation was far from complete; and she testified that, based on her lack of preparation, counsel for the defendant are not prepared to present mitigating evidence on behalf of the defendant at this time;

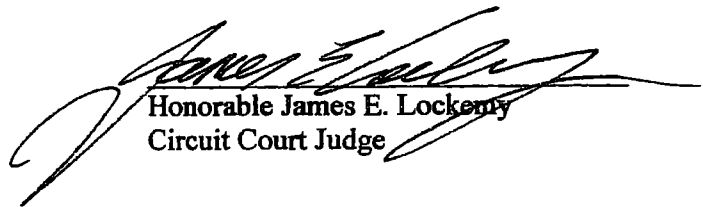
21. The Court noted that numerous hearings and conferences had been held in this matter since late May and never had the Court been advised by counsel for the defense that any problem existed in reference to the mitigation investigator or counsels' readiness to adequately represent the defendant in either the "trial phase" or the "sentencing phase" of the case until July 12, 2007, one business day from the start of the trial in this matter;
22. Solicitor Hembree stated that, in order to insure the defendant a fair trial, the State was compelled to join in the defendant's motion for a continuance; and
23. Mr. Wilson stated the defense could be fully prepared to go forward in the trial of the case within three (3) months and agreed that an October 2007 trial date was appropriate.

IT IS THEREFORE ORDERED THAT the trial of this matter shall be continued based upon the foregoing findings of fact.

IT IS FURTHER ORDERED THAT Paige Munn Tarr shall immediately contact counsel in other cases in which she is retained, and specifically advise them of her current situation and the extent to which she has competed work required of her in those matters. She shall request counsel to immediately contact the assigned Judges in those matters with the request that the assigned Judge contact this Court for further information concerning Ms. Tarr.

IT IS FURTHER ORDERED THAT counsel for the defendant in this matter shall have contact with this Court at a minimum every two weeks until trial to insure appropriate progress is being made in the preparation of the defendant's defense and mitigation of sentence.

AND IT IS SO ORDERED.


Honorable James E. Lockemy
Circuit Court Judge

July 13, 2007

Conway, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF GENERAL SESSIONS
SUBPOENA IN A CRIMINAL CASE
CASE NO. 2006-GS-26-2101

THE STATE OF SOUTH CAROLINA,

Plaintiff,

v.

LOUIS M. WINKLER

Defendant.

SUBPOENA DEUCES TECUM

TO: AT&T/CINGULAR WIRELESS, NATIONAL COMPLIANCE CENTER
11760 US HWY 1
N. PALM BEACH, FL. 33408

BY VIRTUE OF A SUBPOENA IN A CRIMINAL CASE to you directed and herewith shown to you, you are hereby commanded to present to the bearer of this subpoena a copy of the phone records and tower records for cellular number 843- [REDACTED] for the following dates: March 1, 2006 thru March 6, 2006.

****You must comply with this subpoena by furnishing copies to Ralph J. Wilson, Attorney at Law, P.O. Box 1827, Conway, SC 29528 by no later than June 25, 2007.**

Melanie Huggins
MELANIE HUGGINS
CLERK OF COURT FOR Horry County

Conway, South Carolina
June 19, 2007

Requested by: Ralph J. Wilson, Attorney for Defendant
Phone: (843) 381-0765
Fax: (843) 381-0767

FILED
HORRY COUNTY
2007 JUN 19 PM 1:37
MELANIE HUGGINS
CLERK OF COURT

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 18th, 2010



Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

Indictments: 2006-GS-26-2101

State of South Carolina,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

NOTICE OF INTENT TO APPEAL

Louis Michael Winkler, Jr., by and through his court-appointed trial counsel, hereby gives notice of his intent to appeal his conviction and sentence entered on or about February 8, 2008 before the Honorable James E. Lockemy in the Horry County Court of General Sessions.



RALPH J. WILSON
P.O. Box 1827
Conway, SC 29528
(843) 381-0765
Court Appointed Trial Counsel

Other Counsel of Record Served:

J. Gregory Hembree, Solicitor
15th Circuit Solicitor's Office
PO Box 1276
Conway, SC 29526

Dated: February 11, 2008

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Honorable James E. Lockemy, Presiding Judge

Indictments: 2006-GS-26-2101

State of South Carolina,

Respondent,

v.

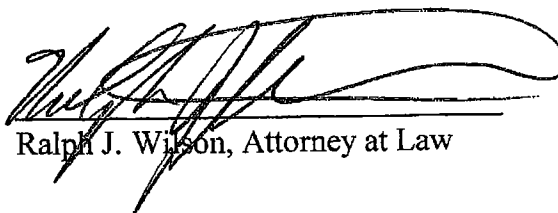
Louis Michael Winkler, Jr.,

Appellant.

PROOF OF SERVICE

I, Ralph J. Wilson, Attorney at Law, hereby certify that I have served the Notice of Intent to Appeal upon the Respondent by having mailed the same via U.S. Mail, first class postage prepaid, to J. Gregory Hembree of the 15th Circuit Solicitor's Office addressed as follows:

J. Gregory Hembree, Solicitor
15th Circuit Solicitor's Office
PO Box 1276
Conway, SC 29526



Ralph J. Wilson, Attorney at Law

February 11, 2008
Conway, South Carolina

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
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ATTORNEYS FOR APPELLANT.

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1.

The court erred by admitting a tape recording, as a prior consistent statement under Rule 801(b)(1)(B), SCRE, of an interview wherein the decedent's son, J [REDACTED] G [REDACTED], told Detective Ann Pitts that his "stepfather," appellant, shot his mother. This statement was not admissible as a prior consistent statement because all of the elements of Rule 801(b)(1)(B), SCRE were not met, and the fact Officer Knochs testified that J [REDACTED] told him immediately following the murders that his "Dad" shot his mother did not make this subsequent statement admissible since there was no accusation of a recent fabrication, improper influence or motive.....

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2.

The court erred when it allowed the transcript of the 911 tape to be given to the jury when it asked to "read over the 911 transcript" during deliberations since the transcript was not in evidence, and it was not an accurate transcription of the interview. The transcript was highly prejudicial to appellant's defense since it erroneously expressed that the 911 operator immediately interrupted J [REDACTED] after she asked him if he was alone following the shooting, where the tape shows a long pause and J [REDACTED] never answering that question.....

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3.

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4.

Alternatively, appellant had the right to represent himself during the penalty phase of his trial under the reasoning of *Faretta*, and his case is not governed by the *Brewer* abuse of discretion standard. Further, it was apparent appellant knew the state's witnesses against him, that he had been actively involved with the experts, and his requests not to involve his family in his "mitigation case" were reasonable and his decision to make 42

5.

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by admitting a tape recording, as a prior consistent statement under Rule 801(b)(1)(B), SCRE, of an interview wherein the decedent's son, J [REDACTED] G [REDACTED], told Detective Ann Pitts that his "stepfather," appellant, shot his mother since this statement was not admissible as a prior consistent statement because all of the elements of Rule 801(b)(1)(B), SCRE were not met, and the fact Officer Knochs testified that J [REDACTED] told him immediately following the murders that his "Dad" shot his mother did not make this subsequent statement admissible since there was no accusation of a recent fabrication, improper influence or motive?

2.

Whether the court erred by allowed the transcript of the 911 tape to be given to the jury when it asked to "read over the 911 transcript" during deliberations since the transcript was not in evidence, and it was not an accurate transcription of the interview?

3.

Whether the court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary?

4.

Whether the court erred, alternatively, by refusing to allow appellant to represent himself during the penalty stage of the trial since appellant had the right to represent

himself during the penalty phase under the reasoning of Faretta, and his case was not governed by the State v. Brewer abuse of discretion standard?

5.

Whether the court erred by failing to properly provide appellant with Faretta warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary?

6.

Whether the court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection, since appellant still had the right to control the case in mitigation and waive mitigation evidence he did not want the jury to consider, even where the judge denied appellant the right to represent himself?

7.

Whether the court erred by refusing to direct a verdict on the aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime aggravator since there was a lack of evidence to support it?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County grand jury for the offenses of murder, burglary in the first degree and assault and battery of a high and aggravated nature. The state alleged appellant entered his estranged wife's condominium without consent, punched his stepson, and shot his estranged wife. R. 3458 - 3460.

His case came on for trial on January 28, 2008 before the Honorable James E. Lockemy, and a jury. J. Gregory Hembree, Francis A. Humphries, Jr., and Scott R. Hixson were the solicitors. Ralph J. Wilson and Paul Elbert Rathbun represented appellant. R. 1.

The state sought the death penalty. At the conclusion of the guilt phase on Saturday, February 2, 2008, the jury found appellant guilty on all three counts. R. 1903, ll. 10 - 15.

The penalty phase commenced on February 4, 2008. R. 1913, ll. 1 - 2. On February 8, 2008 the jury sentenced appellant to death, and the trial judge imposed that sentence. R. 2940, ll. 10- 20.

This appeal follows.

ARGUMENT

1.

The court erred by admitting a tape recording, as a prior consistent statement under Rule 801(b)(1)(B), SCRE, of an interview wherein the decedent's son, J. G. , told Detective Ann Pitts that his "stepfather," appellant, shot his mother. This statement was not admissible as a prior consistent statement because all of the elements of Rule 801(b)(1)(B), SCRE were not met, and the fact Officer Knochs testified that J. told him immediately following the murders that his "Dad" shot his mother did not make this subsequent statement admissible since there was no accusation of a recent fabrication, improper influence or motive.

Relevant Facts

Sixteen-year-old J. G. was the son of the decedent, Rebekah Winkler. Appellant was his stepfather. Roger Grainger was his father. J. testified that his mother married appellant in 2003. As will be seen *infra*, appellant and the decedent were separated, and the decedent was seeing Roger Grainger again. R. 1418, l. 6 – 1420, l. 24.

J. knew appellant as "Mick." They had lived in the Stones Edge neighborhood in North Myrtle Beach at . This was appellant's house. R. 1422, l. 1 – 1423, l. 9.

J. recalled that after about a year he moved out of appellant's house with his mother because "my mom wanted to get a divorce, and she moved out and moved in with my sister [Haley] . . . sometime in 2005." R. 1422, l. 15 – 1423, l. 22. J. lived with his mother and Haley in her at . R. 1423, l. 15 – 1425, l. 16. J. recalled that appellant had visited with them one time at the

██████████ after the separation and prior to the incident on June 6, 2006. R. 1425, ll. 17 -24.

J██████████ testified that on March 6, 2006 he walked home from North Myrtle Beach High School as usual. He said it was a normal day. Once J██████████ got home, he logged onto the computer. Around 5:30 that afternoon, he heard "like a loud bam on the door or somewhere." R. 1426, l. 10 – 1429, l. 22. J██████████ said he was talking on his cell phone with his friend L██████████ C██████████ who was in the eighth grade at the time. R. 1429, l. 7 – 1430, l. 7.

J██████████ stated that the next thing he heard was "another bam," and that "the door flew open." R. 1430, ll. 6 – 15. J██████████ testified that appellant entered the condominium, and that "he was yelling and he came in and he hit me and knocked me over." R. 1431, ll. 7 – 21. J██████████ said that appellant punched him in the eye and that he fell off the bar stool where he had been eating his dinner. R. 1432, l. 6 – 1433, l. 22. J██████████'s claim was that appellant walked over to his mother who was "sitting on the couch watching TV" . . . [and] he just walked up to her and shot her. R. 1434, l. 11 – 1436, l. 25.

J██████████ said he was still on the floor when appellant walked towards him after he shot the decedent. "I told him not to do anything stupid." R. 1437, l. 3 – 1438, l. 14. J██████████ maintained appellant "paced back and forth" for "five to ten seconds," and then he left. J██████████ testified:

Q. He, after he paced back and forth five or ten seconds, tell us, tell this jury what Louis Winkler did.

A. He walked back out the door.

Q. And?

A. That was it.

Q. What did you do?

A. I went and got my cell phone and closed the door and made sure he wasn't coming back in, and looked out the window and got my shoes, and then went and sat on the balcony and called the police.

R. 1439, l. 25 - 1440, l. 9.

J [REDACTED] said when the police officer arrived: "I think he asked if we had any weapons in the house." J [REDACTED] recalled that he told the officer his mother kept a gun "under the pillow in her room." R. 1442, ll. 3 - 16. J [REDACTED] testified the officer "took me downstairs and put me in the back of the car." J [REDACTED] said while he was in the backseat of the patrol car: "I called my sister Jill, and I think I called Haley." R. 1443, ll. 19 - 23.

On cross-examination, J [REDACTED] acknowledged his father was Roger Grainger. R. 1445, ll. 21 - 22. J [REDACTED] admitted his mother had been seeing Roger after she separated from appellant. J [REDACTED] also stated that Roger was supposed to come over that very evening, but J [REDACTED] claimed they did not expect Roger until about 6 p.m. J [REDACTED] called 911 at 5:37 p.m. R. 1414, ll. 12-13. R. 1446, ll. 1 - 9. The following occurred on cross-examination of J [REDACTED]:

Q. And do you recall telling the officer, the first officer who arrived on the scene who asked you about it that *it was your dad who had done the shooting?* Do you recall telling the officer that?

A. *No. I said stepdad.*

Q. You said stepdad? All right, so you didn't tell them it was your dad?

A. No.

R. 1447, ll. 2 – 9. (emphasis added).

J [REDACTED] admitted that he actually did not see the shooting because he had been knocked to the floor at the time his mother was shot. R. 1468, ll. 3- 19.

The first police officer to arrive on the scene was Horry County Police Officer Thomas Knoch. R. 1522, l. 25 – 1523, l. 19. Officer Knoch's remembered on March 6, 2006, at about 5:45 p.m. he was dispatched to the [REDACTED] Complex. R. 1523, l. 12 – 1525, l. 6. When he got to the apartment [REDACTED], Haley's apartment, he had his weapon drawn. He saw J [REDACTED] on the landing and they had "a brief conversation." Knoch said it was an "extremely tense situation." R. 1525, l. 14 – 1527, l. 20. The following occurred on cross-examination of Officer Knoch:

Q. Well, tell about that conversation.

A. After he, he complied with everything that I asked him to do, which was showing me his hands, once I understand that he was not a threat to me, he made a statement to me. He said he's gone, and I asked him. I said who.

One minute, please.

He said my dad, and then I, and I asked him where the person was who was shot, and he said it's my mom, and he pointed towards, like, his condominium or the, the open door of unit [REDACTED]. And he also made kind of a, another statement to me. He said that she's dead. (Emphasis added).

R. 1592, ll. 12 – 22. (emphasis added).

The solicitor asked Officer Knoch "is there any chance he said my step-dad? Officer Knoch responded: "Yes, it very could have been. There could have been several other things that may have been said that I just don't recall due to the situation being as tense as it

was at the time, and I was the only officer of the scene.” R. 1531, ll. 11 – 14. Officer Knoch also said that J [REDACTED] was calm after the shooting and that he was not crying, yelling or screaming. Officer Knoch confirmed this was J [REDACTED]’s demeanor at the time “his mom was laying on the floor dead.” The 911 tape on file with this Court also reveals this eerie calm. As will be seen *infra*, although J [REDACTED] maintained to the 911 operator that appellant was the shooter, in fact the 911 tape reveals a pause and no answer after the 911 operator asked J [REDACTED] if he was alone. R. 1541, l. 4 – 1542, l. 2.

Officer Knoch confirmed on cross-examination that he wrote in his report that J [REDACTED] told him the shooter was “My Dad.” Officer Knoch said he did not know J [REDACTED]’s “Dad from his uncle from his cousin” and that he wrote in his report that J [REDACTED] told him “my Dad” . . . “*just left* or my Dad’s gone.” R. 1541, l. 21 – 1542, l. 12. (emphasis added).

The state called Horry County Police Detective Ann Pitts as a witness. R. 1707, ll. 6 – 21. Pitts knew the decedent. R. 1707, ll. 22 – 24.

Pitts said she went to the decedent’s condominium following the shooting on March 6, 2006. R. 1708, l. 17 – 1709, l. 1.¹ Pitts said that she interviewed J [REDACTED] G [REDACTED] that evening. R. 1711, ll. 16 – 18. Pitts and J [REDACTED] were alone at the time of the interview and it was recorded. R. 1712, l. 5 – 1713, l. 2. When Deputy Solicitor Humphries went to move the tape into evidence defense counsel objected. R. 1713, ll. 5 – 6. The following then occurred:

¹ Pitts said she also went to the decedent’s house on January 11, 2006 and the decedent showed her the firearm she kept under her pillow. R. 1709, ll. 2 – 7.

The Court: How do you address 801(d)(1)? You still object?

Mr. Wilson: Yes, sir.

The Court: (d)(1)(b).

Mr. Humphries: That's the ground under which I - - -

The Court: I'm asking Mr. Wilson this.

Mr. Wilson: Yes.

The Court: Overruled under 801(d)(1)(b).

R. 1713, ll. 9 - 17.

At a subsequent bench conference the solicitors argued that because the defense was "attacking the credibility, specifically the allegation of recent fabrication, these are prior consistent statements." R. 1715, ll. 4 - 6. The solicitor confirmed the issue was whether J [REDACTED] said his Dad did it or his Stepfather did it. The judge then repeated that the taped interview constituted a prior consistent statement under Rule 801(d)(1)(b), SCRE, and he assumed that J [REDACTED] would be available if anyone wished to call him. The solicitor said that J [REDACTED] was still in court. R. 1715, l. 2 - 1717, l. 2.

In his statement during the interview with Pitts, J [REDACTED] named appellant as the shooter. He said appellant hit him and he fell to the floor. "I was sitting on the floor and he was leaning over me. He's, like, you're gonna - - you told people you were gonna kick my butt or whatever. And I'm, like, no, I never said that. And then he just walked over to mom, and she stood up off the couch and he shot her and she fell down. He walked back over to me and he just kept looking at me and acting like he was going to shoot me. And I just said don't shoot me, don't shoot me." R. 1731, l. 20 - 1732, l. 3; Statement at R. 3473.

Pitts testified that the interview with J [REDACTED] ended at 7:28 p.m., approximately two hours after the shooting. R. 1732, ll. 7 – 14.

Appellant's testimony

Appellant testified during the penalty phase of the trial. Appellant said even though there was a restraining order providing that he and the decedent were not supposed to have contact with each other, the decedent would drive her car “in front of my house and park . . . She pulled in my driveway once and parked, yes.” R. 2497, ll. 12 – 24.

Appellant remembered that “March 6th - - started out a normal day.” R. 2499, ll. 3 – 6. Appellant was out of jail on bond on a prior charge that he kidnapped and sexually assaulted the decedent. Appellant said he went next door to play basketball “and the (GPS) monitor wouldn't go off.” R. 2499, ll. 7 – 13. Appellant recalled playing basketball that day and he asked his friend, Jeff Joslin, if he could give him a ride to the decedent's house so that he could return “two DVD's” because “she harped on getting those DVD's - - the DVD copies. She said I want those copies.” R. 2499, l. 6 – 2503, l. 8. These were DVD's of appellant and the decedent having sex. R. 2429, l. 18 – 2430, l. 15.

Appellant remembered that Joslin told him he could not give him a ride at that time so appellant ate lunch and played some more basketball. R. 2501, l. 11 – 2504, l. 2. Appellant testified that about five o'clock Joslin arrived at his house again, and asked him if he still wanted a ride. Appellant accepted and he said it took about ten minutes to reach the decedent's condominium at [REDACTED]. R. 2504, l. 4 – 2505, l. 2.

Appellant testified that Joslin dropped him off at the decedent's home, and “I opened the door the outside entrance that is the entrance to three condos. Now that condo, it had been brought up before, but I did a lot of work there in that condo for Haley [the decedent's

sister who owned the unit] a lot of work. Everything I - - I installed the new door locks for them did all this and that. I had been there a lot of times." R. 2505, ll. 11 - 16.

Appellant explained that when he first knocked on the door "no one came to the door. I knocked on the door again. J [redacted] came and opened the door. . . J [redacted] opened the door and he's, like, just glaring at me, so I pushed my way into the door . . . and J [redacted] just kind of let it go, and I walked in and he just walked over back over to the counter." R. 2506, ll. 2 - 22.

Appellant remembered seeing his estranged wife inside. Appellant recalled: "J [redacted] said what's going on. I said, J [redacted], why would you send the neighborhood boys over to your Tiki bar to destroy it because when I got home from bond, there were some destruction done to our Tiki bar. And I learned [from] one of the neighborhood kids that J [redacted] instructed them . . . they could do whatever they wanted over there because I wasn't allowed to go no further." R. 2507, ll. 9 - 15.

Appellant testified: "I turned toward Becky I said - - well, actually I turned away, came to the end of the couch and took that left and started toward Becky. When she went like this, just she went - - like that and to this day [if] she wouldn't have warned me, I'd be the one dead today instead of her. It was Roger Grainger behind me with his hand straight out like that with a pistol in his hand . . . he was standing right behind me. That bullet was intended to go directly into my head, and when I had seen him, I went like that. And I gave him a jab and knocked his butt right on the floor. He fell on the floor and rolled over, and the gun was laying right beside me. Those are the facts. . . I seen him. I said what in the hell are you doing. And I reached over and I picked the gun up and looked to the left, and it was one of the things that's been haunting me ever since then. I'm the one that couldn't go

to the funeral. I'm the one that was sitting somewhere where I couldn't be anywhere near it. I looked up and Becky's face was facing me flat down. There was blood oozing from her ear, her nose, and it appeared to be right from her face. Her eyes were closed, but it was like she was looking straight at me, and I see that almost every night. I seen her take her last breath. It was my wife and despite we were broke up, I cared very much for her." R. 2508, ll. 7 - 18; R. 2508, l. 24 - 2509, l. 4; R. 2509, l. 6 - l. 18.

Appellant continued: "I did not know what to do. I had just been shot at and I just seen my wife get killed. That bullet was intended for me; there's no doubt about that. Roger had a great motive for it." R. 2510, ll. 3 - 15.

Appellant testified: "I went straight to my house to the golf course." R. 2511, ll. 2 - 5. Appellant said he got some clothes because "it started getting cold." Appellant recalled: "I have never been shot at before, so I don't know actually what was going through my mind." R. 2512, l. 1 - 2513, l. 10.

Appellant testified he walked the golf course all night long and then he spent time in a house under construction and in an abandoned warehouse over the next two weeks. R. 2515, l. 3 - 2520, l. 1. Appellant told the jury: "Now, the reason I was on the run for that long is I know through - - I had heard that Roger Grainger is in a hunt club. He has many guns. I was in fear for my life and I knew they were looking for me. He knew I could pinpoint him, and that's what I was going to do is pinpoint him. That's why I stayed away. The paper said they were looking for a suspect. One night I got the paper; it said they were looking for a suspect. They did not say Roger Grainger." R. 2520, ll. 5 - 13.

Appellant testified when he was on the golf course on the day of his arrest, the "cart girl" asked "[A]re you Winkler? And I said yes. Shook, shook my head yes. Said well, I'm

going to have to call the police. I said - - I shook my head yes." R. 2522, ll. 3 - 22. Appellant remembered seeing the police helicopters and police "carrying what looked to me was an M-16 . . . they are acting like I'm some type of mass murderer, and I, I didn't, in fact, didn't kill anyone." R. 2522, l. 3 - 2523, l. 13. Appellant explained that he told the police: "I didn't shoot Becky." R. 2527, ll. 5 - 8; R. 2536, ll. 13 - 26.

Appellant testified the first person he trusted after his arrest was his family court lawyer, Scott Bellamy. Appellant said he eventually told the police he did not shoot the decedent. R. 2603, l. 1 - 2604, l. 24. Appellant acknowledged he told the police that he took his gun over to the decedent's house but he also told them that he blacked out and he did not remember what happened. R. 2609, l. 12 - 2613, l. 4. Appellant said he hid after the shooting because he was afraid Roger Grainger, who "had a lot of weapons," and he was afraid Grainger would kill him R. 2617, l. 14 - 2618, l. 18.

Discussion

The trial court erred by admitting J [REDACTED]'s statement to Detective Pitts as prior consistent statement. As seen above, defense counsel did not charge J [REDACTED] with recently fabricating his version of events or having an improper influence or motive as mandated for a prior consistent statement being admitted under Rule 801(d)(1)(B), SCRE. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003).

In this case, J [REDACTED] claimed to the 911 operator that appellant shot his mother. However, the tape does reveal, as appellant noted, that J [REDACTED] did not answer the 911 operator's question about whether he was alone at the time. As seen, appellant testified J [REDACTED]'s father, Roger Grainger, was inside the condominium with J [REDACTED] and the decedent when he arrived there. The 911 tape is on file with this Court.

As seen, Officer Knoch testified J [REDACTED] told him "my Dad" had shot his mother, and that he was "gone" or "just left." Officer Knoch admitted when asked by the solicitor that he could have been mistaken. R. 1529 – 1531. J [REDACTED] earlier testified that he told the police that his step-dad shot his mother. R. 1447, ll. 2 – 9. Defense counsel's cross-examination of J [REDACTED], as seen above, was very mild. He simply asked J [REDACTED] whether he remembered telling the officer who arrived on the scene that he said his Dad had shot his mother. J [REDACTED] denied that and he said he told the officer it was his step-dad. R. 1447, ll. 2 – 9.

Defense counsel never accused J [REDACTED] with recently fabricating or having an improper motive to implicate appellant. The cross-examination in this case was very standard. Defense counsel asked J [REDACTED] if he loved his father and J [REDACTED] responded that he did love his father, but he denied he was closer to his father than to his deceased mother. R. 1454, ll. 6 – 12.

The prior consistent statements of a witness is only admissible if: (1) the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statements; (2) the statement is consistent with the declarant's testimony; (3) the statement is offered to *rebut an express or implied charge against the defendant of recent fabrication or improper influence or motive*; and (4) the statement was made before the alleged fabrication, or before the alleged improper influence or motive arose. Rule 801(d)(1)(B), SCRE; State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Fulton, 333 S.C. 59, 509 S.E.2d 819 (Ct. App. 1998).

Here, the judge erred by admitting J [REDACTED]'s statement to the Detective Pitts because it failed under the third and fourth prongs of Rule 801(d)(1)(B), SCRE.

As this Court stated in State v. Foster, merely questioning the accuracy of a witness' memory or attempting to call his credibility into question is simple impeachment. It does not rise to the level of charging fabrication. State v. Foster, 354 S.C. 614, 622, 582 S.E.2d 426, 430 (2003).

Since no charge of recent fabrication or improper influence or improper motive had been made, J[REDACTED]'s statement to the Detective Pitts was not admissible. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994); Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960). Following the adoption of the Rules of Evidence, all of the elements of Rule 801(d)(1)(B), SCRE must be met for the statement to be admissible.

The statement in this case also was not made before any alleged fabrication, or before the alleged improper influence or motive arose. Officer Knoch simply testified that J[REDACTED] told me "my Dad" had shot the decedent. J[REDACTED]'s *subsequent* statement to Detective Pitts wherein he said appellant was the shooter is simply not admissible as a prior consistent statement under the fourth prong of admissibility.

Because the statement failed to qualify as a prior consistent statement, the judge erred by admitting it.

As in State v. Foster, J[REDACTED] was the only eyewitness to the shooting. It was a factual determination for the jury to decide whether appellant or Roger Grainger was the shooter. This error cannot be harmless where J[REDACTED] was the only eyewitness to the shooting, and his testimony was obviously critical to the state's case. The prejudice of erroneously introducing a prior statement of the only eyewitness to the crime was that it improperly bolstered his testimony. State v. Foster, *supra*. Appellant should be granted a new trial.

2.

The court erred when it allowed the transcript of the 911 tape to be given to the jury when it asked to "read over the 911 transcript" during deliberations since the transcript was not in evidence, and it was not an accurate transcription of the interview. The transcript was highly prejudicial to appellant's defense since it erroneously expressed that the 911 operator immediately interrupted J [REDACTED] after she asked him if he was alone following the shooting, where the tape shows a long pause and J [REDACTED] never answering that question.

During deliberations, the jury asked to re-hear the 911 tape that was earlier introduced during the state's case-in-chief. It sent the judge a note: "Could we please read over the 911 transcripts?" R. 3492. R. 1894, ll.20-21; R. 1409, ll. 17-20; R. 1410, l. 23. Someone associated with the state apparently created the transcript. R. 1897, ll. 12-16. Defense counsel objected to the court's giving the jury a copy of a transcript that purported to accurately depict the content of the tape. Defense counsel objected that the transcript contained inaccuracies and that, since the trial had concluded, it was not appropriate for the jury to review matters that were not in evidence. R. 1895, ll. 5-7; R. 1896, ll. 8-11; R. 1899, ll. 12-23.

The 911 tape is inaccurate because it asserts the operator said: "And you're there by yourself. Okay. I have them in route. Okay. Stay with me. All right?" Transcript of tape at 5. R. 3477. The presence or absence of any other individual -- here Roger Grainger -- at the apartment at the time the call was made was critical to appellant's defense. This is why allowing the jury to review the transcript overwhelmingly

prejudiced appellant. As seen, appellant's defense was that J [REDACTED]'s father—Roger Grainger—was, in fact, the murderer and that he was present at the apartment when J [REDACTED] called 911. R. 1865, ll.7-9; R. 1866, ll.6-15; R. 1870, ll.12-19. The failure of J [REDACTED] to answer that question was critical because it lay at the heart of appellant's defense. The tape was materially misleading.

Solicitor Hembree acknowledged that the tape was difficult to hear:

My concern, Your Honor, with that idea is that the tape is still not the greatest quality. It's difficult to hear. That's the entire—that's the reason why we do a transcript at all is so we can take the time to make sure that the words are accurate and get that—so we can clearly present the truth to this jury, not have them subject to misunderstanding and a lot of confusion. And that's the worst of the worst.

R. 1897, ll. 10-17.

The court ruled that the jury would be allowed to review the transcript while they listened to the 911 tape:

If they wished, I could have the court reporter, if I wanted to go to the trouble to do it, read to them everything that was on that tape because she's got it and she could read what was on the tape. There's no difference in her reading it, what's on that tape, and them having something and reading along as they listen to it. She could, if she wished, she could go ahead and it would take a while to do it. She could type up what was on that tape and then they could read that. We could read it out loud to them if we wanted to. But that would take too long and it would take—be too much trouble to do it.

That tape and them reading it is as it was put in, them reading it, the words there that were put before them—and you note your objection—I'm going to permit them to do it that way.

R. 1900, ll. 1-15.

The jury should not have been allowed to review the transcript because it was not admitted into evidence. The jury should simply have been informed that all of the evidence was in at that point, the transcript was not in evidence, but that they could listen to the 911 tape again because it was in evidence.

Allowing the jury to review the erroneous transcript, which was not in evidence, while listening to the 911 tape, and where they were deliberating, and focused critical attention on the contents of the 911 tape heightened its prejudicial impact. See State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978)(critical attention focused on the subject in question). Doing so, the judge unduly emphasized the tape's inaccuracies before the jury. See State v. Gullledge, 277 S.C. 368, 287 S.E.2d 488 (1982); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980).

In this case, the identity of the decedent's slayer was the issue. The admission of this transcript was not harmless, inter alia, because jury exposure to facts not in evidence deprives a defendant of the rights of confrontation, cross-examination and assistance of counsel embodied in the Sixth Amendment. Anderson v. Terhune, 2009 WL2462398 (E.D.Cal.); Dickson v. Sullivan, 849 F.2d 403, 406 (9th Cir. 1988). And see U.S. v. Ofray-Campos, 534 F.3d 1 (C.A.1, 2008) (quoting United States v. Rivera-Santiago, 107 F.3d 960, 965 (1st Cir.1997):

A district court must use extreme caution in answering questions from juries so as not to usurp the jury's fact finding role. As we have noted on many occasions "undeniably inherent in the constitutional guarantee of trial by jury is the principle that a court may not step in and direct a finding of contested fact in favor of the prosecution

regardless of how overwhelmingly the evidence may point in that direction.

Id. At 18. See also, United States v. Sabetta, 373 F.3d 75, 80 (1st Cir. 2004). Allowing the jury to review the transcript, which was not in evidence, during their deliberations, where it was denied appellant of his right to due process. Respectfully, Appellant asks this Court to reverse his convictions and remand his case for trial.

3.

The court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary.

Introduction

Assaulted by his lead counsel only a few days earlier, and fundamentally opposed to his attorneys' mitigation strategy on his behalf, appellant unequivocally asked to represent himself during the penalty phase of his capital trial. Appellant had reason to be concerned with his attorneys' performance. After all, one business day before the original start date of his trial, his attorneys informed the judge that they were not prepared to go forward. They asked for, and received, a continuance. The state reluctantly agreed to join in that motion, since it was clear they had no choice—no work had been done by the mitigation specialist the defense attorneys hired, Paige Tarr. It was against this backdrop of hostility and complete dissatisfaction -- appellant even asked the judge how he could take out an arrest warrant for his lead counsel's arrest for assaulting him -- that appellant asked to represent himself, but the judge, focused on appellant's *ability* to defend himself, and not his right to do so, denied his request.

Relevant Facts

Appellant requested to represent himself before the start of the penalty phase of his capital trial. He had long been dissatisfied with his attorneys, and requested, prior to the start of the *guilt* phase, that he be appointed new attorneys. Denying that request, the judge said:

Any event, we're going to proceed then. There's been no request for you to represent yourself. You're requesting another attorney. Since that's the case, I do not grant your motion. Now, **you always have that option to represent yourself**, which would be very inadvisable for this stage, but we will continue on with the case."

R. 42, ll. 12-18 (emphasis added).

Appellant was convicted of all charges at the close of the guilt phase. After recessing for the mandatory 24 waiting period, the parties returned to court on February 4, 2008. Defense counsel informed the court that appellant wanted to participate in the cross-examination of witnesses. R. 1915, ll. 16-23. Denying that, the trial court reiterated to appellant that he would be allowed to represent himself:

"Well, Mr. Winkler, **you always have the opportunity, sir, if you wish to represent yourself**, sir. And if you want to represent yourself, **we'll go through another dialogue here** to make sure that's what you're doing."

R. 1917, ll. 14-18. (emphasis added).

Appellant then asked the court to allow him to proceed pro se and to allow his attorneys to remain as a resource for him. R.1925, l.14 - 1928, l. 7. Winkler's request was unequivocal:

Court: If you're saying that you want to represent yourself with Mr. Wilson and Mr. Rathbun to stay there as consultants for you to consult with during the course of this phase of the trial, but not to be your attorneys who ask questions or make closing arguments to the jury, is that what you're requesting?

A: Yes, sir.

R. 1928, ll. 11-17; R. 1930, ll. 19-24.

Trial counsel informed the judge that appellant had indicated to him "on more than one occasion" that this is what he wanted to do. R. 1932, ll. 7-9. Appellant made it clear that he was no longer asking for new attorneys, but to represent himself: "I already asked that eight months ago." R. 1932, ll. 15-20.

The judge then asked if appellant had reviewed the materials gathered in preparation for the trial. Appellant responded that he had, otherwise, "[w]e wouldn't be ready for trial." R. 1932, l. 25 - 1933, l. 6. The judge also asked if appellant had reviewed the evidence that Wilson and Rathbun were prepared to introduce during that part of the trial. Again, appellant said he had. R. 1933, ll. 7-10.

Appellant's History of Dissatisfaction with his Attorneys

Appellant was unhappy with his attorneys from a very early point in their representation. During the July 3, 2007 hearing, Wilson informed the trial court that appellant had indicated "on several occasions" that he was dissatisfied with Rathbun. (R. 3260, ll. 8-15). The judge informed appellant that:

"[U]nless anything regarding Rathbun reaches the point of incompetence or something that I would make a preliminary determination of ineffective assistance, it's improbable that I would remove Mr. Rathbun unless it's something that would really seriously prejudice Mr. Winkler's rights to receive a fair trial."

R. 3262, ll. 1-7.

Appellant informed the court that he was concerned because his attorney was telling him to plead guilty. R. 3263, l. 25 - 3265, l. 2.

The Court: That hasn't changed your mind, has it?

Mr. Winkler: Well, no, sir.

The Court: Okay, let's continue on.

R. 3264, ll. 17-19.

At that same hearing, Rathbun informed the court that his wife was a Horry County deputy sheriff. R. 3253, ll. 2-4. The judge denied the motion to relieve Rathbun. R. 3265, ll. 10-21.

Appellant had earlier noted his concern about Rathbun's participation in the trial at a hearing held, nearly a year earlier, on June 15, 2006. There, he expressed his concern with Rathbun's lack of experience, especially in matters relating to the death penalty. R. 2992, ll. 1-20. At the time of his appointment, Rathbun was primarily doing family court work, and he had never tried a murder case. R. 2985, ll. 3-10; R. 2986, ll. 5-6.

At the June 15, 2006, Rathbun explained that he asked Orrie West, the Chief Public Defender for Horry County, to allow him to "help and assist" with appellant's capital trial. West had actually been served with appellant's notice of intention to seek the death penalty. R. 2987, ll. 1-3. Rathbun said he had some spare time that he could use to "research, that kind of thing." R. 2985, ll. 10-16. He had never defended a burglary case, but he had tried an armed robbery case. R. 2986, ll. 4-11. West informed the court that she and appellant were "not as compatible as we could be." R. 2987, ll. 15-17. That was one of the reasons West decided that she would not handle the case herself for the Public Defender's Office. R. 2987, ll. 18-22.

The judge asked:

And you feel he is competent to handle this matter, as long as he's not first chair?

Ms. West: Yes, Your Honor, he is. Yes, he is.

R. 2988, 11.7-9.

Appellant's case was initially scheduled to be tried on July 16, 2007. On July 12, 2007 the court was notified by conference call that the defense was having difficulty communicating with their mitigation investigator. On that late date—one business day before the scheduled start of their client's capital trial-- they were concerned that "little or no work in preparation for mitigation" had been completed. Defense was asking for a continuance at the 11th hour. Yet, according to the Order, dated August 20, 2007 and memorializing the events of the hearing,² counsel knew of these problems since late-May. Order of Judge Lockemy. R. 3548. On Friday, July 13, 2007, *the state* requested a hearing on the matter. The Court sent a Horry County Sheriff's deputy to serve the mitigation investigator, Paige Tarr, with a subpoena in Columbia, South Carolina. July 13th, 2007 Order, ¶ 4. R. 3549. Among the other findings, the Court noted:

[N]umerous hearings and conferences had been held in this matter since late May and never had the Court been advised for the defense that any problem existed in reference to the mitigation investigator or counsels' readiness to adequately represent the defendant in either the "trial phase" or the "sentencing phase" of the case until July 12, 2007, one business day from the start of the trial in this matter.

A new trial date was ultimately set for January 28, 2008. July 13th, 2007 Order, at page one. R. 3549. Counsel for appellant was also ordered to have contact with the Court "at a minimum every two weeks until trial to insure appropriate progress is being made in the preparation of the defendant's defense and mitigation of sentence." Order, dated July 13, 2007, p. 3. R. 3551.

² There is no transcript of this hearing.

Clearly, appellant had reason to be concerned about the representation he was receiving at this point, since there had been no meaningful preparation of his mitigation case prior to the start of his death penalty trial, nor had his attorneys attempted to protect his interests by bringing it to the court's attention at an earlier date. Counsel's actions, surely, did not inspire confidence. And the Court, too, must have been concerned about the representation that appellant was receiving since it required bi-monthly updates, with respect to the mitigation case they were preparing, up until the start of the trial. Additionally, there had been even earlier problems with defense counsel securing a mitigation investigator, a "Ms. Davis", as early as February 16, 2007. They had simply waited too long to try and hire someone. R. 3042, l. 3 - 3045, l. 19:

The Court: This person says they could not begin until June, Ms. Davis.

Mr. Wilson: Well, she's actually begun. She came down and—and actually spent some time with Mr. Winkler. She came down and spent a whole day with me, going over his file.

And I know she's had some other things going on. I do understand that. She made that—

The Court: Her affidavit says: "It will take six to eight months, and I can't start till June." Mr. Wilson, that's determinative.

R. 3043, l. 18 - 3044, l. 3.

As early as January 3, 2006, the parties had been meeting for purposes of scheduling all matters related to this case, yet as late as mid-February, 2007, defense counsel still did not have a mitigation specialist on the case. R. 3040 - 3050 . Appellant

was justified in his lack of confidence in his attorneys' ability to mount a mitigation case on his behalf.

At the start of his trial, on January 28, 2008, defense counsel informed the court that appellant wanted to have *both* Wilson and Rathbun them relieved. R. 30, ll. 13-24. appellant reiterated that he had attempted to have Rathbun relieved eight months earlier, but the request had been denied. R. 32, l. 24 - 33, l. 6.

Appellant also informed the court that a physical altercation occurred between himself and Wilson a couple of days earlier. R. 33, ll. 2 -19. During a hearing on January 24, 2008, appellant informed the trial court of the nature of this altercation, and also complained that he had not seen his attorneys for the week prior to the start of his death penalty trial. R. 25, ll.11-24. Appellant said:

"[Wilson] turned towards me, put his finger in my face, touched my face, and said she [appellant's sister] is a f'ing liar. At that time I swatted his hand away from my face, officers came in, and they acted like it was my fault. But it was Mr. Wilson's. And there's no way I can see where I'm gonna get a fair trial with this man, my attorney, when he has called me and my family liars over the past month."

R. 3409, ll. 4-10.

Appellant also informed the judge that he wanted to press criminal charges against Wilson. He was thwarted in his efforts to secure a warrant for lead counsel's arrest:

I contacted Corporal Neal, who was in my pod last night, directed me to Major Johnson. Relayed my, my message that I'd like to press charges on Mr. Wilson, and he said back to her—I did not speak to Major Johnson. I spoke to, I spoke to Craig that, that, at the jailhouse, did not permit me to do that. I needed a written statement from you in order to do an in-house assault charge.

R. 3409, l. 23 - 3410, l. 4.

The judge informed appellant that these were matters that could be addressed at a later date. R. 3410, ll. 16-17. "There's no urgency about that." R. 3410, l. 17. Wilson was quick to point out that there were witnesses to these events and that he hoped there was a video of the incident. R. 3411, ll. 5-10. Wilson statements clearly show that he was contemplating his defense to appellant's criminal allegations:

The other thing is, is that I was not in the room with him alone when this occurred. Captain Rathbun and my co-counsel with me was (sic) there. And so was the paralegal, Mrs. DePursio. So—and the officers came in and I don't know whether there was a video or not of it. I hope there was.

R. 3411, ll. 5-10.

Appellant continued to express his extreme dissatisfaction with Wilson:

I don't, I don't see how we can get along. We have to—we *have to go through a mock trial and that this man is just now called me a liar, and there is no way we can get along.* I've asked him to be, to be removed. I can't get along with the man. He obviously is just called me a liar again, and, and there's no way that I can get along with him in order to, to get a fair trial out of it, out of this as to what he did tell me.

He did tell me that I was gonna be convicted. He called me a liar again. I'm not—I *can't work with the man*, and, and go about how I'm gonna be approached to be on the stand. So, I don't see it. I don't see how it's gonna, how, how that, in any way, is gonna give me a fair trial with a man that's already come to a conclusion.

R. 3413, ll. 5-18. (emphasis added).

The trial court told Winkler --3 times-- that he could "address this further" on Monday, the start date of his death penalty trial. R. 3413, ll. 23-25; R. 3414, l. 5, R. 3414,

ll. 12-13. On Monday, the judge stated these events were not "significant enough" to remove Wilson, and the trial began. R. 3419, ll. 22-25.

The Trial Court Decides Not to Allow Appellant to Represent Himself

After the trial court informed appellant again that he "always [has] the opportunity . . . to represent himself," he noted it would be dangerous it would be for him to do so. R. 1917, ll. 14-23. *Appellant's attorneys asked the judge to allow appellant to represent himself.* R. 1920, l. 21 – R. 1921, l. 20. The judge again told appellant that the decision was highly inadvisable, and that he would be bound by court rules. R. 1921, ll. 21-25. The state conceded that appellant had the right to represent himself. R. 1922, ll. 2-8. The judge informed appellant for the third time that he had the right to represent himself but that it was dangerous to do so. R. 1922, ll. 14-19. Appellant was insistent that he wished to represent himself. R. 1926, l. 6 - 1927, l. 25; R. 1930, l. 19 - 1931, l. 3.

