

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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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

S.C. Supreme Court

LOUIS MICHAEL WINKLER, JR.,

Respondent/Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

APPENDIX

EMILY C. PAAVOLA, ESQ.
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite #101
Columbia, South Carolina 29201

JOHN R. MILLS, ESQ.
The Law Offices of John R. Mills
3145 Geary Blvd, Unit #213
San Francisco, California 94118

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney
General
No. 4425

J. ANTHONY MABRY
Assistant Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

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

ATTORNEYS FOR
RESPONDENT/PETITIONER

ATTORNEYS FOR
PETITIONER/RESPONDENT

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5. The date upon which sentence was imposed and the terms of the sentence:
- (a.) February 8, 2008 (Death Penalty)
- (b.) _____
- (c.) _____
6. Check whether a finding of guilty was made:
- (a.) after a plea of guilty: _____
- (b.) after a plea of not guilty: X
- (c.) after a plea of nolo contendere: _____
7. Did you appeal from the judgment of conviction of the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Supreme Court
- ii. United States Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed: State v. Louis Michael Winkler, Jr. (2010)
- ii. Certiorari denied: Louis Michael Winkler, Jr. v. South Carolina
- iii. _____
- (c) the date of each such result:
- i. August 16, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010)
- ii. _____
- iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel in violation of the Sixth Amendment
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (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 at Horry County, Melony Huggin's, participation in any aspect of this trial when she was the victim's friend;
- (d) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to use Jeff Naylor, a retained expert prepared to testify to the contents of the victim's computer which would have revealed the victim's involvement with other people who may have killed her;

- (e) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to move DVDs into evidence that were found at the scene;
- (f) The state committed a Brady violation when it failed to turn over, until trial, a photograph that showed the blinds in the apartment were open when a statement was made by law enforcement that the blinds were closed, and when the state's failure to produce relevant and probative evidence demonstrates its desire to have secured a conviction at all costs;
- (g) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they failed to retain a crime scene expert who could have effectively challenged the state's theory of the murder and shown that police officers tampered with the scene;
- (h) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not move to change venue in light of the high profile nature of this case and the significant contacts between the jurors and the victim;
- (i) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to call the victim's estranged husband, Roger Granger, to the stand when Applicant's defense was that Granger killed the victim;
- (j) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by not introducing evidence of J. [REDACTED] G. [REDACTED]'s demon worship and penchant for weapons when such evidence would have been relevant for impeaching his testimony that he witnessed Applicant kill the victim.
- (k) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by not informing the jury that Applicant worked at Tillman Lakes by the Sea for 10 years and was

highly liked by homeowners and families in the resort community.

- (l) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to interview Mildred when Mildred would have testified that the victim was scared of her estranged husband and when this testimony would have been necessary for Applicant to present a complete defense.
- (m) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to secure a copy of the victim's diary when the diary would have offered evidence that the victim was scared of her estranged husband's violent tendencies.
- (n) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to identify whose glasses were located on the back of the couch at the crime scene. Trial counsel was also ineffective for failing to have the DNA on the bullet tested.
- (o) Petitioner may also raise issues relating to possible prosecutorial misconduct, juror issues, and Brady claims. Appellate counsel cannot be more specific regarding these grounds because no investigation was conducted on direct appeal.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? None other than the mandatory appeal to the State Supreme Court
- (b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions, or applications in this or any other Court?

No _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(b) the name and location of the Court in which each was filed:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(c) the disposition thereof:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(d) the date of each such dispositions:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a _____

ii. n/a _____

iii. n/a _____

- iv. n/a
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. n/a
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. n/a
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) This is the first PCR
- (b) _____
- (c) _____
17. Where you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Ralph J. Wilson, Esquire, P.O. Box 1827, Conway, South Carolina 29526
 - ii. Paul Elbert Rathbun, Esquire, 203 Laurel Street, Conway, South Carolina 29526-5125
 - iii. Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589
 - iv. Elizabeth Franklin-Best, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589
 - (b) the proceedings at which each attorney presented you:
 - i. Mr. Wilson and Mr. Rathbun- trial
 - ii. Mr. Dudek and Ms. Franklin-Best - appeal
 - iii. _____
19. State clearly the relief you seek in filing this application.
New Trial
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Horry) VERIFICATION

I, Louis Michael Winkler, Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Louis M. Winkler *[Signature]*

SUBSCRIBED AND SWORN TO before me
 this 21st day of April, 2011.

Sylvia Jones (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 1/24/2018

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT IN SUPPORT THERE OF

I, Louis Michael Winkler, Jr., hereby apply for leave to proceed in this action without prepayment of fees or costs or security, therefore. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Louis M. Winkler Jr
Applicant

SUBSCRIBED AND SWORN TO before me
this 21st day of April, 2011.

Sylvia Jones (L.S.)
Notary Public for South Carolina
My Commission Expires: 1/24/2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

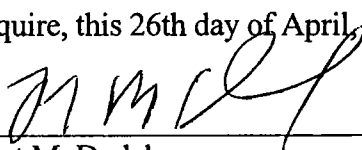
V.

LOUIS MICHAEL WINKLER, JR.,

APPELLANT

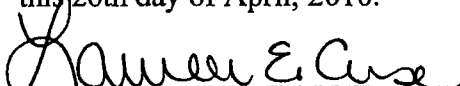
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion for a stay of execution and to appoint a post-conviction relief judge in the above-referenced case has been served upon opposing counsel, Alphonso Simon, Jr., Esquire, this 26th day of April, 2011.


Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 26th day of April, 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 MOTION FOR A STAY OF EXECUTION AND FOR THE
APPOINTMENT OF A POST-CONVICTION RELIEF JUDGE

The Respondent State of South Carolina, through undersigned counsel, hereby makes a Return to the Motion for Stay of Execution and for the Appointment of a Post-Conviction Relief Judge filed April 26, 2011. Respondent does not oppose the request for a stay 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), and Respondent does not oppose the request for appointment of a judge for the post-conviction relief action. In support of this Return, Respondent would show this Court the following:

I.

The Supreme Court of South Carolina affirmed the convictions and death sentence in State v. Louis Michael Winkler, Jr., Op. No. 26857, 388 S.C. 574,

698 S.E.2d 596 (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, Appellant, through counsel Robert M. Dudek and Elizabeth Franklin-Best, made a petition for a stay of execution. Respondent filed a Return on October 4, 2010, and did not oppose the stay because Appellant set forth four issues that warranted the stay under In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). In an Order filed October 20, 2010, this Court granted the petition for stay of execution.

On February 11, 2011, Appellant subsequently timely filed in the United States Supreme Court a Petition for Writ of Certiorari to the Supreme Court of South Carolina. Respondent filed its Brief in Opposition on March 28, 2011. Appellant filed a Reply Brief on April 12, 2011. By Order filed April 25, 2011, the Petition for Writ of Certiorari was denied. Thus, Appellant's direct appeal process has been exhausted.

III.

This Court in its Order concerning capital cases, In Re Stays, supra, stated it will issue a stay to allow a defendant to pursue state post-conviction relief if the defendant timely files "a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief." Appellant has met the requirements for a stay in his Petition. Appellant notes

that he has already started the process of filing an application for post-conviction relief by drafting and submitting an initial application.¹ Appellant also outlines in the Motion that he intends to raise at least three allegations of ineffective assistance of counsel:

(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.

Motion at pp. 2-3. Appellant also attached a copy of the application for post-conviction relief that was being filed. Ineffective assistance of counsel claims are of "the general nature of issues appropriate for post-conviction relief" actions. See, e.g., Strickland v. Washington, 466 U.S. 668 (1984); Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). This Motion is timely; it was filed before a Notice of Execution was issued by this Court. Further, Appellant has set forth

¹ Respondent would note that as of the date of this Return, the Horry County Clerk's Office has not filed the Application submitted by Appellant. However, the filing of an application for post-conviction relief is not necessary to seek the stay. S.C. Code Ann. § 17-27-160(A) states "[t]he filing of the application does not automatically stay any sentence of death." To maintain a stay for post-conviction relief, an application for post-conviction relief needs to be timely filed "within sixty (60) days of the date of the order regarding counsel" In re Stays, 321 S.C. at 546, 471 S.E.2d 140.

issues he intends to raise in his post-conviction relief action. Thus, a stay would be appropriate under In Re Stays.

IV.

Respondent also requests the appointment of a circuit judge for the post-conviction relief action. Respondent has no objection to Appellant's request as this would follow the procedure outlined in In re Stays, supra.

WHEREFORE having made Return, Respondent does not oppose the issuance of a stay of execution or the appointment of a circuit judge for the post-conviction relief action.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
ATTORNEYS FOR RESPONDENT

By: 

Alphonso Simon Jr.
P.O. Box 11549
Columbia, South Carolina 29211

April 28, 2011.

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.,

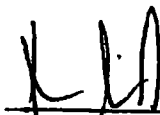
Appellant.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., hereby certify that I have served the *Return to the Motion for Stay of Execution and for the Appointment of a Post-Conviction Relief Judge* in the foregoing action by depositing two (2) copies 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
S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Ste. 401
Columbia, SC 29201



ALPHONSO SIMON, JR.
Assistant Attorney General

April 28, 2011

The Supreme Court of South Carolina

The State,

Respondent,

v.

Louis Michael Winkler, Jr.,

Appellant.

ORDER

Appellant was convicted of murder, first-degree burglary, and assault and battery of a high and aggravated nature. He was sentenced to death. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). Appellant's petition for rehearing was denied on September 22, 2010. The United States Supreme Court denied certiorari on April 25, 2011.

Appellant now seeks a stay of execution, pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not oppose the motion.

The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases.

The Honorable Benjamin H. Culbertson is hereby assigned to the

PCR action appellant has filed. Judge Culbertson shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled.

Judge Culbertson shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge Culbertson shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under In re Stays of Execution in Capital Cases, supra, Judge Culbertson is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

IT IS SO ORDERED.



FOR THE COURT

J.

Columbia, South Carolina

May 25, 2011



STATE OF SOUTH CAROLINA

COUNTY OF Orangeburg

Louis Michael Winkler, Jr. #6027

Plaintiff(s)

vs.

South Carolina

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP-

3907

(Please Print)

Submitted By: Robert M. Dudek

Address: 1330 Lady Street, Ste. 401

Columbia, South Carolina 29211-1589

SC Bar #: 1767

Telephone #: 803-734-1330

Fax #: 803-734-1397

Other:

E-mail: rdudek@sccid.sc.gov

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)**If Action Is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20____-CP-_____ ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Promises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture--Consent Order (850) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature: _____

Date: April 29, 2011

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

ORIGINAL

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Louis Michael Winkler, Jr. #6027)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEF

11

3907

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 notarized (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.) _____

5. The date upon which sentence was imposed and the terms of the sentence:
- (a.) Febuary 8, 2008 (Death Penalty)
- (b.) _____
- (c.) _____
6. Check whether a finding of guilty was made:
- (a.) after a plea of guilty: _____
- (b.) after a plea of not guilty: X
- (c.) after a plea of nolo contendere: _____
7. Did you appeal from the judgment of conviction of the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Supreme Court
- ii. United States Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed: State v. Louis Michael Winkler, Jr. (2010)
- ii. Certiorari denied: Louis Michael Winkler, Jr. v. South Carolina
- iii. _____
- (c) the date of each such result:
- i. August 16, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010)
- ii. _____
- iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
 - (b) _____
 - (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel in violation of the Sixth Amendment
 - (b) _____
 - (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (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 at Horry County, Melony Huggin's, participation in any aspect of this trial when she was the victim's friend;
 - (d) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to use Jeff Naylor, a retained expert prepared to testify to the contents of the victim's computer which would have revealed the victim's involvement with other people who may have killed her;

- (e) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to move DVDs into evidence that were found at the scene;
- (f) The state committed a Brady violation when it failed to turn over, until trial, a photograph that showed the blinds in the apartment were open when a statement was made by law enforcement that the blinds were closed, and when the state's failure to produce relevant and probative evidence demonstrates its desire to have secured a conviction at all costs;
- (g) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they failed to retain a crime scene expert who could have effectively challenged the state's theory of the murder and shown that police officers tampered with the scene;
- (h) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not move to change venue in light of the high profile nature of this case and the significant contacts between the jurors and the victim;
- (i) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to call the victim's estranged husband, Roger Granger, to the stand when Applicant's defense was that Granger killed the victim;
- (j) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by not introducing evidence of J[REDACTED] G[REDACTED]'s demon worship and penchant for weapons when such evidence would have been relevant for impeaching his testimony that he witnessed Applicant kill the victim.
- (k) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by not informing the jury that Applicant worked at Tillman Lakes by the Sea for 10 years and was

highly liked by homeowners and families in the resort community.

- (l) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to interview Mildred when Mildred would have testified that the victim was scared of her estranged husband and when this testimony would have been necessary for Applicant to present a complete defense.
- (m) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to secure a copy of the victim's diary when the diary would have offered evidence that the victim was scared of her estranged husband's violent tendencies.
- (n) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to identify whose glasses were located on the back of the couch at the crime scene. Trial counsel was also ineffective for failing to have the DNA on the bullet tested.
- (o) Petitioner may also raise issues relating to possible prosecutorial misconduct, juror issues, and Brady claims. Appellate counsel cannot be more specific regarding these grounds because no investigation was conducted on direct appeal.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? None other than the mandatory appeal to the State Supreme Court
- (b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions, or applications in this or any other Court?

No _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(b) the name and location of the Court in which each was filed:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(c) the disposition thereof:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(d) the date of each such dispositions:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a _____

ii. n/a _____

iii. n/a _____

iv. n/a

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. n/a

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is the first PCR

(b) _____

(c) _____

17. Where you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. Ralph J. Wilson, Esquire, P.O. Box 1827, Conway, South Carolina 29526
- ii. Paul Elbert Rathbun, Esquire, 203 Laurel Street, Conway, South Carolina 29526-5125
- iii. Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589
- iv. Elizabeth Franklin-Best, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589

(b) the proceedings at which each attorney presented you:

- i. Mr. Wilson and Mr. Rathbun- trial
- ii. Mr. Dudek and Ms. Franklin-Best - appeal
- iii. _____

19. State clearly the relief you seek in filing this application.

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Horry)

VERIFICATION

I, Louis Michael Winkler, Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Louis M. Winkler, Jr.

SUBSCRIBED AND SWORN TO before me
 this 21st day of April, 2011.

Sylvia Jones (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 11/24/2018

CLARE HOGGINS-WARD
 CLERK OF COURT
 MAY -2 PM 2:38
 COUNTY

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT IN SUPPORT THERE OF

I, Louis Michael Winkler, Jr., hereby apply for leave to proceed in this action without prepayment of fees or costs or security, therefore. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Louis M. Winkler, Jr.
Applicant

SUBSCRIBED AND SWORN TO before me
this 21st day of April, 2011.

Sylvia Jones (L.S.)
Notary Public for South Carolina
My Commission Expires: 1/24/2018

CLARE HUGGINS-WARD
CLERK OF COURT
JULY 2 - 2 PM 2:38

WITNESSES

DOCKET NO. 2006-GS-26-2101

The State of South Carolina,

County of HORRY

80744

FAH

COURT OF GENERAL SESSIONS

MAY TERM 2006

THE STATE

vs.

LOUIS M. WINKLER W/M

Little River, SC 29566

DOB:

SSN:

ARREST WARRANT NO.

1. 1252573 CDR: 0116 16-03-0010
2. 1746892 CDR: 0079 16-11-0311(A)
3. 1746891 CDR: 0013 17-25-0030, C/L

DATE: 3/21/06

ACTION OF GRAND JURY

TRUE BILL

MAY 25 2006

Foreman of Grand Jury

VERDICT

ct1 - guilty

ct2 - guilty

ct3 - guilty

Foreman of Petit Jury

Date:

Indictment for

- COUNT 1: MURDER
COUNT 2: BURGLARY, 1ST DEGREE
COUNT 3: ASSAULT AND BATTERY
HIGH AND AGGRAVATED NATURE

J. GREGORY HEMBREE, SOLICITOR

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 .

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

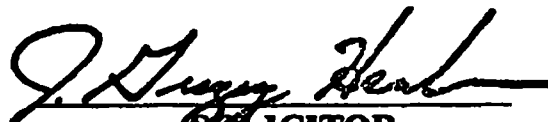
CDR: 0013 C/L, 17-25-0030

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.

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


SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATEHorry
VSLouis M. Winkler

AKA:

Race: W Sex: M Age: 47DOB: [REDACTED] SS# [REDACTED]

Address:

City, State, Zip

DL#

Little River SC 29506

SID#

CORRECTEDCount 3903

INDICTMENT/CASE#:

2006 -GS- 26 - 2101

AW#:

I 746891

Date of Offense:

3-6-2006

S.C. Code §:

17-25-0030 CL

CDR Code #:

0 / 0 / 1 / 3

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Assault + Battery of a High + Aggravated Naturein violation of 17-25-0030 of the S.C. Code of Laws, bearing CDR Code #0 / 0 / 1 / 3☒ NON-VIOLENT☒ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS (CSC☐ §17-25-45w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 10 ~~months~~ years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs

and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina

Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: with other Chgs☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)

§14-1-211(A)(1) (Conv. Surcharge)

§14-1-211(A)(2) (DUI Surcharge)

§56-5-2995 (DUI Assessment)

§35.13 (Public Def/Prob)

§73.3, 1B TP (Law Enforce. Funding)

§33.7, 1B TP (Drug Court Surcharge)

§50-21-114(BUI Breath Test Fee)

§56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

	\$
\$100	\$
\$100	\$
\$12	\$
\$500	\$
\$25	\$
\$100	\$
\$50	\$
\$40/ea	\$
	\$

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

Melanie Huggins

State of Court/Deputy Clerk

Court Reporter:

Elizabeth Harris

PRESIDING JUDGE

Judge Code:

Sentence Date:

James E. Baker
31
February 8, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

Count 3904

COUNTY OF
STATE

Harry

Louis M. Winkler

AKA:

Race: W Sex: M Age: 47

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Little River SC 29566

DL# [REDACTED] SID# [REDACTED]

INDICTMENT/CASE#:

2006 -GS- 26 . 2101

A/W#:

I-746895

Date of Offense:

March 6, 2006

S.C. Code §:

16-11-0311(A)

CDR Code #:

0 / 0 / 7 / 9

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: Burglary First Degree

in violation of §16-11-0311 (A) of the S.C. Code of Laws, bearing CDR Code #

0 / 0 / 7 / 9

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant Initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs

and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: with other chgs☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:	\$
§14-1-206 (Assessments 107.5%)	\$
§14-1-211(A)(1) (Conv. Surcharge)	\$100
§14-1-211(A)(2) (DUI Surcharge)	\$100
§56-5-2996 (DUI Assessment)	\$12
§35.13 (Public Def/Prob)	\$500
§73.3, 1B TP (Law Enforce. Funding)	\$25
§33.7, 1B TP (Drug Court Surcharge)	\$100
§50-21-114(BUI Breath Test Fee)	\$50
§56-5-2942(J) (Vehicle Assessment)	\$40/ea
3% to County (if paid in installments)	\$
TOTAL	\$

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Court Reporter:

BAIL set by

Judge _____

on _____

Type and Amount: _____

Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____

on _____

Defense Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

WITNESSES

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEPENDANTS

ARREST WARRANT

I252573

STATE OF SOUTH CAROLINA

☒ County / ☐ Municipality of
HORRY
THE STATE
against

LOUIS M. WINKLER

Address: [REDACTED]
LITTLE RIVER, SC
 Phone: [REDACTED] SSN: [REDACTED]
 Sex: M Race: W Height: 5' 9" Weight: 175 lbs
 DL State: [REDACTED] DL #: [REDACTED]
 DOB: [REDACTED] Agency ORI #: [REDACTED]

 Prosecuting Agency: [REDACTED]
 Prosecuting Officer: [REDACTED]
 Offense: MURDER

 Offense Code: [REDACTED]
 Code / Ordinance Sec. 16-3-10/16-3-20

 This warrant is **CERTIFIED FOR SERVICE** in the
☐ County / ☐ Municipality of [REDACTED]. The accused
 is to be arrested and brought before me to be
 dealt with according to law.

 (L.S.)
 Signature of Judge [REDACTED]
 Date: [REDACTED]

RETURN

A copy of this arrest warrant was delivered to

defendant Louis M. Winkler
 on 3-21-06
[Signature]
 Signature of Constable / Law Enforcement Officer

RETURN WARRANT TO:

ORIGINAL

STATE OF SOUTH CAROLINA)

☒ County / ☐ Municipality of
HORRY)

 Personally appeared before me the affiant DET. JOHN LEWIS-HCPD who
 being duly sworn deposes and says that defendant LOUIS M. WINKLER
 did within this county and state on 3/06/2006 violate the criminal laws of the
 State of South Carolina (or ordinance of ☐ County / ☐ Municipality of [REDACTED])
 in the following particulars:

 DESCRIPTION OF OFFENSE: 16-3-10/16-3-20
 MURDER

 I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

[Signature]

STATE OF SOUTH CAROLINA)

☒ County / ☐ Municipality of
HORRY)

 Affiant's Address 2560 NORTH MAIN STREET
CONWAY, S.C. 29562
 Affiant's Telephone (843) 248-1520

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

 It appearing from the above affidavit that there are reasonable grounds to believe that
 on 3/06/2006 defendant LOUIS M. WINKLER
 did violate the criminal laws of the State of South Carolina (or ordinance of
☐ County / ☐ Municipality of [REDACTED]) as set forth below:

 DESCRIPTION OF OFFENSE: 16-3-10/16-3-20
 MURDER

 Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant
 and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
 defendant at the time of its execution, or as soon thereafter as is practicable.

 Sworn to and subscribed before me) Judge's Name GERALD T. WHITLEY JR.
 on 3/06/2006) Judge's Address 107 HWY 57 NORTH
[Signature]) LITTLE RIVER, S.C.
 (L.S.)) Judge's Telephone (843) 399-5543
 Signature of Issuing Judge)
 Judge Code: 843) Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit
ORIGINAL
 TRANSFERRED
 TO SOLICITOR APR 11 2006

 3907
 Form Approved by
 SC Attorney General
 April 21, 2003
 SOCA 618
 01MAG1

BAIL set by

Judge _____

on _____

Type and Amount: _____

Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____

on _____

Defense Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(Indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

WITNESSES

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS

JAN 10 1960

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY

STATE VS.

LOUIS M. WINKLER

AKA:

Race: W Sex: M Age: 47DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip Little River, SC 29566DL# [REDACTED] SID# [REDACTED]

INDICTMENT/CASE#:

2006 -GS- 26 - 2101

A/W#: 1252573

Date of Offense: March 6, 2006

S.C. Code §: 16-03-0010

CDR Code #: 0 / 1 / 1 / 6

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: MURDERin violation of § 16-03-0010 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / 6☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of _____ days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient: _____

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge) \$100

\$14-1-211(A)(2) (DUI Surcharge) \$100

\$56-5-2995 (DUI Assessment) \$12

\$ 35.13 (Public Def/Prob) \$500

\$73.3, 1B TP (Law Enforce. Funding) \$25

\$93.7, 1B TP (Drug Court Surcharge) \$100

\$50-21-114(BUI Breath Test Fee) \$50

\$56-5-2942(J) (Vehicle Assessment) \$40/ea

3% to County (if paid in installments)

TOTAL

Melanie Huggins

Clerk of Court/Deputy Clerk

Court Reporter: *Elizabeth Harris*

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE *[Signature]*

Judge Code: _____

Sentence Date: *Feb 8, 2008*

ARREST WARRANT

- L746891

STATE OF SOUTH CAROLINA

☒ County / ☐ Municipality of
HORRY
THE STATE
against

LOUIS M WINKLER

Address: LITTLE RIVER, SC
 Phone: _____ SSN: _____
 Sex: M Race: W Height: 5' 9" Weight: 175 lbs
 State: _____ DL #: _____
 JB: _____ Agency ORI #: _____

Prosecuting Agency: _____

Prosecuting Officer: _____

Offense: ASSAULT AND BATTERY OF A HIGH AND A
AGGRAVATED NATURE (ABHAN)

Offense Code: _____

Code / Ordinance Sec. C/L, 17-25-0030
 This warrant is CERTIFIED FOR SERVICE in the
☐ County / ☐ Municipality of _____

 The accused
 is to be arrested and brought before me to be
 dealt with according to law.

(L.S.)

Signature of Judge

(e: _____)

RETURN

A copy of this arrest warrant was delivered to

defendant Louis M. Winkleron 3-21-06

Signature of Constable / Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☒ County / ☐ Municipality of
HORRY

 Personally appeared before me the affiant TOBY BOYD who
 being duly sworn deposes and says that defendant LOUIS M WINKLER
 did within this county and state on 3/06/2006 violate the criminal laws of the
 State of South Carolina (or ordinance of ☐ County / ☐ Municipality of _____)
 in the following particulars:
DESCRIPTION OF OFFENSE: C/L, 17-25-0030

ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE (ABHAN)

 I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

C/A 06010298

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County / ☐ Municipality of
HORRY
Affiant's Address 2560 N. MAIN STREETCONWAY, SC 29526Affiant's Telephone (843) 915-5350

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

 It appearing from the above affidavit that there are reasonable grounds to believe that
 on 3/06/2006 defendant LOUIS M WINKLER

 did violate the criminal laws of the State of South Carolina (or ordinance of
☐ County / ☐ Municipality of _____) as set forth below:
DESCRIPTION OF OFFENSE: C/L, 17-25-0030

ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE (ABHAN)

 Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant
 and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
 defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 3/21/2006

Signature of Issuing Judge

Judge Code: 82

(L.S.)

Judge's Name BRAD D. MAYERSJudge's Address 1201 3RD AVE 2ND FLOORJudge's Telephone (843) 915-5290Issuing Court: ☒ Magistrate ☐ Municipal ☐ CircuitTRANSFERRED
TO COURT

MAR 28 2006

ORIGINAL

 3910
 Filed by
 April 21, 2006
 SOCA 618
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 FILED
 Horry County
 2006 MAR 21 PM 3:06

BAIL set by

Judge _____

on _____

Type and Amount: _____

Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____

Defense Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(Indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

WITNESSES

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

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Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEPENDANTS

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

Louis Michael Winkler, Jr., #6027,)

C/A No. 2011-CP-11-3907

Applicant,)

v.)

RETURN TO APPLICATION FOR
POST-CONVICTION RELIEF
(Capital Case)

The State of South Carolina,)

Respondent.)

Respondent, above-named, hereby make a Return to the first amended application for post-conviction relief ("APCR"), filed by Louis Michael Winkler, Jr. ("Applicant") on May 2, 2011. This APCR stems from a murder conviction, a first degree burglary conviction, an assault and battery of a high and aggravated nature conviction, and a death sentence.

Respondents respectfully request pursuant to South Carolina Code of Laws, Section 17-27-160(C), that this Court set a scheduling hearing with the parties within thirty (30) days to set any evidentiary hearing that may be necessary within one-hundred and eighty (180) days from that date. Respondents also would request a hearing on the motions to dismiss and for summary judgment in the instant action.

I. Procedural History

During the May 2006 Term of the Horry County Court of General Sessions, Applicant Louis Michael Winkler was indicted by the Horry County Grand Jury for Murder, Burglary in the First Degree, Assault and Battery of a High and Aggravated Nature, and Escape. (R. 3458-60). The State had filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (R. 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. 1977).

On January 28 – February 8, 2008, (“Winkler”) was tried by a jury for murder, first-degree burglary, and assault and battery of a high and aggravated nature.¹ 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. 1903).

On February 8, 2008, the jury found there was evidence of both asserted aggravating circumstances beyond a reasonable doubt. (R. 2940). The jury recommended that Winkler be sentenced to death. (R. 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. 2949).

A timely notice of appeal was filed and served on Applicant’s behalf on February 11, 2008. On appeal, Applicant was represented by Robert M. Dudek, Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of

¹ The State withdrew the Escape charge before trial. (See R. 130).

Appellate Defense, and Elizabeth A. Franklin-Best, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. On April 5, 2010, Applicant perfected his direct appeal with the filing of a Final Brief of Appellant, in which they asserted the following issues:

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 Knoch 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?

The State, through Assistant Attorney General Alphonso Simon Jr., filed its Final Brief of Respondent on April 14, 2010. Applicant, through Mr. Dudek and Ms. Franklin-Best, filed his Final Reply Brief of Appellant on April 4, 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. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). Applicant filed a timely petition for rehearing that was denied on September 22, 2010. The Remittitur was also issued on September 22, 2010.

On October 20, 2010, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated February 11, 2011. The State, through Assistant Attorney General Simon, filed its Brief in Opposition to the Petition for Writ of Certiorari on March 28, 2011. Applicant filed a Reply Brief on April 12, 2011. The United States Supreme Court denied the petition for writ of certiorari by order dated April 25, 2011.

Applicant filed a second Petition for Stay of Execution on April 26, 2011. The State filed a response to the Petition for Stay of Execution on April 28, 2011. By Order filed May 25, 2011, the Supreme Court of South Carolina granted Applicant's Petition for Stay of Execution. In the Order, the South Carolina Supreme Court appointed the Honorable Benjamin H. Culbertson, Circuit Court Judge, to hear this post-conviction relief action. Applicant, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on May 2, 2011.

Attached herewith and incorporated herein by reference are the following documents:¹

- (1) Notice of Appeal
- (2) Record on Appeal, containing eight (8) volumes;
- (3) Final Brief of Appellant;
- (4) Final Brief of Respondent;
- (5) Final Reply Brief of Appellant;
- (6) State v. Louis Michael Winkler, Jr., SC S.Ct. Opinion No. 26857, filed August 16, 2010;
- (7) Petition for Rehearing;
- (8) Order Denying Petition for Rehearing;
- (9) Petition for Writ of Certiorari to the Supreme Court of South Carolina;
- (10) Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina;
- (11) Reply Brief to Petition for Writ of Certiorari to the Supreme Court of South Carolina
- (12) Letter acknowledging denial of Petition for Writ of Certiorari

II. 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. 1430-31, State's Exhibit 1, 51). He knocked her son, J[REDACTED] G., out of a stool and onto the ground. (R. 1431, 1433,

¹ Respondent is sending the attachments to the Clerk of Court with the filing of this Return. Respondent is also sending this Court a copy of all of the attachments. Respondent is not sending a copy of the attachments to Applicant. Copies of the attachments will be forwarded to counsel upon appointment.

State's Exhibit 1, 51). Winkler then shot the victim, Rebekah Grainger Winkler, once in the face at point blank range. (R. 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. 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. 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. 1634). Dr. Proctor testified that death would have been instant. (R.1637).

Winkler then walked over and pointed the gun at J [REDACTED]. (R. 1437, State's Exhibits 1, 51). Shortly thereafter, Winkler left the condo. (R. 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. 1511-1512). She then heard a hit and the phone went to static. (R. 1512). She also heard someone curse a few times, and then the phone went dead. (R. 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. 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.

1554-55, See State's Exhibit 8). He also testified that a reddish colored liquid was collected from the kitchen countertop. (R. 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. 1744, 1747). Cooper also photographed and collected a broken cordless phone. (R. 1562-63). Cooper also testified that a projectile was recovered from the baseboard of the wall behind the victim. (R. 1566-68). They did not locate a shell casing on the scene. (R. 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. 1645-46). On March 13, 2006, they formed a task force to apprehend Winkler. (R. 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. 1647). The police set up a perimeter around the area where Winkler was last seen on the golf course. (R. 1651). Boyd spotted Winkler moving inside the perimeter. (R. 1652). He testified that Winkler was wearing a dark pullover. Boyd requested that the helicopter assisting with the search scan the area. (R. 1652). The helicopter had to refuel. As the helicopter returned to the scene of the search, Boyd saw Winkler in the wood line. (R. 1653). Police were able to apprehend Winkler without any problems. (R. 1653). Boyd noted that Winkler appearance was consistent with someone who had been outside for a period of time. (R. 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. 1682-83). On March 20, 2006, two of the individuals in the bloodhound tracking team screamed contact in the search of the area. (R. 1685). He testified that he went to the sound of where the other officers indicated they had made contact with Winkler. (R. 1686). They were standing over Winkler with their guns drawn, and Winkler was laying face down with his hands behind his back. (R. 1686). Rutherford handcuffed Winkler and searched Winkler. (R. 1686). They recovered a Jennings .380 pistol from his right front pants pocket. (R. 1686-87). Five live rounds were in the pistol, but there was not a live round in the port. (R. 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. 1689-91). In the wallet, there was a newspaper clipping about the shooting and Winkler's license. (R. 1691-92). Rutherford also testified that they recovered a green knit cap and a rolled up sweatshirt as part of search for Winkler. (R. 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. 1710). Police found the victim's address on a piece of paper at the residence. (R. 1709-10).

Vello Paavel, a firearms and toolmark examiner for SLED,² testified that he received a Walther PPK pistol³ .380 pistol, a Jennings Bryco .380 pistol, 1 fired projectile, and 18 unfired cartridges with the Jennings Bryco pistol. (R. 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. 1769). He

² Paavel was qualified as an expert in firearms and toolmark examination. (R. 1760).

³ This pistol was recovered from underneath the bedroom pillow at the condo where the victim was shot.

also noted that the magazine of the Walther PPK was full when he received it. (R. 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. 1777). Paavel concluded that the Jennings Bryco pistol fired the fired bullet. (R. 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. 1992). She noted that they never had problems while she was in high school, but when she went to college, things started changing. (R. 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 doing. (R. 1993-94). Kaiser and Winkler dated for three years, and were then in an on-again, off-again relationship for another two years. (R. 1994). When they were broken up, Kaiser testified that if Winkler saw her talking with someone else, Winkler would harass that person. (R. 1994-95). She noted that Winkler was not always like that, but it was his jealousy that pushed her away. (R. 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. 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. 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. 1998). The two then married. (R. 1999). Kaiser testified that the marriage was good for the first few months.

(R. 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. 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. 2001). Winkler would come home drunk, and sometimes trouble would start. (R. 2001). She noted that Winkler would accuse her of being with someone else or doing something whenever she went out. (R. 2001). She testified that he would get very angry and would either kick her or throw her around. (R. 2001). Physical violence was a part of their relationship. (R. 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. 2002). She also testified that the longer the drinking went on, the worse it got. (R. 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. 2002). He did that on three different occasions. (R. 2003). He would accuse her of being with someone else. (R. 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. 2003). Winkler would go with them. (R. 2003).

Kaiser testified that on the day her daughter was born, Winkler came home early, yelling at her. (R. 2004). She testified that he had her up against a wall, and he then kicked her in the stomach six times. (R. 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. 2004-05). Kaiser went to the hospital and went into labor while there. (R. 2005).

When she returned to the family apartment, everything was okay for a couple of weeks. (R. 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. 2006). One day, he did come home and punched her in the face. (R. 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. 2007-08). When she did return, Winkler was nice and had stopped drinking. (R. 2008). However, the final straw in Winkler's and Kaiser's relationship came during Christmas Eve after the baby was born. (R. 2008). Kaiser testified that Winkler did not want to go to his mother's for Christmas. (R. 2009). Kaiser went to go pick up the baby, who was being kept by Kaiser's mother at the time. (R. 2009). When she got back, Winkler stated he did not want to go. (R. 2009). He left, but when he came back, he started throwing Kaiser up against the wall. (R. 2010). Kaiser testified that Winkler threw framed pictures at her, and her arms were cut by the frames and broken glass. (R. 2010). She testified that Winkler then took a gun out, cocked it, and said he would shoot her right then. (R. 2010). She testified that he accused her of cheating, then started beating on her. (R. 2010). After Winkler finished beating and kicking her, Kaiser wrapped her hands in towels because of the blood, grabbed her purse, and ran. (R. 2010-11). She went to Winkler's mother and showed her what Winkler had done. (R. 2011-12). Kaiser then went to the hospital. (R. 2012). She later pressed charges against Winkler. (R. 2013). She left with the baby and moved in with her parents in North Carolina. (R. 2015). She went back to Ohio for the court hearing on the assault charges. (R. 2017). She testified that he was found guilty. (R. 2017). They later got divorced. (R. 2019-20). She

testified that Winkler somehow got her parents' phone number and he started calling and harassing them. (R. 2019).

Denise Ricketts, Winkler's second ex-wife, also testified at trial. (R. 2043). She testified that there were no problems when they were initially dating. (R. 2045). However, as time passed, the character of their relationship changed. (R. 2045). She noted that Winkler started being controlling, verbally abusive, and physically abusive. (R. 2045-46). Ricketts testified that the problems started about one year into the relationship. (R. 2046). The couple was invited to a Super Bowl party, but Ricketts did not want to go. (R. 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. 2046). She later forgave Winkler. She did note there were other instances of verbal abuse. (R. 2046). She also testified that Winkler was controlling, and he tried to keep her away from family and friends. (R. 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. 2047-8). She reported this incident to police, and Winkler was later found guilty of criminal domestic violence as a result. (R. 2049-51).

Ricketts testified that she forgave Winkler after he later apologized. (R. 2052). She noted that things between them were fine for a while, but eventually, the same problems arose again. (R. 2052). Winkler started drinking a lot, and when he came home he would be mean to her. (R. 2052). They married in September 2001. (R. 2053). She testified that life was bad during the marriage. (R. 2053). He drank a lot,

did not come home from work, and he was verbally abusive. (R. 2054). Ricketts also noted that Winkler was still controlling. (R. 2054). She later left Winkler, in part because she was in fear he would become physically abusive. (R. 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. 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. 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. 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. 2068). Instead, he took Winkler to the Seacoast Medical Center. (R. 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. 2068). Winkler spat on Cauble. (R. 2068). That led to a simple assault and battery conviction against Winkler. (R. 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. 2077). The missing person was Rebekah Winkler. (R. 2077). Winkler's vehicle was first spotted behind the Seacoast Medical Center. (R. 2078). Another officer had moved the vehicle

out of the roadway. (R. 2082). A floor mat, a shoe, and a cigarette butt were recovered from the vicinity of where the Winkler's vehicle was located. (R. 2082). The car was towed. (R. 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. 2086). Her vehicle was found off the road in some trees. (R. 2086). The Horry County Police Department activated its dog team to try to locate two missing persons at that point. (R. 2091). The victim was later found next to Stephen's Crossroads, which was where the magistrate's complex and library was located. (R. 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. 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. 2099-2100). According to Richardson, the woman looked distraught and was acting confused. (R. 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. 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. 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. 2104). Richardson noted that the woman was on the phone, but she could not hear what she was saying on the phone. (R.

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. 2109). Richardson also indicated that the building became very active with police and emergency medical personnel later that morning. (R. 2109). Richardson later learned it was the victim, Rebekah Winkler, who was making the call in the other room. (R. 2110).

Curtis L. Thompson of the Horry County Police Department testified that he was the first officer to arrive at the building. (R. 2117). He found a white female who was very afraid in the building. (R. 2118). Thompson indicated that it appeared the victim had been in some sort of altercation, and she confirmed that she was Rebekah Winkler. (R. 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. 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. 2124-25). They arrested Winkler, and Hemingway transported him to the M.L. Brown Building. (R. 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. 2137). Cooper testified that the Land Rover, which was registered to Rebekah Winkler, appeared to have been wrecked. (R. 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. 2141). He also noted there was some blood around both seats and around the center

console. (R. 2141). On the passenger's side, there were several blood smears and spots on the interior panel of the door. (R. 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. 2144-47). Cooper also took pictures of Winkler's face, arms, and legs. (R. 2150). Cooper transported the blood swabs and the victim's rape kit to SLED. (R. 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. 2162). She testified that during the early stages of Winkler's and the victim's relationship, Winkler seemed to be fine. (R. 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. 2165-66). The victim slept in the bedroom on the first floor, and J[REDACTED] slept on the couch. (R. 2166). When Haley was not there, J[REDACTED] slept in the bedroom upstairs. (R. 2166-67). On October 10, 2005, she and her sister became concerned about their mother's whereabouts. (R. 2167). Haley's sister had called. (R. 2167). That led Haley and her boyfriend to start looking for Rebekah. (R. 2168). Initially, they went to Winkler's home. (R. 2168). When they found his car was not there, they saw a Land Rover in the woods down the road. (R. 2168). It was later identified as her mother's Land Rover. (R. 2169).

Haley saw her mother the next morning at the Seacoast Medical Center. (R. 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. 2170). At first, Rebekah did not want her children to see her, but they talked her into it. (R. 2170). Haley testified that after the incident, her mother was very depressed and could not sleep. (R. 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. 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. 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. 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. 2184-91).

Lisa Gore, a staff nurse at Seacoast Medical Center, treated the victim when she was brought in on October 11, 2005. (R. 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. 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. 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. 2207-10). A sexual assault evidence kit was collected from Rebekah. (R. 2213-15).

Ann Pitts responded to the Stephen's Crossroads Complex. (R. 2220). She later responded to the Seacoast Medical Center to interview the victim. (R. 2221). Pitts testified that the victim seemed to be in shock, and was very afraid. (R. 2222). Rebekah did tell Pitts what happened and where it happened. (R. 2222). The victim also described the clothes she was wearing. (See R. 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. 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. 2227). He was found at a friend's house. (R. 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. 2228). Pitts was also present at Winkler's first bond hearing. (R. 2230). Bond was initially denied in his case. (R. 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. 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. 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. 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. 2249-51).

Tammy Cox was one of Rebekah's friends. (R. 2262-63). They first met when Rebekah trained Cox in medical transcription. (R. 2263-64). Cox testified that Rebekah was shy until you got to know her. (R. 2264). She also described Rebekah as a very sweet and caring person who worked all the time. (R. 2265). Cox indicated that Rebekah did not like having her picture taken. (R. 2266). Rebekah helped Cox with her work and with her illness during Cox's second pregnancy. (R. 2266-67). Cox testified that Rebekah was married to Roger Grainger before she married Winkler. (R. 2268-69). They split in 2001. (R. 2269). When Cox learned of Rebekah's relationship with Winkler, she never saw them out much. (R. 2269). After Rebekah married Winkler, Cox hardly ever saw her. (R. 2270). Cox testified that they only talked on the phone during the day when Winkler was at work. (R. 2269-70). Cox became aware that there were problems in Rebekah and Winkler's relationship in August or September. (R. 2270). She learned of the assault in October 2005. (R. 2271). Cox spent time with Rebekah between October 2005 and Rebekah's murder in March 2006. Cox noticed changes in Rebekah's personality. (R. 2271). Rebekah could not work any more and did not want to do anything any more. (R. 2272). Further, Rebekah did not go out, she

lived in fear every day, and she could not sleep at night. (R. 2272). Cox stated that she was a totally different person, and that she was never the same person. (R. 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. 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. 2288). Shelley indicated that Winkler was not very friendly, and when she visited his home, she felt unwelcome. (R. 2288). After Shelley had her first child, Rebekah's first grandchild, Winkler did not really want them around his house. (R. 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. 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. 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. 2291). It was Winkler calling the house because Rebekah had made him leave. (R. 2291). Some time thereafter, Winkler returned to the house and started kicking the side door. (R. 2292). Winkler was yelling and screaming until Rebekah let him into the house. (R. 2292). Shelley threatened to call the police. Winkler responded by warning Rebekah that she knew what would happen if

they called the police. (R. 2292). Shelley testified that Rebekah moved out of Winkler's home as a result of this confrontation. (R. 2292).

Shelley also testified about the night of the kidnapping. (R. 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. 2293-94). Shelley called the police when she first heard of the problem. (R. 2294). She noted that her mother's Land Rover was found that night, but there was no sign of either Rebekah or Winkler. (R. 2295). Shelley saw her mother the next morning at Seacoast hospital. (R. 2295). Shelley testified that her mother was very beat up and dirty. (R. 2295). Rebekah's eye was very swollen, and her hair was matted with sand spurs and twigs. (R. 2296). Rebekah was also nervous, and she wanted them to do something with Winkler to get him away from her. (R. 2296). Rebekah was very depressed. (R. 2296). Shelley testified that Rebekah lived in fear all the time and was scared. (R. 2296). Rebekah did not go anywhere or do anything. (R. 2297). She could no longer work, and she was never the same. (R. 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. 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. 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. 2301-02). He also threatened to post the video online. See (R. 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. 2302-03).

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. 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. 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. 2655-57, 2658-60). Dr. William Morton, Jr., who was qualified as an expert in psychopharmacology, also testified. (R. 2695-2743).

Te Anne Oehler, a social worker, testified that Winkler's father was very controlling of his mother. (R. 2752). When Winkler's parents were first married, they moved in with his father's parents. (R. 2752). Winkler's father made his mother quit her job, even before they had children. (R. 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. 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. 2752).

Oehler further testified that Winkler's mother was the primary caregiver because she was the person home during the day. (R. 2753). His mother was the person involved with Winkler's schoolwork. (R. 2753). Winkler's father did coach all of the

boys on their sports teams. (R. 2753). However, Winkler's father would leave and go out after dinner, and he would not come back until 1 or 2 am. (R. 2753). Oehler noted that Winkler's father had frequently been drinking a lot, and he was not always present at home. (R. 2753-54). She stated that Winkler's father was very controlling towards family members, and he had very poor parenting skills. (R. 2754). While Winkler denied his father ever beat him, both of the oldest Winkler children informed Oehler that their father had beaten them. (R. 2754). The only exception was when Winkler was a junior in high school, and his mother found marijuana in the bathroom. (R. 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. 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. 2754-55).

Oehler also testified that Winkler got his first drink from his father on a camping trip when Winkler was 13. (R. 2755). By the time Winkler graduated from high school, he was using alcohol and marijuana frequently. (R. 2755). At that point, if there was any problem with one of the Winkler children, Winkler's mother addressed it. (R. 2755). Winkler's father was out of the home working more with his insurance business. (R. 2755).

Oehler also testified about Winkler's personal history with women. She noted that Winkler tended to seek out women who had children. (R. 2758). She also noted that Winkler was a chronic drinker throughout the years, starting when he was a teenager. (R. 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. 2760). Oehler asserted that Winkler did not immediately trust others, and he would remain suspicious of others until they proved otherwise. (R. 2761). Winkler grew up in a strict Catholic home where his father was very rigid. (R. 2761-62). There was no physical abuse later in Winkler's upbringing. (R. 2762). Also, Winkler's father controlled his wife and children through finances. (R. 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. 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. 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. 2766). Some of his family relationships focused around holiday times, and he always seemed to be surrounded by children. (R. 2766-67).

After further testimony from Oehler, Rosemary Wolfe, a tenant in the Tillman property where Winkler worked testified on his behalf. (R. 2782-87). Counsel also presented the testimony of two of Applicant's sisters, one of Applicant's brothers, and Applicant's mother. They all testified about Applicant's upbringing and their interactions with Applicant as an adult. They all also requested the jury please spare Applicant's life. (R. 2790-2810). Counsel also presented the testimony of Sharon Myers, the lieutenant over the classifications division of the Horry County Sheriff's Department. (R. 2811-16). She testified that Applicant only had two infractions while being detained at the J. Reuben Long Detention Center. One was related to the fact Applicant was not wearing his ankle monitor when he was arrested. The second was for being out of his cell at an improper time on June 26, 2006. (R. 2813-14).

III. Allegations in this Application for Post-Conviction Relief

Applicant asserts fifteen claims of ineffective assistance of counsel in violation of the Sixth Amendment. Specifically, Applicant asserts counsel was ineffective for the following:

- (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 at Horry County, Melony Huggin's, participation in any aspect of this trial when she was the victim's friend;
- (d) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to use Jeff Naylor, a retained expert prepared to testify to the contents of the victim's computer which would have revealed the victim's involvement with other people who may have killed her;
- (e) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to move DVDs into evidence that were found at the scene;
- (f) The state committed a Brady violation when it failed to turn over, until trial, a photograph that showed the blinds in the apartment were open when a statement was made by law enforcement that the blinds were closed, and when the state's failure to produce relevant and probative evidence demonstrates its desire to have secured a conviction at all costs;
- (g) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they failed to retain a crime scene expert who could have effectively challenged the state's

theory of the murder and shown that police officers tampered with the scene;

- (h) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they did not move to change venue in light of the high profile nature of this case and the significant contacts between the jurors and the victim;
- (i) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to call the victim's estranged husband, Roger Granger, to the stand when Applicant's defense was that Granger killed the victim;
- (j) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by not introducing evidence of J. [REDACTED] G. [REDACTED]'s demon worship and penchant for weapons when such evidence would have been relevant for impeaching his testimony that he witnessed Applicant kill the victim.
- (k) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by not informing the jury that Applicant worked at Tillman Lakes by the Sea for 10 years and was highly liked by homeowners and families in the resort community.
- (l) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to interview Mildred when Mildred would have testified that the victim was scared of her estranged husband and when this testimony would have been necessary for Applicant to present a complete defense.
- (m) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to secure a copy of the victim's diary when the diary would have offered evidence that the victim was scared of her estranged husband's violent tendencies.
- (n) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to identify whose glasses were located on the back of the couch at the crime scene. Trial counsel was also ineffective for failing to have the DNA on the bullet tested.

General Law on Ineffective Assistance Of Counsel.

Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598-99 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

. . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance

unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

Next, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 1514 (2000).

In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 332 S.C. at 333, 504 S.E.2d at 823 (quoting Strickland). Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict

and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.").

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that Applicant's attorneys were diligent in their representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

A. Counsel 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.

Respondent submits Applicant cannot establish counsel was ineffective in this regard. First, Applicant cannot show that counsel was deficient in not retaining a crime scene investigator to explore the drop of blood identified in a photograph in this case. Second, Applicant cannot show that he was prejudiced by counsel not retaining a crime scene investigator for this issue.

It appears that at issue in this claim is the analysis of a "reddish color liquid" that was discovered on the kitchen countertop by law enforcement in their investigation of the scene shortly after the murder. (See R. 1559, State's Exhibit 20). Cooper testified that he collected two swabs of the liquid. (R. 1559). He labeled the box in which he placed the collected swabs as item 17. (R. 1560). The swab box was marked at trial as State's Exhibit 21. (See R. 1560-61, 1570, 1746-47). The serological swab was sent to SLED for further analysis. (R. 1570-71). Kimberly Hahn, the SLED analyst who processed the swabs for comparison, determined the blood swab from the counter matched Applicant's DNA profile. (R. 1747). She testified "the probability of randomly selecting another person from the population having the same exact DNA profile is one in 24 quadrillion." (R. 1747, ll 21-23).

Respondent submits that Applicant cannot show that retaining a crime scene investigator would have assisted in addressing this issue at trial. First, Applicant has not shown that counsel was deficient. He has not identified what, if anything, a crime scene investigator could have done to assist in addressing this evidence. Further, in light of the testimony indicating the blood found on the counter matched Applicant's profile, Respondent submits Applicant cannot show that he was prejudiced. Also, in light of the overwhelming evidence of guilt presented, Applicant cannot show there was a reasonable probability the result at trial would have been different had a crime scene investigator been involved in addressing the evidence regarding the blood drop on the counter. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

B. Trial counsel was ineffective when they mounted a mitigation case completely at odds with Applicant's wishes.

Respondent submits this claim is without merit. Respondent submits trial counsel's decision to mount the mitigation case presented at Applicant's trial was the result of a reasonable strategic decision. As a result, Applicant is not entitled to post-conviction relief upon this claim.

As noted in the Statement of Facts, during the sentencing phase, the defense presented several witnesses in regards to Applicant's personal history. After testimony from Te Anne Oehler, the social worker retained by the defense, Rosemary Wolfe, a tenant in the Tillman property where Winkler worked testified on his behalf. (R. 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. 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. 2789).

Applicant raised a claim of trial court error that corresponds to this claim of ineffective assistance of counsel. In resolving the argument in the direct appeal, the South Carolina Supreme Court stated:

"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.

Winkler, 388 S.C. at 588, 698 S.E.2d at 603. Respondent submits that in light of the ruling by the South Carolina Supreme Court, the only argument that can be asserted by Applicant in regards to this claim was that the strategy chosen by counsel was unreasonable. In light of the United States Supreme Court and South Carolina Supreme Court opinions consistently expressing the importance and necessity of the presentation of mitigation evidence, Respondent further submits that counsel's presentation of the mitigation evidence at trial was reasonable, and Applicant is not entitled to relief upon this claim. See generally Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003); Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008); State v. Mercer, 381 S.C. 149, 171 n.7, 672 S.E.2d 556, 567 n.7 (2009). In the event this Court disagrees the issue should be

dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

- C. Trial counsel was ineffective when they did not object to the Clerk of Court at Horry County, Melony Huggin's[sic], participation in any aspect of this trial when she was the victim's friend.**

Respondent submits this claim is without merit. Applicant has not shown that counsel was deficient in this regard. Further, Applicant has not established how he was prejudiced. Respondent would note that it is not clear from the record there was any connection between the victim and the Clerk of Court. Further, Applicant has not identified any error or misconduct that resulted from Ms. Huggins' participation in Applicant's trial. Altogether, Applicant has not presented a basis upon which counsel could have objected to the Clerk's involvement in the trial, nor has he shown that he was prejudiced. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

- D. Trial counsel was ineffective for failing to use Jeff Naylor, a retained expert prepared to testify to the contents of the victim's computer which would have revealed the victim's involvement with other people who may have killed her.**

Respondent submits it is unclear from the record whether there is a factual to support this claim. Thus, Respondent respectfully requests an evidentiary hearing to resolve any questions of fact regarding this claim. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

- E. Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, by failing to move DVDs into evidence that were found at the scene.**

To the extent that Applicant is referring to two DVDs that were found in his possession when he was arrested, Respondent submits this claim is without merit. First, Applicant cannot establish that counsel was deficient in not attempting to have these DVDs entered into evidence.

When Applicant was arrested, he was in possession of two DVDs. (R. 1701). These DVDs were not introduced into evidence at trial. During the sentencing phase, a letter Applicant sent to one of the victim's daughters was introduced into evidence and read into the record. In that letter, Applicant referred to DVDs that he had of he and the victim engaging in sexual activity. (See R. 2301-02). When Applicant was testifying in the sentencing phase of trial, he indicated that he wanted to have the DVDs introduced into evidence and shown to the jury as evidence explaining his version of what occurred on the night Applicant kidnapped and sexually assaulted the victim. (R. 2429-30). Counsel did, outside the presence of the jury, ask the court if the DVDs could be introduced into evidence. (R. 2429). Upon questioning by the court, counsel noted that the activity on the DVDs was not from the night of the kidnapping. (R. 2430). However, it was video of sexual activity between Applicant and the victim from some time prior to the incident. Id. The trial court stated it would not permit the introduction of the evidence because it was not relevant to Applicant's case at all. Id. The record clearly shows that counsel did make an attempt to have the DVDs introduced. Thus, Applicant has not shown that counsel was deficient. Furthermore, Applicant cannot establish he was prejudiced. He has not identified any means by which the DVD would have been admissible at trial. Nor has he established there was a reasonable probability the result

would have been different had counsel made further attempts to have the DVDs introduced into evidence. As a result, this claim for relief should be denied.

To the extent Applicant is referring to some other DVDs, Respondent moves for a more definite statement pursuant to Rule 12(e) of the South Carolina Rules of Civil Procedure. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

F. The state committed a Brady violation when it failed to turn over, until trial, a photograph that showed the blinds in the apartment were open when a statement was made by law enforcement that the blinds were closed, and when the state's failure to produce relevant and probative evidence demonstrates its desire to have secured a conviction at all costs.

First, Respondent moves for a more definite statement pursuant to Rule 12(e) of the South Carolina Rules of Civil Procedure. It is not clear from the allegation as to which photograph Applicant refers, or what statement he believes it would impeach.

Second, even without review of the photograph, Respondent submits this claim is without merit. Applicant has not established there was a Brady violation. "A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different.” Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a “showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal,” id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a “showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,” Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused’s guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006)(citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it.” U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted). “[W]here evidence is equally available to the accused, the obligation on the

part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

Applicant's claim is defective in several ways. First, Applicant's allegation indicates the photograph was disclosed. It appears from the record that all photographs were disclosed before trial, and well before any evidence was presented at trial. (See R. 40). Since the photo was properly disclosed, there was no Brady violation. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (S.C. Ct. App. 1998) aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999) (noting no Brady violation if the defense discovers the information in time to adequately use it at trial); see Lawrence v. Lensing, 42 F.3d 255, 257 (5th Cir. 1994) (denying relief upon Brady claim where evidence was disclosed at trial, holding "that the prosecution did not suppress any evidence.")(citing United States v. Jackson, 6 F.3d 911, 918 (2d Cir.1993)("Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.")(citation and internal quotation marks omitted); United States v. McKinney, 758 F.2d 1036, 1049-50 (5th Cir.1985)(holding that the prosecution did not suppress evidence where Brady materials were disclosed at trial and reasoning that "[i]f the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have, and indeed, should have been") United States v. Randall, 887 F.2d 1262, 1269 (5th Cir.1989); United States v. Mitchell, 777 F.2d 248, 255 (5th Cir.1985)).

Applicant also cannot show that the photograph was favorable, or that the photograph was material to the accused's guilt or innocence or was impeaching. It

appears, based on the allegation, that at best, Applicant could only have used the photograph to impeach a witness. However, it is not even clear how a witness could have been impeached with the photograph as there was no testimony at trial relating to whether blinds on a window at the condo were open or closed. Altogether, Applicant has not established there was a Brady violation. This claim for relief should be denied. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

- G. Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, when they failed to retain a crime scene expert who could have effectively challenged the state's theory of the murder and shown that police officers tampered with the scene.**

Respondent submits it is unclear from the record whether there is a factual to support this claim. Thus, Respondent respectfully requests an evidentiary hearing to resolve any questions of fact regarding this claim. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

- H. Trial counsel was ineffective when they did not move to change venue in light of the high profile nature of this case and the significant contacts between the jurors and the victim.**

This claim should be denied because it is without merit. There is no factual basis supporting this claim. Counsel did move for a change of venue. (R. 1304-14, 3188-92). The motion was originally presented at a pre-trial hearing on April 26, 2007, and renewed after voir dire before trial. Id. Since counsel did move for a change of venue, this claim for relief should be denied and dismissed.

- I. Trial counsel was ineffective by failing to call the victim's estranged husband, Roger Granger, to the stand when Applicant's defense was that Granger killed the victim.**

Respondent submits this claim for relief is without merit. Applicant cannot show that counsel was deficient in this regard. Further, Applicant cannot show that he was prejudiced by counsel not calling Roger Granger to testify. Respondent also submits that counsel's decision to not call Roger Granger was based upon reasonable trial strategy. A review of the record clearly indicates that the defense presented by counsel was not that Roger Granger killed the victim. Trial counsel inferred this in an ex parte pre-trial discussion before opening statements. (R. 1376-82). In that conversation, counsel noted the only evidence that Roger Granger could have been involved in the crime would be Applicant's testimony. Respondent submits the defense strategy reflected in the record was to hold the State to its burden of proof. There was never any attempt to raise a defense of third-party guilt. In light of the overwhelming evidence of guilt, Respondent believes Applicant cannot establish he is entitled to relief upon this claim. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

- J. Trial counsel was ineffective by not introducing evidence of J[REDACTED] G[REDACTED]'s demon worship and penchant for weapons when such evidence would have been relevant for impeaching his testimony that he witnessed Applicant kill the victim.**

Respondent submits this claim for post-conviction relief is without merit. Applicant cannot show that counsel was deficient in this regard. First, trial counsel did make some attempts to explore some of these issues on the cross of J[REDACTED]

G [REDACTED]. (R. 1460-61). Applicant cannot establish that any further exploration of this issue would have been relevant. Further, Applicant cannot show how any further examination of these claims allegations at trial would have impeached J [REDACTED]'s testimony. That being said, in the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

K. Trial counsel was ineffective by not informing the jury that Applicant worked at Tillman Lakes by the Sea for 10 years and was highly liked by homeowners and families in the resort community.

Respondent submits this claim is without merit. Counsel did present testimony and evidence that Applicant worked at Tillman Lakes for 10 years. First, during the sentencing phase, Applicant testified that he worked at Tillman Lakes by the Sea for nine and one-half to ten years. (R. 2381). Te Anne Oehler also corroborated that Applicant worked at Tillman Lakes for a significant amount of time. (See R. 2760, 2767). Counsel also presented the testimony of Rosemary Wolfe, a former resident of Tillman Lakes. (R. 2782-89). She testified that Applicant did a wonderful job, that he was very responsible, and that he was a hard worker. (R. 2782-83). She noted that Applicant enjoyed his job, and took great pride in his work. (R. 2783). She also testified that Applicant was very affable, always friendly, and had many redeeming qualities. (R. 2784). In light of the testimony that was presented at trial, Respondent submits that Applicant cannot show that counsel was deficient in this regard, or that Applicant was prejudiced by counsel not presenting additional testimony in this regard. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent

requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

- L. Trial counsel was ineffective by failing to interview Mildred when Mildred would have testified that the victim was scared of her estranged husband and when this testimony would have been necessary for Applicant to present a complete defense.**

Respondent submits it is unclear from the record whether there is a factual to support this claim. Thus, Respondent respectfully requests an evidentiary hearing to resolve any questions of fact regarding this claim. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

- M. Trial counsel was ineffective for failing to secure a copy of the victim's diary when the diary would have offered evidence that the victim was scared of her estranged husband's violent tendencies.**

Respondent submits it is unclear from the record whether there is a factual to support this claim. Thus, Respondent respectfully requests an evidentiary hearing to resolve any questions of fact regarding this claim. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

- N. Trial counsel was ineffective for failing to identify whose glasses were located on the back of the couch at the crime scene. Trial counsel was also ineffective for failing to have the DNA on the bullet tested.**

Respondent submits that both claims presented here are without merit. Applicant cannot show that counsel was deficient in handling the evidence in either claim. Further, Applicant has not shown that he was prejudiced.

In Applicant's first claim, he asserts trial counsel was ineffective in identifying the owner of the glasses found at the crime scene. At trial, counsel cross examined Investigator Cooper regarding a pair of eyeglasses that he recovered from the scene.

Cooper testified he did not have the glasses examined for fingerprints, and he did not know who owned the glasses. (R. 1605). Respondent submits that in light of the overwhelming evidence of Applicant's guilt presented at trial, and the lack of forensic evidence that would point to the possibility of any other assailant, Applicant cannot show that he was prejudiced by any alleged failure of counsel in the handling of this issue. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

In Applicant's second claim, he asserts trial counsel was ineffective in not having the DNA on the bullet tested. Respondent submits this claim is without merit because there is no factual basis to support this claim. During cross-examination, Detective Toby Boyd testified that he and defense counsel had discussed having the projectile tested for DNA. (R. 1660-61). Boyd indicated that he did eventually send the projectile for DNA testing. (R. 1661). Boyd noted that the test results were inconclusive because the projectile had already gone through ballistics testing. Id. Boyd also admitted that it could not be proven scientifically that the projectile that was found in the wall was the one that went through the victim's brain. Id. Vello Paavel, the firearms and toolmark examiner who analyzed projectile in this case, testified that if there was any blood on the bullet, he would have collected biological material and packaged the swab. (R. 1767). If there is a request to actually have that swab analyzed, he would routed that swab to the proper dept. Id. His notes reflected that there was no obvious blood or tissue on the bullet. (R. 1767-68). He used a magnifier to look for obvious blood or other material. (R. 1797). Had he seen something on the projectile, he would have

used higher power or another device if necessary. Id. He did not do that in this case he did not see any obvious visible blood, body tissue, or bone on the projectile. Id.

Paavel further testified on cross-examination that the projectile would not have had DNA on it after he tested it. (R. 1788). He did not see anything on the projectile before he decontaminated it. (R. 1789). Following his normal process and protocol, he examined the projectile for materials. Id. He indicated that he did not know if one cannot always see DNA. He noted that if there was visible blood, he would have collected it for analysis. (R. 1790). He also did not know if a DNA analyst could collect DNA from a bullet that had no obvious blood on it. Id.

Applicant cannot show that counsel was deficient in this regard. Counsel did attempt to have the projectile tested for DNA, and it appears from Boyd's testimony, that the projectile was indeed tested for DNA. Further, Applicant cannot show that he was prejudiced by any error of counsel in this regard. Respondent submits that based upon Boyd's testimony, it appears that any future DNA testing on the projectile would be inconclusive because there would be insufficient data on the projectile for testing. Respondent submits that since testing the projectile for DNA would be inconclusive, Applicant cannot show the results of any such testing would have a reasonable probability of leading to a different result at his trial. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be denied and dismissed.

Respectfully submitted,

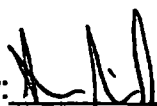
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
(Counsel of Record)

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

By: 

ATTORNEYS FOR RESPONDENT

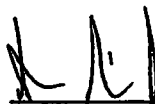
June 8, 2011.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the *Return, Motion to Dismiss and Motion for Summary Judgment*, by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Louis Michael Winkler, Jr., #6027
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

This 8th day of June, 2011.



ALPHONSO SIMON, JR.

11 JUN 10 AM 10:48
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
LOUIS MICHAEL WINKLER, JR.)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-26-03907

**FIRST AMENDED APPLICATION FOR
POST-CONVICTION RELIEF**

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court which imposed sentence: Horry County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2006-GS-26-2101
5. The date upon which sentence was imposed and the terms of the sentence: February 8, 2008 (Death Sentence).
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. The Courts to which applicant appealed:
 - (a) The South Carolina Supreme Court.
 - (b) The United States Supreme Court.

The result in each Court to which applicant appealed:

- (a) Affirmed
- (b) Petition for Writ of Certiorari denied.

The date of each result:

- (a) August 16, 2010
- (b) April 25, 2011

Citations of any written opinion or orders entered pursuant to such results:

- (a) *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2011).

(b) *Winkler v. South Carolina*, 131 S.Ct. 2155, 179 L.Ed.2d 940 (2011).

9. Not applicable.

GROUND FOR RELIEF WITH SUPPORTING FACTS

10 & 11(a) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 – during the pre-trial and guilt-or-innocence phases of his capital trial – when trial counsel:

(1) failed to object to the trial court's pre-trial refusal to permit Applicant to discharge appointed counsel and allow him to proceed *pro se*. See *Strickland v. Washington*, 466 U.S. 668 (1994); *Faretta v. California*, 422 U.S. 806 (1975);¹ and,

(2) failed to object to and/or adequately impeach the trial testimony of Mr. Vello Paavel, portions of which were improper, inaccurate, unreliable and inadmissible. See *Strickland v. Washington*, 466 U.S. 668 (1994).

10 & 11(b) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 – during the sentencing phase of his capital trial – when trial counsel:

(1) failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction; and

(2) failed to object when the trial court: (a) repeatedly refused to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict; and, (b) issued improper instructions to the jury under unduly coercive circumstances.

¹ With the exception of information "necessary" to respond to the specific claims raised in this First Amended Application For Post-Conviction Relief, applicant does not waive the attorney-client privilege to any extent. S.C. Code § 17-27-130. Applicant requests that his prior counsel not disclose any other portion of their files to respondent or discuss any aspect of their representation outside the narrow scope of this limited waiver. To the extent that there is any uncertainty as to what information is necessary to respond to these specific allegations, applicant requests a judicially supervised *in camera* review of any information in question. This procedure is recommended by the American Bar Association's Standing Committee on Ethics and Professional Responsibility. See ABA Formal Opinion 10-456, issued July 14, 2010 (attached).

- 10 & 11(c) Applicant's right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 § 14 of the South Carolina Constitution, was violated by the trial court's refusal to permit him to discharge appointed counsel and proceed *pro se*.
- 10 & 11(d) Applicant's right to a fair and impartial jury determination of his sentence – free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated by the trial court's repeated refusal to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict and the court's improper instructions to the jury under unduly coercive circumstances.
12. (a) Applicant has not filed any petition in state court other than the mandatory appeal to the South Carolina Supreme Court.
- (b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.
- (c) Applicant has not filed any petitions to the United States Supreme Court other than the petition already specified *supra*.
- (d) Applicant has not filed any motions, petitions, or applications in this or any other Court.
13. Not applicable.
14. Applicant has not raised any ground set forth in (10) in this or any other court.
15. Not Applicable.
16. These grounds rely on additional facts outside the record which was before the previous courts.
17. Applicant was previously represented by counsel.
18. Applicant was represented at trial by Ralph Wilson, Esq., P.O. Box 1827, Conway, SC 29572 and Paul Rathbun, Esq., 203 Laurel Street, Conway, SC 29528.
- On direct appeal applicant was represented by Elizabeth Franklin-Best, of the South Carolina Office of Appellate Defense, 1330 Lady Street, Columbia, South Carolina 29201.
19. Applicant seeks relief from his conviction and sentence.

20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
900 Elmwood Avenue
Suite 101
Columbia, South Carolina 29201
(803) 765-1044

JOHN R. MILLS

Attorney at Law
201 W. Main Street
Suite 301
Durham, NC 27701
(919) 251-6259

BY: *John R. Mills*
ATTORNEY FOR APPLICANT

January 31, 2012

STATE OF NORTH CAROLINA)

COUNTY OF DURHAM)

VERIFICATION

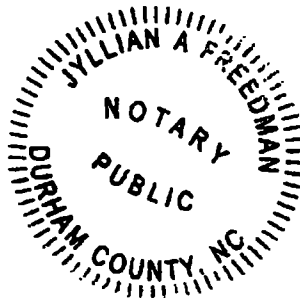
I, John R. Mills, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me at this time for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

John R. Mills
John R. Mills

Sworn to and subscribed before me this
31 day of January, 2012.

[Signature]
Notary Public.

My Commission Expires: DEC 1, 2015



Certificate of Service

I hereby certify that a copy of Mr. Winkler's First Amended Application for Post Conviction Relief has been duly served upon Mr. Al Simon, Assistant Attorney General, by deposit in the United States mail, first-class and postage prepaid to the following addresses:

Mr. Al Simon
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

This is the 31st day of January, 2012.



John R. Mills
Law Offices of John R. Mills

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-456

July 14, 2010

Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client's informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant's claim in order to help the prosecution establish that the lawyer's representation was competent.¹ This question may arise, for example, because a prosecutor or other government lawyer defending the former client's ineffective assistance claim seeks the trial lawyer's file or an informal interview to respond to the convicted defendant's claim, or to prepare for a hearing on the claim.

Under *Strickland v. Washington*,² a convicted defendant seeking relief (e.g., a new trial or sentencing) based on a lawyer's failure to provide constitutionally effective representation, must establish both that the representation "fell below an objective standard of reasonableness" and that the defendant thereby was prejudiced, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."³ Claims of ineffective assistance of counsel often are dismissed without taking evidence due to insufficient factual allegations or other procedural deficiencies. Numerous claims also are dismissed without a determination regarding the reasonableness of the trial lawyer's representation based on the defendant's failure to show prejudice. The Supreme Court recently expressed confidence "that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit."⁴ Although it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding, sometimes trial lawyers have done so,⁵ and commentators have expressed concerns about the practice.⁶

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. See Rules 1.6 & 1.9(c). The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."⁷

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² 466 U.S. 668 (1984).

³ *Id.* at 694.

⁴ *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 1485 (2010).

⁵ See, e.g., *Purkey v. United States*, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009), *motion to amend denied*, 2009 WL 5176598 (Dec. 22, 2009) (lawyer represented criminal defendant at trial and on appeal voluntarily filed 117-page affidavit extensively refuting former client's ineffective assistance of counsel claim); *State v. Binney*, 683 S.E.2d 478 (S.C. 2009) (defendant's trial counsel met with law enforcement authorities and provided his case file to them in response to defendant's ineffective assistance of counsel claim).

⁶ See, e.g., Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1186-88 (2003); David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14.

⁷ Rule 1.6 cmt. 3. See, e.g., *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when, under threat of subpoena, it disclosed former client's statement to prosecutor without former client's consent; court stated that "[d]isclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.⁸ Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent.

Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant's ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so. The criminal defendant may be able to make non-frivolous objections to the trial lawyer's disclosures even though the ineffective assistance of counsel claim ordinarily waives the attorney-client privilege and work product protection with regard to otherwise privileged communications and protected work product relevant to the claim.⁹ For example, the criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client's opportunity to object and obtain a judicial ruling. Absent a relevant exception, a lawyer may disclose client information protected by Rule 1.6 only with the client's "informed consent." Such consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rules 1.0(e) & 1.6(a). A client's express or implied waiver of the attorney-client privilege has the legal effect of forgoing the right to bar disclosure of the client's prior confidential communications in a judicial or similar proceeding. Standing alone, however, it does not constitute "informed consent" to the lawyer's voluntary disclosure of client information outside such a proceeding.¹⁰ A client might agree that the former lawyer may testify in an adjudicative proceeding to the extent the court requires but not agree that the former lawyer voluntarily may disclose the same client

prohibited by the disciplinary rules," *id.* at 265 n.5).

⁸ "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that ... the information sought [in a judicial or other proceeding] is protected against disclosure by the attorney-client privilege or other applicable law." Rule 1.6, cmt. 13. The lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client. *See, e.g.,* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-385 (1994) (Subpoenas of a Lawyer's Files) ("If a governmental agency, or any other entity or person, subpoenas, or obtains a court order for, a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena or court order on any legitimate available grounds so as to protect documents that are deemed to be confidential under Rule 1.6."); *see also* Connecticut Bar Ass'n Eth. Op. 99-38 (absent a waiver, subpoenaed lawyer must invoke the attorney-client privilege if asked to testify regarding inconsistencies between former client's court testimony and former client's communications with lawyer and previous lawyer), 1999 WL 33115188; Maryland State Bar Ass'n Committee on Eth. Op. 2004-17 (2004) (if subpoenaed lawyer's client was "estate," lawyer permitted to turn over documents to successor personal representative and may reveal information; if representation included the former personal representative in both his fiduciary and in his individual capacity, lawyer is subject to constraints of Rule 1.6(a)); Rhode Island Sup. Ct. Eth. Adv. Panel Op. No. 98-02 (1998) (lawyer who received notice of deposition and subpoena must not disclose information relating to representation of former client); South Carolina Bar Ethics Advisory Committee Adv. Op. 98-30 (1998) (in response to third party's request for affidavits and/or depositions, lawyer must assert attorney-client privilege and may only disclose such information by order of court); Utah State Bar Eth. Advisory Op. Committee Op. 05-01, 2005 WL 5302775 (2005) (absent court order requiring lawyer's testimony, and notwithstanding subpoena served on lawyer by prosecution, lawyer may not divulge any attorney-client information, either to prosecution or in open court).

⁹ *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim.")

¹⁰ *Cf. Clock v. United States*, No. 09-cv-379-JD, slip op. (D.N.H. 2010). In *Clock*, at the prosecution's request, the defendant signed a form explicitly waiving the attorney-client privilege with respect to the issues in her post-conviction petition in order to authorize her trial lawyer to answer questions regarding her ineffective assistance of counsel claim. Based on her office's institutional policy, trial counsel nonetheless declined to respond to the prosecution's questions unless ordered to do so by the court. Based on the defendant's explicit waiver, the court ordered trial counsel to submit an affidavit limited to the issues in the defendant's petition. *Id.* at *2.

confidences to the opposite party prior to the proceeding.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the "self-defense exception" of Rule 1.6(b)(5),¹¹ which provides that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." The self-defense exception grows out of agency law and rests on considerations of fairness.¹² Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer's self-defense.¹³

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so.¹⁴ For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception.¹⁵ Although the scope of the exception has expanded over time,¹⁶ the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation.¹⁷ Consequently, it has been said that "[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences"¹⁸

When a former client calls the lawyer's representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b)(5) do not apply. The lawyer may not

¹¹ Although the confidentiality duty is subject to other exceptions, none of the other exceptions seems applicable to this situation.

¹² See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. b ("in the absence of the exception . . . , lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group").

¹³ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83.

¹⁴ Rule 1.6 cmt. 10 ("The rule] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."). Cases addressing the self-defense exception to the attorney-client privilege are to the same effect. See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974) (lawyer named as defendant in class action brought by purchasers of securities who claimed that prospectus contained misrepresentations had right to make appropriate disclosure to lawyers representing stockholders as to his role in public offering of securities).

¹⁵ See, e.g., *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557 (S.D.N.Y. 1986) (self-defense exception to attorney-client privilege permits lawyer who is being sued for misconduct in securities matter to disclose in discovery documents within attorney-client privilege if lawyer's interest in disclosure outweighs interest of client in maintaining confidentiality of communications, and if disclosure will serve truth-finding function of litigation process); Association of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Op. 1986-7, 1986 WL 293096 (1986) (lawyer need not resist disclosure until formally accused because of cost and other burdens of defending against formal charge and damage to reputation); Pennsylvania Bar Association Committee on Legal Eth. and Prof'l Resp. Eth. Op. 96-48, 1996 WL 928143 (1996) (lawyer charged by former clients with malpractice in their defense in SEC is permitted to speak to SEC lawyers and reveal information concerning the representation as he reasonably believes necessary to respond to allegations); South Carolina Bar Eth. Adv. Committee Adv. Op. 94-23, 1994 WL 928298, (1994) (lawyer under investigation by Social Security Administration for possible misconduct in connection with his client may reveal confidential information as may be necessary to respond to or defend against allegations; no grievance proceeding pending anywhere else against lawyer).

¹⁶ Disciplinary Rule 4-101(C)(4) of the predecessor ABA Model Code of Professional Responsibility (1980) provided: "A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct," but did not expressly authorize the disclosure of confidences to establish a claim on behalf of a lawyer other than for legal fees.

¹⁷ Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. See Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 810-11 (1977).

¹⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c (emphasis added).

respond in order "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client," because the legal controversy is not between the client and the lawyer.¹⁹ Nor is disclosure justified "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved," because the defendant's motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

The more difficult question is whether, in the context of an ineffective assistance of counsel claim, the lawyer may reveal information relating to the representation "to respond to allegations in any proceeding concerning the lawyer's representation of the client." This provision enables lawyers to defend themselves and their associates as reasonably necessary against allegations of misconduct in proceedings that are comparable to those involving criminal or civil claims against a lawyer. For example, lawyers may disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation. On its face, the provision also might be read to apply to a proceeding brought to set aside a criminal conviction based on a lawyer's alleged ineffective assistance of counsel, because the proceeding includes an allegation concerning the lawyer's representation of the client to which the lawyer might wish to respond.²⁰

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is *necessary* to do so.²¹ It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable.²² The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements ... to the fullest extent practicable."²³ Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences.²⁴ These limitations are equally applicable to Rule 1.6(b)(5).²⁵

¹⁹ See Utah State Bar Eth. Adv. Op. Committee Eth. Op. 05-01, 2005 WL 5302775, at *6 (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or in court in response to defendant's claim that lawyer's prior advice was confusing; court stated, "[w]hile an arguable case might be made for disclosure under this exception, it ... is fraught with problems. The primary problem is that the 'controversy' is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no 'controversy' between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer."). But see Arizona State Bar Op. 93-02 (1993), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=652> (interpreting "controversy" to include a disagreement in the public media).

²⁰ Cf. *State v. Madigan*, 68 N.W. 179, 180 (Minn. 1896) (lawyer accused of inadequate criminal defense representation may submit affidavit containing attorney-client privileged information to disprove such charge).

²¹ See Rule 1.6(b)(5) (allowing disclosure only "to the extent the lawyer reasonably believes necessary"); Rule 1.6 cmts. 10 & 14.

²² See Rule 1.0(i) ("Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.")

²³ Rule 1.6 cmt. 14 (emphasis added). Similar restrictions have been held applicable to the related context in which a lawyer seeks to disclose confidences to collect a fee. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 250 (1943), in *OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS ANNOTATED* 555, 556 (American Bar Foundation 1967) ("where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights").

²⁴ For example, in *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 F.R.D. 687, 692 (C.D. Ca. 1988), the district court "reject[ed] the suggestion made by some parties that 'selective' disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed," finding that this suggestion was "directly contrary to the reasonable necessity standard." Accord *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 83 cmt. e ("The lawyer's invocation of the exception must be appropriate to the lawyer's need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence."); cf. *Dixon v. State Bar*, 653 P.2d 321, 325 (1982) (lawyer sanctioned for gratuitous disclosure of confidence in response to former client's motion to enjoin lawyer from harassing her); *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 886-87 (E.D. Pa. 1976) ("In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word 'necessary' in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and to the legal profession.")

²⁵ Courts further recognize that disclosures may be made to defend against a non-client's accusation of misconduct only if the accusation is credible enough to put the lawyer at some risk of adverse consequences, such as a criminal indictment or a civil lawsuit; third parties otherwise would have an incentive to raise utterly meritless claims of lawyer misconduct to gain access to confidential information. Cf. *SEC v. Forma*, 117 F.R.D. 516, 519-525 (S.D.N.Y. 1987) (formal charges need not be issued in order for the self defense exception to apply); *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 566 n.15 (S.D.N.Y. 1986) (former auditor's evidence against lawyer must "pass muster under Fed. R. Civ. P. 11").

Permitting disclosure of client confidential information outside court-supervised proceedings undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding.²⁶ Disclosure of such information might prejudice the defendant in the event of a retrial.²⁷ Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.

Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, *ex parte* disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information.²⁸ If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.²⁹

²⁶ *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. e (before making disclosures under the self-defense exception, a lawyer ordinarily must give notice to former client).

²⁷ Some courts preclude the prosecution from introducing the trial lawyer's statements in a later trial, *see, e.g.,* *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir.), *cert. denied*, 540 U.S. 1013 (2003) (waiver of privilege for purposes of habeas claim does not necessarily mean extinguishment of the privilege for all time and in all circumstances), but not all courts have done so. *See, e.g.,* *Fears v. Warden*, 2003 WL 23770605 (S.D. Ohio 2003) (scope of habeas petitioner's waiver of privilege not waived for all time and all purposes including possible retrial).

²⁸ *See, e.g.,* Utah State Bar Eth. Advisory Op. Committee Op. 05-01, *supra* notes 8 & 19 (where criminal defense lawyer's former client moved to set aside his guilty plea on ground that lawyer's advice about plea offer confused him, lawyer may not divulge attorney-client information to prosecutor to prevent a possible fraud on court or protect lawyer's reputation; lawyer must assert attorney-client privilege in hearing on former client's motion, and may testify only upon court order).

²⁹ *See* Rule 1.6 cmt. 14.

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

Louis Michael Winkler, Jr., #6027,)

C/A No. 2011-CP-11-3907

Applicant,)

v.)

RETURN TO AMENDED
APPLICATION FOR POST-
CONVICTION RELIEF AND MOTION
FOR MORE DEFINITE STATEMENT
(Capital Case)

The State of South Carolina,)

Respondent.)
_____)

Respondent, above-named, here by makes Return to the first amended application for post-conviction relief ("APCR"), served by Louis Michael Winkler, Jr. ("Applicant") on January 31, 2011. This APCR stems from a murder conviction, a first degree burglary conviction, an assault and battery of a high and aggravated nature conviction, and a death sentence.

Respondent respectfully moves for a more definite statement in regards to the allegations set forth in 10 & 11(a)(2) and in 10 & 11(b)(1). Respondent submits that as submitted, those allegations are too vague for response.

I. Procedural History

During the May 2006 Term of the Horry County Court of General Sessions, Applicant Louis Michael Winkler was indicted by the Horry County Grand Jury for Murder, Burglary in the First Degree, Assault and Battery of a High and Aggravated Nature, and Escape. (R. 3458-60). The State had filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (R. 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. 1977).

On January 28 – February 8, 2008, ("Winkler") was tried by a jury for murder, first-degree burglary, and assault and battery of a high and aggravated nature.¹ 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. 1903).

On February 8, 2008, the jury found there was evidence of both asserted aggravating circumstances beyond a reasonable doubt. (R. 2940). The jury recommended that Winkler be sentenced to death. (R. 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. 2949).

A timely notice of appeal was filed and served on Applicant's behalf on February 11, 2008. On appeal, Applicant was represented by Robert M. Dudek, Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Elizabeth A. Franklin-Best, Appellate Defender with the South

¹ The State withdrew the Escape charge before trial. (See R. 130).

Carolina Commission on Indigent Defense, Division of Appellate Defense. On April 5, 2010, Applicant perfected his direct appeal with the filing of a Final Brief of Appellant, in which they asserted the following issues:

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 Knoch 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?

The State, through Assistant Attorney General Alphonso Simon Jr., filed its Final Brief of Respondent on April 14, 2010. Applicant, through Mr. Dudek and Ms. Franklin-Best, filed his Final Reply Brief of Appellant on April 4, 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. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). Applicant filed a timely petition for rehearing that was denied on September 22, 2010. The Remittitur was also issued on September 22, 2010.

On October 20, 2010, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated February 11, 2011. The State, through Assistant Attorney General Simon, filed its Brief in Opposition to the Petition for Writ of Certiorari on March 28, 2011. Applicant filed a Reply Brief on April 12, 2011. The United States Supreme Court denied the petition for writ of certiorari by order dated April 25, 2011.