The judge began to seriously engage appellant regarding his decision to represent himself. R. 1929, l.14. Wilson clarified appellant's position:

Mr. Wilson: Yes, sir, but what he, what he what he wants to do, and he'll tell you if I'm correct. What he wants to do is to represent himself, but he wants to make sure, and you say dismiss your attorneys, and that's the other word that's confusing him.

R. 1927, ll. 21-25.

Appellant unequivocally invoked his right to represent himself. R. 1928, ll. 11-17.

The judge wanted to know if appellant was concerned about undertaking self-representation because he was not a skilled lawyer. R. 1929, ll. 6-13. The court wondered if appellant had enough time to consider the decision, and whether he would know how to make proper objections. R. 1929, ll.14-21. He told appellant he would be

treated like "anyone else in a court of law." R. 1929, ll. 22-23. He informed him this was the mitigation phase, and not the penalty phase. R. 1930, ll. 6-18. The judge noted that he was reviewing Faretta, *supra*, Brewer³, and Fuller⁴ while asking these questions. R. 1931, ll.1-3.

The judge then discussed appellant's medications. R. 1931, ll. 4-25. Wilson again informed the judge that appellant was adamant about representing himself, even though Wilson -- as would any attorney -- did not believe it was a good idea. R. 1932, ll. 4-9. The judge asked appellant if he reviewed the mitigation materials collected by his defense team. R. 1932, l. 25 - 1933, l. 10. He asked him if he understood "the nature of the term leading question." R. 1933, ll.1-20. Appellant answered that "it's trying to get someone to say something that you want them to say, putting words in their mouth." R. 1933, ll. 11-17.

The judge asked if appellant had reviewed the rules of evidence for South Carolina; did he understand the various exceptions to hearsay? R. 1933, ll.18-25. Did he know what an excited utterance is? R. 1934, ll.1-5.

Appellant then addressed the court:

Your Honor, my view of it is yesterday we won that trial. We got the bad verdict. I did not have my day in court. I did not take the stand, which we were trying to fit in. . . . Most of these witnesses that they're going to call today, what I understand, there's nobody that knows them better than myself. They were supposedly my friends who turned against me to keep me with my wife, who they only met several times. I know them better than anybody in this

³ 328 S.C. 117, 492 S.E.2d 97 (1997).

⁴ 337 S.C. 236, 523 S.E.2d 168 (1999).

room, your Honor, and-- . . . Your Honor, I'm confident in taking, taking care of this, this business.

R. 1934, l.8 - 1935, l. 4.

The judge then asked counsel to look at Fuller, supra, and Brewer, supra to see when the decision to proceed pro se had to be made. And he asked appellant:

And let me just review these one more time. Let me—but you understand the dangers, the pitfalls? You understand it's not that, that – it's very dangerous to do this, and you understand at this phase of the trial, sir, this jury is going to decide whether or not you would receive life imprisonment or the death penalty? You understand that, sir?

Defendant: Yes, Your Honor.

R. 1925, ll.16-23.

The judge then asked appellant if he understood the danger of going forward representing himself--if it was a decision he wished to make. Appellant said he did. R. 1936, ll. 2-9.

After this, Solicitor Hembree asked the judge to "engage in a discussion of all the factors under Faretta just for the record." R. 1937, ll. 18-23. The judge replied that he thought he had. R. 1937, l. 24 - 1938, l. 2. The judge said that he would entertain specific requests from counsel if they wished to put them in writing. R. 1938, ll.19-24.

The parties then engaged in a discussion regarding the timing of appellant's request. The judge said to appellant:

Mr. Winkler, I do want you to consider this very seriously because this is a serious decision. If ultimately, though, I determine that you've make (sic) that decision and it is a knowing, intelligent and voluntary decision and you made it pursuant to Faretta vs. California standards and reviewing Fuller and Brewer, then it's probable I'll permit you to do. Let me think further with it.

R. 1938, l. 25 - 1939, l. 7.

Defense counsel continued to insist on their client's right to represent himself. R. 1944, ll. 8-20. The judge stated that he had "not yet made a finding that he's—knowing and voluntary decision knowing his rights (sic)." R. 1944, ll. 21-24. "I haven't made that finding yet." R. 1945, ll. 1-2.

Defense counsel again enthusiastically argued appellant's right to represent himself, while maintaining that they did not personally agree with his decision. R. 1953, ll. 9 - 1954, l. 18. The judge then asked if appellant was familiar with South Carolina Code Ann. §16-3-20. R. 1954, ll. 19-22. Appellant said he was not. Defense counsel then argued that Brewer allows appellant to represent himself:

"The open (sic) test is whether defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice but the defendant's understanding . . . The determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right of self-representation. The only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to —"

R. 1955, l. 9 - 1956, l. 1.

The judge again stated that he was concerned about a long delay, appellant's "anxiety situation" and "whether he really understands the nature of representing himself." R. 1956, l. 1 - 1957, l. 19. Appellant had been found competent to stand trial and assist in his defense during two prior Blair hearings, conducted on February 16, 2007 and December 13, 2007. R. 3007; R. 3300.

Defense counsel Wilson told the judge at one point, that "he [Appellant] wanted to be heard." The judge responded: "No. I think I have heard enough in that regard." R.

1958, ll. 20-22. The judge, of course, ultimately did not allow appellant to represent himself.

The judge asked both counsel to review State v. Fuller⁵ and State v. Brewer⁶ to determine when the decision to allow a defendant to represent himself must be made. As the judge noted, Brewer states that the decision must be made before trial. The judge noted, however that "one could assert this is a trial." R.1935, ll.10-15. The judge also gave counsel for both sides the opportunity to make "specific requests of conversation with the defendant if you want to put that in writing." R. 1938, ll. 19-24. The judge told appellant:

If ultimately, though, I determine that you've made that decision and it is knowing, intelligent and voluntary decision and you made it pursuant to Faretta v. California standards and reviewing Fuller and Brewer, then it's probable I'll permit you to do. Let me think further with it.

R.1939, ll. 2-7.

The judge asked whether the parties agreed, pursuant to Fuller, that the decision was now within the discretion of the judge. R.1940, ll. 5-11. The state did agree. R.1940, ll.12-15. However, defense counsel did not agree—their position was that appellant had the right to represent himself during the penalty phase of his own capital trial. R. 1940, l. 23 -- R. 1942, l. 5. Defense counsel distinguished State v. Reed⁷ from the instant case. Essentially, counsel argued that, unlike Reed, this was not a case where a defendant was asking to have counsel "reinstated" after having represented himself

⁵ 337 S.C. 236, 523 S.E.2d 168 (1999).

⁶ 328 S.C. 117, 492 S.E.2d 97 (1997).

during the guilt phase of a capital trial. R. 1943, l. 15 - 1945, l. 2. The judge then suggested that he had concerns that appellant was even capable of making a knowing and voluntary waiver of his rights. R. 1944, ll. 21-24. The court took a recess.

When court convened again, the judge informed the parties that he was concerned that appellant had not had the opportunity to review the volumes of material that had been amassed in preparation for the penalty phase of the trial. He noted that there was an expert witness scheduled to testify for the defense and that "Mr. Wilson and Mr. Rathbun obviously know better how to examine them (sic)." R. 1948, l. 1 - 1949, l. 11. The judge stated that he did not think it was appropriate or fair to delay the trial to give appellant the opportunity to review the materials. R. 1949, ll. 12-19.

The judge was also concerned about appellant's mental health and the fact that he would need additional medications to control his anxiety if he were allowed to represent himself. R. 1949, l. 20 - 1951, l. 6.

Then if we had that, would that affect the situation of maybe his senses being dulled since that would make him miss points that he would really need to make to help himself. And that does concern me.

R. 1951, ll. 3-6.

The judge spoke with, and took testimony from, Deborah Hipp, a nurse practitioner. She testified that an "increase in anxiety may require more medication." R. 1951, l. 13. The judge then asked her:

And more medication, although it might keep someone calm, it may go at some point in time over the line, keep him calm to the extent that they maybe are not quite as alert as they would be without it?

⁷ 332 S.C. 35, 503 S.E.2d 747 (1998).

A. That's true.

R. 1952, ll. 14-18.

Again, the judge stated that his medicines cause him concern "about whether or not he can adequately represent himself." R. 1953, ll. 1-3.

Wilson informed the court that appellant was not attempting to delay the trial with his request, and that he was ready to go forward. Counsel said that appellant was familiar with the materials, and that he had met with every expert on multiple occasions. He said that the experts had given appellant the materials that they intended to present, and that he knew what those materials were. R.1953, ll. 9-19. Counsel also informed the court that there was no indication he was mentally incapable of proceeding. R. 1953, ll. 22-25.

The judge reiterated that he was concerned that he would have to delay the case, and that he might need more medication, and that he was concerned that appellant did not "really understand[] the nature of representing himself." R. 1956, l. 9 - 1957, l. 19.

This was when defense counsel told the judge that appellant wished to be heard, but the judge stated he had "heard enough in that regard." R. 1958, ll. 20-22.

The trial judge then conducted an *in camera* telephone conference with counsel and Dr. Rikki Halavonich, a forensic psychiatrist who testified later in the trial as a defense witness. The judge asked her about appellant's ability to represent himself in light of his medical condition. The doctor stated:

"Well, I, you know, am concerned frankly, regardless of whether they increased his medication or not, of his ability to actively cross-examine witnesses and that type of thing without getting frustrated and, you know, worked up. **It's his personality.**"

R. 1960, ll. 2-23 (emphasis added).

The doctor continued to explain that the Klonopin-- the prescribed medication for Appellant's anxiety-- "kicks in pretty quickly." R.1962, ll. 12-13. She stated that they could titrate the medications to accommodate any increase in his anxiety. She stated it would be "kind of a clinical call." R. 1963, l. 8. As an expert witness, she did not believe she could oversee his medications, but she suggested that Dr. Smith could come and be available as needed during the trial to oversee his medications. She also stated that Klonopin works on the same receptors as alcohol does, and that if you start getting *too much* it could impair judgment. R. 1962, l. 2 – R. 1963, l. 17.

The judge then put his ruling on the record, and denied appellant's request. R. 1964, l. 8 – R. 1972, l. 7.

Defense counsel reiterated that appellant never asked for a delay, and that he has not asked the court for any additional time to do anything. R. 1973, ll. 7-12. Defense counsel continued to object that appellant should be allowed to represent himself. R. 1973, l. 13 - 1975, l. 24.

Legal Analysis

The Sixth Amendment provides that an accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806 (1975); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). That right must be preserved even if the court believes that the defendant will benefit from the advice of counsel. State v. Fuller, 337, S.C. 236, 241, 523 S.E.2d 168, 170 (1999). See also United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997). If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge. Fuller at

241. See also Singleton, supra; United States v. Lawrence, 605 F.2d 1321 (4th Cir. 1979).

[I]t is incumbent upon the trial court to determine whether the request is made for purposes of delay or to gain a tactical advantage, and whether the lateness of the request may hinder the administration of justice." Fuller at 241 (quoting People v. Mogul, 812 P.2d 705, 709 (Colo.App. 1991)).

The judge abused his discretion in this case for two reasons. First, the judge found that he would have to delay the case to give appellant an opportunity to review and study the law, and to otherwise review the materials that had been collected on his behalf. R. 1956, ll. 9-20. Appellant, however, never requested a continuance, as his attorneys informed the court there was no need for any delay. Also, appellant had already thoroughly reviewed all of the materials in their possession. As counsel informed the court:

One, I don't think that there is—that this defendant is making this motion in order to delay this trial or in any way impede justice in any way whatsoever. And every indication is that he said to this court that he is ready to go forward. He is willing to go forward. He's indicated to this court that he has, he is familiar with the materials and to be frank with you, he is. *Every expert that we have hired, he has met with on multiple occasions; he has talked with them on multiple occasions. They have given him whenever (sic) they have on that they intend to present, so he knows what that it is.*

R. 1953, ll. 9-19. (emphasis added).

The judge abused his discretion because it was predicated on a non-existent fact. Appellant was prepared to go forward immediately—the trial did not need -- nor was it requested -- to be continued.

The judge also abused his discretion because both the nurse practitioner and Dr. Halavonich informed him that appellant's medications could be monitored in such a way as to allow him to proceed pro se. The nurse practitioner, Hipp, merely made the observation that an increase in anxiety *may* require more medication. R. 1952, l. 13. She did not render an opinion as to whether he would, in fact, need any more medication, or whether any increase in medications would render him incapable of representing himself. Also, Dr. Halavonich cited appellant's *personality* as the cause of her concern about his ability to actively cross-examine witnesses. R. 1960, ll. 19-23. This, of course, was not a proper basis upon which to deny a defendant the right to represent himself. Then she proceeded to suggest to the judge a viable plan for overseeing Appellant's medications. She suggested Dr. Smith could oversee his medications so they *would not* dull his senses. R. 1963, ll. 14-17. As she informed the judge—"[A] little bit can kind of relax you, but if you start getting *too much*, it can make you, your judgment be impaired and make less appropriate decisions." R. 1961, ll. 12-16. Dr. Halavonich's testimony informed the court that there was, in fact, a viable way for appellant's medications to be controlled so that he could represent himself. The trial judge appears to have placed a different interpretation on her remarks, and one not consistent with her actual statements. Concern for his medications was not a sufficient basis to deny appellant's request, and it was an abuse of the judge's discretion to do so.

The judge's abuse of discretion was further enhanced by his unwillingness to allow appellant to address the issue with him. This case is similar to Fuller in the sense that the appellant's request was made "in an atmosphere of his escalating dissatisfaction" with his attorneys. Id. At 242. In Fuller, the trial court fined defense counsel a few days

before trial for being dilatory; and on the day of trial, Fuller complained that trial counsel had been ineffective in preparing for trial. In this case, appellant had been vocal about his dissatisfaction with one attorney for over a year. Appellant informed the court of a physical confrontation with his other attorney a few days before trial, that he wanted to swear out a warrant for his arrest, and he attempted to have them replaced on the day his trial began.

Respectfully to trial counsel, they had certainly been dilatory in their efforts to mount a mitigation case prior to the initial scheduled trial date. One business day before the start of the trial, the state was "forced" to join in the continuance motion given that the defense was unprepared for trial. Obviously, the state sensed the post-conviction action to come if this continuance motion was denied, and the trial court blamed -- correctly -- defense counsel for being unprepared for trial since there is "no ineffective assistance of expert."

In short, the record is replete with examples of appellant's rationally based, understandable unhappiness with his trial counsel. And as in Fuller, the trial judge failed to fully assess the purpose of appellant's request. Had he done so, he would have realized that, as in Fuller, there were significant and fundamental disagreements with counsel about counsel's preparation that underlay appellant's decision to represent himself, and that he was not seeking a strategic advantage with his request.

During the penalty phase, it became quite evident that appellant and his attorneys had divergent views about how the penalty phase was to proceed:

Mr. Wilson: *As you know* the record will reflect that I put up a social, social history through a sociologist, Ms. Oehler, in—regarding the defendant and his history and his

family. And the defendant wants me to let the court know that he had asked me not to put up any social history and that I put that up in spite of his objections. And for the record, I'm noting that he did ask me not to put any social history in because he didn't want anything derogatory said about his family. But in my judgment as a lawyer, I felt it was the appropriate thing to do and I did it.

R. 2788, ll. 13-23.

Appellant also addressed the court:

Sir, I'd like to also again put for the record that, that again disobeying what I, I asked him, what I—you know, I told him specifically that I did not want my family dragged through the mud, and he did it anyway.⁸

R. 2789, ll. 1-5.

Appellant did not request to proceed pro se in order to delay the trial or otherwise work a strategic advantage. He was dissatisfied with his attorneys, as he informed the court on numerous occasions. The court was simply concerned that appellant would not do a good job of representing himself. That, however, was not the correct standard for the court to employ. As this Court held in State v. Brewer:

A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel.

Id. At 119. See also Faretta v. California, supra; United States v. Bennett, 539 F.2d 45 (10th Cir. 1976). See State v. Reed, supra. ("A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one.") The judge abused his discretion by failing to acknowledge "that respect for the individual

⁸ This issue is discussed in detail infra.

which is the lifeblood of the law” and by “forcing” a lawyer upon an unwilling defendant.

Faretta, at 834, 2540-41, supra.

As also argued more fully infra, the trial judge never engaged in a focused colloquy with appellant regarding his right to represent himself. Instead, discussions meandered from his invocation of the right, to issues of his medication, and then to questions regarding the appropriate time for appellant to make the request. At no time did the judge specifically indicate that he was asking questions for purposes of determining whether appellant was making a knowing and voluntary waiver of his right to be represented by counsel. Respectfully, he should have. Additionally, the judge led appellant to believe, on three occasions, that he would have the right to represent himself, should it come to that. Once convicted, and with the penalty phase about to commence, appellant invoked the right that he was led, *by the judge*, to believe that he had—the right to represent himself during that phase. It was an abuse of discretion for the judge to then disallow him the opportunity. Appellant respectfully submits he should be granted a new sentencing trial.

4.

Alternatively, appellant had the right to represent himself during the penalty phase of his trial under the reasoning of *Faretta*, and his case is not governed by the *Brewer* abuse of discretion standard. Further, it was apparent appellant knew the state's witness against him, that he had been actively involved with the experts, and his requests not to involve his family in his "mitigation case" were reasonable and his decision to make.

Appellant had the right to represent himself at the penalty phase of his trial pursuant to the reasoning of *Faretta*, *supra*.

The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the state interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master, and the right to make a defense is stripped of the personal character upon which the Amendment insists.

Faretta (Id. At 2533-34). And see *McKaskle v. Wiggins*, 465 U.S. 168 (1984) ("The Counsel Clause itself, which permits the accused to have the Assistance of Counsel for his defense, implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial.").

Appellant should not have been forced to proceed during the penalty phase of his trial with counsel with whom he was clearly, and with plenty of reason in the record vocally, displeased.

The justifications underlying *pro se* representation are no less present in the context of a capital trial penalty phase hearing than exist in a garden-variety criminal

trial. Indeed, given the extremely personal quality of a penalty phase hearing, those considerations are, in fact, even more compelling. The language of Lockett v. Ohio, 438 U.S. 586 (1978) is no less instructive in the context of this self-representation issue:

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. . . . The non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Id. At 2965.

Other jurisdictions have acknowledged the personal quality of penalty phase litigation and have held, for example, that a defendant may dispense with counsel altogether and waive mitigation in its entirety. See Hojan v. State of Florida, 3 So.3d 1204, 1211 (2009) (“Competent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys’ handling of their cases. This includes the right to either waive presentation of mitigation evidence or to choose what mitigation evidence is introduced by counsel.”); Cowans v. Bagley, 2008 WL 4452578 (S.D. Ohio, 2008) (finding the record sufficient to demonstrate that petitioner’s waiver of the right to present mitigation evidence—whatever the scope and constitutional magnitude of that right—was knowing, intelligent, and voluntary and that petitioner was competent to waive that right); Chapman v. Commonwealth of Kentucky, 265 S.W. 3d 156 (2007) (“Once the trial court allowed Chapman to proceed pro se, Chapman himself became the arbiter of what, if any, evidence he wanted to offer, including a right to waive his right to

present mitigation evidence”), reconsideration denied; People v. Miller, 153 Cal.App.4th 1015, 62 Cal.Rptr.3d 900 (2007) (since request was timely—2 months between penalty and sentencing phases—defendant had an absolute right to represent himself); Lamarca v. State, 931 So.2d 838 (2006) (defendant represented himself during penalty phase and therefore cannot claim that trial counsel was deficient for decisions he made in conducting his defense through this stage); Commonwealth v. Davido, 582 Pa.52, 868 A.2d 431 (2005) (“A criminal defendant has the right to decide whether mitigating evidence will be presented on his behalf. We will not remove that right and compel admission of such evidence. Defense counsel has no duty to introduce and argue evidence of mitigating circumstances where his client has specifically directed otherwise”).

In United States v. Davis, 285 F.3d 378 (5th Cir. 2002), the defendant was allowed to present his own penalty case because he did not desire to present traditional mitigation evidence. Instead, he wished to focus on attacking the government’s case as to guilt. Id. At 380. The Court of Appeals reversed the district court’s decision that did not allow the defendant to represent himself because the “right to self-representation does not extend to criminal sentencing.” Id. The Court found the district court failed[ed] to “take into consideration the strength and nature of the right to self-representation.” Id. At 384.

Faretta teaches us that the right to self-representation is a personal right. It cannot be impinged upon merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented in a penalty phase.

Id.

The core of a defendant's right to pro se representation is his ability to preserve actual control over the case he chooses to present to the jury. Id. At 385. See also McKaskle v. Wiggins, supra. That appellant's rights were violated by the judge's disallowing him to represent himself during the penalty phase is nowhere more apparent than when counsel placed on the record that they pursued a penalty phase strategy at odds with what their client directed them to do. Appellant did not want his family dragged "through the mud," but despite his wishes, counsel presented the jury with appellant's social history over his *known* objections.

Significantly, the mitigation case that appellant did not want presented to the jury was one focused exclusively on his family history. Wilson called Te Anne Oehler, a licensed social worker, to the stand to testify about the family. She did not portray a very positive portrait of the family—appellant's father drank excessively and was controlling, and his mother was not a happy person. R. 2752, l. 8—2754, l. 15. Ultimately they divorced. R. 2757, ll. 21-25.

Oehler met with a number of appellant's family members to prepare for this testimony. R. 2776, l. 24—2777, l. 2. At trial, appellant's counsel called a number of appellant's family members to testify over appellant's objection,—Karen Reeves, a sister; Rick Winkler, a brother; Jody McDougal, another sister; and appellant's mother, JoAnne Winkler. Each of these witnesses essentially begged the jury to spare their loved one's life. Ms. Reeves, apparently, was crying. R. 2750, ll.5-7; R. 2795, ll.15-16; R. 2795, ll. 16-18; R. 2796, ll. 17-18; R. 2801, ll.2-7; R. 2801, ll. 23-24; R. 2804, ll.17-21; R. 2805, ll. 13-14; R. 2808, ll. 18-24.

Appellant clearly did not wish to put his family through this ordeal -- and to beg for his life -- which he had the right to decide. Nevertheless, over his objections, defense counsel proceeded with the case they believed they were entitled to present. Appellant was denied his right to self-representation as guaranteed by Faretta, and appellant respectfully submits that this Court should remand for a new sentencing hearing.

5.

The court erred by failing to properly provide appellant with *Faretta* warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary.

According to Faretta:

Although a defendant need not have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.

Id. At 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. at 279).

The Faretta colloquy in this case was inadequate because the judge focused on appellant's legal acumen, and not on his knowing and voluntary waiver of the right to represent himself. The judge's approach, then, violated Faretta. Also, the judge failed to conduct a proper colloquy to explore the reasons surrounding appellant's request to represent himself. As in State v. Fuller, supra this omission requires reversal. Id. At 242.

The judge's Faretta colloquy was insufficient because the judge focused on appellant's ability to adequately represent himself, and not whether he was knowingly and voluntarily waiving his right to counsel. Repeatedly the judge asked appellant about sophisticated rules of evidence and the death penalty statute. As seen supra, appellant understood what a leading question was, but he did not know the nature of an excited utterance. Under the judge's exacting standard, only an attorney—and likely, only a

criminal defense attorney—would ever been entitled to represent himself in a death penalty trial. This clearly was not what Faretta contemplates.

Additionally, the judge should have looked to this state's law to determine if appellant's waiver was knowing and voluntary. The judge should have considered the following factors: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation, (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002); State v. Cash, 309 S.C. 40, 419 S.E.2d 811 (Ct.App.1992).

Under these factors, it is apparent that appellant was capable of making a knowing and voluntary waiver of his rights. However, as seen above, the trial judge essentially brushed aside even the state's assertion that he should engage appellant in a full Faretta colloquy stating he thought he had done so. He had not, and in this instance he should have heeded the solicitor's advice, and the continued representations of defense counsel that appellant was able to represent himself. Further, the judge told defense counsel

Wilson that he had "heard enough" when Wilson informed him appellant wished to address the court on this subject.

As in State v. Fuller, supra, the failure to engage appellant in a full and focused Faretta waiver hearing was reversible error.

6.

The court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection since appellant still had the right to control the case in mitigation and waive mitigation evidence he did not want the jury to consider even where the judge denied appellant the right to represent himself.

Relevant facts

As seen, the trial judge ordered defense counsel to keep him informed every two weeks about the progress on the preparation of appellant's defense and case in mitigation of sentence. July 13, 2007 order R. 3549. The judge had thus injected himself into overseeing the defense in this case in a highly unusual manner.

After social worker Te Anne Oehler testified that appellant's father drank excessively and was controlling, and that his mother was not a happy person, and that they ultimately divorced,⁹ the following occurred:

The Court: Mr. Wilson?

Mr. Wilson: As you know, the record will reflect that I put a social, social history through a sociologist, Ms. Oehler, in - - regarding the defendant and his history and his family. And the defendant wants me to let the court know that he had asked me not to put up any social history and that I put that up in spite of his objections. And for the record, I'm noting that he did ask me not to put any social history in because he didn't want anything derogatory said about his family. But in my judgment as a lawyer, I felt it was the appropriate thing to do and I did it.

⁹ R. 2752, l. 8 — 2757, ll. 21-25.

The Court: All right. That's noted. Be noted. Thank y'all very much. All right.

The Defendant: Sir, I'd like to also again put for the record that, that again disobeying what I, I asked him, what I - - you know, I told him specifically that I did not want my family dragged through the mud, and he did it anyway.

I'm asking again for a new lawyer. This is the third time that he's done that. He did it on the witness stand earlier today, and it's - - everything I'm asking him to do, he's going against me. I asked him for a recess, he ignored me while that was going on, while his, while his - - Ms. Te Anne was doing that, and he ignored me.

The Court: All right. That's noted. That's noted, Mr. Winkler. Noted for the record.

The Defendant: Thank you.

The Court: All right. Do you have your next witness in the courtroom, Mr. Wilson?

Mr. Wilson: Yes.

The Court: Okay. Bring the jury in, please.

(The jury enters at 6:36 p.m.)

R. 2788, l. 5 - 2789, l. 19.

With the judge's approval for placing "mitigation evidence" before the jury over appellant's objection appellant's counsel then called a number of appellant's family members to testify over appellant's objection. As seen above, they were Karen Reeves, a sister; Rick Winkler, a brother; Jody McDougal, another sister; and appellant's mother, JoAnne Winkler. Each of these witnesses essentially begged the jury to spare their loved one's life. Ms. Reeves, apparently, was crying. R. 2750, ll.5-7; R. 2795, ll.15-16; R.

2795, ll. 16-18; R. 2796, ll. 17-18; R. 2801, ll. 2-7; R. 2801, ll. 23-24; R. 2804, ll. 17-21; R. 2805, ll. 13-14; R. 2808, ll. 18-24.

Discussion

Appellant had the right to prevent his attorneys from calling social worker Oehler to the stand to provide his social history, and he had the right to keep them, also, from calling his family members.

If this Court determines that appellant did not have the right to fire his attorneys and conduct the penalty phase of his trial pro se, and if the Court further determines that the judge did not abuse his discretion in forbidding appellant from proceeding pro se, then appellant still had the right to exercise control over the mitigation evidence his attorneys presented on his behalf. As this Court will recall in Hojan v. State of Florida, supra, the Supreme Court of Florida acknowledged a defendant's right to control the mitigation case presented on his behalf. The court specifically acknowledged that "[T]he defendant, not the attorney, is the captain of the ship." Id. At 1211 (*quoting Nixon v. Singletary*, 758 So.2d 618, 625 (Fla. 2000)). Here, conversely, the judge did not credit appellant's dissatisfactions. The judge essentially gave the defense team *carte blanche* in their handling of appellant's mitigation case despite his meticulous oversight of it prior to trial.

Appellant's counsel had requested that the judge allow appellant to represent himself during the penalty stage. As seen above, the judge then approved of counsel presenting mitigation evidence over appellant's objection. It is clear from the judge's response to appellant's complaints about the case being presented on his behalf that he simply did not recognize that appellant had any right to exercise any control over the case

being presented by the attorneys. The judge's actions failed to acknowledge the highly personal quality of penalty phase litigation, and failed to acknowledge that the Federal Constitution provides for the "assistance" of counsel and not the right of counsel to exercise sole discretion in the presentation of mitigation on a defendant's behalf. See McKaskle v. Wiggins, supra ("The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defense," implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial."). Respectfully, this Court should grant appellant a new sentencing hearing.

7.

The court erred by refusing to direct a verdict on the statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime, since there was lack of evidence to support it.

The aggravating circumstance at issue in the case is "the murder of a witness or a potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." See S.C. Code § 16-3-20(C)(a)(11). There was no evidence to support that aggravating circumstance being sent to the jury. See State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007); State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000).

Defense counsel correctly moved for a directed verdict on this aggravating circumstance: "I would submit to the court that while there has certainly been evidence produced of a crime, [but] there has been no evidence produced that it was for the purpose of deterring or impeding the criminal procedure which would have followed." The trial judge responded, "I was thinking that also, Mr. Wilson, that – what was going to be introduced in that regard." However, the judge then stated that he thought "[t]here's sufficient evidence, Mr. Wilson, circumstantially for a jury to accept beyond a reasonable doubt. They may not, but they could find that's an aggravating circumstance based on circumstantial evidence." R. 2307, l. 2 -2309, l. 7.

Defense counsel renewed his motion at the close of the evidence. The trial judge again denied the motion. R. 2317, ll. 4-15.

There was certainly no direct evidence appellant killed the decedent for the purpose of impeding the criminal prosecution against him. Interestingly as to motive, as seen, J [REDACTED] G [REDACTED] admitted that his mother was seeing his father (whom Officer Knoch said he told him was the killer) again, and that his father had stayed with his mother overnight at their condominium. Further, J [REDACTED] acknowledged that his father was expected at their home at about 6 p.m. that day. The murder occurred at approximately 5:30. J [REDACTED] also said that his father was upset that his mother ever "got with Mick," and that his father "didn't have any particular love for Mick." R. 1445, l. 21 - 1454, l. 5. If anything, given the entire record, this appears to be a crime of passion.

The opinion of the North Carolina Supreme Court in State v. Oliver, 302 N.C. 28, 274 S.E.2d 183, 204 (1981), is instructive given that there was no evidence here, for example, of a pending court date, evidence the decedent was cooperating in a prosecution, evidence appellant had a criminal lawyer, or of any plea discussions. There was simply a failure of evidence on this aggravating circumstance. The Oliver court held: "Where it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolve in favor of the defendant." When "a person's life is at stake . . . the jury should not be instructed upon one of the (aggravating) statutory circumstances in a doubtful case. State v. Goodman, 298 N.C. at 30, 257 S.E.2d at 588, supra."

Here, the jury was being asked to find this aggravating circumstance beyond a reasonable doubt merely because the decedent may have been a witness in some future trial, and because appellant had been arrested. The statutory aggravating circumstance requires that *the motive for the murder* was for "the purpose of impeding or deterring

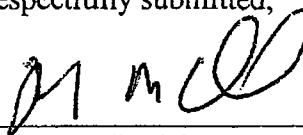
prosecution.” The state simply failed to prove that in this case. The jury was asked to speculate that because appellant had been arrested for a crime against the decedent, that he murdered her to keep her from testifying at some trial to be held at some point in the future. Such speculation has never been sufficient to survive a directed verdict motion because it would authorize a verdict based on suspicion. See State v. Mitchell, 341 S.C. 404, 409, 535 S.E.2d 126, 127 (1999). “Suspicion” implies a belief as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

Further, the remaining burglary aggravator was tainted by the fact that J [REDACTED] G [REDACTED]’s interview with Detective Pitts was improperly admitted as a prior consistent statement. As seen, during that interview J [REDACTED] stated that appellant kicked in the door, entering without consent, and that is what constituted the burglary. See Interview at 3-4; R. 3495 - 3496. As stated above, the improperly admitted interview of the only eyewitness to the crime, J [REDACTED], improperly bolstered his own testimony to the detriment of appellant’s testimony. Appellant testified that he had been to his estranged wife’s new home often, and that he entered with consent. Since the only remaining aggravating circumstance, the burglary, pursuant to S.C. Code § 16-3-20 (C)(a)(1)(c) was tainted by this improper evidence, appellant’s death sentence must be vacated since after the elimination of the invalid aggravator, appellant’s death sentence no longer rests on firm ground. See Tuggle v. Netherland, 516 U.S. 10, 13 (1995).

CONCLUSION

By reason of the forgoing arguments, appellant's conviction should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial. In the alternative, appellant's death sentence should be vacated, and this case remanded for a new sentencing trial.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT.

April 5, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

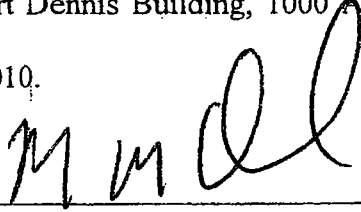
V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

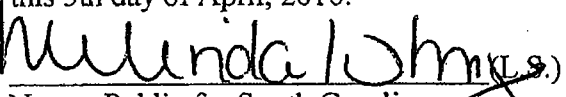
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 5th day of April, 2010.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 5th day of April, 2010.



Notary Public for South Carolina
My Commission Expires: October 30, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY

James E. Lockemy, Circuit Court Judge

THE STATE

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.

APPELLANT.

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by admitting a tape recording, as a prior consistent statement under Rule 801(b)(1)(B), SCRE, of an interview wherein the decedent's son, J. [REDACTED] G., told Detective Ann Pitts that his "stepfather," appellant, shot his mother since this statement was not admissible as a prior consistent statement because all of the elements of Rule 801(b)(1)(B), SCRE were not met, and the fact Officer Knoch testified that J. [REDACTED] told him immediately following the murders that his "Dad" shot his mother did not make this subsequent statement admissible since there was no accusation of a recent fabrication, improper influence or motive?
2. Whether the court erred by allowed the transcript of the 911 tape to be given to the jury when it asked to "read over the 911 transcript" during deliberations since the transcript was not in evidence, and it was not an accurate transcription of the interview?
3. Whether the court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary?
4. Whether the court erred, alternatively, by refusing to allow appellant to represent himself during the penalty stage of the trial since appellant had the right to represent himself during the penalty phase under the

reasoning of Faretta, and his case was not governed by the State v. Brewer abuse of discretion standard?

5. Whether the court erred by failing to properly provide appellant with Faretta warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary?
6. Whether the court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection since appellant still had the right to control the case in mitigation and waive mitigation evidence he did not want the jury to consider even where the judge denied appellant the right to represent himself?
7. Whether the court erred by refusing to direct a verdict on the aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime aggravator since there was a lack of evidence to support it?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court erred by admitting the audio tape recording as a prior consistent statement under Rule 801(b)(1)(B), SCRE, when defense counsel implicitly and explicitly asserted that J. [REDACTED] G. fabricated his testimony when he stated he told Officer Knochs that it was his stepfather who shot his mother?
2. Whether the trial court erred in allowing the jury to review the transcript of the 911 tape when the jury was only allowed to see the transcript in the courtroom with the defendant and counsel present and only when the audio tape was played as requested by the jury?
3. Whether the trial court correctly held that it was within the court's discretion to grant or deny Appellant's Motion to proceed pro se when the motion was not timely made?
4. Whether the trial court abused its discretion when it denied Appellant's Motion to proceed pro se when the court determined that granting the motion would cause undue delay, the court had concerns regarding Appellant's ability to represent himself as the result of his preparedness and his anxiety condition, and there was the potential of jury confusion caused by the change in Appellant's representation?
5. Whether the trial court erred in not conducting a full Faretta inquiry when Appellant's request to proceed pro se was not governed by Faretta?
6. Whether the trial court erred in allowing defense counsel to present mitigation evidence to which Appellant objected when no timely objection

to the testimony was made, and no argument regarding the allegation was presented on the record?

7. Whether the trial court erred in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11) when there was substantial circumstantial evidence supporting the charge?

STATEMENT OF THE CASE

On January 28 – February 8, 2008, Appellant Louis Michael Winkler ("Winkler") was tried by a jury for murder, first-degree burglary, and assault and battery of a high and aggravated nature. He was tried in the Horry County Court of General Sessions before the Honorable James E. Lockemy, Circuit Court Judge. Ralph J. Wilson, Esquire, and Assistant Public Defender Paul Elbert Rathbun, Esquire, represented Winkler. Solicitor J. Gregory Hembree, Esquire, Deputy Solicitor Francis A. Humphries, Jr., Esquire, and Assistant Solicitor Scott R. Hixson, Esquire, all of the Fifteenth Judicial Circuit, represented the State. On February 2, 2008, Winkler was convicted on all three charges. (R. p. 1903).

The State had filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (R. p. 1976). In the Notice, the statutory aggravating circumstances asserted were that the murder was committed during the commission of a burglary, S.C. Code Ann. Section 16-3-20(C)(a)(8); and that the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime under S.C. Code Ann. Section 16-3-20(C)(a)(11). (R. p. 1977). On February 8, 2008, the jury found there was evidence of both asserted aggravating circumstances beyond a reasonable doubt. (R. p. 2940). The jury recommended that Winkler be sentenced to death. (R. p. 2940). Judge Lockemy sentenced Winkler to thirty years confinement on the burglary conviction, and ten years confinement on the ABHAN conviction, both to be

served concurrently with a death sentence for the murder. (R. p. 2949). This appeal follows.

STATEMENT OF FACTS

On March 6, 2006, Appellant Louis Michael Winkler ("Winkler") broke into his estranged wife's condo in North Myrtle Beach, SC. (R. pp. 1430-31, State's Exhibit 1, 51). He knocked her son, J [REDACTED] G., out of a stool and onto the ground. (R. pp. 1431, 1433, State's Exhibit 1, 51). Winkler then shot the victim, Rebekah Grainger Winkler, once in the face at point blank range. (R. p. 1436, State's Exhibit 1, 51). According to Dr. Edward Leroy Proctor, Jr., the forensic pathologist who conducted the victim's autopsy, the victim received a very close range gunshot wound that entered her left cheek, penetrated her brain stem, and exited through the rear right side of her brain. (R. p. 1634). Dr. Proctor noted that the shot was probably fired within a distance of 12 to 18 inches, and no more than 24 inches of the victim. (R. p. 1634). Dr. Proctor further testified there was stippling around the wound that caused by the burning gunpowder coming from the end of the gun. (R. p. 1634). Dr. Proctor testified that death would have been instant. (R. p. 1637).

Winkler then walked over and pointed the gun at J [REDACTED]. (R. p. 1437, State's Exhibits 1, 51). Shortly thereafter, Winkler left the condo. (R. p. 1440, State's Exhibits 1, 51).

M [REDACTED] E [REDACTED] C., J [REDACTED] G.'s friend, testified that she was on the phone with him when she heard a loud pop noise, and a voice that was not J [REDACTED]'s say "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not -- I'm back, I'm back. I'm never going back to jail." (R. p. 1511-1512).

She then heard a hit and the phone went to static. (R. p. 1512). She also heard someone curse a few times, and then the phone went dead. (R. p. 1512).

Andrew Cooper, a former crime scene technician for the Horry County Police Department, took a picture of the door jamb of the victim's condo door. (R. pp. 1546, 1554). He testified that it appeared there had been a forced entry because the door jamb, the door frame, the lock mechanism, and other parts of the door had been busted. (R. pp. 1554-55, See State's Exhibit 8). He also testified that a reddish colored liquid was collected from the kitchen countertop. (R. pp. 1559, 1570-71). Kimberly Hahn, a former SLED scientist, testified that she compared the blood swabs recovered from the counter of the victim's residence to Winkler's blood standard, and the blood from the counter matched Winkler's blood profile. (R. pp. 1744, 1747). Cooper also photographed and collected a broken cordless phone. (R. pp. 1562-63). Cooper also testified that a projectile was recovered from the baseboard of the wall behind the victim. (R. pp. 1566-68). They did not locate a shell casing on the scene. (R. p. 1572).

Toby Boyd, a violent crime detective for the Horry County Police Department, testified that police were unable to find and arrest Winkler in the days after the homicide. (R. p. 1645-46). On March 13, 2006, they formed a task force to apprehend Winkler. (R. p. 1646). On March 20, 2006, two weeks after the homicide, Winkler was spotted in the wood line of a hole at the Eagle Nest Golf Course. (R. p. 1647). The police set up a perimeter around the area where Winkler was last seen on the golf course. (R. p. 1651). Boyd spotted Winkler moving inside the perimeter. (R. p. 1652). He testified that Winkler was

wearing a dark pullover. Boyd requested that the helicopter assisting with the search scan the area. (R. p. 1652). The helicopter had to refuel. As the helicopter returned to the scene of the search, Boyd saw Winkler in the wood line. (R. p. 1653). Police were able to apprehend Winkler without any problems. (R. p. 1653). Boyd noted that Winkler appearance was consistent with someone who had been outside for a period of time. (R. p. 1657).

William Scott Rutherford, captain of the Horry County Police Department's Special Operations Division, testified that he and his team were called in to assist in the apprehension and arrest of Winkler. (R. pp. 1682-83). On March 20, 2006, two of the individuals in the bloodhound tracking team screamed contact in the search of the area. (R. p. 1685). He testified that he went to the sound of where the other officers indicated they had made contact with Winkler. (R. p. 1686). They were standing over Winkler with their guns drawn, and Winkler was laying face down with his hands behind his back. (R. p. 1686). Rutherford handcuffed Winkler and searched Winkler. (R. p. 1686). They recovered a Jennings .380 pistol from his right front pants pocket. (R. pp. 1686-87). Five live rounds were in the pistol, but there was not a live round in the port. (R. p. 1687). During a full search of Winkler, they recovered eighteen rounds of .380 ammunition, a guard lock blade knife, and a brown bi-fold wallet. (R. pp. 1689-91). In the wallet, there was a newspaper clipping about the shooting and Winkler's license. (R. pp. 1691-92). Rutherford also testified that they recovered a green knit cap and a rolled up sweatshirt as part of search for Winkler. (R. pp. 1692-93).

Ann Pitts, the lead detective in Winkler's investigation, testified that she went to Winkler's residence three days after the homicide. (R. p. 1710). Police found the victim's address on a piece of paper at the residence. (R. pp. 1709-10).

Vello Paavel, a firearms and toolmark examiner for SLED,¹ testified that he received a Walther PPK pistol² .380 pistol, a Jennings Bryco .380 pistol, 1 fired projectile, and 18 unfired cartridges with the Jennings Bryco pistol. (R. pp. 1757, 1760-61). He testified that there was dust, lint, and oil present in the bore of the Walther PPK, and that indicated it had not been fired since the last time it was cleaned. (R. p. 1769). He also noted that the magazine of the Walther PPK was full when he received it. (R. p. 1773). He also noted that the Bryco Jennings pistol's magazine held six cartridges, but only five were in the magazine when he received it. (R. p. 1777). Paavel concluded that the Jennings Bryco pistol fired the fired bullet. (R. p. 1787).

Sentencing Phase

Several witnesses testified on behalf of the State during the sentencing phase of Winkler's trial. The first witness to testify was Winkler's first ex-wife, Carla Kaiser. She testified that she first met Winkler when she was a freshman in high school and he was a senior. (R. p. 1992). She noted that they never had problems while she was in high school, but when she went to college, things started changing. (R. p. 1992). She testified that he was a jealous boyfriend, and at one point he called her five times in one night to ask her what she was

¹ Paavel was qualified as an expert in firearms and toolmark examination. (R. p. 1760).

² This pistol was recovered from underneath the bedroom pillow at the condo where the victim was shot.

doing. (R. pp. 1993-94). Kaiser and Winkler dated for three years, and were then in an on-again, off-again relationship for another two years. (R. p. 1994). When they were broken up, Kaiser testified that if Winkler saw her talking with someone else, Winkler would harass that person. (R. pp. 1994-95). She noted that Winkler was not always like that, but it was his jealousy that pushed her away. (R. p. 1995).