Applicant filed a second Petition for Stay of Execution on April 26, 2011. The State filed a response to the Petition for Stay of Execution on April 28, 2011. By Order filed May 25, 2011, the Supreme Court of South Carolina granted Applicant's Petition for Stay of Execution. In the Order, the South Carolina Supreme Court appointed the Honorable Benjamin H. Culbertson, Circuit Court Judge, to hear this post-conviction relief action. Applicant, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on May 2, 2011. By Order filed June 24, 2011, this Court appointed Emily Paavola, Esquire, and John Mills, Esquire, to represent Applicant. On February 2, 2012, Applicant filed his first amended Application for Post-Conviction Relief.

Incorporated herein by reference are the following documents:²

- (1) Notice of Appeal
- (2) Record on Appeal, containing eight (8) volumes;
- (3) Final Brief of Appellant;
- (4) Final Brief of Respondent;
- (5) Final Reply Brief of Appellant;
- (6) State v. Louis Michael Winkler, Jr., SC S.Ct. Opinion No. 26857, filed August 16, 2010;
- (7) Petition for Rehearing;
- (8) Order Denying Petition for Rehearing;
- (9) Petition for Writ of Certiorari to the Supreme Court of South Carolina;
- (10) Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina;
- (11) Reply Brief to Petition for Writ of Certiorari to the Supreme Court of South Carolina
- (12) Letter acknowledging denial of Petition for Writ of Certiorari

II. Statement of Facts

On March 6, 2006, Applicant Louis Michael Winkler ("Winkler") broke into his estranged wife's condo in North Myrtle Beach, SC. (R. 1430-31, State's Exhibit 1, 51). He knocked her son, J[REDACTED] G., out of a stool and onto the ground. (R. 1431, 1433, State's Exhibit 1, 51). Winkler then shot the victim, Rebekah Grainger Winkler, once in the face at point blank range. (R. 1436, State's Exhibit 1, 51). According to Dr. Edward

² These documents were attached to Respondent's Return to the initial Application for Post-Conviction Relief.

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. 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. 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. 1634). Dr. Proctor testified that death would have been instant. (R.1637).

Winkler then walked over and pointed the gun at J[REDACTED]. (R. 1437, State's Exhibits 1, 51). Shortly thereafter, Winkler left the condo. (R. 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. 1511-1512). She then heard a hit and the phone went to static. (R. 1512). She also heard someone curse a few times, and then the phone went dead. (R. 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. 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. 1554-55, See State's Exhibit 8). He also testified that a reddish colored liquid was collected from the kitchen countertop. (R. 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. 1744, 1747). Cooper also photographed and collected a broken cordless phone. (R. 1562-63). Cooper also testified that a projectile was recovered from the baseboard of the wall behind the victim. (R. 1566-68). They did not locate a shell casing on the scene. (R. 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. 1645-46). On March 13, 2006, they formed a task force to apprehend Winkler. (R. 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. 1647). The police set up a perimeter around the area where Winkler was last seen on the golf course. (R. 1651). Boyd spotted Winkler moving inside the perimeter. (R. 1652). He testified that Winkler was wearing a dark pullover. Boyd requested that the helicopter assisting with the search scan the area. (R. 1652). The helicopter had to refuel. As the helicopter returned to the scene of the search, Boyd saw Winkler in the wood line. (R. 1653). Police were able to apprehend Winkler without any problems. (R. 1653). Boyd noted that Winkler appearance was consistent with someone who had been outside for a period of time. (R. 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. 1682-83). On March 20, 2006, two of the individuals in the bloodhound tracking team screamed contact in the search of the area.

(R. 1685). He testified that he went to the sound of where the other officers indicated they had made contact with Winkler. (R. 1686). They were standing over Winkler with their guns drawn, and Winkler was laying face down with his hands behind his back. (R. 1686). Rutherford handcuffed Winkler and searched Winkler. (R. 1686). They recovered a Jennings .380 pistol from his right front pants pocket. (R. 1686-87). Five live rounds were in the pistol, but there was not a live round in the port. (R. 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. 1689-91). In the wallet, there was a newspaper clipping about the shooting and Winkler's license. (R. 1691-92). Rutherford also testified that they recovered a green knit cap and a rolled up sweatshirt as part of search for Winkler. (R. 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. 1710). Police found the victim's address on a piece of paper at the residence. (R. 1709-10).

Vello Paavel, a firearms and toolmark examiner for SLED,³ testified that he received a Walther PPK pistol⁴ .380 pistol, a Jennings Bryco .380 pistol, 1 fired projectile, and 18 unfired cartridges with the Jennings Bryco pistol. (R. 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. 1769). He also noted that the magazine of the Walther PPK was full when he received it. (R. 1773). He also noted that the Bryco Jennings pistol's magazine held six cartridges, but

³ Paavel was qualified as an expert in firearms and toolmark examination. (R. 1760).

⁴ This pistol was recovered from underneath the bedroom pillow at the condo where the victim was shot.

only five were in the magazine when he received it. (R. 1777). Paavel concluded that the Jennings Bryco pistol fired the fired bullet. (R. 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. 1992). She noted that they never had problems while she was in high school, but when she went to college, things started changing. (R. 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 doing. (R. 1993-94). Kaiser and Winkler dated for three years, and were then in an on-again, off-again relationship for another two years. (R. 1994). When they were broken up, Kaiser testified that if Winkler saw her talking with someone else, Winkler would harass that person. (R. 1994-95). She noted that Winkler was not always like that, but it was his jealousy that pushed her away. (R. 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. 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. 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. 1998). The two then married. (R. 1999). Kaiser testified that the marriage was good for the first few months. (R. 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. 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. 2001). Winkler would come home drunk, and sometimes trouble would start. (R. 2001). She noted that Winkler would accuse her of being with someone else or doing something whenever she went out. (R. 2001). She testified that he would get very angry and would either kick her or throw her around. (R. 2001). Physical violence was a part of their relationship. (R. 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. 2002). She also testified that the longer the drinking went on, the worse it got. (R. 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. 2002). He did that on three different occasions. (R. 2003). He would accuse her of being with someone else. (R. 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. 2003). Winkler would go with them. (R. 2003).

Kaiser testified that on the day her daughter was born, Winkler came home early, yelling at her. (R. 2004). She testified that he had her up against a wall, and he then kicked her in the stomach six times. (R. 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. 2004-05). Kaiser went to the hospital and went into labor while there. (R. 2005).

When she returned to the family apartment, everything was okay for a couple of weeks. (R. 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. 2006). One day, he did come home and punched her in the face. (R. 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. 2007-08). When she did return, Winkler was nice and had stopped drinking. (R. 2008). However, the final straw in Winkler's and Kaiser's relationship came during Christmas Eve after the baby was born. (R. 2008). Kaiser testified that Winkler did not want to go to his mother's for Christmas. (R. 2009). Kaiser went to go pick up the baby, who was being kept by Kaiser's mother at the time. (R. 2009). When she got back, Winkler stated he did not want to go. (R. 2009). He left, but when he came back, he started throwing Kaiser up against the wall. (R. 2010). Kaiser testified that Winkler threw framed pictures at her, and her arms were cut by the frames and broken glass. (R. 2010). She testified that Winkler then took a gun out, cocked it, and said he would shoot her right then. (R. 2010). She testified that he accused her of cheating, then started beating on her. (R. 2010). After Winkler finished beating and kicking her, Kaiser wrapped her hands in towels because of the blood, grabbed her purse, and ran. (R. 2010-11). She went to Winkler's mother and showed her what Winkler had done. (R. 2011-12). Kaiser then went to the hospital. (R. 2012). She later pressed charges against Winkler. (R. 2013). She left with the baby and moved in with her parents in North Carolina. (R. 2015). She went back to Ohio for the court hearing on the assault charges. (R. 2017). She testified that he was found guilty. (R. 2017). They later got divorced. (R. 2019-20). She testified that Winkler somehow got her parents' phone number and he started calling and harassing them. (R. 2019).

Denise Ricketts, Winkler's second ex-wife, also testified at trial. (R. 2043). She testified that there were no problems when they were initially dating. (R. 2045). However, as time passed, the character of their relationship changed. (R. 2045). She noted that Winkler started being controlling, verbally abusive, and physically abusive. (R. 2045-46). Ricketts testified that the problems started about one year into the relationship. (R. 2046). The couple was invited to a Super Bowl party, but Ricketts did not want to go. (R. 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. 2046). She later forgave Winkler. She did note there were other instances of verbal abuse. (R. 2046). She also testified that Winkler was controlling, and he tried to keep her away from family and friends. (R. 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. 2047-8). She reported this incident to police, and Winkler was later found guilty of criminal domestic violence as a result. (R. 2049-51).

Ricketts testified that she forgave Winkler after he later apologized. (R. 2052). She noted that things between them were fine for a while, but eventually, the same problems arose again. (R. 2052). Winkler started drinking a lot, and when he came home he would be mean to her. (R. 2052). They married in September 2001. (R. 2053). She testified that life was bad during the marriage. (R. 2053). He drank a lot, did not come home from work, and he was verbally abusive. (R. 2054). Ricketts also noted that Winkler was still controlling. (R. 2054). She later left Winkler, in part

because she was in fear he would become physically abusive. (R. 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. 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. 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. 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. 2068). Instead, he took Winkler to the Seacoast Medical Center. (R. 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. 2068). Winkler spat on Cauble. (R. 2068). That led to a simple assault and battery conviction against Winkler. (R. 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. 2077). The missing person was Rebekah Winkler. (R. 2077). Winkler's vehicle was first spotted behind the Seacoast Medical Center. (R. 2078). Another officer had moved the vehicle out of the roadway. (R. 2082). A floor mat, a shoe, and a cigarette butt were recovered from the vicinity of where the Winkler's vehicle was located. (R. 2082). The car was

towed. (R. 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. 2086). Her vehicle was found off the road in some trees. (R. 2086). The Horry County Police Department activated its dog team to try to locate two missing persons at that point. (R. 2091). The victim was later found next to Stephen's Crossroads, which was where the magistrate's complex and library was located. (R. 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. 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. 2099-2100). According to Richardson, the woman looked distraught and was acting confused. (R. 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. 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. 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. 2104). Richardson noted that the woman was on the phone, but she could not hear what she was saying on the phone. (R. 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. 2109). Richardson also indicated that the building became very active with police and emergency medical personnel later that morning. (R. 2109). Richardson later learned it was the victim, Rebekah Winkler, who was making the call in the other room. (R. 2110).

Curtis L. Thompson of the Horry County Police Department testified that he was the first officer to arrive at the building. (R. 2117). He found a white female who was very afraid in the building. (R. 2118). Thompson indicated that it appeared the victim had been in some sort of altercation, and she confirmed that she was Rebekah Winkler. (R. 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. 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. 2124-25). They arrested Winkler, and Hemingway transported him to the M.L. Brown Building. (R. 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. 2137). Cooper testified that the Land Rover, which was registered to Rebekah Winkler, appeared to have been wrecked. (R. 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. 2141). He also noted there was some blood around both seats and around the center console. (R. 2141). On the passenger's side, there were several blood smears and spots on the interior panel of the door. (R. 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. 2144-47). Cooper also took pictures of Winkler's face, arms, and legs. (R. 2150). Cooper transported the blood swabs and the victim's rape kit to SLED. (R. 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. 2162). She testified that during the early stages of Winkler's and the victim's relationship, Winkler seemed to be fine. (R. 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. 2165-66). The victim slept in the bedroom on the first floor, and J [REDACTED] slept on the couch. (R. 2166). When Haley was not there, J [REDACTED] slept in the bedroom upstairs. (R. 2166-67). On October 10, 2005, she and her sister became concerned about their mother's whereabouts. (R. 2167). Haley's sister had called. (R. 2167). That led Haley and her boyfriend to start looking for Rebekah. (R. 2168). Initially, they went to Winkler's home. (R. 2168). When they found his car was not there, they saw a Land Rover in the woods down the road. (R. 2168). It was later identified as her mother's Land Rover. (R. 2169).

Haley saw her mother the next morning at the Seacoast Medical Center. (R. 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. 2170). At first, Rebekah did not want her children to see her, but they talked her into it. (R. 2170). Haley testified that after the incident, her mother was very depressed and could not sleep. (R. 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. 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. 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. 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. 2184-91).

Lisa Gore, a staff nurse at Seacoast Medical Center, treated the victim when she was brought in on October 11, 2005. (R. 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. 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. 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. 2207-10). A sexual assault evidence kit was collected from Rebekah. (R. 2213-15).

Ann Pitts responded to the Stephen's Crossroads Complex. (R. 2220). She later responded to the Seacoast Medical Center to interview the victim. (R. 2221). Pitts testified that the victim seemed to be in shock, and was very afraid. (R. 2222). Rebekah did tell Pitts what happened and where it happened. (R. 2222). The victim also described the clothes she was wearing. (See R. 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. 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. 2227). He was found at a friend's house. (R. 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. 2228). Pitts was also present at Winkler's first bond hearing. (R. 2230). Bond was initially denied in his case. (R. 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. 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. 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. 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. 2249-51).

Tammy Cox was one of Rebekah's friends. (R. 2262-63). They first met when Rebekah trained Cox in medical transcription. (R. 2263-64). Cox testified that Rebekah was shy until you got to know her. (R. 2264). She also described Rebekah as a very sweet and caring person who worked all the time. (R. 2265). Cox indicated that Rebekah did not like having her picture taken. (R. 2266). Rebekah helped Cox with her work and with her illness during Cox's second pregnancy. (R. 2266-67). Cox testified that Rebekah was married to Roger Grainger before she married Winkler. (R. 2268-69). They split in 2001. (R. 2269). When Cox learned of Rebekah's relationship with Winkler, she never saw them out much. (R. 2269). After Rebekah married Winkler, Cox hardly ever saw her. (R. 2270). Cox testified that they only talked on the phone during the day when Winkler was at work. (R. 2269-70). Cox became aware that there were problems in Rebekah and Winkler's relationship in August or September. (R. 2270). She learned of the assault in October 2005. (R. 2271). Cox spent time with Rebekah between October 2005 and Rebekah's murder in March 2006. Cox noticed changes in Rebekah's personality. (R. 2271). Rebekah could not work any more and did not want to do anything any more. (R. 2272). Further, Rebekah did not go out, she lived in fear every day, and she could not sleep at night. (R. 2272). Cox stated that she was a totally different person, and that she was never the same person. (R. 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. 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. 2288). Shelley indicated that Winkler was not very friendly, and when she visited his home, she felt unwelcome. (R. 2288). After Shelley had her first child, Rebekah's first grandchild, Winkler did not really want them around his house. (R. 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. 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. 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. 2291). It was Winkler calling the house because Rebekah had made him leave. (R. 2291). Some time thereafter, Winkler returned to the house and started kicking the side door. (R. 2292). Winkler was yelling and screaming until Rebekah let him into the house. (R. 2292). Shelley threatened to call the police. Winkler responded by warning Rebekah that she knew what would happen if they called the police. (R. 2292). Shelley testified that Rebekah moved out of Winkler's home as a result of this confrontation. (R. 2292).

Shelley also testified about the night of the kidnapping. (R. 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. 2293-94). Shelley called the police when she first heard of the problem. (R. 2294). She noted that her mother's Land Rover was found that night, but there was no sign of either Rebekah or Winkler. (R. 2295). Shelley saw her mother the next morning at Seacoast hospital. (R. 2295). Shelley testified that her mother was very beat up and dirty. (R. 2295). Rebekah's eye was very swollen, and her hair was matted with sand spurs and twigs. (R. 2296). Rebekah was also nervous, and she wanted them to do something with Winkler to get him away from her. (R. 2296). Rebekah was very depressed. (R. 2296). Shelley testified that Rebekah lived in fear all the time and was scared. (R. 2296). Rebekah did not go anywhere or do anything. (R. 2297). She could no longer work, and she was never the same. (R. 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. 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. 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. 2301-02). He also threatened to post the video online. See (R. 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. 2302-03).

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. 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. 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. 2655-57, 2658-60). Dr. William Morton, Jr., who was qualified as an expert in psychopharmacology, also testified. (R. 2695-2743).

Te Anne Oehler, a social worker, testified that Winkler's father was very controlling of his mother. (R. 2752). When Winkler's parents were first married, they moved in with his father's parents. (R. 2752). Winkler's father made his mother quit her job, even before they had children. (R. 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. 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. 2752).

Oehler further testified that Winkler's mother was the primary caregiver because she was the person home during the day. (R. 2753). His mother was the person involved with Winkler's schoolwork. (R. 2753). Winkler's father did coach all of the boys on their sports teams. (R. 2753). However, Winkler's father would leave and go out after dinner, and he would not come back until 1 or 2 am. (R. 2753). Oehler noted

that Winkler's father had frequently been drinking a lot, and he was not always present at home. (R. 2753-54). She stated that Winkler's father was very controlling towards family members, and he had very poor parenting skills. (R. 2754). While Winkler denied his father ever beat him, both of the oldest Winkler children informed Oehler that their father had beaten them. (R. 2754). The only exception was when Winkler was a junior in high school, and his mother found marijuana in the bathroom. (R. 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. 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. 2754-55).

Oehler also testified that Winkler got his first drink from his father on a camping trip when Winkler was 13. (R. 2755). By the time Winkler graduated from high school, he was using alcohol and marijuana frequently. (R. 2755). At that point, if there was any problem with one of the Winkler children, Winkler's mother addressed it. (R. 2755). Winkler's father was out of the home working more with his insurance business. (R. 2755).

Oehler also testified about Winkler's personal history with women. She noted that Winkler tended to seek out women who had children. (R. 2758). She also noted that Winkler was a chronic drinker throughout the years, starting when he was a teenager. (R. 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. 2760). Oehler asserted that Winkler did not immediately trust others, and he would remain suspicious of others until they proved

otherwise. (R. 2761). Winkler grew up in a strict Catholic home where his father was very rigid. (R. 2761-62). There was no physical abuse later in Winkler's upbringing. (R. 2762). Also, Winkler's father controlled his wife and children through finances. (R. 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. 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. 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. 2766). Some of his family relationships focused around holiday times, and he always seemed to be surrounded by children. (R. 2766-67).

After further testimony from Oehler, Rosemary Wolfe, a tenant in the Tillman property where Winkler worked testified on his behalf. (R. 2782-87). Counsel also presented the testimony of two of Applicant's sisters, one of Applicant's brothers, and Applicant's mother. They all testified about Applicant's upbringing and their interactions with Applicant as an adult. They all also requested the jury please spare Applicant's life. (R. 2790-2810). Counsel also presented the testimony of Sharon Myers, the lieutenant over the classifications division of the Horry County Sheriff's Department. (R. 2811-16). She testified that Applicant only had two infractions while being detained at the J. Reuben Long Detention Center. One was related to the fact Applicant was not wearing his ankle monitor when he was arrested. The second was for being out of his cell at an improper time on June 26, 2006. (R. 2813-14).

III. Allegations in this Amended Application for Post-Conviction Relief

Applicant asserts as follows:

10 & 11(a) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 -- during the pre-trial and guilt-or-innocence phases of his capital trial -- when trial counsel:

- (1) failed to object to the trial court's pre-trial refusal to permit Applicant to discharge appointed counsel and allow him to proceed pro se. See Strickland v. Washington, 466 U.S. 668 (1994); Faretta v. California, 422 U.S. 806 (1975); and,
- (2) failed to object to and/or adequately impeach the trial testimony of Mr. Vello Paavel, portions of which were improper, inaccurate, unreliable and inadmissible. See Strickland v. Washington, 466 U.S. 668 (1994).

10 & 11(b) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 -- during the sentencing phase of his capital trial -- when trial counsel:

- (1) failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction; and
- (2) failed to object when the trial court: (a) repeatedly refused to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict; and, (b) issued improper instructions to the jury under unduly coercive circumstances.

10 & 11(c) Applicant's right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 § 14 of the South Carolina Constitution, was violated by the trial court's refusal to permit him to discharge appointed counsel and proceed pro se.

10 & 11(d) Applicant's right to a fair and impartial jury determination of his sentence -- free from the influence of passion, prejudice, or any other arbitrary factor -- guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated by the trial court's repeated refusal to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict and the court's improper instructions to the jury under unduly coercive circumstances.

General Law on Ineffective Assistance Of Counsel.

Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598-99 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

. . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance

unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

Next, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 1514 (2000).

In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 332 S.C. at 333, 504 S.E.2d at 823 (quoting Strickland). Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict

and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.").

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that Applicant's attorneys were diligent in their representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

Ground 10(a): Ineffective Assistance of Counsel during pre-trial and guilt phase

Ground 10(a)(1): Counsel failed to object to the trial court's pre-trial refusal to permit Applicant to discharge appointed counsel and allow him to proceed pro

se. See Strickland v. Washington, 466 U.S. 668 (1994); Fareta v. California, 422 U.S. 806 (1975)

Relevant Facts

At Applicant's first appearance, Ms. Orrie West, Esquire, a public defender for Horry County, was appointed to represent him. (R. 2984). One of Applicant'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. 2985). At the appointment of counsel hearing on June 15, 2006, Ralph Wilson, Esquire, was appointed to serve as first chair in Applicant's defense. (R. 2993-94). At the hearing, Applicant indicated that he found the Public Defender's Office to be very inadequate. (R. 2991). He complained that Ms. West called him by the wrong first name. (R. 2991). Applicant also indicated that he had concerns about Mr. Rathbun because Rathbun told him he had not tried a murder case before. (R. 2992). When asked if he had any objections to Rathbun being appointed as second chair, Applicant indicated that he had an objection. (R. 2999). He indicated that he and Rathbun had argued more than anything. (R. 2999).

At the July 3, 2007 hearing, Applicant's trial counsel put on the record that Applicant was dissatisfied with Mr. Rathbun as counsel because of disagreements they had. (R. 3260). Wilson noted that a couple of weeks before the hearing, Rathbun went to see Applicant, and they had a conversation. (R. 3260). Rathbun and Wilson had gone to see Applicant the Friday before, but they were not able to see Applicant because he had been taken to Charleston to meet with a psychiatrist. (R. 3260). Rathbun went to see Applicant the following Monday. (R. 3260). On Tuesday, Applicant was upset and irate. (R. 3260). Applicant told Wilson that Rathbun had said

some things. (R. 3261). The Court indicated that Applicant 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 Applicant's rights to receive a fair trial. (R. 3262). Wilson indicated that even when there have been disagreements between Rathbun and Applicant, Wilson has been able to sit down with Applicant and decide on the correct course of action with Applicant's consent. (R. 3262). Applicant was heard in this matter. (R. 3263-64). He informed the court that Rathbun was telling him to take a plea, plead guilty. (R. 3264). He told the court that when he sought counsel about the issue, Rathbun told him to plead guilty. (R. 3264). Applicant interpreted that to mean that Rathbun thought he was guilty. (R. 3264). Rathbun responded that he believed Applicant heard what he wanted to hear and didn't hear what counsel was saying. (R. 3265). Rathbun affirmed to the court that he would do his utmost to represent Applicant in a trial. (R. 3265).

During an ex parte hearing held before jury selection. Counsel indicated that during the telephonic conference on the Thursday before this hearing, Applicant started giving details about an incident that occurred between Applicant and Wilson. The Court allowed Applicant the opportunity to get the information on the record. Applicant told the court that he wanted Wilson to go forward as counsel. (R. 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. 32). He informed the court that Rathbun got in his face, put his finger in Applicant's face, and touched his face. (R. 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. 33). The court noted that it did not think that was enough to warrant counsel be relieved. (R. 33). Applicant asked, "how can I get a fair trial with guys that are against me? I mean, they've actually - -" (R. 34). Applicant informed the court that he did not believe they would do their best to get him acquitted. (R. 34).

In response, Wilson informed the court that he had done everything he knew to do to represent Applicant in the best fashion he knew. (R. 34). He also indicated that Applicant is antagonistic, and has been so since the first day. (R. 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. 34). He informed the court they were prepared for trial. (R. 34). The fact that Applicant'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. 34-5). Rathbun also stated he was ready for trial. (R. 35). Applicant complained that his attorneys did not find a witness. (R. 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. Applicant indicated he thought the witness was still in Horry County. Applicant 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. 37). He also complained that no one has gone out to the murder scene and measured couches and counters. (R. 39). Wilson noted that they could not because the unit belonged to the daughter of the victim, not the defendant. (R. 39).

Applicant continually complained that counsel was advising his family that Applicant was likely going to be convicted. (R. 41-2). The Court responded that it could not chastise counsel for giving him an honest opinion. (R. 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. 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 Applicant testify in the guilt phase of trial. (R. 1376-81).

Argument

First, to the extent Applicant asserts that trial counsel was ineffective for not objecting to the trial judge denying a request for Applicant to represent himself, Respondent submits this claim should be denied and dismissed because it is not supported by the record. As was noted by the trial court and by the South Carolina Supreme Court in the opinion in Applicant's direct appeal, Applicant never made a request to represent himself pre-trial. (See R. 42; see also Winkler, 388 S.C. at 586, 698 S.E.2d at 602). Since a request was not made pretrial, and the trial court did not rule upon such a request pretrial, counsel had no opportunity to object to a denial of such a request. Thus, counsel could not be deficient in this regard, and Applicant cannot show that he was prejudiced.

Second, to the extent Applicant contends trial counsel was ineffective for not objecting to the trial judge denial of Applicant's request for counsel to be relieved, Respondent submits this claim is without merit.

Applicant cannot show that counsel was deficient in this regard. In each instance in the record that Applicant indicated he wanted a new attorney, counsel ensured the issue was heard by the trial court. (See R. 32-42, 3260-65). The trial court heard from the Applicant and the attorneys at each instance, and the court denied the request to relieve counsel in both situations. Since counsel brought Applicant's concerns and requests to relieve counsel to the trial court's attention, and the trial court ruled on the matter both times, Respondent submits counsel was not deficient. Additional objection was not needed to preserve the issue for appeal. See generally State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.") (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed.2002)).

Applicant also cannot show that he was prejudiced by counsel not further objecting to the trial court's denial of Applicant's request to relieve counsel. First, as already noted, an additional objection was not needed to preserve any challenge to the denial of Applicant's motion to relieve counsel for appeal. Second, even if an additional objection was needed to preserve the issue for appeal, Applicant was not entitled to relief upon a claim that the trial court improperly denied his requests to relieve counsel.

"A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Graddick, 345 S.C. 383, 385-86, 548 S.E.2d 210, 211 (2001)(citing State v. Hyman, 276 S.C. 559, 562, 281 S.E.2d 209, 211 (1981), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)). The defendant has the burden of establishing satisfactory cause for removal. Graddick, 345 S.C. at 386, 548 S.E.2d at 211; Hyman, 276 S.C. at 562, 281 S.E.2d at 211. Respondent submits the record supports a finding that the trial court did not abuse its discretion in denying the requests to relieve counsel. Since the trial court did not abuse its discretion, Applicant was not entitled to relief upon the underlying claim. Thus, Applicant cannot establish that the result at his trial would have been different had counsel further objected to the trial court's denial of Applicant's request to relieve counsel. This claim should therefore be denied.

In the event this Court disagrees the issue should be dismissed as a matter of law based upon the record, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(a)(2): Counsel failed to object to and/or adequately impeach the trial testimony of Mr. Vello Paavel, portions of which were improper, inaccurate, unreliable and inadmissible. See Strickland v. Washington, 466 U.S. 668 (1994).

Pursuant to Rule 12(e) of the South Carolina Rules of Civil Procedure, Respondent moves for a more definite statement because the allegation as stated is too vague for a response to be framed. In this claim, Applicant asserts that counsel should have objected to testimony of Vello Paavel, the SLED toolmarks and firearms examiner who examined the two firearms collected in the investigation (one from the crime scene

and one from Applicant when he was arrested), the projectile from the crime scene, and other ballistics evidence examined by law enforcement. (R. 1757-1798). Applicant asserts counsel should have objected to portions of Paavel's testimony, but does not identify what portions of Paavel's testimony he believes were improper, inaccurate, unreliable, or inadmissible. Respondent requests that Applicant indicate which portions of Paavel's testimony were "improper, inaccurate, unreliable, and inadmissible;" and the basis for the objections and/or impeachment Applicant alleges counsel should have made.

Respondent further submits Applicant cannot show that counsel was deficient in this regard, and further cannot show that Applicant was prejudiced.

Ground 10(b): Ineffective Assistance of Counsel during the sentencing phase of his capital trial

Ground 10(b)(1): Counsel failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction

Pursuant to Rule 12(e) of the South Carolina Rules of Civil Procedure, Respondent moves for a more definite statement because the allegation as stated is too vague for a response to be framed. In this claim, Applicant asserts that counsel failed to investigate and present evidence of alleged neurological and cognitive impairments and/or dysfunction. However, Applicant does not set forth what evidence, if any, counsel should have uncovered and presented. Respondent requests that Applicant indicate what evidence of neurological and cognitive impairment and/or dysfunction Applicant should have uncovered.

Respondent further submits Applicant cannot show that counsel was deficient in this regard, and further cannot show that Applicant was prejudiced. Respondent further

submits that this issue raises questions of fact that cannot be resolved solely on the record below. Thus, Respondent requests that any questions of fact regarding this issue be heard at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(b)(2)(a): Counsel failed to object when the trial court repeatedly refused to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict.

Relevant facts

During the jury deliberations, the jurors sent the trial judge a note asking the following question: "Could you please explain what happens if we're not able to reach a unanimous decision?" (R. 2921, ll 23-4). The trial judge then indicated that he had shared the question with both counsel for the State and counsel for Applicant. (R. 2921-22). There was agreement amongst the attorneys and the trial judge that the jurors were not indicating they were deadlocked, and all were concerned about the ramifications of responding to the question. (R. 2922). In light of those concerns, the trial judge sent a response stating, "I cannot answer the question the way you phrased it. Please let me know if you have any other questions." (R. 2923, ll 5-7).

After receiving no response from the jury, the trial judge indicated on the record that the attorneys for both sides expressed concern regarding whether the jury did have a question. (R. 2923-24). As a result, the trial judge sent a second note to the jury, asking, "Mr. Foreman and members of the jury, do you have any questions or messages for the court?" (R. 2924, ll 13-4). In response, the judge received the following question from the jurors: "What is the law state when a jury does not reach any unanimous decision at this stage of the trial?" (R. 2925, ll 3-5).

The trial judge indicated that he believed the question was a hypothetical question. (R. 2925). After discussing the matter further with the attorneys, the trial judge sent the jury another note. In this note, the judge stated, "I cannot answer hypothetical questions. Do you have any specific questions to ask or comments that you would like to make about your jury?" (R. 2925 | 23- 2926 | 1). Shortly thereafter, the jury sent another note to the trial judge. (R. 2926, Ct. Exh. 25). Both sides agreed that the last message from the jury indicated they were deadlocked. (R. 2926).

Argument

Applicant asserts trial counsel was ineffective in not objecting to the trial court not answering the jurors' questions regarding what would happen if the jury could not come to a unanimous verdict. This contention is without merit.

Trial counsel was not deficient when they did not object to the trial judge's decision not to answer the questions. The trial court was well within its discretion in refusing to answer the initial questions asked by the jury, and, as a result, counsel had no basis for objecting. S.C. Code Ann. § 16-3-20(C) states:

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).

The South Carolina Supreme Court has held that this sentencing portion of the subsection (C) does not need to be shared with the jury.

The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an

unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

State v. Adams, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Copeland, 278 S.C. 572, 584-85, 300 S.E.2d 63, 70 (1982); see State v. Spann, 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983)(finding harmless error when judge instructed jury that any sentence for life imprisonment must be unanimous because jury need not be instructed of legal effect of unalterable divided jury). "[T]he Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381 (1999).

We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." Allen v. United States, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896). We further have recognized that in a capital sentencing proceeding, the Government has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." Lowenfield v. Phelps, 484 U.S. 231, 238, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (citation and internal quotation marks omitted). We are of the view that a charge to the jury of the sort proposed by petitioner might well have the effect of undermining this strong governmental interest.

Jones, 527 U.S. at 382 (footnote omitted).

The questions posed by the jurors specifically asked what would happen if they did not reach a unanimous verdict. In light of the longstanding precedent against informing jurors of what would occur if they did not reach a unanimous verdict, it was proper for the trial court to not respond to the jurors' questions on that subject. Thus,

trial counsel had no basis for objecting to the trial court's refusal to answer the questions. As a result, counsel was not deficient.

Applicant cannot show that he was prejudiced by counsel not objecting to the trial court's refusal to answer those questions from the jury. First, as already noted, the trial court's refusal to answer the questions was proper. Thus, any objection would have been without merit. See, e.g., Werts v. Vaughn, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); see also Almon v. U.S., 302 F.Supp.2d 575, 586 (D.S.C.,2004) ("There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable."). Second, Respondent submits Applicant cannot show that the result at his sentencing hearing would have been different but for the fact counsel did not object to the trial court's refusal to answer the jurors' questions regarding the result of a hung jury. Thus, this claim for relief should be denied.

In the event this Court disagrees the issue should be dismissed as a matter of law based on the record below, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(b)(2)(b): Counsel failed to object when the trial court issued improper instructions to the jury under unduly coercive circumstances.

Relevant facts

After receiving the jury's last note, the trial judge proposed that he would bring the jury out, give them an Allen charge, and then give them the option of either continuing deliberations that evening or returning the next day to continue deliberations.

(R. 2926-27). Both the attorneys for the State and Applicant's trial counsel agreed with the suggestion. (R. 2927). The judge then charged the jury as follows:

Ladies and gentlemen, I have your comment. Let me reply to you in this fashion and in this way.

Mr. Foreman, ladies and gentlemen of the jury, you stated that you've been unable to unanimously agree on the decision in this case. As I instructed you earlier, the decision of the jury must be unanimous.

When a matter is in dispute, it isn't always easy for even two people to agree. So, when twelve people must agree, it's even more difficult. In most cases, absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous decision.

In doing so, you should consult with one another, express your own views, listen to the opinions of your fellow jurors, tell each other how you feel, and why you feel that way. Discuss your differences with open minds. Although the decision of the jury must be unanimous, every one of you has a right to your own opinion. The verdict, the decision you agree to must be your own decision, the result of your own convictions, and you should not give up your firmly-held beliefs merely to be in agreement with a fellow juror.

The majority should consider the minority's position, and the minority should consider the majority's position. You should carefully consider and respect the opinion of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and the evidence in this case.

Now, ladies and gentlemen of the jury, I'm going to give you an option at this time. I'm going to ask you to return and continue deliberations with the hope that you can arrive at a decision, a unanimous decision within a reasonable time. If you wish to do so, to continue deliberations tonight to see if you can come to a unanimous decision within a reasonable time, then I'll be glad to let you do so. I'll let you make the decision. If you'd rather go back to the hotel room, come back tomorrow to see if you can reach a unanimous decision in a reasonable time, you can do that. I will let you make the decision.

So, return to the jury room. If you wish to continue deliberations tonight to see if you can reach a unanimous decision, that's fine. That's

your choice, and we'll wait with you. Or if you feel you'd rather return to the hotel rooms and come back tomorrow to continue deliberations, see if you can reach a unanimous decision within a reasonable time, then we'll do that.

(R. 2928, 12 – 2929, 123). No exceptions were taken to the instruction. (R. 2930). The jury subsequently decided to end deliberations for the evening and start again in the morning. (R. 2930).

When the jury returned the next morning, and after the trial court asked if any of the jurors needed to hear the charge again, jurors requested that the judge give the charge again. (R. 2931-33, 2934-35). After discussion with counsel for both Applicant and the State, the trial court repeated the charge to the jury. The court charged the jury as follows:

Ladies and gentlemen, take no emphasis on me repeating it. What I take from you all is that it was after midnight last night and maybe because of the length of the day, you didn't listen carefully or could not listen as carefully as maybe you can after some rest, and you really want me to charge it, but no emphasis about anything other than the fact that you may not heard what I said last night. That's what I assume, so please don't take any, any meaning of about me doing. This is like the first time charging this.

Ladies and gentlemen of the jury and Mr. Foreman, you stated that you've been unable to unanimously agree on the decision in this case. As I instructed you earlier, the decision of the jury must be unanimous. When a matter is in dispute, it isn't always easy for even two people to agree. So, when twelve people must agree, it becomes even more difficult.

In most cases, absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous decision. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way; discuss your differences with open minds.

Although the decision of the jury must be unanimous, everyone of you has the right to your own opinion. The decision you agree to must be

your own decision, the result of your own convictions, and you should not give up your firmly-held beliefs merely to be in agreement with your fellow jurors.

The majority should consider the minority's position, and the minority should consider the majority's position. You should carefully consider and respect the opinions of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and the evidence in this case.

I therefore, ladies and gentlemen, ask you to return to your deliberations with the hope that you can arrive at a verdict within a reasonable time.

Now, ladies and gentlemen, I told you not to deliberate last night after I charged you in this, and I told you not to deliberate this morning until after you I came in and saw you. So, now at this time with that additional charge then, if you would please step to the jury room. You may begin deliberations until you reach a decision within a reasonable time. You may return to your jury room.

(R. 2936, l 22 – 2938, l 19).

Argument

Applicant asserts trial counsel should have objected to this charge because they were improper and were given in unduly coercive circumstances. Respondent submits this contention is without merit.

Neither the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); see also Jones v. United States, 527 U.S. 373, 119 S.Ct. 2090 (1999) (no constitutional requirement that capital jury be informed of consequences of its failure to agree). Whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the circumstances." Lowenfield, supra.

Tucker v. Catoe, 346 S.C. 483, 490-91, 552 S.E.2d 712, 716 (2001).

In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-

handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (citations omitted).

In determining whether an Allen charge is unconstitutionally coercive, a court should look to whether (1) the charge spoke specifically to the minority juror(s); (2) the judge included in his charge any language such as "You have got to reach a decision in this case;" (3) there was an inquiry into the jury's numerical division, which is generally coercive; and (4) whether the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion; and if so, whether the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge. Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237, 108 S.Ct. 546); see State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010), cert. denied, 131 S. Ct. 230, 178 L. Ed. 2d 153 (2010).

Respondent submits the Allen charge given in Applicant's case was not coercive. The language utilized in the charge was similar to the language upheld in Lowenfield and to the charge upheld in Williams. Further, the charge did not speak directly to the minority jurors. The trial court never intimated that the jury had to reach a verdict. The trial court never inquired into the jury's numerical division. And while the jury returned its verdict approximately one hour after hearing the charge, there is no indication in the record that such coercion was readily apparent. Since the Allen charge was not coercive, counsel was not deficient in not objecting to the charge.

Applicant also cannot show that he was prejudiced by counsel not objecting to the Allen charge. First, such an objection would have been without merit because the charge was not coercive. Thus, any objection would have been dismissed. Respondent submits Applicant cannot show that he was otherwise prejudiced by counsel not objecting.

In the event this Court disagrees the issue should be dismissed as a matter of law based upon the record, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(c): Applicant's right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 § 14 of the South Carolina Constitution, was violated by the trial court's refusal to permit him to discharge appointed counsel and proceed pro se.

These allegations are procedurally barred because they could have been raised at trial and on direct appeal.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299

S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979).

Therefore, this ground is not appropriate for PCR.

Second, Respondent submits this claim has essentially been ruled upon by the South Carolina Supreme Court in Applicant's direct appeal. In its opinion, the Supreme Court wrote:

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.

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 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.

Winkler, 388 S.C. at 585-87, 698 S.E.2d at 602-03. Since this issue has already been resolved by the South Carolina Supreme Court, and there have been no intervening changes in the law that would require re-examination of this issue, Respondent submits it cannot be re-examined in this post-conviction relief action. As a result, this claim for relief should be denied.

In the event this Court disagrees the issue should be dismissed as a matter of law based on the record below, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(d) Applicant's right to a fair and impartial jury determination of his sentence –free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3,14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated by the trial court's repeated refusal to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict and the court's improper instructions to the jury under unduly coercive circumstances.

These allegations are procedurally barred because they could have been raised at trial and on direct appeal.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). Therefore, this ground is not appropriate for PCR.

Furthermore, for the reasons underlying Respondent's response to Ground 10(b)(2), Respondent submits these claims are without merit. As a result, this ground should be denied and dismissed. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

CONCLUSION

Each and every allegation in the Application that is not hereinabove expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be denied and dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
(Counsel of Record)

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

By: 

ATTORNEYS FOR RESPONDENT

March 1, 2012.

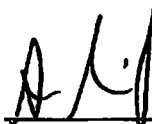
CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the ***Return to Amended Application for Post-Conviction Relief and Motion for more Definite Statement***, by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Emily C. Paavola, Esquire
Death Penalty Resource and Defense Ctr
900 Elmwood Ave., Ste. #101
Columbia, SC 29201

John R. Mills, Esq.
201 West Main St., Ste. # 301
Durham, NC 27701

This 1st day of March, 2012.



ALPHONSO SIMON, JR.

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State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
 Resident Circuit Judge

P. O. Box 479 (zip code 29442)
 401 Cleland St. (zip code 29440)
 Georgetown, South Carolina
 Telephone: (843) 545-3030
 Facsimile: (843) 545-3282
 Email: bculbertsonj@sccourts.org

April 5, 2011

Via Email and U.S. Mail Delivery

Emily C. Paavola, Esquire
 Death Penalty Resource & Defense Center
 900 Elmwood Avenue, Suite 101
 Columbia, SC 29201

Email: Emily@deathpenaltyresource.org

John R. Mills, Esquire
 Attorney at Law
 201 W. Main Street, Suite 301
 Durham, NC 27701

Email: John@jrmillslaw.com

Alphonzo Simon, Jr., Asst. Attorney General
 Office of the Attorney General
 P.O. Box 11549
 Columbia, SC 29211

Email: asimon@scag.gov

J. Gregory Hembree, Solicitor
 Office of the Solicitor, 15th Judicial Circuit
 P.O. Box 1276
 Conway, SC 29528

Email: hembree1@horrycounty.org
psnowden@horrycounty.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
 Case Number: 2011-CP-26-03907

Dear Attorneys:

Please find enclosed a copy of the Form 4 and Order Regarding Respondent's Motion For More Definite Statement.

Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
J. Gregory Hembree, Solicitor

April 5, 2012
Page Two

By copy of this letter and enclosure to the Clerk of Court, I am forwarding the original Form 4 and order for filing.

With kindest regards, I remain

Very truly yours,



Benjamin H. Culbertson

BHC/bhc

Enclosures (a/s)

pc: Melanie Huggins-Ward, Clerk of Court
(via hand delivery)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-26-3907

Louis Michael Winkler, Jr.
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.*
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Respondent's Motion for More Definite Statement is partially GRANTED and partially DENIED.

*This motion was decided without oral arguments.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$ N/A
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Benjamin H. Culbertson
Benjamin H. Culbertson, Circuit Court Judge

2148
Judge Code

April 5, 2012
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows:

Emily C. Paavola

John R. Mills

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alphonzo Simon, Jr.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: None

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2011-CP-26-3907

Louis Michael Winkler, Jr.,)
Applicant,)

vs.)

State of South Carolina,)
Respondent.)

ORDER REGARDING RESPONDENT'S
MOTION FOR MORE DEFINITE STATEMENT

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CLERK OF COURT

Before the court is the respondent's Motion for More Definite Statement. This motion is decided on briefs without oral arguments.

Paragraph 10 & 11(a) (2) of the applicant's First Amended Application For Post-Conviction Relief alleges that the applicant was denied his right to the effective assistance of counsel because the applicant's trial attorney "failed to object to and/or adequately impeach the trial testimony of Mr. Vello Paavel, portions of which were improper, inaccurate, unreliable and inadmissible." Although the applicant does not identify the portions of Mr. Paavel's testimony that should have been objected to and/or impeached, the allegation is not so vague that the respondent cannot frame a response. The respondent need only show that the applicant's trial attorney objected to and/or impeached Mr. Paavel's testimony when it was proper to do so, but refrained from objecting to and/or impeaching Mr. Paavel's testimony when the testimony was proper, accurate, reliable and admissible.

Paragraph 10 & 11(b) (1) of the applicant's First Amended Application For Post-Conviction Relief alleges that the applicant was denied his right to the effective assistance of counsel because the applicant's attorney "failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction." However, the

applicant does not identify what neurological and cognitive impairments and/or dysfunction should have been investigated and what evidence, if any, should have been uncovered and presented. Such allegation is so vague that the respondent cannot frame an adequate response.

Rule 12(e), SCRCP, states as follows:

Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the Court is not obeyed within 15 days after notice of the order or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or make such order as it deems just.

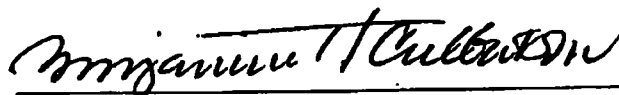
NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED, that the respondent's Motion for More Definite Statement is DENIED as to paragraph 10 & 11(a) (2) of the applicant's First Amended Petition for Post-Conviction Relief; it is further

ORDERED, that the respondent's Motion for More Definite Statement is GRANTED as to paragraph 10 & 11(b) (1) of the applicant's First Amended Petition for Post-Conviction Relief; it is further

ORDERED, that within 15 days of the date of this order, the applicant shall identify the evidence of the applicant's neurological and cognitive impairments and/or dysfunction that should have been presented at trial.

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

April 5, 2012
Conway, SC

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
LOUIS MICHAEL WINKLER, JR.)
Applicant,)
vs.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-26-03907

**SECOND AMENDED APPLICATION
FOR POST-CONVICTION RELIEF**

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court which imposed sentence: Horry County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2006-GS-26-2101
5. The date upon which sentence was imposed and the terms of the sentence: February 8, 2008 (Death Sentence).
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. The Courts to which applicant appealed:
 - (a) The South Carolina Supreme Court.
 - (b) The United States Supreme Court.

The result in each Court to which applicant appealed:

- (a) Affirmed
- (b) Petition for Writ of Certiorari denied.

The date of each result:

- (a) August 16, 2010
- (b) April 25, 2011

Citations of any written opinion or orders entered pursuant to such results:

- (a) *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2011).
- (b) *Winkler v. South Carolina*, 131 S.Ct. 2155, 179 L.Ed.2d 940 (2011).

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Horry County

9. Not applicable.

GROUND'S FOR RELIEF WITH SUPPORTING FACTS

- 10 & 11(a) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 – during the pre-trial and guilt-or-innocence phases of his capital trial – when trial counsel:

(1) failed to object to the trial court's pre-trial refusal to permit Applicant to discharge appointed counsel and allow him to proceed *pro se*. See *Strickland v. Washington*, 466 U.S. 668 (1994); *Faretta v. California*, 422 U.S. 806 (1975);¹

(2) failed to object to and/or adequately impeach the trial testimony of Mr. Vello Paavel, portions of which were improper, inaccurate, unreliable and inadmissible. See *Strickland v. Washington*, 466 U.S. 668 (1994); and,

(3) failed to impeach the State's witnesses with evidence that J. [REDACTED] G. [REDACTED] was not on the telephone with Elizabeth Craft at the time of the crime. See *Strickland v. Washington*, 466 U.S. 668 (1994).

- 10 & 11(b) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 – during the sentencing phase of his capital trial – when trial counsel:

(1) failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction;

¹ With the exception of information "necessary" to respond to the specific claims raised in this First Amended Application For Post-Conviction Relief, applicant does not waive the attorney-client privilege to any extent. S.C. Code § 17-27-130. Applicant requests that his prior counsel not disclose any other portion of their files to respondent or discuss any aspect of their representation outside the narrow scope of this limited waiver. To the extent that there is any uncertainty as to what information is necessary to respond to these specific allegations, applicant requests a judicially supervised *in camera* review of any information in question. This procedure is recommended by the American Bar Association's Standing Committee on Ethics and Professional Responsibility. See ABA Formal Opinion 10-456, issued July 14, 2010.

(2) failed to present mitigating evidence regarding applicant's change in demeanor and mental state before the crime and evidence that the victim harassed and taunted applicant while he was on house arrest;

(3) failed to object when the trial court: (a) repeatedly refused to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict; and, (b) issued improper instructions to the jury under unduly coercive circumstances.

- 10 & 11(c) Applicant's right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 § 14 of the South Carolina Constitution, was violated by the trial court's refusal to permit him to discharge appointed counsel and proceed *pro se*.
- 10 & 11(d) Applicant's right to a fair and impartial jury determination of his sentence – free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated by the trial court's repeated refusal to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict and the court's improper instructions to the jury under unduly coercive circumstances.
- 10 & 11(e) Applicant's right to a fair and impartial jury determination of his sentence – free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated when Juror Jeron Wallingford was coerced into voting for a death sentence by threat of physical harm and intimidation by his fellow jurors.
12. (a) Applicant has not filed any petition in state court other than the mandatory appeal to the South Carolina Supreme Court.
 (b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.
 (c) Applicant has not filed any petitions to the United States Supreme Court other than the petition already specified *supra*.
 (d) Applicant has not filed any motions, petitions, or applications in this or any other Court.
13. Not applicable.
14. Applicant has not raised any ground set forth in (10) in this or any other court.

15. Not Applicable.
16. These grounds rely on additional facts outside the record which was before the previous courts.
17. Applicant was previously represented by counsel.
18. Applicant was represented at trial by Ralph Wilson, Esq., P.O. Box 1827, Conway, SC 29572 and Paul Rathbun, Esq., 203 Laurel Street, Conway, SC 29528.

On direct appeal applicant was represented by Elizabeth Franklin-Best, of the South Carolina Office of Appellate Defense, 1330 Lady Street, Columbia, South Carolina 29201.

19. Applicant seeks relief from his conviction and sentence.
20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
900 Elmwood Avenue
Suite 101
Columbia, South Carolina 29201
(803) 765-1044

JOHN R. MILLS

Attorney at Law
201 W. Main Street
Suite 301
Durham, NC 27701
(919) 251-6259

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT (9)

May 1, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

LOUIS MICHAEL WINKLER, JR.)

SK6027)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
11-CP-26-03907**CERTIFICATE OF SERVICE**

FILED
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CLERK OF COURT

The undersigned certifies that a copy of the foregoing Applicant's Second Amended Application for Post-Conviction Relief, was served by first class United States mail, postage prepaid, this 1st day of May, 2012, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider
Jill A. Rider

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF HORRY)

Louis Michael Winkler, Jr., #6027,)

C/A No. 2011-CP-21-3907)

Applicant,)

v.)

RETURN TO SECOND AMENDED
APPLICATION FOR POST-
CONVICTION RELIEF AND MOTION
FOR MORE DEFINITE STATEMENT
(Capital Case)

The State of South Carolina,)

Respondent.)

Respondent, above-named, here by makes Return to the second amended application for post-conviction relief ("APCR"), served by Louis Michael Winkler, Jr. ("Applicant") on January 31, 2011. This APCR stems from a murder conviction, a first degree burglary conviction, an assault and battery of a high and aggravated nature conviction, and a death sentence.

Respondent respectfully moves for a more definite statement in regards to the allegations set forth in 10 & 11(b)(1) and 10 & 11(b)(2). Respondent submits that as submitted, those allegations are too vague for response.

I. Procedural History

During the May 2006 Term of the Horry County Court of General Sessions, Applicant Louis Michael Winkler was indicted by the Horry County Grand Jury for Murder, Burglary in the First Degree, Assault and Battery of a High and Aggravated Nature, and Escape. (R. 3458-60). The State had filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (R. 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. 1977).

On January 28 – February 8, 2008, ("Winkler") was tried by a jury for murder, first-degree burglary, and assault and battery of a high and aggravated nature.¹ 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. 1903).

On February 8, 2008, the jury found there was evidence of both asserted aggravating circumstances beyond a reasonable doubt. (R. 2940). The jury recommended that Winkler be sentenced to death. (R. 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. 2949).

A timely notice of appeal was filed and served on Applicant's behalf on February 11, 2008. On appeal, Applicant was represented by Robert M. Dudek, Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Elizabeth A. Franklin-Best, Appellate Defender with the South

¹ The State withdrew the Escape charge before trial. (See R. 130).

Carolina Commission on Indigent Defense, Division of Appellate Defense. On April 5, 2010, Applicant perfected his direct appeal with the filing of a Final Brief of Appellant, in which they asserted the following issues:

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?

The State, through Assistant Attorney General Alphonso Simon Jr., filed its Final Brief of Respondent on April 14, 2010. Applicant, through Mr. Dudek and Ms. Franklin-Best, filed his Final Reply Brief of Appellant on April 4, 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. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). Applicant filed a timely petition for rehearing that was denied on September 22, 2010. The Remittitur was also issued on September 22, 2010.

On October 20, 2010, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated February 11, 2011. The State, through Assistant Attorney General Simon, filed its Brief in Opposition to the Petition for Writ of Certiorari on March 28, 2011. Applicant filed a Reply Brief on April 12, 2011. The United States Supreme Court denied the petition for writ of certiorari by order dated April 25, 2011.

Applicant filed a second Petition for Stay of Execution on April 26, 2011. The State filed a response to the Petition for Stay of Execution on April 28, 2011. By Order filed May 25, 2011, the Supreme Court of South Carolina granted Applicant's Petition for Stay of Execution. In the Order, the South Carolina Supreme Court appointed the Honorable Benjamin H. Culbertson, Circuit Court Judge, to hear this post-conviction relief action. Applicant, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on May 2, 2011. By Order filed June 24, 2011, this Court appointed Emily Paavola, Esquire, and John Mills, Esquire, to represent Applicant. On February 2, 2012, Applicant filed his first amended Application for Post-Conviction Relief. Applicant subsequently filed this second amended Application for Post-Conviction Relief.

Incorporated herein by reference are the following documents:²

- (1) Notice of Appeal
- (2) Record on Appeal, containing eight (8) volumes;
- (3) Final Brief of Appellant;
- (4) Final Brief of Respondent;
- (5) Final Reply Brief of Appellant;
- (6) State v. Louis Michael Winkler, Jr., SC S.Ct. Opinion No. 26857, filed August 16, 2010;
- (7) Petition for Rehearing;
- (8) Order Denying Petition for Rehearing;
- (9) Petition for Writ of Certiorari to the Supreme Court of South Carolina;
- (10) Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina;
- (11) Reply Brief to Petition for Writ of Certiorari to the Supreme Court of South Carolina
- (12) Letter acknowledging denial of Petition for Writ of Certiorari

II. Statement of Facts

On March 6, 2006, Applicant Louis Michael Winkler ("Winkler") broke into his estranged wife's condo in North Myrtle Beach, SC. (R. 1430-31, State's Exhibit 1, 51). He knocked her son, J. [REDACTED] G., out of a stool and onto the ground. (R. 1431, 1433, State's Exhibit 1, 51). Winkler then shot the victim, Rebekah Grainger Winkler, once in the face at point blank range. (R. 1436, State's Exhibit 1, 51). According to Dr. Edward

² These documents were attached to Respondent's Return to the initial Application for Post-Conviction Relief.

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. 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. 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. 1634). Dr. Proctor testified that death would have been instant. (R.1637).

Winkler then walked over and pointed the gun at J [REDACTED]. (R. 1437, State's Exhibits 1, 51). Shortly thereafter, Winkler left the condo. (R. 1440, State's Exhibits 1, 51).

M [REDACTED] E [REDACTED] C., Jo [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. 1511-1512). She then heard a hit and the phone went to static. (R. 1512). She also heard someone curse a few times, and then the phone went dead. (R. 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. 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. 1554-55, See State's Exhibit 8). He also testified that a reddish colored liquid was collected from the kitchen countertop. (R. 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. 1744, 1747). Cooper also photographed and collected a broken cordless phone. (R. 1562-63). Cooper also testified that a projectile was recovered from the baseboard of the wall behind the victim. (R. 1566-68). They did not locate a shell casing on the scene. (R. 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. 1645-46). On March 13, 2006, they formed a task force to apprehend Winkler. (R. 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. 1647). The police set up a perimeter around the area where Winkler was last seen on the golf course. (R. 1651). Boyd spotted Winkler moving inside the perimeter. (R. 1652). He testified that Winkler was wearing a dark pullover. Boyd requested that the helicopter assisting with the search scan the area. (R. 1652). The helicopter had to refuel. As the helicopter returned to the scene of the search, Boyd saw Winkler in the wood line. (R. 1653). Police were able to apprehend Winkler without any problems. (R. 1653). Boyd noted that Winkler appearance was consistent with someone who had been outside for a period of time. (R. 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. 1682-83). On March 20, 2006, two of the individuals in the bloodhound tracking team screamed contact in the search of the area.

(R. 1685). He testified that he went to the sound of where the other officers indicated they had made contact with Winkler. (R. 1686). They were standing over Winkler with their guns drawn, and Winkler was laying face down with his hands behind his back. (R. 1686). Rutherford handcuffed Winkler and searched Winkler. (R. 1686). They recovered a Jennings .380 pistol from his right front pants pocket. (R. 1686-87). Five live rounds were in the pistol, but there was not a live round in the port. (R. 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. 1689-91). In the wallet, there was a newspaper clipping about the shooting and Winkler's license. (R. 1691-92). Rutherford also testified that they recovered a green knit cap and a rolled up sweatshirt as part of search for Winkler. (R. 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. 1710). Police found the victim's address on a piece of paper at the residence. (R. 1709-10).

Vello Paavel, a firearms and toolmark examiner for SLED,³ testified that he received a Walther PPK pistol⁴ .380 pistol, a Jennings Bryco .380 pistol, 1 fired projectile, and 18 unfired cartridges with the Jennings Bryco pistol. (R. 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. 1769). He also noted that the magazine of the Walther PPK was full when he received it. (R. 1773). He also noted that the Bryco Jennings pistol's magazine held six cartridges, but

³ Paavel was qualified as an expert in firearms and toolmark examination. (R. 1760).

⁴ This pistol was recovered from underneath the bedroom pillow at the condo where the victim was shot.

only five were in the magazine when he received it. (R. 1777). Paavel concluded that the Jennings Bryco pistol fired the fired bullet. (R. 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. 1992). She noted that they never had problems while she was in high school, but when she went to college, things started changing. (R. 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 doing. (R. 1993-94). Kaiser and Winkler dated for three years, and were then in an on-again, off-again relationship for another two years. (R. 1994). When they were broken up, Kaiser testified that if Winkler saw her talking with someone else, Winkler would harass that person. (R. 1994-95). She noted that Winkler was not always like that, but it was his jealousy that pushed her away. (R. 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. 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. 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. 1998). The two then married. (R. 1999). Kaiser testified that the marriage was good for the first few months. (R. 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. 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. 2001). Winkler would come home drunk, and sometimes trouble would start. (R. 2001). She noted that Winkler would accuse her of being with someone else or doing something whenever she went out. (R. 2001). She testified that he would get very angry and would either kick her or throw her around. (R. 2001). Physical violence was a part of their relationship. (R. 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. 2002). She also testified that the longer the drinking went on, the worse it got. (R. 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. 2002). He did that on three different occasions. (R. 2003). He would accuse her of being with someone else. (R. 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. 2003). Winkler would go with them. (R. 2003).

Kaiser testified that on the day her daughter was born, Winkler came home early, yelling at her. (R. 2004). She testified that he had her up against a wall, and he then kicked her in the stomach six times. (R. 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. 2004-05). Kaiser went to the hospital and went into labor while there. (R. 2005).

When she returned to the family apartment, everything was okay for a couple of weeks. (R. 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. 2006). One day, he did come home and punched her in the face. (R. 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. 2007-08). When she did return, Winkler was nice and had stopped drinking. (R. 2008). However, the final straw in Winkler's and Kaiser's relationship came during Christmas Eve after the baby was born. (R. 2008). Kaiser testified that Winkler did not want to go to his mother's for Christmas. (R. 2009). Kaiser went to go pick up the baby, who was being kept by Kaiser's mother at the time. (R. 2009). When she got back, Winkler stated he did not want to go. (R. 2009). He left, but when he came back, he started throwing Kaiser up against the wall. (R. 2010). Kaiser testified that Winkler threw framed pictures at her, and her arms were cut by the frames and broken glass. (R. 2010). She testified that Winkler then took a gun out, cocked it, and said he would shoot her right then. (R. 2010). She testified that he accused her of cheating, then started beating on her. (R. 2010). After Winkler finished beating and kicking her, Kaiser wrapped her hands in towels because of the blood, grabbed her purse, and ran. (R. 2010-11). She went to Winkler's mother and showed her what Winkler had done. (R. 2011-12). Kaiser then went to the hospital. (R. 2012). She later pressed charges against Winkler. (R. 2013). She left with the baby and moved in with her parents in North Carolina. (R. 2015). She went back to Ohio for the court hearing on the assault charges. (R. 2017). She testified that he was found guilty. (R. 2017). They later got divorced. (R. 2019-20). She testified that Winkler somehow got her parents' phone number and he started calling and harassing them. (R. 2019).

Denise Ricketts, Winkler's second ex-wife, also testified at trial. (R. 2043). She testified that there were no problems when they were initially dating. (R. 2045). However, as time passed, the character of their relationship changed. (R. 2045). She noted that Winkler started being controlling, verbally abusive, and physically abusive. (R. 2045-46). Ricketts testified that the problems started about one year into the relationship. (R. 2046). The couple was invited to a Super Bowl party, but Ricketts did not want to go. (R. 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. 2046). She later forgave Winkler. She did note there were other instances of verbal abuse. (R. 2046). She also testified that Winkler was controlling, and he tried to keep her away from family and friends. (R. 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. 2047-8). She reported this incident to police, and Winkler was later found guilty of criminal domestic violence as a result. (R. 2049-51).

Ricketts testified that she forgave Winkler after he later apologized. (R. 2052). She noted that things between them were fine for a while, but eventually, the same problems arose again. (R. 2052). Winkler started drinking a lot, and when he came home he would be mean to her. (R. 2052). They married in September 2001. (R. 2053). She testified that life was bad during the marriage. (R. 2053). He drank a lot, did not come home from work, and he was verbally abusive. (R. 2054). Ricketts also noted that Winkler was still controlling. (R. 2054). She later left Winkler, in part

because she was in fear he would become physically abusive. (R. 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. 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. 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. 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. 2068). Instead, he took Winkler to the Seacoast Medical Center. (R. 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. 2068). Winkler spat on Cauble. (R. 2068). That led to a simple assault and battery conviction against Winkler. (R. 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. 2077). The missing person was Rebekah Winkler. (R. 2077). Winkler's vehicle was first spotted behind the Seacoast Medical Center. (R. 2078). Another officer had moved the vehicle out of the roadway. (R. 2082). A floor mat, a shoe, and a cigarette butt were recovered from the vicinity of where the Winkler's vehicle was located. (R. 2082). The car was

towed. (R. 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. 2086). Her vehicle was found off the road in some trees. (R. 2086). The Horry County Police Department activated its dog team to try to locate two missing persons at that point. (R. 2091). The victim was later found next to Stephen's Crossroads, which was where the magistrate's complex and library was located. (R. 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. 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. 2099-2100). According to Richardson, the woman looked distraught and was acting confused. (R. 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. 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. 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. 2104). Richardson noted that the woman was on the phone, but she could not hear what she was saying on the phone. (R. 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. 2109). Richardson also indicated that the building became very active with police and emergency medical personnel later that morning. (R. 2109). Richardson later learned it was the victim, Rebekah Winkler, who was making the call in the other room. (R. 2110).

Curtis L. Thompson of the Horry County Police Department testified that he was the first officer to arrive at the building. (R. 2117). He found a white female who was very afraid in the building. (R. 2118). Thompson indicated that it appeared the victim had been in some sort of altercation, and she confirmed that she was Rebekah Winkler. (R. 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. 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. 2124-25). They arrested Winkler, and Hemingway transported him to the M.L. Brown Building. (R. 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. 2137). Cooper testified that the Land Rover, which was registered to Rebekah Winkler, appeared to have been wrecked. (R. 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. 2141). He also noted there was some blood around both seats and around the center console. (R. 2141). On the passenger's side, there were several blood smears and spots on the interior panel of the door. (R. 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. 2144-47). Cooper also took pictures of Winkler's face, arms, and legs. (R. 2150). Cooper transported the blood swabs and the victim's rape kit to SLED. (R. 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. 2162). She testified that during the early stages of Winkler's and the victim's relationship, Winkler seemed to be fine. (R. 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. 2165-66). The victim slept in the bedroom on the first floor, and J [REDACTED] slept on the couch. (R. 2166). When Haley was not there, J [REDACTED] slept in the bedroom upstairs. (R. 2166-67). On October 10, 2005, she and her sister became concerned about their mother's whereabouts. (R. 2167). Haley's sister had called. (R. 2167). That led Haley and her boyfriend to start looking for Rebekah. (R. 2168). Initially, they went to Winkler's home. (R. 2168). When they found his car was not there, they saw a Land Rover in the woods down the road. (R. 2168). It was later identified as her mother's Land Rover. (R. 2169).

Haley saw her mother the next morning at the Seacoast Medical Center. (R. 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. 2170). At first, Rebekah did not want her children to see her, but they talked her into it. (R. 2170). Haley testified that after the incident, her mother was very depressed and could not sleep. (R. 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. 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. 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. 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. 2184-91).

Lisa Gore, a staff nurse at Seacoast Medical Center, treated the victim when she was brought in on October 11, 2005. (R. 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. 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. 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. 2207-10). A sexual assault evidence kit was collected from Rebekah. (R. 2213-15).

Ann Pitts responded to the Stephen's Crossroads Complex. (R. 2220). She later responded to the Seacoast Medical Center to interview the victim. (R. 2221). Pitts testified that the victim seemed to be in shock, and was very afraid. (R. 2222). Rebekah did tell Pitts what happened and where it happened. (R. 2222). The victim also described the clothes she was wearing. (See R. 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. 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. 2227). He was found at a friend's house. (R. 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. 2228). Pitts was also present at Winkler's first bond hearing. (R. 2230). Bond was initially denied in his case. (R. 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. 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. 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. 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. 2249-51).

Tammy Cox was one of Rebekah's friends. (R. 2262-63). They first met when Rebekah trained Cox in medical transcription. (R. 2263-64). Cox testified that Rebekah was shy until you got to know her. (R. 2264). She also described Rebekah as a very sweet and caring person who worked all the time. (R. 2265). Cox indicated that Rebekah did not like having her picture taken. (R. 2266). Rebekah helped Cox with her work and with her illness during Cox's second pregnancy. (R. 2266-67). Cox testified that Rebekah was married to Roger Grainger before she married Winkler. (R. 2268-69). They split in 2001. (R. 2269). When Cox learned of Rebekah's relationship with Winkler, she never saw them out much. (R. 2269). After Rebekah married Winkler, Cox hardly ever saw her. (R. 2270). Cox testified that they only talked on the phone during the day when Winkler was at work. (R. 2269-70). Cox became aware that there were problems in Rebekah and Winkler's relationship in August or September. (R. 2270). She learned of the assault in October 2005. (R. 2271). Cox spent time with Rebekah between October 2005 and Rebekah's murder in March 2006. Cox noticed changes in Rebekah's personality. (R. 2271). Rebekah could not work any more and did not want to do anything any more. (R. 2272). Further, Rebekah did not go out, she lived in fear every day, and she could not sleep at night. (R. 2272). Cox stated that she was a totally different person, and that she was never the same person. (R. 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. 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. 2288). Shelley indicated that Winkler was not very friendly, and when she visited his home, she felt unwelcome. (R. 2288). After Shelley had her first child, Rebekah's first grandchild, Winkler did not really want them around his house. (R. 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. 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. 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. 2291). It was Winkler calling the house because Rebekah had made him leave. (R. 2291). Some time thereafter, Winkler returned to the house and started kicking the side door. (R. 2292). Winkler was yelling and screaming until Rebekah let him into the house. (R. 2292). Shelley threatened to call the police. Winkler responded by warning Rebekah that she knew what would happen if they called the police. (R. 2292). Shelley testified that Rebekah moved out of Winkler's home as a result of this confrontation. (R. 2292).

Shelley also testified about the night of the kidnapping. (R. 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. 2293-94). Shelley called the police when she first heard of the problem. (R. 2294). She noted that her mother's Land Rover was found that night, but there was no sign of either Rebekah or Winkler. (R. 2295). Shelley saw her mother the next morning at Seacoast hospital. (R. 2295). Shelley testified that her mother was very beat up and dirty. (R. 2295). Rebekah's eye was very swollen, and her hair was matted with sand spurs and twigs. (R. 2296). Rebekah was also nervous, and she wanted them to do something with Winkler to get him away from her. (R. 2296). Rebekah was very depressed. (R. 2296). Shelley testified that Rebekah lived in fear all the time and was scared. (R. 2296). Rebekah did not go anywhere or do anything. (R. 2297). She could no longer work, and she was never the same. (R. 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. 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. 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. 2301-02). He also threatened to post the video online. See (R. 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. 2302-03).

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. 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. 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. 2655-57, 2658-60). Dr. William Morton, Jr., who was qualified as an expert in psychopharmacology, also testified. (R. 2695-2743).

Te. Anne Oehler, a social worker, testified that Winkler's father was very controlling of his mother. (R. 2752). When Winkler's parents were first married, they moved in with his father's parents. (R. 2752). Winkler's father made his mother quit her job, even before they had children. (R. 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. 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. 2752).

Oehler further testified that Winkler's mother was the primary caregiver because she was the person home during the day. (R. 2753). His mother was the person involved with Winkler's schoolwork. (R. 2753). Winkler's father did coach all of the boys on their sports teams. (R. 2753). However, Winkler's father would leave and go out after dinner, and he would not come back until 1 or 2 am. (R. 2753). Oehler noted

that Winkler's father had frequently been drinking a lot, and he was not always present at home. (R. 2753-54). She stated that Winkler's father was very controlling towards family members, and he had very poor parenting skills. (R. 2754). While Winkler denied his father ever beat him, both of the oldest Winkler children informed Oehler that their father had beaten them. (R. 2754). The only exception was when Winkler was a junior in high school, and his mother found marijuana in the bathroom. (R. 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. 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. 2754-55).

Oehler also testified that Winkler got his first drink from his father on a camping trip when Winkler was 13. (R. 2755). By the time Winkler graduated from high school, he was using alcohol and marijuana frequently. (R. 2755). At that point, if there was any problem with one of the Winkler children, Winkler's mother addressed it. (R. 2755). Winkler's father was out of the home working more with his insurance business. (R. 2755).

Oehler also testified about Winkler's personal history with women. She noted that Winkler tended to seek out women who had children. (R. 2758). She also noted that Winkler was a chronic drinker throughout the years, starting when he was a teenager. (R. 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. 2760). Oehler asserted that Winkler did not immediately trust others, and he would remain suspicious of others until they proved

otherwise. (R. 2761). Winkler grew up in a strict Catholic home where his father was very rigid. (R. 2761-62). There was no physical abuse later in Winkler's upbringing. (R. 2762). Also, Winkler's father controlled his wife and children through finances. (R. 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. 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. 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. 2766). Some of his family relationships focused around holiday times, and he always seemed to be surrounded by children. (R. 2766-67).

After further testimony from Oehler, Rosemary Wolfe, a tenant in the Tillman property where Winkler worked testified on his behalf. (R. 2782-87). Counsel also presented the testimony of two of Applicant's sisters, one of Applicant's brothers, and Applicant's mother. They all testified about Applicant's upbringing and their interactions with Applicant as an adult. They all also requested the jury please spare Applicant's life. (R. 2790-2810). Counsel also presented the testimony of Sharon Myers, the lieutenant over the classifications division of the Horry County Sheriff's Department. (R. 2811-16). She testified that Applicant only had two infractions while being detained at the J. Reuben Long Detention Center. One was related to the fact Applicant was not wearing his ankle monitor when he was arrested. The second was for being out of his cell at an improper time on June 26, 2006. (R. 2813-14).

III. Allegations in the second Amended Application for Post-Conviction Relief

Applicant asserts as follows:

10 & 11(a) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 -- during the pre-trial and guilt-or-innocence phases of his capital trial -- when trial counsel:

- (1) failed to object to the trial court's pre-trial refusal to permit Applicant to discharge appointed counsel and allow him to proceed pro se. See Strickland v. Washington, 466 U.S. 668 (1994); Faretta v. California, 422 U.S. 806 (1975);
- (2) failed to object to and/or adequately impeach the trial testimony of Mr. Vello Paavel, portions of which were improper, inaccurate, unreliable and inadmissible. See Strickland v. Washington, 466 U.S. 668 (1994); and,
- (3) failed to impeach the State's witnesses with evidence that J [REDACTED] G [REDACTED] was not on the telephone with E [REDACTED] Cr [REDACTED] at the time of the crime. See Strickland v. Washington, 466 U.S. 668 (1994).

10 & 11(b) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 -- during the sentencing phase of his capital trial -- when trial counsel:

- (1) failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction; and
- (2) failed to present mitigating evidence regarding applicant's change in demeanor and mental state before the crime and evidence that the victim harassed and taunted applicant while he was on house arrest;
- (3) failed to object when the trial court: (a) repeatedly refused to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict; and, (b) issued improper instructions to the jury under unduly coercive circumstances.

10 & 11(c) Applicant's right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 § 14 of the South Carolina Constitution, was violated by the trial court's refusal to permit him to discharge appointed counsel and proceed pro se.

10 & 11(d) Applicant's right to a fair and impartial jury determination of his sentence – free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated by the trial court's repeated refusal to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict and the court's improper instructions to the jury under unduly coercive circumstances.

10 & 11(e) Applicant's right to a fair and impartial jury determination of his sentence – free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated when Juror Jeron Wallingford was coerced into voting for a death sentence by threat of physical harm and intimidation by his fellow jurors.

General Law on Ineffective Assistance Of Counsel.

Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598-99 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

... the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

Next, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 1514 (2000).

In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors,

the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death,” citing Strickland. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jones, 332 S.C. at 333, 504 S.E.2d at 823 (quoting Strickland). Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) (“[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.” Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath’s favor.”).

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant’s trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that Applicant’s attorneys were diligent in their representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239

S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

Ground 10(a): Ineffective Assistance of Counsel during pre-trial and guilt phase

Ground 10(a)(1): Counsel failed to object to the trial court's pre-trial refusal to permit Applicant to discharge appointed counsel and allow him to proceed pro se. See Strickland v. Washington, 466 U.S. 668 (1994); Faretta v. California, 422 U.S. 806 (1975)

Relevant Facts

At Applicant's first appearance, Ms. Orrie West, Esquire, a public defender for Horry County, was appointed to represent him. (R. 2984). One of Applicant'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. 2985). At the appointment of counsel hearing on June 15, 2006, Ralph Wilson, Esquire, was appointed to serve as first chair in Applicant's defense. (R. 2993-94). At the hearing, Applicant indicated that he found the Public Defender's Office to be very inadequate. (R. 2991). He complained that Ms. West called him by the wrong first name. (R. 2991). Applicant also indicated that he had concerns about Mr. Rathbun because Rathbun told him he had not tried a murder case before. (R. 2992). When asked if he had any objections to Rathbun being appointed as second chair, Applicant indicated that he had an objection. (R. 2999). He indicated that he and Rathbun had argued more than anything. (R. 2999).

At the July 3, 2007 hearing, Applicant's trial counsel put on the record that Applicant was dissatisfied with Mr. Rathbun as counsel because of disagreements they had. (R. 3260). Wilson noted that a couple of weeks before the hearing, Rathbun went to see Applicant, and they had a conversation. (R. 3260). Rathbun and Wilson had

gone to see Applicant the Friday before, but they were not able to see Applicant because he had been taken to Charleston to meet with a psychiatrist. (R. 3260). Rathbun went to see Applicant the following Monday. (R. 3260). On Tuesday, Applicant was upset and irate. (R. 3260). Applicant told Wilson that Rathbun had said some things. (R. 3261). The Court indicated that Applicant 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 Applicant's rights to receive a fair trial. (R. 3262). Wilson indicated that even when there have been disagreements between Rathbun and Applicant, Wilson has been able to sit down with Applicant and decide on the correct course of action with Applicant's consent. (R. 3262). Applicant was heard in this matter. (R. 3263-64). He informed the court that Rathbun was telling him to take a plea, plead guilty. (R. 3264). He told the court that when he sought counsel about the issue, Rathbun told him to plead guilty. (R. 3264). Applicant interpreted that to mean that Rathbun thought he was guilty. (R. 3264). Rathbun responded that he believed Applicant heard what he wanted to hear and didn't hear what counsel was saying. (R. 3265). Rathbun affirmed to the court that he would do his utmost to represent Applicant in a trial. (R. 3265).

During an ex parte hearing held before jury selection. Counsel indicated that during the telephonic conference on the Thursday before this hearing, Applicant started giving details about an incident that occurred between Applicant and Wilson. The Court allowed Applicant the opportunity to get the information on the record. Applicant told the court that he wanted Wilson to go forward as counsel. (R. 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. 32). He informed the court that Rathbun got in his face, put his finger in Applicant's face, and touched his face. (R. 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. 33). The court noted that it did not think that was enough to warrant counsel be relieved. (R. 33). Applicant asked, "how can I get a fair trial with guys that are against me? I mean, they've actually - -" (R. 34). Applicant informed the court that he did not believe they would do their best to get him acquitted. (R. 34).

In response, Wilson informed the court that he had done everything he knew to do to represent Applicant in the best fashion he knew. (R. 34). He also indicated that Applicant is antagonistic, and has been so since the first day. (R. 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. 34). He informed the court they were prepared for trial. (R. 34). The fact that Applicant'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. 34-5). Rathbun also stated he was ready for trial. (R. 35). Applicant complained that his attorneys did not find a witness. (R. 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. Applicant indicated he thought the witness was still in Horry County. Applicant 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. 37). He also complained that no one has gone out to the murder scene and measured couches and counters. (R. 39). Wilson noted that they could not because the unit belonged to the daughter of the victim, not the defendant. (R. 39).

Applicant continually complained that counsel was advising his family that Applicant was likely going to be convicted. (R. 41-2). The Court responded that it could not chastise counsel for giving him an honest opinion. (R. 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. 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 Applicant testify in the guilt phase of trial. (R. 1376-81).

Argument

First, to the extent Applicant asserts that trial counsel was ineffective for not objecting to the trial judge denying a request for Applicant to represent himself, Respondent submits this claim should be denied and dismissed because it is not supported by the record. As was noted by the trial court and by the South Carolina Supreme Court in the opinion in Applicant's direct appeal, Applicant never made a request to represent himself pre-trial. (See R. 42; see also Winkler, 388 S.C. at 586, 698 S.E.2d at 602). Since a request was not made pretrial, and the trial court did not rule upon such a request pretrial, counsel had no opportunity to object to a denial of

such a request. Thus, counsel could not be deficient in this regard, and Applicant cannot show that he was prejudiced.

Second, to the extent Applicant contends trial counsel was ineffective for not objecting to the trial judge denial of Applicant's request for counsel to be relieved, Respondent submits this claim is without merit.

Applicant cannot show that counsel was deficient in this regard. In each instance in the record that Applicant indicated he wanted a new attorney, counsel ensured the issue was heard by the trial court. (See R. 32-42, 3260-65). The trial court heard from the Applicant and the attorneys at each instance, and the court denied the request to relieve counsel in both situations. Since counsel brought Applicant's concerns and requests to relieve counsel to the trial court's attention, and the trial court ruled on the matter both times, Respondent submits counsel was not deficient. Additional objection was not needed to preserve the issue for appeal. See generally State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.")(quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002)).

Applicant also cannot show that he was prejudiced by counsel not further objecting to the trial court's denial of Applicant's request to relieve counsel. First, as already noted, an additional objection was not needed to preserve any challenge to the denial of Applicant's motion to relieve counsel for appeal. Second, even if an additional

objection was needed to preserve the issue for appeal, Applicant was not entitled to relief upon a claim that the trial court improperly denied his requests to relieve counsel. "A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Graddick, 345 S.C. 383, 385-86, 548 S.E.2d 210, 211 (2001)(citing State v. Hyman, 276 S.C. 559, 562, 281 S.E.2d 209, 211 (1981), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)). The defendant has the burden of establishing satisfactory cause for removal. Graddick, 345 S.C. at 386, 548 S.E.2d at 211; Hyman, 276 S.C. at 562, 281 S.E.2d at 211. Respondent submits the record supports a finding that the trial court did not abuse its discretion in denying the requests to relieve counsel. Since the trial court did not abuse its discretion, Applicant was not entitled to relief upon the underlying claim. Thus, Applicant cannot establish that the result at his trial would have been different had counsel further objected to the trial court's denial of Applicant's request to relieve counsel. This claim should therefore be denied.

In the event this Court disagrees the issue should be dismissed as a matter of law based upon the record, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(a)(2): Counsel failed to object to and/or adequately impeach the trial testimony of Mr. Vello Paavel, portions of which were improper, inaccurate, unreliable and inadmissible. See Strickland v. Washington, 466 U.S. 668 (1994).

Relevant Facts

Vello Paavel is a firearms and toolmarks examiner with the State Law Enforcement Division. (R. 1757). He was qualified as an expert in firearms and

toolmarks examination at Applicant's criminal trial. (R. 1760). Agent Paavel testified that he received a Walther PPK .380 caliber pistol with a magazine with 7 unfired cartridges; a Jennings Bryco .380 caliber pistol with a magazine five unfired .380 caliber cartridges; one fired projectile; and 18 unfired cartridges. (R. 1760-61). Paavel testified that his examination of the Walther PPK pistol indicated the firearm had not been fired since the last time it was cleaned, or the last time the barrel was oiled. (R. 1769). Paavel determined the Walther pistol had not fired the projectile he examined. (R. 1770). Paavel also testified that the magazine for the Walther pistol was full when he received the weapon. (R. 1773).

Paavel further testified that he examined the Bryco pistol, and it had been fired at some point in time. (R. 1775). Paavel noted the magazine for the Bryco held six cartridges, and there five in the magazine he examined. (R. 1777). Paavel concluded the fired projectile he was provided was fired by the Bryco pistol. (R. 1787).

During the cross-examination, Paavel noted the bullet was definitely dented and damaged. (R. 1788). He further noted that he did not see anything on the bullet before he decontaminated it for his examination. (R. 1789). Paavel testified that he test fired the Bryco pistol four times, and he did not have any misfires. (R. 1791-92). He also noted that the Walther pistol had dust, lint, and oil, and he could not say when the oil was put in the pistol or when the lint got into the pistol. (R. 1792-93). Paavel also testified about elemental bullet lead analysis, which at one point in time was used by the FBI as a means to determine whether bullets had a common origin. (R. 1794-95). He noted that it was later determined that the interpretation of the results in elemental bullet

lead analyses was overstated. (R. 1795). During redirect, Paavel testified that no such elemental bullet lead analysis was performed in this case. (R. 1796).

Response

Respondent denies that counsel were deficient or that Applicant was prejudiced by counsel's handling of Agent Paavel as a witness. Applicant has not set forth any factual assertion regarding what was "inaccurate, unreliable and inadmissible" about Paavel's testimony. Respondent submits the record reflects that Agent Paavel's testimony was proper, and counsel had no basis for objecting to his testimony. Further, Applicant's claim that counsel failed to adequately impeach Agent Paavel is without merit. Again, Applicant does not set forth how Agent Paavel should have been impeached. "In hindsight, there are a few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would past muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). Here, counsel vigorously cross-examined Paavel. Applicant cannot show that counsel's efforts were deficient. Nor can Applicant establish he was prejudiced. As a result, this claim for relief should be denied and dismissed with prejudice. In the event this Court disagrees any of these issues should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(a)(3): Counsel failed to impeach the State's witnesses with evidence that J. G. was not on the telephone with E. C. at the time of the crime. See Strickland v. Washington, 466 U.S. 668 (1994).

Relevant Facts

At trial, J. G., the victim's son, testified that on the afternoon of the shooting, he was eating supper and talking on the phone with his friend L. (R. 1427-29). He noted that he was talking with her on his house phone. (R. 1430). While they were talking, he heard a loud noise at the door. (R. 1430). After hearing a second loud noise, the front door to the condo flew open. (R. 1430-31). He then saw the Applicant enter the condo yelling and cursing. (R. 1431). J. testified that the Applicant hit him and knocked him over. (R. 1431). J. indicated that the telephone was smashed and broken in the encounter. (R. 1434). A photograph of the broken telephone was entered into evidence as State's Exhibit 25. (R. 1435).

After Applicant killed the victim and left, J. got his cell phone and called the police. (R. 1440). A copy of the 911 call was entered into evidence as State's Exhibit 1 (R. 1409). J. further testified that he spoke with L. again after the police arrived at the condo. (R. 1443). He noted that he thought she called him. (R. 1443). J. also indicated that he thought he called both of his sisters. (R. 1443). During cross-examination, J. testified that he also called his father, Roger Grainger, that night. (R. 1446). He also noted that it was approximately 5:30 p.m. when he was talking with L. on the phone. (R. 1448). J. recounted that when the Applicant entered the condo, he walked over to J. and knocked the phone out of his hand. (R. 1451).