Kaiser related that on her 21st birthday, Winkler punched her square in the nose and knocked her out in front of a bar where her friends took her to celebrate her birthday. (R. p. 1996). She did not have direct contact with him after that. However, she did attempt to recover some coats and other items she had left at his apartment. (R. p. 1997). Kaiser testified that while she was there, Winkler forced himself on her sexually, and that was how she became pregnant with her daughter. (R. p. 1998). The two then married. (R. p. 1999). Kaiser testified that the marriage was good for the first few months. (R. p. 2000). However, she noted things changed when Winkler lost his job with an auto parts store and he started working construction with one of his friend's father's construction company. (R. pp. 2000-01). She noted that he would then start going to a bar right after work, and she would not see him until 1 or 2 a.m. (R. p. 2001). Winkler would come home drunk, and sometimes trouble would start. (R. p. 2001). She noted that Winkler would accuse her of being with someone else or doing something whenever she went out. (R. p. 2001). She testified that he would get very angry and would either kick her or throw her around. (R. p. 2001). Physical violence was a part of their relationship. (R. p. 2001). Sometimes

Winkler would hit her; a lot of times he would throw her up against the wall or kick her while she was against the wall. (R. p. 2002). She also testified that the longer the drinking went on, the worse it got. (R. p. 2002). She testified that he kept a long gun next to the bed, and he would sometimes point it at her and ask her if she wanted to die that day. (R. p. 2002). He did that on three different occasions. (R. p. 2003). He would accuse her of being with someone else. (R. p. 2002). Kaiser also testified that girls who were not her friends would come to their apartment and ask Winkler to go to the bar with them. (R. p. 2003). Winkler would go with them. (R. p. 2003).

Kaiser testified that on the day her daughter was born, Winkler came home early, yelling at her. (R. p. 2004). She testified that he had her up against a wall, and he then kicked her in the stomach six times. (R. p. 2004). He then called her mother, told her mother that Kaiser was about to have the baby, and then told Kaiser to go to the hospital because her mother would be looking for her there. (R. pp. 2004-05). Kaiser went to the hospital and went into labor while there. (R. p. 2005).

When she returned to the family apartment, everything was okay for a couple of weeks. (R. p. 2006). While Winkler did not want any of Kaiser's friends to see the baby or for Kaiser to have any visitors when he was not around, she did note that the violence did initially slow down. (R. p. 2006). One day, he did come home and punched her in the face. (R. p. 2006). Kaiser testified that she talked with Winkler's mother about the violence, and she left the apartment for a little over a week. (R. pp. 2007-08). When she did return,

Winkler was nice and had stopped drinking. (R. p. 2008). However, the final straw in Winkler's and Kaiser's relationship came during Christmas Eve after the baby was born. (R. p. 2008). Kaiser testified that Winkler did not want to go to his mother's for Christmas. (R. p. 2009). Kaiser went to go pick up the baby, who was being kept by Kaiser's mother at the time. (R. p. 2009). When she got back, Winkler stated he did not want to go. (R. p. 2009). He left, but when he came back, he started throwing Kaiser up against the wall. (R. p. 2010). Kaiser testified that Winkler threw framed pictures at her, and her arms were cut by the frames and broken glass. (R. p. 2010). She testified that Winkler then took a gun out, cocked it, and said he would shoot her right then. (R. p. 2010). She testified that he accused her of cheating, then started beating on her. (R. p. 2010). After Winkler finished beating and kicking her, Kaiser wrapped her hands in towels because of the blood, grabbed her purse, and ran. (R. pp. 2010-11). She went to Winkler's mother and showed her what Winkler had done. (R. pp. 2011-12). Kaiser then went to the hospital. (R. p. 2012). She later pressed charges against Winkler. (R. p. 2013). She left with the baby and moved in with her parents in North Carolina. (R. p. 2015). She went back to Ohio for the court hearing on the assault charges. (R. p. 2017). She testified that he was found guilty. (R. p. 2017). They later got divorced. (R. pp. 2019-20). She testified that Winkler somehow got her parents' phone number and he started calling and harassing them. (R. p. 2019).

Denise Ricketts, Winkler's second ex-wife, also testified at trial. (R. p. 2043). She testified that there were no problems when they were initially dating.

(R. p. 2045). However, as time passed, the character of their relationship changed. (R. p. 2045). She noted that Winkler started being controlling, verbally abusive, and physically abusive. (R. pp. 2045-46). Ricketts testified that the problems started about one year into the relationship. (R. p. 2046). The couple was invited to a Super Bowl party, but Ricketts did not want to go. (R. p. 2046). She testified that Winkler grabbed her by the neck and threw her to the floor; they ended up going to the party as a result of the fight. (R. p. 2046). She later forgave Winkler. She did note there were other instances of verbal abuse. (R. p. 2046). She also testified that Winkler was controlling, and he tried to keep her away from family and friends. (R. p. 2047). She testified that in April of 1997, before they were married, he came home one night and wanted to argue. She asserted that he kicked her in the legs and drug her around the house for a while, and then he threw her out the back door in her bedclothes and locked the door. (R. pp. 2047-8). She reported this incident to police, and Winkler was later found guilty of criminal domestic violence as a result. (R. pp. 2049-51).

Ricketts testified that she forgave Winkler after he later apologized. (R. p. 2052). She noted that things between them were fine for a while, but eventually, the same problems arose again. (R. p. 2052). Winkler started drinking a lot, and when he came home he would be mean to her. (R. p. 2052). They married in September 2001. (R. p. 2053). She testified that life was bad during the marriage. (R. p. 2053). He drank a lot, did not come home from work, and he was verbally abusive. (R. p. 2054). Ricketts also noted that Winkler was still controlling. (R. p. 2054). She later left Winkler, in part because she was in fear

he would become physically abusive. (R. pp. 2054-55). She indicated that Winkler began to follow her, and he would leave notes in her car and would call her cell phone. (R. p. 2056). She later took out a restraining order on Winkler after he threatened to kill her when he saw a suitcase in the back of her truck. (R. p. 2057).

Jeff Cauble, a Patrolman First Class with the Horry County Police Department, testified that he responded to a call to a residence where Winkler was present. (R. p. 2067). He initially started to transport Winkler to the North Myrtle Beach Police Department, but he changed course after Winkler started gasping for air and complaining of chest pains. (R. p. 2068). Instead, he took Winkler to the Seacoast Medical Center. (R. p. 2068). At that time, Winkler was very angry with Patrolman Cauble, and it took a couple of people to get Winkler out of the vehicle. (R. p. 2068). Winkler spat on Cauble. (R. p. 2068). That led to a simple assault and battery conviction against Winkler. (R. pp. 2069, 3468-69).

Kidnapping and Criminal Sexual Conduct Against Victim Rebekah Winkler

On October 10, 2005, Winkler kidnapped and sexually assaulted Rebekah Grainger Winkler, the murder victim. Allen Large, a detective with the Horry County Police Department, testified that on that evening, he received a page from dispatch regarding a missing person reference to a possible domestic incident. (R. p. 2077). The missing person was Rebekah Winkler. (R. p. 2077). Winkler's vehicle was first spotted behind the Seacoast Medical Center. (R. p. 2078). Another officer had moved the vehicle out of the roadway. (R. p. 2082).

A floor mat, a shoe, and a cigarette butt were recovered from the vicinity of where the Winkler's vehicle was located. (R. p. 2082). The car was towed. (R. p. 2085). Large testified that while the scene where Winkler's car was being processed, dispatch reported that the victim's car was located. Large left the scene where Winkler's car was found and went to scene where the victim's car was found. (R. p. 2086). Her vehicle was found off the road in some trees. (R. p. 2086). The Horry County Police Department activated its dog team to try to locate two missing persons at that point. (R. p. 2091). The victim was later found next to Stephen's Crossroads, which was where the magistrate's complex and library was located. (R. p. 2092).

Phyllis Richardson, who worked for the Horry County Probate Court on October 11, 2005, testified she was working at the satellite office located over by Stephen's Crossroads. (R. p. 2097). She testified that when she arrived at the parking lot that morning around 7:30am, she saw a woman walking in the lot being followed by a man. Richardson noted that the woman had on a long shirt, but the woman was not wearing any shoes. (R. pp. 2099-2100). According to Richardson, the woman looked distraught and was acting confused. (R. p. 2100). Richardson did not recognize the woman. She also noted that the man was about thirty feet behind the woman, and he was wearing a pair of shorts but not shirt. (R. p. 2101). Richardson noted that his hands were in the air as if he was raging and irritated; however, she could not hear what he was saying. (R. pp. 2101-02). Richardson later entered the office where she worked. She testified that shortly thereafter, she saw the woman from the parking lot in the

room where the probate court performed ceremonies. (R. p. 2104). Richardson noted that the woman was on the phone, but she could not hear what she was saying on the phone. (R. p. 2104). Richardson testified that she did not recognize the woman that was making the call, but described the woman's hair as being very matted, tangled looking, with some bald spots. (R. p. 2109). Richardson also indicated that the building became very active with police and emergency medical personnel later that morning. (R. p. 2109). Richardson later learned it was the victim, Rebekah Winkler, who was making the call in the other room. (R. p. 2110).

Curtis L. Thompson of the Horry County Police Department testified that he was the first officer to arrive at the building. (R. p. 2117). He found a white female who was very afraid in the building. (R. p. 2118). Thompson indicated that it appeared the victim had been in some sort of altercation, and she confirmed that she was Rebekah Winkler. (R. p. 2118). Thompson further testified that the left side of her head looked like it had been ripped out, she had black eyes, abrasions, and other scratches. (R. pp. 2118-19). After EMS transported the victim to the Seacoast Medical Center, Thompson assisted in the search for Winkler. He and Officer Hemingway located Winkler at a third person's residence. (R. pp. 2124-25). They arrested Winkler, and Hemingway transported him to the M.L. Brown Building. (R. pp. 2125-26, 2130).

Andrew Cooper testified that he processed both the Isuzu Rodeo and Land Rover that were connected to the kidnapping investigation. No evidence was collected from the Isuzu Rodeo. (R. p. 2137). Cooper testified that the Land

Rover, which was registered to Rebekah Winkler, appeared to have been wrecked. (R. p. 2140). Cooper took pictures of the vehicle as he processed it. He testified there was blood on the driver side seat, and that the floor mat was missing from the driver's side of the car. (R. p. 2141). He also noted there was some blood around both seats and around the center console. (R. p. 2141). On the passenger's side, there were several blood smears and spots on the interior panel of the door. (R. p. 2142). Cooper collected blood from the door handle of the interior driver's side door; swabs on the outside edge of the driver's side front seat, swabs from the exterior of the steering wheel; blood spots in the dash; blood spots from the back support; spots in the area between the center console and the edge of the driver's front seat; and blood on the passenger side front seat. (R. pp. 2144-47). Cooper also took pictures of Winkler's face, arms, and legs. (R. p. 2150). Cooper transported the blood swabs and the victim's rape kit to SLED. (R. p. 2151).

Haley Grainger, the victim's younger daughter, testified that she first met Winkler at the house where the Rebekah, Haley's sister, and Haley's brother were staying. (R. p. 2162). She testified that during the early stages of Winkler's and the victim's relationship, Winkler seemed to be fine. (R. p. 2164). Haley testified that after Winkler and Rebekah had been married for a couple of years, Rebekah and J [REDACTED] G. moved out of Winkler's home and moved into Haley's condo. (R. pp. 2165-66). The victim slept in the bedroom on the first floor, and J [REDACTED] slept on the couch. (R. p. 2166). When Haley was not there, J [REDACTED] slept in the bedroom upstairs. (R. pp. 2166-67). On October 10, 2005, she and

her sister became concerned about their mother's whereabouts. (R. p. 2167). Haley's sister had called. (R. p. 2167). That led Haley and her boyfriend to start looking for Rebekah. (R. p. 2168). Initially, they went to Winkler's home. (R. p. 2168). When they found his car was not there, they saw a Land Rover in the woods down the road. (R. p. 2168). It was later identified as her mother's Land Rover. (R. p. 2169).

Haley saw her mother the next morning at the Seacoast Medical Center. (R. p. 2170). Haley testified that Rebekah was in pretty bad shape: her face was really messed up, her hair was all tangled and looked horrible, and she had scratches all over. (R. p. 2170). At first, Rebekah did not want her children to see her, but they talked her into it. (R. p. 2170). Haley testified that after the incident, her mother was very depressed and could not sleep. (R. p. 2172). She also observed that Rebekah was always scared, and she did not take any steps to change her outlook. Haley did note that Rebekah took steps to protect herself. Rebekah borrowed a gun from Haley's father (Rebekah's ex-husband Roger), and Rebekah received a can of mace from her mother (Haley's grandmother). (R. p. 2172).

Haley also identified a toe ring, an earring, a hair clip, shorts, and a shirt with a wad of hair in it that all belonged to Rebekah. (R. p. 2171). Jeff Gause, a police officer with the Horry County Police Department, testified that he recovered the shorts, a shirt with a wad of hair, a hair clip, and some underwear from a partly wooded area of the county that he had been informed was part of the area in which the assault took place. (R. pp. 2176-80). Neil Livingston, a

detective with the Horry County Police Department, testified that he recovered an earring and another piece of jewelry from the inside of a commercial building that was under construction in the Little River section of Horry County. (R. pp. 2184-91).

Lisa Gore, a staff nurse at Seacoast Medical Center, treated the victim when she was brought in on October 11, 2005. (R. pp. 2195-96). Gore testified that the victim had injuries to the left eye, some swelling to the jaw area, bruising around the neck, dried blood about the face, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, and a bite mark to the face. (R. pp. 2205-06). Gore also testified that the victim had a large amount of hair removed from her head, along with some matting and disarrangement of her hair with leaves and debris mixed in. (R. p. 2206). Gore also indicated there were bruises to Rebekah's arms and wrists, the tops of her hands, her neck area, scrapes on her torso, belly, and back, and contusions and scrapes to her lower legs, thighs, and feet. (R. pp. 2207-10). A sexual assault evidence kit was collected from Rebekah. (R. pp. 2213-15).

Ann Pitts responded to the Stephen's Crossroads Complex. (R. p. 2220). She later responded to the Seacoast Medical Center to interview the victim. (R. p. 2221). Pitts testified that the victim seemed to be in shock, and was very afraid. (R. p. 2222). Rebekah did tell Pitts what happened and where it happened. (R. p. 2222). The victim also described the clothes she was wearing. (See R. p. 2226). While those clothes were not recovered when Pitts, the victim, and Detective Livingston initially went to the area, they were later recovered

when members from the crime scene unit and dog team searched the area. (R. p. 2226). Pitts testified that Winkler was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping on October 11, 2005. (R. p. 2227). He was found at a friend's house. (R. p. 2227). When he was arrested, he was wearing blue jean shorts, a t-shirt with some type of printing on it, and some brown shoes. (R. p. 2228). Pitts was also present at Winkler's first bond hearing. (R. p. 2230). Bond was initially denied in his case. (R. p. 2231). At a second bond hearing, Winkler's bond was set at \$150,000, and he was required to wear an electronic monitor while out on bond. (R. pp. 2231-33). Pitts also testified that at Winkler's third bond hearing, his bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment. (R. pp. 2233-34). According to the bond, the monitor was to be off from 4pm to 6pm.

John Ortuno, a DNA analyst for SLED, testified that the DNA from the semen found in the rectal and vaginal swabs from the sexual assault evidence collection kit matched Winkler's DNA. (R. pp. 2244-49). He also testified that the blood found in the Land Rover belonged to the victim, but there were mixtures with a secondary profile that could not be reliably interpreted. (R. pp. 2249-51).

Tammy Cox was one of Rebekah's friends. (R. pp. 2262-63). They first met when Rebekah trained Cox in medical transcription. (R. pp. 2263-64). Cox testified that Rebekah was shy until you got to know her. (R. p. 2264). She also described Rebekah as a very sweet and caring person who worked all the time. (R. p. 2265). Cox indicated that Rebekah did not like having her picture taken.

(R. p. 2266). Rebekah helped Cox with her work and with her illness during Cox's second pregnancy. (R. pp. 2266-67). Cox testified that Rebekah was married to Roger Grainger before she married Winkler. (R. pp. 2268-69). They split in 2001. (R. p. 2269). When Cox learned of Rebekah's relationship with Winkler, she never saw them out much. (R. p. 2269). After Rebekah married Winkler, Cox hardly ever saw her. (R. p. 2270). Cox testified that they only talked on the phone during the day when Winkler was at work. (R. pp. 2269-70). Cox became aware that there were problems in Rebekah and Winkler's relationship in August or September. (R. p. 2270). She learned of the assault in October 2005. (R. p. 2271). Cox spent time with Rebekah between October 2005 and Rebekah's murder in March 2006. Cox noticed changes in Rebekah's personality. (R. p. 2271). Rebekah could not work any more and did not want to do anything any more. (R. p. 2272). Further, Rebekah did not go out, she lived in fear every day, and she could not sleep at night. (R. p. 2272). Cox stated that she was a totally different person, and that she was never the same person. (R. pp. 2272-73).

Jill Shelley, Rebekah's older daughter, was the last witness to testify for the State during the sentencing phase. Shelley testified that she did not like her mother's relationship with Winkler or Winkler when it started to get more serious. (R. p. 2287). Shelley testified that it was just a few months after they started dating that Winkler was asking Rebekah to move in with him. (R. p. 2288). Shelley indicated that Winkler was not very friendly, and when she visited his home, she felt unwelcome. (R. p. 2288). After Shelley had her first child,

Rebekah's first grandchild, Winkler did not really want them around his house. (R. p. 2289). Winkler also would not let Rebekah leave her house to come see Shelley's family. Shelley testified that she did not know that they had trouble, but she knew something was not right because before Rebekah married Winkler, Rebekah would do things with the rest of the family that she no longer could after they were married. (R. p. 2290).

Shelley relayed to the court an incident that occurred in September 2005 when Shelley went to take her mother shopping. She could not get Rebekah on the phone, so she drove over to Winkler's house. (R. p. 2291). When she got there, she found Rebekah was beat up and her arms were covered in bruises. She also noted that the phone was continually ringing. (R. p. 2291). It was Winkler calling the house because Rebekah had made him leave. (R. p. 2291). Some time thereafter, Winkler returned to the house and started kicking the side door. (R. p. 2292). Winkler was yelling and screaming until Rebekah let him into the house. (R. p. 2292). Shelley threatened to call the police. Winkler responded by warning Rebekah that she knew what would happen if they called the police. (R. p. 2292). Shelley testified that Rebekah moved out of Winkler's home as a result of this confrontation. (R. p. 2292).

Shelley also testified about the night of the kidnapping. (R. p. 2293). Shelley indicated she first became concerned when she found out from her brother that he was not picked up from a football game on October 10, 2005. (R. pp. 2293-94). Shelley called the police when she first heard of the problem. (R. p. 2294). She noted that her mother's Land Rover was found that night, but

there was no sign of either Rebekah or Winkler. (R. p. 2295). Shelley saw her mother the next morning at Seacoast hospital. (R. p. 2295). Shelley testified that her mother was very beat up and dirty. (R. p. 2295). Rebekah's eye was very swollen, and her hair was matted with sand spurs and twigs. (R. p. 2296). Rebekah was also nervous, and she wanted them to do something with Winkler to get him away from her. (R. p. 2296). Rebekah was very depressed. (R. p. 2296). Shelley testified that Rebekah lived in fear all the time and was scared. (R. p. 2296). Rebekah did not go anywhere or do anything. (R. p. 2297). She could no longer work, and she was never the same. (R. pp. 2297-98). The final item of evidence presented by the State was a letter sent by Winkler to Jill Shelley while he was incarcerated. In the letter, Winkler asserted that had Shelley not gotten involved in he and Rebekah's business, Rebekah would still be alive. (R. p. 2300). He complained about Shelley's calling her mother to talk about Shelley's marriage, and he claimed that no one else in the family liked Shelley. (R. pp. 2300-01). Winkler claimed that the victim slept with everyone, and he alleged that he had pornographic movies of him and the victim having sex. (R. pp. 2301-02). He also threatened to post the video online. See (R. p. 2303). Winkler claimed that the victim saw him during the separation after the initial arrest, stated that Rebekah lied to police about the first set of charges, and blamed Shelley for her mother's death. (R. pp. 2302-03).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TAPE OF J [REDACTED] G.'S INTERVIEW WITH POLICE ON THE EVENING OF THE MURDER; THE TAPE WAS ADMISSIBLE UNDER RULE 801(D)(1)(B)

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007).

Relevant Facts

J [REDACTED] G. testified that he saw Appellant shoot and kill his mother on March 6, 2006. J [REDACTED] testified that he was talking on the house phone with his friend L [REDACTED] (M [REDACTED] E [REDACTED] C.). (R. pp. 1428-29). At the time, he was sitting in a bar stool at the bar near the kitchen in the apartment. (R. p. 1428). His mother was sitting on the couch in the living area, and she was watching television. (R. p. 1435). At around 5:30 pm, he heard a loud bam at the door. (R. pp. 1427-28). He testified that it did not sound like it was on the door. It was

just a loud boom. (R. pp. 1427-28). He heard a second bam five to ten seconds later. (R. p. 1430). After the second bam, the door to the apartment flew open. (R. p. 1430). At that point, he saw Appellant. (R. p. 1431). J [REDACTED] described Appellant as wearing a sweater, and noted that he was yelling. (R. p. 1431). He testified that Appellant was stating, "I'm back and you thought I was going to prison, something like that." He was yelling very loud. (R. p. 1431). J [REDACTED] later testified that he did not initially see a gun on Appellant when he entered the apartment. (R. p. 1437). He later saw Appellant pull the gun he used from his waistband after he walked into the apartment and knocked J [REDACTED] onto the ground. (R. pp. 1437-38).

According to J [REDACTED], Appellant approached him first once he entered the apartment. (R. p. 1432). When Appellant reached J [REDACTED], Appellant punched J [REDACTED].³ (R. p. 1432). J [REDACTED] testified that he fell off the bar stool, and the telephone "smashed and broke." (R. pp. 1433-34). J [REDACTED] testified that as he hit the ground, Appellant walked over towards J [REDACTED]'s mother. (R. p. 1435). "He just walked up to her and shot her." (R. p. 1436, l 17). J [REDACTED] further testified that Appellant was "[n]ot very far away. Like point blank." (R. p. 1436, l 19). Appellant fired just one shot. (R. p. 1436). The victim, Rebekah Winkler, fell to the ground face down. (R. p. 1436).

After shooting the victim, Appellant walked back over to J [REDACTED], who at the time was still lying on the floor. (R. p. 1437). J [REDACTED] testified that he told Appellant not to do anything stupid because Appellant was pointing the gun at

³ State's Exhibits 2 and 3, photographs of J [REDACTED] from the night of the incident, were entered into evidence at trial. (R. pp. 1432-33). J [REDACTED] testified it showed a red mark under his right eye that was the result of being punched by Appellant. (See R. pp. 1432-33).

him. (R. p. 1437). Appellant stood over J [REDACTED] for five to ten seconds, pointing the gun at his face. (R. p. 1438). J [REDACTED] testified that Appellant did not say anything at this point. (R. p. 1438). After Appellant paced for five to ten seconds, he left. (R. p. 1439-40).

J [REDACTED] testified that after Appellant left, he went and got his cell phone, closed the door to the apartment, and made sure Appellant was not coming back. (R. p. 1440). He then went to the balcony in the apartment and called 911. (R. p. 1440). J [REDACTED] was sitting on the balcony when the first police officer arrived on the scene. (R. p. 1441). J [REDACTED] went downstairs to let the officer into the apartment. (R. p. 1441). According to J [REDACTED], the officer asked if there were any weapons in the house. (R. p. 1442). J [REDACTED] informed the officer that his mother kept a gun underneath the pillow in her room. (R. pp. 1442-3). J [REDACTED] testified that the officer took him downstairs and put him in the back of his patrol car. (R. p. 1443). He noted that he did call his sister Jill, his friend L [REDACTED], and he thought he called his other sister, Haley. (R. p. 1443). Sometime later that evening, J [REDACTED] was taken to the police station. (R. p. 1443).

During cross-examination, J [REDACTED] testified that his father was Roger Grainger. (R. p. 1445). Roger was the victim's ex-husband, and the victim had been seeing him during her separation from Appellant. (R. pp. 1446-47). J [REDACTED] testified that Grainger was supposed to come over on the night of the shooting. (R. p. 1446). J [REDACTED] admitted that he forgot he called Roger after the shooting. (R. p. 1446). Defense counsel then asked J [REDACTED] if he remembered telling the first officer who arrived on the scene that it was his dad

who shot his mother. (R. p. 1447). J [REDACTED] denied he told the first officer that, and stated he told the officer it was his stepdad. (R. p. 1447). J [REDACTED] also testified that Roger was supposed to arrive at the apartment at around 6pm. (R. p. 1447). He noted that he told the officer it was his stepdad. (R. p. 1447). He later again affirmed that he did not say his dad was the shooter. (R. p. 1459).

J [REDACTED] also testified that he only called Roger dad. (R. p. 1462). He noted that Roger would have been off from work at the time of the shooting. (R. p. 1462). J [REDACTED] also testified that he did not believe that he spoke with Roger either the day before the shooting, or at any point before he called 911. (R. pp. 1462-63). He also did not call his dad before the police arrived. (R. p. 1463). J [REDACTED] did not recall whether he answered the 911 dispatcher's question about if he was alone or not. (R. pp. 1465-66). He did deny that Roger was at the apartment when the shooting occurred. (R. p. 1466).

Officer Thomas Knoch of the Horry County Police Department also testified at trial. Officer Knoch was the first to arrive on the scene after J [REDACTED] called 911. He noted that personal safety and the safety of anyone at the scene was a major concern. (R. p. 1527). He also noted that he wanted to secure the scene for later investigation. When he opened the door to the apartment, he yelled up to the top of the steps where a young man, J [REDACTED], was sitting. (R. p. 1527). He had the young man expose his hands around the corner. (R. p. 1527). They had a brief conversation with the officer being at the bottom of the stairs, and the young man at the top of the stairs. (R. p. 1527). Officer Knoch testified that the young man complied with every thing that Knoch asked him to

do. (R. p. 1529). Officer Knoch testified that as he was heading up the steps to the apartment, the young man [REDACTED] stated, "[h]e said he's gone, and I asked him. I said who. . . . He said my dad. . . ." (R. p. 1529).

Officer Knoch also testified that when he first entered the apartment, he observed wood splinters on the floor directly adjacent to the door and the jamb. (R. p. 1530). He also observed a female victim laying face down with her head turned so that the left side of her face was exposed upwards. (R. p. 1530). Officer Knoch noted that she had a wound of some sort to her face, and there was blood on the wound and on the floor. (R. p. 1531). He also indicated that there was a chance that [REDACTED] said it was his stepdad, and not his dad, who shot the victim. (R. p. 1531). "Yes, it very well could have been. There could have been several other things that may have been said that I just don't recall due to the situation being as tense as it was at the time, and I was the only officer of the scene." (R. p. 1531, ll 11-14). Officer Knoch testified that he checked the victim for signs of life, but he did not detect either a pulse or breathing. (R. p. 1531). During cross-examination, Knoch testified that in his report, he wrote "he said - - that I can recall - - he is gone. When I asked him who, he said my dad." (R. p. 1542, ll 4-6). He further testified that he would not have written that if [REDACTED] had not told him that. (R. p. 1542).

Detective Ann Pitts, who was with the Horry County Police Department in March 2006, was one of the primary investigators in the victim's murder. (R. p. 1707). Pitts testified that she spoke with [REDACTED] on the evening of the shooting, March 6, 2006. (R. p. 1711). The conversation was audio recorded.

(R. p. 1711). She identified State's Exhibit 51 as the audiotape of her conversation with J [REDACTED]. (R. pp. 1711-12). She also noted that it was authentic, and that it accurately reflected the statement obtained from J [REDACTED]. (R. p. 1712). Detective Pitts was also provided with a transcript of the audiotape. She indicated that the transcript was accurate. (R. p. 1712).

The State submitted State's 51 to be entered into evidence. (R. p. 1713). The defense objected. (R. p. 1713). Initially, the court asked defense counsel how he addresses the 801(d)(1)(B) issue. Then the court overruled the objection under Rule 801(d)(1)(B), SCRE. (R. p. 1713).

The trial court later allowed for more discussion on the admissibility of the statement in a bench conference.

The Court: Go ahead and say why you want me to state why I shouldn't let you put that in.

Mr. Humphries: Because there's two - - attacking the credibility, specifically the allegation of recent fabrication. These are prior consistent statements.

The Court: Is this about the dad did it? This about the dad, stepdad thing?

Mr. Humphries: Right. Exactly.

The Court: And what would you like to say, Mr. Wilson?

Mr. Wilson: Of course I said I object when he testified. He, he testified that - - he said his story was that - - what he said to me today was the first time that he said it. That's what he said. I didn't make it up. He said it.

The Court: Said what?

Mr. Wilson: That, that what he said on the witness stand was the first time he said that today. . . .

Mr. Humphries: I have no idea what he's talking about.

The Court: I don't either.

Mr. Wilson: When J [REDACTED] testified on the witness stand, I asked him about what he, where he was and what he saw. And he testified to me that he told the solicitor he actually saw the shooting.

The Court: Oh, no, no, I'm not sure the statement's about that, but if it is --

Mr. Wilson: It is.

Mr. Humphries: It's particularly about his saying the stepdad, dad. This is a prior consistent statement which supports his testimony.

The Court: Anyway, I just want to get some stuff on the record. 801(d)(1)(B) is what you are seeking?

Mr. Humphries: Yes, Your Honor.

The Court: In evidence.

The Court: In making my ruling, by the way, of 801(d)(1)(B), I looked at the first sentence and thought that he was here. I assume you'd have him ready if anyone wishes to call him?

Mr. Humphries: Yes sir. No question. He's here.

(R. pp. 1715-16, 1717).

- A. *This issue is not preserved for appellate review; counsel's objection under 801(d)(1)(B) was that the presentation of statement was not allowable under 801(d)(1)(B) because it discussed whether J [REDACTED] actually saw Appellant pull the trigger, not whether he told the officer it was his dad who shot the victim.***

Appellant's claim in this argument is not preserved for appellate review.

Appellant argues that the prior statement was inadmissible because there was never any allegation that J [REDACTED] recently fabricated testimony in regards to whether he told the first officer on the scene that it was his dad, not his stepdad, who shot and killed the victim. See Appellant's Brief, pg. 13-15. When asked why he objected, counsel stated that he was challenging the admission of the statement under 801(d)(1)(B) because J [REDACTED] stated for the first time on the

stand that he actually saw the shooting. (R. pp. 1715-16). He never contested the statement was not admissible under 801(d)(1)(B) because of the issue of whether J. [REDACTED] told the officer it was his dad, and not his stepdad, who killed his mother. Since this argument was not raised to the trial court, it is not preserved for appellate review. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

B. *The statement was not hearsay under 801(d)(1)(B)*

The trial court did not abuse its discretion in admitting the statement into evidence because it was not hearsay under Rule 801(d)(1)(B).

Pursuant to Rule 801(d)(1)(B), SCRE, a statement is not hearsay if

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose....

Thus, in order for a prior consistent statement to be admissible pursuant to this rule, the following elements must be present: (1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121-122, 551 S.E.2d 240, 244 (2001).

J [REDACTED]'s statement to Detective Pitts qualified as a prior consistent statement admissible under Rule 801(d)(1)(B). First, there is no dispute that J [REDACTED] testified at trial, and was subject to cross-examination. Second, Winkler implicitly, if not explicitly, accused J [REDACTED] of recently fabricating the statement. Clearly, Appellant was accusing J [REDACTED] of lying when he testified that he told Officer Knoch it was his stepdad who shot his mother, not his dad. Appellant's questioning indicates that he was asserting that J [REDACTED] was denying making the statement to the officer because he loved his father Roger. Through questioning, counsel also pointed out that Roger was expected at the victim's apartment that evening, Roger was not at work when the shooting occurred, and J [REDACTED] did not answer the 911 dispatcher's question about whether he was alone. (R. pp. 1447, 1454, 1462, 1466). Further, the alleged fabrication was necessarily recent. There was no testimony or probative evidence introduced at trial that indicated that J [REDACTED] was aware of what was in Officer Knoch's report before defense counsel asked him about it.

Third, J [REDACTED]'s statement to Detective Pitts was clearly consistent with his testimony at trial. In the statement to Detective Pitts, J [REDACTED] identified Appellant as the one who broke into the apartment and shot his mother. (See State's Exhibit 51, R. p. 3483). This was consistent with J [REDACTED]'s testimony at trial that Appellant broke into the apartment and shot J [REDACTED]'s mother. (R. pp. 1428-36). Fourth, the statement to Detective Pitts clearly occurred before the alleged recent fabrication. The statement to Detective Pitts was given on the

night of the shooting, March 6, 2006. The alleged fabrication occurred at trial on January 31, 2008.

The circumstances surrounding the admission of J [REDACTED]'s statement to police is clearly distinguishable from the improper admission of prior consistent statements in both State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003), and State v. Saltz, *supra*. In Foster, this Court found the admission of prior consistent statements was improper because the cross examination of the witness had not asserted she fabricated some portion of her testimony, and thus only amounted to simple impeachment. 354 S.C. at 622, 582 S.E.2d at 430. This Court noted that the cross-examination consisted primarily of questions regarding the witness's prior inconsistent statements. *Id.* at 619, 582 S.E.2d at 428. Similarly, in Saltz, this Court found that the admission of the prior consistent statement of Sydney Johnston was improper because the cross examination of Johnston only questioned the accuracy of the witness's memory, but did not charge her with recent fabrication. Saltz, 346 S.C. at 124, 551 S.E.2d at 245-46. Such a finding cannot be made in this case because Winkler was clearly asserting that J [REDACTED] was lying when he stated he told Officer Knoch it was his stepdad who shot his mother. Winkler's counsel attempted to establish that J [REDACTED]'s father, Roger, was the one who actually shot Rebekah. Counsel asked J [REDACTED] about whether his father was going to be at the condo that evening, whether his father was working at the time of the shooting, and confirmed that J [REDACTED] loved his father. Counsel also pointed out that J [REDACTED] did not respond to the 911 dispatcher's question regarding whether he was alone at the scene. Clearly,

counsel was asserting that J [REDACTED] was lying when he stated he told Officer Knoch it was his stepfather who did the shooting. Since defense counsel was clearly intimating that J [REDACTED] was fabricating his story that he told Officer Knoch that it was his stepdad who shot his mother, and that fabrication would have been recent, the trial court properly admitted J [REDACTED]'s interview with Detective Pitts. As a result, this claim for appellate relief should be dismissed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURY TO VIEW COPIES OF THE TRANSCRIPT OF THE 911 TAPE WHILE LISTENING TO THE TAPE.

Relevant facts

The first witness to testify in Appellant's trial was Sharon Renee Hardwick, of the deputy director of Horry County's 911 system. (R. pp. 1406-07). She maintained the 911 recordings for the county. (R. pp. 1407). She testified that she had the tape from J [REDACTED]'s 911 call from the night of the murder. (R. p. 1407). A transcript of the 911 tape was prepared for trial. Hardwick testified that she reviewed the transcript, and it accurately reflected the conversation that was contained on the 911 tape between J [REDACTED] and the 911 operator. (R. p. 1408). The 911 tape was entered into evidence as State's Exhibit 1, and the transcript was tendered as State's Exhibit 35, but was entered as Court's Exhibit 18. Both were entered without objection. (R. pp. 1408-09).

During jury deliberations, the jury sent the judge a question asking if they could read the 911-call transcript. (R. p. 1894). The court noted that it told the jurors the transcripts would not be going back into the jury room. (R. p. 1894). Defense counsel then noted that he thought there might be some inaccuracies in the transcript, and that he would be concerned about sending the transcript back to the jury because of that concern. (R. p. 1895). The court noted that the transcript and tape were introduced without objection during the trial. (R. p. 1895). Defense counsel countered that he did not want the jury to have the transcript because of his concerns about the inaccuracies. (R. p. 1895). The

court stated that he would not be sending the transcript back to the jury room, but asked counsel for both sides if they would have any issues with the court utilizing the same procedure that was used during trial for review of the audio tape of the 911 call. (R. p. 1895). In that procedure, the court would allow the jury to review the transcript while listening to the 911 tape in the courtroom. (R. p. 1895).

Appellant's counsel argued that procedure was not appropriate. "I know they did during the trial without objection, but this is - - the trial is over now. The document is not in evidence and the jury is already in the process of deliberating, and I don't understand - - they're not supposed to get the document again." (R. pp. 1895-96). Appellant went on to note that the document was not in evidence, and the trial was over. (R. p. 1896). The trial court responded that it was concerned that the jury would think the parties were hiding something because it was not allowed to have the transcripts, and the court did not want it to seem as though it was adding too much emphasis on something. (R. p. 1896). Winkler urged the court to inform the jury that the transcript was not in evidence, and allow the jury to play the audiotape until they could discern their concern.

The State noted it was concerned with not providing the jury with the transcript because the quality of the 911 audiotape was not great. (R. p. 1897). The State noted that the reason they made a transcript was to make sure the words were accurate. (R. p. 1897). The State also agreed with the court's assessment that the jury would be curious as to why they could not review the transcript, and it would probably lead to more confusion than help to present it to them in a way different than it was presented at trial. (R. p. 1897). At that point,

the Court noted it was concerned the jury room was not wired like the courtroom, and he could not see how the jurors could all hear the tape because there were no big speakers in the jury room. (R. p. 1898).

Defense counsel argued that the document was not in evidence, was not part of trial record, was only offered as an aid to the tape recording, and was never put into evidence. (R. p. 1899). Defense counsel further stated that the jury was only entitled to review evidence. (R. p. 1899). The trial court decided that allowing the jury to review the transcript while listening to the 911 tape in the courtroom in the presence of Winkler and counsel for both sides would be no different than having the court reporter transcribe what was played on the tape and having her read it aloud to the jury. (R. p. 1900). "That tape and them reading it is as it was put in, them reading it, the words there that were put before them and you note your objection -- I'm going to permit them to do it that way." (R. p. 1900). The 911 tape was replayed before the jury in the courtroom. (R. p. 1901). The jury was allowed to review the transcript while the tape played. (R. p. 1901). However, the jury was not allowed to take the transcripts back to the jury room. (R. p. 1901).

A. *To the extent Appellant is challenging the accuracy of the transcript, that issue is not preserved for appellate review because Appellant failed to raise the issue in the first instance.*

As reflected in the record and noted by the trial court during the discussion on whether the jury could receive a copy of the transcript during deliberations, Appellant did not challenge the accuracy of the 911 transcript when it was used during trial. Since there was no objection made when the transcript was first

used, Appellant was precluded from asserting the transcript was inaccurate later in the proceeding. Appellant is further precluded from making the assertion in this appeal. State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review.").

Furthermore, the record does not support Winkler's assertion that the transcript was inaccurate. In his brief, Winkler asserts that the transcript is incorrect on page 5 in its recitation of a series of statements made by the operator. (See State's Exhibit 1, R. pp. 3473-79). A review of the transcript while listening to the tape clearly shows that that the text in the transcript is accurate. Thus, to the extent Winkler asserts the trial court improperly allowed the jury to review the 911 tape's transcript during jury deliberations because it was inaccurate, his claims should be dismissed because the record does not support it.

B. The trial court did not abuse its discretion in allowing the jury to review the tape and transcript in the exact same fashion as they did during the testimony presented at trial.

The trial court, in its discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations. State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request. Id. The court is not required to submit evidence to the jury for review beyond that specifically requested but may, in its discretion, have the jury review other evidence relating to the same factual issue so as not to give undue

prominence to the evidence requested. Id. In Plyler, this Court found there was no abuse of discretion by the trial court when it allowed the jury to hear the tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. Id. Only the direct examination of the testimony was played for the jury in Plyler. Id.

The trial court did not abuse its discretion in its handling of the 911 tape transcript. The jury was not allowed to take the transcript back to the jury room for deliberations, and it was only allowed to view the transcript while listening to the 911 tape in the presence of the judge, defendant, and counsel for both sides. This case is clearly distinguishable from State v. Gullede, 277 S.C. 368, 287 S.E.2d 488 (1982). In Gullede, the trial court allowed the jury to retain during deliberations the transcript of the tape-recorded communication between two highway patrolmen. Id. at 371, 287 S.E.2d at 490. Here, the jury was not allowed to take the transcript back to the jury room. They were only allowed to view the transcript in the judge's presence. The jury was not presented with any facts that were not already in evidence. The transcript was of the 911 tape that was played at trial and during the jury's deliberations. The underlying 911 tape was properly in evidence, unchallenged by Winkler. Clearly, the trial court exercised reasonable discretion in the handling of this issue at trial. Winkler has failed to establish that the trial court abused its discretion in handling the jury's request. As a result, this claim for relief should be dismissed, and Winkler's convictions should be affirmed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING
APPELLANT'S REQUEST TO GO PRO SE DURING THE SENTENCING
PHASE OF HIS TRIAL.

Relevant Facts

Pre-Trial Discussions Regarding Counsel

At Appellant's first appearance, Ms. Orrie West, Esquire, a public defender for Horry County, was appointed to represent him. (R. p. 2984). One of Appellant's trial counsel, Mr. Thomas Rathbun, Esquire, also of the Horry County's Public Defender's Office, was assigned to help assist with the case. (R. p. 2985). At the appointment of counsel hearing on June 15, 2006, Ralph Wilson, Esquire, was appointed to serve as first chair in Appellant's defense. (R. pp. 2993-94). At the hearing, Appellant indicated that he found the Public Defender's Office to be very inadequate. (R. p. 2991). He complained that Ms. West called him by the wrong first name. (R. p. 2991). Appellant also indicated that he had concerns about Mr. Rathbun because Rathbun told him he had not tried a murder case before. (R. p. 2992). When asked if he had any objections to Rathbun being appointed as second chair, Appellant indicated that he had an objection. (R. p. 2999). He indicated that he and Rathbun had argued more than anything. (R. p. 2999).

At the July 3, 2007 hearing, Appellant's trial counsel put on the record that Appellant was dissatisfied with Mr. Rathbun as counsel because of disagreements they had. (R. p. 3260). Wilson noted that a couple of weeks before the hearing, Rathbun went to see Appellant, and they had a conversation.

(R. p. 3260). Rathbun and Wilson had gone to see Appellant the Friday before, but they were not able to see Appellant because he had been taken to Charleston to meet with a psychiatrist. (R. p. 3260). Rathbun went to see Appellant the following Monday. (R. p. 3260). On Tuesday, Appellant was upset and irate. (R. p. 3260). Appellant told Wilson that Rathbun had said some things. (R. p. 3261). The Court indicated that Appellant needed to know that unless something regarding Rathbun reached the point of incompetence or something that would lead to a preliminary determination of ineffective assistance, it was improbable that the court would remove Rathbun unless it was something that would seriously prejudice Appellant's rights to receive a fair trial. (R. p. 3262). Wilson indicated that even when there have been disagreements between Rathbun and Appellant, Wilson has been able to sit down with Appellant and decide on the correct course of action with Appellant's consent. (R. p. 3262). Appellant was heard in this matter. (R. pp. 3263-64). He informed the court that Rathbun was telling him to take a plea, plead guilty. (R. p. 3264). He told the court that when he sought counsel about the issue, Rathbun told him to plead guilty. (R. p. 3264). Appellant interpreted that to mean that Rathbun thought he was guilty. (R. p. 3264). Rathbun responded that he believed Appellant heard what he wanted to hear and didn't hear what counsel was saying. (R. p. 3265). Rathbun affirmed to the court that he would do his utmost to represent Appellant in a trial. (R. p. 3265).