M ■ E ■ C. (L ■), J ■ G.'s friend, testified that she called J ■ on the afternoon of the shooting. (See R. 1510-12). L ■ testified that she initially called J ■'s house phone around 5 p.m. (R. 1510, 1511). She noted that the victim was on the phone, and the victim told L ■ to call back later. (R. 1510). L ■ testified that she called back around 5:25 or 5:30. (R. 1511). She noted that she called from her house phone to J ■'s house phone. (R. 1511). L ■ 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." (R. 1511-1512). She then heard a hit and the phone went to static. (R. 1512). She also heard someone curse a few times, and then the phone went dead. (R. 1512). L ■ tried calling back to J ■'s house phone a few times to no avail. (R. 1512). She noted that she called J ■'s cell phone at around 5:56 or 5:57. (R. 1512-13). L ■ later clarified that J ■ had called her on her cell phone around 5:56 or 5:57, and not vice versa. (R. 1518, see 1521-22). L ■ also noted that she could not check the times for the phone calls from the house phone, but she could check the records from her cell phone. (R. 1519, see R. 1521).

Response

Respondent submits the Applicant cannot show that he is entitled to relief upon this claim. Respondent submits that counsel acted reasonably in not attempting to impeach either witness to the phone conversation by asserting they were not on the phone at the time. Respondent further submits that trial counsel's decision not to impeach the witnesses with such an assertion would have been the result of a

reasonable strategic decision by counsel. However, this claim cannot be resolved solely on the trial court record. Thus, Respondent requests that any questions of fact regarding this issue be heard at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(b): Ineffective Assistance of Counsel during the sentencing phase of his capital trial

Ground 10(b)(1): Counsel failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction

Pursuant to Rule 12(e) of the South Carolina Rules of Civil Procedure, Respondent moves for a more definite statement because the allegation as stated is too vague for a response to be framed. In this claim, Applicant asserts that counsel failed to investigate and present evidence of alleged neurological and cognitive impairments and/or dysfunction. However, Applicant does not set forth what evidence, if any, counsel should have uncovered and presented. Respondent requests that Applicant indicate what evidence of neurological and cognitive impairment and/or dysfunction Applicant should have uncovered.⁵

⁵ Respondent would note that in the first Amended application, the Applicant raised this same claim. Respondent moved for a more definite statement in response, and this Court granted the motion for a more definite statement. The Applicant, in response, did file a more definite statement asserting as follows:

Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, sections 3 and 14 of the South Carolina Constitution and S.C. Code section 17-3-20---during the sentencing phase of his capital trial-when trial counsel failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction, including a history of head injuries and exposure to trauma resulting in neurological damage, impaired brain functioning, and compromised judgment complicated by a family history of progressive neurological conditions, including dementia and Alzheimer's disease.

Respondent further submits Applicant cannot show that counsel was deficient in this regard, and further cannot show that Applicant was prejudiced. Respondent further submits that this issue raises questions of fact that cannot be resolved solely on the record below. Thus, Respondent requests that any questions of fact regarding this issue be heard at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(b)(2): Counsel failed to present mitigating evidence regarding applicant's change in demeanor and mental state before the crime and evidence that the victim harassed and taunted applicant while he was on house arrest.

Relevant facts

During the sentencing phase, the Applicant testified. During the course of his testimony, the Applicant made several allegations that the victim was visiting his home while they both had restraining orders against one another. (R. 2438-39, 2497, 2579). Applicant asserted he saw the victim in his driveway three times. (R. 2439). He claimed that when he saw her, he would not leave his home. (R. 2440-41). He further claimed that other individuals also witnessed her appearances in his neighborhood. In fact, Applicant asserted some of his friends from Raleigh photographed and videotaped

It is not clear from the second amended Application whether the Applicant intends to raise the claim as asserted in the more definite statement. Thus, Respondent moves for a more definite statement in this claim. To the extent the Applicant is asserting the claim raised in the more definite statement, Respondent submits Applicant could not show counsel was deficient in this regard. See Wiggins v. Smith, 123 S.Ct. 2527 (2003) ("In assessing the reasonableness of an attorney's presentation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further"). Furthermore, Respondent submits the Applicant will not be able to show that he was prejudiced. Inasmuch as these claims raise factual issues as to counsel's investigation, preparation, and representation, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

her. (R. 2441). Applicant also asserted that he told Aaron Wilkes of the Horry County Police Department. (R. 2441-42). Applicant also claimed that the victim would call his house and hang up. (R. 2497, 2579). A diary that Applicant kept between October 10, 2005 and the murder was introduced into evidence by the State as State's Exhibit 162. (R. 2584-85, 2633-36).

Response

First, Respondent moves for a more definite statement in regards to the first allegation within this claim, i.e., counsel failed to present mitigating evidence regarding applicant's change in demeanor and mental state before the crime. It is unclear from the allegations set forth what constitutes the period "before the crime." Further, it is unclear from the allegations what Applicant asserts was his demeanor and mental state "before the crime." Without more specific details regarding these allegations, Respondent cannot properly respond to the allegation.

As to the allegation that counsel failed to present evidence the victim allegedly harassed and taunted Applicant while he was on house arrest, Respondent submits Applicant cannot show that counsel was deficient in this regard, and further cannot show that Applicant was prejudiced. Counsel did present evidence of the alleged harassment through Applicant's testimony. Thus, the presentation of any additional evidence would have been cumulative to Applicant's testimony. Since the presentation of additional evidence would have been cumulative, Applicant cannot show counsel was ineffective in not presenting such additional evidence. Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011). Furthermore, Applicant has neither identified what additional evidence could have been presented nor shown that such additional evidence

would have been admissible at trial. Respondent submits that the overall mitigation presentation made by trial counsel was proper and effective, and the decision to present the mitigation case in the way presented at trial was the result of reasonable trial strategy. Thus, Applicant is not entitled to relief upon this claim. See generally Meyer v. Branker, 506 F.3d 358, 371 (4th Cir. 2007). Finally, Respondent submits Applicant cannot show that he was prejudiced in light of the strength of the State's case in aggravation and the limited, if any, mitigating value this alleged evidence may have had. See generally Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998). Respondent further submits that this issue raises questions of fact that cannot be resolved solely on the record below. Thus, Respondent requests that any questions of fact regarding this issue be heard at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(b)(3)(a): Counsel failed to object when the trial court repeatedly refused to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict.

Relevant facts

During the jury deliberations, the jurors sent the trial judge a note asking the following question: "Could you please explain what happens if we're not able to reach a unanimous decision?" (R. 2921, ll 23-4). The trial judge then indicated that he had shared the question with both counsel for the State and counsel for Applicant. (R. 2921-22). There was agreement amongst the attorneys and the trial judge that the jurors were not indicating they were deadlocked, and all were concerned about the ramifications of responding to the question. (R. 2922). In light of those concerns, the

trial judge sent a response stating, "I cannot answer the question the way you phrased it. Please let me know if you have any other questions." (R. 2923, ll 5-7).

After receiving no response from the jury, the trial judge indicated on the record that the attorneys for both sides expressed concern regarding whether the jury did have a question. (R. 2923-24). As a result, the trial judge sent a second note to the jury, asking, "Mr. Foreman and members of the jury, do you have any questions or messages for the court?" (R. 2924, ll 13-4). In response, the judge received the following question from the jurors: "What is the law state when a jury does not reach any unanimous decision at this stage of the trial?" (R. 2925, ll 3-5).

The trial judge indicated that he believed the question was a hypothetical question. (R. 2925). After discussing the matter further with the attorneys, the trial judge sent the jury another note. In this note, the judge stated, "I cannot answer hypothetical questions. Do you have any specific questions to ask or comments that you would like to make about your jury?" (R. 2925 l 23- 2926 l 1). Shortly thereafter, the jury sent another note to the trial judge. (R. 2926, Ct. Exh. 25). Both sides agreed that the last message from the jury indicated they were deadlocked. (R. 2926).

Argument

Applicant asserts trial counsel was ineffective in not objecting to the trial court not answering the jurors' questions regarding what would happen if the jury could not come to a unanimous verdict. This contention is without merit.

Trial counsel was not deficient when they did not object to the trial judge's decision not to answer the questions. The trial court was well within its discretion in

refusing to answer the initial questions asked by the jury, and, as a result, counsel had no basis for objecting. S.C. Code Ann. § 16-3-20(C) states:

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).

The South Carolina Supreme Court has held that this sentencing portion of the subsection (C) does not need to be shared with the jury.

The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

State v. Adams, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Copeland, 278 S.C. 572, 584-85, 300 S.E.2d 63, 70 (1982); see State v. Spann, 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983)(finding harmless error when judge instructed jury that any sentence for life imprisonment must be unanimous because jury need not be instructed of legal effect of unalterable divided jury). "[T]he Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381 (1999).

We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." Allen v. United States, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896). We further have recognized that in a capital sentencing

proceeding, the Government has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." Lowenfield v. Phelps, 484 U.S. 231, 238, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (citation and internal quotation marks omitted). We are of the view that a charge to the jury of the sort proposed by petitioner might well have the effect of undermining this strong governmental interest.

Jones, 527 U.S. at 382 (footnote omitted).

The questions posed by the jurors specifically asked what would happen if they did not reach a unanimous verdict. In light of the longstanding precedent against informing jurors of what would occur if they did not reach a unanimous verdict, it was proper for the trial court to not respond to the jurors' questions on that subject. Thus, trial counsel had no basis for objecting to the trial court's refusal to answer the questions. As a result, counsel was not deficient.

Applicant cannot show that he was prejudiced by counsel not objecting to the trial court's refusal to answer those questions from the jury. First, as already noted, the trial court's refusal to answer the questions was proper. Thus, any objection would have been without merit. See, e.g., Werts v. Vaughn, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); see also Almon v. U.S., 302 F.Supp.2d 575, 586 (D.S.C.,2004) ("There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable."). Second, Respondent submits Applicant cannot show that the result at his sentencing hearing would have been different but for the fact counsel did not object to the trial court's refusal to answer the jurors' questions regarding the result of a hung jury. Thus, this claim for relief should be denied.

In the event this Court disagrees the issue should be dismissed as a matter of law based on the record below, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(b)(3)(b): Counsel failed to object when the trial court issued improper instructions to the jury under unduly coercive circumstances.

Relevant facts

After receiving the jury's last note, the trial judge proposed that he would bring the jury out, give them an Allen charge, and then give them the option of either continuing deliberations that evening or returning the next day to continue deliberations. (R. 2926-27). Both the attorneys for the State and Applicant's trial counsel agreed with the suggestion. (R. 2927). The judge then charged the jury as follows:

Ladies and gentlemen, I have your comment. Let me reply to you in this fashion and in this way.

Mr. Foreman, ladies and gentlemen of the jury, you stated that you've been unable to unanimously agree on the decision in this case. As I instructed you earlier, the decision of the jury must be unanimous.

When a matter is in dispute, it isn't always easy for even two people to agree. So, when twelve people must agree, it's even more difficult. In most cases, absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous decision.

In doing so, you should consult with one another, express your own views, listen to the opinions of your fellow jurors, tell each other how you feel, and why you feel that way. Discuss your differences with open minds. Although the decision of the jury must be unanimous, every one of you has a right to your own opinion. The verdict, the decision you agree to must be your own decision, the result of your own convictions, and you should not give up your firmly-held beliefs merely to be in agreement with a fellow juror.

The majority should consider the minority's position, and the minority should consider the majority's position. You should carefully consider and respect the opinion of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and the evidence in this case.

Now, ladies and gentlemen of the jury, I'm going to give you an option at this time. I'm going to ask you to return and continue deliberations with the hope that you can arrive at a decision, a unanimous decision within a reasonable time. If you wish to do so, to continue deliberations tonight to see if you can come to a unanimous decision within a reasonable time, then I'll be glad to let you do so. I'll let you make the decision. If you'd rather go back to the hotel room, come back tomorrow to see if you can reach a unanimous decision in a reasonable time, you can do that. I will let you make the decision.

So, return to the jury room. If you wish to continue deliberations tonight to see if you can reach a unanimous decision, that's fine. That's your choice, and we'll wait with you. Or if you feel you'd rather return to the hotel rooms and come back tomorrow to continue deliberations, see if you can reach a unanimous decision within a reasonable time, then we'll do that.

(R. 2928, 12 – 2929, 123). No exceptions were taken to the instruction. (R. 2930). The jury subsequently decided to end deliberations for the evening and start again in the morning. (R. 2930).

When the jury returned the next morning, and after the trial court asked if any of the jurors needed to hear the charge again, jurors requested that the judge give the charge again. (R. 2931-33, 2934-35). After discussion with counsel for both Applicant and the State, the trial court repeated the charge to the jury. The court charged the jury as follows:

Ladies and gentlemen, take no emphasis on me repeating it. What I take from you all is that it was after midnight last night and maybe because of the length of the day, you didn't listen carefully or could not listen as carefully as maybe you can after some rest, and you really want me to charge it, but no emphasis about anything other than the fact that

you may not heard what I said last night. That's what I assume, so please don't take any, any meaning of about me doing. This is like the first time charging this.

Ladies and gentlemen of the jury and Mr. Foreman, you stated that you've been unable to unanimously agree on the decision in this case. As I instructed you earlier, the decision of the jury must be unanimous. When a matter is in dispute, it isn't always easy for even two people to agree. So, when twelve people must agree, it becomes even more difficult.

In most cases, absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous decision. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way; discuss your differences with open minds.

Although the decision of the jury must be unanimous, everyone of you has the right to your own opinion. The decision you agree to must be your own decision, the result of your own convictions, and you should not give up your firmly-held beliefs merely to be in agreement with your fellow jurors.

The majority should consider the minority's position, and the minority should consider the majority's position. You should carefully consider and respect the opinions of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and the evidence in this case.

I therefore, ladies and gentlemen, ask you to return to your deliberations with the hope that you can arrive at a verdict within a reasonable time.

Now, ladies and gentlemen, I told you not to deliberate last night after I charged you in this, and I told you not to deliberate this morning until after you I came in and saw you. So, now at this time with that additional charge then, if you would please step to the jury room. You may begin deliberations until you reach a decision within a reasonable time. You may return to your jury room.

(R. 2936, I 22 – 2938, I 19).

Argument

Applicant asserts trial counsel should have objected to this charge because they were improper and were given in unduly coercive circumstances. Respondent submits this contention is without merit.

Neither the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); see also Jones v. United States, 527 U.S. 373, 119 S.Ct. 2090 (1999) (no constitutional requirement that capital jury be informed of consequences of its failure to agree). Whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the circumstances." Lowenfield, *supra*.

Tucker v. Catoe, 346 S.C. 483, 490-91, 552 S.E.2d 712, 716 (2001).

In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (citations omitted).

In determining whether an Allen charge is unconstitutionally coercive, a court should look to whether (1) the charge spoke specifically to the minority juror(s); (2) the judge included in his charge any language such as "You have got to reach a decision in this case;" (3) there was an inquiry into the jury's numerical division, which is generally coercive; and (4) whether the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion; and if so, whether the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge. Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237, 108 S.Ct. 546); see State

v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010), cert. denied, 131 S. Ct. 230, 178 L. Ed. 2d 153 (2010).

Respondent submits the Allen charge given in Applicant's case was not coercive. The language utilized in the charge was similar to the language upheld in Lowenfield and to the charge upheld in Williams. Further, the charge did not speak directly to the minority jurors. The trial court never intimated that the jury had to reach a verdict. The trial court never inquired into the jury's numerical division. And while the jury returned its verdict approximately one hour after hearing the charge, there is no indication in the record that such coercion was readily apparent. Since the Allen charge was not coercive, counsel was not deficient in not objecting to the charge.

Applicant also cannot show that he was prejudiced by counsel not objecting to the Allen charge. First, such an objection would have been without merit because the charge was not coercive. Thus, any objection would have been dismissed. Respondent submits Applicant cannot show that he was otherwise prejudiced by counsel not objecting. Respondent also asserts that trial counsel decision not to object was reasonable trial strategy.

In the event this Court disagrees the issue should be dismissed as a matter of law based upon the record, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(c): Applicant's right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 § 14 of the South Carolina Constitution, was violated by the trial court's refusal to permit him to discharge appointed counsel and proceed pro se.

These allegations are procedurally barred because they could have been raised at trial and on direct appeal.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). Therefore, this ground is not appropriate for PCR.

Second, Respondent submits this claim has essentially been ruled upon by the South Carolina Supreme Court in Applicant's direct appeal. In its opinion, the Supreme Court wrote:

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.

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 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.

Winkler, 388 S.C. at 585-87, 698 S.E.2d at 602-03. Since this issue has already been resolved by the South Carolina Supreme Court, and there have been no intervening changes in the law that would require re-examination of this issue, Respondent submits

it cannot be re-examined in this post-conviction relief action. As a result, this claim for relief should be denied.

In the event this Court disagrees the issue should be dismissed as a matter of law based on the record below, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(d) Applicant's right to a fair and impartial jury determination of his sentence –free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3,14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated by the trial court's repeated refusal to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict and the court's improper instructions to the jury under unduly coercive circumstances.

These allegations are procedurally barred because they could have been raised at trial and on direct appeal.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). Therefore, this ground is not appropriate for PCR.

Furthermore, for the reasons underlying Respondent's response to Ground 10(b)(2), Respondent submits these claims are without merit. As a result, this ground should be denied and dismissed. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Ground 10(e): Applicant's right to a fair and impartial jury determination of his sentence – free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated when Juror Jeron Wallingford was coerced into voting for a death sentence by threat of physical harm and intimidation by his fellow jurors.

"The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors." State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998) (citing Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); S.C. Const. art I, §§ 3 & 14). The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence. State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005); State v. Smith, 338 S.C. 66, 525 S.E.2d 263 (Ct.App.1999). Where a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice. Zeigler, supra; State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct.App.2004); see also State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) (a defendant must demonstrate

prejudice from jury misconduct in order to be entitled to a new trial). Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case. Smith, 338 S.C. at 71, 525 S.E.2d at 266.

"As a general rule, juror testimony may not be the basis for impeaching a jury verdict. Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict." State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). Rule 606(b), SCRE states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

"[J]uror testimony involving internal misconduct is competent only when necessary to ensure due process, i.e. fundamental fairness." Id.

[T]he exception to the general rule against review of internal jury deliberations carved out in Hunter is a narrow one, limited by our supreme court to those few situations which implicate due process raising a question of fundamental fairness.

But the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be lightly made.

State v. Franklin, 341 S.C. 555, 562, 534 S.E.2d 716, 720 (Ct. App. 2000). "The occurrence of a significant degree of jury misconduct calling for the admission of juror testimony has proved to be quite rare." Shumpert v. State, 378 S.C. 62, 69, 661 S.E.2d

369, 372 (2008) (citing State v. Pittman, 373 S.C. at 554-55, 647 S.E.2d at 158 (suggesting that the mine-run of prejudicial jury misconduct cases involve internal coercion based on race or gender bias)). In Shumpert, the Supreme Court warned that trial courts should exercise a degree of caution before entertaining juror testimony presented in an attack on a jury's verdict. Shumpert, 378 S.C. at 69, 661 S.E.2d at 372.

In Franklin, the South Carolina Court of Appeals found no error in the trial court's denial of the appellant's request for a factual inquiry into allegations of undue coercion and gender bias raised in a juror's affidavit post-trial. Franklin, 341 S.C. at 561, 534 S.E.2d at 719. In the affidavit at issue in Franklin, the juror alleged that several other jurors called her derogatory names and blamed her for wasting other jurors' time. Id. at 559, 534 S.E.2d at 718. The juror further alleged that during a discussion about how an alternate could get involved in the deliberations, one juror stated that "someone would have to die," and everyone laughed when the juror providing the affidavit said it would have to be her. Id. at 559-60, 534 S.E.2d at 718. The Court of Appeals found that the allegations of gender bias were not borne out by the affidavit, and the remaining allegations did not indicate internal misconduct sufficient to raise a due process concern. Id. at 561, 534 S.E.2d at 719. Similarly, in Shumpert, the South Carolina Supreme Court found that a juror affidavit that alleged misconduct in the form of other jurors allegedly ignoring the trial judge's instructions regarding the defendant's exercise of his right to remain silent and the burden of proof did "not measure up to the high bar that precedent sets for the seriousness of allegations that juror testimony must raise before it may be admitted." Shumpert, 378 S.C. at 64-5, 68, 661 S.E.2d at 370, 372.

Even in those cases where an issue of fundamental fairness was found to warrant consideration of a juror's testimony or affidavit, relief upon the underlying claim has been consistently denied when the underlying facts did not support a finding of fundamental unfairness or prejudice. See Hunter, 337 S.C. 307, 509 S.E.2d 811 (finding juror testimony regarding use of racial slur and claim that juror was touched on the shoulders by another juror did not warrant a new trial); Pittman, 373 S.C. 527, 647 S.E.2d 144 (affirming denial of relief upon juror misconduct claim based upon juror testimony that they felt they were coerced and that they only found the defendant guilty based upon information other jurors provided).

Respondent submits that Applicant has not set forth sufficient allegations in this claim in the application to warrant review. The allegation does not set forth any facts that would implicate due process by raising a question of fundamental fairness. The allegations set forth in this claim do not fall within the parameters of those cases in which fundamental fairness has warranted further review. Thus, Respondent submits this claim for relief should be denied and dismissed with prejudice.

Furthermore, Respondent submits Applicant cannot show there was a due process violation that impinges on fundamental fairness in the jury's deliberations. Respondent further submits Applicant cannot show that he was prejudiced. This claim is without merit. In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent submits any questions of fact in this claim can be resolved at the evidentiary hearing. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

CONCLUSION

Each and every allegation in the Application that is not hereinabove expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be denied and dismissed.

Respectfully submitted,

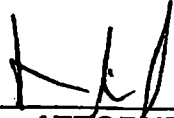
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
(Counsel of Record)

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

By: 

ATTORNEYS FOR RESPONDENT

May 30, 2012.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the Respondent's Return to Second Amended Application for Post-Conviction Relief and Motion for More Definite Statement via U.S. mail, first class, postage pre-paid, addressed to:

Emily C. Paavola, Esquire
Death Penalty and Defense Center
900 Elmwood Ave., Suite #101
Columbia, SC 29201

John R. Mills, Esq.
201 West Main St., Ste. #301
Durham, NC 27701

This 30th day of May, 2012.



ALPHONSO SIMON, JR.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Louis Michael Winkler, Jr.)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-26-03907

**APPLICANT'S NOTICE OF INTENT TO
RELY ON AFFIDAVITS**

Applicant, Louis Michael Winkler, Jr., hereby informs the Court and opposing counsel that he intends to offer proof in support of his post-conviction relief claims through affidavits of certain defense witnesses in lieu of direct examination of those witnesses at trial. In support of this notification, applicant apprizes this Court of the following relevant facts:

1. Applicant is an indigent, death-sentenced inmate in South Carolina. He was convicted and sentenced to death in Horry County. *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2011). He is currently seeking post-conviction relief.

2. In support of his application for post-conviction relief, applicant intends to rely upon affidavits provided by certain defense witnesses in lieu of conducting direct examination of those witnesses at trial. This procedure is authorized pursuant to S.C. Code § 17-27-80, which provides that, in a hearing on an application for post-conviction relief, "[a]ll rules and statutes applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." Furthermore, this procedure has been used in numerous capital post-conviction cases. *See, e.g., Herman Lee Hughes v. Michael Moore*, 98-CP-09-101 (Calhoun County); *Joseph M. L. Gardner v. Michael Moore*, 98-CP-18-453 (Dorchester County); *Keith L.*

Simpson v. Michael Moore, 97-CP-42-1911 (Spartanburg County); *Kenneth Simmons v. State*, 05-CP-18-1368 (Dorchester County); *Kevin Mercer v. State*, 09-CP-32-5465 (Lexington County). The South Carolina Supreme Court has specifically approved this process. See *Simpson v. Moore*, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006) (finding that the PCR court did not err in allowing the applicant to introduce over forty depositions and approximately twenty-two affidavits into evidence in lieu of live testimony); see also, *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982).

3. Moreover, this process is in no way prejudicial to the State's case. By employing this procedure, applicant seeks to expedite the hearing and eliminate the need for live testimony – or at least live direct testimony – from a number of relatively minor witnesses. By being provided with their direct testimony weeks in advance of the hearing, the Attorney General will, in fact, have an improved opportunity to consider the witnesses' direct testimony and make an informed decision about whether to cross-examine those witnesses than if the witnesses were called for direct examination at the evidentiary hearing.

4. Undersigned counsel have previously provided counsel for respondent with photocopies of all of the affidavits they currently intend to admit. Applicant hereby provides both counsel for the respondent and the Court with copies of all of the affidavits presently in his possession that he intends to admit, attached cumulatively hereto as Attachment A.

5. Of course, applicant acknowledges that the Attorney General has the prerogative to call any or all witnesses who have provided affidavits or other documentary evidence for purposes of cross-examination. Whether to do so is completely within the Attorney General's discretion.

WHEREFORE, applicant requests that the Court accept the affidavits and other documentary evidence provided by certain defense witnesses in lieu of a direct examination of those witnesses at trial.

6/4/2012
DATE

Emily C. Paavola
JOHN R. MILLS
Law Offices of John R. Mills, NPC
201 W. Main Street, Suite 301
Durham, NC 27701
919-251-6259

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Ave., Suite 101
Columbia, SC 29201
803-765-1044

ATTACHMENT A

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

)
)
)
AFFIDAVIT

Philip Randall, who appeared personally before me, affirms and states the following:

1. I was a juror in Mr. Louis Michael Winkler's trial.
2. During the penalty phase, deliberations were slow. We were initially split eight to four. Three women and the African American man were in the minority. I was in the majority along with seven others.
3. As part of the deliberations we discussed the facts of the crime, including whether Mr. Winkler intended to kill J [REDACTED] G [REDACTED], the only eyewitness. Chris Trout, the jury foreman, and one other juror explained to us that each of them had some prior knowledge and experience with guns. Based on that, he knew that the gun in question was cheap and given to jamming. He called it a piece of junk.
4. During deliberations we also discussed the prospect of Mr. Winkler getting out of prison. The deliberations were taking a long time, and the two sides were somewhat entrenched. One of our concerns was that if we did not reach a unanimous decision in the sentencing phase we did not know whether he would go free. This concern motivated us to reach a unanimous verdict.
5. As deliberations wound down, it was clear that there was one hold out, the short African American man. It seemed that nothing would change his mind. I wondered if the comfort of the nice meals and the jury service paycheck led to him sticking to his guns. We were frustrated that the verdict might not be unanimous and were determined that it not end as a hung jury. We felt like we had to turn up the heat. The foreman of the jury and I stood on either side of him and made him look at the autopsy photos. It was

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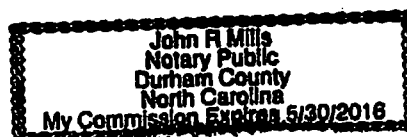
important to us for him to see what Mr. Winkler had done. The hold out kept saying that he wanted the killing to end and, therefore, did not want to give death. We reminded the him man that he had told the judge that he was willing to give death and that, therefore, his objection did not make sense. When the judge polled the jury, there was almost a sigh of relief when he said that he supported verdict.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.


PHILIP RANDALL

Sworn to and subscribed before me
This 14th day of January, 2011


Notary Public for the State of North Carolina John R. Mills
My commission expires: 5/30/2016



STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

TeAnne Oehler, who appeared personally before me, affirms and states the following:

1. My name is TeAnne Oehler. I am a clinical social worker and psychotherapist. I have a Masters Degree in Social Work from the University of North Carolina at Chapel Hill. My business address is 1601 Oak Street, Myrtle Beach, SC 29577.
2. I was retained in the Louis Michael Winkler case by his attorney, Ralph Wilson. My role was to prepare a psycho-social evaluation and testify about my findings. I testified in the penalty phase of Mr. Winkler's 2008 capital trial.
3. No specific penalty-phase theory was ever articulated to me from anyone on the defense team. My instructions were basically to just let them know if I found any mitigation.
4. I told Mr. Winkler's attorneys that they should get a neuropsychologist to evaluate Mr. Winkler because he has a history of head injury with loss of consciousness. It is my normal practice to recommend such an evaluation in any case where there is evidence of a possible head injury. Mr. Winkler's attorneys thought that I could testify about those issues myself, but I explained to them that brain damage is not my area of expertise. To my knowledge, no neuropsychological evaluation was ever performed on Mr. Winkler.

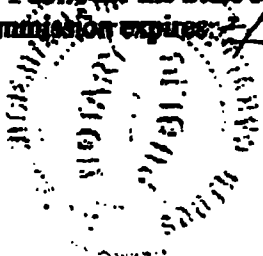
I affirm, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Further affiant sayeth naught

TeAnne Oehler, LSW
TEANNE OEHLER

Sworn to and subscribed before me

This 31 day of May, 2012

Cynthia Whitlana
Notary Public for the State of South Carolina
My commission expires 2/1/2021



STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

AFFIDAVIT

Vicki Childs, who appeared personally before me, affirms and states the following:

1. My name is Vicki Childs. My work address is P.O. Box 21297, Charleston, South Carolina 29413. I was retained to work as a private investigator on Louis Michael ("Mick") Winkler's case. My role was to serve as a fact investigator only. I was not serving as a mitigation investigator.
2. I primarily did fact interviews relating to the guilt-or-innocence phase of the case, collected documents, and other miscellaneous tasks. I did whatever I was directed to do by the trial attorneys. I was not asked to talk to witnesses about the possibility that Mick was suicidal near the time of the crime. I was not asked to investigate anything related to mental illness or Mick's mental state. These tasks would have been more appropriate for a mitigation investigator to do, which was not my role in the case.

I affirm, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Further affiant sayeth naught


VICKI CHILDS

Sworn to and subscribed before me

This 30 day of May, 2012


Notary Public for the State of South Carolina

My commission expires: 9-21-20

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

Stephen Fitzwater, who appeared personally before me, affirms and states the following:

1. Mick Winkler lived across the street from me when I lived with my foster sister, ^{brother-in-law - S.F} foster mother, and foster ~~stepfather~~ Frank Paterson.

2. I did not know Mick well until after he was confined to his house on home detention. During that time he was very depressed. He would make insinuations about committing suicide. He would refer to ending it. My step-brother and a couple of my friend's would try to get him to play basketball since it was about the only thing he could do without leaving the area his ankle monitor would require him to stay in. We played with him mostly because we felt sorry for him.

3. His ex-wife would sometimes come around, and this would be very upsetting to Mick. He got me to video her. It was weird to video her, but it was also weird that she would come by and park just outside of Mick's allowed area.

4. Prior to trial, I was not contacted by anyone from Mick's defense team. If I had been asked by Mick's trial attorneys, I would have been willing to testify to the information in this statement.

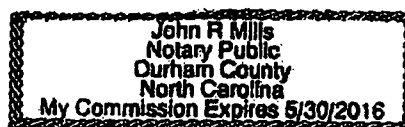
I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

Stephen Fitzwater
STEPHEN FITZWATER

Sworn to and subscribed before me

This 27th day of May, 2012

John R. Mills
Notary Public for the State of North Carolina
My commission expires: 5/30/2016



STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

Pat White, who appeared personally before me, affirms and states the following:

1. Mick Winkler and I have known each other since the early 1990s. I moved to Myrtle Beach in 1989.

2. I first met Mick at a New Year's party in the early 1990s. Mick lived in North Carolina at the time, and we exchanged phone numbers. We called each other a couple times each week and became friends.

3. Mick was interested in moving to Myrtle Beach, and I helped him find a job at Kingston Plantation, where I worked putting together golf packages.

4. Mick needed help getting on his feet, and I was like a mother to him. I allowed Mick to live with me while he was getting settled. Mick could not manage money for ten minutes. I was always on him to do better with it. He didn't even have a bank account. Mick would often end up giving away a lot of what little money he had by hosting friends. He was a great cook, and he loved to have friends over, even if he barely knew the people. He was desperate for affirmation and he would take it from anyone who gave it to him.

5. The two houses Mick eventually got and lived in on his own were both purchased by his father. The same is true of Mick's truck. Mick was proud of his house. He added a deck and pool to the house he and Becky shared. Even so, if it weren't for his father, Mick would not have had a thing in the world.

6. While Mick lived at my place, he was very helpful. He made significant renovations, helped around the house, and did anything I asked of him. He planted


PW

flowers that are in my garden even today. He also put up the gutters on my house and put the siding and roof on the shed in my back yard.

6. In the summer of 1994 Mick was still living with me. He had gone out with some of his friends from Kingston Plantations, where he worked. Mick got hit hard in the head with a bottle, and it knocked him out. I got a call very late, around 2:00 a.m. When I saw Mick he had his head totally split open on the front of his forehead. He tried to get up off the table in the hospital room, but he slumped all the way down to the floor. The doctors said to keep him from sleeping, but he was groggy and sleepy for several days after it happened. He was very embarrassed over the injury, and he would hide in the passenger seat of my car when I took him places. He didn't want people to see the bandages. I don't know if it gave him long-term damage, but getting hit in the head like that really did a number on Mick.

7. Sometime after Mick moved out, he gave me his dog, Buster, as a gift. Buster was the puppy of Mick's prior dog. Mick took to Buster in particular because Buster was smaller than the other puppies in the litter, and he wanted to look after him and protect him. Mick enjoyed playing ball with Buster. He also had a cat named Mariah. She would lie on the back of his sofa and rule the roost. When I went out of town, Mick would look after my dog. I would do the same for the dog he and Becky shared. Mick loved animals and enjoyed looking after them.

8. Mick was a hard worker. He would go in to work even when he was sick. He was proud of his job, and he wanted to do well at it. He loved the job at Tilghman Lakes, and the people at Tilghman loved him. He would help the condo owners who couldn't do things for themselves. He did repair work and painted decks and balconies, even though

PJ
PW

none of that was his job as the maintenance man. He was just responsible for the grass and the pool. The condo owners really liked him and gave him Christmas gifts. He also liked the work. If he were sick, he would insist on going to work. He was adamant about going to work every day. He also sought out additional responsibilities at work. When he started at Tilghman, it was only his job to mow the grass and take care of the pools. But he sought out, and obtained, responsibility for treating the property for pests. He took pride in his work.

9. When Mick was on house arrest, I would stop by to check in on him. I was worried about him. He did not have any money, and he was pretty depressed. Sometimes when I went by, the refrigerator would be totally empty. I would buy him groceries and share the fish I caught with him because I wanted him to have something to eat.

10. Another time he called and was very down in the dumps. I thought seeing his old dog, Buster, might make him feel better. Buster was getting older, and she was having some problems with her legs. I had been giving her some medication. Somehow Buster got injured as I was putting her in the car to take her to Mick's. When Mick saw Buster, he was thrilled. That night, the dog got up, and as she was walking around, she fell over and could not get up. Mick called me first thing the next morning and—because he was on home detention—asked me to take Buster to the vet. I took Buster to Kind Care, and they had to put Buster down. When Mick found out, he was devastated. He cried and cried. He wondered what else could go wrong in his life.

11. Around Christmas, while he was still on home detention, Mick called and asked me to come over and bake my Christmas cookies with him. He was very down, and he


PW

was seeking company so he might feel better. I had made Christmas cookies every year when we lived together, and they were something he liked. They were simple to make, and I was happy to bring over the ingredients. It was fun to show him how to make the cookies and try to get Mick back to his old self.

11. But Mick was in tough shape. For a while, he did not have access to a phone. When I visited Mick, he would be pacing up and down the floor and moving the whole time we talked. Mick normally kept a clean house, but while he was on home detention, he took it to the next level. He had washed the walls, the woodworks, the floors, and every inch of the house. The house was spotless. I had never seen anything like it. Mick was not well. He had lost his job, his car, his family, and even his dog. He had no money and his friends had abandoned him. He seemed to be going further downhill every day. He was pitiful and was trying to maintain control over what little he still had, a clean house. He might have been suicidal. I visited Mick because I was very worried about him.

12. Becky did not make things any easier for Mick while he was on home detention. She would come by his house with her mother. She was taunting Mick. It got him really upset. Mick even showed me photos of Becky in her car that her neighbor had taken. She was running around, and he was stuck at home and could not go anywhere.

13. Becky also tried to manipulate me. She called me and tried to turn me against Mick. I do not understand why she would have done that because she did not even know me. It was like she was trying to further isolate him.

14. Mick was losing at every turn. I know how catastrophic that can be and make you feel. I believe he went crazy that day.


PW

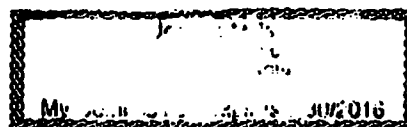
15. Before Mick's trial, I talked with Ralph Wilson on the phone, and I met with Carolyn Graham. They did not explain how a death penalty trial works or that if I had been called to testify, how the information in this affidavit would have been helpful. They did not explain that the penalty phase was not about whether Mick had committed a death penalty eligible crime, only what the appropriate punishment was, including whether there is a reason to show him mercy. If Mick's trial attorneys had explained this to me, I would have been willing to testify in the penalty phase to the information in this statement. Even if they had not explained the process to me, I would have been willing to sign an affidavit to the information contained in this affidavit.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

Pat White
PAT WHITE

Sworn to and subscribed before me
This 29th day of May, 2012

John K. Miles
Notary Public for the State of North Carolina
My commission expires: 5/30/2016



PW
PW

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

Frank Patterson, who appeared personally before me, affirms and states the following:

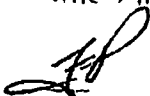
1. I lived across the street from Mick Winkler when he lived on [REDACTED] in Little River, SC. At first I was just neighbors with Mick, but we became friends.

2. My wife at the time and I would go over to Mick's place, and Mick and his wife, Becky, would come over to ours. My ex-wife and I enjoyed spending time with them.

3. Becky moved out of Mick's place in September, but she still came to the neighborhood pretty often to see Mick. I assumed they were in the process of working out their differences.

4. After the incident in October, Mick was in tough shape. Many of his neighbors stopped socializing with him. My stepson and foster brother-in-law and a couple of their friends felt sorry for him, so they would play basketball with him close enough to his house that his ankle monitor would not go off. I would periodically go by his house just to see if he was alright. He would run out of money and at times go a day or two without eating. I told him that if he was without food, he should just join my family and me. We happily provided him with a plate of food when we realized he did not have any. Mick was depressed and trapped.

5. I was surprised when I saw Becky start showing up in the neighborhood again after the October incident. Instead of going to Mick's house though, she would drive around the neighborhood and then park just outside the range of the ankle monitor. I do not know why she did this, but it tore Mick up when she did. At some point, my ex-wife's mother had my stepson video Becky's driving around. Nothing excuses what

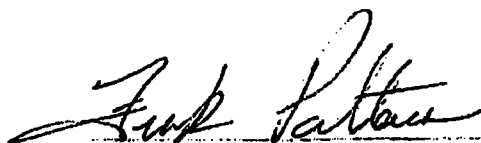

FP

Mick did, but it just did not seem right that she behaved that way.

6. When I visited Mick, we would talk about his situation. He was shocked by the allegations related to the October charge, and he professed his love for Becky. At times he would be mad, but he never spoke of violence. He was mostly depressed. He talked about killing himself. I did not know he had a gun, but I would have assumed he would have used it on himself if he did. Mick was very depressed.

7. If I had been asked by Mick's trial attorneys, I would have been willing to testify to the information in this statement.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

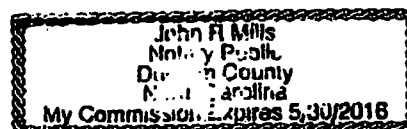

FRANK PATTERSON

Sworn to and subscribed before me

This ~~10th~~ day of May, 2011
John Miller


Notary Public for the State of North Carolina

My commission expires: 5/30/2012




FP

STATE OF OHIO

COUNTY OF WAYNE

AFFIDAVIT

Edward Genet, who appeared personally before me, affirms and states the following:

1. I currently reside at [REDACTED], Doylestown, Ohio 44230.
2. I am a childhood friend of Louis ("Mick") Winkler. We attended school together at St. Peter and St. Paul's Catholic School from kindergarten through eighth grade. We also played football together for all four years at Chippawa High School.
3. Mick was a great kid who loved the outdoors. We spent a lot of time together doing outdoor activities like hiking and biking. My parents were also good friends with Mick's parents and we did family activities together.
4. Mick was always very polite and respectful to people. Even as a kid, he would make a point to say hello to my parents and ask how they were doing when he came over. Mick has always been very meticulous about being clean. His closet was always neat and orderly. Even when he was very young, he would play with a toy and then put it back in the box and clean up afterwards.
5. Mick is very family oriented. He has always loved holidays and birthdays. Spending time with his family is very important to him. He is very close to his family and he loves them a lot. Mick seemed very troubled by his parents' divorce. I think he took it especially hard because family was so important to him.
6. I kept in touch with Mick after he moved away from Ohio. He would call me a couple of times each year. He always made a point to call me on my birthday. I would take my family on vacation to South Carolina and visit Mick.
7. I visited Mick in South Carolina once when he was married to Denise. Mick seemed very involved with Denise's son. He spent a lot of time with him doing outdoor stuff. Mick was also very good with my two kids. They called him "Uncle Mick."
8. I met Becky on a couple of occasions. Mick seemed very proud of his life with her. Mick is a hard worker and he enjoyed his job working at the condos. I last saw Mick when he and Becky came to Ohio to visit during the Christmas holidays in 2004.

I affirm that the foregoing is true and correct to the best of my knowledge. Further
affiant sayeth naught

Edward Genet
EDWARD GENET

Sworn to and subscribed before me
This 21 day of May, 2012

Shirley A. Blagg
Notary Public for the State of Ohio
My commission expires: March 25, 2017



SHIRLEY A. BLAGG
NOTARY PUBLIC
STATE OF OHIO
STARK COUNTY

My Comm. Expires March 25, 2017

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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)

AFFIDAVIT

Dickie Caines, who appeared personally before me, affirms and states the following:

1. I lived at Tilghman Lakes condo complex throughout Mick Winkler's time there as the maintenance man and grounds keeper.

2. Mick was a good employee and was well liked by the residents. I was on the Board of Directors while Mick was there, and we approved several raises for him. When Mick got engaged to Denise, a number of the condo owners put together some money to help pay for their marriage. Some of us paid for the limo, and others helped pay for the flowers. We went to their wedding out on the beach. That is not something we would have done for just any employee. I have stood up ^{made} and board meetings and said that Mick is someone who deserves a raise. Mick was well liked.

3. Mick was someone who the condo owners trusted. He had keys to many of our places, and when storms would come, he put the furniture away for us. He would do all sorts of odd jobs.

4. Mick was kind to me. I liked gardening, and the two of us would work together planting things around the premises. He was nice to work with.

5. Towards the end of Mick's time at Tilghman Lakes, something changed in Mick. He was no longer the diligent, polite, and helpful person he had been for his first eight years of employment. He once kind of snapped at me when I made a request of him. He would be late and not show. Mick was eventually let go because of the change. I was very surprised because that kind of behavior was very uncharacteristic of Mick.

6. If I had been asked by a member of Mick's trial team, I would have been willing

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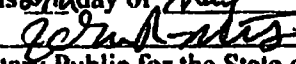
to provide them the information in this affidavit.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

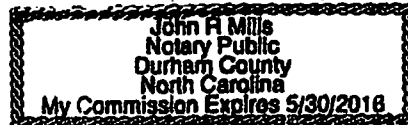

DICKIE CAINES

Sworn to and subscribed before me

This 24th day of May, 2012


Notary Public for the State of North Carolina

My commission expires: 5/30/2016



STATE OF SOUTH CAROLINA

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COUNTY OF HORRY

)

AFFIDAVIT

Chuck Webster, who appeared personally before me, affirms and states the following:

1. I was a tenant at Tilghman Lakes while Mick Winkler worked here on our landscaping. It was his job to maintain the grass, bushes, shrubs, and the pool.
2. For most of his tenure here, everyone liked him. Most people here are absentee landlords, and to them, no news was good news. Mick would show up, and he did his work. Some of the owners would have him do personal work, like fix screen doors.
3. My parents would spend a couple of weeks out of the year here, and they liked him. When I spoke with Mick, it was usually pretty casual. We talked about fishing, and things were fine.
4. As a board member, I voted a couple times for him to receive a raise. He had been here a while and provided satisfactory work.
5. Towards the end of his time here at Tilghman, I had an odd confrontation with him. He came to my place and accused me of letting my dog toilet in the yard. He was being very confrontational and it was if he was ready to get into a physical fight over the dog poop. He was eventually fired over a similar blow-up with another condo owner. These blow-ups were wholly inconsistent with the Mick we had known for years prior.
6. No one from Mick's defense team talked to me before Mick's trial. Had they done so, I would have been willing to provide them with the information in this affidavit and to testify to it in court.

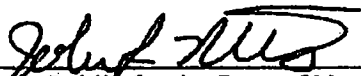
I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the

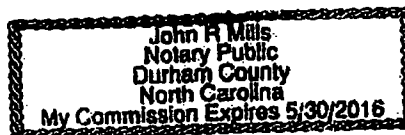

CW

foregoing is true and correct.


CHUCK WEBSTER

Sworn to and subscribed before me
This 29th day of May, 2017.


Notary Public for the State of North Carolina
My commission expires: 5/30/2016




CW

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

AFFIDAVIT

Carolyn Graham, who appeared personally before me, affirms and states the following:

1. I was hired as the mitigation specialist on Mick Winkler's case. Ralph Wilson contacted me and asked that I get involved. Paige Tarr had previously been on the case, but she had barely done any work. We did not have a lot of time left before trial. We had to do the best with the time we had. I also worked with Dorian Hall, who was hired to do investigation in Ohio. There was not enough time for one person to do the entire investigation alone. Dorian and I were responsible for working with TeAnne Oehler.

2. Mick's case presented some challenges for me. Paul Rathbun was the other attorney on the case. I had very limited contact with him. He and Mick did not get along.

3. Communication on the team was also difficult. We mostly communicated via e-mail, but all e-mails had to go through Danielle, Ralph Wilson's paralegal. It was as if she was running the show. This was an odd procedure and it slowed down our communication. I did not spend much time talking with either of the attorneys about exactly what they were hoping to present. I have conducted many mitigation investigations, but it is my expectation and preference to work with the team to develop penalty phase themes that are coherent and consistent with the guilt phase presentation. That did not happen in Mick's case. Trial counsel got me appointed, and left it up to me to develop the mitigation presentation. I did not receive guidance about what the theory of the penalty phase would be or about how that theory might fit into the guilt phase presentation.

4. Mick's relationship with trial counsel was very strained. Mick did not trust that they were doing a good job on his case. His conversations with trial counsel were often very contentious, and trial counsel did little to address his concerns. Mick was always upset with both Paul Rathbun and Ralph Wilson.

5. Things came to a head with trial counsel shortly before the hearing. Mick was not doing well. The stress of the pending trial was wearing on him. He was very anxious about the trial. Making matters worse, Paul and Ralph decided to do a mock trial exercise where they cross-examined Mick on the stand. The cross-examination was extremely upsetting for Mick, and he felt that his lawyers were against him rather than on his side. Apparently, Mick and Ralph Wilson had some kind of blow up shortly after the mock cross-examination. I had been with the team during the cross, but I stepped out to speak to a security guard afterward. When I came back, Mick was being led away by a guard. A couple of days later, I was asked to attend a meeting where Paul and Ralph talked to Mick about why they did not want him to testify at trial. They brought a court reporter to this meeting and had it recorded. This was very unusual. I have never worked on a case where the trial lawyers recorded a conversation like that with their client. Again, this event was extremely upsetting for Mick. His relationship with trial counsel deteriorated even further after these two events.

6. During the trial, the judge asked that I sit with Mick. It was because his relationship with his attorneys was so strained. Mick and his attorneys did not get along.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

JUN-01-12 12:47 PM DAVID R PRICE

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P.02

Carolyn Graham
CAROLYN GRAHAM

Sworn to and subscribed before me
This 1st day of June, 2012

Jicki Lynn Pauline Marcus
Notary Public for the State of South Carolina
My commission expires: 03/06/2018

STATE OF NORTH CAROLINA)

COUNTY OF LEE)

AFFIDAVIT

John Burch, who appeared personally before me, affirms and states the following:

1. I have known Mickey Winkler since the early 1990s. We had a mutual friend in Henry Yates, and that is how I met him.
2. We lived in Apex in when we met Mick, but we frequently go to the Lumberton area, where we met Mickey, because both my wife's family and my family live in Lumberton.
3. Early in our relationship, Mickey took us to a Bruce Springsteen concert at the Dean Dome in Chapel Hill. He drove us there, and he paid for the tickets. It was a generous gesture, especially because he did not have a lot for himself.
4. When we went to visit our families, we would often stay with Mickey. He was always happy to host and generous with whatever he had. Mickey would cook us delicious Spanish omelets for breakfast. He was always an immaculate housekeeper. Everything was very clean and in its place, even if he did not have a lot of space to live in. Because he was working construction, he sometimes would not have much, but he was always happy to share.
5. Sometimes people from his work would come by the house to see him. He was willing to give them whatever he had. He would give you the shirt off of his back. There was no pretentiousness.
6. I attended Mickey and Denise's wedding. We were treated like family. Most of the guests were not on the family tab, but Mick put us on it. He was generous with us.

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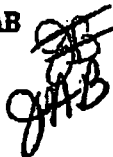
7. At the wedding Rick gave Mick a one thousand dollar bill. He asked me if there really was such a thing. It spoke volumes about their relationship that he was not sure if his brother would give him a fake bill as a wedding present.

8. Mickey was always a hard worker. He worked construction jobs, and he was always the sort of person who would show up to work every day. The work was often physically demanding, but he would always show. He was a reliable worker.

9. Mickey was willing to work hard and to share his construction skills. I built the garage at our house, and Mickey helped out. My father-in-law was also willing to help, and Mickey rode with my father-in-law from Lumberton to Apex, where I live. I have some basic carpentry skills, but Mickey was the project manager. He led and I followed. The project was supposed to be finished early on Sunday, but we were not done. Instead of quitting as planned, Mickey insisted that he wanted to help work until the job was done. We worked through the weekend and up until sundown on Sunday. We finished the job. I offered to pay him for the work, but he insisted the meal we bought him the night before was more than enough. I was impressed that he volunteered and worked so hard on that project. Mickey was a generous friend.

10. After Mickey got charged with the rape and kidnap, my wife and I were worried about him. His friends in Myrtle had abandoned him, and he was by himself. We took two trips down to check on him, one in November and one in February. He was not doing well, especially in February. He had lost his car and he could not leave his house. His lawyer had given him evidence from the charge, including the statement of Becky from the kidnapping charge. Mickey narrated the statement and responded to the allegations. It was a weird thing to share with his friends and an odd experience. It was

JAB



clear though that he was obsessing about the charge. His world was crashing down around him, and he was in bad sorts. It was not the Mick we had known for many years.

11. While we were there Mick pointed out that the same car drove by several times. When he pointed it out, I realized too that it had been by several times before. He explained that it was someone from Becky's family. He explained that they drove by all the time. I don't know if they drove by all the time or not, but in the state Mick was in, he thought they did. Nothing excuses what Mick is accused of doing, but he was very agitated by them coming by, and it drove him further down his downward spiral.

12. If I had been asked, I would have been willing to provide the information in this statement to Mickey's defense team.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

John A. Burch

JOHN A. BURCH

Sworn to and subscribed before me

This 25th day of March, 2012

Notary Public for the State of North Carolina

My commission expires 3/2/16

JAB

JAB

STATE OF NORTH CAROLINA

COUNTY OF LEE

AFFIDAVIT

John Burch, who appeared personally before me, affirms and states the following:

1. I have known Mickey Winkler since the early 1990s. We had a mutual friend in Henry Yates, and that is how I met him.

2. We lived in Apex in when we met Mick, but we frequently go to the Lumberton area, where we met Mickey, because both my wife's family and my family live in Lumberton.

3. Early in our relationship, Mickey took us to a Bruce Springsteen concert at the Dean Dome in Chapel Hill. He drove us there, and he paid for the tickets. It was a generous gesture, especially because he did not have a lot for himself.

4. When we went to visit our families, we would often stay with Mickey. He was always happy to host and generous with whatever he had. Mickey would cook us delicious Spanish omelets for breakfast. He was always an immaculate housekeeper. Everything was very clean and in its place, even if he did not have a lot of space to live in. Because he was working construction, he sometimes would not have much, but he was always happy to share.

5. Sometimes people from his work would come by the house to see him. He was willing to give them whatever he had. He would give you the shirt off of his back. There was no pretentiousness.

6. I attended Mickey and Denise's wedding. We were treated like family. Most of the guests were not on the family tab, but Mick put us on it. He was generous with us.

JAB

7. At the wedding Rick gave Mick a one thousand dollar bill. He asked me if there really was such a thing. It spoke volumes about their relationship that he was not sure if his brother would give him a fake bill as a wedding present.

8. Mickey was always a hard worker. He worked construction jobs, and he was always the sort of person who would show up to work every day. The work was often physically demanding, but he would always show. He was a reliable worker.

9. Mickey was willing to work hard and to share his construction skills. I built the garage at our house, and Mickey helped out. My father-in-law was also willing to help, and Mickey rode with my father-in-law from Lumberton to Apex, where I live. I have some basic carpentry skills, but Mickey was the project manager. He led and I followed. The project was supposed to be finished early on Sunday, but we were not done. Instead of quitting as planned, Mickey insisted that he wanted to help work until the job was done. We worked through the weekend and up until sundown on Sunday. We finished the job. I offered to pay him for the work, but he insisted the meal we bought him the night before was more than enough. I was impressed that he volunteered and worked so hard on that project. Mickey was a generous friend.

10. After Mickey got charged with the rape and kidnap, my wife and I were worried about him. His friends in Myrtle had abandoned him, and he was by himself. We took two trips down to check on him, one in November and one in February. He was not doing well, especially in February. He had lost his car and he could not leave his house. His lawyer had given him evidence from the charge, including the statement of Becky from the kidnapping charge. Mickey narrated the statement and responded to the allegations. It was a weird thing to share with his friends and an odd experience. It was

clear though that he was obsessing about the charge. His world was crashing down around him, and he was in bad sorts. It was not the Mick we had known for many years.

11. While we were there Mick pointed out that the same car drove by several times. When he pointed it out, I realized too that it had been by several times before. He explained that it was someone from Becky's family. He explained that they drove by all the time. I don't know if they drove by all the time or not, but in the state Mick was in, he thought they did. Nothing excuses what Mick is accused of doing, but he was very agitated by them coming by, and it drove him further down his downward spiral.

12. If I had been asked, I would have been willing to provide the information in this statement to Mickey's defense team.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

JOHN A. BURCH

Sworn to and subscribed before me
This _____, 20____

Notary Public for the State of North Carolina
My commission expires _____

JAB

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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AFFIDAVIT

Jeannie Walker, who appeared personally before me, affirms and states the following:

1. I know Louis "Mick" Winkler from his time working at Tilghman Lakes in North Myrtle Beach. My daughter lived there, and Mick worked maintenance. I lived in the condo complex next door.

2. Mick was a hard worker at Tilghman. He would answer maintenance calls at all hours of the day, every day of the week. He helped my daughter on several occasions.

3. Mick was willing to go above and beyond the call of duty. He would help people carry up their groceries, and do odd jobs for them. He fixed the light on my daughter's car, repaired her deck, and helped her move things into storage. When we'd offer to pay him, he would always decline. Mick took pride in his work.

4. After Mick was fired, there were rumors about him not doing his work and a change in his work ethic. Any lapse in his work would have been a big change because he loved that job.

5. I invited Mick to the open houses that I would host for my friends and neighbors. Mick would compliment my fried chicken and be grateful for the invitation. Mick was pleasant to have around.

6. Prior to trial no one asked me to provide the information in this affidavit to the court. Had they asked me to do so, I would have been willing to do so.

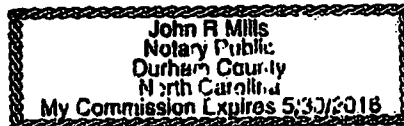
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I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

Jeannie Walker
JEANNIE WALKER

Sworn to and subscribed before me
This 25 day of May, 2016

John R. Mills
Notary Public for the State of North Carolina
My commission expires: 5/30/2016



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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

Carolyn Samuels, who appeared personally before me, affirms and states the following:

1. I lived at Tilghman Lakes by the Sea in North Myrtle Beach from 1990 until 2007

My mother lived in the condo complex next door to Tilghman. During my time there Mick Winkler worked maintenance.

2. I appreciated Mick's hard work at Tilghman. For many years he would reliably clean the grounds, address maintenance issues on the property, and would respond day or night, seven days a week to maintenance calls.

3. In addition to taking care of his responsibilities, he made a point of taking care of the residents. Mick helped fix my deck and the taillight on my car. He would often help the residents carry in their groceries and do odd jobs that were well outside of his job's responsibilities. Mick was always willing to help out, and he never expected—or accepted—money for his services.

4. Mick was generally well liked at Tilghman. We included him in the annual golf tournament, and he consistently received raises though his time there.

5. Towards the end of his time there, there were rumors that he was not working hard and addressing his responsibilities. If that is true, it would have been very much out of character for Mick. He was a good worker who cared about his job.

6. Prior to the trial I was interviewed by an investigator from the Defense Team. I provided her with the same information contained in this affidavit. I also told her I was willing to testify. After speaking with the investigator, I never heard from the Defense Team again.

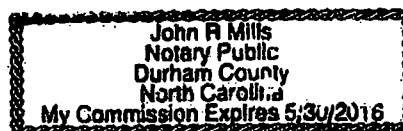
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I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

Carolyn Samuels
CAROLYN SAMUELS

Sworn to and subscribed before me
This 25 day of May, 2015

John R Mills
Notary Public for the State of North Carolina
My commission expires: 5/30/2016



STATE OF NORTH CAROLINA)

AFFIDAVIT

COUNTY OF COLUMBUS)

Ben Hege, who appeared personally before me, affirms and states the following:

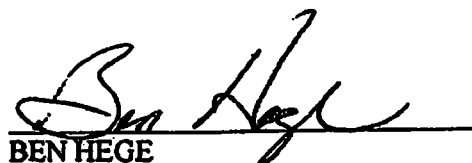
1. I met Louis "Mick" Winkler when he was the maintenance person at Tilghman Lakes by the Sea in North Myrtle Beach, South Carolina. My father owns a condo there, and I met Mick when I visited.

2. Mick had a reputation for doing a good job and being generous. I barely knew him, but on one of my visits there he let me store my boat over night at his house. Nothing about his job required him to do something like that, and I thought it was a generous gesture.

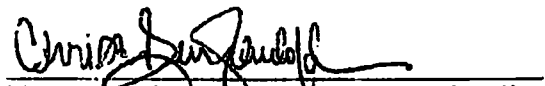
3. I was shocked to learn about this crime happening.

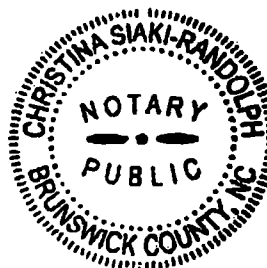
4. Prior to Mick's trial no one from Mick's trial team contacted me or asked me to provide the information in this affidavit. Had they asked me to do so, I would have been willing to testify to the information contained in it.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.


BEN HEGE

Sworn to and subscribed before me
This 29 day of May, 2012


Notary Public for the State of North Carolina
My commission expires: July 2, 2016



STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

AFFIDAVIT

CPK
 Lauren Roughton, who appeared personally before me, affirms and states the following:

1. I was a juror in Louis Michael Winkler's death penalty case.
2. The deliberations in Mr. Winkler's case, in the penalty phase, were ugly. After the initial vote, it was clear that three people were voting for life. It was me, an older white woman, and an African American man.
3. There was a lot of pressure to change my vote. Many of those pushing for death were concerned that if we did not give him death, that he would one day have the opportunity to be a free man. Part of the concern was that if we did not reach a unanimous decision, then there may have been no punishment inflicted. I was not sure if that was the case, but I thought that the death penalty was not appropriate in this case. We even sent a note to the judge about what would happen, but the judge refused to answer our question. *because of the way we worded it.* *UPR*
4. I held out through the end of the first day of deliberations. We went late that night, and we were all tired by the end. When we left that evening, it was still nine to three, with three of us voting for life.
5. When we got back the next day, the people who wanted a death verdict made it clear that they were ready to get this over with and to go home. They did not respect the life-voters' positions, and it was clear that there was no chance that any of those voting for death would switch to life.
6. I eventually gave in to the majority. I thought I was a stronger person than to have given up on my convictions. I had prayed to God for strength, but in the end I

CPK
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failed. I gave in when the majority did not respect my feelings and beliefs. To this day, I regret my vote.

7. The young African American man held out the longest. Once he was the lone holdout, things got heated. Two men and one woman were particularly intense about trying to make him switch. One of the men was the foreman. The other was the person who was quoted in the newspaper. The woman was younger and had straight black hair.

8. The two men stood on either side of the holdout. With their voices raised they were swearing and pounding on the table. The juror was not particularly well-spoken, but he was entitled to his opinion. The other jurors did not respect that. They kept yelling, "Why? Why? Why?," trying to force him to explain himself.

9. I felt bad for him because I also felt railroaded into changing my vote. I consider myself smart, but unlike the people who yelled at the juror, I do not talk a lot. I'm not very verbal. The last holdout seemed the same way. He could not explain how he felt, so he got pushed into voting the way everyone else did.

I NEVER DOUBTED MR WINKLER'S GUILT, BUT *LR*
10. I never truly wished for Mr. Winkler to get the death penalty. I only changed my vote because I felt pressured to do so by the majority. It must have been all the more difficult for the last holdout. To this day I regret my vote.

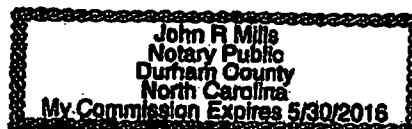
I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

Sworn to and subscribed before me
This 30th day of March, 2016

Lauren Roughten
LAUREN ROUGHTEN *on* *LR*

John R. Mills
Notary Public for the State of North Carolina
My commission expires: 5/30/2016

LR
LR



STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

Thomas Hardwick, who appeared personally before me, affirms and states the following:

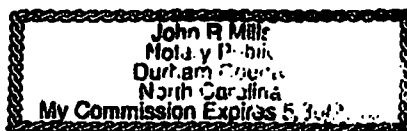
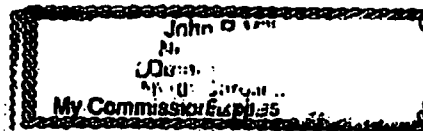
1. I was a juror in Mr. Louis Michael Winkler's trial.
2. I do not have much of a memory for the trial or the deliberations, but I remember there being a great deal of discussion during deliberations about whether Mr. Winkler would ever get out of prison. We weren't sure, if we didn't reach a death sentence, whether Mr. Winkler might ever get out of prison.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

Thomas Hardwick
THOMAS HARDWICK

Sworn to and subscribed before me
This 11th day of January, 2011

John R. Miller
Notary Public for the State of North Carolina
My commission expires: 5/30/2016



T 14
TH

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT

Jeron Wallingford, who appeared personally before me, affirms and states the following:

1. I served as a juror in Louis Michael Winkler's trial in 2008. I was the only African American on the jury.

2. On Saturday, when we began deliberations, there was a vote. It was around nine to three. There were at least two women, in addition to myself, who wanted to vote for ~~J.W. life. One of the women who wanted to vote for life used to be a parole officer.~~

3. We deliberated for a long time on Saturday. It was very late, well after midnight, before we left.

4. When we arrived the next morning, we were all tired and it seemed like some of the jurors just wanted to go home. The two other votes for life and I still wanted to give Mr. Winkler a life sentence.

5. I felt, and feel, that the killing needed to stop. Mr. Winkler deserved punishment, but not the death penalty.

J.W. 6. The other jurors would not listen when I tried to explain my position. I told them that I felt for Mr. Winkler's family, especially his mother, but they would not listen. ^{wouldn't listen}

7. The other jurors became belligerent and threatening. They suggested that something bad might happen to my daughter if Mr. Winkler did not get death. At one point two or three of the male jurors stood over me and forced me to look at autopsy photos of Rebecca Winkler. They were shouting threats at me and were trying to physically intimidate me into voting for death. They swore, yelled, and pounded on the

J.W.,
JW

table. Things did not get physical, but I thought they could. And one of the men in particular was pretty large.

8. Over the course of the deliberations, the other two jurors voting for life changed their votes. Because of the threats and yelling, I felt hopeless to change their minds, and I gave in. I voted for death.

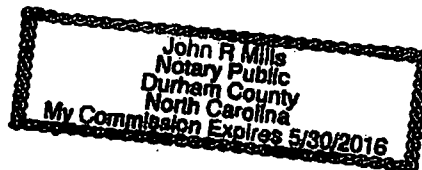
9. Death for Mr. Winkler was not my choice, and I regret that I let the other jurors make me change my vote.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.

Jeron Wallingford
JERON WALLINGFORD

Sworn to and subscribed before me
This 15th day of May, 2012

John R. Mills
Notary Public for the State of North Carolina
My commission expires: 5/30/2016



J.W.
JW

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

LOUIS MICHAEL WINKLER, JR.)

SK6027)

Applicant,)

vs.)

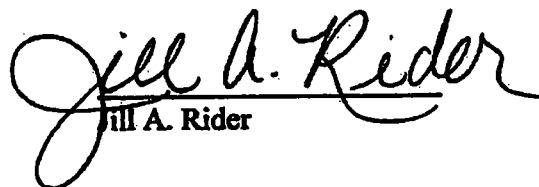
STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
11-CP-26-03907**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Applicant's Notice of Intent to Rely Upon Affidavits, was served by first class United States mail, postage prepaid, this 4th day of June, 2012, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Louis Michael Winkler, Jr.
Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-26-03907

**APPLICANT'S MOTION TO LIMIT
SCOPE OF CROSS-EXAMINATION**

Applicant, Louis Michael Winkler, Jr., (hereafter, "Winkler") offers his attached affidavit as his direct testimony and moves this Court to limit any cross-examination to the subject matters contained in the affidavit. In support of this motion, Winkler apprizes this Court of the following relevant facts and points of law.

RELEVANT FACTS

This case is scheduled for an evidentiary hearing to begin on June 18, 2012. Winkler seeks post-conviction relief from his capital convictions and sentence. His Second Amended Application for Post-Conviction Relief asserts that his trial attorneys, Ralph Wilson and Paul Rathbun, provided ineffective assistance of counsel for, among other things, failing to protect his Sixth Amendment right to proceed *pro se* at trial. See Second Amended Application, Ground 10 & 11(a)(1). Moreover, the Application alleges that the trial court violated Winkler's constitutional right to self-representation by refusing to permit him to discharge Wilson and Rathburn after Winkler made a pre-trial request to discharge appointed counsel and proceed *pro se*. See *id.* at Ground 10 & 11(c). On at least two occasions prior to trial, Winkler informed the trial judge that he wished to exercise his constitutional right to self-representation. These discussions were not recorded. The trial judge neither denied these particular requests on the

record nor made any findings on the record regarding these requests. Thus, Winkler seeks to introduce his own testimony for the limited purpose of establishing that these conversations occurred and that his requests to proceed *pro se* went unheeded. Winkler now moves, *in limine*, that this Court limit any cross-examination of him to this particular subject area.

ARGUMENT

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION APPLIES IN POST-CONVICTION.

The Fifth Amendment, which is applied to the states through the Fourteenth Amendment, *Mallow v. Hogan*, 378 U.S. 1, 6 (1964), commands that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. This amendment grants individuals the privilege of refusing to answer any official questions in any civil or criminal, formal or informal proceeding where the answer might incriminate the individual in future proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Generally, a defendant who is convicted of and receives a sentence for a crime no longer has a Fifth Amendment privilege when he can no longer be incriminated by testimony related to that crime. *See Reina v. United States*, 364 U.S. 507, 513 (1960) (noting that there is “weighty authority” for the proposition that “once a person is convicted of a crime, he no longer has the privilege against self-incrimination”). The privilege does apply, however, when a defendant exercises a right to appeal the conviction and still risks potential self-incrimination that could be used against him at a retrial or a resentencing. *See Taylor v. Best*, 746 F. 2d 220, 222 (4th Cir. 1984) (noting that in the situation in which post-conviction incriminating evidence could possibly be used against a convicted defendant who was in the midst of an appeal, the *Reina* rule does not apply). The likelihood that an incriminating statement will be suppressed at a later proceeding does not

negate the State's violation of a defendant's Fifth Amendment privilege in the original course of questioning. *Id.* at 224.

Because Winkler risks providing testimony at the evidentiary hearing that could be used against him in a subsequent retrial or resentencing, and because the State does not have an alternative legitimate interest in asking Winkler questions about the facts underlying his conviction, this Court should recognize Winkler's Fifth Amendment privilege during the evidentiary hearing. A defendant is constitutionally entitled to remain silent during his appeals process when he might provide incriminating statements that could be used against him after a successful appeal and when the State does not offer specific, direct, and narrow questions related to a legitimate alternative purpose other than determining whether the defendant did or did not commit the criminal act. *See Taylor*, 746 F. 2d at 222-226; *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation of New York*, 392 U.S. 280, 285 (1968). In *Taylor*, the Fourth Circuit addressed the actions of a prison disciplinary committee that had punished Taylor for refusing to answer a prison psychologist's questions about the crime Taylor had been convicted of committing. The psychologist asked Taylor the questions while Taylor was in the midst of his appeal. The Fourth Circuit Court of Appeals found that Taylor retained a Fifth Amendment privilege in such a situation. *Taylor*, 746 F. 2d at 222. However, because the State had the clear alternative purpose of discovering Taylor's custodial and rehabilitative needs, the court found that Taylor's Fifth Amendment privilege would only arise if and when the State tried to use the psychologist's evaluation in a subsequent criminal proceeding. *Id.* at 224. In *Uniformed Sanitation Men v. Ass'n v. Commissioner of Sanitation of New York*, however, the Court found that New York sanitation workers had refused to answer questions that could expose them to criminal prosecution and that were not otherwise "specifically, directly, and narrowly" related to

the workers' job duties. 392 U.S. 280, at 284. The court held that the workers could not be discharged for refusing to answer the questions regardless of whether the statements would have actually been used against them in a subsequent criminal proceeding. *Id.* at 284. As in *Taylor*, Winkler's participation in answering state inquiries about the crime puts him at risk of providing self-incriminating material that can be used against him in his ongoing criminal matter. Unlike the State psychologist in *Taylor*, in this case the State has no alternative purpose in questioning Winkler about the facts underlying the crime he was convicted of committing. Instead, the State's only purpose in questioning Winkler about the facts underlying the crime, as in *Uniformed Sanitation*, would be to attempt to further develop a criminal case against him that could be used at a retrial or resentencing.

II. THIS COURT SHOULD LIMIT ANY CROSS-EXAMINATION TO THE SCOPE OF WINKLER'S DIRECT EXAMINATION TO PROTECT WINKLER'S RIGHT TO TESTIFY ON COLLATERAL MATTERS WITHOUT FULLY WAIVING HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

An individual does not completely waive a Fifth Amendment privilege by testifying solely on collateral or preliminary matters. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (holding that a defendant's testimony at a Fourth Amendment suppression hearing could not be used against him at trial unless he did not object). A defendant's limited testimony that is necessary to guarantee that he is afforded the other benefits of the Bill of Rights does not fully waive his Fifth Amendment privilege against self-incrimination. *See Id.* at 392 (finding that it was intolerable that when the trial court could have limited cross-examination to the issues of the suppression hearing that "one constitutional right should have to be surrendered in order to assert another").

Winkler does not waive his Fifth Amendment privilege against self-incrimination regarding the facts underlying his conviction by providing testimony strictly limited to his

attempts to exercise his Sixth Amendment right to represent himself at trial. Courts, whenever possible, should not force a defendant to sacrifice one constitutional right in order to assert another. *Id.*

For example, the Supreme Court has protected a defendant's Fifth Amendment privilege when the defendant testified for the limited purpose of asserting his Fourth Amendment right to be free from unreasonable search and seizures. In *Simmons v. United States*, the defendant gave pretrial testimony in an attempt to assert a Fourth Amendment claim that certain State evidence was the inadmissible product of an illegal search and seizure. *Id.* at 389. The State then used this testimony against the defendant at trial. *Id.* The Supreme Court held that the prosecution could not use the defendant's testimony, which was limited to the Fourth Amendment claim, against the defendant at trial unless the defendant did not object, because it created an "undeniable tension" between the defendant's exercise of his Fourth and Fifth Amendment rights. *Id.* at 393.

The Second Circuit has recognized that a defendant does not fully waive his Fifth Amendment privilege by attempting to exercise a Sixth Amendment right to appointed counsel. In *United States v. Branker*, the government introduced testimony that the defendant had given at a preliminary hearing for the purpose of establishing a right to appointed counsel. 418 F. 2d 378, at 380 (2nd Cir. 1969). The court held that the State impermissibly used the testimony against the defendant, and it noted that the defendant should "enjoy his constitutional rights to counsel . . . without running the risk that thereby he may be incriminating himself." *Id.* at 380.

Multiple states have also recognized that a court commits error when it allows the prosecution to cross-examine a defendant about the underlying facts of a case when the defendant testifies at a pretrial hearing for the limited purpose of establishing that a confession

was involuntary and not in accord with Due Process under the Fourteenth Amendment. For example, in *McCain v. State*, the Texas Court of Appeals held that the trial court committed an error when, at a hearing on a motion to suppress, the court allowed the prosecutor to ask the defendant whether he was in a car and whether he pulled up alongside and shot at another car. 995 S.W.2d 229, 235-42 (Tex. App. 1999) (holding that the error committed by the trial court was harmless). In *Marshall v. State*, the Georgia Supreme Court recognized that the trial court erred by not limiting cross-examination during a *Jackson v. Denno* hearing (a pretrial hearing to determine the issue of voluntariness of a confession). See 266 Ga. 304, 305-306 (1996). The Supreme Court of Mississippi, in *Powell v. State*, noted that the extensive cross-examination of the defendant at a *Jackson v. Denno* hearing concerning the truthfulness of the defendant's out of court statement was impermissible. 540 So. 2d 13, 15-16 (Miss. 1989). The Supreme Court of Kansas, in *Kansas v. Boggess*, found that a defendant may take the stand for the limited purpose of testifying about whether a statement was voluntarily made while still maintaining a Fifth Amendment privilege in regards to questions that go to the substance of the out of court statement. 268 P.3d 481 (Kan. 2012) (finding that the trial court erred when the court struck the defendant's testimony at the suppression hearing after the defendant refused to answer questions about events that were the bases of the charged crimes). There is no material distinction between a defendant's testimony at a suppression hearing and the testimony applicant intends to present in this case. In both instances, the testimony is unrelated to the facts of the crime and it is offered to demonstrate the denial of a constitutional right.

Tennessee is an example of a state that recognizes this principle and has adopted a clear rule that gives a defendant the right to testify at a post-conviction evidentiary hearing without being forced to face cross examination regarding the facts underlying the crime for which a

defendant has been convicted. In *Keough v. State*, the Tennessee Supreme Court addressed its post-conviction Rule 28 §8(C)(1)(d), which states, “[u]nder no circumstances shall petitioner be required to testify regarding the facts of the conviction which the petition attacks unless necessary to establish the allegation of the petition or necessary to the state’s attempt to rebut the allegations of the petition.” 356 S.W.3d 366, 366 (Tenn. 2011). Applying this Rule, the Tennessee Supreme Court vacated a decision and remanded a case for a hearing with limited cross-examination after the hearing judge denied the defendant’s motion to limit cross-examination at the evidentiary hearing to the issue of ineffective assistance of counsel and the defendant subsequently chose not take the stand. *Id.* at 368, 373.

Winkler faces a situation that is similar to those faced by the defendants in the previously mentioned cases: in order to assert his constitutional claim, Winkler must offer testimony related to a particular fact-bound experience that is entirely separate from any of the facts of the crime he was convicted of committing. Specifically, Winkler seeks to offer testimony about his prior, unrecorded requests to the trial judge that he be allowed to represent himself. If the Court allows the State to cross-examine Winkler beyond the scope of this testimony, then the Court will force him to abandon his Fifth Amendment privilege in order to attempt to exercise the protections of the Sixth Amendment. If Winkler must avoid testifying in order to maintain his Fifth Amendment Privilege, he cannot prove his Sixth Amendment claim, because his requests and the judge’s denials are not reflected by the record. This is the same “undeniable tension” that the Court in *Simmons* avoided by limiting the State’s ability to undermine a defendant’s Fifth Amendment privilege when the defendant attempts to claim another constitutional protection.

Therefore, the Court should limit the State's cross-examination to the scope of Winkler's affidavit, the factual circumstances regarding his requests to represent himself at trial, in order to protect Winkler's access to all of his constitutional rights.

CONCLUSION

For all of the reasons stated above, Winkler respectfully requests that the Court limit any cross-examination by the State at the evidentiary hearing to the scope of Winkler's direct testimony, offered in his affidavit, in order to allow him to assert his Sixth Amendment claim while maintaining his Fifth Amendment privilege against self-incrimination.

Respectfully submitted,

6/4/2012
DATE

Emily C. PAAVOLA
JOHN R. MILLS
Law Offices of John R. Mills, NPC
201 W. Main Street, Suite 301
Durham, NC 27701
919-251-6259

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Ave., Suite 101
Columbia, SC 29201
803-765-1044

ATTACHMENT A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

AFFIDAVIT

Louis Michael Winkler, who appeared personally before me, affirms and states the following:

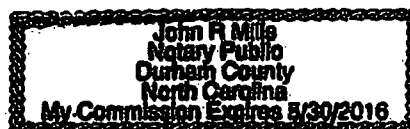
1. I was represented by Paul Rathbun and Ralph Wilson in connection with my 2008 capital trial.
2. As we prepared for trial over the course of 2006 and 2007, my lawyers and I attended several pre-trial meetings and hearings with the judge. At several of these meetings, I informed the trial judge that I wished to represent myself. I specifically remember telling the trial judge that if he would not appoint new attorneys for me, then I wanted to represent myself.
3. When I first made this request, the trial judge was dismissive and suggested that this was an issue that could be addressed at a later date. When I continued to say that I wanted to represent myself at later meetings, the trial judge simply said that he had already considered that, and we had already been through it, and my request was denied.
4. Prior to trial, the judge never advised me that I had a right to represent myself. He did not explain that it was my decision to make, and he did not discuss with me the pros and cons of self-representation.
5. I told the trial judge that I wanted to represent myself on several occasions. I do not remember the dates of all of these occasions, but I specifically remember telling him this at a hearing in Conway, South Carolina on July 3, 2007, after the trial judge denied my request to remove Paul Rathbun as my attorney. I also specifically remember telling the judge that I wanted to represent myself at a hearing in Dillon, South Carolina on December 13, 2007.

I affirm, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Further affiant sayeth naught

Louis M. Winkler
 LOUIS MICHAEL WINKLER

Sworn to and subscribed before me
 This 28th day of May, 2012

John F. Mills
 Notary Public for the State of South Carolina
 My commission expires: 5/30/2016



STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

LOUIS MICHAEL WINKLER, JR.)

SK6027)

Applicant,)

vs.)

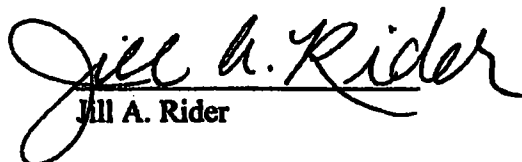
STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
11-CP-26-03907**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Applicant's Motion to Limit Scope of Cross-Examination, was served by first class United States mail, postage prepaid, this 4th day of June, 2012, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider



State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
 Resident Circuit Judge

P. O. Box 479 (zip code 29442)
 401 Cleland St. (zip code 29440)
 Georgetown, South Carolina
 Telephone: (843) 545-3030
 Facsimile: (843) 545-3282
 Email: bculbertsonj@secourts.org

June 6, 2011

Via Email and U.S. Mail Delivery

Emily C. Paavola, Esquire
 Death Penalty Resource & Defense Center
 900 Elmwood Avenue, Suite 101
 Columbia, SC 29201

Email: Emily@deathpenaltyresource.org

John R. Mills, Esquire
 Attorney at Law
 201 W. Main Street, Suite 301
 Durham, NC 27701

Email: John@jrmillslaw.com

Alphonzo Simon, Jr., Asst. Attorney General
 Office of the Attorney General
 P.O. Box 11549
 Columbia, SC 29211

Email: asimon@scag.gov

J. Gregory Hembree, Solicitor
 Office of the Solicitor, 15th Judicial Circuit
 P.O. Box 1276
 Conway, SC 29528

Email: hembree1@horrycounty.org
psnowden@horrycounty.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
 Case Number: 2011-CP-26-03907

Dear Attorneys:

Please find enclosed a copy of the Form 4 and Order Regarding Applicant's Motion to Limit Cross Examination.

Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
J. Gregory Hembree, Solicitor

June 6, 2012
Page Two

By copy of this letter and enclosure to the Clerk of Court, I am forwarding the original Form 4 and order for filing.

With kindest regards, I remain

Very truly yours,



Benjamin H. Culbertson

BHC/bhc

Enclosures (a/s)

pc: Melanie Huggins-Ward, Clerk of Court
(via hand delivery)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-26-3907

Louis Michael Winkler, Jr.
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.*
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Applicant's Motion to Limit Scope of Cross Examination is DENIED.

*This motion was decided without oral arguments.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$ N/A
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Benjamin H. Culbertson

Benjamin H. Culbertson, Circuit Court Judge

2148

Judge Code

June 6, 2012

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Emily C. Paavola

John R. Mills

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alphonzo Simon, Jr.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: None

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2011-CP-26-3907
Louis Michael Winkler, Jr.,	)	
	)	
Applicant,	)	
	)	
vs.	)	ORDER REGARDING APPLICANT'S MOTION
	)	TO LIMIT SCOPE OF CROSS EXAMINATION
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Before the court is a motion *in limine* by the applicant ("Winkler") to limit the scope of cross examination by the respondent ("State") at the trial of this post-conviction relief case. This motion is decided on the arguments set forth in Winkler's written motion and without oral arguments.

In his motion, Winkler "asserts that his trial attorneys...provided ineffective assistance of counsel for, ***among other things***, failing to protect his Sixth Amendment right to proceed *pro se* at trial." (emphasis added). The motion is supported by Winkler's affidavit stating that he requested to represent himself at his criminal trial but the court denied his request. Winkler now seeks to limit the State's cross-examination of him at the trial of this case to the sole issue of whether his criminal trial attorneys provided ineffective assistance of counsel for failing to protect his Sixth Amendment right to proceed *pro se* at his criminal trial. Winkler argues that cross examination beyond the scope of his direct examination violates his right against self-incrimination as guaranteed by the fifth amendment of the *United States Constitution*.

Even though Winkler's affidavit in support of this motion refers only to his denied request to proceed *pro se* at his criminal trial, the motion alleges ineffective assistance of counsel on this ground and "among other things...." Further, Winkler's Application for Post-Conviction

Relief alleges numerous deficiencies by his criminal trial attorneys constituting ineffective assistance of counsel. Therefore, the State's cross examination of Winkler should not be limited solely to his denied request to proceed *pro se* at his criminal trial. However, Winkler may still assert his Fifth Amendment right against self-incrimination during the course of the State's cross examination of him if a reasonable possibility exists that requiring him to answer a certain question would provide information that could be used against him in a criminal proceeding or would lead to the discovery of such information. See *Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E.2d 112 (S.Ct. 2008). Whether the privilege is applicable to a certain question will have to be ruled upon by the court when the situation presents itself at trial. Therefore, Winkler's motion *in limine* to limit the scope of the State's cross examination should be denied.

NOW, THEREFORE, it is hereby ORDERED that the applicant's Motion to Limit Scope of Cross Examination is DENIED.

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

June 6, 2012
Conway, SC

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF HORRY)

Louis Michael Winkler, Jr., #6027,)

C/A No. 2011-CP-26-3907)

Applicant,)

v.)

**RESPONDENT'S OBJECTION TO
APPLICANT'S NOTICE OF INTENT TO
RELY ON AFFIDAVITS AND
RESPONDENT'S MOTION TO
EXCLUDE STATEMENTS AND
AFFIDAVITS**

The State of South Carolina,)

(Capital Case))

Respondent.)

2012 JUN 11 PM 2:21
CLERK OF COURT
HORRY COUNTY

Respondent, above-named, by and through the Office of the Attorney General, hereby objects to the Applicant's Notice of Intent to Rely on Affidavits and moves to exclude statements and affidavits attached to the notice from evidence in this action. In support of this motion, Respondent would show this Court the following:

1. The statements from Philip Randall, Thomas Hardwick, Lauren Roughton, and Jeron Wallingford are inadmissible under Rule 606(b) of the South Carolina Rules of Evidence. "As a general rule, juror testimony may not be the basis for impeaching a jury verdict. Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict." State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). Rule 606(b), SCRE states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question

whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

"[J]uror testimony involving internal misconduct is competent only when necessary to ensure due process, i.e. fundamental fairness." Hunter, supra.

[T]he exception to the general rule against review of internal jury deliberations carved out in Hunter is a narrow one, limited by our supreme court to those few situations which implicate due process raising a question of fundamental fairness.

But the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be lightly made.