During an ex parte hearing held before jury selection. Counsel indicated that during the telephonic conference on the Thursday before this hearing,

Appellant started giving details about an incident that occurred between Appellant and Wilson. The Court allowed Appellant the opportunity to get the information on the record. Appellant told the court that he wanted Wilson to go forward as counsel. (R. p. 32). However, he no longer wanted Rathbun to continue as counsel. He noted that eight months prior, he had requested Rathbun be relieved, and he was turned down. (R. p. 32). He informed the court that Rathbun got in his face, put his finger in Appellant's face, and touched his face. (R. p. 33). He then told the court that he gave Wilson his sister's pictures, and told Wilson that Wilson was calling her a liar. (R. p. 33). The court noted that it did not think that was enough to warrant counsel be relieved. (R. p. 33). Appellant asked, "how can I get a fair trial with guys that are against me? I mean, they've actually - -" (R. p. 34). Appellant informed the court that he did not believe they would do their best to get him acquitted. (R. p. 34).

In response, Wilson informed the court that he had done everything he knew to do to represent Appellant in the best fashion he knew. (R. p. 34). He also indicated that Appellant is antagonistic, and has been so since the first day. (R. p. 34). Wilson further noted that they had made every effort to protect every right, hired every expert they could think to hire, and have tried to talk with every witness they could possibly find. (R. p. 34). He informed the court they were prepared for trial. (R. p. 34). The fact that Appellant's personality got on Wilson's last nerve would not affect him and his ability to represent him in the fashion he was entitled to. (R. pp. 34-5). Rathbun also stated he was ready for trial. (R. p. 35). Appellant complained that his attorneys did not find a witness.

(R. pp. 35-6). Wilson told the court that they had made an exhaustive effort to find the witness requested, and according to the witness' family, they did not know where he was. Appellant indicated he thought the witness was still in Horry County. Appellant indicated that his question regarding that witness was answered. He then noted that he was not sure if counsel had done their best efforts to find what he needed because he was in lockup. (R. p. 37). He also complained that no one has gone out to the murder scene and measured couches and counters. (R. p. 39). Wilson noted that they could not because the unit belonged to the daughter of the victim, not the defendant. (R. p. 39).

Appellant continually complained that counsel was advising his family that Appellant was likely going to be convicted. (R. pp. 41-2). The Court responded that it could not chastise counsel for giving him an honest opinion. (R. p. 42).

Any event, we're going to proceed then. There's no request for you to represent yourself. You're requesting another attorney. Since that's the case, I will not grant your motion. Now, you always have that option to represent yourself, which would be very inadvisable at this stage, but we will continue on with the case.

(R. p. 42, ll 12-17).

Counsel later put on the record that it disagreed with Winkler's request to make a certain argument in the opening statement because counsel believed it would require Appellant testify in the guilt phase of trial. (R. pp. 1376-81).

Winkler Made the Request to Proceed Pro Se Before the Start of the Sentencing Phase

Before the start of the sentencing phase of trial, defense counsel asked the court to explain to Appellant the pitfalls of him participating in the cross examination of witnesses. (R. p. 1915). This led to a court inquiry into whether

Appellant was asking to proceed pro se. (R. pp. 1916-19). Counsel then indicated to the court that Appellant wanted to question each witness and advised the court that after some discussion with Appellant, he may want to go on his own. (R. p. 1921). The court informed Appellant that it was highly unadvisable to go pro se at this point in the proceeding, and further warned Appellant that he would be restrained by the same rules as anyone else as far as questions, and that he could not make any statements at all. (R. p. 1921).

The State's initial position on the matter at trial was that if Appellant wanted to represent himself, the only process was to let his lawyers go and allow him to do so. (R. p. 1922). The State recognized a defendant's right to do so. (R. p. 1922). It agreed with the court that it was a hazardous course, but there are Faretta warnings. (R. p. 1922). The Court again advised Appellant that it was very dangerous and not advisable to represent himself, and it was always better to have a professional do that. (R. p. 1922). He was also informed that he would not be allowed to question witnesses directly if he retained counsel. (R. p. 1922). The State also pointed out that if Appellant decided to represent himself for one witness, he was responsible for questioning all witnesses and all other aspects of the case. (R. p. 1923). The Court then allowed Appellant to think about the matter for a while. (R. pp. 1924-26).

After a recess, the trial court asked Winkler if he wanted to proceed pro se or if he wanted another lawyer. (R. p. 1926). Winkler responded that he wished to proceed in the manner that he requested, i.e., that he be allowed to question the witnesses. (R. p. 1926). He further indicated that he did not want his lawyers

dismissed, and he stated that he did not want to abandon them. (R. p. 1926).

After some further discussion, defense counsel articulated that Winkler's request was to represent himself, but he wanted counsel to stay in the courtroom and give him advice, information, and assist him in doing those things. (R. p. 1928).

The trial court then asked Winkler if he was requesting to represent himself, but wanted counsel around to consult. (R. p. 1928). Winkler stated that was what he was requesting. (R. p. 1928).

The trial court further inquired into Winkler's understanding of what he was doing. The court advised Winkler it was a very dangerous thing to do, and noted that he would be required to follow court procedure as lawyers would be required to do in the sense of following the rules of evidence. (R. p. 1928). Winkler was also told that he would have to follow the restraints on how and what questions are permitted and how they are permitted to be asked. (R. p. 1929). The court asked Winkler if he had any training in that regard, and Winkler said he had not. (R. p. 1929). The trial court also asked Winkler if he was not concerned about that, noting Winkler might not be able to bring out points that could be brought out by a skilled attorney. (R. p. 1929). Winkler was further asked if he had enough time to consider all of those concerns. (R. p. 1929). The court further noted that Winkler did not even know the ground rules, and he wanted to ensure that Winkler understood the danger of going forward pro se. (R. pp. 1929-30). Winkler indicated that he understood. (R. p. 1930).

The trial court then proceeded to ask Winkler if he understood that his guilt or innocence of the crimes had already been decided, and he could not go into

whether he committed the crime or not. (R. p. 1930). Winkler stated that he understood, and that he understood he could not bring up those issues. Winkler then requested again the court dismiss his attorneys but allow them to stay and consult. (R. p. 1930). The trial court noted that as it was reviewing Winkler's request, it was reviewing Faretta, State v. Brewer, and State v. Fuller. (R. p. 1931). He also asked Winkler about the medication issue, and whether Winkler is confident that the lack of getting his medication yesterday as often as he felt he needed was in any way affecting his decision. (R. p. 1931). Winkler stated that he was not concerned if they got the medication at the appropriate time. (R. p. 1931). The court then asked defense counsel if he had a concern about that. Wilson responded that the medication issue was a concern throughout the trial because Winkler was a different person on his medication and it is in his system appropriately. Counsel further noted that when Winkler is not on his proper dosage of medication, he gets extremely anxious and combative, and he can be argumentative. (R. p. 1931). Counsel could not say that missing one dose the day before the hearing was the difference. (R. pp. 1931-32).

The trial court asked Winkler if he had a chance to review all of the matters that counsel gathered for mitigation. (R. pp. 1932-33). Winkler stated that he had. (R. p. 1933). Winkler also informed the court that he had reviewed all of the evidence that counsel was going to introduce in the sentencing phase of the trial. (R. p. 1933). Winkler demonstrated that he understood what a leading question was, but he state that he had not reviewed the rules of evidence. (R. p. 1933). Winkler indicated that he understood exceptions to hearsay, but when

asked by the court, he did not know what an excited utterance was. (R. pp. 1933-34). In response to the court's question about whether Winkler was concerned that the state might get things in that he would not know how to object to them, Winkler stated that he felt that his view of the guilt phase was that the State won that trial, and he did not have his day in court. (R. p. 1934). Winkler further noted that most of the witnesses that were going to testify were people that he knew better than anyone else, including people who were supposedly friends who turned against him. (R. p. 1934). Winkler stated that he knew them better than anyone in the room. (R. p. 1934).

The trial court then noted that Brewer required Winkler to make his decision before trial, and Fuller indicated that it was within the discretion of the court. (R. p. 1935). The court then asked Winkler if he understood the dangers and pitfalls of proceeding pro se, and reminded him that it was dangerous to do this. (R. p. 1935). The court further asked if Winkler understood the danger, appreciated the danger of the decision he wished to make. (R. p. 1936). The court insisted it wanted to be sure this was not something that Winkler's family or attorneys were telling him to do. (R. p. 1936). Winkler stated that he had not talked to his family about his decision to represent himself. (R. p. 1936). Defense counsel interjected that both Winkler's family and counsel had advised him against representing himself. (R. p. 1936).

The State did request the court determine whether Winkler was capable of representing himself and that his request was a knowing and intelligent waiver of his right to counsel. (R. p. 1937). The State further requested the court engage

in a discussion of all of the factors under Faretta on the record. (R. p. 1937).

The trial judge requested that both defense counsel and the solicitors put in writing specific requests for what they wish to be discussed with Winkler. (R. p. 1938). The trial judge noted that he would consider Winkler's request and would ask additional questions. He asked Winkler to consider his request very seriously because it was a serious decision. (R. pp. 1938-39).

The State then argued that under Fuller, the court would have discretion to court says Fuller indicated that it was in the discretion of the judge, but noted that Fuller cited Lawrence, which points out the right to proceed pro se was done prior to the swearing of the jury. (R. p. 1939). The State argued that they were well past that point, and further questioned whether discretion continued after the jury was sworn. (R. pp. 1939-40). The State did agree with the court's statement that if Winkler wanted to represent himself, the court had the discretion to decide, and that it would not be a violation of either Brewer or Faretta if in the court's discretion, Winkler's request was denied. (R. p. 1940). "I believe that if the court in their discretion declines his assertion to proceed pro se, that the court can find that that's appropriate and that it meets the ends of justice to the administration of justice." (R. p. 1940). Winkler's defense counsel disagreed with the court's assessment and argued that the sentencing proceeding was a separate and distinct proceeding from the guilt phase of the trial. (R. p. 1941). Counsel argued that Winkler had the right to defend himself if that is what he wants to do, provided the court believes and understands that Winkler is voluntarily making that decision. (R. p. 1942). In response, the solicitor pointed to State v. Reed, in

which the defendant was qualified and represented himself in guilt phase, convicted, and during the penalty phase moved to have counsel reappointed. (R. p. 1942). The trial court found that since he represented himself in guilt phase, he was no longer entitled to bring his lawyers back. (R. p. 1942). The solicitor argued that Reed was the inverse of what happened here, and asked court to consider Reed. Defense counsel argued there was a distinct difference between Winkler's request and the request in Reed because in Reed, counsel was not prepared to step in. (R. p. 1943). The Court acknowledged that before he can even get to the point of deciding whether Winkler has made a knowing and voluntary decision, until it resolved its concern about Winkler's medication and whether he fully understands what he's doing. (R. pp. 1944-45). The Court asked the attorneys to review Fuller and asked if they knew of any other capital case where the request to dismiss counsel came at the conclusion of the guilt phase. (R. p. 1945, see R. p. 1947).

After a short recess, the trial court noted on the record that

[t]he research that I've done convinces me that this is the continuation of a trial, and it is not a separate trial. It is a separate proceeding in a bifurcated trial. And pursuant my reviewing Fuller as well as State vs. Reed, by the way, where they make a point of saying that the defendant does not -- that the judge is not required to permit hybrid representation so that part is with counsel and part is without counsel.

(R. p. 1948). The court then noted that it was concerned that Winkler may not have had the opportunity to review the volumes of material collected during the mitigation investigation done by counsel. (R. pp. 1948-49). Further, the trial court was concerned that it would cause a delay of a few days to allow Winkler to review everything, and the court indicated it did not believe that would be

appropriate or fair to delay the proceedings to allow such review. (R. p. 1949). The trial court was also concerned about Winkler's mental health because of the concerns regarding Winkler's medication made by defense counsel. (R. pp. 1949-50). The court was concerned that if there was a problem with Winkler's medication, and the state was objecting to improper questions, it would cause more anxiety because Winkler would have to go to counsel to ask how to respond. (R. p. 1950). The trial court was concerned about Winkler's senses being dulled by the medication, and was afraid he would miss points that he would really need to make to help himself. (R. p. 1951).

Deborah Hipp, the nurse practitioner who administered drugs at the detention center, testified that she was currently prescribing drugs to keep Winkler calm. (R. pp. 1951-52). The current dosage was based upon Winkler not being as actively involved as a lawyer would be. (R. p. 1952). She further indicated that an increase in anxiety would require more medication, and more medication may make Winkler less alert. (R. p. 1952). That caused the trial court great concern. (R. p. 1953).

Defense counsel noted that he did not think that Winkler was making this request to delay the trial or in any way impede justice. (R. p. 1953). Counsel asserted Winkler was ready and willing to go forward. (R. p. 1953). Winkler had indicated that he is familiar with the materials, and Winkler had met with every expert on multiple occasions. (R. p. 1953). Counsel concluded by saying he did not agree with Winkler's decision, but he wanted it on the record that there was

no indication that he was mentally incapable of not proceeding on his own if that's what he elects to do. (R. p. 1953).

The trial court then asked Winkler if he was familiar with S.C. Code Ann. § 16-3-20. (R. p. 1954). Winkler indicated that he was not. (R. p. 1954). The trial court then asked if Winkler was familiar with the listed mitigating factors in the statute. (R. p. 1954). Winkler again indicated that he was not. (R. p. 1955). The trial court then asked defense counsel if he believed Winkler would need time to review all those things so he would understand. In response, defense counsel read part of State v. Brewer:

The determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right to self-representation. The only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right . . .

(R. pp. 1955-56).

The trial court responded that if this was the beginning of trial, Brewer would be right on point. (R. p. 1956). The court then indicated it was concerned that dismissing counsel would require a long delay so Winkler could review the statutes so he would know what mitigating evidence he could produce and what aggravating evidence the state could not produce, and the court was concerned about Winkler's anxiety situation with his medication. (R. pp. 1956-57). The trial court did not see how he can be fair to Winkler to permit him to represent himself without giving him an adequate opportunity to review all the law. (R. p. 1957). The trial court was also concerned that Winkler did not fully understand what he was requesting. (R. p. 1958). The trial court further expressed its concern that the delay would work to Winkler's detriment because the jury was already

sequestered, and it would have to remain sequestered while Winkler prepared. (R. p. 1958).

During a recess, the court conducted a telephone conference with Dr. Halanovich, one of Winkler's treating psychiatrists. (R. p. 1959). During the conference, Halanovich expressed the same concern the court had with keeping Winkler calm during the proceedings if he represented himself. Halanovich was concerned regardless of whether they increased the medication because it was his personality to get worked up. (R. p. 1960). While Winkler's personality had been better since Dr. Smith increased his medication, Klonopin could make Winkler think less clearly and impact his ability to make good, clear decisions. (R. pp. 1960-61). Halanovich indicated that increasing the dosage would have the same effect as drinking too much alcohol; however, a possible solution might be to give Winkler a smaller dosage if he got worked upon in the courtroom. (R. p. 1962). However, a low dose still could dull Winkler. (R. p. 1963).

In issuing its decision, the trial court noted that it considered Faretta, State v. Lawrence in the Fourth Circuit, State v. Fuller, State v. McLauren, State v. Reed, State v. Brewer, State v. Walters from North Carolina, Grandson v. Maryland, U.S. v. Dunlap, another Fourth Circuit decision, Kubsch v. Indiana, and State v. Bateman. (R. pp. 1965-66). The trial court found this was a bifurcated trial. (R. p. 1967). Under Fuller, it was clear that it was not an absolute right to waive counsel in the middle of trial. (R. p. 1968). Such requests are within the discretion of the trial court. (R. p. 1968). The trial court noted that both Walters and Lawrence support that position. (R. p. 1968). Furthermore, the

court indicated it was persuaded by Dunlap in the sense that the court had the obligation to minimize disruptions; avoid inconvenience and delay, maintain continuity, and avoid confusing the jury. (R. p. 1968). The judge further noted that in Lawrence, only the jury had been selected; trial had not even proceeded other than the jury being sworn. Thus, in exercising discretion in deciding whether to permit the defendant to proceed pro se, the court must make sure its decision is not an abuse of discretion. (R. pp. 1968-69). The decision must really consider the rights of the defendant, fairness of trial, rights of state, rights of jury to make sure they are presented matters that will let them make a decision after being presented evidence on both sides and with an opportunity to decide those issues. (R. p. 1969). The trial court was concerned with Winkler's ability to proceed without the anxiety situation. (R. p. 1969). Since there was a jury waiting, and it had already been selected and heard the first part of trial, the court found it would be undue delay to wait, and that would be improper in the administration of justice. (R. p. 1970). Further, the court was concerned the jury may be confused to have one half of the case tried by counsel and the second half of the case tried without counsel, especially if the jury could see counsel at the defendant's counsel table. (R. p. 1970). In all, the court determined it would not be in the proper administration of justice to allow Winkler to proceed pro se, so the court decided it would not be proper to grant his motion. (R. p. 1971).

III. THE TRIAL COURT CORRECTLY FOUND THAT THE DECISION REGARDING WHETHER WINKLER WAS ENTITLED TO REPRESENT HIMSELF DURING THE SENTENCING PHASE OF TRIAL WAS WITHIN THE TRIAL COURT'S DISCRETION.

The trial court was correct when it found that it was within the court's discretion whether Winkler should be allowed to represent himself during the sentencing phase of the trial. Winkler's request to proceed pro se during the sentencing phase was made well after the trial began.

It is well-established that an accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975). Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. at 834, 95 S.Ct. at 2541 (internal quotation omitted). A defendant's right to waive the assistance of counsel is not unlimited. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). The request to proceed pro se must be clearly asserted by the defendant prior to trial. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998)); State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991), cert. denied, 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992). "If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." State v. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing U.S. v. Singleton, 107 F.3d 1091 (4th Cir. 1997); U.S. v. Lawrence, 605 F.2d 1321 (4th Cir.1979)).

Winkler's request to proceed pro se in this case was clearly not timely. Winkler did not make the request until the day the sentencing phase of his trial was to commence. (R. p. 1926). The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B); see generally, State v. Stewart, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986). Thus, Winkler's request to proceed pro se could not be considered timely. As a result, it was clearly within the trial court's discretion to decide whether Winkler would be allowed to proceed pro se in this case. This argument for relief should therefore be dismissed.

The cases cited by Winkler to support his argument that it was not within the court's discretion to decide whether he could proceed pro se when the request was made just before the sentencing phase either support the proposition the decision on whether a defendant is allowed to proceed pro se when the request is made after the trial has begun or are clearly distinguishable from Appellant's case. In Commonwealth v. Davido, 582 Pa. 52, 65, 868 A.2d 431, 438 (2005), the Supreme Court of Pennsylvania noted that in its previous decision in Commonwealth v. Owens, 496 Pa. 16, 436 A.2d 129 (1981), it had

noted that "[w]here the accused does not request to represent himself before trial, the constitutional right to self-representation recognized in Faretta is not implicated. When, during the course of trial, an accused wishes to dismiss counsel and either represent himself or obtain new counsel, his request is addressed to the sound discretion of the trial court." Owens, 436 A.2d at 133 n. 6 (citations omitted); see also United States v. McKenna, 327 F.3d 830, 844 (9th Cir.2003); Commonwealth v. Jermyn, 551 Pa. 96, 709 A.2d 849, 863 (1998).

Davido, 582 Pa. at 65, 868 A.3d at 438.

Winkler's reliance upon United States v. Davis, 285 F.3d 378 (5th Cir.2002), is also misplaced. The defendant in Davis had been granted a new sentencing trial due to an error in his original trial. Id. at 380. The defendant had requested to proceed pro se in his new sentencing trial. Id. After a Faretta hearing, the trial court found that the defendant's decision to represent himself was knowingly and intelligently made. Id. However, the district court concluded that the right to self representation did not extend to sentencing, and that even if it did, Davis's interest were outweighed by the Eighth Amendment requirement that the death penalty not be applied arbitrarily or capriciously. Id. The Fifth Circuit Court of Appeals overturned the trial court's decision when the defendant filed for a writ of mandamus to require the district court to allow him to proceed pro se. Id. at 380. The Fifth Circuit did allow the district court to appoint standby counsel. Id. At issue in the Davis opinion was whether the district court failed to comply with the Fifth Circuit's writ of mandamus when it appointed independent counsel to represent the defendant. Id. The district court had appointed counsel to present a mitigation case that the defendant had indicated that he did not want to present. Id. at 381. The appointed counsel's presentation would have been independent of the defendant's defense case. Id.

The Fifth Circuit's opinion in Davis is not applicable to Winkler's case for several reasons. First, unlike Winkler's case, there was no question that the defendant in Davis timely requested to represent himself in his new sentencing hearing. The timeliness of the defendant's request in Davis was never an issue before either the district court or the Fifth Circuit. Since the defendant in Davis

had timely moved to represent himself in his new sentencing trial, it was not within the trial court's discretion whether the defendant could proceed pro se. This is clearly distinguishable from Winkler, whose request to represent himself was not timely because it was not made before the beginning of trial.

Second, the Fifth Circuit has recognized that a trial court has the discretion to decide whether to grant a defendant permission to proceed pro se when the request to do so is untimely. Wood v. Quarterman, 491 F.3d 196, 201-02 (5th Cir. 2007)(citing Martinez v. Court of Appeal, 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000); United States v. Davis, 269 F.3d 514, 520 (5th Cir.2001) ("The district court was not obliged to honor Davis's mid-trial request to represent himself.") (citing Moreno v. Estelle, 717 F.2d 171, 176 (5th Cir.1983)); see also Haynes v. Cain, 298 F.3d 375, 384 (5th Cir.2002) (en banc) (Dennis, J., concurring)). In Wood, the Fifth Circuit found that the state court did not unreasonably apply federal law when it found the trial court had the discretion to deny a motion to proceed pro se when the defendant made the motion after the guilt phase and immediately before the sentencing phase in his capital trial. 491 F.3d at 202. The state habeas court in Wood held the trial court had the discretion because the motion was not timely. Id. at 201-02.

People v. Miller, 153 Cal.App.4th 1015, 62 Cal.Rptr.3d 900 (2007) is also not applicable. In Miller, a non-capital case, the defendant requested to represent himself at his sentencing hearing. The California Court of Appeals held that the defendant's request to proceed pro se was timely because sentencing in non-capital cases in California are post-trial matters. 153

Cal.App.4th 1023-24; 62 Cal.Rptr.3d at 905-06. Thus, the defendant's request was not untimely when it was made after the trial was completed and after his motion for a new trial was dismissed. In its reasoning, the California Court of Appeals, Fifth District, noted that in People v. Windham, 19 Cal.3d 121, 124, 137 Cal.Rptr. 8, 560 P.2d 1187 (1977), the California Supreme Court concluded "that 'when a defendant has elected to proceed to trial represented by counsel and the trial has commenced, it is thereafter within the sound discretion of the trial court to determine whether such a defendant may dismiss counsel and proceed pro se.'" Miller, 153 Cal.App.4th 1021; 62 Cal.Rptr.3d at 903. Further, the California Court of Appeals acknowledged that the California Supreme Court

has held that, for purposes of assessing the timeliness of a motion for self-representation, a motion made between the guilt and penalty phases in a capital prosecution is untimely, and therefore subject to the trial court's discretion, because the guilt and penalty phases are not separate trials, but parts of a single trial.

Id. at 1023, 62 Cal.Rptr.3d at 905.

Hojan v. Florida, 3 So.3d 1204 (2009), is not applicable to this case. The issue in Hojan was whether a defendant could waive the presentation of mitigation evidence. Id. at 1211. There was no issue of whether the defendant could proceed pro se in that case. Similarly, Cowans v. Bagley, 624 F.Supp.2d 709 (S.D.Ohio 2008), is not applicable because the defendant never requested to proceed pro se in his case. Also, Lamarca v. Florida, 931 So. 2d 838 (2006), is not applicable because there is no discussion regarding the decision by the trial court to allow the defendant to proceed pro se for the sentencing phase of his trial. This issue was not an appellate issue at any point in time during the

proceedings, either in Lamarca's direct appeal or in his post-conviction relief action appeal. Finally, Chapman v. Commonwealth, 265 S.W.3d 156 (Ky 2007), is not applicable to this issue. In Chapman, the defendant moved to fire his attorneys and proceed pro se well before his trial. Id. at 161. Thus, there was no issue of whether the trial court had the discretion to either grant or deny the request before either the trial or appellate court.

In all, Winkler has failed to establish that the trial court incorrectly determined that it was within the court's discretion to either grant or deny his request to represent himself during the sentencing phase of his trial. Faretta did not apply to this determination because the motion to proceed pro se was not timely made. As a result, it was well within the sound discretion of the trial court to decide to deny the motion. Winkler's argument in the alternative, that his case was not governed by the abuse of discretion standard lacks merit. As a result, this claim for relief should be dismissed, and Winkler's convictions and death sentence should be affirmed.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WINKLER'S REQUEST TO PROCEED PRO SE; THE COURT'S FINDING THAT GRANTING THE MOTION WOULD CAUSE UNDUE DELAY BECAUSE OF WINKLER'S NEED FOR TIME TO PREPARE, CONCERNS ABOUT WINKLER'S ANXIETY, AND CONCERNS REGARDING POTENTIAL JURY CONFUSION SUPPORTED THE COURT'S FINDING THAT IT WOULD IMPEDE IN THE ADMINISTRATION OF JUSTICE IF THE MOTION WAS GRANTED.

As already noted, "[I]f the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." State v. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing U.S. v. Singleton, 107 F.3d 1091 (4th Cir. 1997); U.S. v. Lawrence, 605 F.2d 1321 (4th Cir.1979)).

In justifying the need to timely raise the right of self-representation, the courts recognized, among other things, the need to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury. In light of this limitation on the right of self-representation existing before Faretta, the courts held that whether the defendant could dismiss counsel and proceed pro se was within the sound discretion of the trial court.

United States v. Dunlap, 577 F.2d 867, 868 (4th Cir. 1978). "Once trial commences, that right [to proceed pro se] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." United States v. Wesley, 798 F.2d 1155, 1155-56 (8th Cir. 1986).

"[O]nce a trial has begun, a defendant's right to rep-resent himself 'is sharply

curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'" United States v. Stevens, 83 F.3d 60, 66-7 (2d Cir. 1996).

The trial judge clearly exercised due discretion in denying Winkler's request to proceed pro se for the sentencing phase of his trial. The trial court indicated that it had three major concerns regarding Winkler's request. First, the trial court noted that it was concerned that Winkler's medication would affect his ability to properly and fully function as his own counsel. This concern was well founded in the record. During the guilt phase of Winkler's trial, the closing arguments were delayed because Winkler needed to take his medication, and it was not immediately available in the courtroom. (R. pp. 1833-35). Winkler's medication issues were also raised as a concern before he moved to proceed pro se on the morning the sentencing phase was set to begin. (R. p. 1915). The trial court heard from the nurse practitioner who administered Winkler's medication at the detention center. The current dosage was based upon Winkler not being as actively involved as a lawyer would be: (R. p. 1952). She further indicated that an increase in anxiety could require more medication, and more medication may make Winkler less alert. (R. p. 1952). That caused the trial court great concern. (R. p. 1953). Dr. Halanovich also expressed concern about Winkler's anxiety because she felt that he could get more frustrated in handling the case on his own. (R. p. 1960). She indicated that the medication might not prevent that from happening because of his personality. (R. p. 1960). She also

noted that the medication, which had been increased during the course of the trial, could dull Winkler if increased even more. (R. p. 1961).

Second, the trial court was concerned that allowing Winkler to represent himself at this juncture of the trial would require some delay in order for Winkler to fully prepare for trial. Specifically, the court noted that Winkler did not appear to understand some of the basics of courtroom procedure, including the rules of evidence, and Winkler was not aware of the law regarding mitigation. This was supported by Winkler's responses to the trial court's inquiries on those subjects. Winkler asserts that the trial court applied the wrong standard in assessing whether Winkler should have been allowed to proceed pro se. He asserts that the only relevant inquiry in deciding whether Winkler should have been allowed to proceed pro se was whether the accused made a knowing and intelligent waiver of the right to counsel, as outlined in State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). See Brief of Appellant at p. 40. As noted by the trial court, however, Brewer did not apply to Winkler's request to proceed pro se. In Brewer, the defendant appears to have timely filed his motion to proceed pro se. Thus, as noted in the discussion in Section III, the defendant would have an absolute right to proceed pro se as long as his request to do so was voluntarily and intelligently made. See Faretta, supra; Fuller, supra. Unlike Brewer, however, Winkler's request was not timely. As a result, the standard for assessing whether a defendant should be allowed to proceed pro se outlined in Brewer did not apply to Winkler's case. Thus, the trial court could properly consider Winkler's

knowledge of the processes of the court, and the time it would take for Winkler to prepare his case.

Third, the trial court was concerned that allowing Winkler to proceed pro se would confuse the jury, especially in light of the fact that his attorneys for the guilt phase would be sitting at Winkler's counsel table as standby counsel. In all, the trial court found that when considering those three concerns together, those concerns weighed against granting Winkler's motion because they would lead to undue delay and would be improper in the administration of justice. The trial court also indicated that if for no other reason, there would likely need to be a delay if Winkler was allowed to proceed pro se just to determine if Winkler would need additional medication to continue as a result of his anxiety situation. (See R. p. 1973). In light of the reasoned decision by the trial court, Winkler cannot establish that the court's denial of his motion to proceed pro se was an abuse of discretion. As a result, this claim for appellate relief should be dismissed.

V. THE TRIAL COURT DID NOT ERR WHEN IT GAVE ITS WARNINGS TO WINKLER REGARDING SELF-REPRESENTATION: A FULL FARETTA INQUIRY WAS NOT REQUIRED BECAUSE FARETTA DID NOT APPLY; WINKLER'S MOTION TO PROCEED PRO SE WAS NOT TIMELY.

Faretta did not apply to Winkler's request to proceed pro se because Winkler's request was untimely. As noted in Argument Section III, Winkler did not request to represent himself until after the guilt phase was completed, and the sentencing phase was about to begin. The right to self-representation in Faretta is not absolute, and it is within the sound discretion of the trial court whether Since Faretta did not apply to Winkler's request to proceed pro se, the trial court did not err in not providing Winkler with a full, focused waiver hearing.

Contrary to Appellant's assertion in his brief, Fuller does not require reversal. Fuller is clearly distinguishable from Winkler's case. In Fuller, the defendant moved to waive counsel and proceed pro se on the morning of trial before the charges were read and before the jury was selected and sworn. 337 S.C. at 240, 523 S.E.2d at 170. The Supreme Court declined to hold that a motion to proceed pro se is either timely or untimely when the motion is made on the morning of trial prior to the beginning of trial proceedings as a matter of law. Id. at 241, 523 S.E.2d at 171 (citing People v. Mogul, 812 P.2d 705 (Colo.Ct.App.1991)). The Supreme Court further noted that the trial court failed to conduct an adequate hearing to fully assess the purpose behind the defendant's request or to determine what effect the granting of the request would have had on the proceedings. Fuller, 337 S.C. at 242, 523 S.E.2d at 171.

Fuller does not reach the issue of whether a full Faretta hearing is required in every case where a defendant moves to proceed pro se. The Supreme Court only found that when the timeliness or untimeliness of a motion to proceed pro se is in question, a trial court should conduct a hearing to assess the purpose behind the request and to determine the effect granting the request would have on the proceedings. Furthermore, unlike Fuller, it is clear that Winkler's request to proceed pro se was untimely. The jury was selected, and a verdict upon Winkler's guilt was in place when Winkler made his request to proceed pro se. Thus, the concerns raised by the Supreme Court in Fuller were not present. Finally, the trial court did engage in an adequate hearing to determine the motives behind Winkler's request to proceed pro se and the effect granting the request would have on the proceedings as required by Fuller. The request initially arose from Winkler's insistence that he be allowed to question witnesses that would be presented by the state during the sentencing phase of his trial. Winkler was allowed to explain why he wished to proceed pro se. In his analysis, the trial judge noted that he had some concerns about the effect of allowing Winkler to represent himself at that time would lead to undue delay and would have impede the administration of justice. The trial judge pointed out that he had concerns about Winkler's anxiety issues and his preparedness to continue with the trial immediately if the request was granted. The court also indicated it was concerned that allowing Winkler to represent himself would also confuse the jury. Thus, the trial court clearly engaged in the analysis required by Fuller when it denied Winkler's motion to proceed pro se.

Overall, Winkler has failed to establish that he was entitled to a full Faretta hearing because his request to proceed pro se was untimely. As a result, the trial court did not err by not providing Winkler with a full, focused waiver hearing as outlined by Faretta. The trial court also complied with the requirements outlined in Fuller. Since Winkler has failed to establish that he was entitled to a full Faretta hearing in his case, this claim for appellate relief should be dismissed.

VI. THE TRIAL COURT DID NOT ERR BY ALLOWING DEFENSE COUNSEL TO PRESENT MITIGATING SOCIAL HISTORY EVIDENCE: THIS ARGUMENT FOR RELIEF IS NOT PRESERVED FOR APPELLATE REVIEW BECAUSE IT WAS NOT TIMELY MADE; IT WAS NOT FULLY DEVELOPED BEFORE THE TRIAL COURT, AND IT WAS NOT RULED UPON BY THE TRIAL COURT.

Relevant Facts

During Winkler's mitigation case, the defense presented the testimony of several witnesses. First, Dr. Richard Frierson, a forensic psychiatrist, testified that he diagnosed Winkler with having depressive disorder not otherwise specified, anxiety, alcohol abuse, and having some paranoid personality traits. (R. pp. 2338-39, 2343-46). During cross-examination, Frierson noted that Winkler did not have a history of childhood physical abuse, childhood sexual assault or child neglect. (R. p. 2347). Dr. Rikki Halanovich, another forensic psychiatrist, testified that she diagnosed Winkler with borderline personality disorder, major depressive disorder, alcohol dependence and cocaine abuse. (R. pp. 2655-57, 2658-60). Dr. William Morton, Jr., who was qualified as an expert in psychopharmacology, also testified. (R. pp. 2695-2743).

Te Anne Oehler, a social worker, testified that Winkler's father was very controlling of his mother. (R. p. 2752). When Winkler's parents were first married, they moved in with his father's parents. (R. p. 2752). Winkler's father made his mother quit her job, even before they had children. (R. p. 2752). Further, Oehler testified that Winkler's father worked at the family owned bar. Winkler's father would come home late at night, was very controlling of Winkler's

mother, and he would not let her have any money of her won. (R. p. 2752). By the time the second Winkler child was born, Winkler's mother was emphatic that the new family move out into their own home. (R. p. 2752).

Oehler further testified that Winkler's mother was the primary caregiver because she was the person home during the day. (R. p. 2753). His mother was the person involved with Winkler's schoolwork. (R. p. 2753). Winkler's father did coach all of the boys on their sports teams. (R. p. 2753). However, Winkler's father would leave and go out after dinner, and he would not come back until 1 or 2 am. (R. p. 2753). Oehler noted that Winkler's father had frequently been drinking a lot, and he was not always present at home. (R. pp. 2753-54). She stated that Winkler's father was very controlling towards family members, and he had very poor parenting skills. (R. p. 2754). While Winkler denied his father ever beat him, both of the oldest Winkler children informed Oehler that their father had beaten them. (R. p. 2754). The only exception was when Winkler was a junior in high school, and his mother found marijuana in the bathroom. (R. p. 2754). Oehler testified that when she told Winkler's father that evening after work, Winkler's father grabbed Winkler by the throat and started choking him. (R. p. 2754). According to Oehler, Winkler's mother informed Oehler that she did not tell his father of any other transgressions out of fear that he might hurt Winkler worse. (R. pp. 2754-55).

Oehler also testified that Winkler got his first drink from his father on a camping trip when Winkler was 13. (R. p. 2755). By the time Winkler graduated from high school, he was using alcohol and marijuana frequently. (R. p. 2755).

At that point, if there was any problem with one of the Winkler children, Winkler's mother addressed it. (R. p. 2755). Winkler's father was out of the home working more with his insurance business. (R. p. 2755).

Oehler also testified about Winkler's personal history with women. She noted that Winkler tended to seek out women who had children. (R. p. 2758). She also noted that Winkler was a chronic drinker throughout the years, starting when he was a teenager. (R. p. 2760). She testified that the drinking affected his ability to hold down a job, and she noted that the longest tenure for Winkler at a job was his last one with the property management company. (R. p. 2760). Oehler asserted that Winkler did not immediately trust others, and he would remain suspicious of others until they proved otherwise. (R. p. 2761). Winkler grew up in a strict Catholic home where his father was very rigid. (R. pp. 2761-62). There was no physical abuse later in Winkler's upbringing. (R. p. 2762). Also, Winkler's father controlled his wife and children through finances. (R. p. 2762). This was a source of conflict in the family among the older children because Winkler's father helped Winkler out financially every time. (R. pp. 2762-63). Oehler indicated that Winkler lived a happy-go-lucky life growing up that he tried to replicate by seeking women with children. (R. p. 2763). She testified that Winkler had difficulty in relationships with peers because he sought to be the center of attention, and he wanted affirmation from others. (R. p. 2766). Some of his family relationships focused around holiday times, and he always seemed to be surrounded by children. (R. pp. 2766-67).

After further testimony from Oehler, Rosemary Wolfe, a tenant in the Tillman property where Winkler worked testified on his behalf. (R. pp. 2782-87).

During the break after Wolfe's testimony, defense counsel stated the following on the record:

As you know, the record will reflect that I put up a social, social history through a sociologist, Ms. Oehler, in -- regarding the defendant and his history and his family. And the defendant wants me to let the court know that he had asked me not to put up any social history and that I put that up in spite of his objections. And for the record, I'm noting that he did ask me not to put any social history in because he didn't want anything derogatory said about his family. But in my judgment as a lawyer, I felt it was the appropriate thing to do and I did it.

(R. p. 2788). The trial court noted the statement on the record. Winkler then stated

Sir, I'd like to also again put for the record that, that again disobeying what I, I asked him, what I -- you know, I told him specifically that I did not want my family dragged through the mud, and he did it anyway.

I'm asking again for a new lawyer. This is the third time that he's done that. He did it on the witness stand earlier today, and it's everything I'm asking him to do, he's going against me. I asked him for a recess, he ignored me while that was going on, while his, while his -- Ms. Te Anne was doing that, and he ignored me.

(R. p. 2789).

Argument

First, Winkler failed to preserve this issue for review on direct appeal. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court." State v. Goodwin, 384 S.C. 588, 603, 683 S.E.2d 500, 508 (Ct.App.2009)(citing State v. Turner, 373 S.C. 121, 126 n. 1, 644 S.E.2d 693, 696 n. 1 (2007)). Respondent submits that no proper objection was ever made to any of the testimony of the social worker Te Anne Oehler

before or during her testimony. Counsel only had the court note for the record that Winkler did not want Te Anne Oehler to testify about his family history. This was not sufficient to preserve this issue for appellate review. The trial court was not asked to rule upon any objection. Further, the trial court did not rule upon the notation made in the record. Thus, there is no alleged preserved error to review on appeal. As a result, this claim for relief should be dismissed. Note that this case is not similar to the circumstances in Hojan, supra, in which the defendant waived the presentation of certain mitigating evidence on the record. In Winkler's case, no such motions were ever presented to the trial court. Thus, there was no issue upon which the trial court could rule regarding the presentation of evidence during the sentencing phase.

Second, the issue raised in Winkler's sixth appellate argument is not an appropriate claim for direct appeal. This Court has held that ineffectiveness assistance of counsel claims are "not appropriate for review on direct appeal, and may be asserted only in proceedings under the Post-Conviction Procedure Act." State v. Kornahrens, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986). Winkler's claim in this argument is the equivalent of an ineffective assistance of counsel claim. In Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551 (2004), the United States Supreme Court stated

An attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. Strickland, 466 U.S., at 688, 104 S.Ct. 2052. That obligation, however, does not require counsel to obtain the defendant's consent to "every tactical decision." Taylor v. Illinois, 484 U.S. 400, 417-418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval).

Nixon, 543 U.S. at 187, 125 S.Ct. at 560.⁴ Resolution of this claim for relief on direct appeal would necessarily require examination into whether the decision regarding what questions to ask Te Anne Oehler constituted tactical decisions within the control of counsel or were instead important decisions within the control of the defendant. In all, the record is clearly insufficient to support a finding on this issue in this case. As a result, this claim for appellate relief should be dismissed.

⁴ Florida v. Nixon reversed Nixon v. Singletary, which was cited by the Florida Supreme Court in Hojan.

VII. THE TRIAL COURT CORRECTLY DENIED WINKLER'S MOTION FOR A
DIRECTED VERDICT ON THE STATUTORY AGGRAVATING
CIRCUMSTANCE OF THE MURDER OF A WITNESS TO IMPEDE OR DETER
PROSECUTION OF A CRIME; THERE WAS SUBSTANTIAL
CIRCUMSTANTIAL EVIDENCE SUPPORTING THE CHARGE.

Relevant Facts:

At the close of the State's case during the sentencing phase of Winkler's trial, counsel moved for a directed verdict on the second aggravating factor asserted by the State, which was the murder was of a witness or potential witness committed at any time during a criminal process for the purpose of impeding or deterring the prosecution of any kind. (R. p. 2307).

I would submit to the court that while there has certainly been evidence produced of a crime, there has been no evidence produced that it was for the purpose of deterring or impeding the criminal procedure which would have followed. And, and, and because of that, I would think that they failed, then, to have proven this particular statutory aggravating circumstance as a matter of law. And I would ask the court to rule as a matter of law that the state has failed to prove that as an aggravating circumstance.

(R. p. 2307). The trial court noted that the state had had introduced evidence that there was an allegation, and Winker was arrested for several charges: criminal sexual conduct in the first degree, kidnapping, and assault and battery with intent to kill. (R. p. 2307). Further, there was evidence introduced that the victim was a witness to that crime, so based on the circumstances the death of the victim would have been the death of a witness of the prosecution. (R. pp. 2307-08). The State asserted that was exactly what it was going to argue, and further contended that if you take the defense's argument to its logical

conclusion, the state would never be able to prove that a killing was for the purpose of impeding or deterring a prosecution unless the defendant stated that he killed her so she could not testify. (R. p. 2308). The trial court found there was sufficient evidence for the jury to find the aggravating circumstance beyond a reasonable doubt based on circumstantial information. (R. pp. 2308-09).

At the close of the defense's case, defense counsel renewed its motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11). (R. p. 2817). The trial court again denied the motion because of the existence of circumstantial evidence. (R. p. 2817).

Argument

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned with the existence of the evidence, not its weight." State v. Smith, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). "The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it." State v. Lindsey, 372 S.C. 185, 194-195, 642 S.E.2d 557, 562 (2007)(citing State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000)).

There was substantial circumstantial evidence to support the aggravating circumstance enumerated in S.C. Code Ann. § 16-3-20(C)(a)(11): "[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." First, the State clearly established there was an ongoing criminal process against Winkler when he murdered his estranged wife. During the sentencing phase, the

State presented evidence establishing that there was an open case against Winkler for kidnapping, criminal sexual conduct in the first degree, and assault and battery with intent to kill. On October 10, 2005, Haley Grainger and her sister became concerned about their mother's whereabouts. (R. p. 2167). Haley's sister had called. (R. p. 2167). That led Haley and her boyfriend to start looking for Rebekah. (R. p. 2168). Jill Shelley, Rebekah's other daughter, also testified about the night of the kidnapping. (R. p. 2293). Shelley indicated she first became concerned when she found out from her brother that he was not picked up from a football game on October 10, 2005. (R. pp. 2293-94). Shelley called the police when she first heard of the problem. (R. p. 2294). She noted that her mother's Land Rover was found that night, but there was no sign of either Rebekah or Winkler. (R. p. 2295). Shelley saw her mother the next morning at Seacoast hospital. (R. p. 2295). Shelley testified that her mother was very beat up and dirty. (R. p. 2295). Rebekah's eye was very swollen, and her hair was matted with sand spurs and twigs. (R. p. 2296). Rebekah was also nervous, and she wanted them to do something with Winkler to get him away from her. (R. p. 2296).