State v. Franklin, 341 S.C. 555, 562, 534 S.E.2d 716, 720 (Ct. App. 2000). "The occurrence of a significant degree of jury misconduct calling for the admission of juror testimony has proved to be quite rare." Shumpert v. State, 378 S.C. 62, 69, 661 S.E.2d 369, 372 (2008) (citing State v. Pittman, 373 S.C. at 554-55, 647 S.E.2d at 158 (suggesting that the mine-run of prejudicial jury misconduct cases involve internal coercion based on race or gender bias)). In Shumpert, the Supreme Court warned that trial courts should exercise a degree of caution before entertaining juror testimony presented in an attack on a jury's verdict. Shumpert, 378 S.C. at 69, 661 S.E.2d at 372. In both Franklin and Shumpert, challenges to the jury's verdict were both based upon affidavits from jurors. In both cases, the respective appellate courts found no error in the trial courts' denial of the admission of those affidavits.

Mr. Randall, Mr. Hardwick, Ms. Roughton, and Mr. Wallingford were all jurors in Applicant's criminal trial. Respondent submits that these individuals' statements do not

assert facts that "measure up to the high bar that precedent sets for the seriousness of allegations that juror testimony must raise before it may be admitted." Shumpert, 378 S.C. at 64-5, 68, 661 S.E.2d at 370, 372. Thus, these four statements should not be admitted.

If this Court disagrees, Respondent believes it will be necessary for each of the jurors who participated in the sentencing of Applicant to testify in regards to the allegations outlined in Applicant's second amended application Ground 10(e). Respondent respectfully requests a telephonic status conference to discuss the process for presenting such testimony.

2. The statements from Philip Randall, Stephen Fitzwater, Pat White, Frank Patterson, Dickie Caines, Chuck Webster, Jeannie Walker, Carolyn Samuels, Lauren Roughton, Thomas Hardwick, and Jeron Wallingford are not properly notarized. All of these statements were signed in Horry County, South Carolina, but notarized by Mr. Mills, a North Carolina notary. "An affidavit is a voluntary *ex parte* statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation." State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) (citing 3 Am.Jur.2d, Affidavits, Section 1). The statements of Mr. Randall, Mr. Fitzwater, Ms. White, Mr. Patterson, Ms. Caines, Mr. Webster, Ms. Walker, Ms. Samuels, Ms. Roughton, Mr. Hardwick, and Mr. Wallingford do not meet the requirements for affidavits. They were not sworn to or affirmed before someone legally authorized to administer an oath or affirmation where the statements were made. Thus, Respondent submits none of those statements can be admitted as affidavits under S.C. Code § 17-27-80.

3. Respondent disputes Applicant's assertion that counsel provided all of the affidavits enclosed with the notice prior to the filing of the notice. Prior to the filing of the Notice, Respondent had only received the statements from Philip Randall and Thomas Hardwick, both of which were included in Applicant's initial responses to Respondent's Request for Production of Documents. Those responses were mailed by Applicant's counsel on February 8, 2012, and were received by Respondent on February 15, 2012. To date, Respondent has not received any additional discovery responses or documents from Applicant.

Since Respondent first received notice of the existence of Edward Genet, John Burch, and Ben Hege as potential witnesses when Applicant filed the Notice of Intent to Rely on Affidavits, Respondent submits it is prejudiced by the admission of their affidavits. Respondent submits that the late notice did not provide Respondent with sufficient time to attempt to secure the presence of those three witnesses to court for cross-examination. Thus, if these affidavits are admitted into evidence, Respondent respectfully reserves the right to request additional time to submit either counter-affidavits or depositions of those individuals if they cannot be obtained before the hearing.

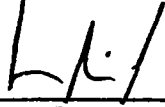
WHEREFORE, premises considered, and for the reasons stated above, Respondent respectfully requests this Court deny Applicant's request to admit the statements of Philip Randall, Stephen Fitzwater, Pat White, Frank Patterson, Dickie Caines, Chuck Webster, Jeannie Walker, Carolyn Samuels, Lauren Roughton, Thomas Hardwick, and Jeron Wallingford, along with the affidavits of Edward Genet, John Burch, and Ben Hege. Respondent further requests a telephonic status conference at

the Court's earliest convenience to discuss the logistics of securing and presenting the testimony of all twelve jurors at the PCR evidentiary hearing. Respondent further requests any other relief this Court deems appropriate.

Respectfully submitted,

ALPHONSO SIMON, JR.
Assistant Attorney General
(Counsel of Record)

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

By: 

ATTORNEYS FOR RESPONDENT

June 8, 2012.

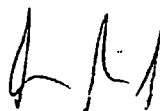
CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the ***Respondent's Objection to Applicant's Notice of Intent to Rely Upon Affidavits and Respondent's Motion to Exclude Statements and Affidavits***, by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Emily C. Paavola, Esquire
Death Penalty Resource and Defense Ctr
900 Elmwood Ave., Ste. #101
Columbia, SC 29201

John R. Mills, Esq.
201 West Main St., Ste. # 301
Durham, NC 27701

This 8th day of June, 2012.



ALPHONSO SIMON, JR.

FILED
CLERK OF COURT
2012 JUN 11 PM 3:21
MELANIE HUGGINS-WARD

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
LOUIS MICHAEL WINKLER, JR.)
Applicant,)
vs.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-26-03907

**MOTION TO DISMISS FOR FAILURE
TO STATE FACTS SUFFICIENT TO
CONSTITUTE A CAUSE OF ACTION
PURSUANT TO RULE 12(b)(6), SCRPC**

**HORRY COUNTY
CLERK OF COURT
12 JUN 14 PM 2:28**

Comes now, Respondent, ("the State"), above named, by and through the Attorney General of South Carolina and moves to dismiss grounds 10(c) and 10(d) of applicant, Louis Michael Winkler's ("Applicant") application seeking post-conviction relief ("PCR"). Specifically, the State moves for dismissal as the above-referenced grounds, even if true, fail to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and South Carolina law. See Rule 12(b)(6), SCRPC (explaining a claim may be dismissed for failing to state facts sufficient to constitute a cause of action); Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("[P]ost-conviction hearing statutes do not afford relief in the case of alleged errors for which remedies were available before and during the original trial, or by review on motion for a new trial or on appeal."). In support of this motion, the State would show this Court the following:

I. BACKGROUND

Applicant was tried before the Honorable James E. Lockemy in the Horry County Court of General Sessions on charges of murder, burglary first and assault and battery of a high and aggravated nature ("ABHAN"). He was represented by Ralph Wilson, Sr. and Paul Rathbun. At the conclusion of the guilt-phase of his trial, Applicant was found guilty as charged and received

a sentence of death. After unsuccessfully appealing his conviction and sentence, Applicant filed his initial application for PCR on May 2, 2011. Thereafter, Applicant was appointed counsel in Emily Paavola and John Mills, who subsequently filed a first amended application for PCR and on May 1, 2012, filed a second amended application for PCR.

Within the second amended application, Applicant alleges *inter alia*, two free-standing Constitutional claims regarding his right to self-representation (ground 10(c)) and his right to a fair and impartial jury (ground 10(d)). Specifically, with respect to ground 10(c), Applicant contends his “right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 § 14 of the South Carolina Constitution, was violated by the trial court’s refusal to permit him to discharge appointed counsel and proceed *pro se*.”¹ With respect to ground 10(d) of Applicant’s second amended PCR application, Applicant maintains his “right to a fair and impartial jury determination of his sentence—free from the influence of passion, prejudice, or any other arbitrary factor—guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated by the trial court’s repeated refusal to answer the juror’s question about what would happen if they could not reach a unanimous sentencing verdict and the court’s improper instructions to the jury under unduly coercive circumstances.” The State now moves for dismissal of the above-referenced grounds pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

¹ This claim is properly asserted in ground 10 & 11(a)(1) of Applicant’s second amended PCR application as an ineffective assistance of counsel claim premised upon trial counsel’s alleged failure to “object to the trial court’s pre-trial refusal to permit Applicant to discharge appointed counsel and allow him to proceed *pro se*.” See Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“Issues that could have been raised at trial or on direct appeal cannot be reasserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.”).

II. GROUNDS 10(c) AND 10(d) FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AS SOUTH CAROLINA LAW PROHIBITS THE LITIGATION OF DIRECT APPEAL CLAIMS IN PCR MATTERS, AND AS A RESULT, APPLICANT IS UNABLE TO RECEIVE RELIEF ON SUCH CLAIMS AS A MATTER OF LAW

As noted above, grounds 10(c) and 10(d) fail to alleged facts sufficient to constitute a cause of action in PCR as South Carolina law prohibits the litigation of direct appeal claims in PCR matters. As a result, even assuming the facts alleged in ground 10(c) and 10(d) are true, Applicant would still be procedurally barred from receiving relief on such claims as a matter of law and therefore, the State's 12(b)(6) motion must be granted.

In analyzing a motion to dismiss under Rule 12(b)(6), the trial court must "construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). If the facts alleged and inferences deducible therefrom would entitle the non-moving party to any relief, then dismissal under Rule 12(b)(6) is improper. Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). Here, the State submits Applicant's claims 10(c) and 10(d), by virtue of the fact they are free-standing claims which could have been presented to the trial court or raised on appeal, cannot prevail on these claims in PCR as a matter of law, and therefore, the State's motion to dismiss must be granted.

In Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) the Supreme Court of South Carolina declined to address two issues of trial court error in post-conviction relief stating, "[i]t is uniformly held that an application for post-conviction relief is not a substitute for an appeal." 264 S.C. at 423, 215 S.E.2d at 885. Continuing, the Simmons Court explained "post-conviction hearing statutes do not afford relief in the case of alleged errors for which remedies were

available before and during the original trial, or by review on motion for a new trial or on appeal.” Id. Elaborating, the Simmons Court reasoned, “[PCR] statutes were not intended to afford a procedure to operate as a substitute for a motion for a new trial, or for an appeal or writ of error; and ordinarily a judgment of conviction may not be challenged on grounds which could have been raised by a direct appeal.” Id.

The rationale of Simmons was reaffirmed in Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) where the Supreme Court of South Carolina again noted, “errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.” 312 S.C. at 8, 430 S.E.2d at 519. Interpreting the state PCR statute at the time, the Drayton Court concluded, “post-conviction relief is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.” 312 S.C. at 8, 430 S.E.2d at 520 (internal citations omitted). Accordingly, the Drayton Court affirmed the PCR court’s dismissal of a PCR applicant’s free-standing Eighth and Fourteenth Amendment claims related to the trial court’s exclusion of evidence regarding prison adaptability; the trial court’s admission of allegedly irrelevant, improper and prejudicial evidence; and the trial court’s allegedly erroneous jury instructions. 312 S.C. at 7, 430 S.E.2d at 519. In so holding, the Drayton Court reinforced the Simmons rule stating, “[i]ssues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.” 312 S.C. at 8, 430 S.E.2d at 520.

Here, grounds 10(c) and 10(d), which allege free-standing claims that were either addressed on appeal or could have been addressed on appeal, are not cognizable claims in PCR and therefore, must be dismissed. See Rule 12(b)(6), SCRPC (explaining a claim may be

dismissed for failing to state facts sufficient to constitute a cause of action); see also Drayton, 312 S.C. at 8, 430 S.E.2d at 520 (“Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.”). Specifically, the issue in ground 10(c) was ruled upon in Applicant’s direct appeal by virtue of the fact the record on appeal contained the pre-trial proceedings, but the Court determined that Applicant did not raise the issue to the trial court until the sentencing phase of trial. See State v. Winkler, 388 S.C. 574, 585-87, 698 S.E.2d 596, 602-03 (2011) (“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.”). Furthermore, even assuming this did not amount to a ruling on the trial court’s *pre-trial refusal* to rule on such a claim, Applicant is still unable to prevail under such a theory because the issue is structured as a free-standing claim of trial court error rather than a claim of ineffective assistance of counsel. See Drayton, 312 S.C. at 8, 430 S.E.2d at 520 (“Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.”). The same is true with respect to ground 10(d). In particular, ground 10(d) is not cognizable and must be dismissed by virtue of the fact it raises a free-standing claim of trial court error which clearly could have been “raised at trial or on direct appeal” had defense counsel registered an objection. See Drayton, 312 S.C. at 8, 430 S.E.2d at 520 (“Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of

ineffective assistance of counsel.”). Accordingly, grounds 10(c) and 10(d) must be dismissed as Applicant is unable to assert facts supporting such a claim for relief.

III. CONCLUSION

In light of the foregoing, the State respectfully requests this Court, to dismiss claims 10(c) and 10(d) of Applicant’s second amended application for PCR pursuant to Rule 12(b)(6) of the South Carolina Rule of Civil Procedure.

Respectfully Submitted,

ALAN WILSON
Attorney General

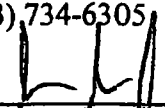
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

South Carolina Office of Attorney General
Capital and Collateral Litigation Unit
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-6305

By: 

ATTORNEY(S) FOR THE RESPONDENT

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF HORRY)

Case No. 2011-CP 26-03907)

Louis Michael Winkler Jr.)

Applicant,)

v.)

**RETURN TO RESPONDENT'S
OBJECTION TO APPLICANT'S
RELIANCE ON STATEMENTS AND
AFFIDAVITS**

State of South Carolina,)

Respondent.)

On June 4, Applicant, Louis Michael Winkler, provided notice of his intent to rely on affidavits. Applicant attached the affidavits he intended to rely upon to the notice. Respondent was served via first class and electronic mail. Ex. 1 (e-mail to Al Simon); Ex. 2 (certificate of service of process). The previous Friday, June 1, Applicant had mailed discovery responses to Respondent, consistent with this court's scheduling order. On June 8, 2012 Respondent filed an Objection to Applicant's Notice of Intent to Rely Upon Affidavits and a Motion to Exclude Statements and Affidavits containing three arguments. Applicant files this Return pursuant to the Court's request.

First, Respondent claims that Applicant's claim of jury misconduct, as outlined in his Application for Post-Conviction Relief and as supported by the affidavits of Philip Randall, Lauren Roughten, and Jeron Wallingford, does not implicate fundamental fairness. Applicant agrees that "as a general rule," juror testimony about "internal misconduct" is inadmissible to impeach a verdict. *State v. Hunter*, 320 S.C. 85, 88, 463, S.E.2d 313, 316 (1995). But, as Respondent acknowledges, where "fundamental fairness" is implicated, the testimony is admissible. *Id.* Here, fundamental fairness is implicated. The only person of color on the jury was teamed up on by several men, and physically intimidated into changing his vote—but not

into changing his preference for a life sentence. Thus, Mr. Winkler should not have been sentenced to death. Being executed pursuant to a jury verdict brought on by physical intimidation, rather than deliberation about the facts of the case, implicates "fundamental fairness." *Id.*

Second, Respondent argues that several affidavits offered by Mr. Winkler are not admissible because they are not properly notarized. South Carolina Code section 17-27-80 allows this Court to "receive proof by affidavits, depositions, oral testimony or other evidence." The challenged affidavits were sworn to and signed before Mr. Mills, who has been admitted *pro hac vice* in this matter and is a notary in North Carolina. In light of counsel's *pro hac vice* admission and authority as a notary, counsel believes he was "some person legally authorized to administer an oath or affirmation." *State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987). Even if Mr. Mills is not such a person, the statements are "other evidence" and, with proper authentication, admissible within the terms of the statute.¹ S.C. Code § 17-27-80 (West 2012); S.C. Evid. R. 901 (West 2012).

Third, Respondent claimed that Applicant had not provided the affidavits during the discovery process. This morning, counsel for Respondent confirmed that he did, in fact, receive Applicant's Supplemental Responses and Answers, but because of post office error, he did not receive them until today, June 11, 2012. Thus, Respondent has received the affidavits twice: once as part of Applicant's compliance with the scheduling order and once attached to Applicant's Notice of Intent to Rely on Affidavits. Applicant's notice was not "late," and Respondent was not prejudiced by their timely disclosure. *C.f.* Resp't Objection at 4.

¹ Attached to this motion is an affidavit of John Mills authenticating the affidavits in question. Ex. 3.

Applicant respectfully requests this Court overrule Respondent's objections, and to allow Mr. Winkler to present the affidavits of Philip Randall, Stephen Fitzwater, Pat White, Frank Patterson, Dickie Caines, Chuck Webster, Jeannie Walker, Carolyn Samuels, Lauren Roughton, Thomas Hardwick, Jeron Wallingford, Edward Genet, John Burch, and Ben Hege in support of his Application for Post-Conviction Relief.

Respectfully submitted,

June 11, 2012
DATE

Edin R. Mills
COUNSEL FOR MR. WINKLER

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue
Suite 101
Columbia, South Carolina 29201
(803) 765-1044

JOHN R. MILLS
Attorney at Law
201 W. Main Street
Suite 301
Durham, NC 27701
(919) 251-6259

EXHIBIT 1

From: Jill Rider
To: bculbertson@sccourts.org; BCulbertsonSC@sccourts.org
Cc: Emily Paavola; john@jrmilislaw.com; asimon@scaq.gov
Subject: Winkler v. State
Date: Monday, June 04, 2012 3:19:59 PM
Attachments: Motion to Limit Scope of Cross.pdf
Notice of Intent to Rely on Affidavits.pdf

Judge Culbertson,

Please find attached Applicant's Motion to Limit Scope of Cross-Examination and Applicant's Notice of Intent to Rely on Affidavits that were filed via US Mail with the Horry County Clerk of Court's office today. I have also sent you a hard copy in the mail.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Jill A. Rider
Paralegal to Emily Paavola

EXHIBIT 2

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

LOUIS MICHAEL WINKLER, JR.)

SK6027)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
11-CP-26-03907**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Applicant's Notice of Intent to Rely Upon Affidavits, was served by first class United States mail, postage prepaid, this 4th day of June, 2012, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

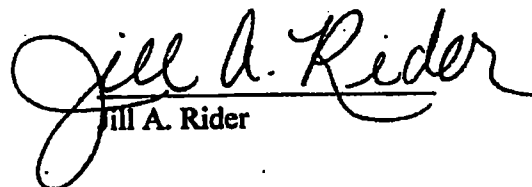

Jill A. Rider

EXHIBIT 3

STATE OF NORTH CAROLINA)

COUNTY OF DURHAM)

AFFIDAVIT

John R. Mills, who appeared personally before me, affirms and states the following:

1. I am a notary, authorized and licensed in North Carolina.
2. Attached to this affidavit are copies of the affidavits of Philip Randall, Stephen Fitzwater, Pat White, Frank Patterson, Dickie Caines, Chuck Webster, Jeannie Walker, Carolyn Samuels, Laruen Roughton, Thomas Hardwick, and Jeron Wallingford. Each of these persons appeared personally before me and offered the statements under penalty of perjury. Each are accurate representations of the statements that these persons signed.

I have reviewed this affidavit, and I affirm, under the penalty of perjury, that the foregoing is true and correct.


JOHN R. MILLS

Sworn to and subscribed before me

This 11th day of June, 2012


Notary Public for the State of North Carolina
My commission expires: Jan. 13, 2014


JRM

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

LOUIS MICHAEL WINKLER, JR.)
Applicant,)

v.)

STATE OF SOUTH CAROLINA,)
Respondent.)IN THE COURT OF COMMON PLEAS
11-CP-26-03907**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of Applicant's ReSupplemental Answers to Respondent's Interrogatories and Supplemental Responses to Respondent's Request for Documents and Things was served by first class United States mail, postage prepaid on this the 17th day of June 2012 upon the following:

Mr. Al Simon
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211


John R. Mills
Law Offices of John R. Mills

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Louis Michael Winkler, Jr., #6027,)
Applicant,)

C/A No. 2011-CP-26-3907

v.)

REPLY TO APPLICANT'S RETURN
TO RESPONDENT'S OBJECTION TO
APPLICANT'S NOTICE OF INTENT TO
RELY ON AFFIDAVITS AND
RESPONDENT'S MOTION
EXCLUDE STATEMENTS AND
AFFIDAVITS
(Capital Case)

The State of South Carolina,)
Respondent.)

FILED
JUN 15 PM 1:16
Horry County
Clerk of Court

Respondent, above-named, by and through the Office of the Attorney General, hereby replies to the Return to Respondent's Objection to Applicant's Reliance on Statements and Affidavits. In reply, Respondent would show this Court the following:

1. Contrary to Mr. Mills' assertion, he is not "some person legally authorized to administer an oath or affirmation" in South Carolina. North Carolina law only allows notaries to perform notarial acts within North Carolina. N.C. Gen. Stat. Ann. § 10B-9 (West). Furthermore, Applicant has not shown, and Respondent has not found any South Carolina statute that authorizes attorneys in South Carolina to administer an oath or affirmation based solely on their admission to the bar.

2. The statements notarized by Mr. Mills are not admissible as "other evidence" under S.C. Code Ann. § 17-27-80. At this point, Respondent submits those statements are inadmissible as hearsay. Furthermore, the statements have to be authenticated. Respondent submits that to be authenticated, Applicant must either present the

testimony of those issuing the statements or of the witness to the statement. See Rule 901, SCRE. In light of the fact that Mr. Mills was the person who witnessed the signing of the statements, Respondent believes that the admission of those statements would necessarily render Mr. Mills a potential witness in this proceeding.¹

3. Applicant is correct in that Respondent did not receive the supplemental responses and answers until June 11, 2012. A note on the envelope of the disclosures indicated it was placed in the wrong post office box. Respondent would note that the address on the envelope does list the wrong post-office box for counsel for Respondent. A copy of the envelope is attached hereto as Exhibit A. Whether service of the affidavits was timely or not, Respondent submits that two weeks' notice did not provide Respondent with enough time to either depose or arrange for the presence of the three out-of-state affiants, and Respondent respectfully reserved the right to request additional time to submit the cross-examination of those witnesses either counter-affidavits or depositions of those individuals if they cannot be obtained before the hearing.

WHEREFORE, premises considered, for the reasons stated above and in the Respondent's Objection to Applicant's Notice of Intent to Rely Upon Affidavits and Respondent's Motion to Exclude Statements and Affidavits, Respondent respectfully requests this Court deny Applicant's request to admit the statements of Philip Randall,

¹ Respondent would note that the affidavit submitted by Mr. Mills with the Applicant's Return supports this conclusion. In the Notice of Intent to Rely on Affidavits, the Applicant noted that it would be within the Respondent's discretion to call any and all witnesses who have provided affidavits for the purposes of cross-examination. (Notice, pg. 2). The same would clearly apply if Applicant intends to submit and rely upon Mr. Mills' affidavit in support of the Applicant's case.

Stephen Fitzwater, Pat White, Frank Patterson, Dickie Caines, Chuck Webster, Jeannie Walker, Carolyn Samuels, Lauren Roughton, Thomas Hardwick, and Jeron Wallingford, along with the affidavits of Edward Genet, John Burch, and Ben Hege. Respondent further requests any other relief this Court deems appropriate.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

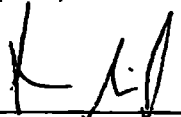
DONALD J. ZELENKA
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J. ANTHONY MABRY
Assistant Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General

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

By: 

ATTORNEYS FOR RESPONDENT

June 14, 2012.

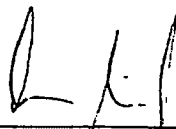
CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the *Reply to Applicant's Return to Respondent's Objection to Applicant's Notice of Intent to Rely Upon Affidavits and Respondent's Motion to Exclude Statements and Affidavits*, by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Emily C. Paavola, Esquire
Death Penalty Resource and Defense Ctr
900 Elmwood Ave., Ste. #101
Columbia, SC 29201

John R. Mills, Esq.
201 West Main St., Ste. # 301
Durham, NC 27701

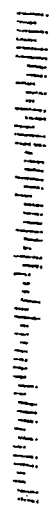
This 14th day of June, 2012.



ALPHONSO SIMON, JR.

HORRY COUNTY
12 JUN 15 PM 1:16
MELANIE HUGGINS-WARD
CLERK OF COURT

Exhibit A



RALEIGH NC
PSNC 27575 AF5M#7
FRI 01 JUN 2012 PM

LAW OFFICES OF JOHN R. MILLS
201 W. Main Street, Suite 301
Durham, NC 27705

Mr. Al Simon
SC Attorney General's Office
P.O. Box 1159
Columbia, SC 29211

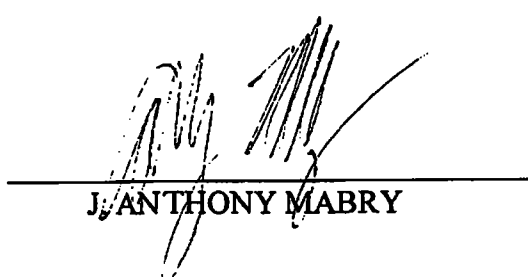
CERTIFICATE OF SERVICE

I, J. Anthony Mabry, counsel for the Respondent, certify that I have served the *Respondent's Reply to Applicant's Return to Respondent's Objection to Applicant's Notice of Intent to Rely on Affidavits and Respondent's Motion to Exclude Statements and Affidavits* by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

John R. Mills, Esquire
Attorney At Law
201 West Main Street, Suite 301
Durham, NC 27701

Emily C. Paavola, Esquire
Death Penalty and Defense Center
Post Office Box 11311
Columbia, SC 29211

This 14th day of June, 2012.



J. ANTHONY MABRY

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

) Case No. 2011-CP 26-03907

Louis Michael Winkler Jr.)
Applicant,)

v.)

State of South Carolina,)

Respondent.)

**RETURN TO RESPONDENT'S MOTION
TO DISMISS FOR FAILURE TO STATE
FACTS SUFFICIENT TO CONSTITUTE
A CAUSE OF ACTION PURSUANT TO
RULE 12(b)(6)**

On June 11, 2012 Respondent filed a Motion to Dismiss two of Applicant's claims under South Carolina Rule of Civil Procedure 12(b)(6). Applicant files this Return in response to that Motion.

ARGUMENT**I. Respondent's Motion to Dismiss Is Not Timely.**

Respondent's Motion to Dismiss is not timely. On December 8, 2011 this Court entered a scheduling order entitling each party fourteen days to respond to pretrial motions. Sched. Order at 2. The hearing is set for June 18, 2012. On May 1, Applicant filed his Final Amended Application, which includes the claims in question. Respondent, however, did not file the motion until the evening of June 11, 2012. This eleventh hour filing only leaves Applicant four business days to respond to the motion before the start of the hearing. Applicant's response to the Motion will be necessarily abbreviated, as he has considerably less than the contemplated fourteen days to respond.

Because Respondent did not file the pre-trial motion within the terms of the scheduling order, it is untimely, and should not be considered. *See Arthur v. Sexton*, 368 S.C. 326, 338, 628 S.E.2d

894, 900 (2006) (“Given Appellant’s failure to strictly comply with the scheduling order, the trial judge had discretionary authority to impose the appropriate sanction.”)

II. Relief Can Be Granted on the Claims in Question.

Respondent argues that no set of facts could support two of Applicant’s claims for relief. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (in considering motions to dismiss under Rule 12(b)(6), the trial court must “construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.”).

a. The claims are appropriate for post-conviction review.

The first claim Respondent argues should be dismissed is 10(c). This claim addresses whether Mr. Winkler’s right to represent himself was violated. *See Farretta v. California*, 422 U.S. 806 (1975). This allegation relates to whether trial counsel failed to request and the trial judge failed to hold a hearing on whether Applicant desired to represent himself. The allegation is based on conversations that took place off-the-record. Because the basis for the claim is not contained in the record of proceedings below, it could not have been presented during direct review and is appropriate for review for post-conviction review. *C.f. Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (declining to review record-based errors available for review on appeal); *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993) (same). Because claim 10(c) relies on material outside the record of the trial, it is appropriate for post-conviction review.

The same is true of the other claim Respondent moves to dismiss. Claim 10(d) addresses whether the jury’s verdict was rendered under unduly coercive circumstances. Because those circumstances include information outside the record of what happened at trial, this claim is appropriate for post conviction review.

Neither of the claims in questions are barred from review because they rely on information outside the record of what happened at trial.

b. Even if the claims are procedurally barred, trial counsel's ineffectiveness is cause for excusing the default.

Even if this Court finds that the claims are procedurally barred, trial counsel's ineffectiveness is cause for excusing the default. Although whether trial counsel's ineffective assistance can constitute cause for excusing a procedural default is an open question in South Carolina, it is well established under federal law that trial counsel's ineffectiveness can constitute cause for excusing a default. *See Coleman v. Thompson*, 501 U.S. 753-54 (1991) ("Attorney error that constitutes ineffective assistance of counsel is cause [for excusing a procedural default]"). The Supreme Court explained that post-conviction counsel's ineffectiveness may also provide cause for excusing a procedural default. *See Martinez v. Ryan*, __ U.S. __, 132 S. Ct. 1309 (2012). Because Applicant has alleged ineffective assistance of counsel related to both of these claims, any procedural bar should be excused.

Even if the claims are procedurally bared, they are properly before this Court because of trial counsel's ineffectiveness.

CONCLUSION

Because Respondent's motion is not timely, this Court should not consider it. Nonetheless, Applicant's claims 10(c) and 10(d) rely on evidence external to the record on appeal, are not procedurally barred, and constitute claims upon which relief can be granted. For the foregoing reasons, Respondent's Motion should be denied.

Respectfully submitted,

June 11, 2012
DATE


COUNSEL FOR MR. WINKLER

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue
Suite 101
Columbia, South Carolina 29201
(803) 765-1044

JOHN R. MILLS
Attorney at Law
201 W. Main Street
Suite 301
Durham, NC 27701
(919) 251-6259

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

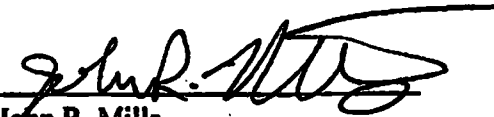
LOUIS MICHAEL WINKLER, JR.)
Applicant,)

v.)

STATE OF SOUTH CAROLINA,)
Respondent.)IN THE COURT OF COMMON PLEAS
11-CP-26-03907**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of Applicant's Return to Respondent's Motion to Dismiss for Failure to State Facts Sufficient to Constitute a Cause of Action Pursuant to Rule 12(b)(6) was served by first class United States mail, postage prepaid on this the 11th day of June 20__ upon the following:

Mr. Al Simon
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211


John R. Mills
Law Offices of John R. Mills

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 LOUIS MICHAEL WINKLER, JR.)
)
 Applicant,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-26-03907

REPLY TO APPLICANT'S RETURN
 TO RESPONDENT'S MOTION TO
 DISMISS FOR FAILURE TO STATE
 FACTS SUFFICIENT TO
 CONSTITUTE A CAUSE OF ACTION
 PURSUANT TO RULE 12(b)(6), SCRC

HORRY COUNTY
 2 JAN 25 PM 1:20
 JAMES HUGGINS-MARCO
 CLERK OF COURT

Comes now, Respondent, ("the State"), above named, by and through the Attorney General of South Carolina and replies to applicant Louis Winkler's ("Applicant") return to the State's motion to dismiss grounds 10(c) and 10(d) of his application for post-conviction relief ("PCR"). In his return, Applicant alleges the State's motion should be denied for essentially two reasons. First Applicant contends (1) the motion is allegedly untimely; and (2) the claims are purportedly appropriate for PCR. In reply, the State would show this Court the following:

I. THE MOTION IS TIMELY

Applicant contends the State's motion is untimely arguing the motion is a pre-trial motion and therefore, should have been raised prior to the close of pleadings. In response, the State notes Applicant's position ignores the dictates of Rules 12(g) and 12(h)(2), of the Rules of Civil Procedure as a 12(b)(6) defense cannot be waived and can even be raised at trial. See Rule 12(g), SCRC ("If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, *except a motion as provided in subdivision (h)(2) hereof on any grounds there stated.*") (emphasis added); Rule 12(h)(2), SCRC ("A defense of failure to state a cause of action upon which relief can be

granted . . . may be made in any pleading permitted or ordered under Rule 7(a), *or by motion for judgment on the pleadings, or at the trial on the merits.*") (emphasis added). In fact, the denial of a motion to dismiss for failure to state facts sufficient to constitute a cause of action on the basis of timeliness is reversible error. See Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 241-42, 363 S.E.2d 691, 692 (1988) ("At trial, the judge denied as untimely Dealer's motion to dismiss the complaint for failure to state facts sufficient to constitute a cause of action. This was error. As permitted under Rule 12(h)(2), SCRCP, a defense of failure to state a cause of action upon which relief can be granted may be raised at the trial on the merits.") (internal quotations omitted). With this in mind, the State submits the motion is timely.

II. GROUNDS 10(c) AND 10(d) FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION UNDER SOUTH CAROLINA LAW AS DISCUSSED IN THE STATE'S MOTION TO DISMISS

Furthermore, despite Applicant's assertion to the contrary, neither ground 10(c) or 10(d) are appropriate claims for relief as discussed previously in the State's motion to dismiss.¹ While Applicant casts ground 10(c) as an allegation focused on trial counsel's failure to request a hearing and the trial judge's failure to hold a hearing, this is inconsistent with the language of the claim itself. Ground 10(c) merely alleges Applicant's "right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 § 14 of the South Carolina Constitution, was violated by the *trial court's refusal* to permit him to discharge appointed counsel and proceed *pro se.*" (emphasis added). Indeed, there is nothing within ground 10(c) which alleges counsel was in any way deficient in its representation as this

¹ See Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) ("[E]rrors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); Drayton, 312 S.C. at 8, 430 S.E.2d at 420 ("Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.").

is the allegation submitted in ground 10(a)(1). Rather, the issue in ground 10(c) is clearly a claim premised on trial court error and must be dismissed under Simmons and its progeny.

The same is true with respect to ground 10(d). In particular, ground 10(d), by its terms, alleges that Applicant's "right to a fair and impartial jury determination of his sentence—free from the influence of passion, prejudice, or any other arbitrary factor—guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated *by the trial court's repeated refusal* to answer the juror's question about what would happen if they could not reach a unanimous sentencing verdict *and the court's improper instructions to the jury* under unduly coercive circumstances." (emphasis added). In other words, Applicant is alleging his rights were violated when the trial court refused to answer the jury's question and then gave an allegedly improper instruction. Quite simply, this claim, like ground 10(c), is a claim of trial court error, and therefore, should be dismissed under the Simmons doctrine.

Additionally, Applicant appears to argue that should his claims be barred under Simmons, they still should not be dismissed under the South Carolina Rules of Civil Procedure because the Supreme Court of the United States, in Martinez v. Ryan, __ U.S. __, 132 S.Ct. 1309 (2012), determined the federal habeas corpus statute, 28 U.S.C. § 2254(d), allows for the excusal of a procedural default where initial-review collateral counsel (i.e. PCR trial counsel) failed to raise a substantial claim of ineffective assistance of counsel in state court. In response, the State submits Martinez is irrelevant to this discussion because Applicant's failure to state a cause of action in state court has nothing to do with the Martinez Court's interpretation of the federal habeas corpus statute. Even assuming South Carolina courts interpreted the state PCR statute consistent with the Martinez Court's interpretation of the federal habeas corpus statute, such an

interpretation would have no bearing on whether Applicant had stated facts sufficient to constitute a cause of action in his PCR application. In other words, the Martinez decision does not magically transform a claim of trial court error that pursuant to the Simmons doctrine, is not a cause of action in a state PCR, into a cause of action. Rather, this is a question which South Carolina courts have already addressed in Simmons and its progeny.

III. CONCLUSION

In light of the foregoing, the State respectfully requests this Court, to dismiss claims 10(c) and 10(d) of Applicant's second amended application for PCR.

Respectfully Submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

South Carolina Office of Attorney General
Capital and Collateral Litigation Unit
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-6305

By: 
ATTORNEY(S) FOR THE RESPONDENT

CERTIFICATE OF SERVICE

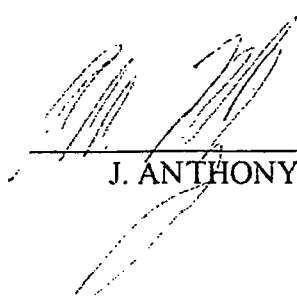
I, J. Anthony Mabry, counsel for the Respondent, certify that I have served the Reply to Applicant's Return to Respondent's Motion to Dismiss by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

John R. Mills, Esquire
Attorney At Law
201 West Main Street, Suite 301
Durham, NC 27701

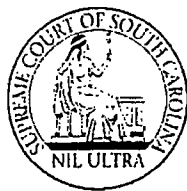
Emily C. Paavola, Esquire
Death Penalty and Defense Center
Post Office Box 11311
Columbia, SC 29211

HORRY COUNTY
12 JUN 15 PM 1:20
MELANIE HUGGINS-MARD
CLERK OF COURT

This 14th day of June, 2012.



J. ANTHONY MABRY



ATTORNEY GENERAL'S OFFICE
RECEIVED 6-15-12

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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June 15, 2012

Mr. Donald J. Zelenka
State of South Carolina
PO Box 11549
Columbia, SC 29211-1549

✓ Re: The State v. Winkler, Louis Michael Jr.
Appellate Case No. 2008-081626

Dear Counsel:

The following exhibit(s) filed with this Court are being returned:

Court's 2-A, 3-A, 4-B, 5-E, 6-F, 7-G, 8-H, 9-J, 10-J, 11-E, 12-K, 13-K, 14-L, 15-M, 16-M, and 17-N, 22, 23, 25

State's 1 (tape of 911 call)

State's exhibits 2-10, 12, 13, 15-16, 18-20, 22-24, 26-27, 29-33, 37, 38, 42, 52-67, 71-101, 103-137, 140-143, 151-158, 160, 161,

State's exhibits 69 (Notice of Final Disposition)

Defendant's exhibits 1-25, 26(paper)

Oversize exhibits State's 11, 47, 68, 150

Your office has picked-up of the exhibit(s). Please sign copy of this letter acknowledging receipt.

Very truly yours,

Linda Allen

Administrative Assistant

cc:

Alan Wilson

Robert Michael Dudek

Elizabeth Anne Franklin-Best

Alphonso Simon, Jr.

John W. McIntosh

John Gregory Hembree

Received By *R. J. A.*
Date 6/15/2012

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
2011-CP-26-03907

Louis Michael Winkler,)
)
vs.)
)
State of South Carolina.)
)

TRANSCRIPT OF RECORD

June 18-19,21, 2012
CONWAY, SOUTH CAROLINA

BEFORE:

The Honorable, Benjamin H. Culbertson, Judge

APPEARANCES:

BY: Alphonso Simon, Jr., Esq.
Anthony Mabry, Esq.
Brendan J. McDonald, Esq.
Attorneys for State of South Carolina

BY: John R. Mills, Esq.
Emily C. Paavola, Esq.
Attorneys for Louis Michael Winkler

Brenda R. Babb
Circuit Court Reporter

2

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(Reporter's Note: Petitioner's Exhibits identified as Pet in index. Respondent's Exhibits identified as Res in index. Petitioner's Exhibits 10, 11, 12, 13, 14, 15 and 16 entered on June 20, 2012 with Reporter Kay H. Richardson.)

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Call of Case

6

1 The Court: This is the case of Louis Michael
2 Winkler, Jr. v. The State of South Carolina, case number
3 2011-CP-26-3907. The matter is before the Court on an
4 application seeking post conviction relief. I know we've
5 got a number of people here so for the court reporter
6 everybody who is participating as far as attorney let's
7 stand and, please, give the court reporter your name and
8 who you represent?

9 Ms. Paavola: My name is Emily Paavola and I'm
10 here on behalf of the Applicant Louis Winkler.

11 The Court: All right.

12 Mr. Mills: Good morning, Your Honor, my name is
13 John Mills and I'm here on behalf of Mr. Winkler.

14 The Court: All right.

15 Mr. Simon: Your Honor, good morning, my name is
16 Al Simon and I'm here on behalf of the State of South
17 Carolina. Also my co-counsel here if they would, please,
18 introduce themselves.

19 Mr. McDonald: Brendan McDonald.

20 The Court: Excuse me?

21 Mr. McDonald: Brendan McDonald.

22 The Court: All right.

23 Mr. Mabry: Anthony Mabry, m-a-b-r-y, Your
24 Honor.

25 The Court: All right, Mr. McDonald, m -

Motion to Dismiss by State

7

1 Mr. McDonald: M-c.

2 The Court: -- c, thank you, all right. Now I
3 understand we've got a couple of preliminary motions we
4 need to deal with up front. Does it matter what order we
5 take them in or how we want to proceed?

6 Ms. Paavola: It doesn't matter to us, Your
7 Honor.

8 The Court: Okay.

9 Mr. McDonald: It doesn't with us, Your Honor.

10 The Court: I know the first thing we've got is
11 a motion to dismiss that might be dispositive of some of
12 the matters. Let me hear from you on your motion to
13 dismiss, Mr. Simon, or whoever wants to argue?

14 Mr. Simon: Mr. McDonald would be arguing that
15 one, Your Honor.

16 The Court: All right, as I read your motion I
17 think you're just seeking to dismiss, is it two causes of
18 action?

19 Mr. McDonald: That's correct, it's the two
20 free-standing claims essentially because there are claims
21 of trial court error. They make up a class of cases that
22 really as a matter of law cannot be granted and as a result
23 we're asking that under Rule 12(b)(6), 12(c), 12(h)(2), all
24 those, those matters that essentially because really they
25 can't be granted that it constitutes a, it's not a cause of

Motion to Dismiss by State

8

1 action under, under South Carolina law and, therefore, we
2 ask that it be dismissed.

3 The Court: And you're going to need to refresh
4 my memory. Those are the causes of actions for --

5 Mr. McDonald: Ten, I believe it's 10(c) and
6 10(d), there are, in the alternative they are asserted, I
7 believe, as IAC claims as well. We have no issue with
8 that. I think that would be proper, properly before the
9 Court, but the 10(c) and 10(d) under Simmons and Drayton v.
10 Evatt I think it's pretty clear that those are free
11 standing claims of trial court error. I don't, I don't see
12 any, any way where it really could be granted even assuming
13 that all the facts that are alleged there are true.
14 Specifically with respect to the self representation issue
15 I believe the Supreme Court ruled on that and they have
16 determined that there was no pretrial refusal by saying
17 that this was only, this wasn't brought to the Court's
18 attention until the sentencing phase and that's why they
19 looked at it under the abuse of discretion standard because
20 Farretta simply wasn't implicated and so with respect to
21 10(c) I think that's already been ruled upon in addition to
22 being part of that class of claims that just isn't
23 cognizable in PCR.