Lisa Gore, a staff nurse at Seacoast Medical Center, treated the victim when she was brought in on October 11, 2005. (R. pp. 2195-96). Gore testified that the victim had injuries to the left eye, some swelling to the jaw area, bruising around the neck, dried blood about the face, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, and a bite mark to the face. (R. pp. 2205-06). Gore also testified that the victim

had a large amount of hair removed from her head, along with some matting and disarrangement of her hair with leaves and debris mixed in. (R. p. 2206). Gore also indicated there were bruises to Rebekah's arms and wrists, the tops of her hands, her neck area, scrapes on her torso, belly, and back, and contusions and scrapes to her lower legs, thighs, and feet. (R. pp. 2207-10). A sexual assault evidence kit was collected from Rebekah. (R. pp. 2213-15).

Ann Pitts responded to the Stephen's Crossroads Complex. (R. p. 2220). She later responded to the Seacoast Medical Center to interview the victim. (R. p. 2221). Pitts testified that the victim seemed to be in shock, and was very afraid. (R. p. 2222). Rebekah did tell Pitts what happened and where it happened. (R. p. 2222). The victim also described the clothes she was wearing. (See R. p. 2226). While those clothes were not recovered when Pitts, the victim, and Detective Livingston initially went to the area, they were later recovered when members from the crime scene unit and dog team searched the area. (R. p. 2226). Haley also identified a toe ring, an earring, a hair clip, shorts, and a shirt with a wad of hair in it that all belonged to Rebekah. (R. p. 2171). Jeff Gause, a police officer with the Horry County Police Department, testified that he recovered the shorts, a shirt with a wad of hair, a hair clip, and some underwear from a partly wooded area of the county that he had been informed was part of the area in which the assault took place. (R. pp. 2176-80). Neil Livingston, a detective with the Horry County Police Department, testified that he recovered an earring and another piece of jewelry from the inside of a commercial building that was under construction in the Little River section of Horry County. (R. pp. 2184-

91). John Ortuno, a DNA analyst for SLED, testified that the DNA from the semen found in the rectal and vaginal swabs from the sexual assault evidence collection kit matched Winkler's DNA. (R. pp. 2244-49).

Pitts testified that Winkler was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping on October 11, 2005. (R. p. 2227). He was found at a friend's house. (R. p. 2227). When he was arrested, he was wearing blue jean shorts, a t-shirt with some type of printing on it, and some brown shoes. (R. p. 2228). Pitts was also present at Winkler's first bond hearing. (R. p. 2230). Bond was initially denied in his case. (R. p. 2231). At a second bond hearing, Winkler's bond was set at \$150,000, and he was required to wear an electronic monitor while out on bond. (R. pp. 2231-33). Pitts also testified that at Winkler's third bond hearing, his bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment. (R. pp. 2233-34). According to the bond, the monitor was to be off from 4pm to 6pm.

Second, Rebekah, the victim, was clearly a witness or potential witness in Winkler's trial on these three charges. Third, there was clear circumstantial evidence to support a finding that he killed his estranged wife to impede or deter the kidnapping and criminal sexual conduct prosecution. First, during the guilt phase of the trial, J [REDACTED] testified that He testified that Winker was stating, "I'm back and you thought I was going to prison, something like that," when he broke into the condo. (R. p. 1431). He was yelling very loud. (R. p. 1431). M [REDACTED] E [REDACTED] C., J [REDACTED]'s friend, testified that she was on the phone with

J [REDACTED] when she heard a loud pop noise, and a voice that was not J [REDACTED]'s say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not -- I'm back, I'm back. I'm never going back to jail." (R. pp. 1511-1512). Jill Shelley testified that during the incident on September 2005, Winkler warned Rebekah that she knew what would happen if someone called the police on him. (R. p. 2292). Further, the last item of evidence introduced during the sentencing phase of Winkler's trial was a letter that Winkler asserted that Rebekah had lied to the police about the first set of charges against him (i.e. the kidnapping, criminal sexual conduct, and ABWIK). (R. p. 2302). He claimed that the evidence clearly showed that Rebekah was driving the Land Rover when it crashed, and she lied to establish the charges against him (i.e. the kidnapping, criminal sexual conduct, and ABWIK). (R. p. 2302). He claimed that the evidence clearly showed that Rebekah was driving the Land Rover when it crashed, and he alleged that Rebekah lied because she was afraid to tell Shelley. (R. p. 2302). Winkler also asserted that Rebekah would not be dead had Shelley not initially called the police. (R. p. 2302).

In all, there was clearly sufficient circumstantial evidence to support the statutory aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11). As a result, Winkler's claim for appellate relief in his seventh argument should be dismissed.

Even if the trial court erred in not granting Winkler's motion for a directed verdict, the error was harmless. "[A] death sentence supported by at least one valid aggravating circumstance need not be set aside ... simply because another

aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty." Zant v. Stephens, 462 U.S. 862, 884, 103 S.Ct. 2733, 2746 (1983). Since the jury also found there was evidence beyond a reasonable doubt to support the aggravating factor enunciated in S.C. Code Ann. § 16-3-20 (C)(a)(1)(c), and the burglary aggravating circumstance was supported by sufficient evidence, any error in charging the jury with the second aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11) was harmless. State v. Elkins, 312 S.C. 541, 545, 436 S.E.2d 178, 180 (1993) ("[T] the failure of one aggravating circumstance does not so taint the proceedings as to require reversal where there remains a valid aggravating circumstance upon which the sentence of death is based."); see United States v. Higgs, 353 F.3d 281 (4th Cir. 2003).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny Winkler's appeal and affirm his convictions for murder, burglary in the first degree, assault and battery of a high and aggravated nature, and his death sentence.

Respectfully submitted,

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By: KLJ
Alphonso Simon Jr.

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April 14, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
James E. Lockemy, Circuit Court Judge

THE STATE

RESPONDENT,

V.

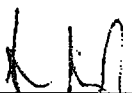
LOUIS MICHAEL WINKLER, JR.

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 14th day of April, 2010.



ALPHONSO SIMON, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY

James E. Lockemy, Circuit Court Judge

THE STATE

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.

APPELLANT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via United States mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This the 14th day of April, 2010.



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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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ARGUMENTS IN REPLY

3.

Defense counsel was clear that appellant was ready to proceed and that he wanted to represent himself during the penalty phase. No delay was necessary, defense counsel supported appellant's decision to represent himself, and the judge abused his discretion by refusing to allow appellant to represent himself under the unusual facts of this case.

Appellant did not want to go quietly to his death represented by an attorney who only a few days earlier had assaulted him. Appellant was willing and ready to represent himself and the trial would not have been delayed. Defense counsel repeatedly and correctly stated appellant had the right to represent himself and the trial would not have been disrupted. The state's assertion to the contrary finds no support in the record, and this case simply is not State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998).

In State v. Reed the defendant asked to have his standby counsel take over and cross-examine witnesses during the penalty phase. This court noted "standby counsel stated that while he would do his best to prepare to cross-examine witnesses, he was *not prepared* to represent appellant during the penalty phase. Standby counsel stated he had not investigated the case in reference to victim impact evidence or mitigation." 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998) This Court concluded that it would be a hybrid form of representation placing standby counsel in the position of not being fully prepared to cross-examine witnesses without delaying the trial.

Here, conversely, preparation was not an issue and appellant was not attempting to put his attorney in an unfair position of later being held ineffective because he was not prepared. Appellant simply wanted control over the penalty phase of his trial, and in this

highly unusual case where his attorney had assaulted him and appellant had good reason not to have confidence in the defense team, it was an abuse of discretion for the judge to refuse to allow appellant to defend himself.

Faretta v. California 422 U.S. 806 (1975) is anchored in affirming the dignity of a defendant who wishes to represent himself where his life or liberty is at stake rather than having the government impose counsel that the defendant does not trust to represent him. If ever there was a case in which this fundamental Constitutional right to be free of government imposed counsel was meaningful it was this case. Counsel had assaulted appellant and appellant wanted to know how to have counsel arrested for assault and battery. Counsel stated, and the judge should have accepted counsel's assertion, that appellant should be allowed to represent himself.

6.

The state's claim that allowing defense counsel to present mitigating social history evidence over appellant's objection is an ineffective assistance of counsel claim is misplaced. Appellant was not allowed to defend himself and he placed on the record that his attorneys were disregarding his specific instructions that his family members not be called as witnesses.

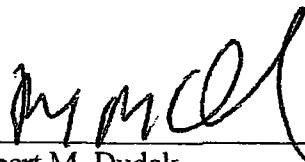
As seen, the court refused to allow appellant to represent himself during the penalty phase. Appellant had the right to prevent his attorneys from calling social worker Oehler and his family members as witnesses. See Hojan v. State, 3 So.3d 1204 (2009); Commonwealth v. Davido, 582 Pa.52, 868 A.2d 431 (2005); United States v. Davis, 285 F.3d 378 (5th Cir. 2002); Chapman v. Commonwealth of Kentucky, 265 S.W. 3d 156 (2007). Even though appellant was not representing himself, he objected to his attorneys disregarding his wishes and, and in appellant's words, dragging his family "through the mud." R. 2788, l. 5 – 2789, l. 19.

Appellant's family was brought down to South Carolina from Ohio because appellant's attorneys sought to have them beg for appellant's life. Appellant clearly did not want his family members to be witnesses during the penalty stage. This is not an ineffective assistant of counsel claim ripe only in post-conviction relief -- it is a right to control evidence in mitigation case -- and the state's argument to the contrary has no support in this record or the law.

CONCLUSION

By reason of the forgoing arguments, and the arguments in appellant's brief, appellant's convictions and death sentence should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

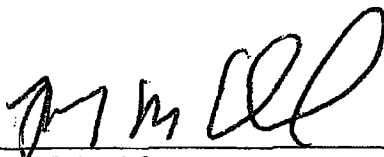
Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEYS FOR APPELLANT.

April 5, 2010

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEYS FOR APPELLANT.

April 5, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

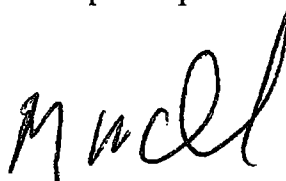
V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

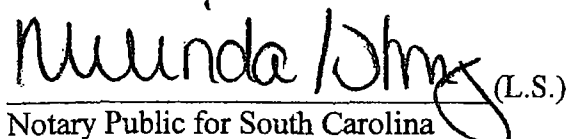
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, this 5th day of April, 2010.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 5th day of April, 2010.


(L.S.)
Notary Public for South CarolinaMy Commission Expires: October 30, 2018.

The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

The Honorable James E. Lockemy
Horry County
Trial Court Case No. 2006-GS-26-02101

ORDER

Pursuant to Rule 210(f) of the South Carolina Appellate Court Rules, it is ordered that the Clerk of Court for Horry County release:

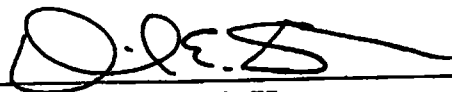
State's Exhibit 1 – Tape of 911 Call

to be transported to the South Carolina Supreme Court, by the South Carolina Office of Attorney General or his designee, for consideration in the above referenced appeal.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

June 17, 2019

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
✓ Assistant Attorney General Alphonso Simon, Jr.
The Honorable Melanie Huggins

The Supreme Court of South Carolina

The State,

Respondent,

v.

RECEIVED

Louis Michael Winkler, Jr.,

Appellant.

JUN 22 2010

The Honorable James E. Lockemy
Horry County

S.C. SUPREME COURT

Trial Court Case No. 2006-GS-26-02101

Debbie M. Hopkins

ORDER

Pursuant to Rule 210(f) of the South Carolina Appellate Court Rules, it is
ordered that the Clerk of Court for Horry County release:

Photos

State's Exhibits 2-10, 12, 13, 15-16, 18-20, 22-24, 26-27, 29-33, 37-42, 52-68, 71-101, 103-137, 140-143, 145-46, 151-158, 160-61 ³⁸

✓ Defense Exhibits 1-25

Other Paper Exhibits

- ✓ State's 11 (diagram)
- ✓ State's 47 (aerial map)
- ✓ State's 69 (Notice of Final Disposition)
- ✓ State's 150 (diagram)
- ~~Defense 25 (excerpts from DSM-IV)~~
- ✓ Defense 26 (records from Detention Center)

Court Exhibits

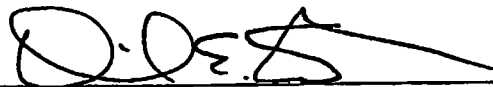
- ✓ Court's Exhibit 22 (Notice of Evidence in Aggravation)
- ✓ Court's Exhibit 23 (Miranda Warning)
- ✓ Court's Exhibit 25 (Jury Question)

to be transported to the South Carolina Supreme Court, by the South Carolina Office of Attorney General or his designee, for consideration in the above referenced appeal.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

June 21, 2010

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
✓ Assistant Attorney General Alphonso Simon, Jr.
The Honorable Melanie Huggins

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

Appeal from Horry County
James E. Lockemy, Circuit Court Judge

Opinion No. 26857
Heard June 24, 2010 – Filed August 16, 2010

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Appellate Defender Elizabeth A. Franklin-Best, both of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Alphonso Simon, Jr., all of Columbia, and Solicitor J. Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: In this capital murder case, Louis Michael Winkler, Jr. (Appellant) appeals his sentence of death.¹

FACTS/PROCEDURAL HISTORY

Appellant kidnapped and sexually assaulted Rebekah Grainger Winkler (Victim) on October 10, 2005, five months before Victim was murdered.² That evening, Appellant's car was spotted behind the Seacoast Medical Center (Seacoast). Victim's car was found off the road in some trees and appeared to have been wrecked. There was blood on both of Victim's car seats, around the center console, and on the interior panel of the passenger's side door. The Horry County Police Department activated its dog team in an attempt to locate two missing persons. Victim was later found next to Stephen's Crossroads, which is where the magistrate's complex and library is located.

Phyllis Richardson (Richardson) arrived at the parking lot at Stephen's Crossroads around 7:30 a.m. on October 11, 2005, and saw a woman walking in the parking lot being followed by a man. Richardson noted the woman looked distraught and was acting confused, and that the man's hands were in the air as if he were raging and irritated. Shortly after Richardson entered her office, she saw the woman from the parking lot on the phone in her office building. The woman's hair was matted and tangled with some bald spots. Richardson later learned the woman making the call was Victim. Curtis Thompson was the first officer to arrive at the building, and noticed some of Victim's hair looked like it had been ripped out, and she had black eyes, abrasions, and other scratches.

Victim was transported to Seacoast by EMS where Lisa Gore (Gore), a nurse at Seacoast, tended to Victim and noted her injuries to the left eye, some swelling in the jaw area, bruising around the neck, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple

¹ This case consolidates Appellant's direct appeal and the mandatory review provisions of S.C. Code Ann. § 16-3-25 (2003).

² Victim was Appellant's estranged wife.

bruises and contusions, a bite mark to the face, and a large amount of hair removed from her head. A sexual assault kit was collected from Victim. The DNA found in the rectal and vaginal swabs from the sexual assault kit matched Appellant's DNA.

On October 11, 2005, Appellant was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping. Bond was initially denied; however, at a second bond hearing, Appellant's bond was set at \$150,000 and he was required to wear an electronic monitor while out on bond. At a third bond hearing, Appellant's bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment between the hours of 4 p.m. and 6 p.m. Appellant was out of jail on bond on the day Victim was murdered.

At around 5:30 p.m. March 6, 2006, Appellant kicked in the door to Victim's condominium. Appellant knocked Victim's son, J. G. (J.), onto the ground and then shot Victim once in the face at point blank range. According to the forensic pathologist who conducted Victim's autopsy, death occurred instantly. Appellant then walked over and pointed the gun at J. Shortly thereafter, Appellant left the condominium.

Appellant hid in the woods for two weeks. When police apprehended Appellant,³ they recovered a Jennings .380 pistol from his right front pants pocket. Five live rounds were found in the pistol, but there was not a live round in the port. During a full search of Appellant, police recovered eighteen rounds of .380 ammunition, a guard lock blade knife, and a wallet. In the wallet, there was a newspaper clipping about the shooting and murder.

Appellant was tried and found guilty of murder, first-degree burglary, and assault and battery of a high and aggravated nature. At trial, the State sought to establish two statutory aggravating circumstances: (1) the murder was committed during the commission of a burglary; and (2) the murder was of a witness or potential witness committed at any time during the criminal

³ Three days after the murder, police searched Appellant's residence and found a piece of paper with Victim's address on it. However, police were not able to find Appellant until March 20, 2006, two weeks after the murder.

process for the purpose of impeding or deterring prosecution of any crime. S.C. Code Ann. § 16-3-20(C)(a)(1)(c), (C)(a)(11) (2003 & Supp. 2009). The jury recommended that Appellant be sentenced to death.

During the guilt phase of Appellant's trial, M E C. (M), J's friend, testified that on the evening of the murder she was on the phone with J when she heard a loud pop noise, and a voice that was not J's say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." M then heard a hit and the phone went to static. Andrew Cooper (Cooper), a former crime scene technician for the Horry County Police Department, testified that it appeared there had been a forced entry because the door jamb, door frame, lock mechanism, and other parts of the door had been broken. Cooper also testified that a reddish colored liquid was collected from the kitchen countertop. Kimberly Hahn, a former State Law Enforcement Division (SLED) scientist, testified that she compared the blood swabs recovered from the counter of Victim's residence to Appellant's blood standard, and the blood from the counter matched Appellant's blood profile. Cooper testified that a projectile was recovered from the baseboard of the wall behind Victim. A firearms and toolmark examiner for SLED testified that the Jennings pistol found on Appellant when apprehended fired the bullet recovered from Victim's baseboard.

During the sentencing phase of Appellant's trial, Jill Shelley (Shelley), Victim's older daughter, testified that in September 2005, six months before the murder, she could not contact Victim on the phone so she drove to Victim's home. When she arrived at Victim's residence she saw that Victim was beat up and her arms were covered in bruises. Appellant later arrived, started kicking the door, and was screaming for Victim to let him in. Shelley threatened to call the police. Appellant responded that Victim knew what would happen if they called the police. Shelley testified that Victim moved out of Appellant's home as a result of that confrontation. One piece of evidence presented by the State was a letter sent by Appellant to Shelley while Appellant was incarcerated. In the letter Appellant asserted that had Shelley not gotten involved, Victim would still be alive.

ISSUES

- I. Did the trial court err in admitting an audio tape recording as a prior consistent statement under Rule 801(d)(1)(B), SCRE?
- II. Did the trial court err in allowing the jury to review the transcript of the 911 tape?
- III. Did the trial court err in refusing to allow Appellant to represent himself during the sentencing phase of trial?
- IV. Did the trial court err in not conducting a full *Faretta* inquiry?
- V. Did the trial court err in allowing defense counsel to present mitigation evidence to which Appellant objected?
- VI. Did the trial court err in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20 (C)(a)(11)?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pittman*, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007) (citation omitted).

LAW/ANALYSIS

I. Rule 801(d)(1)(B), SCRE

Appellant argues the trial court erred in admitting as a prior consistent statement under Rule 801(d)(1)(B), SCRE an audio tape recording of J[REDACTED]'s interview with police on the evening of the murder. We disagree.

Prior consistent statements are not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE. In order for a prior consistent statement to be admissible pursuant to Rule 801(d)(1)(B), the following elements must be present:

(1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

Saltz, 346 S.C. at 121-22, 551 S.E.2d at 244.

J[REDACTED] testified that he saw Appellant shoot and kill his mother. During cross examination, J[REDACTED] testified that his father was Roger Grainger (Grainger). He also testified that Grainger was the only person he called "dad," and that he did not refer to Appellant as "dad." Defense counsel

asked J[REDACTED] if he remembered telling the first officer who arrived on the scene that it was his dad who shot his mother. J[REDACTED] denied he told the officer that it was his dad, and stated he told the officer it was his stepdad. J[REDACTED] also testified that Grainger was supposed to arrive at the condominium around 6 p.m. on the night of the murder.

Officer Thomas Knoch (Knoch), the first officer to arrive at the scene of the murder, testified that as he was heading up the steps to the condominium the following conversation took place between him and J[REDACTED], "He said he's gone, and I asked him. I said who. . . . He said my dad" Knoch also testified that in his report he wrote, "When I asked him who, he said my dad."

Detective Ann Pitts (Pitts) testified that she spoke with J[REDACTED] on the evening of the shooting and recorded the conversation. The state moved to enter the tape recorded conversation into evidence. In the statement to Pitts, J[REDACTED] identified Appellant as the man who broke into the condominium and shot Victim. Appellant objected and the court overruled Appellant's objection under Rule 801(d)(1)(B), SCRE.

We hold that J[REDACTED]'s statement to Pitts was a prior consistent statement admissible under Rule 801(d)(1)(B), SCRE. First, J[REDACTED] testified at trial and was subject to cross-examination. Second, Appellant accused J[REDACTED] of recently fabricating the statement. Appellant was accusing J[REDACTED] of lying when J[REDACTED] testified that he told Knoch it was his stepdad who shot his mother, not his dad. This alleged fabrication was necessarily recent because it happened during the trial. Third, J[REDACTED]'s statement to Pitts was consistent with his testimony at trial. Fourth, the statement to Pitts occurred before the alleged recent fabrication. Thus, all of the elements of Rule 801(d)(1)(B), SCRE are satisfied and the trial court committed no error in allowing into evidence J[REDACTED]'s statement to Pitts.

II. 911 Tape

Appellant argues the trial court erred in allowing the jury to view the transcript of the 911 tape while the jurors were listening to the tape during deliberations. We disagree.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations." *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). "The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request." *Id.* The court is not required to submit evidence to the jury for review beyond that specifically requested but in its discretion may have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. *Id.* In *Plyler*, the trial court allowed the jury to hear a tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. *Id.* In that case, this Court found there was no abuse of discretion where only the direct examination was played and the trial judge denied the defendant's motion that the jury be required to also hear the cross-examination to prevent overemphasis of the portion reheard. *Id.*

In this case, during jury deliberations, the jury sent the judge a question asking if they could read the 911 transcript. Appellant argued the transcript was not part of the trial record, was only offered as an aid to the tape recording, and was never put into evidence. The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the evidence was presented at trial.⁴ This was done in Appellant's presence at the request of the jury. Thus, the judge exercised proper discretion and committed no error in allowing the jury to read the transcript while listening to the 911 tape.

⁴ Appellant offered no objection to the introduction of the 911 transcript at trial, nor did he object to the transcript being read while the 911 tape played.

III. Self-representation

Appellant argues the trial court abused its discretion by refusing to allow Appellant to represent himself during the sentencing phase of the trial. We disagree.⁵

An accused may waive the right to counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *Id.* (citation omitted). "If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." *Id.* (citing *United States v. Singleton*, 107 F.3d 1091 (4th Cir.1997); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979)). "Once trial commences, that right [to proceed *pro se*] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." *U.S. v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986) (citations omitted); *see also U.S. v. Stevens*, 83 F.3d 60, 66-67 (2d Cir. 1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'"). The sentencing phase of a capital trial does not constitute a separate trial. *See* S.C. Code Ann. § 16-3-20(B) (2003); *see also State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed *pro se* at the beginning of trial. Appellant made his request to proceed *pro se* at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

⁵ Issue three condenses Appellant's third and fourth issues on appeal into one issue.

The trial court did not abuse its discretion in denying Appellant's request to proceed *pro se* at the sentencing phase of the trial. First, the trial court noted it was concerned that Appellant's medication would affect his ability to properly and fully function as his own counsel. Second, the trial court was concerned that allowing Appellant to represent himself during the sentencing phase would require some delay for Appellant to fully prepare. Third, the trial court was concerned the jury may be confused to have the first half of the case tried by counsel and the second half tried without counsel, especially if the jury could see counsel at Appellant's counsel table. For these reasons, the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress. Hence, the trial court's decision to not allow Appellant to proceed *pro se* during the sentencing phase of trial was not an abuse of discretion and, therefore, nor error.

IV. *Faretta* Warnings

Appellant argues the trial court erred by failing to properly provide Appellant with *Faretta* warnings when Appellant sought to proceed *pro se* at the beginning of the sentencing phase. We disagree.

As noted above, Appellant did not timely waive his right to counsel and proceed *pro se*. Hence, Appellant's reliance on *Faretta* is misplaced. Had Appellant moved to proceed *pro se* before the trial began, then *Faretta* would apply. Moreover, Appellant contends that *Fuller* requires reversal. In *Fuller*, the defendant moved to proceed *pro se* before the trial began. 337 S.C. at 241, 523 S.E.2d at 170. However, in this case, Appellant did not seek to proceed *pro se* until the sentencing phase. Appellant's reliance on *Faretta* and *Fuller* is misplaced, and the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress.⁶

⁶ Even if *Faretta* were applicable, the record reflects the trial judge met the *Faretta* standard by adequately warning Appellant of the dangers of self-representation.

V. Mitigating Social History

Appellant contends the trial court erred by allowing defense counsel to present mitigating social history evidence and call Appellant's family members as mitigation witnesses over Appellant's objection. We disagree.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565, 578 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S. Ct. 646, 657, 98 L. Ed. 2d 798, 816 (1988)). The introduction of the mitigation evidence at issue was a tactical decision made by Appellant's trial counsel and is reviewed on a case by case basis. The mitigation evidence presented served the purpose of humanizing Appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigating evidence that Appellant did not want to be introduced.

VI. S.C. Code Ann. § 16-3-20(C)(a)(11)

Appellant argues the trial court erred by refusing to direct a verdict on the statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime. We disagree.

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight." *State v. Smith*, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). "The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it." *State v. Lindsey*, 372 S.C. 185, 194-95, 642 S.E.2d 557, 562 (2007).

The aggravating circumstance at issue is "[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." S.C. Code Ann.

§ 16-3-20(C)(a)(11) (2003 & Supp. 2009). The State established there was an ongoing criminal process from 2005 against Appellant for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping at the time Victim was murdered. Victim, as the victim in the 2005 crimes, was clearly a potential witness in Appellant's trial on these three charges. There was circumstantial evidence to support a finding that Appellant murdered Victim to impede or deter prosecution of the charges listed above. J. [REDACTED] testified that Appellant stated, "you thought I was going to prison," when he broke into the condominium. M. [REDACTED] testified she heard a loud pop noise, and a voice that was not J. [REDACTED]'s say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Shelley testified that Appellant warned Victim that she knew what would happen if someone called the police. Lastly, in the letter from Appellant to Shelley written while Appellant was incarcerated, Appellant asserted that Victim would still be alive had Shelley not gotten involved in Victim's life. This evidence is circumstantial evidence to support the statutory aggravating circumstance contained in section 16-3-20(C)(a)(11), and the trial court is affirmed in its denial of Appellant's motion for a directed verdict.

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

CONCLUSION

For the aforementioned reasons, Appellant's conviction and sentence are affirmed.

BEATTY, KITTREDGE, HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

Opinion No. 26857

PETITION FOR REHEARING

Counsel for appellant respectfully petitions this Court, pursuant to Rule 221(a), SCACR, for rehearing of its decision in, State v. Winkler, Op. No. 26857, Shearouse's Adv. Sh. 32 at 16-28 (filed August 16, 2010) because this Court, in affirming his capital conviction and sentence, overlooked material facts and law relating to the case including the fact the trial judge **promised appellant prior to trial**, that he could represent himself but not at that early stage. Further, as explained infra, appellant respectfully disagrees with this Court's holding that the "sentencing phase of a capital trial does not constitute a separate trial" for purposes of Faretta v. California, 422 U.S. 806 (1975) and self-representation. State v. Winkler, Op. No. 26857, Shearouse's Adv. Sh. #32 at 24-25 (filed August 16, 2010). See Bullington v. Missouri, 451 U.S. 430 (1981).

At the last pre-trial hearing on January 24, 2010, four days before appellant's trial was to begin on Monday, January 28, 2010, defense counsel Wilson told the judge: "[M]r. Winkler wants to be heard and so I want to, [you to] hear him." Appellant then told the judge about a physical altercation he had with defense counsel Wilson at "the jailhouse" where Wilson put his finger in appellant's face, pushed him and called his sister "a f'ing liar." R. 3407, l. 121 – 3410, l. 4.

Appellant, who was always respectful to the court, informed the judge that when he told Wilson "[p]lease do not ever call my sister or anyone in my family a liar again. He [Wilson] turned towards me, put his finger in my face, touched my face, and said she is a f'ing liar. At that time I swatted his hand away from my face, officers came in, and they acted like it was my fault. But it was Mr. Wilson's. And there's no way I can see where I'm gonna get a fair trial with this man, my attorney, when he [has] called me and my family liars over the past month . . . He's the one that lost his temper and stuck his finger in my face and used the F word concerning my sister, who is a teacher in Ohio . . . I contacted Corporal Neal, who was in my pod last night, directed me to Major Johnson. Relayed my, my message that **I'd like to press charges on Mr. Wilson**, and he said back to her – I did not speak with Major Johnson. I spoke to. I spoke to Craig that, that, at the jailhouse, did not permit me to do that. **I needed a written statement from you in order to do an in-house assault charge.**" R. 3407, l. 121 – 3410, l. 4. (emphasis added).

The judge told appellant that criminal charge against Wilson "can be addressed **at a later date**. There's no urgency about it. " R. 3410, ll. 5-17. (emphasis added).

The judge asked Wilson if he thought this altercation and appellant's accusation of criminal behavior on his part would hamper his ability to represent appellant. Wilson said it would not, and appellant continued to complain about Wilson until the judge told appellant he did not want to hear "anymore about it" -- the lack of communication with Wilson. R. 3410, l. 18 – 3414, l. 14.

Appellant responded: “[I] don’t see how we can get along. We have to – we have to go through a mock trial and this man [has] just now called me a liar, and there is no way we can get along. I’ve asked him to be, to be removed . . .” The judge said, “[I]f your request is to have another attorney appointed, from what you told me, that request is denied.” R. 3410, l. 18 – 3414, l. 14. The judge stated he wanted the attorneys to do their best over the weekend and stated “I would rather address anything further about **this Monday**, and you-all just prepare in your best efforts for this weekend.” R. 3410, l. 18 – 3414, l. 14. (emphasis added).

Prior to trial, and before jury selection on Monday, January 28, 2008, the judge again heard appellant’s continuing complaints about defense counsel Wilson and the judge concluded:

[In] any event, we’re going to proceed then. There’s been no request for you to represent yourself. You’re requesting another attorney. Since that’s the case, I do not grant your motion. Now, **you always have that option to represent yourself**, which would be very inadvisable **for this stage**, but we will continue on with the case.”

R. 42, ll. 12-18 (emphasis added).

Given the judge’s pre-trial promise that appellant would always have the opportunity to represent himself the self-representation issue should not have been analyzed under the abuse of discretion “untimely request” standard of State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). In Reed, the defendant represented himself during the guilt phase, he was convicted, and he then decided he wanted his appointed counsel, Chief Public Defender Ashley Pennington, to represent him during the penalty phase. Under these very different circumstances this Court stated the trial judge did not abuse his discretion by not forcing Public Defender Pennington, who acknowledged he was not prepared immediately to go forward, to represent Reed.

This Court should grant rehearing because it applied the wrong standard of review – abuse of discretion standard – rather than the correct standard that the request of self-representation “must

be honored out of that respect for the individual “which is the lifeblood of the law” standard of Faretta v. California, 422 U.S. 806, 834 (1975). The trial court’s failure to honor its promise, and allow appellant’s request to represent himself and control his case in mitigation during the penalty stage trial constitutes a due process violation. See Knox v. Collins, 928 F.2d 657 (5th Cir. 1991)(failure to give a jury instruction as promised and relied upon by the defendant violated the essential demands of fairness despite the fact the jury charge was not required by law at that time).

However, even under an abuse of discretion standard each of the trial judge’s three purported reasons for refusing to allow appellant to represent himself were without support in this record. Trial counsel said that appellant was ready to represent himself and that there would be no delay, appellant’s very mild antidepressant medication could be managed, and the jury would not have been confused by appellant representing himself during the penalty stage trial. R. 1952, l. 14-1953, ll. 9-19. As to the possibility the jury may become confused, in State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004), the Court said this situation was easily manageable by the trial judge reminding the jury during the penalty stage that the defendant was representing himself.

Further, and respectfully, this Court should address in the opinion the highly unusual fact that appellant **wanted his attorney arrested for assaulting him** prior to the trial since it is probative of the self-representation issue.

Moreover, in this case appellant’s attorneys also wanted appellant to represent himself. After recessing for the mandatory twenty-four hour waiting period following appellant’s convictions, the parties returned to court on February 4, 2008. Defense counsel informed the court that appellant wanted to participate in the cross-examination of witnesses. R. 1915, ll. 16-23. Denying that, the trial court **reiterated to appellant its promise** that he would be allowed to represent himself:

"Well, Mr. Winkler, you always have the opportunity, sir, if you wish to represent yourself, sir. And if you want to represent yourself, we'll go through another dialogue here to make sure that's what you're doing."

R. 1917, ll. 14-18. (emphasis added).

Appellant then asked the court to allow him to proceed pro se and to allow his attorneys to remain as a resource for him. R.1925, l.14 - 1928, l. 7. Winkler's request was unequivocal:

Court: If you're saying that you want to represent yourself with Mr. Wilson and Mr. Rathbun to stay there as consultants for you to consult with during the course of this phase of the trial, but not to be your attorneys who ask questions or make closing arguments to the jury, is that what you're requesting?

A: Yes, sir.

R. 1928, ll. 11-17; R. 1930, ll. 19-24.

Trial counsel informed the judge that appellant had indicated to him "on **more than one occasion**" that this is what he wanted to do. R. 1932, ll. 7-9. Appellant made it clear that he was no longer asking for new attorneys, but to represent himself: "I already asked that eight months ago." R. 1932, ll. 15-20.

The judge then asked if appellant had reviewed the materials gathered in preparation for the trial. Appellant responded that he had, otherwise, "[w]e wouldn't be ready for trial." R. 1932, l. 25 - 1933, l.6. The judge also asked if appellant had reviewed the evidence that Wilson and Rathbun were prepared to introduce during that part of the trial. Again, appellant said he had. R. 1933, ll. 7-10.

After the trial court informed appellant again that he "always [has] the opportunity . . . to represent himself," he noted it would be dangerous it would be for him to do so. R. 1917, ll. 14-23. **Appellant's attorneys asked the judge to allow appellant to represent himself.** R. 1920, l. 21 - R. 1921, l. 20. The judge again told appellant that the decision was highly inadvisable,

and that he would be bound by court rules. R. 1921, ll. 21-25. The state **conceded that appellant had the right to represent himself**. R. 1922, ll. 2-8. The judge informed appellant for the third time that he had the right to represent himself but that it was dangerous to do so. R. 1922, ll. 14-19. Appellant was insistent that he wished to represent himself. R. 1926, l. 6 - 1927, l. 25; R. 1930, l. 19 - 1931, l. 3.

The judge began to seriously engage appellant regarding his decision to represent himself. R. 1929, l. 14. Wilson clarified appellant's position:

Mr. Wilson: [W]hat he what he wants to do, and he'll tell you if I'm correct. What he wants to do is to represent himself, but he wants to make sure, and you say dismiss your attorneys, and that's the other word that's confusing him.

R. 1927, ll. 21-25.

Appellant unequivocally invoked his right to represent himself. R. 1928, ll. 11-17.

The judge noted that he was reviewing Faretta, *supra*, Brewer¹, and Fuller². R. 1931, ll. 1-3. The judge then discussed appellant's medications, which a nurse stated were not a serious consideration. R. 1931, ll. 4-25. Wilson again informed the judge that appellant was adamant about representing himself, even though Wilson -- as would any attorney -- did not believe it was a good idea. R. 1932, ll. 4-9. The judge asked appellant if he reviewed the mitigation materials collected by his defense team. R. 1932, l. 25 - 1933, l. 10. He asked him if he understood "the nature of the term leading question." R. 1933, ll. 1-20. Appellant answered that "it's trying to get someone to say something that you want them to say, putting words in their mouth." R. 1933, ll. 11-17.

¹ 328 S.C. 117, 492 S.E.2d 97 (1997).

² 337 S.C. 236, 523 S.E.2d 168 (1999).

The judge asked if appellant had reviewed the rules of evidence for South Carolina; did he understand the various exceptions to hearsay? R. 1933, ll.18-25. Did he know what an excited utterance is? R. 1934, ll.1-5.

Appellant told the court:

Most of these witnesses that they're going to call today, what I understand, there's nobody that knows them better than myself. They were supposedly my friends who turned against me to keep me with my wife, who they only met several times. I know them better than anybody in this room, your Honor, and-- . . . Your Honor, I'm confident in taking, taking care of this, this business.

R. 1934, l.8 - 1935, l. 4.

The judge then asked counsel to look at Fuller, supra, and Brewer, supra to see when the decision to proceed pro se had to be made. And he asked appellant:

And let me just review these one more time. Let me—but you understand the dangers, the pitfalls? You understand it's not that, that – it's very dangerous to do this, and you understand at this phase of the trial, sir, this jury is going to decide whether or not you would receive life imprisonment or the death penalty? You understand that, sir?

Defendant: Yes, Your Honor.

R. 1925, ll.16-23.

The judge then asked appellant if he understood the danger of going forward representing himself--if it was a decision he wished to make. Appellant said he did. R. 1936, ll. 2-9.

After this, Solicitor Hembree asked the judge to "engage in a discussion of all the factors under Faretta just for the record." R. 1937, ll. 18-23. The judge replied that he thought he had.

R. 1937, l. 24 - 1938, l. 2.

The parties then engaged in a discussion regarding the timing of appellant's request. The judge said to appellant:

Mr. Winkler, I do want you to consider this very seriously because this is a serious decision. If ultimately, though, I determine that you've make (sic) that decision and it is a knowing, intelligent and voluntary decision and you made it pursuant to Faretta vs. California standards and reviewing Fuller and Brewer, then it's probable I'll permit you to do. Let me think further with it.

R. 1938, l. 25 - 1939, l. 7.

Defense counsel continued to enthusiastically argue appellant's right to represent himself, while maintaining that they did not personally agree with his decision. R. 1953, ll. 9 - 1954, l. 18. Defense counsel argued that Brewer allows appellant to represent himself:

The . . . test is whether [the] defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice but the defendant's understanding . . . The determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right of self-representation. The only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to -

R. 1955, l. 9 - 1956, l. 1.

Defense counsel Wilson told the judge at one point, that "he [Appellant] wanted to be heard." The judge responded: "No. I think I have heard enough in that regard." R. 1958, ll. 20-22.

The judge asked both counsel to review State v. Fuller³ and State v. Brewer⁴ to determine when the decision to allow a defendant to represent himself must be made. As the judge noted, Brewer states that the decision must be made before trial. The judge noted, however that "one could assert this is a trial." R. 1935, ll. 10-15. The judge also gave counsel for both sides the

³ 337 S.C. 236, 523 S.E.2d 168 (1999).

⁴ 328 S.C. 117, 492 S.E.2d 97 (1997).

opportunity to make “specific requests of conversation with the defendant if you want to put that in writing.” R. 1938, ll. 19-24. The judge told appellant:

If ultimately, though, I determine that you’ve made that decision and it is knowing, intelligent and voluntary decision and you made it pursuant to Faretta v. California standards and reviewing Fuller and Brewer, then it’s probable I’ll permit you to do. Let me think further with it.

R.1939, ll. 2-7.

The judge asked whether the parties agreed, pursuant to Fuller, that the decision was now within the discretion of the judge. R.1940, ll. 5-11. The state did agree. R.1940, ll.12-15. However, defense counsel did not agree—their position was that appellant had the right to **represent himself during the penalty phase of his own capital trial**. R. 1940, l. 23 -- R. 1942, l. 5. Defense counsel distinguished State v. Reed⁵ from the instant case as appellant has also done above. R. 1943, l. 15 - 1945, l. 2. The trial judge ultimately ruled he was not going to allow appellant to represent himself.

As stated above, given the trial judge’s promise that appellant could later represent himself it was fundamentally unfair for the court not to honor its promise pursuant to Faretta and this Court should grant rehearing on its application of an abuse of discretion standard to these facts. Appellant also respectfully requests rehearing of this Court’s holding that “the sentencing phase of a capital trial does not constitute a separate trial.” State v. Winkler, Op. No. 26857, Shearouse’s Adv. Sh. #32 at 24-25 (filed August 16, 2010). Clearly if appellant had been sentenced to life imprisonment rather than death that sentencing phase trial verdict would constitute have constituted double jeopardy if the state again sought death at a subsequent trial. See Bullington v. Missouri, 451 U.S. 430 (1981). Missouri’s statutory procedure, like this state’s procedure, calls for a separate hearing

⁵ 332 S.C. 35, 503 S.E.2d 747 (1998).

for the same jury when the defendant has been convicted of murder. Bullington v. Missouri, 451 U.S. 430, at 433-434 (1981).

In State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004), the Court held that a defendant had the right to represent himself during the guilt and penalty phases of a capital trial. While noting that the United States Supreme Court's opinion in Faretta predated that state's death penalty statutory complex, the Court nonetheless noted that Faretta prohibits states from haling "a person into its criminal courts and there forc[ing] a lawyer upon him, even when he insists that he wants to conduct his own defense. 422 U.S. at 807" State v. Reddish, 181 N.J. 553, 579-580, 859 A.2d 1173, 1188 (2004). "Faretta, ultimately, is about respecting a defendant's capacity to make choices for himself, whether to his benefit or to his detriment." State v. Reddish, 181 N.J. 553, 585-586, 859 A.2d 1173, 1192 (2004).

The Court in Reddish stated that it accepted the principle that a capital defendant had the right to represent himself during the sentencing phase trial. The Court noted the state's interest in assuring fairness in capital sentencing and stated for that reason it would not allow defendants to waive their direct appeal in a capital case. The Court also held that it disagreed with the Fifth Circuit's holding in United States v. Davis, 285 F.3d 378, 385 (5th Cir. 2002) that standby counsel must honor a pro se defendant's *absolute* right to waive the presentation of mitigating evidence. However, the court advised that "the court should consider dismissing the jury in order to confer with both the defendant and standby counsel in order to avoid affecting the jury's perception of the defendant's control over his defense." The Court also stated that trial courts should not hesitate to repeatedly remind the jury that the defendant is representing himself. State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004).

The issue of standby counsel is not at issue here. A defendant does not have the right to hybrid representation, and it was clear Wilson wanted appellant to represent himself and Wilson was willing to advise appellant, if desired, while appellant conducted the sentencing trial pro se.

In Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990), the seventh circuit rejected the argument that because Faretta was not a capital case that it not require the trial counsel to similarly honor a defendant's request to represent himself during the penalty phase trial: "If an individual in a capital sentencing hearing wishes to proceed *pro se*, Faretta grants him the right to do so." Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990).

The Court in Silagy also rejected any alleged dichotomy between a defendant's right to represent himself pursuant to Faretta and the societal interest in ensuring that death is the appropriate penalty in each case in which it is imposed. See Ake v. Oklahoma, 470 U.S. 68, 83-84 (1985). The Court wrote that the "Sixth Amendment does not provide merely that a defense shall be for the accused; it grants to the accused personally the right to make his defense." Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990), citing Faretta v. California, 422 U.S. at 819.

The Silagy Court also stated that the implication of the Supreme Court's opinion in Blystone v. Pennsylvania, 494 U.S. 299 (1990), was that a defendant can choose "to forego the presentation of mitigation evidence even over the contrary advice of counsel and the warnings of the court. In light of this fact, it would be strange indeed for this court to conclude that a decision to forego the presentation of mitigation evidence could act as a bar to a defendant's otherwise constitutional right to proceed pro se." Silagy v. Peters, 905 F.2d 986, 1007-1008 (7th Cir. 1990).

In Smith v. State, 407 So. 2d 894 (1981), the Florida Supreme Court also rejected the argument that it was error to allow the defendant to waive representation during the sentencing phase trial. Focusing specifically upon the defendant's right to make the closing argument to the

jury during the penalty stage the Court held the defendant was aware "that a very real result might be imposition of the death penalty." The Court noted there was no need for it to assess how well the defendant had "mastered the intricacies of the sentencing process, for his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself. . . . Appellant was warned of the dangers of what he was doing and discouraged from doing so." Smith v. State, 407 So. 2d 894, 899-900 (1981).

The expressly promised appellant, that he could represent himself but not during the guilt phase. Appellant should not now be blamed for taking the judge at his word. See Knox v. Collins, 928 F.2d 657 (5th Cir. 1991)(failure to give a jury instruction as promised and relied upon by the defendant violated the essential demands of fairness despite the fact the jury charge was not required by law at that time); State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001)(same principle).

When it became time for appellant to represent himself, with his attorneys' encouragement, the judge did not honor his promise to appellant. The trial judge's assertion that the jury would have been confused by appellant representing himself during the penalty phase reflects that fact that the Court has misapprehended and overlooked the significance of the **defendant's control** over the mitigation submitted to a jury on his behalf which naturally follows his right to represent himself during his penalty phase trial. State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004).

In its opinion, this Court now holds that trial counsel -- whom the defendant wanted arrested for assaulting him, whom appellant did not want to represent him, and where counsel to the judge as an officer of the court told the court that appellant was ready and willing to represent himself and should be allowed to represent himself -- may submit any evidence on defendant's behalf that the attorney would like to present, regardless of the express desires of the defendant. This Court has now designated mitigation as a mere "tactical decision" made on behalf of a defendant by his

attorney, who the defendant did not want to represent him, even though the United States Supreme Court has acknowledged the extremely personal quality of penalty phase evidence, and other jurisdictions have also recognized the unique quality of mitigation evidence. Lockett v. Ohio, 438 U.S. 586 (1978).

This Court has overlooked decisions in other jurisdictions that have granted capital defendants significantly more latitude in controlling in mitigation that is presented to a jury on their behalf, by minimizing its significance and characterizing it as a mere "tactical decision." See State v. Fry, 125 Ohio St.3d 163, 926 N.E.2d 1239 (2010) (Waiver by defendant of opportunity to present mitigating evidence in penalty phase of capital murder trial was valid, although court did not explain all legal ramifications of guilty verdict, that waiver made death penalty more likely, or discuss low reversal rate on capital appeals; trial court conducted comprehensive inquiry, in which it considered forensic psychologist's report, conferred with counsel, questioned defendant about his educational background and mental health, determined that he was competent, and advised him of right to present mitigating evidence); Rienhardt v. Ryan, 669 F.Supp.2d 1038 (D. Ariz. 2009) (A capital defendant may waive the right to present mitigating evidence); State v. Bordelon, 33 So.3d 842 (La. 2009) (Capital defendant was authorized to make knowing and intelligent of right to present mitigating evidence at sentencing hearing); State v. Pearce, 994 So.2d 1094 (Fla. 2008) (Although a defendant may waive mitigation during the penalty phase of a capital case, he should not do so blindly; counsel must first investigate and advise the defendant so that the defendant reasonably understands what is being waived, the ramifications of the waiver, and is able to make an informed, intelligent decision); Hojan v. State of Florida, 3 So.3d 1204 (2009) (Defendant who waived mitigation evidence was barred from asserting that counsel was ineffective in investigating that evidence); Cowans v. Bagley, 624 F.Supp.2d 709

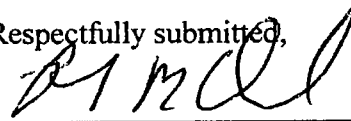
(S.D. Ohio, 2008) (defendant knowing and voluntarily waived presenting evidence in mitigation); Chapman v. Commonwealth of Kentucky, 265 S.W.3d 156, 170 (2007) (Standby counsel went beyond the scope of his role by delivering mitigating evidence to the court under seal, and the court did not err by not considering it); Lamarca v. State, 931 So.2d 838 (2006) (Defendant's inappropriate or unwise comments to the jury while representing himself during the penalty phase did not negate the fact he was properly allowed to represent himself); Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431 (2005) (Defendant waived his right to counsel during the penalty stage and his right to present evidence in mitigation); United States v. Davis, 285 F.3d 378 (5th Cir. 2002) (District Court's decision to appoint independent counsel to introduce traditional mitigation evidence over the *pro se* defendant's objection was error, and violated the Sixth Amendment). And see McKaskle v. Wiggins, 465 U.S. 168 (1984) (defendant's right to conduct his own defense was not improperly impeded by the limited actions of standby counsel where the record disclosed standby counsel's actions were kept within reasonable limits).

Appellant did not want his family members to be put through the pain of testifying about their personal family life. In addition, evidence appellant's father may have drunk too much and that his mother was depressed at times was largely unremarkable in the context of mitigation phase evidence and it was something appellant did not want to put his family through even if it were compelling. The sentencing phase jury, if it chose, could find that fact alone mitigating on appellant's behalf.

This Court should recognize, as have other jurisdictions, that a defendant can intelligently waive his right to present mitigating evidence. This is consistent with the dignity a defendant is accorded when his request to represent himself is likewise honored pursuant to

Faretta. The issue is not whether self-representation or whether waiving mitigating evidence is the most legally viable manner of obtaining an acquittal or a life sentence. This respect for the dignity of the individual through penalty phase self-representation and waiver of mitigating evidence poses no threat to the criminal justice system. Our system is fully protected because the knowing waiver of the right to counsel or to present mitigating evidence are made on-the-record, and the system is thus protected against a later collateral attack of those decisions. Respectfully, this Court should grant rehearing in this case.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

This 31st day of August, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

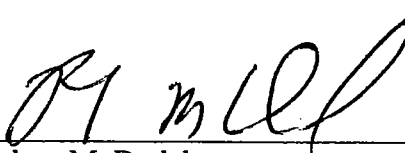
V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

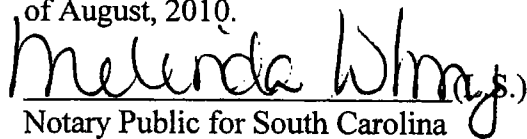
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Alphonso Simon, Jr., Esquire, this 31st day of August, 2010.


Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEYS FOR APPELLANT

SWORN TO BEFORE ME this 31st day
of August, 2010.


Notary Public for South Carolina

My Commission Expires: October 30, 2018.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 22, 2010

Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Winkler, Louis Michael Jr.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

September 22, 2010."

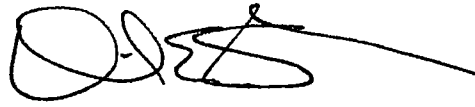
The remittitur is today being forwarded to the lower court.

The State v. Winkler, Louis Michael Jr.

Page Two

September 22, 2010

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a series of loops and a long horizontal stroke extending to the right.

CLERK

DES/dmh

cc: ✓ Assistant Attorney General Alphonso Simon, Jr.
The Honorable J. Gregory Hembree

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

PETITIONER.

PETITION FOR STAY OF EXECUTION

Counsel for Louis Michael Winkler, Jr., petitions this Court for a stay of execution to allow him to file a petition for writ of certiorari with the United States Supreme Court.

I.

This Court affirmed petitioner's convictions and death sentence in State v. Louis Michael Winkler, Jr., Op. No. 26857, Shearouse's Adv. Sh. #32 at 16-28 (filed August 16, 2010) This Court denied rehearing on September 22, 2010.

II.

A petition for rehearing was filed on August 31, 2010. As stated, this Court denied

rehearing on September 22, 2010.

III.

A petition for writ of certiorari to the United States Supreme Court is now petitioner's proper avenue for relief from the judgment of this Court affirming his murder conviction, and sentence of death. Supreme Court Rule 13.1. Pursuant to *In re STAYS OF EXECUTION IN CAPITAL CASES*, 321 S.C. 544, 471 S.E.2d 544 (1996), this Court is the proper Court to issue the stay pending the disposition of petitioner's case in the United States Supreme Court.

IV.

Petitioner can raise any and all of the following federal issues, preliminarily framed, in the United States Supreme Court:

1.

Whether the South Carolina Supreme Court erred by holding that the sentencing phase of a capital trial does not constitute a separate trial for purposes of Faretta v. California, 422 U.S. 806 (1975) and self-representation?

2.

Whether the South Carolina Supreme Court erred by holding that petitioner's right to represent himself during the penalty stage of the trial was properly analyzed under an "abuse of discretion" standard where the trial judge promised petitioner prior to jury selection and the guilt phase that he would be allowed to represent himself if he desired during a subsequent phase, the penalty stage of the trial, and then refused to allow him to do so, since this was constituted an error

of law and the judge's ruling violated due process and the essential demands of fairness?

3.

Whether the South Carolina Supreme Court erred by holding petitioner did not have the right to represent himself during the penalty stage, because his request was untimely, since the Court's holding that the penalty stage was not a separate proceeding was an error of law under Bullington v. Missouri, 451 U.S. 430 (1981)?

4.

Whether the South Carolina Supreme Court erred by ruling the judge did not abuse his discretion by refusing to allow petitioner to represent himself during the penalty phase since his attorney had assaulted him, petitioner was attempting to have his lead counsel arrested, his attorneys told the judge petitioner was ready and willing to represent himself, since the refusal to allow petitioner to represent himself under these circumstances violated the mandate of Faretta v. California, 422 U.S. 806 (1975)?

5.

Whether the South Carolina Supreme Court erred by ruling the trial judge was not obligated to properly conduct a Faretta colloquy with petitioner because his request to represent himself was untimely, where petitioner was promised prior to trial that he could represent himself, and the request therefore was not untimely, since this ruling violated petitioner's right to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975)?

6.

Whether the South Carolina Supreme Court erred by holding that trial counsel controlled

the case in mitigation, and that petitioner did not have the right to forego the presentation of mitigation evidence his family members were asked to give at the behest of his trial counsel, and over his objection, since this violated petitioner's right to conduct his own defense pursuant to Faretta v. California, 422 U.S. 806 (1975)?

WHEREFORE, counsel for Louis Michael Winkler, Jr., requests a ninety day stay of execution from September 22, 2010, in which to file a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

By: 

Robert M. Dudek
Chief Appellate Defender

Elizabeth Franklin-Best
Appellate Defender
ATTORNEYS FOR PETITIONER.

September 23, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

PETITIONER.

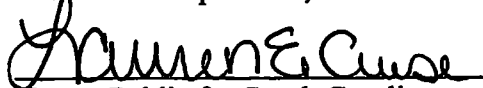
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Stay of Execution in the above-referenced case has been served upon opposing counsel, Alphonso Simon, Jr., Esquire, this 23rd day of September, 2010.



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

SUBSCRIBED AND SWORN TO before me
this 23rd of September, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable James E. Lockemy, Circuit Court Judge

THE STATE,

Respondent,

v.

LOUIS MICHAEL WINKLER, JR.,

Appellant

RETURN TO PETITION FOR STAY OF EXECUTION

The Respondent State of South Carolina, through undersigned counsel, hereby makes a Return to the Petition for Stay of Execution pending a petition for writ of certiorari in the United States Supreme Court due to be filed within ninety (90) days of the denial of rehearing on September 22, 2010 which is December 21, 2010. Respondents do not oppose the stay request pursuant to the mandates of this Court in In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) because questions two, four, five, and six satisfy the conditions precedent. Respondent will show this Court the following reasons:

I.

The Supreme Court of South Carolina affirmed the convictions and death sentence in State v. Louis Michael Winkler, Jr., Op. No. 26857, 2010 WL 3219334, -- S.C. -- , --

S.E.2d – (August 16, 2010). A petition for rehearing was made on August 31, 2010. It was denied September 22, 2010. The remittitur was issued the same date.

II.

On September 24, 2010, Petitioner, through counsel Robert M. Dudek and Elizabeth Franklin-Best, made a petition for a stay of execution. In the petition, he asserted that he intended to seek certiorari and raise in a petition the following issues:

- I. Whether the South Carolina Supreme Court erred by holding that the sentencing phase of a capital trial does not constitute a separate trial for purposes of Faretta v. California, 422 U.S. 806 (1975) and self-representation?
- II. Whether the South Carolina Supreme Court erred by holding that petitioner's right to represent himself during the penalty stage of the trial was properly analyzed under an "abuse of discretion" standard where the trial judge promised petitioner prior to jury selection and the guilt phase that he would be allowed to represent himself if he desired during a subsequent phase, the penalty stage of the trial, and then refused to allow him to do so, since this was constituted an error of law and the judge's ruling violated due process and the essential demands of fairness?
- III. Whether the South Carolina Supreme Court erred by holding petitioner did not have the right to represent himself during the penalty stage, because his request was untimely, since the Court's holding that the penalty stage was not a separate proceeding was an error of law under Bullington v. Missouri, 451 U.S. 430 (1981)?

- IV. Whether the South Carolina Supreme Court erred by ruling the judge did not abuse his discretion by refusing to allow petitioner to represent himself during the penalty phase since his attorney had assaulted him, petitioner was attempting to have his lead counsel arrested, his attorneys told the judge petitioner was ready and willing to represent himself, since the refusal to allow petitioner to represent himself under these circumstances violated the mandate of Faretta v. California, 422 U.S. 806 (1975)?
- V. Whether the South Carolina Supreme Court erred by ruling the trial judge was not obligated to properly conduct a Faretta colloquy with petitioner because his request to represent himself was untimely, where petitioner was promised prior to trial that he could represent himself, and the request therefore was not untimely, since this ruling violated petitioner's right to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975)?
- VI. Whether the South Carolina Supreme Court erred by holding that trial counsel controlled the case in mitigation, and that petitioner did not have the right to forego the presentation of mitigation evidence his family members were asked to give at the behest of his trial counsel, and over his objection, since this violated petitioner's right to conduct his own defense pursuant to Faretta v. California, 422 U.S. 806 (1975)?

Petition, p. 2-4.

III.

This Court in its Order concerning capital cases, In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), stated that the Court will issue a stay in the

direct appeal setting for filing certiorari, if the Petitioner files a stay motion setting forth the questions and "as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court," this Court will grant a stay of execution for ninety (90) days from the date of the remittitur.

A review of the record before this Court reveals that some of the issues were preserved at trial and on appeal. Therefore, under In Re Stays, Respondent concedes the stay is appropriate, although there is no likelihood of success on the merits on certiorari for the reasons set forth in this Court's Opinion.

ISSUE ONE - Sentencing Phase Not a Separate Trial.

In the initial claim, petitioner asserts that the Court erred in holding that the sentencing phase of a trial does not constitute a separate trial for the purposes of Faretta.

In the Opinion, the Court noted:

The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B) (2003); see also State v. Stewart, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed pro se at the beginning of trial. Appellant made his request to proceed pro se at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

State v. Winkler, supra.

This issue is not proper for certiorari consideration because there is no federal constitutional basis in the decision in this Court. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions."). State courts "are the ultimate expositors of state

law." Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

Question one is purely an interpretation of state law. It fails to provide a basis for relief under the federal constitution and was not raised below as a federal constitutional claim.

This does not provide a basis for a stay under In Re Stays, supra.

ISSUE TWO, THREE, and FOUR - Self-Representation

In his second question, Petitioner asserts that the Court erred in applying an abuse of discretion standard in analyzing whether Petitioner had a right to represent himself in sentencing. In his third question, Petitioner takes issue with the Court's holding he did not have the right to represent himself because his request was untimely due to the fact the penalty stage was not a separate proceeding. In his fourth question, Petitioner asserts that the Court erred in holding he did not have the right to represent himself. These issues were raised by Petitioner in the Final Brief of Appellant as follows:

Whether the court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary?

Whether the court erred, alternatively, by refusing to allow appellant to represent himself during the penalty stage of the trial since appellant had the right to represent himself during the penalty phase under the reasoning of Faretta, and his case was not governed by the State v. Brewer abuse of discretion standard?

Final Brief of Appellant, pgs. 1-2. This Court addressed these issues in the following manner:

Appellant argues the trial court abused its discretion by refusing to allow Appellant to represent himself during the sentencing phase of the trial. We disagree.¹

An accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed pro se must be clearly asserted by the defendant prior to trial." Id. (citation omitted). "If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." Id. (citing United States v. Singleton, 107 F.3d 1091 (4th Cir.1997); United States v. Lawrence, 605 F.2d 1321 (4th Cir.1979)). "Once trial commences, that right [to proceed pro se] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." U.S. v. Wesley, 798 F.2d 1155, 1155-56 (8th Cir.1986) (citations omitted); see also U.S. v. Stevens, 83 F.3d 60, 66-67 (2d Cir.1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'"). The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B) (2003); see also State v. Stewart, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed pro se at the beginning of trial. Appellant made his request to proceed pro se at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

The trial court did not abuse its discretion in denying Appellant's request to proceed pro se at the sentencing phase of the trial. First, the trial court noted it was concerned that Appellant's medication would affect his ability to properly and fully function as his own counsel. Second, the trial court was concerned that allowing Appellant to represent himself during the sentencing phase would require some delay for Appellant to fully prepare. Third, the trial court was concerned the jury may be confused to have the first half of the case tried by counsel and the second half tried without counsel, especially

¹Issue three condenses Appellant's third and fourth issues on appeal into one issue.

if the jury could see counsel at Appellant's counsel table. For these reasons, the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress. Hence, the trial court's decision to not allow Appellant to proceed pro se during the sentencing phase of trial was not an abuse of discretion and, therefore, nor error.

State v. Winkler, *supra*.

Respondent submits that it appears that Petitioner as to proposed questions two and four, that Petitioner has met the condition precedent for a stay of "as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court." As to proposed question five, Respondent submits that this issue was not properly presented to the Court. There was no argument asserting that the sentencing phase of a trial is a separate proceeding in either the Final Brief of Appellant or the Final Reply Brief of Appellant. The potential question fails to satisfy the condition precedent "as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court," this Court will grant a stay of execution. This does not provide a basis for a stay under In Re Stays, *supra*.

ISSUE FIVE - Faretta Colloquy

In his fifth proposed issue, Petitioner asserts that the South Carolina Supreme Court erred in finding a Faretta colloquy was not warranted because the request to proceed pro se was untimely. In raising this claim in his Final Brief of Appellant, he asserted as the statement of the issue:

Whether the court erred by failing to properly provide appellant with Faretta warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary?

Final Brief of Appellant, p. 2. The Court addressed this issue in the following manner:

Appellant argues the trial court erred by failing to properly provide Appellant with Faretta warnings when Appellant sought to proceed pro se at the beginning of the sentencing phase. We disagree.

As noted above, Appellant did not timely waive his right to counsel and proceed pro se. Hence, Appellant's reliance on Faretta is misplaced. Had Appellant moved to proceed pro se before the trial began, then Faretta would apply. Moreover, Appellant contends that Fuller requires reversal. In Fuller, the defendant moved to proceed pro se before the trial began. 337 S.C. at 241, 523 S.E.2d at 170. However, in this case, Appellant did not seek to proceed pro se until the sentencing phase. Appellant's reliance on Faretta and Fuller is misplaced, and the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress.²

State v. Winkler, supra.

Respondent submits that it appears that as to proposed question five, Petitioner has met the condition precedent for a stay of ""as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court."

ISSUE SIX - Control of Presentation of Mitigation Evidence

In his sixth proposed issue, Petitioner asserts the Court erred in holding that trial counsel controlled the case in mitigation, and Petitioner did not have the right to forego the presentation of certain mitigation evidence. In the *Final Brief of Appellant*, this issue was raised as follows:

Whether the court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection, since appellant still had the right to

²Even if Faretta were applicable, the record reflects the trial judge met the Faretta standard by adequately warning Appellant of the dangers of self-representation.

control the case in mitigation and waive mitigation evidence he did not want the jury to consider, even where the judge denied appellant the right to represent himself?

Final Brief of Appellant, pg. 2. The Court addressed this issue in the following manner:

Appellant contends the trial court erred by allowing defense counsel to present mitigating social history evidence and call Appellant's family members as mitigation witnesses over Appellant's objection. We disagree.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 560, 160 L.Ed.2d 565, 578 (2004) (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984)). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" Id. (quoting Taylor v. Illinois, 484 U.S. 400, 418, 108 S.Ct. 646, 657, 98 L.Ed.2d 798, 816 (1988)). The introduction of the mitigation evidence at issue was a tactical decision made by Appellant's trial counsel and is reviewed on a case by case basis. The mitigation evidence presented served the purpose of humanizing Appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigating evidence that Appellant did not want to be introduced.

State v. Winkler, supra. Respondent submits that it appears that as to proposed question six, Petitioner has met the condition precedent for a stay of "'as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court."

IV.

WHEREFORE having made Return, Respondent respectfully requests this Court to take appropriate steps to issue a stay to allow a timely petition for writ of certiorari, where the condition precedent has been satisfied by propounded questions two, four, five, and six.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

By: KLJ

October 4, 2010

**P.O. Box 11549
Columbia, South Carolina 29211**

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable James E. Lockemy, Circuit Court Judge

THE STATE,

Respondent,

v.

LOUIS MICHAEL WINKLER, JR.,

Appellant

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., hereby certify that I have served the *Return to Petition for Stay of Execution* in the foregoing action by depositing one (1) copy in the U.S. mail to the following:

Robert M. Dudek
Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Ste. 401
Columbia, SC 29201

Elizabeth Franklin-Best
Assistant Appellate Defender
1330 Lady Street, Ste. 401
Columbia, SC 29201



ALPHONSO SIMON, JR.
Assistant Attorney General

October 4, 2010

The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Petitioner.

ORDER

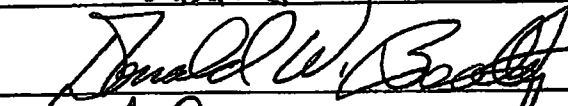
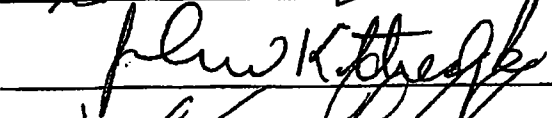
This Court recently affirmed petitioner's death sentence in State v. Winkler, Op. No. 26857 (S.C. Sup. Ct. filed August 16, 2010). Petitioner's petition for rehearing was denied and the remittitur sent on September 22, 2010. A notice of execution has not been issued.

Petitioner now requests a stay of execution to allow him to file a petition for a writ of certiorari in the United States Supreme Court. The State has filed a return stating it does not oppose the petition for a stay of execution because petitioner has set forth at least four issues that satisfy the conditions precedent for a stay.

Because petitioner intends to raise to the United States Supreme Court at least one federal question that is preserved for review, we grant the petition for a stay of execution pursuant to In re Stays of Execution in Capital

Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), and the stay shall remain in effect to the extent provided by this Court therein.

IT IS SO ORDERED.

 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

October 20, 2010

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

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CAPITAL CASE**QUESTION PRESENTED**

Does a defendant charged with a capital crime who proceeds with appointed counsel during the guilt phase of trial and is convicted have a Sixth Amendment right under *Faretta v. California*, 422 U.S. 806 (1975) to represent himself during the penalty phase?

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IN THE SUPREME COURT OF THE UNITED STATES

February Term, 2011

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

Counsel for Louis Michael Winkler petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his conviction for murder and his death sentence.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010) and is reproduced in the Appendix to this petition at pages A1-A7 .

JURISDICTION

The final judgment of the South Carolina Supreme Court in this case was entered August 16, 2010. The Supreme Court denied rehearing on September 22, 2010. The petition for rehearing and order denying rehearing appear in the Appendix at pages A8- A24. On December 3, counsel filed an application to extend the time to file this petition for writ of certiorari. The Chief Justice extended the time in which to file this petition for writ of certiorari until February 18, 2011.

The Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Winkler is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments which provide, in pertinent part:

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Amendment XIV: No State "shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Louis Michael Winkler was tried for murder, burglary, and assault and battery of a high and aggravated nature in Horry County, South Carolina and was convicted. Deeply dissatisfied with his attorneys for a number of months prior to trial, he attempted to invoke his right pursuant to *Faretta* to represent himself during the penalty phase. The judge denied his request, and defense counsel proceeded to present a mitigation case that petitioner found deeply offensive.

At the start of the penalty phase of his capital trial, petitioner made his unequivocal request:

COURT: If you're saying that you want to represent yourself with Mr. Wilson and Mr. Rathburn to stay there as consultants for you to consult with during the course of this phase of the trial, but not to be your attorneys who ask questions or make closing arguments to the jury, is that what you're requesting?

A: Yes, sir.

R. 1928, ll. 11-17; R. 1930, ll. 19-24.

After a lengthy discussion with the attorneys, and defense counsel's vigorous argument that petitioner should be allowed to represent himself, the trial court judge refused petitioner's request. R. 1964, l. 8- R. 1972, l. 7. Counsel argued that the penalty phase of petitioner's capital trial was a separate and distinct proceeding.

Defense counsel argued:

[T]he courts have on many, many occasions reversed the sentencing phase and let the trial phase stay intact, and you come back and you get a new chance to go forward. And the defendant would certainly at that point decide whether or not he wanted to represent himself, which simply is saying that -- that having been said, well, we can't -- he doesn't have that right simply because we are at this particular stage.

This is a, this is a separate and distinct proceeding from the original proceeding. This is the sentencing proceeding. This is the beginning of the sentencing proceeding as opposed to the beginning of the trial. . . .

And I think that, that this is different, and I think it is distinct, and I do think that he has the right to defend himself if that's what he wants to do, provided the court believes and understands that this defendant has voluntarily making that decision.

Tr. 1941, l. 7- 1942, l. 5.

Trial counsel continued to enthusiastically argue appellant's right to represent himself. R. 1941, l. 7- 1942, l. 5; 1943, ll. 15-20; 1944, ll.8-20; 1955, l. 6- 1956, l. 8; 1972, l. 11- 1975, l. 23.

The state also acknowledged appellant had the right to proceed *pro se*. R. 1922, ll. 2-13. The state asked the trial judge to review the *Faretta* factors with petitioner. R. 1937, ll. 18-23. Later, however, the state vacillated and stated it believed the judge could exercise his discretion on this issue. R. 1940, ll. 12-15.

The trial court judge disagreed with counsel, and the state's first position, and concluded petitioner's capital trial did not constitute "two trials" or "two proceedings." R. 1966, ll.22-23. The trial court judge reasoned then that since petitioner's request was made "in the midst of the trial" that the proper standard to employ was an abuse of discretion. R. 1967, l. 25- R. 1969, l. 5.

The South Carolina Supreme Court agreed with the trial court judge's analysis, and has determined that the sentencing phase of a capital trial does not constitute a separate trial for purposes of invoking one's right to represent oneself. State v. Winkler, 698 S.E.2d 596 at 602. The court found that, although an accused may waive the right to counsel and proceed *pro se*, pursuant to *Faretta*, this right is very strongly limited since the sentencing phase is not a separate trial. Id. at 586, 602.

Appellant did not make his request to proceed *pro se* at the beginning of trial. Appellant made his request to proceed *pro se* at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

Id. at 586, 602-603.

Petitioner was categorically opposed to the mitigation case that counsel was determined to present on his behalf. Defense counsel presented a mitigation case that focused exclusively on petitioner's family history. Petitioner did not want his family "dragged through the mud." R. 2789, l. 4. After trial counsel put up this evidence, defense counsel put "on the record":

Mr. Wilson: As you know, the record will reflect that I put a social, social history through a sociologist, Ms. Oehler, in - - regarding the defendant and his history and his family. And the defendant wants me to let the court know that he had asked me not to put up any social history and that I put that up in spite of his objections. And for the record, I'm noting that he did ask me not to put any social history in because he didn't want anything derogatory said about his family. But in my judgment as a lawyer, I felt it was the appropriate thing to do and I did it.

The Court: All right. That's noted. Be noted. Thank y'all very much. All right.

R. 2788, ll. 5 -25.

With the judge's approval for placing "mitigation evidence" before the jury over petitioner's objection, trial counsel then called a number of petitioner's family members to testify over his objection—two sisters, a brother, and petitioner's mother. One of his sisters, apparently, was crying. R. 2750, ll.5-7; R. 2795, ll.15-16; R. 2795, ll. 16-18; R. 2796, ll. 17-18; R. 2801, ll. 23-24; R. 2804, ll. 17-21; R. 2805, ll. 13-14; R. 2808, ll. 18-24.

Regarding this issue, the South Carolina Supreme Court held that trial counsel made a

“tactical decision” introducing this evidence, and thus found no error:

The introduction of the mitigation evidence at issue was a tactical decision made by appellant's trial counsel and is reviewed on a case-by-case basis. The mitigation evidence presented served the purpose of humanizing appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigation evidence that appellant did not want to be introduced.

Id. at 587, 603.

Petitioner's dissatisfaction with his attorneys was long-standing and justified. He attempted to have new attorneys appointed prior to the guilt phase. R. 42. The judge denied the request. R. 42, ll. 12-18. During an earlier pre-trial hearing, counsel informed the trial judge that petitioner had indicated “on several occasions” that he was dissatisfied with his co-counsel, Paul Rathbun. R. 3260, ll. 8-15. Petitioner informed the court he was concerned because his attorney was telling him to plead guilty. R. 3263, l. 25- 3265, l. 2. During an earlier hearing, one attorney, Paul Rathbun, disclosed that his wife was a sheriff's deputy in the county where this case was tried. R. 3253, ll. 2-4.

Petitioner's case was initially scheduled to be tried on July 16, 2007. On July 12, 2007 the court was notified by conference call that the defense was having difficulty communicating with their mitigation investigator. On that late date—one business day before the scheduled start of their client's capital trial-- they were concerned that “little or no work in preparation for mitigation” had been completed. Defense was asking for a continuance at the 11th hour. Yet, according to the Order, dated August 20, 2007 and memorializing the events of the hearing, counsel knew of these problems since late May. R. 3548. On Friday, July 13, 2007, *the state* requested a hearing on the matter. Among other findings, the Court noted:

[N]umerous hearings and conferences had been held in this matter since late May and never had the Court been advised for the defense that any problem existed in reference to the mitigation investigator or counsels' readiness to adequately represent the defendant in either the "trial phase" or the "sentencing phase" of the case until July 12, 2007, one business day from the start of the trial in this matter.

A new trial date was set for January 28, 2008. R. 3549. Counsel for petitioner was also ordered to have contact with the Court "at a minimum every two weeks until trial to insure appropriate progress is being made in the preparation of the defendant's defense and mitigation of sentence." R. 3551.

At the start of his trial, on January 28, 2008, defense counsel informed the court that petitioner wanted to have *both* Wilson and Rathbun relieved. R. 30, ll. 13-24. Petitioner reiterated that he had attempted to have Rathbun relieved eight months earlier, but the request had been denied. R. 32, l. 24 - 33, l. 6.

Petitioner also informed the court that a physical altercation occurred between himself and Wilson a couple of days earlier. R. 33, ll. 2 -19. During a hearing on January 24, 2008, petitioner informed the trial court of the nature of this altercation, and also complained that he had not seen his attorneys for the week prior to the start of his death penalty trial. R. 25, ll. 11-24. Petitioner said:

"[Wilson] turned towards me, put his finger in my face, touched my face, and said she [appellant's sister] is a f'ing liar. At that time I swatted his hand away from my face, officers came in, and they acted like it was my fault. But it was Mr. Wilson's. And there's no way I can see where I'm gonna get a fair trial with this man, my attorney, when he has called me and my family liars over the past month."

R. 3409, ll. 4-10.

Petitioner also informed the judge that he wanted to press criminal charges against Wilson. He was thwarted in his efforts to secure a warrant for lead counsel's arrest. R. 3409, l. 23 - 3410, l. 4.

The judge informed petitioner that these were matters that could be addressed at a later date. R. 3410, ll. 16-17. "There's no urgency about that." R. 3410, l. 17. Wilson was quick to point out that there were witnesses to these events and that he hoped there was a video of the incident. R. 3411, ll. 5-10.

Petitioner continued to express his extreme dissatisfaction with Wilson. R. 3413, ll. 5-18. The trial court told Winkler --3 times-- that he could "address this further" on Monday, the start date of his capital trial. R. 3413, ll. 23-25; R. 3414, l. 5, R. 3414, ll. 12-13. On Monday, the judge stated these events were not "significant enough" to remove Wilson, and the trial began. R. 3419, ll. 22-25.

Indeed, prior to the start of trial, trial counsel and the mitigation specialist, Carolyn Graham, convened a Special Meeting of the Counsel for Louis M. Winkler at the J. Reuben Long detention center. They brought a court reporter with them who transcribed a conversation between defense counsel and petitioner on Saturday, January 26, 2008, from 11:57am- 12:29pm. R. 3418-3457. Counsel wanted to "put on" the record his understanding of why petitioner was placed in maximum security after the court hearing held that Thursday before. Counsel referenced the physical altercation he had with petitioner. R. 3420. Counsel also wanted to "make the record clear" that the evidence against petitioner was overwhelming, and that there was a "great likelihood" he was going to be convicted if he took the stand and advanced his theory of the defense. Counsel, on the record, wanted petitioner to understand that his defense

was "inconsistent with every fact that we are aware of." R. 3426. Petitioner was well aware that counsel was holding this recorded meeting for purposes of protecting themselves. R. 3425 ("So you got a court reporter in just to, just for this"); R. 3431 ("So you're just covering your butt by having the court reporter here." And "So you're just—And that's the only reason you have the court reporter here, is to cover your own butt, right?"); R. 3445 ("You guys are just covering your own butt — "); Counsel explained his "reason" for conducting this privileged communication with a court reporter present:

MR. WINKLER: So you can let the judge hear that you're not backing me anymore.

MR. WILSON: -- an opportunity to understand me. No. This record will be sealed. When this court reporter types this, she will put it in a sealed envelope. It will be sealed, and the only time it will be opened is if you are convicted. If you are convicted, then it will be opened at the appellate level, but it will not be opened at trial. Nobody else other than the people in this room will be privy to this conversation whatsoever. But I do want that to be made a part of this record. And so that it is clear that if you do these things that you're doing them against my advice and over my objections, but that I am your lawyer, and if you decide that you're going to do it, then I'm going to facilitate you in every way I know how to make sure that you are allowed to do it, and we'll do it as effectively and in the best manner that we know how to represent you.

R. 3421-3433.

Rathbun was also asked if he wanted to put anything on the record, and he replied: "I just want to say that I concur with what Ralph said, that we have tried to get across to Mick what the strategy is and how his testifying could hurt the mitigation phase and that we are trying desperately to save Mr. Winkler's life." R. 3454-55.

Petitioner put his thoughts "on the record" too:

What kind of chance do I have when they're not working towards acquittal, all they're working for is, I don't know, you know, backing themselves. I ask questions. They dodge them, they lawyer me to death on it. But I have no support. All they're doing with the court reporter here is covering their own butts, and that's the only thing I can get out of this, and he just said, you know, Mr. Rathbun says that he concurs with, with Mr. Wilson. So, you know, that's both lawyers, and neither one of them had said anything about an acquittal, nobody.

R. 3455-56.

It is against this backdrop that petitioner made his request to represent himself during the penalty phase of his death penalty trial. Petitioner should have been allowed the right to proceed *pro se* during this critical proceeding when he was justifiably dissatisfied with this attorneys and personally opposed to the mitigation case that they insisted be presented to the jury on his behalf.

Even if petitioner had received imminently competent assistance of counsel during the guilt phase of his trial, petitioner still should have been allowed to exercise this fundamental right of self-representation during the penalty phase. In any event, having been convicted of capital murder, petitioner should not have been forced to proceed to the penalty phase with attorneys who were derelict in preparing a mitigation case at all, who he was trying to criminally prosecute, and who were clearly only interested in protecting themselves from future claims of ineffectiveness as evidenced by their conduct the weekend before the start of trial.

REASONS FOR GRANTING THE WRIT

I. WITHOUT THIS COURT'S INTERVENTION SOUTH CAROLINA WILL REMAIN AMONG THE JURISDICTIONS THAT IMPROPERLY DENY A CAPITAL DEFENDANT THE RIGHT TO PROCEED *PRO SE* DURING THE PENALTY PHASE OF TRIAL, AND THEREBY BIND THE DEFENDANT WITH THE "TACTICAL DECISIONS" OF HIS ATTORNEYS THAT HE FINDS OFFENSIVE.

Respectfully, petitioner asks this Court to grant his petition for writ of certiorari to review the South Carolina Supreme Court's declaration that a capital defendant's decision to represent himself during the penalty phase of his capital trial is subject to an abuse of discretion standard. The South Carolina Supreme Court, South Carolina's court of last resort, has decided an important federal question in a way that conflicts with the decision of other state courts of last resort and of United States courts of appeal. In addition to resolving a split among the states and courts of appeal, petitioner's issue is important because the issue arises in two distinct situations. First, the issue presents itself in just this kind of case -- where the claim is that the defendant has the right, under *Faretta*, to represent himself during the penalty phase of his capital trial. But also this issue arises when the claim on appellate review is that an appellant should not have been allowed to represent himself. Given the variety of factual circumstances which give rise to an analysis of a defendant's right to represent himself at his capital trial, petitioner respectfully submits this is an issue of wide-ranging importance.

Additionally, the South Carolina Supreme Court's decision is inconsistent with this Court's holding in Bullington v. Missouri, 451 U.S. 430 (1981), that a capital trial is two proceedings for purposes of invoking the proscription against double jeopardy, and Lockett v. Ohio, 438 U.S. 586 (1978) which holds that the sentencer in a capital case cannot be precluded from considering, as a mitigation factor, any aspect of a defendant's character or record and any

of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

There is a great need to provide guidance on this fundamental question of *pro se* representation with the context of a capital trial. A capital trial is a unique creature because the jury is asked to take into account the individual characteristics of the defendant in rendering its decision to impose death as the ultimate penalty. Lockett; Williams v. New York, 337 U.S. 241 (1949). A capital trial, therefore, is personal and revealing in the sense that a regular trial is not. Matters of a highly personal and individual nature become relevant when the State asks jurors to impose a death sentence. A personal appeal from a capital defendant could have an effect on a juror that could result in a life sentence. Wiggins v. Smith, 539 U.S. 510 (2003). It follows, given the irrevocable penalty that may be imposed, a defendant should be allowed to plead his case, personally, to the arbiters of his sentence. As *Faretta* makes clear, the Sixth Amendment grants the accused personally the right to make his defense. Id. at 819.

To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master, and the right to make a defense is stripped of the personal character upon which the amendment insists.

Id. at 820.

Such a fundamental right then should not be subject to a judge's discretion.

The South Carolina Supreme Court erred because it failed to appreciate the strength of the right of self representation. In four paragraphs, South Carolina eviscerated petitioner's right to personally offer the mitigation case that he wanted to put forward for the jury's consideration.

Petitioner had the right to represent himself during the penalty phase of his capital trial

pursuant to the reasoning of *Faretta*. Instead of being bound by the mitigation case defense counsel presented on his behalf, petitioner had the right to personally defend his life. Respectfully, this Court should grant petitioner's petition for writ of certiorari.

II. THE COURTS ARE DIVIDED, AND THE ISSUE RAISED IS IMPORTANT

The courts of various jurisdictions have addressed the issue of a capital defendant's right to represent himself during the penalty phase of a capital trial, and opinion is divided.

A. Fifth Circuit, Seventh Circuit, Florida, Illinois, Kentucky, Oklahoma, and Pennsylvania

The following cases hold that a defendant has the right to represent himself during the penalty phase of a capital trial and thus can either control or waive the mitigation evidence offered on his behalf.

In United States v. Davis, 285 F.3d 378 (5th Cir. 2002), the court of appeals reversed the district court when the district court appointed an independent counsel to represent appellant during the penalty phase of his capital murder trial, and when the appellant sought to argue residual doubt instead of presenting traditional mitigation evidence. The court found that appellant's right to self representation encompasses the right to direct trial strategy. For that reason the district court's decision to impose an independent counsel was overturned. Id. at 384-385. The court of appeals noted that the district court failed to consider the strength and nature of the right of self- representation. Id. at 384. And the court further noted that "the Framers 'always conceived of the right to counsel as an assistance for the accused, to be used at his option, in defending himself.'" Id. at 384 (quoting *Faretta*, 422 U.S. at 832). Davis

acknowledges what other jurisdictions do not—that a capital defendant has the right to be heard, in his own person, before the jury that assigns his sentence. Davis recognizes the strong *Faretta* right.

The defendant in Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990) elected to represent himself during his capital sentencing hearing. On appeal, he complained of his right to do so. In denying this assignment of error, the court concluded that *Faretta* grants a capital defendant the right to represent himself during his penalty phase hearing: “If an individual in a capital sentencing hearing wishes to proceed *pro se*, *Faretta* grants him the right to do so.” Id. at 1007. The court also rejected petitioner's claim that the nature of the defense he wished to present during the penalty phase hearing should preclude his right to represent himself. Petitioner's argument was that since he chose to waive the presentation of mitigation evidence, his right to represent himself was subservient to the societal interest in ensuring that death was the appropriate sentence. Ake v. Oklahoma, 470 U.S. 68 (1985). The court concluded that petitioner mischaracterized the scope of the Sixth amendment right guaranteed in *Faretta*. Id. at 1007. According to the court, *Faretta* does not impose any restriction upon a defendant's right to refuse the assistance of counsel except to state that the right must be “knowingly and intelligently waived.” Id. at 1007 (quoting *Faretta* at 422 U.S. at 835). Silagy, too, recognizes the strength of the *Faretta* right, and the importance of this right in relation to the mitigation case a capital defendant either chooses to present, or chooses not to present. This case, too, illustrates the many ways in which this issue can arise during capital litigation.

While the issue raised in this Florida Supreme Court case, Hojan v. Florida, 3 So.3d 1204 (2009), is narrow—appellant argued that the trial court improperly concluded that his waiver of

the right to present mitigation evidence during his penalty phase was also a waiver of presentation of post-trial motions— the court, in resolving the issue, implicitly adopts the position that a defendant has the right to dispense with counsel and proceed *pro se* during the penalty phase of his capital trial. The court held that appellant, “like any competent defendant, could have discharged his counsel and proceeded *pro se* . . . at which point he could have personally withdrawn the motions.” *Id.* at 1212.

The claim on appeal in People v. Coleman, 168 Ill.2d 509, 660 N.E.2d 919 (1995), was that appellant should not have been allowed to represent himself during the penalty phase of his capital trial. Appellant argued that the Eighth amendment requires heightened reliability of the process by which capital punishment may be imposed, and that the demands of increased reliability require that an accused be represented by counsel notwithstanding his desire to conduct his defense *pro se*. *Id.* at 544-545. The court rejected that argument and found *Faretta* grants a defendant the right to represent himself, and that “[t]his reasoning applies with no less force in a capital case than in other cases.” *Id.* 545.

In this death penalty “volunteer” case, Chapman v. Kentucky, 265 S.W.3d 156 (2007), the Supreme Court of Kentucky found that the trial court did not err when it refused to consider mitigation evidence submitted to it by stand-by counsel when the defendant did not wish for any mitigation to be put forward on his behalf. The Court concluded that “[o]nce the trial court allowed Chapman to proceed *pro se*, Chapman himself became the arbiter of what, if any, evidence he wanted to offer, including a right to waive his right to present mitigation evidence.” *Id.* At 169. This case, again, acknowledges the strength of the *Faretta* right, and its importance to a defendant in directing the mitigation case offered on his behalf.

The Oklahoma Court of Criminal Appeals, in Lay v. State, 179 P.3d 615 (2008), and referencing both United States v. Davis and Silagy v. Peters, found that the appellant, who argued on appeal that he should not have been granted the right to represent himself during the penalty phase of his capital trial, in fact was guaranteed that right pursuant to *Faretta*. The court determined there was no “principled reason” to deny a death-eligible defendant his *Faretta* right to proceed without the assistance of counsel, and appellant’s conviction and sentence were upheld. Id. at 618.

The appellant in Pennsylvania v. Davido, 582 Pa. 52, 868 A.2d 431 (2005), a Pennsylvania Supreme Court case—illustrates the dual nature of this particular claim—appellant raised the issue on appeal that the trial court erred in not allowing him to proceed *pro se* during the guilt phase of his capital trial. The court, finding that appellant’s request was equivocal, found that the trial court judge did not abuse his discretion in not granting that request. However, appellant also complained that the trial court erred in allowing him to proceed *pro se* during the penalty phase of his capital trial. At trial, appellant waived the introduction of any mitigating evidence. The court found that appellant knowingly, intelligently, and voluntarily waived his right to be represented during the penalty phase of his capital trial, and his right to present mitigating evidence. Id. at 444.

The common thread that runs through the preceding cases is that a capital defendant has a strong right to represent himself, pursuant to the reasoning of *Faretta*, for purposes of advancing or not advancing a particular mitigation strategy on his own behalf.

B. Fourth Circuit, Fifth Circuit, California, Maryland, New Jersey, and South Carolina

These following cases hold that a defendant does not have the right to represent himself at the penalty phase of his capital trial because either that right can be outweighed by the state's interest in a fully informed jury, because the trial court judge retains the discretion to refuse the defendant that right if it is untimely, or, having invoked his right to represent himself before trial started, a defendant is not allowed to have counsel reinstated for the penalty phase.

I. State's interest outweighs defendant's right

In State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004), the Supreme Court of New Jersey undertook to detail the approach its state would take towards analyzing *Faretta* issues within the capital trial context. The appellant was denied the right to represent himself during his capital trial. The court "accept[s] the principle that defendants have that right." *Id.* at 1192. However, the court also found that the state's interest in fair trials permits courts to ensure that their judgments meet the high level of reliability demanded by the Constitution, and therefore a defendant's right to represent himself is subservient to the state's larger interest in the conduct of its capital trials. *Id.* 1193. "The right to a fair trial in a capital proceeding is paramount to the right of self-representation." *Id.* at 1203. In this case, the highest court of New Jersey mandated standby defense counsel in capital cases. *Id.* at 1198-1999. Additionally, the court reiterated its position that a defendant cannot block the presentation of mitigating evidence at a capital sentencing. *Id.* at 1202. As the court noted: "the State has an "interest in a reliable penalty determination."" *Id.* at 1202 (*quoting State v. Koedatich I*, 112 N.J. 225, 330, 548 A.2d 939, 939).

In this opinion, the court expressly disagrees with U.S. v. Davis, 285 F.3d 378 (5th Cir.

2002) that held that standby counsel may not present mitigation evidence over a *pro se* defendant's objection. Instead, the court finds relies on what it perceives to be this Court's mandate in Gregg v. Georgia, 428 U.S. 153 (1976) and Eddings v. Oklahoma, 436 U.S. 921 (1978) that a jury cannot be deprived of an opportunity to make an individualized judgment based on a fair presentation of mitigating evidence. Id. at 605.

II. Trial judge retains discretion if the request is "untimely."

In Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), the court of appeals implicitly adopts the claim, found in State v. Winkler, 698 S.E.2d 596 at 602, that capital trial is "one trial" for purposes of analyzing a *Faretta* claim. In denying appellant's argument that he was entitled to make a make the closing argument (which the court construed as appellant's attempt to either "become co-counsel with his two appointed counsel" or "proceed *pro se*" Id. at 941), the court held that the Sixth Amendment right of self-representation may be waived or limited if not raised before trial. Id. at 941. The court found that "*Faretta* does not deal with the situation of a defendant attempting to proceed *pro se* after trial has begun." Id. 942.

Under the highly deferential AEDPA standard, the 5th Circuit Court of Appeals did not find, in Wood v. Quarterman, 491 F.3d 196 (2007), that the state habeas court's holding that petitioner was not entitled to relief because his motion to proceed *pro se* was untimely was neither contrary to, nor an unreasonable application of federal law. In Wood, petitioner moved to be allowed to proceed *pro se* after the jury returned the verdict of guilty, but before sentencing began. Petitioner informed the judge that he did not want to present any evidence or cross-examine any witnesses. Id. at 198. The trial court judge did not base his decision to not allow

petitioner the right based on a timeliness argument, but the state habeas court did make that finding. In upholding the state habeas court's finding, the Fifth Circuit court of appeals found: "Because no decision of the Supreme Court obligates state courts to permit self-representation when the defendant fails to invoke his *Faretta* right in a timely manner, we are compelled to find that the state habeas court's holding that Wood was not entitled to relief because his motion was untimely was neither contrary to, nor an unreasonable application of, federal law." *Id.* at 202.

The California Supreme Court, in *People v. Bloom*, 48 Cal.3d 1194, 774 P.2d 698 (1989), implicitly adopted the "one proceeding" approach, now adopted in *Winkler*, and found that appellant's request to represent himself during the penalty phase of his capital trial was a decision firmly within the discretion of the trial court judge. The court holds that "[a] request for self representation asserted for the first time after trial has commenced . . . is "based on nonconstitutional grounds" and is addressed to the sound discretion of the trial court. *Id.* 1219-1220. The court further found that appellant's mid trial motion for self representation-- in which he expressly intended not to present any mitigation evidence but rather wanted to assist the prosecution in securing a death sentence-- did not contravene the policy against state aided suicide. *Id.* at 1223.

III. The court will not allow counsel to be reinstated during the penalty phase of trial because invocation of the right to represent oneself flows through the entire trial.

In *Grandison v. Maryland*, 305 Md. 685, 506 A.2d 580 (1986), appellant argued that, having represented himself during the guilt phase of his capital trial, he was entitled to counsel during the penalty phase. The court held that appellant's waiver of the right to counsel extended

through both parts of the trial and thus the court denied appellant the right to counsel during the penalty phase. In this analysis, the court implicitly adopts the claim that a capital trial is "one trial" for purposes of analyzing a defendant's right to represent himself, and stated "[w]e find nothing in *Faretta* which supports Grandison's argument." *Id.* at 613.

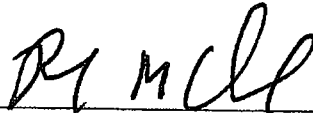
Also, in *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998), another South Carolina Supreme Court case, the trial court judge found that, having waived his right to counsel during the guilt phase of the proceedings, the defendant was not entitled to the re-assignment of counsel during the sentencing proceeding.

As a review of the preceding cases illustrate, opinion is divided on this very critical question. This issue can only be expected to continue to arise in each case a capital defendant, having been convicted of capital murder, then attempts to personally advance a mitigation strategy on his own behalf. In this case, petitioner was vocally and categorically opposed to the mitigation case his attorneys presented to the jury. It is difficult to conceive of a situation in which the right to represent oneself, pursuant to *Faretta*, is more forceful than when a capital defendant seeks to personally address the decision-makers of this irrevocable penalty. The South Carolina Supreme Court trivializes the inherent strength of this right when it subsumes it under an abuse of discretion standard. Even the most competent and well-intentioned attorneys should not be able to direct a mitigation strategy at odds with the wishes of their client, and when that client wants to personally address his jurors. In the end, as *Faretta* reminds, "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.* at 819-820. Respectfully, petitioner asks this Court to grant his petition for writ of certiorari.

CONCLUSION

For the preceding reasons, petitioner respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

February 18, 2011

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

A P P E N D I X

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APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

V.

Louis Michael Winkler, Jr., Appellant.

Appeal from Horry County
James E. Lockemy, Circuit Court Judge

Opinion No. 26857
Heard June 24, 2010 – Filed August 16, 2010

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Appellate
Defender Elizabeth A. Franklin-Best, both of Columbia, for
Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney
General Donald J. Zelenka, and Assistant Attorney General
Alphonso Simon, Jr., all of Columbia, and Solicitor J.
Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: In this capital murder case, Louis Michael Winkler, Jr. (Appellant) appeals his sentence of death.[1]

FACTS/PROCEDURAL HISTORY

Appellant kidnapped and sexually assaulted Rebekah Grainger Winkler (Victim) on October 10, 2005, five months before Victim was murdered.[2] That evening, Appellant's car was spotted behind the Seacoast Medical Center (Seacoast). Victim's car was found off the road in some trees and appeared to have been wrecked. There was blood on both of Victim's car seats, around the center console, and on the interior panel of the passenger's side door. The Horry County Police Department activated its dog team in an attempt to locate two missing persons. Victim was later found next to Stephen's Crossroads, which is where the magistrate's complex and library is located.

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Phyllis Richardson (Richardson) arrived at the parking lot at Stephen's Crossroads around 7:30 a.m. on October 11, 2005, and saw a woman walking in the parking lot being followed by a man. Richardson noted the woman looked distraught and was acting confused, and that the man's hands were in the air as if he were raging and irritated. Shortly after Richardson entered her office, she saw the woman from the parking lot on the phone in her office building. The woman's hair was matted and tangled with some bald spots. Richardson later learned the woman making the call was Victim. Curtis Thompson was the first officer to arrive at the building, and noticed some of Victim's hair looked like it had been ripped out, and she had black eyes, abrasions, and other scratches.

Victim was transported to Seacoast by EMS where Lisa Gore (Gore), a nurse at Seacoast, tended to Victim and noted her injuries to the left eye, some swelling in the jaw area, bruising around the neck, a fractured nose, an upper lip injury, redness under her right eye, corneal abrasions, multiple bruises and contusions, a bite mark to the face, and a large amount of hair removed from her head. A sexual assault kit was collected from Victim. The DNA found in the rectal and vaginal swabs from the sexual assault kit matched Appellant's DNA.

On October 11, 2005, Appellant was arrested for criminal sexual conduct, first degree, assault and battery with intent to kill, and kidnapping. Bond was initially denied; however, at a second bond hearing, Appellant's bond was set at \$150,000 and he was required to wear an electronic monitor while out on bond. At a third bond hearing, Appellant's bond was amended to allow him to remove his electronic monitor for two hours so he could seek employment between the hours of 4 p.m. and 6 p.m. Appellant was out of jail on bond on the day Victim was murdered.

At around 5:30 p.m. March 6, 2006, Appellant kicked in the door to Victim's condominium. Appellant knocked Victim's son, J. [REDACTED] G. (J. [REDACTED]), onto the ground and then shot Victim once in the face at point blank range. According to the forensic pathologist who conducted Victim's autopsy, death occurred instantly. Appellant then walked over and pointed the gun at J. [REDACTED]. Shortly thereafter, Appellant left the condominium.

Appellant hid in the woods for two weeks. When police apprehended Appellant, [3] they recovered a Jennings .380 pistol from his right front pants pocket. Five live rounds were found in the pistol, but there was not a live round in the port. During a full search of Appellant, police recovered eighteen rounds of .380 ammunition, a guard lock blade knife, and a wallet. In the wallet, there was a newspaper clipping about the shooting and murder.

Appellant was tried and found guilty of murder, first-degree burglary, and assault and battery of a high and aggravated nature. At trial, the State sought to establish two statutory aggravating circumstances: (1) the murder was committed during the commission of a burglary; and (2) the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime. S.C. Code Ann. § 16-3-20(C)(a)(1)(c), (C)(a)(11) (2003 & Supp. 2009). The jury recommended that Appellant be sentenced to death.

During the guilt phase of Appellant's trial, M. [REDACTED] E. [REDACTED] C. (M. [REDACTED]), J. [REDACTED]'s friend, testified that on the evening of the murder she was on the phone with J. [REDACTED] when she heard a loud pop noise, and a voice that was not J. [REDACTED]'s say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." M. [REDACTED] then heard a hit and the phone went to static. Andrew Cooper (Cooper), a former crime scene technician for the Horry County Police Department, testified that it appeared there had been a forced entry because the door jamb, door frame, lock mechanism, and other parts of the door had been broken. Cooper also testified that a reddish colored liquid was collected from the kitchen countertop. Kimberly Hahn, a former State Law Enforcement Division (SLED) scientist, testified that she compared the blood swabs recovered from the counter of Victim's residence to Appellant's blood standard, and the blood from the counter matched

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Appellant's blood profile. Cooper testified that a projectile was recovered from the baseboard of the wall behind Victim. A firearms and toolmark examiner for SLED testified that the Jennings pistol found on Appellant when apprehended fired the bullet recovered from Victim's baseboard.

During the sentencing phase of Appellant's trial, Jill Shelley (Shelley), Victim's older daughter, testified that in September 2005, six months before the murder, she could not contact Victim on the phone so she drove to Victim's home. When she arrived at Victim's residence she saw that Victim was beat up and her arms were covered in bruises. Appellant later arrived, started kicking the door, and was screaming for Victim to let him in. Shelley threatened to call the police. Appellant responded that Victim knew what would happen if they called the police. Shelley testified that Victim moved out of Appellant's home as a result of that confrontation. One piece of evidence presented by the State was a letter sent by Appellant to Shelley while Appellant was incarcerated. In the letter Appellant asserted that had Shelley not gotten involved, Victim would still be alive.

ISSUES

- I. Did the trial court err in admitting an audio tape recording as a prior consistent statement under Rule 801(d)(1)(B), SCRE?
- II. Did the trial court err in allowing the jury to review the transcript of the 911 tape?
- III. Did the trial court err in refusing to allow Appellant to represent himself during the sentencing phase of trial?
- IV. Did the trial court err in not conducting a full *Faretta* inquiry?
- V. Did the trial court err in allowing defense counsel to present mitigation evidence to which Appellant objected?
- VI. Did the trial court err in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20 (C)(a)(11)?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pittman*, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007) (citation omitted).

LAW/ANALYSIS

I. Rule 801(d)(1)(B), SCRE

Appellant argues the trial court erred in admitting as a prior consistent statement under Rule 801(d)(1)(B), SCRE an audio tape recording of J[REDACTED]'s interview with police on the evening of the murder. We

Prior consistent statements are not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE. In order for a prior consistent statement to be admissible pursuant to Rule 801(d)(1)(B), the following elements must be present:

(1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

Saltz, 346 S.C. at 121-22, 551 S.E.2d at 244.

J. [REDACTED] testified that he saw Appellant shoot and kill his mother. During cross examination, J. [REDACTED] testified that his father was Roger Grainger (Grainger). He also testified that Grainger was the only person he called "dad," and that he did not refer to Appellant as "dad." Defense counsel asked J. [REDACTED] if he remembered telling the first officer who arrived on the scene that it was his dad who shot his mother. J. [REDACTED] denied he told the officer that it was his dad, and stated he told the officer it was his stepdad. J. [REDACTED] also testified that Grainger was supposed to arrive at the condominium around 6 p.m. on the night of the murder.

Officer Thomas Knoch (Knoch), the first officer to arrive at the scene of the murder, testified that as he was heading up the steps to the condominium the following conversation took place between him and J. [REDACTED], "He said he's gone, and I asked him. I said who. . . . He said my dad" Knoch also testified that in his report he wrote, "When I asked him who, he said my dad."

Detective Ann Pitts (Pitts) testified that she spoke with J. [REDACTED] on the evening of the shooting and recorded the conversation. The state moved to enter the tape recorded conversation into evidence. In the statement to Pitts, J. [REDACTED] identified Appellant as the man who broke into the condominium and shot Victim. Appellant objected and the court overruled Appellant's objection under Rule 801(d)(1)(B), SCRE.

We hold that J. [REDACTED]'s statement to Pitts was a prior consistent statement admissible under Rule 801(d)(1)(B), SCRE. First, J. [REDACTED] testified at trial and was subject to cross-examination. Second, Appellant accused J. [REDACTED] of recently fabricating the statement. Appellant was accusing J. [REDACTED] of lying when J. [REDACTED] testified that he told Knoch it was his stepdad who shot his mother, not his dad. This alleged fabrication was necessarily recent because it happened during the trial. Third, J. [REDACTED]'s statement to Pitts was consistent with his testimony at trial. Fourth, the statement to Pitts occurred before the alleged recent fabrication. Thus, all of the elements of Rule 801(d)(1)(B), SCRE are satisfied and the trial court committed no error in allowing into evidence J. [REDACTED]'s statement to Pitts.

II. 911 Tape

Appellant argues the trial court erred in allowing the jury to view the transcript of the 911 tape while the

jurors were listening to the tape during deliberations. We disagree.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations." *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). "The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request." *Id.* The court is not required to submit evidence to the jury for review beyond that specifically requested but in its discretion may have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested. *Id.* In *Plyler*, the trial court allowed the jury to hear a tape of the testimony of the defendant's ex-wife in response to the jury's request to have her testimony read back to them. *Id.* In that case, this Court found there was no abuse of discretion where only the direct examination was played and the trial judge denied the defendant's motion that the jury be required to also hear the cross-examination to prevent overemphasis of the portion reheard. *Id.*

In this case, during jury deliberations, the jury sent the judge a question asking if they could read the 911 transcript. Appellant argued the transcript was not part of the trial record, was only offered as an aid to the tape recording, and was never put into evidence. The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the evidence was presented at trial.[4] This was done in Appellant's presence at the request of the jury. Thus, the judge exercised proper discretion and committed no error in allowing the jury to read the transcript while listening to the 911 tape.

III. Self-representation

Appellant argues the trial court abused its discretion by refusing to allow Appellant to represent himself during the sentencing phase of the trial. We disagree.[5]

An accused may waive the right to counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *Id.* (citation omitted). "If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." *Id.* (citing *United States v. Singleton*, 107 F.3d 1091 (4th Cir.1997); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979)). "Once trial commences, that right [to proceed *pro se*] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." *U.S. v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986) (citations omitted); see also *U.S. v. Stevens*, 83 F.3d 60, 66-67 (2d Cir. 1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.'"). The sentencing phase of a capital trial does not constitute a separate trial. See S.C. Code Ann. § 16-3-20(B) (2003); see also *State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed *pro se* at the beginning of trial. Appellant made his request to proceed *pro se* at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

The trial court did not abuse its discretion in denying Appellant's request to proceed *pro se* at the sentencing phase of the trial. First, the trial court noted it was concerned that Appellant's medication would affect his ability to properly and fully function as his own counsel. Second, the trial court was concerned that allowing Appellant to represent himself during the sentencing phase would require some

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delay for Appellant to fully prepare. Third, the trial court was concerned the jury may be confused to have the first half of the case tried by counsel and the second half tried without counsel, especially if the jury could see counsel at Appellant's counsel table. For these reasons, the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress. Hence, the trial court's decision to not allow Appellant to proceed *pro se* during the sentencing phase of trial was not an abuse of discretion and, therefore, nor error.

IV. *Faretta* Warnings

Appellant argues the trial court erred by failing to properly provide Appellant with *Faretta* warnings when Appellant sought to proceed *pro se* at the beginning of the sentencing phase. We disagree.

As noted above, Appellant did not timely waive his right to counsel and proceed *pro se*. Hence, Appellant's reliance on *Faretta* is misplaced. Had Appellant moved to proceed *pro se* before the trial began, then *Faretta* would apply. Moreover, Appellant contends that *Fuller* requires reversal. In *Fuller*, the defendant moved to proceed *pro se* before the trial began. 337 S.C. at 241, 523 S.E.2d at 170.

However, in this case, Appellant did not seek to proceed *pro se* until the sentencing phase. Appellant's reliance on *Faretta* and *Fuller* is misplaced, and the trial court properly considered the legitimate interests of Appellant and the potential disruption of the proceedings already in progress.[6]

V. Mitigating Social History

Appellant contends the trial court erred by allowing defense counsel to present mitigating social history evidence and call Appellant's family members as mitigation witnesses over Appellant's objection. We disagree.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565, 578 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S. Ct. 646, 657, 98 L. Ed. 2d 798, 816 (1988)). The introduction of the mitigation evidence at issue was a tactical decision made by Appellant's trial counsel and is reviewed on a case by case basis. The mitigation evidence presented served the purpose of humanizing Appellant to the jury. We find the introduction of this mitigation evidence was a tactical decision made by trial counsel and the trial court committed no error in admitting mitigating evidence that Appellant did not want to be introduced.

VI. S.C. Code Ann. § 16-3-20(C)(a)(11)

Appellant argues the trial court erred by refusing to direct a verdict on the statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime. We disagree.

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight." *State v. Smith*, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). "The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it." *State v. Lindsey*, 372 S.C. 185, 194-95, 642 S.E.2d 557, 562 (2007).

The aggravating circumstance at issue is "[t]he murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." S.C. Code Ann. § 16-3-20(C)(a)(11) (2003 & Supp. 2009). The State established there was an ongoing criminal process from 2005 against Appellant for criminal sexual conduct, first degree, assault and battery

with intent to kill, and kidnapping at the time Victim was murdered. Victim, as the victim in the 2003 crimes, was clearly a potential witness in Appellant's trial on these three charges. There was circumstantial evidence to support a finding that Appellant murdered Victim to impede or deter prosecution of the charges listed above. J. testified that Appellant stated, "you thought I was going to prison," when he broke into the condominium. M. testified she heard a loud pop noise, and a voice that was not J.'s say, "I told you I'd be back. I'm not going to jail you stupid bitch, and I'm not—I'm back, I'm back. I'm never going back to jail." Shelley testified that Appellant warned Victim that she knew what would happen if someone called the police. Lastly, in the letter from Appellant to Shelley written while Appellant was incarcerated, Appellant asserted that Victim would still be alive had Shelley not gotten involved in Victim's life. This evidence is circumstantial evidence to support the statutory aggravating circumstance contained in section 16-3-20(C)(a)(11), and the trial court is affirmed in its denial of Appellant's motion for a directed verdict.

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. See, e.g., *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

CONCLUSION

For the aforementioned reasons, Appellant's conviction and sentence are affirmed.

BEATTY, KITTREDGE, HEARN, JJ., concur. PLEICONES, J., concurring in result only.

[1] This case consolidates Appellant's direct appeal and the mandatory review provisions of S.C. Code Ann. § 16-3-25 (2003).

[2] Victim was Appellant's estranged wife.

[3] Three days after the murder, police searched Appellant's residence and found a piece of paper with Victim's address on it. However, police were not able to find Appellant until March 20, 2006, two weeks after the murder.

[4] Appellant offered no objection to the introduction of the 911 transcript at trial, nor did he object to the transcript being read while the 911 tape played.

[5] Issue three condenses Appellant's third and fourth issues on appeal into one issue.

[6] Even if *Faretta* were applicable, the record reflects the trial judge met the *Faretta* standard by adequately warning Appellant of the dangers of self-representation.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

Opinion No. 26857

PETITION FOR REHEARING

Counsel for appellant respectfully petitions this Court, pursuant to Rule 221(a), SCACR, for rehearing of its decision in, State v. Winkler, Op. No. 26857, Shearouse's Adv. Sh. 32 at 16-28 (filed August 16, 2010) because this Court, in affirming his capital conviction and sentence, overlooked material facts and law relating to the case including the fact the trial judge **promised appellant prior to trial**, that he could represent himself but not at that early stage. Further, as explained infra, appellant respectfully disagrees with this Court's holding that the "sentencing phase of a capital trial does not constitute a separate trial" for purposes of Faretta v. California, 422 U.S. 806 (1975) and self-representation. State v. Winkler, Op. No. 26857, Shearouse's Adv. Sh. #32 at 24-25 (filed August 16, 2010). See Bullington v. Missouri, 451 U.S. 430 (1981).

At the last pre-trial hearing on January 24, 2010, four days before appellant's trial was to begin on Monday, January 28, 2010, defense counsel Wilson told the judge: "[M]r. Winkler wants to be heard and so I want to, [you to] hear him." Appellant then told the judge about a physical altercation he had with defense counsel Wilson at "the jailhouse" where Wilson put his finger in appellant's face, pushed him and called his sister "a f'ing liar." R. 3407, l. 121 – 3410, l. 4.

Appellant, who was always respectful to the court, informed the judge that when he told Wilson "[p]lease do not ever call my sister or anyone in my family a liar again. He [Wilson] turned towards me, put his finger in my face, touched my face, and said she is a f'ing liar. At that time I swatted his hand away from my face, officers came in, and they acted like it was my fault. But it was Mr. Wilson's. And there's no way I can see where I'm gonna get a fair trial with this man, my attorney, when he [has] called me and my family liars over the past month . . . He's the one that lost his temper and stuck his finger in my face and used the F word concerning my sister, who is a teacher in Ohio . . . I contacted Corporal Neal, who was in my pod last night, directed me to Major Johnson. Relayed my, my message that **I'd like to press charges on Mr. Wilson**, and he said back to her – I did not speak with Major Johnson. I spoke to. I spoke to Craig that, that, at the jailhouse, did not permit me to do that. **I needed a written statement from you in order to do an in-house assault charge.**" R. 3407, l. 121 – 3410, l. 4. (emphasis added).

The judge told appellant that criminal charge against Wilson "can be addressed **at a later date**. There's no urgency about it. " R. 3410, ll. 5-17. (emphasis added).

The judge asked Wilson if he thought this altercation and appellant's accusation of criminal behavior on his part would hamper his ability to represent appellant. Wilson said it would not, and appellant continued to complain about Wilson until the judge told appellant he did not want to hear "anymore about it" -- the lack of communication with Wilson. R. 3410, l. 18 – 3414, l. 14..

Appellant responded: “[I] don’t see how we can get along. We have to – we have to go through a mock trial and this man [has] just now called me a liar, and there is no way we can get along. I’ve asked him to be, to be removed . . .” The judge said, “[I]f your request is to have another attorney appointed, from what you told me, that request is denied.” R. 3410, l. 18 – 3414, l. 14. The judge stated he wanted the attorneys to do their best over the weekend and stated “I would rather address anything further about **this Monday**, and you-all just prepare in your best efforts for this weekend.” R. 3410, l. 18 – 3414, l. 14. (emphasis added).

Prior to trial, and before jury selection on Monday, January 28, 2008, the judge again heard appellant’s continuing complaints about defense counsel Wilson and the judge concluded:

[In] any event, we’re going to proceed then. There’s been no request for you to represent yourself. You’re requesting another attorney. Since that’s the case, I do not grant your motion. Now, **you always have that option to represent yourself**, which would be very inadvisable **for this stage**, but we will continue on with the case.”

R. 42, ll. 12-18 (emphasis added).

Given the judge’s pre-trial promise that appellant would always have the opportunity to represent himself the self-representation issue should not have been analyzed under the abuse of discretion “untimely request” standard of State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). In Reed, the defendant represented himself during the guilt phase, he was convicted, and he then decided he wanted his appointed counsel, Chief Public Defender Ashley Pennington, to represent him during the penalty phase. Under these very different circumstances this Court stated the trial judge did not abuse his discretion by not forcing Public Defender Pennington, who acknowledged he was not prepared immediately to go forward, to represent Reed.

This Court should grant rehearing because it applied the wrong standard of review – abuse of discretion standard – rather than the correct standard that the request of self-representation “must

be honored out of that respect for the individual "which is the lifeblood of the law" standard of Faretta v. California, 422 U.S. 806, 834 (1975). The trial court's failure to honor its promise, and allow appellant's request to represent himself and control his case in mitigation during the penalty stage trial constitutes a due process violation. See Knox v. Collins, 928 F.2d 657 (5th Cir. 1991)(failure to give a jury instruction as promised and relied upon by the defendant violated the essential demands of fairness despite the fact the jury charge was not required by law at that time).

However, even under an abuse of discretion standard each of the trial judge's three purported reasons for refusing to allow appellant to represent himself were without support in this record. Trial counsel said that appellant was ready to represent himself and that there would be no delay, appellant's very mild antidepressant medication could be managed, and the jury would not have been confused by appellant representing himself during the penalty stage trial. R. 1952, l. 14-1953, ll. 9-19. As to the possibility the jury may become confused, in State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004), the Court said this situation was easily manageable by the trial judge reminding the jury during the penalty stage that the defendant was representing himself.

Further, and respectfully, this Court should address in the opinion the highly unusual fact that appellant **wanted his attorney arrested for assaulting him** prior to the trial since it is probative of the self-representation issue.

Moreover, in this case appellant's attorneys also wanted appellant to represent himself. After recessing for the mandatory twenty-four hour waiting period following appellant's convictions, the parties returned to court on February 4, 2008. Defense counsel informed the court that appellant wanted to participate in the cross-examination of witnesses. R. 1915, ll. 16-23. Denying that, the trial court **reiterated to appellant its promise** that he would be allowed to represent himself:

"Well, Mr. Winkler, you always have the opportunity, sir, if you wish to represent yourself, sir. And if you want to represent yourself, we'll go through another dialogue here to make sure that's what you're doing."

R. 1917, ll. 14-18. (emphasis added).

Appellant then asked the court to allow him to proceed pro se and to allow his attorneys to remain as a resource for him. R.1925, l.14 - 1928, l. 7. Winkler's request was unequivocal:

Court: If you're saying that you want to represent yourself with Mr. Wilson and Mr. Rathbun to stay there as consultants for you to consult with during the course of this phase of the trial, but not to be your attorneys who ask questions or make closing arguments to the jury, is that what you're requesting?

A: Yes, sir.

R. 1928, ll. 11-17; R. 1930, ll. 19-24.

Trial counsel informed the judge that appellant had indicated to him "on more than one occasion" that this is what he wanted to do. R. 1932, ll. 7-9. Appellant made it clear that he was no longer asking for new attorneys, but to represent himself: "I already asked that eight months ago." R. 1932, ll. 15-20.

The judge then asked if appellant had reviewed the materials gathered in preparation for the trial. Appellant responded that he had, otherwise, "[w]e wouldn't be ready for trial." R. 1932, l. 25 - 1933, l.6. The judge also asked if appellant had reviewed the evidence that Wilson and Rathbun were prepared to introduce during that part of the trial. Again, appellant said he had. R. 1933, ll. 7-10.

After the trial court informed appellant again that he "always [has] the opportunity . . . to represent himself," he noted it would be dangerous it would be for him to do so. R. 1917, ll. 14-23. **Appellant's attorneys asked the judge to allow appellant to represent himself.** R. 1920, l. 21 - R. 1921, l. 20. The judge again told appellant that the decision was highly inadvisable,

and that he would be bound by court rules. R. 1921, ll. 21-25. The state **conceded that appellant had the right to represent himself**. R. 1922, ll. 2-8. The judge informed appellant for the third time that he had the right to represent himself but that it was dangerous to do so. R. 1922, ll. 14-19. Appellant was insistent that he wished to represent himself. R. 1926, l. 6 - 1927, l. 25; R. 1930, l. 19 - 1931, l. 3.

The judge began to seriously engage appellant regarding his decision to represent himself. R. 1929, l.14. Wilson clarified appellant's position:

Mr. Wilson: [W]hat he what he wants to do, and he'll tell you if I'm correct. What he wants to do is to represent himself, but he wants to make sure, and you say dismiss your attorneys, and that's the other word that's confusing him.

R. 1927, ll. 21-25.

Appellant unequivocally invoked his right to represent himself. R. 1928, ll. 11-17.

The judge noted that he was reviewing Faretta, *supra*, Brewer¹, and Fuller². R. 1931, ll.1-3. The judge then discussed appellant's medications, which a nurse stated were not a serious consideration. R. 1931, ll. 4-25. Wilson again informed the judge that appellant was adamant about representing himself, even though Wilson -- as would any attorney -- did not believe it was a good idea. R. 1932, ll. 4-9. The judge asked appellant if he reviewed the mitigation materials collected by his defense team. R. 1932, l. 25 - 1933, l. 10. He asked him if he understood "the nature of the term leading question." R. 1933, ll.1-20. Appellant answered that "it's trying to get someone to say something that you want them to say, putting words in their mouth." R. 1933, ll. 11-17.

¹ 328 S.C. 117, 492 S.E.2d 97 (1997).

² 337 S.C. 236, 523 S.E.2d 168 (1999).

The judge asked if appellant had reviewed the rules of evidence for South Carolina; did he understand the various exceptions to hearsay? R. 1933, 11.18-25. Did he know what an excited utterance is? R. 1934, 11.1-5.

Appellant told the court:

Most of these witnesses that they're going to call today, what I understand, there's nobody that knows them better than myself. They were supposedly my friends who turned against me to keep me with my wife, who they only met several times. I know them better than anybody in this room, your Honor, and-- . . . Your Honor, I'm confident in taking, taking care of this, this business.

R. 1934, 1.8 - 1935, 1.4.

The judge then asked counsel to look at Fuller, supra, and Brewer, supra to see when the decision to proceed pro se had to be made. And he asked appellant:

And let me just review these one more time. Let me—but you understand the dangers, the pitfalls? You understand it's not that, that — it's very dangerous to do this, and you understand at this phase of the trial, sir, this jury is going to decide whether or not you would receive life imprisonment or the death penalty? You understand that, sir?

Defendant: Yes, Your Honor.

R. 1925, 11.16-23.

The judge then asked appellant if he understood the danger of going forward representing himself--if it was a decision he wished to make. Appellant said he did. R. 1936, 11. 2-9.

After this, Solicitor Hembree asked the judge to "engage in a discussion of all the factors under Faretta just for the record." R. 1937, 11. 18-23. The judge replied that he thought he had.

R. 1937, 1. 24 - 1938, 1. 2.

The parties then engaged in a discussion regarding the timing of appellant's request. The judge said to appellant:

Mr. Winkler, I do want you to consider this very seriously because this is a serious decision. If ultimately, though, I determine that you've make (sic) that decision and it is a knowing, intelligent and voluntary decision and you made it pursuant to Faretta vs. California standards and reviewing Fuller and Brewer, then it's probable I'll permit you to do. Let me think further with it.

R. 1938, l. 25 - 1939, l. 7.

Defense counsel continued to enthusiastically argue appellant's right to represent himself, while maintaining that they did not personally agree with his decision. R. 1953, ll. 9 - 1954, l. 18. Defense counsel argued that Brewer allows appellant to represent himself:

The . . . test is whether [the] defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice but the defendant's understanding . . . The determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right of self-representation. The only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to -

R. 1955, l. 9 - 1956, l. 1.

Defense counsel Wilson told the judge at one point, that "he [Appellant] wanted to be heard." The judge responded: "No. I think I have heard enough in that regard." R. 1958, ll. 20-22.

The judge asked both counsel to review State v. Fuller³ and State v. Brewer⁴ to determine when the decision to allow a defendant to represent himself must be made. As the judge noted, Brewer states that the decision must be made before trial. The judge noted, however that "one could assert this is a trial." R. 1935, ll. 10-15. The judge also gave counsel for both sides the

³ 337 S.C. 236, 523 S.E.2d 168 (1999).

⁴ 328 S.C. 117, 492 S.E.2d 97 (1997).

opportunity to make "specific requests of conversation with the defendant if you want to put that in writing." R. 1938, ll. 19-24. The judge told appellant:

If ultimately, though, I determine that you've made that decision and it is knowing, intelligent and voluntary decision and you made it pursuant to Faretta v. California standards and reviewing Fuller and Brewer, then it's probable I'll permit you to do. Let me think further with it.

R.1939, ll. 2-7.

The judge asked whether the parties agreed, pursuant to Fuller, that the decision was now within the discretion of the judge. R.1940, ll. 5-11. The state did agree. R.1940, ll.12-15. However, defense counsel did not agree—their position was that appellant had the right to represent himself during the penalty phase of his own capital trial. R. 1940, l. 23 -- R. 1942, l. 5. Defense counsel distinguished State v. Reed⁵ from the instant case as appellant has also done above. R. 1943, l. 15 - 1945, l. 2. The trial judge ultimately ruled he was not going to allow appellant to represent himself.

As stated above, given the trial judge's promise that appellant could later represent himself it was fundamentally unfair for the court not to honor its promise pursuant to Faretta and this Court should grant rehearing on its application of an abuse of discretion standard to these facts. Appellant also respectfully requests rehearing of this Court's holding that "the sentencing phase of a capital trial does not constitute a separate trial." State v. Winkler, Op. No. 26857, Shearouse's Adv. Sh. #32 at 24-25 (filed August 16, 2010). Clearly if appellant had been sentenced to life imprisonment rather than death that sentencing phase trial verdict would constitute have constituted double jeopardy if the state again sought death at a subsequent trial. See Bullington v. Missouri, 451 U.S. 430 (1981). Missouri's statutory procedure, like this state's procedure, calls for a separate hearing

⁵ 332 S.C. 35, 503 S.E.2d 747 (1998).

for the same jury when the defendant has been convicted of murder. Bullington v. Missouri, 451 U.S. 430, at 433-434 (1981).

In State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004), the Court held that a defendant had the right to represent himself during the guilt and penalty phases of a capital trial. While noting that the United States Supreme Court's opinion in Faretta predated that state's death penalty statutory complex, the Court nonetheless noted that Faretta prohibits states from haling "a person into its criminal courts and there forc[ing] a lawyer upon him, even when he insists that he wants to conduct his own defense. 422 U.S. at 807" State v. Reddish, 181 N.J. 553, 579-580, 859 A.2d 1173, 1188 (2004). "Faretta, ultimately, is about respecting a defendant's capacity to make choices for himself, whether to his benefit or to his detriment." State v. Reddish, 181 N.J. 553, 585-586, 859 A.2d 1173, 1192 (2004).

The Court in Reddish stated that it accepted the principle that a capital defendant had the right to represent himself during the sentencing phase trial. The Court noted the state's interest in assuring fairness in capital sentencing and stated for that reason it would not allow defendants to waive their direct appeal in a capital case. The Court also held that it disagreed with the Fifth Circuit's holding in United States v. Davis, 285 F.3d 378, 385 (5th Cir. 2002) that standby counsel must honor a pro se defendant's *absolute* right to waive the presentation of mitigating evidence. However, the court advised that "the court should consider dismissing the jury in order to confer with both the defendant and standby counsel in order to avoid affecting the jury's perception of the defendant's control over his defense." The Court also stated that trial courts should not hesitate to repeatedly remind the jury that the defendant is representing himself. State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004).

The issue of standby counsel is not at issue here. A defendant does not have the right to hybrid representation, and it was clear Wilson wanted appellant to represent himself and Wilson was willing to advise appellant, if desired, while appellant conducted the sentencing trial *pro se*.

In Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990), the seventh circuit rejected the argument that because Faretta was not a capital case that it not require the trial counsel to similarly honor a defendant's request to represent himself during the penalty phase trial: "If an individual in a capital sentencing hearing wishes to proceed *pro se*, Faretta grants him the right to do so." Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990).

The Court in Silagy also rejected any alleged dichotomy between a defendant's right to represent himself pursuant to Faretta and the societal interest in ensuring that death is the appropriate penalty in each case in which it is imposed. See Ake v. Oklahoma, 470 U.S. 68, 83-84 (1985). The Court wrote that the "Sixth Amendment does not provide merely that a defense shall be for the accused; it grants to the accused personally the right to make his defense." Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990), citing Faretta v. California, 422 U.S. at 819.

The Silagy Court also stated that the implication of the Supreme Court's opinion in Blystone v. Pennsylvania, 494 U.S. 299 (1990), was that a defendant can choose "to forego the presentation of mitigation evidence even over the contrary advice of counsel and the warnings of the court. It light of this fact, it would be strange indeed for this court to conclude that a decision to forego the presentation of mitigation evidence could act as a bar to a defendant's otherwise constitutional right to proceed *pro se*." Silagy v. Peters, 905 F.2d 986, 1007-1008 (7th Cir. 1990).

In Smith v. State, 407 So. 2d 894 (1981), the Florida Supreme Court also rejected the argument that it was error to allow the defendant to waive representation during the sentencing phase trial. Focusing specifically upon the defendant's right to make the closing argument to the

jury during the penalty stage the Court held the defendant was aware "that a very real result might be imposition of the death penalty." The Court noted there was no need for it to assess how well the defendant had "mastered the intricacies of the sentencing process, for his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself. . . . Appellant was warned of the dangers of what he was doing and discouraged from doing so." Smith v. State, 407 So. 2d 894, 899-900 (1981).

The expressly promised appellant, that he could represent himself but not during the guilt phase. Appellant should not now be blamed for taking the judge at his word. See Knox v. Collins, 928 F.2d 657 (5th Cir. 1991)(failure to give a jury instruction as promised and relied upon by the defendant violated the essential demands of fairness despite the fact the jury charge was not required by law at that time); State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001)(same principle).

When it became time for appellant to represent himself, with his attorneys' encouragement, the judge did not honor his promise to appellant. The trial judge's assertion that the jury would have been confused by appellant representing himself during the penalty phase reflects that fact that the Court has misapprehended and overlooked the significance of the **defendant's control** over the mitigation submitted to a jury on his behalf which naturally follows his right to represent himself during his penalty phase trial. State v. Reddish, 181 N.J. 553, 605, 859 A.2d 1173, 1204 (2004).

In its opinion, this Court now holds that trial counsel -- whom the defendant wanted arrested for assaulting him, whom appellant did not want to represent him, and where counsel to the judge as an officer of the court told the court that appellant was ready and willing to represent himself and should be allowed to represent himself -- may submit any evidence on defendant's behalf that the attorney would like to present, regardless of the express desires of the defendant. This Court has now designated mitigation as a mere "tactical decision" made on behalf of a defendant by his

attorney, who the defendant did not want to represent him, even though the United States Supreme Court has acknowledged the extremely personal quality of penalty phase evidence, and other jurisdictions have also recognized the unique quality of mitigation evidence. Lockett v. Ohio, 438 U.S. 586 (1978).

This Court has overlooked decisions in other jurisdictions that have granted capital defendants significantly more latitude in controlling in mitigation that is presented to a jury on their behalf, by minimizing its significance and characterizing it as a mere "tactical decision." See State v. Fry, 125 Ohio St.3d 163, 926 N.E.2d 1239 (2010) (Waiver by defendant of opportunity to present mitigating evidence in penalty phase of capital murder trial was valid, although court did not explain all legal ramifications of guilty verdict, that waiver made death penalty more likely, or discuss low reversal rate on capital appeals; trial court conducted comprehensive inquiry, in which it considered forensic psychologist's report, conferred with counsel, questioned defendant about his educational background and mental health, determined that he was competent, and advised him of right to present mitigating evidence); Rienhardt v. Ryan, 669 F.Supp.2d 1038 (D. Ariz. 2009) (A capital defendant may waive the right to present mitigating evidence); State v. Bordelon, 33 So.3d 842 (La. 2009) (Capital defendant was authorized to make knowing and intelligent of right to present mitigating evidence at sentencing hearing); State v. Pearce, 994 So.2d 1094 (Fla. 2008) (Although a defendant may waive mitigation during the penalty phase of a capital case, he should not do so blindly; counsel must first investigate and advise the defendant so that the defendant reasonably understands what is being waived, the ramifications of the waiver, and is able to make an informed, intelligent decision); Hojan v. State of Florida, 3 So.3d 1204 (2009) (Defendant who waived mitigation evidence was barred from asserting that counsel was ineffective in investigating that evidence); Cowans v. Bagley, 624 F.Supp.2d 709

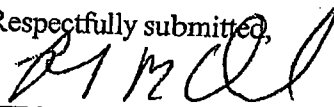
(S.D. Ohio, 2008) (defendant knowing and voluntarily waived presenting evidence in mitigation); Chapman v. Commonwealth of Kentucky, 265 S.W.3d 156, 170 (2007) (Standby counsel went beyond the scope of his role by delivering mitigating evidence to the court under seal, and the court did not err by not considering it); Lamarca v. State, 931 So.2d 838 (2006) (Defendant's inappropriate or unwise comments to the jury while representing himself during the penalty phase did not negate the fact he was properly allowed to represent himself); Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431 (2005) (Defendant waived his right to counsel during the penalty stage and his right to present evidence in mitigation); United States v. Davis, 285 F.3d 378 (5th Cir. 2002) (District Court's decision to appoint independent counsel to introduce traditional mitigation evidence over the *pro se* defendant's objection was error, and violated the Sixth Amendment). And see McKaskle v. Wiggins, 465 U.S. 168 (1984) (defendant's right to conduct his own defense was not improperly impeded by the limited actions of standby counsel where the record disclosed standby counsel's actions were kept within reasonable limits).

Appellant did not want his family members to be put through the pain of testifying about their personal family life. In addition, evidence appellant's father may have drunk too much and that his mother was depressed at times was largely unremarkable in the context of mitigation phase evidence and it was something appellant did not want to put his family through even if it were compelling. The sentencing phase jury, if it chose, could find that fact alone mitigating on appellant's behalf.

This Court should recognize, as have other jurisdictions, that a defendant can intelligently waive his right to present mitigating evidence. This is consistent with the dignity a defendant is accorded when his request to represent himself is likewise honored pursuant to

Faretta. The issue is not whether self-representation or whether waiving mitigating evidence is the most legally viable manner of obtaining an acquittal or a life sentence. This respect for the dignity of the individual through penalty phase self-representation and waiver of mitigating evidence poses no threat to the criminal justice system. Our system is fully protected because the knowing waiver of the right to counsel or to present mitigating evidence are made on-the-record, and the system is thus protected against a later collateral attack of those decisions. Respectfully, this Court should grant rehearing in this case.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

This 31st day of August, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

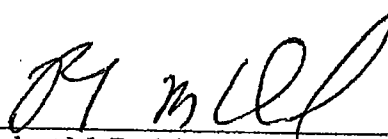
V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Alphonso Simon, Jr., Esquire, this 31st day of August, 2010.

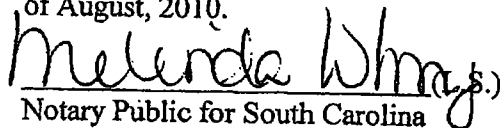


Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEYS FOR APPELLANT

SWORN TO BEFORE ME this 31st day
of August, 2010.


Notary Public for South Carolina

My Commission Expires: October 30, 2018.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

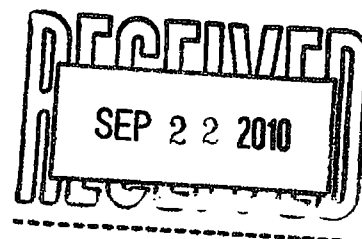
BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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September 22, 2010



Chief Appellate Defender Robert M. Dudek
✓ Appellate Defender Elizabeth A. Franklin-Best
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Winkler, Louis Michael Jr.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

September 22, 2010."

The remittitur is today being forwarded to the lower court.

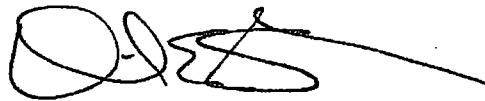
The State v. Winkler, Louis Michael Jr.

Page Two

September 22, 2010

3821

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a series of loops and a long horizontal stroke extending to the right.

CLERK

DES/dmh

cc: Assistant Attorney General Alphonso Simon, Jr.
The Honorable J. Gregory Hembree

Code 1976 § 16-3-20

Code of Laws of South Carolina 1976 Annotated Currentness

Title 16. Crimes and Offenses

Chapter 3. Offenses Against the Person

Article 1. Homicide

§ 16-3-20. Punishment for murder; separate sentencing proceeding when death penalty sought.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life" or "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14, Article IV of the Constitution of South Carolina, 1895, the commuttee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

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(a) Statutory aggravating circumstances:

- (1) The murder was committed while in the commission of the following crimes or acts:
 - (a) criminal sexual conduct in any degree;
 - (b) kidnapping;
 - (c) trafficking in persons;
 - (d) burglary in any degree;
 - (e) robbery while armed with a deadly weapon;
 - (f) larceny with use of a deadly weapon;
 - (g) killing by poison;
 - (h) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445;
 - (i) physical torture;
 - (j) dismemberment of a person; or
 - (k) arson in the first degree as defined in Section 16-11-110(A).
- (2) The murder was committed by a person with a prior conviction for murder.
- (3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.
- (4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.
- (5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
- (7) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.
- (8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.
- (9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

- (10) The murder of a child eleven years of age or under.
- (11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.
- (12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to Section 44-48-120.
- (b) Mitigating circumstances:
- (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
- (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.
- (3) The victim was a participant in the defendant's conduct or consented to the act.
- (4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.
- (5) The defendant acted under duress or under the domination of another person.
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (7) The age or mentality of the defendant at the time of the crime.
- (8) The defendant was provoked by the victim into committing the murder.
- (9) The defendant was below the age of eighteen at the time of the crime.
- (10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance

is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

CREDIT(S)

HISTORY: 1962 Code § 16-52; 1952 Code § 16-52; 1942 Code § 1102; 1932 Code § 1102; Cr. C. '22 § 2; Cr. C. '12 § 136; Cr. C. '02 § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361; 1977 Act No. 177 § 1; 1978 Act No. 555 § 1; 1985 Act No. 104, § 1; 1986 Act No. 462, § 27; 1990 Act No. 604, § 15; 1992 Act No. 488, § 1; 1995 Act No. 83, § 10; 1996 Act No. 317, § 1; 2002 Act No. 224, § 1, eff May 1, 2002 (applicable to offenses committed on or after that date); 2002 Act No. 278, § 1, eff May 28, 2002; 2006 Act No. 342, § 2, eff July 1, 2006; 2007 Act No. 101, § 1, eff June 18, 2007; 2010 Act No. 273, § 21, eff June 2, 2010; 2010 Act No. 289, § 4, eff June 11, 2010.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A-

LOUIS MICHAEL WINKLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

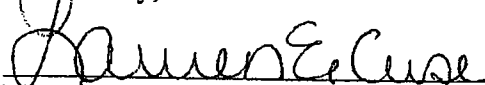
CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 18th day of February, 2011.



*ROBERT M. DUDEK
Counsel of Record

SWORN TO BEFORE me this 18th day
of February, 2011.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

No. 10-9125

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

LOUIS MICHAEL WINKLER,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF IN OPPOSITION

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CAPITAL CASE

PETITIONER'S QUESTION PRESENTED

Does a defendant charged with a capital crime who proceeds with appointed counsel during the guilt phase of trial and is convicted have a Sixth Amendment right under Faretta v. California, 422 U.S. 806 (1975) to represent himself during the penalty phase?

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Respondent, the State of South Carolina, through the Attorney General, hereby makes a brief in opposition to the petition for a writ of certiorari filed by Petitioner, Louis Michael Winkler, who has been convicted of one count of murder, one count of first-degree burglary, and one count of assault and battery of a high and aggravated nature, and sentenced to death. Respondent respectfully submits the petition is without merit and must be denied for the reasons set forth herein.

CITATION TO THE OPINION BELOW

The South Carolina Supreme Court entered its opinion affirming the convictions on August 16, 2010. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). (See also Petitioner's Appendix, pp. A1-A7). The Order denying the Petition for Rehearing filed on September 22, 2010 was unpublished. (Petitioner's Appendix, pp. A24-25).

JURISDICTION

The South Carolina Supreme Court issued its opinion on August 16, 2010, and rehearing was denied on September 22, 2010. Petitioner contends this Court has jurisdiction over the questions presented pursuant to 28 U.S.C. § 1257, in that he asserted below and asserts in his petition a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner asserts that this case involves the Sixth Amendment right "to have the Assistance of Counsel for his defense," and the Fourteenth Amendment rights to due process and equal protection.

RESPONDENT'S STATEMENT OF THE CASE

The State filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (R. p. 1976). In the Notice, the statutory aggravating circumstances asserted were that the murder was committed during the commission of a burglary, S.C. CODE ANN. § 16-3-20(C)(a)(8); and that the murder was of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime under S.C. CODE ANN. § 16-3-20(C)(a)(11). (R. p. 1977).

On January 28 – February 8, 2008, Petitioner Louis Michael Winkler ("Petitioner") was tried by a jury for murder, first-degree burglary, and assault and battery of a high and aggravated nature. He was tried in the Horry County Court of General Sessions before the Honorable James E. Lockemy, Circuit Court Judge. Ralph J. Wilson, Esquire, and Assistant Public Defender Paul Elbert Rathbun, Esquire, represented Petitioner. Solicitor J. Gregory Hembree, Esquire, Deputy Solicitor Francis A. Humphries, Jr., Esquire, and Assistant Solicitor Scott R. Hixson, Esquire, all of the Fifteenth Judicial Circuit, represented the State. On February 2, 2008, the jury convicted Petitioner on all three charges. (R. p. 1903).

On February 8, 2008, the jury found there was evidence of both asserted aggravating circumstances beyond a reasonable doubt, and recommended that Petitioner be sentenced to death. (R. p. 2940). Judge Lockemy sentenced Petitioner to thirty years confinement on the burglary conviction, and ten years confinement

on the ABHAN conviction, both to be served concurrently with a death sentence for the murder. (R. p. 2949). Petitioner filed a timely notice of intent to appeal.

Robert M. Dudek, Chief Appellate Defender of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Elizabeth Franklin-Best, Appellate Defender of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Petitioner on appeal. Appellate counsel filed a Final Brief of Appellant in the Supreme Court of South Carolina on April 5, 2010, and raised seven issues:

1. Whether the court erred by admitting a tape recording, as a prior consistent statement under Rule 801(b)(1)(B), SCRE, of an interview wherein the decedent's son, J. [REDACTED] G., told Detective Ann Pitts that his "stepfather," appellant, shot his mother since this statement was not admissible as a prior consistent statement because all of the elements of Rule 801(b)(1)(B), SCRE were not met, and the fact Officer Knochs testified that J. [REDACTED] told him immediately following the murders that his "Dad" shot his mother did not make this subsequent statement admissible since there was no accusation of a recent fabrication, improper influence or motive?
2. Whether the court erred by allowed the transcript of the 911 tape to be given to the jury when it asked to "read over the 911 transcript" during deliberations since the transcript was not in evidence, and it was not an accurate transcription of the interview?
3. Whether the court abused its discretion by refusing to allow appellant to represent himself during the penalty phase of his capital trial particularly where his attorneys agreed appellant was ready to represent himself and that no delay in the trial was necessary?
4. Whether the court erred, alternatively, by refusing to allow appellant to represent himself during the penalty stage of the trial since appellant had the right to represent himself during the penalty phase under the reasoning of Faretta, and his case

was not governed by the State v. Brewer abuse of discretion standard?

5. Whether the court erred by failing to properly provide appellant with Fareta warnings, during a focused waiver hearing, when appellant invoked his right to represent himself, and his attorneys told the court that appellant was ready and willing to represent himself and that no delay in the trial was necessary?
6. Whether the court erred alternatively by allowing defense counsel to present mitigating social history evidence and call appellant's family members as mitigation witnesses over his objection since appellant still had the right to control the case in mitigation and waive mitigation evidence he did not want the jury to consider even where the judge denied appellant the right to represent himself?
7. Whether the court erred by refusing to direct a verdict on the aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime aggravator since there was a lack of evidence to support it?

The State, through Assistant Attorney General Alphonso Simon Jr., filed its Final Brief of Respondent on April 14, 2010. The Supreme Court of South Carolina heard oral arguments on the issue on June 24, 2010, and subsequently issued its opinion affirming the convictions and sentence on August 16, 2010. Petitioner filed a timely petition for rehearing that was denied on September 22, 2010. Petitioner now seeks certiorari review by this Court.

RESPONDENT'S STATEMENT OF FACTS

On October 11, 2005, Petitioner Louis Michael Winkler ("Petitioner") was charged with the kidnapping, criminal sexual conduct in the first degree, and assault and battery with intent to kill of his estranged wife, Rebekah Grainger

Winkler. (R. p. 2227). Those charges stemmed from the kidnapping which occurred on the night October 10, 2005.

On March 6, 2006, Petitioner broke into his estranged wife's condo in North Myrtle Beach, SC. (R. pp. 1430-31). He knocked her son, J [REDACTED] G., off of a stool and onto the ground. (R. pp. 1431, 1433). Petitioner then shot the victim, Rebekah Grainger Winkler, once in the face at point blank range. (R. p. 1436). Shortly thereafter, Petitioner left the condo. (R. p. 1440).

According to Dr. Edward Leroy Proctor, Jr., the forensic pathologist who conducted the victim's autopsy, the victim received a very close range gunshot wound that entered her left cheek, penetrated her brain stem, and exited through the rear right side of her brain. (R. p. 1634). Dr. Proctor noted that the shot was probably fired within a distance of 12 to 18 inches, and no more than 24 inches of the victim. (R. p. 1634). Dr. Proctor further testified there was stippling around the wound that caused by the burning gunpowder coming from the end of the gun. (R. p. 1634). Dr. Proctor testified that death would have been instant. (R. p. 1637).

Police were unable to find and arrest Petitioner in the days immediately after the homicide. (R. p. 1645-46). On March 13, 2006, law enforcement formed a task force to apprehend Petitioner. (R. p. 1646). On March 20, 2006, two weeks after the homicide, Petitioner was spotted in the wood line of a hole at the Eagle Nest Golf Course in North Myrtle Beach, South Carolina. (R. p. 1647). The police set up a perimeter around the area where Petitioner was last seen on the golf course. (R. p. 1651). Boyd spotted Petitioner moving inside the perimeter. (R. p. 1652). He

testified that Petitioner was wearing a dark pullover. Boyd requested that the helicopter assisting with the search scan the area. (R. p. 1652). The helicopter had to refuel. As the helicopter returned to the scene of the search, Boyd saw Petitioner in the wood line. (R. p. 1653). Police were able to apprehend Petitioner without any problems. (R. p. 1653). Boyd noted that Petitioner appearance was consistent with someone who had been outside for a period of time. (R. p. 1657).

Prior to trial, Petitioner had conflicts with appointed counsel. At a July 3, 2007 hearing, Petitioner indicated that Rathbun, the second chair, was telling him to take a plea, plead guilty. (R. p. 3264). Petitioner interpreted that to mean that Rathbun thought he was guilty. (R. p. 3264). Rathbun responded that he believed Petitioner heard what he wanted to hear and didn't hear what counsel was saying. (R. p. 3265). Rathbun affirmed to the court that he would do his utmost to represent Petitioner in a trial. (R. p. 3265). At that hearing, Wilson indicated that when there have been disagreements between Rathbun and Petitioner, Wilson had been able to sit down with Petitioner and decide on the correct course of action with Petitioner's consent. (R. p. 3262).

During an ex parte hearing held just prior to jury selection for Petitioner's trial, Petitioner again complained to the trial judge about trial counsel. Petitioner asserted that Rathbun got in his face, put his finger in Appellant's face, and touched his face. (R. p. 33). Petitioner also complained that Wilson was calling Petitioner's sister a liar. (R. p. 33). In response, Wilson informed the court that he had done everything he knew to do to represent Petitioner in the best fashion he knew. (R. p.

34). He also indicated that Petitioner is antagonistic, and has been so since the first day. (R. p. 34). Wilson further noted that they had made every effort to protect every right, hired every expert they could think to hire, and have tried to talk with every witness they could possibly find. (R. p. 34). He informed the court they were prepared for trial. (R. p. 34). The fact that Petitioner's personality got on Wilson's last nerve would not affect him and his ability to represent him.

Petitioner continually complained that counsel was advising his family that Petitioner was likely going to be convicted. (R. pp. 41-2). The Court responded that it could not chastise counsel for giving him an honest opinion. (R. p. 42).

Any event, we're going to proceed then. There's no request for you to represent yourself. You're requesting another attorney. Since that's the case, I will not grant your motion. Now, you always have that option to represent yourself, which would be very inadvisable at this stage, but we will continue on with the case.

(R. p. 42, ll 12-17).

Prior to the start of the sentencing phase, Petitioner initially indicated that he wanted to cross-examine some of the witnesses scheduled to testify for the State. (R. p. 1915-19). Eventually, Petitioner requested to waive counsel and proceed pro se. After lengthy discussions with Petitioner, prosecutors, one of Petitioner's treating psychiatrists, and defense counsel, the trial court found Petitioner's request to proceed pro se was untimely. (R. pp. 1919-68). Thus, it was in the trial court's discretion whether to allow Petitioner to represent himself for the sentencing phase. (R. pp. 1966-70). After balancing several factors, the trial court denied Petitioner's request to waive counsel and proceed pro se. (R. pp. 1970-71).

REASONS WHY THE WRIT SHOULD BE DENIED

Certiorari is not warranted in this case. Contrary to Petitioner's assertions in the Petition, the South Carolina Supreme Court has not declared that a capital defendant's decision to represent himself during the sentencing phase of his trial is subject to an abuse of discretion standard on appeal. Instead, the South Carolina Supreme Court held that it is within the discretion of the trial court whether to allow a defendant to proceed pro se when the request is untimely. Petitioner's request at trial was not timely because he did not make his request until shortly before the sentencing phase was set to begin. Since the guilt-or-innocence phase and sentencing phase of a capital trial in South Carolina together constitute a single trial, Petitioner would have needed to have made his request before the beginning of the guilt phase to be timely.

A. This ruling is consistent with those of other jurisdictions that have addressed the issue, and this ruling is not inconsistent with this Court's precedent.

The South Carolina Supreme Court addressed the trial court's handling of Petitioner's request to proceed pro se as follows:

An accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed pro se must be clearly asserted by the defendant prior to trial." Id. (citation omitted). "If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." Id. (citing United States v. Singleton, 107 F.3d 1091 (4th Cir.1997); United States v. Lawrence, 605 F.2d 1321 (4th Cir.1979)).

"Once trial commences, that right [to proceed pro se] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." U.S. v. Wesley, 798 F.2d 1155, 1155-56 (8th Cir.1986) (citations omitted); see also U.S. v. Stevens, 83 F.3d 60, 66-67 (2d Cir.1996) ("[O]nce a trial has begun, a defendant's right to represent himself 'is sharply curtailed,' and the judge considering the motion must weigh 'the prejudice to the legitimate interests of the defendant' against the 'potential disruption of proceedings already in progress.' "). The sentencing phase of a capital trial does not constitute a separate trial. See S.C.CODE ANN. § 16-3-20(B) (2003); see also State v. Stewart, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Appellant did not make his request to proceed pro se at the beginning of trial. Appellant made his request to proceed pro se at the beginning of the sentencing phase, which is not a separate trial. Thus, review of this issue is governed by the abuse of discretion standard outlined above and Appellant's right to represent himself was sharply curtailed by his failure to exercise this right prior to trial.

Winkler, 388 S.C. at 586, 698 S.E.2d at 602-03. The South Carolina Supreme Court further found the trial court did not abuse its discretion in denying Petitioner's request to represent himself during the sentencing phase. Id. at 586-87, 698 S.E.2d at 603. This ruling was both narrow and consistent with the holdings of other jurisdictions that have addressed whether a trial court has discretion to deny an untimely request from a defendant to waive counsel and proceed pro se.

It is well-established that an accused may waive the right to counsel and proceed pro se. Faretta, 422 U.S. 806, 95 S.Ct. 2525. Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. at 834, 95 S.Ct. at 2541 (internal quotation omitted). However,

[a]s the Faretta opinion recognized, the right to self-representation is not absolute. The defendant must "voluntarily and intelligently" elect to conduct his own defense, 422 U.S., at 835, 95 S.Ct. 2525 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)), and most courts require him to do so in a timely manner.

Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 161-62, 120 S. Ct. 684, 691, 145 L. Ed. 2d 597 (2000).

B. There is a common agreement among courts across the United States that when a defendant makes an untimely request to represent himself, waiver of counsel is left to the discretion of the trial court.

Courts that have addressed the issue of whether an untimely request to waive counsel should be granted have consistently found it is within the trial court's discretion.¹ The jurisdictions of the cases upon which Petitioner relies all recognize that a defendant does not have an absolute right to represent himself at trial if his request to waive counsel and proceed pro se is untimely. People v. Gorga, 396 Ill. App. 3d 406, 410, 920 N.E.2d 535, 540 (Ill. App. Ct. 2009) appeal denied, 236 Ill. 2d 520, 930 N.E.2d 412 (2010) (citing People v. Burton, 184 Ill.2d 1, 24, 703 N.E.2d 49 (1998)). United States v. Oakey, 853 F.2d 551, 553 (7th Cir.1988)(once trial commences, the district court retains discretion to balance the interests of the

¹ See generally Robards v. Rees, 789 F.2d 379 (6th Cir. 1986) (finding trial court did not abuse its discretion in denying request to waive counsel and proceed pro se on eve of trial); United States v. Mackovich, 209 F.3d 1227, 1236 (10th Cir. 2000)(noting defendant must timely assert intention to represent himself to exercise the right); United States v. Betancourt-Arretuche, 933 F.2d 89, 95-6 (1st Cir. 1991)(finding defendant waived right to represent self by waiting until after jury selected and sworn before making request); United States v. Young, 287 F.3d 1352, 1353-54 (11th Cir. 2002); People v. Halvorsen, 42 Cal.4th 379, 165 P.3d 512 (2007).

defendant against the potential disruption of the proceedings already in progress); see Gregory v. State, 628 P.2d 384 (Okla. Crim. App. 1981)(finding no violation of Faretta right because request was equivocal and untimely); Gowter v. State, 589 P.2d 682, 688 (Okla. Crim. App. 1978)(“ In order to proceed pro se, the right must be timely asserted, and accompanied by a valid waiver of counsel.”); Soto v. Com., 139 S.W.3d 827, 857 (Ky. 2004)(“[A] defendant who wishes to waive his constitutional right to counsel (or, as here, make a limited waiver) must do so in a timely manner so as not to cause a delay in the proceedings.”); Thomas v. State, 958 So. 2d 995, 996 (Fla. Dist. Ct. App. 2007) (“In Florida, it has been held that after a trial has begun with the defendant being represented by counsel, the decision of whether to allow a defendant to proceed pro se rests in the sound discretion of the trial court.”).

Petitioner has pointed to no authority where a court found a defendant had an absolute right to represent himself when his request was untimely. Instead, he relies upon cases whose procedural postures are incongruent to the facts in Petitioner's case.

For instance, Petitioner relies upon the Fifth Circuit Court of Appeals decision in United States v. Davis, 285 F.3d 378 (5th Cir. 2002). In Davis, the defendant had been granted a new sentencing trial due to an error in his original trial. Id. at 380. The defendant had requested to proceed pro se in his new sentencing trial. Id. After a Faretta hearing, the trial court found that the defendant's decision to represent himself was knowingly and intelligently made. Id. However, the district court concluded that the right to self representation did not

extend to sentencing, and that even if it did, Davis's interest were outweighed by the Eighth Amendment requirement that the death penalty not be applied arbitrarily or capriciously. Id. The Fifth Circuit Court of Appeals overturned the trial court's decision when the defendant filed for a writ of mandamus to require the district court to allow him to proceed pro se. Id. at 380. Unlike Petitioner's case, there was no question that the defendant in Davis timely requested to represent himself in his new sentencing hearing.

The timeliness of the defendant's request in Davis was never an issue before either the district court or the Fifth Circuit. Since the defendant in Davis had timely moved to represent himself in his new sentencing trial, it was not within the trial court's discretion whether the defendant could proceed pro se. Further, the district court's denial in Davis was based upon its belief that the Eighth Amendment requirement that the death penalty not be applied arbitrarily or capriciously trumped the defendant's right to represent himself. That issue was not presented to the South Carolina Supreme Court in Petitioner's case.

Other cases in the Fifth Circuit Court of Appeals are consistent with the South Carolina Supreme Court's ruling in Petitioner's case. For example, the Fifth Circuit recognized that a trial court has the discretion to decide whether to grant a defendant permission to proceed pro se when the request to do so is untimely. United States v. Long, 597 F.3d 720, 727 (5th Cir. 2010); Wood v. Quarterman, 491 F.3d 196, 201-02 (5th Cir. 2007)(citing Martinez v. Court of Appeal, 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000); United States v. Davis, 269 F.3d 514,

520 (5th Cir.2001) ("The district court was not obliged to honor Davis's mid-trial request to represent himself.") (citing Moreno v. Estelle, 717 F.2d 171, 176 (5th Cir.1983)); see also Haynes v. Cain, 298 F.3d 375, 384 (5th Cir.2002) (en banc) (Dennis, J., concurring)).

In Wood, the Fifth Circuit found that the state court did not unreasonably apply federal law when it found the trial court had the discretion to deny a motion to proceed pro se when the defendant made the motion after the guilt phase and immediately before the sentencing phase in his capital trial. 491 F.3d at 202. The state habeas court in Wood held the trial court had the discretion because the motion was not timely. Id. at 201-02.

The timeliness of the defendant's request to represent himself was also not an issue in any of the cases upon which Petitioner relies in support of his claim. In Chapman v. Commonwealth, 265 S.W.3d 156 (Ky. 2007), the defendant moved to fire his attorneys and proceed pro se well before his trial. Id. at 161. Thus, there was no issue of whether the trial court had the discretion to either grant or deny the request before either the trial or appellate court. The issue in Hojan v. State, 3 So.3d 1204 (Fla. 2009), was whether a defendant could waive the presentation of mitigation evidence. Id. at 1211. As acknowledged by Petitioner, there was no issue of whether the defendant could represent himself. In Lay v. State, 179 P.3d 615 (Okla. Crim. App. 2008), the defendant represented himself in both the guilt-or-innocence phase and the sentencing phase of his trial. In Lay, the defendant only challenged his right to represent himself during the sentencing phase on appeal. Id.

at 619. Thus, there was no question regarding the timeliness of his request to represent himself during the sentencing phase.

In Commonwealth v. Davido, 582 Pa. 52, 65, 868 A.2d 431, 438 (2005), the Supreme Court of Pennsylvania noted that in its previous decision in Commonwealth v. Owens, 496 Pa. 16, 436 A.2d 129 (1981), it had

noted that “[w]here the accused does not request to represent himself before trial, the constitutional right to self-representation recognized in Faretta is not implicated. When, during the course of trial, an accused wishes to dismiss counsel and either represent himself or obtain new counsel, his request is addressed to the sound discretion of the trial court.” Owens, 436 A.2d at 133 n. 6 (citations omitted); see also United States v. McKenna, 327 F.3d 830, 844 (9th Cir.2003); Commonwealth v. Jermyn, 551 Pa. 96, 709 A.2d 849, 863 (1998).

Davido, 582 Pa. at 65, 868 A.3d at 438. And in both Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990), and People v. Coleman, 168 Ill.2d 509, 660 N.E.2d 919 (1995), there were no challenges to the timeliness of the defendants’ request to proceed pro se. Indeed, both defendants were allowed to represent themselves during the sentencing phase. The South Carolina Supreme Court’s decision is not akin to the decision made by the New Jersey Supreme Court in State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (2004). Since Petitioner was not allowed to waive counsel for the sentencing phase of the trial, the powers of and/or limitations on standby counsel were not addressed in Petitioner’s case.² Furthermore, neither the

² Also, Petitioner’s argument that the South Carolina Supreme Court’s finding Petitioner’s request was untimely is analogous to the New Jersey Supreme Court’s finding that the right to a fair trial in a capital proceeding takes priority to the right of self-representation in Reddish is both unfounded and untimely. Petitioner did not raise this argument until he filed his Petition for Rehearing. The two arguments are not similar.

trial court nor the South Carolina Supreme Court delved into whether Petitioner would have been required to represent himself in the guilt phase of his trial had he made a timely motion to represent himself during the sentencing phase.

Altogether, the South Carolina Supreme Court's finding that Petitioner's request to proceed pro se was untimely and subject to the trial court's discretion was correct, proper, and consistent with the decisions of other courts that have addressed the same issue. The South Carolina Supreme Court's decision neither conflicts with the decision of another state court of last resort or United States court of appeal, nor decided an important question of federal law that has not been, but should be, settled by this Court, nor decided an important federal question in a way that conflicts with relevant decisions of this Court. Thus, this Petition should be denied.

CONCLUSION

For all the foregoing reasons the petition for a writ of certiorari must be denied.

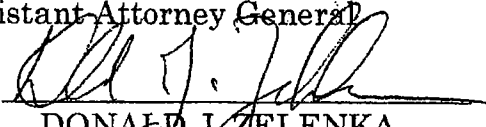
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March 28, 2011.

* Counsel of Record

No. 10-9125

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

LOUIS MICHAEL WINKLER,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

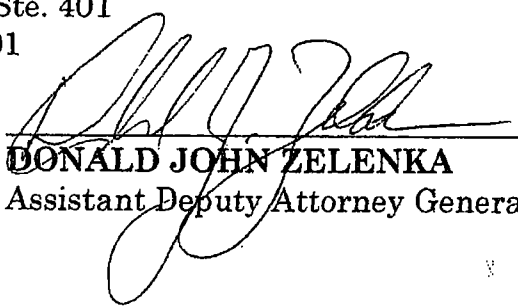
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Brief in Opposition* in the foregoing action by depositing two (2) copies in the U.S. mail, first class, postage prepaid to the following:

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No. 10-9125

IN THE
SUPREME COURT OF THE UNITED STATES

LOUIS MICHAEL WINKLER,

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v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of South Carolina

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REPLY BRIEF FOR PETITIONER

The State does not contest the importance of the right to represent oneself during the penalty phase of a capital trial. Nor does it dispute the frequency with which this issue arises, nor the fact that this case squarely presents the issue. The State nonetheless resists certiorari on the grounds that the South Carolina Supreme Court's holding – that a trial court may deny a request to proceed *pro se* at sentencing if not made before the commencement of trial – is consistent with this Court's decision in *Faretta v. California*, 422 U.S. 806 (1975), and with the decisions of all other jurisdictions to have considered the matter. BIO 8.

Neither is true. *Faretta* not only allows defendants to proceed *pro se* at capital sentencing proceedings, but the nature of the Sixth Amendment right and the structure of capital trials make clear that trial courts must honor requests to proceed *pro se* when, as here, those requests are made knowingly and intelligently prior to the beginning of the sentencing phase. Two circuits and three state courts of last resort have adopted that rule, in conflict with the decision in this case and decisions from courts of last resort in California and Texas.

I. The South Carolina Supreme Court's Decision Contravenes *Faretta*.

The South Carolina Supreme Court held that in order to represent oneself at a capital sentencing proceeding, the "request to proceed *pro se* must be clearly asserted by the defendant prior to trial." Pet. App. A5. This holding – like the State's defense of it, BIO 9-10 – could mean one of two things. First, it could mean that in order to ensure the right to represent oneself at the sentencing phase, a defendant must also forgo assistance of counsel at the guilt phase. Second, it could mean that a defendant may represent

himself at the sentencing phase after accepting counsel at the guilt phase, but he must declare at the outset of the guilt phase that he intends to exercise his right to self-representation at sentencing. Neither proposition is consistent with the Sixth Amendment.

1. Requiring a capital defendant to waive his right to counsel during the guilt phase of his trial in order to exercise his *Faretta* right to proceed *pro se* at sentencing would violate the fundamental principle that "one constitutional right [need not] be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968).

A defendant's ability to preserve both constitutional rights is especially important in the context of capital trials. The "core of the *Faretta* right" is the defendant's entitlement to "preserve actual control over the case he chooses to present to the jury." *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). More than any other criminal proceeding, a capital sentencing involves moral and value-laden judgments. In reaching its verdict, a jury may consider "any aspect of a defendant's character or record," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), "any relevant mitigating evidence," *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982), and simply whether to exercise "compassion[]" or mercy, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). A capital defendant therefore may want to appear at sentencing "before the jury in the status of one who is defending himself" to make these irreducibly personal appeals to the jury in his own voice. *McKaskle*, 465 U.S. at 179. Nowhere is it more true that "[f]rom the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself." *Id.*

The sentencing phase of a capital case also has unique significance for the “dignity and autonomy” interests *Faretta* was designed to protect. *McKaskle*, 465 U.S. at 178. Indeed, the need to respect individual dignity and autonomy in capital cases “is *far more important* than in noncapital cases.” *Lockett*, 438 U.S. at 605 (emphasis added). What the jury is to be told about the defendant, his history, his family, and his responsibility for his actions – much of which may be deeply embarrassing or offensive to the defendant – is an intensely personal decision. In this case, for example, petitioner’s request to proceed *pro se* at sentencing was driven largely by his desire to avoid having his family “dragged through the mud” by a state-appointed lawyer whom petitioner neither trusted nor liked. Pet. 9. A State cannot burden a capital defendant’s deeply personal – and constitutionally protected – wishes in this respect with the requirement that he waive his right to counsel at the guilt phase.

2. Even if South Carolina would permit a capital defendant to accept counsel at the guilt stage but represent himself at the sentencing phase so long as he declares that wish at the outset of trial, that rule would still violate the right to self-representation. A defendant cannot be expected to guess before trial has even begun whether he will be found guilty of capital murder. Nor should a state be able to deprive a defendant of the ability to exercise his judgment based on information obtained during the guilt phase of trial concerning his counsel’s performance, the jury’s reaction to him, and other matters.

To be sure, this Court has recognized that courts have discretion to deny untimely invocation of Sixth Amendment rights. *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000). But, for two reasons, a capital defendant like petitioner, who “has never requested a delay” and “has said that he is

ready and willing and able to go forward as we speak,” R. 1973, ll. 9-11, satisfies any constitutionally permissible timeliness requirement, as long as he invokes his right before commencement of the sentencing phase.

First, requiring a defendant to decide at the outset of trial whether to waive his Sixth Amendment right to self-representation at sentencing is unnecessary to protect states’ legitimate interests in the proper functioning of their criminal justice systems. In *Faretta*, this Court acknowledged that states may limit Sixth Amendment rights when necessary to prevent defendants from “deliberately engag[ing] in serious and obstructionist misconduct.” 422 U.S. at 834 n.46. It is to avoid that disruption – not to erect arbitrary barriers to the exercise of fundamental rights – that states may require a *Faretta* right to be invoked “in a timely manner,” *Martinez*, 528 U.S. at 162.

Invoking one’s right to self-representation at the outset of a capital sentencing proceeding does not inherently cause disruption or delay. An invocation of the right to represent oneself causes delay only if the defendant, court, or prosecution needs additional time to prepare before the defendant proceeds *pro se*. Yet the State points to no reason to believe that all, or even most, requests to proceed *pro se* at sentencing will cause delay unless made before the trial begins. Nor could it. In contrast to a request to dismiss counsel in the middle of the guilt phase, there is a natural break between the end of trial and beginning of sentencing. While the trial court here may have believed that petitioner would have mounted a better defense if given more time, it did not doubt petitioner’s competency to make the choice to represent himself even if that meant proceeding on the preexisting trial schedule. Pet. App. A5-6. Nor did either of the courts

below suggest that granting petitioner's request would have interfered with any other legitimate state interest in the orderly progression of the trial.

Second, even if a state could demand as a general matter that a defendant invoke *Faretta* at the outset of the proceeding at issue, this Court has recognized – contrary to the South Carolina Supreme Court's assertion, Pet. App. A5 – that a capital trial entails two distinct proceedings. In *Bullington v. Missouri*, 451 U.S. 430 (1981), this Court held that a bifurcated sentencing hearing for the death penalty is a separate proceeding for purposes of double jeopardy, *id.* at 446, noting that the sentencing phase “was itself a trial on the issue of punishment,” *id.* at 438. Even South Carolina's own death penalty statute recognizes that “[w]hen the State seeks the death penalty, upon conviction or adjudication of guilt . . . the court shall conduct a separate sentencing proceeding.” Pet. App. A26. This separate proceeding should be treated as distinct for purposes of the Sixth Amendment right to self-representation as well.

II. The South Carolina Supreme Court's Decision Deepens A Conflict Among State Courts Of Last Resort And Federal Courts Of Appeals.

The State argues that the decision below “is consistent with those of other jurisdictions that have addressed the issue,” BIO 8, because courts broadly acknowledge that “a defendant does not have an absolute right to represent himself at trial if his request to waive counsel and proceed *pro se* is untimely,” *id.* 10. But that argument simply elides the controversy in this case and the disagreement among jurisdictions. The question is not whether courts have discretion to deny untimely *Faretta* requests. They do. Rather, the question presented is whether a request to proceed *pro se* at a capital

sentencing proceeding is untimely, as a matter of law, simply because it was not asserted prior to the guilt phase of trial. On that question, the courts are genuinely divided.

In this case, the South Carolina Supreme Court held that petitioner's *Faretta* request was untimely because it was not made before the start of the guilt phase. Pet. App. A5. That view has been adopted by at least two other state courts of last resort. See *People v. Hardy*, 825 P.2d 781, 846 (Cal. 1992) ("A motion for self-representation" at the sentencing phase that is "made during guilt phase deliberations in a capital trial is untimely."); *Wood v. Quarterman*, 491 F.3d 196, 200 (5th Cir. 2007) (noting unpublished decision from Texas Court of Criminal Appeals holding that "the trial court did not err in denying Wood's request" – made at the outset of his capital sentencing proceeding – "to proceed *pro se* because . . . 'the request for self-representation was not presented in a timely manner'"). However, as the petition demonstrated, Pet. 17-20, other courts have taken the contrary view. They hold that the Sixth Amendment entitles a capital defendant, as a matter of right, to proceed *pro se* at sentencing even if the request is made after the guilt phase has concluded.

In *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002), the Fifth Circuit held that a defendant had a Sixth Amendment right to proceed *pro se* at sentencing even though he had not made that request prior to his guilt phase. *Id.* at 385. The State argues that the defendant's request in *Davis* was timely only because there was an intervening appeal, and accordingly, *Davis* does not establish the rule that a request to proceed *pro se* at sentencing can be made after trial on guilt has commenced. BIO 12. But nothing in the court's opinion in *Davis* turned on the existence of a prior appeal. Moreover, the Fifth Circuit has applied the same rule in a case that did not involve an intervening

appeal. In *United States v. Cano*, 519 F.3d 512 (5th Cir. 2008), the defendant was represented during the guilt phase of his trial but requested to proceed *pro se* at his (noncapital) sentencing hearing. *Id.* at 515. The district court summarily denied his request to proceed *pro se*. *Id.* The Fifth Circuit reversed, citing *Davis* and holding that “[d]efendants have a constitutional right to represent themselves in federal court. That right extends to sentencing proceedings.” *Id.* (citation omitted).

Cano also makes clear that South Carolina overreads the Fifth Circuit’s holding in *Wood*. See BIO 12-13. Because that case was governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, the Fifth Circuit was limited to assessing whether the state court decision was clearly contrary to, or an unreasonable application of, federal law as decided by this Court. *Wood*, 491 F.3d at 201. Although the court held that the state court’s application of *Faretta* was not reversible under that standard, the Fifth Circuit’s subsequent decision in *Cano* makes clear its view that the better reading of *Faretta* requires courts to allow *pro se* representation at sentencing even when the request was not made prior to trial.

The Seventh Circuit and the Pennsylvania, Illinois, and Florida Supreme Courts have adopted the same rule, albeit in a slightly different context. Pet. 18-20. In each of these jurisdictions, courts have rejected claims by defendants that they were wrongly permitted to represent themselves at capital sentencing proceedings, holding that “[i]f an individual in a capital sentencing hearing wishes to proceed *pro se*, *Faretta* grants him the right to do so.” *Silagy v. Peters*, 905 F.2d 986, 1007 (7th Cir. 1990); see also *Smith v. State*, 407 So. 2d 894, 899-900 (Fla. 1982); *People v. Coleman*, 660 N.E.2d 919, 937-38 (Ill. 1996); *Pennsylvania v. Davido*, 868 A.2d 431, 442-44 (Pa. 2005).

Respondent suggests that these cases are consistent with its rule because either they do not explicitly address timeliness or they accept that untimely requests are subject to the court's discretion. BIO 14. Not so. Although in each of these cases the defendant requested self-representation at sentencing after trial had begun, in none of the cases did the courts ask whether the trial court had abused its discretion in allowing the defendant to proceed *pro se*. Instead, these courts asked only whether the trial court had found that the defendant "knowingly, intelligently, and voluntary waived his right to be represented during the penalty phase," in which case, the courts recognized, the defendants had an absolute right under *Faretta* to proceed *pro se*. *Davido*, 868 A.2d at 444; *see also Smith*, 407 So. 2d at 900 (recognizing defendant's "right to defend himself" at capital sentencing); *Silagy*, 905 F.2d at 1008 ("[I]t would be strange indeed for this court to conclude that a [tactical decision] could act as a bar to a defendant's otherwise constitutional right to proceed *pro se*.").

Accordingly, had petitioner's trial been conducted in the Fifth or Seventh Circuit, or in Pennsylvania, Illinois, or Florida, he would have been permitted, as a matter of right, to represent himself during the sentencing phase of his trial. That essential Sixth Amendment right should not vary depending on accidents of geography. The Court should grant certiorari in this case to bring uniformity to the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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No. 10-9125

IN THE
Supreme Court of the United States

LOUIS MICHAEL WINKLER,
Petitioner,

v.

SOUTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of
South Carolina

CERTIFICATE OF SERVICE

The undersigned certifies that he has this 12th day of April 2011 caused one copy of the foregoing **Reply Brief for Petitioner** to be served on the below-named counsel by first-class mail, postage prepaid, and further certifies that all persons required to be served have been served:

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April 25, 2011

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Re: Louis Michael Winkler
v. South Carolina
No. 10-9125

Dear Mr. Zelenka:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

A handwritten signature in cursive script that reads "William K. Suter".

William K. Suter, Clerk

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

MOTION FOR A STAY OF EXECUTION AND
FOR THE APPOINTMENT OF A
POST-CONVICTION RELIEF JUDGE

Counsel for Louis Michael Winkler, Jr. moves this Court for a stay of execution and to appoint a post-conviction relief judge so that post-conviction counsel can be appointed by the post-conviction relief judge.

I.

This Court affirmed petitioner's murder conviction and death sentence in State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010).

II.

Petitioner filed a petition for rehearing. This Court denied that petition on September 22, 2010.

III.

A petition for writ of certiorari to the United States Supreme Court, *Louis Winkler v. State of South Carolina*, No. 10-9125, was then filed on February 18, 2011. The Court denied certiorari in its order dated April 25, 2011. A copy of that order is attached to this motion.

IV.

Petitioner now can and will raise numerous grounds of ineffective assistance of counsel in an application for post-conviction relief. Lauren Cruse of this office yesterday, April 25, 2011, overnight mailed petitioner's application for post-conviction relief to the Horry County Court of Common Pleas for filing. In that application for post-conviction relief, petitioner raised fifteen allegations of ineffective assistance of counsel while reserving the right to amend once counsel is appointed. A copy of that post-conviction relief application is attached. The first three allegations of ineffective assistance counsel in that attached application are that:

- (a) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not retain a crime scene investigator to explore the drop of blood identified in a photograph, and situated on the kitchen countertop in the victim's apartment, and which would have supported Applicant's defense that someone else murdered the victim;
- (b) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they mounted a mitigation case completely at odds with Applicant's wishes;
- (c) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they

did not object to the Clerk of Court [for] Horry County, Melony Huggin's, participation in any aspect of this trial when she was the victim's friend;

The attached post-conviction relief allegations is not meant to be exhaustive, and will likely expand, once appointed post-conviction counsel has had the opportunity to investigate. The above grounds, and those grounds contained in the attached post-conviction relief application are offered to show that numerous issues of ineffective assistance of counsel exist in this case.

V.

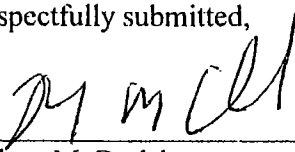
Present counsel cannot take a position on the issue of ineffective assistance of appellate counsel. That is a matter for post-conviction counsel and the post-conviction court to determine.

VI.

Based on the above, petitioner requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel. See, In Re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140, 141 (1996) This will allow petitioner to pursue his state court post-conviction relief action in the Horry County Court of Common Pleas.

WHEREFORE, counsel for Louis Michael Winkler, Jr. requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel so that petitioner can pursue post-conviction relief with the assistance of counsel in the Horry County Court of Common Pleas upon the grounds of ineffective assistance of counsel, and any other grounds that may arise from post-conviction counsel's investigation of this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R M Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

April 26, 2011

Westlaw.

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--- S.Ct. ----, 2011 WL 664175 (U.S.S.C.)
(Cite as: 2011 WL 664175 (U.S.S.C.))

H

Only the Westlaw citation is currently available.

Supreme Court of the United States
WINKLER, LOUIS M. V. SOUTH CAROLINA.

No. 10-9125.
April 25, 2011.

*1 The petition for writ of certiorari is denied.

U.S.,2011.
Winkler v. South Carolina
--- S.Ct. ----, 2011 WL 664175 (U.S.S.C.)

END OF DOCUMENT

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FORM 5

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF HORRY)
)
 Louis Michael Winkler, Jr. #6027) APPLICATION FOR
) POST-CONVICTION RELIEF
 Full name and prison number (if any) of Applicant)
)
 v.)
)
 State of South Carolina)

INSTRUCTIONS- READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should; therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention: Lieber Correctional Institution
2. Name and location o Court which imposed sentence: Horry County Court of General Sessions
3. Name(s) of co-defendant(s) (if any): _____
4. The indictment number or numbers (if known) upon which the offense for which sentence was imposed:

- (a.) 2006-GS-26-2101
- (b.) _____
- (c.) _____