24 The Court: All right, thank you.

25 Ms. Paavola: Your Honor, our position is that

Motion to Dismiss by State

9

1 none of these claims are procedurally barred in post
2 conviction because they could not have been raised on
3 direct appeal. Simmons and Evans both stand for the
4 proposition that claims that could have been raised on
5 direct appeal may not be re-raised in post conviction.
6 Here both of these claims were not on the record; they were
7 not objected to and preserved for appellate review. They
8 would have been procedurally barred in appellate review.
9 They cannot be both procedurally barred for appellate
10 review and procedurally barred in post conviction. There
11 has to be some place where Mr. Winkler may raise these
12 claims.

13 The Court: Okay, so you're saying the appellate
14 court's didn't address either one of these allegations?

15 Ms. Paavola: They did not, Your Honor. The
16 allegation, the Farretta allegation that Mr. McDonald is
17 referring to was the request that occurred after the close
18 of the guilt phase of the capital trial. This claim is
19 based on our allegation that Mr. Winkler made a pretrial
20 request before the guilt phase ever began.

21 The Court: Okay, all right, all right, I'm
22 going to deny your motion. This is a non-jury so I'm going
23 to allow them to go ahead with it, all right. All right,
24 now what do we have next?

25

Motion to Strike Affidavits

10

1 Mr. Simon: Your Honor, we have the, I guess the
2 motion to strike the affidavits that were, that the
3 Applicant has indicated that they intend to rely upon for
4 this hearing.

5 The Court: All right, and your basic argument
6 is it's barred by, there's a Rule 606, Rule 60 what?

7 Mr. Simon: Well there are several prongs to our
8 argument, first in terms of dealing with the jury
9 affidavits we look to Rule 606 which limits the ability of
10 jurors offer testimony about what occurred during
11 deliberations. They, the affidavits that they provided of
12 the four jurors that was Thomas Hardwick, Phillip Randall,
13 Jaron Wallingford, and Lauren Roughton, they all talk
14 specifically about what occurred during the deliberations
15 and for those to be considered by the Court first the Court
16 would have to find that there was, that something in those
17 affidavits impugnes upon the fundamental fairness of the
18 trial because the only exceptions that have been outlined
19 by the Supreme Court through State v. Hunter and State v.
20 Franklin and Sumpter v. State and certainly State v.
21 Zeigler has been where the Court makes a finding that what,
22 what was provided in an affidavit or in juror testimony
23 impugnes on the fundamental fairness of the trial and we
24 believe first before any of those affidavits can be
25 admitted there has to be something within those affidavits

Motion to Strike Affidavits

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1 that impugnes on the fundamental fairness of the trial..

2 On top of that we believe that those, what was
3 submitted on affidavits at all. They are all signed
4 statements by the witnesses but the ones that were taken in
5 Horry County were not sworn by a South Carolina notary.
6 Instead they were sworn by Mr. Mills who is not a notary
7 here and has no authorization to take the oaths of
8 affirmations of any individuals in the State of South
9 Carolina.

10 And I believe that the third part of our argument
11 was in regards to the out of state witnesses. These are
12 individuals that we cannot, based on the amount of notice
13 that we have of the affidavits being submitted by those
14 folks those are folks we couldn't get to the courtroom
15 today because they were out of state and with that we're
16 requesting if the Court was going to allow those in
17 additional time to either get counter affidavits or to
18 depose those individuals.

19 The Court: All right.

20 Ms. Paavola: Your Honor, I agree with Mr.
21 Simon's general outline of the law on the admissibility of
22 juror testimony. We believe that the allegations in the
23 juror affidavits do rise to a level of impugning
24 fundamental fairness; that's why we think they're
25 admissible. We think that the Court should review the

Motion to Strike Affidavits

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1 allegations in the affidavits, make that decision; that's
2 the only way that you can make that decision.

3 The three affidavits that they object to based on
4 being out to state witnesses two of them are not out of
5 state witnesses. Ben Hege is a resident of South Carolina
6 - no?

7 Mr. Mills: North Carolina.

8 Ms. Paavola: I'm sorry, North Carolina. John
9 Burch that issue is moot because he will be here this
10 afternoon to testify, and Ed Genet is a resident of North,
11 I'm sorry, of Ohio, however, Mr. Simon was notified of
12 these witnesses on at a minimum June 4th. We believe he
13 had adequate time to contact those witnesses and determine
14 whether he wanted to secure a counter affidavit or their
15 testimony.

16 The Court: Okay.

17 Ms. Paavola: As for the notarization issue we
18 believe that the, the affidavits are sworn statements.
19 They were all sworn under the penalty of perjury. We think
20 they're admissible on that basis and ---

21 The Court: Well the question is is where were
22 they obtained, in North Carolina or in South Carolina?

23 Ms. Paavola: In South Carolina.

24 The Court: All right, and were they obtained in
25 the presence of Mr. Mills who notarized them?

Motion to Strike Affidavits

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1 Ms. Paavola: Yes.

2 The Court: So can a North Carolina notary
3 notarize a South Carolina affidavit?

4 Ms. Paavola: No.

5 Mr. Mills: Your Honor, I think the point that
6 Ms. Paavola is making is that while it may not be properly
7 notarized they are none the less signed under penalty of
8 perjury.

9 The Court: Well that might be the case but I
10 mean the fact of the matter is is to be a valid affidavit
11 you've got to meet certain requirements. Now the question
12 is is if you've got a North Carolina notary can a North
13 Carolina notary come into South Carolina and take a sworn
14 statement from a South Carolina witness and make it
15 admissible in court. I don't think they can.

16 Mr. Mills: And we concede the point, Your
17 Honor.

18 The Court: Okay, all right, based upon the fact
19 that it is not a valid affidavit I'll grant your motion
20 because I don't think a North Carolina notary can take an
21 affidavit from a South Carolina witness in South Carolina
22 and have it as a valid affidavit, all right.

23 Ms. Paavola: That's fine, I would like to note,
24 Your Honor, for the record that Mr. Simon's office has
25 subpoenaed all of those witnesses and we are prepared to

Motion to Strike Affidavits

14

1 call the three jurors that we, from the four jurors that we
2 submitted affidavits from ---

3 The Court: All right, well I'm ---

4 Ms. Paavola: --- in, in, in light of the
5 Court's ruling.

6 The Court: All right, well I'm just striking
7 the affidavits because I find that they were not validly
8 executed. I'm not going to grant your motion in limine to
9 prohibit the testimony; I'm going to allow them if they
10 want to call them to testify. They can call them to
11 testify. If they try to elicit any objectionable testimony
12 you can go ahead and object at that time but I'm not going
13 to grant your motion in limine. I'm going to let them
14 proceed, okay. I'm not saying that they can get in the
15 testimony but raise your objection when they try to get to
16 the information that you find is objectionable, all right.

17 Mr. Mills: Thank you, Your Honor.

18 The Court: All right.

19 Mr. Mills: And, Your Honor, just to clarify I
20 assume this does reach the affidavits that are not
21 notarized by me? In other words, there are affidavits
22 aren't notarized by, that a affidavit was notarized by an
23 notary in Ohio.

24 The Court: Okay.

25 Mr. Mills: Mr. Hege had his affidavits

Motion to Strike Affidavits

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1 notarized by a North Carolina.

2 Ms. Paavola: Yes, there are six affidavits that
3 are not notarized by Mr. Mills.

4 The Court: Okay, well I'm, I'm only dealing
5 with the South Carolina affidavits. I'll allow the other
6 affidavits to come in, okay.

7 Ms. Paavola: Thank you, Your Honor.

8 The Court: So I'm granting your motion as to
9 the South Carolina affidavits. I'm denying it as to the
10 affidavit from Ohio and where?

11 Mr. Mills: North Carolina.

12 The Court: All right.

13 Ms. Paavola: And, sorry, Your Honor, just one
14 more item to note, there are three other affidavits also
15 notarized by people other than Mr. Mills that I believe the
16 State did not object to which is Carolyn Graham, Vicki
17 Childs, and TeAnne Oehler.

18 Mr. Simon: That is correct, Your Honor, and we
19 believe that we're going to have the testimony from at
20 least two of those witnesses during this proceeding.

21 The Court: All right, Carolyn Graham, who?

22 Ms. Paavola: Vicki Childs, and TeAnne Oehler
23 which is spelled t-e-A-n-n-e Oehler, o-e-h-l-e-r.

24 The Court: Carolyn Graham, Vicki --

25 Ms. Paavola: Childs.

Proffer by Applicant

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1 The Court: Childs, okay, got it, and ya'll do
2 not object to those, correct?

3 Mr. Simon: No, Your Honor, and we plan on
4 presenting the testimony of at least two of those
5 witnesses.

6 The Court: All right, all right, anything else?

7 Mr. Mills: Your Honor, a couple of matters,
8 first of all we understand our motion to continue this
9 proceeding was denied.

10 The Court: Denied, correct.

11 Mr. Mills: And in light of that denial we'd
12 like to make a proffer for the record. I have copies for
13 the Court as well as for counsel.

14 The Court: All right, now what is it you're
15 proffering?

16 Mr. Mills: Your Honor, we proffer, excuse me,
17 we'd like to make a proffer of what we would have been able
18 to do had the continuance been granted.

19 The Court: All right, cause I'm trying to think
20 how you, you filed a motion for a continuance, I denied it,
21 so now you are proffering what you would have done had the
22 continuance been granted?

23 Ms. Paavola: The, I'm sorry, the evidence that
24 we believe we could have developed and presented had the
25 continuance been granted.

Proffer by Applicant

17

1 The Court: All right, when you say you believe
2 you could have developed it ---

3 Mr. Mills: Well, Your Honor ---

4 Ms. Paavola: Well some of it hinges on the PET
5 scan which hasn't been analyzed yet so we would like to
6 proffer what we believe the PET scan would have shown and
7 what the additional evidence would have developed from
8 that, those results had that analysis been completed.

9 The Court: Okay, I'm not going to allow you to
10 introduce what you think it would have shown without
11 something to substantiate it. I mean I'm going to allow
12 you to say or you can go ahead and state that you had a PET
13 scan and hadn't got the results but I'm not going to let
14 you speculate as to what those results would have shown
15 unless you've got something that substantiates what those
16 results would have shown because unless, because as I
17 understand they could have shown the direct opposite
18 unless you ---

19 Ms. Paavola: Correct.

20 The Court: Okay ---

21 Mr. Mills: Indeed they could have, Your Honor,
22 and we've got some examples of the kinds of reports that
23 have been produced on the analysis that we've requested to
24 have done; that makes up the bulk of this proffer. In
25 other words if we had had time to obtain the PET scan an

Proffer by Applicant

18

1 analysis ---

2 The Court: All right, now when you say time to
3 obtain when did you start on this because this has been
4 pending for well over a year now, so when you say if you
5 would have had time I'm going to require you to say when
6 you first started seeking this information and how you
7 diligently sought it since that first time because I know
8 one of the things is you said you couldn't get subpoenaed
9 witnesses but I notice you didn't subpoena the witnesses
10 until like two days before you filed your motion for a
11 continuance, that type of thing, and so I'm not going to
12 let you put anything in the record that gives the
13 appearance that you were diligently seeking this
14 information if in fact you were not, okay.

15 Mr. Mills: Yes, Your Honor, and we wouldn't
16 want to do that.

17 The Court: All right.

18 Mr. Mills: In the proffer we lay out the timing
19 of the investigations we did related to the PET scan. We
20 began we contacted the radiologist in, I believe it was
21 either late October or early November of last year. We
22 obtained the MRI, we obtained MRI in January, on January
23 26th of this year. At the time we obtained the MRI we
24 learned for the first time that Mr. Winkler had undiagnosed
25 diabetes and because of the elevated blood sugar related to

Proffer by Applicant

19

1 that he was unable to obtain the PET scan at that time.
2 The way PET scans work are based on norms for people, for
3 people's blood sugar and the way they metabolize a certain
4 kind of glucose and the PET scan works by injecting some
5 radioactive glucose that's been observed during the PET
6 scan and because Mr. Winkler's blood sugars were
7 significantly elevated something like three fold beyond
8 norm we were unable to do the PET scan. As the radiologist
9 explained to us it takes between six to eight weeks to get
10 the blood sugars back down to normal then a couple of
11 additional weeks to schedule a follow up PET scan and then
12 the analysis of the PET and MRI take another six to eight
13 weeks, so that's why we didn't have time.

14 The Court: Okay, so you're looking at two,
15 four, six, eight, you're looking at six months to do one
16 and basically you didn't start it until November. So
17 you're looking at even if there had not been a problem in
18 November you're looking at November, December, January,
19 February, March, April before you could have gotten the
20 results anyway, correct?

21 Mr. Mills: We would have had the results within
22 the discovery deadline, yes, Your Honor.

23 The Court: Yeah, okay, all right. Well, I
24 mean, when you say proffer it are you just wanting to ---

25 Mr. Mills: To submit this as part of the

Proffer by Applicant

20

1 record, Your Honor.

2 The Court: All right.

3 Mr. McDonald: Just a second, Your Honor,
4 looking through what they have provided in this notebook it
5 appears in at least part of this notebook includes
6 testimony from Reuben Gerve but I can only suppose that
7 they are asserting that this would have been something that
8 they could have presented and as you were noting earlier
9 this, I mean the fact that, we believe this is going to end
10 up being speculation.

11 The Court: Yeah, and I think you're right and
12 that's why I'm not going to even consider it. The question
13 is is they want to proffer it so it will be part of the
14 record in the event the Appellate Court says I was wrong
15 and I should have considered it.

16 Ms. Paavola: Yes, Your Honor, that is its only
17 purpose.

18 The Court: Yeah.

19 Mr. Mills: Precisely.

20 The Court: Yeah, so and I understand your
21 argument. I'm going to allow them to go ahead and proffer
22 it just so it will be part of the record if the Appellate
23 Court thinks it's valid to look at or not but I'm not going
24 to consider it because I agree it's speculative and so I'm
25 not going to consider it in my decision. The Appellate

Proffer by Applicant

21

1 Court might say, man, you were wrong, you should have
2 looked at it so it will be there for them to look at, okay.

3 Mr. Mills: Thank you, Your Honor.

4 The Court: All right.

5 Mr. Mills: I have, I have a copy for the Clerk.
6 I have a copy for you if you want.

7 The Court: No, I'm fine, I don't want, I'm not
8 going to consider it at all.

9 Mr. Mills: I understand, thank you, Your Honor.

10 The Court: All right, so how are we going to,
11 how do we mark that?

12 Mr. Mills: We'd like to mark it as our first
13 exhibit.

14 The Court: Okay, so it would be --

15 Madam Court Reporter: We're using Petitioner
16 and Respondent.

17 The Court: Okay, so Petitioner's Exhibit Number
18 1 not allow it into evidence. I'm allowing them to proffer
19 it as the basis for their request for a continuance of this
20 trial that I denied, all right.

21 (Whereupon, Petitioner's Exhibit Number 1 marked
22 for identification.)

23 Ms. Paavola: Are you finished with this?

24 Mr. Mills: With the proffer, yes. We also,
25 we're going to just also just for the record enter in the

Proffer by Applicant

22

1 pleadings as one unit for expediency in binders.

2 The Court: So now you know.

3 Mr. Mills: We have a record of all the
4 pleadings in the case.

5 The Court: Okay.

6 Mr. Mills: And we're going to provide both
7 parties with a copy so that they would be, so that it would
8 be easier to put together the record on appeal.

9 The Court: The pleadings of this PCR?

10 Mr. Mills: Yes, Your Honor.

11 The Court: Okay, well I guess we're just going
12 forward on your, are you talking about the application or
13 are you talking about every motion, every, I mean it's
14 going to be in the file?

15 Ms. Paavola: Your Honor, just to clarify, some
16 of this, some of the initial requests for funding for the
17 analysis relating to the PET scan those were done ex parte.

18 The Court: Right.

19 Ms. Paavola: We would like to just mark as a
20 Court's Exhibit or some how made part of the record. We
21 realize they're originally ex parte but we believe they
22 support our request for the continuance and so we want to
23 ensure that they're part of the appellate record.

24 The Court: Okay, this was what they're talking
25 is where they sought fees from the Office of Indigent

Proffer by Applicant

23

1 Defense to conduct some studies and things like that, not
2 to get the statute, but it provides them with funding for
3 investigative purposes, examinations, and things like that
4 that's provided to indigent defendants and I signed a
5 number of those ex parte orders to allow them to get
6 funding for these matters and so I guess they're saying
7 that that was the basis for the continuance was based upon
8 the information that they got so I'm going to allow them go
9 ahead and proffer that as well, all right.

10 Ms. Paavola: And finally, Your Honor, we have
11 two small housekeeping matters or perhaps three, one item I
12 know Your Honor may already be aware of and I think you
13 indicated would like to discuss it here today before we
14 began, but we submitted a request for a court order for Mr.
15 Winkler's medication to be administered on its normal
16 schedule. It's our understanding ---

17 The Court: I'm sorry.

18 Madam Court Reporter: Excuse me, Judge, he's --
19 -

20 The Court: Yeah, and I apologize for
21 interrupting but we'll put those as Applicant's [sic]
22 Exhibit 2 denying their admission but letting them proffer
23 it.

24 Madam Court Reporter: All right, which one will
25 be 2?

Proffer by Applicant

24

1 (Whereupon, Petitioner's Exhibit Number 2 marked
2 for identification.)

3 The Court: All right, I apologize, go ahead,
4 Ms. Paavola.

5 Ms. Paavola: Your Honor, it's our understanding
6 that Mr. Winkler takes medication three times a day. He's
7 had the first dose this morning before he was transported
8 here and the next two doses have been delivered with him
9 from the prison where he's housed at Leiber Correctional,
10 however, the staff at J. Reuben Long who is assisting in
11 his security we need a Court order in order to be
12 authorized to give the medication, that's my understanding.

13 The Court: All right, do we have anybody here,
14 I mean are they objecting or --

15 Mr. Mills: The State is apparently fine with
16 this arrangement, Your Honor ---

17 Ms. Paavola: We're just asking ---

18 Mr. Mills: --- but I think J. Reuben Long will
19 not do it without a court order.

20 The Court: Okay.

21 Mr. McDonald: Your Honor, as for our office we
22 are taking no position. If he needs to be medicated and we
23 have no issue with that, so whatever issue is I guess out
24 of our hands, we're taking no position on that.

25 The Court: Okay, well I mean I guess my

Proffer by Applicant

25

1 question is I don't want to be ordering some medicine that
2 he's not supposed to have. By the same token I don't know
3 why they're objecting to ---

4 Mr. Mills: The basis of their objection is that
5 although Mr. Winkler receives his medications three times a
6 day at Leiber they only administer their medications two
7 times a day at all and so they won't deviate from that
8 schedule.

9 The Court: Oh, I see, okay, yeah, I'll grant
10 your motion.

11 Mr. Mills: Thank you, Your Honor.

12 The Court: They administer the medication as it
13 says, it's prescribed medication?

14 Mr. Mills: Yes, Your Honor.

15 The Court: All right, so I'll order that they,
16 J. Reuben Long administer Mr. Winkler's medication as it's
17 prescribed to him.

18 Mr. Mills: Thank you, Your Honor.

19 The Court: All right.

20 Ms. Paavola: Next, Your Honor, we would like to
21 request that if the SCDC officials approve or agree with
22 this Mr. Winkler is currently wearing the black box and we
23 would like him to be able to take notes and perhaps they
24 could loosen the restraints somewhat and they typically
25 take off the box so that we can take notes.

Proffer by Applicant

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1 The Court: Okay, well that's kind of a security
2 matter. Mr. Winkler, hold up your hands and let me see
3 (The Applicant complies). Okay, I don't know how we're
4 going to deal with that. That's a security issue, I mean
5 they're the ones that's in charge of security. Let me
6 think on that a minute, all right, anything else?

7 Ms. Paavola: Lastly, Your Honor, we would just
8 like to note for scheduling purposes we have three
9 witnesses, Mr. Winkler's siblings who were expected to
10 arrive yesterday afternoon from Ohio, their flight was
11 delayed yesterday due to a mechanical issue. We've shifted
12 some witnesses around; they will be here this afternoon,
13 however, we may, we may run out of witnesses for an early
14 lunch break but we have additional witnesses in the
15 afternoon given the delay in their travel schedule.

16 The Court: That won't be a problem, we can work
17 around that, that will be ---

18 Ms. Paavola: Thank you.

19 The Court: All right, I think I've got this
20 whole week set aside. We'll have, ya'll see any trouble
21 getting it in this week?

22 Ms. Paavola: No, Your Honor.

23 Mr. McDonald: No, Your Honor.

24 The Court: Okay, all right, yeah, we'll work
25 around that, that's not a problem. All right, anything

Proffer by Applicant

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1 else?

2 Ms. Paavola: And then finally I would just to
3 note for the record before we call our first witness it is
4 our understanding based on the Court's pretrial ruling on
5 this issue that should Mr. Winkler be called to testify the
6 State may question him on cross examination about the
7 allegations in the PCR application that we are litigating
8 here today, however, Mr. Winkler may be allowed to assert
9 his Fifth Amendment privilege if a reasonable possibility
10 exists that the answer could provide incriminating
11 information or lead to the discovery of such information.

12 The Court: On another, on any other issue, not
13 on what he's facing here today cause he's been convicted
14 of this, so self incrimination as I understand it is not
15 applicable to these charges. I'm trying to think, I know I
16 did the research on it and I'm trying to think of what
17 it's, I know he still has his Fifth Amendment right if it
18 will generate any new -- I need to go look at my order. has
19 anybody got a copy of my order?

20 Ms. Paavola: I do.

21 The Court: Let me see cause I remember citing
22 the case, I might need to go back and read that case again
23 because there was a distinction I was thinking, in other
24 words they can't question him whether or not he robbed a
25 bank in Ohio ten years ago and he can assert his Fifth

Proffer by Applicant

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1 Amendment right but if it has to do with this case I'm not
2 really sure, I don't remember, hold for one second.

3 Okay, yeah, he can still assert his Fifth
4 Amendment right but whether or not, that's fine, but
5 whether or not it's applicable I don't know because it's
6 whether or not it will lead to any, lead to any information
7 that could be used against him in a criminal proceeding.
8 Now his criminal proceeding in these charges are over.
9 This is just whether or not he's entitled to post
10 conviction relief so I don't know that it's going to apply
11 to the charges against him in this case, but certainly if
12 they go off on some chase and they're trying to get some
13 information to paint him as a bad guy because he committed
14 a crime in some other avenue that he has not been tried on
15 then, yeah, he's got his Fifth Amendment right against self
16 incrimination but it has to be determined whether or not it
17 will lead to any evidence that could be used against him in
18 a criminal proceeding and as far as for what he is now
19 seeking post conviction relief those criminal proceedings
20 are over.

21 Ms. Paavola: Well, Your Honor, it's our
22 position that as a result of this post conviction
23 proceeding he could obtain a new criminal proceeding at
24 which he, he would be facing the same charges.

25 The Court: Okay, well I'll deal with that when

Proffer by Applicant

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1 it arises. We'll just, we'll have to wait and see. Yeah,
2 I guess you're right if he succeeds in this Post Conviction
3 Relief then he could face another, a re-trial in another
4 criminal proceeding so, yeah, in response to your question
5 he can assert his Fifth Amendment rights against self
6 incrimination is my understanding.

7 Ms. Paavola: Thank you, Your Honor.

8 The Court: Yes, sir?

9 Mr. McDonald: Just a moment, Your Honor. Your
10 Honor, since that position is, he's already been convicted
11 of these, these crimes ---

12 The Court: That's right.

13 Mr. McDonald: --- and first it's speculative
14 for them to go ahead and assume that he is going to be more
15 likely to receive a new trial and to allow him to assert
16 the Fifth Amendment privilege here and then prevent certain
17 testimony we believe is going to impinge on the State's
18 ability to prove its or provide a defense here fully.
19 Furthermore, if that issue was to come up, like if there is
20 an issue about what is admissible based off what occurs in
21 this trial we believe that's something that should be taken
22 up in a re-trial not, not something that he should be
23 allowed to assert a Fifth Amendment right here.

24 Some of the questions we may ask are going to go
25 to looking at Strickland prejudice and depending on what

Proffer by Applicant

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1 sort of answers are if he pleads the Fifth we may not be
2 able to find what, if there would be any prejudice if any.

3 The Court: Well the fact of the matter is is
4 the burden of proof is on him to prove his case so, yeah,
5 this is post conviction relief, this isn't like the
6 criminal trial where he's presumed innocent. He's been
7 convicted; he's seeking post conviction relief. The burden
8 of proof is on him to prove ineffective assistance of
9 counsel or whatever the other allegations are in his
10 application, so it's, it's not like he is going to be taken
11 the stand under the presumption of innocence and where
12 you're having to seek a conviction in allowing him to
13 assert his Fifth Amendment right; so I'm going to go ahead
14 and allow him to assert his Fifth Amendment rights and I
15 agree I'm not going to presume that he's going to get a re-
16 trial because he's got a burden of proof that he's got to
17 meet so it's more or less it's coming in like you say the
18 scales, or even that he's got to tip them in his favor to
19 get the relief he's requesting. Now how that's going to
20 come to play we'll just have to wait and see when he takes
21 the stand and when and if he asserts his Fifth Amendment
22 right, but I mean, say for the far fetched he takes the
23 stand, you can't say did you commit this crime because he's
24 already been convicted of committing the crime and the
25 record already shows that he committed the crime and the

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1 record already shows that a jury has found that he
2 committed the crime and so whether or not you ask him that
3 question is irrelevant to these proceedings because even,
4 you know, if he, if he gave a denial it doesn't affect
5 these proceedings. If he gave an admission it doesn't
6 affect these proceedings because the jury has already made
7 that determination. The question is is whether or not he
8 got his due process at his trial, all right.

9 Mr. McDonald: Thank you, Your Honor.

10 The Court: All right, anything else?

11 Ms. Paavola: Nothing further.

12 The Court: All right, let me see the attorneys
13 and I guess we need to put, I need somebody with security
14 so I can talk to them about, you know, whether or not we're
15 going to be able to allow Mr. Winkler to take notes or not
16 and I need, and I don't know whether ya'll have to be with
17 him or how we want to deal with this. Do both of ya'll
18 have to be in here or can one of ya'll come with the
19 attorneys and see me? Okay, all right, I need to know if
20 you need to put him back in the holding cell first.

21 The Deputy: How long you going to be?

22 The Court: Probably five or ten minutes.

23 The Deputy: All right.

24 The Court: Okay, all right, let me see the
25 attorneys and see you back here in my office so we can

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1 decide what we're going to do on this.

2 (Whereupon, a recess was taken and the following
3 take place on the record after the recess.)

4 The Court: All right, I understand they've
5 adjusted handcuffs where he can now take notes, good. All
6 right, anything else before we call the first witness?

7 Ms. Paavola: Nothing from us, Your Honor.

8 The Court: All right.

9 Mr. Simon: Just one thing just so the Court's
10 aware, there were a number of exhibits that were at the
11 South Carolina Supreme Court. We had gotten an order to
12 have them transported and actually brought them with us
13 today.

14 The Court: Okay.

15 Mr. Simon: Over to the right.

16 The Court: All right, good. All right, you can
17 call your first witness.

18 Ms. Paavola: Your Honor, we call Louis Winkler.

19 The Court: All right, now is this, let's see I
20 need them to be able to see and I don't know if we want him
21 to testify from right there or to come around here? I
22 guess, yeah, let him go ahead and come around here.

23 **Louis Michael Winkler Jr.**

24 **being first duly sworn, testified as follows:**

25 The Court: All right?

Applicant Winkler - Direct Examination by Ms. Paavola 33

Direct Examination

By Ms. Paavola:

Q Good morning, Mr. Winkler.

A Good morning.

Q Before we begin I just want to know, it's my understanding that you have a hearing problem?

A Yes, a slight hearing problem in my left ear.

Q Okay, and so if at any time you do not hear my question, please, let me know and I'll restate it?

A Yes, ma'am.

Q Mr. Winkler, before you were tried were there any occasions on which you indicated to your trial judge that you wished to dismiss your attorneys and represent yourself?

A Yes, there were several times.

Q Do you recall any of those and then how many of those events there might have been?

A I know there were at least three, two of them I remember the dates on it.

Q All right, what were those dates?

A There was one on July 3rd and the other was December 13th hearing.

Q Okay, and when, at the first request that you can recall specifically what was the trial Judge's

Applicant Winkler - Cross Examination by Mr. Simon

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1 response when you indicated that you wanted to represent
2 yourself?

3 A He said that he would, there would be a
4 later date that we could discuss that the first time I said
5 that.

6 Q All right, and when you made subsequent
7 requests what did the trial Judge say?

8 A He said I've already, I've already thought
9 about that, I've made my decision let's move on and that
10 was about it.

11 Ms. Paavola: All right, thank you, Mr. Winkler,
12 no further questions.

13 A Thank you.

14 The Court: All right, Mr. Simon?

15 Mr. Simon: May it please the Court?

16 **Cross Examination**

17 **By Mr. Simon:**

18 Q All right, Mr. Winkler, how are you this
19 morning?

20 A Good, sir, thank you.

21 Q All right, can you hear me all right?

22 A Yes.

23 Q Okay, you state that you informed the Judge
24 on two occasions on the record that you wanted to represent
25 yourself; is that correct?

Applicant Winkler - Cross Examination by Mr. Simon

35

1 A I don't know if it was on the record or
2 not.

3 Q Okay?

4 A It was at pretrial period before the
5 hearing.

6 Q Okay, let me show you, let me take a step
7 back for a second. During the, I guess, your pretrial
8 proceedings, well I guess pretrial, you had issues with
9 your attorneys, correct?

10 A Yes, sir.

11 Q You did not get along with Mr. Rathbun,
12 correct?

13 A No, I did not.

14 Q And that was from fairly early on, correct?

15 A Yes.

16 Q And on a number of different occasions you
17 raised to your attorneys that you wanted them fired,
18 correct?

19 A Yes, I raised to the Judge that those
20 concerns.

21 Q There were a number of different occasions
22 where with while you were in Court your attorneys informed
23 the Judge that you had issues with them, correct?

24 A Correct.

25 Q And on those occasions they informed the

Applicant Winkler - Cross Examination by Mr. Simon 36

1 Judge and asked that the Judge hear you out, correct?

2 A Yes.

3 Q You state that one of those occasions was
4 on July 3rd of 2007; is that right?

5 A I believe so, yes.

6 Q And that was initially, do you recall why
7 you were at Court that day?

8 A It was a motion hearing, they were putting
9 in some motions.

10 Q And there's a point in time after they went
11 through a number of the motions that Mr. Wilson asked if,
12 indicated to the Judge that you had an issue you wanted to
13 be heard, correct?

14 A Yes.

15 Q And at that point in time you informed the
16 Court that you wanted to fire Mr. Rathbun; is that correct?

17 A Yes, both attorneys.

18 Q All right, make sure I have the right page
19 here --

20 Mr. Simon: Actually excuse me, Your Honor, may
21 I beg the Court's indulgence for just a --

22 The Court: Certainly.

23 Mr. Simon: (Continuing)

24 Q Mr. Winkler --

25 Mr. Simon: Your Honor, may I approach the

Applicant Winkler - Cross Examination by Mr. Simon

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1 witness?

2 The Court: Yes.

3 Q I am passing you Volume 7 of the record on
4 appeal and I am going to page thirty-two sixty-one but
5 before I do that let me show you why, what this is of,
6 starting on page thirty-two zero four and tell me if
7 incorrectly say? Starting on page thirty-two zero four
8 that is, indicates that's a transcript for the July 3rd,
9 2007, hearing, correct?

10 A Yeah, I've never seen this before.

11 Q You've never seen the transcript?

12 A Not that, no.

13 Q Okay, here is what I would like you to do,
14 if you'd read starting on page fifty-seven --

15 A You can read it, you can read it.

16 Q Well I actually want you to read it to
17 yourself?

18 A Okay.

19 Q From here to page 3267?

20 A From right here, okay -- okay, it's 3266
21 you said?

22 Q I believe I actually said 3264. Have you
23 completed reading the discussion that was on the record
24 about your request to dismiss counsel?

25 A Yeah, where was this taking place at? Is

Applicant Winkler - Cross Examination by Mr. Simon

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1 this pretrial?

2 Q July 3rd, 2007?

3 A Okay.

4 Q Now in reading that was there anywhere in
5 there, does it refresh your recollection at any point in
6 time during that hearing did you request to go pro se?

7 A Yes.

8 Q Where?

9 A I don't know exactly where it's at.

10 Q Was it on the record?

11 A I don't know if they put it on the record
12 or not.

13 Q You didn't bring it up to the Judge when
14 you were given the opportunity to talk about counsel?

15 A Yeah, we talked about counsel several,
16 several times that day.

17 Q When you had the opportunity on the record
18 to make the request to represent yourself you didn't, did
19 you?

20 A Yes, I did.

21 Q Where?

22 A I don't know where it's at in here.

23 Q You said that one of those occasions was on
24 July 3rd, 2007, correct?

25 A Yes.

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1 Q And you have just read the discussion, the
2 argument you had about ---

3 A I read two pages, I mean is it in here
4 somewhere else? There's three thousand two hundred pages
5 here or whatever is in it for that date?

6 Q Well let's move on to the, you said the
7 second time you made the request was the December 13th,
8 2007 hearing, correct?

9 A Yes.

10 Q I'm going to ask you to turn to page 3700?

11 A Okay.

12 Mr. Simon: Actually may I approach the witness?

13 The Court: Yes.

14 A Okay, these are, this is trial, this is a
15 voir dire for the witnesses.

16 Q It's indicated it's December 13th, 2007?

17 A Yeah, pretrial, yeah.

18 Q And if you would, please, review that
19 transcript, if you would?

20 A This whole transcript right here?

21 Q Oh, no, the pretrial hearing transcript, it
22 should be twenty-one pages?

23 Ms. Paavola: Just in the interest of expediency
24 we, we acknowledge that there are transcripts from pretrial
25 hearings on these two dates and they do not include a

Applicant Winkler - Cross Examination by Mr. Simon

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1 recorded request from Mr. Winkler to represent himself.

2 The Court: All right, so stipulated.

3 Mr. Simon: (Continuing)

4 Q In light of that you don't have to continue
5 reading, but I would like to ask you didn't make the
6 request on the record?

7 A Yes, I did, I, I, I discussed with Mr.
8 Wilson in detail that if he couldn't, if the Judge wasn't
9 going to replace them that I wanted, I wanted to represent
10 myself and I told the Judge that.

11 Q And you claim that you told the Judge that
12 on July 3rd, 2007 and December 13th, 2007, correct?

13 A Yes, and one other time that I don't recall
14 what the date was.

15 Q And you claim you did that on the record?

16 A I don't know if they put it on the record
17 or not.

18 Q Were you in the Court ---

19 A I know I stood up and I addressed the
20 Judge.

21 Q And you were in a courtroom?

22 A Yes.

23 Q Okay, if you had represented yourself what
24 would you have done differently?

25 Ms. Paavola: Objection, that's irrelevant.

Applicant Winkler - Cross Examination by Mr. Simon

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1 Mr. Simon: Your Honor ---

2 The Court: He's got to show likelihood of
3 success before he's entitled to post conviction relief even
4 though he might be, he's alleging some discrepancy. He has
5 to show that it, you know, the representation fell below
6 the standard of a normal attorney and had he received
7 representation then the outcome at trial could have been
8 substantially different so I think he is and I'm going to
9 overrule your objection, I'll allow the question.

10 Mr. Winkler: (Continuing)

11 A Would you repeat the question?

12 Q What would you have done different?

13 A Well there's a number of things, I can't go
14 over them all, I would have had to have studied on the
15 case.

16 Q Well you were provided the discovery by
17 your attorney the whole time, correct?

18 A Yes.

19 Q And you met with the investigators
20 apparently frequently, correct?

21 A Yes.

22 Q And you met with your attorneys frequently?

23 A Yes.

24 Q Ya'll had discussions about strategy?

25 A No.

Applicant Winkler - Cross Examination by Mr. Simon

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1 Q Did you have discussions about what
2 evidence that they were going over to consider presenting
3 at trial?

4 A No, not, not until, we weren't even, we
5 weren't even ready and as a matter of fact the investigator
6 was replaced right before trial, week before trial, week
7 before trial, and we had to get an extension, that's how
8 bad, he wasn't even in touch with my investigator and at
9 the pretrial hearing of Paige Tarr she wasn't prepared,
10 hadn't even been to Ohio. He didn't even know that. We
11 were set to go to trial in a week or ten days so we were
12 not prepared, no, and the investigator was replaced and
13 that was Paige Tarr. That's how bad it was. He didn't
14 even get in touch with her so I would have definitely
15 gotten along a lot better and been able to discuss with my
16 detective a lot more than what he did. Just for one point
17 alone and that is on the record, I know that it was right
18 before trial he hadn't even discussed what they were going
19 to say and do, she wasn't even to Ohio yet so --

20 Q Now Paige Tarr was replaced, correct?

21 A Absolutely.

22 Ms. Paavola: Your Honor, I'm sorry to object
23 again but under the Sixth Amendment Mr. Winkler does not
24 have to prove that his trial attorneys were ineffective in
25 order to have the right to represent himself. He has an

Applicant Winkler - Cross Examination by Mr. Simon

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1 absolute right under the Sixth Amendment to exercise his
2 decision to represent himself. He doesn't have to justify
3 it by establishing that his attorneys were not effective.
4 The claim here is were they ineffective in failing to
5 preserve his Sixth Amendment right to represent himself by
6 making sure that this was preserved on the record, that's
7 the only issue.

8 The Court: Well I mean but ya'll agree some
9 other allegations of ineffective assistance of counsel or
10 is your only allegation of ineffective assistance of
11 counsel that you're going to present is the fact that they
12 did not allow him to represent himself? If you are raising
13 other issues that deal with ineffective assistance of
14 counsel I'm going to allow the question to continue, but if
15 your only allegation of ineffective assistance of counsel
16 is that his trial attorneys did not preserve his right to
17 represent himself then I sustain your objection, but I was
18 of the impression of your application that you were
19 alleging other ineffective assistance.

20 Ms. Paavola: That's correct. We do have other
21 allegations and I don't have a problem with Mr. Simon
22 asking about those specific allegations but it isn't
23 relative to his request to represent himself. He is
24 entitled to represent himself regardless of whether he
25 views his attorneys as effective or not.

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1 The Court: And I agree with that and if that
2 was the only issue before the Court I would sustain your
3 objection but there are other issues before the Court that
4 deal with the ineffective assistance of counsel so I'm
5 going to allow him to go forward with the questioning.
6 Hold for a second.

7 Ms. Paavola: I understand, thank you.

8 The Court: All right, all right, go ahead.

9 Mr. Simon: (Continuing)

10 Q I'll come back to that, that issue in a
11 minute, let's go to your second claim in your PCR
12 application; you assert that your counsel should have
13 raised some issues in crossing the firearms expert,
14 correct?

15 A The what?

16 Q The SLED firearms expert Vello Pavel?

17 A Yes.

18 Q Now when you interviewed, when you were
19 first interviewed by law enforcement when you were arrested
20 you indicated that you took a gun to the house, correct?

21 Ms. Paavola: Objection.

22 The Court: Sustained.

23 Mr. Simon: (Continuing)

24 Q Let me ask you this, was there any
25 controversy over what gun was used in the shooting?

Applicant Winkler - Cross Examination by Mr. Simon

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1 Ms. Paavola: Objection.

2 The Court: I'm going to allow that question,
3 overruled, go ahead.

4 Mr. Winkler: (Continuing)

5 A What was the question?

6 Q Was there any dispute over what, which gun
7 was used in the shooting?

8 A I don't know if there was a dispute over
9 it.

10 Q Did you not claim that there was, you
11 struggled with the gun, struggled over the gun with
12 somebody else and you took the gun from the scene?

13 Ms. Paavola: Objection.

14 The Court: Sustained.

15 Mr. Simon: (Continuing)

16 Q I'm going to move to your sentencing phase
17 allegations. You have a claim in which you say that the
18 victim harassed you?

19 A Yes, I do.

20 Q Did you have any witnesses to that?

21 A Yes, we do.

22 Q Who?

23 Ms. Paavola: Objection, those witnesses will be
24 testifying later today. This is not a relevant question
25 for Mr. Winkler.

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1 The Court: Overruled, I'll allow it, go ahead.

2 Mr. Simon: (Continuing)

3 Q Well who were those witnesses?

4 A Neighbors that seen her in front of my
5 house.

6 Q And do you know if, are you aware if trial
7 counsel spoke to those folks?

8 A Pardon?

9 Q Are you aware if trial counsel spoke with
10 those individuals?

11 A Yes, they did.

12 Q And did you have any photos of --

13 A I didn't.

14 Q Have you seen any photos of the victim
15 coming around to your house?

16 A Yes, I have.

17 Q Do you know who has those photos?

18 A No, I do not.

19 Q Who had them when you saw them?

20 A A neighbor, he took the picture, the car,
21 the plate, everything.

22 Q And did you report any of this to the
23 police?

24 A Yes, I did, Mr. Aaron Wilkes who was the,
25 he was in charge of the home detention.

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1 Q Let me ask you this, when, when did these
2 incidents occur that you say that you saw her?

3 A Between October 10th and March 6th.

4 Q Do you have any more specific dates as to
5 when they occurred?

6 A I don't know if it's on the picture or not;
7 there's a video also.

8 A You say that you reported this to Aaron
9 Wilkes; did you file any police reports?

10 A No, I let, I let my attorney know.

11 Q Okay --

12 Mr. Simon: Beg the Court's indulgence for just
13 a moment.

14 The Court: All right.

15 Mr. Simon: (Continuing)

16 Q Just, just a few more questions. First the
17 gun that was in your possession when you were arrested,
18 where did you obtain that gun?

19 Ms. Paavola: Objection.

20 The Court: Sustained.

21 Mr. Simon: No further questions at this time,
22 Your Honor.

23 The Court: All right, redirect?

24 Ms. Paavola: Nothing further, Your Honor.

25 The Court: All right, you may step down.

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1 Applicant Winkler: Thank you.

2 The Court: All right, you can call your next
3 witness.

4 Ms. Paavola: Your Honor, we call Professor
5 Adina Schwartz.

6 **Professor Adina Schwartz**

7 **being first duly sworn, testified as follows:**

8 Madam Clerk: Please speak your name for the
9 Court?

10 The Witness: Adina Schwartz.

11 (Whereupon, Petitioner's Exhibit Number 3 marked
12 for identification.)

13 **Direct Examination**

14 **By Ms. Paavola:**

15 Q Good morning, Professor Schwartz.

16 A Good morning.

17 Q Could you, please, tell the Court where you
18 currently reside?

19 A New York City.

20 Q And how are you employed there?

21 A I'm a professor at John Jay College of
22 Criminal Justice which is part of the City University of
23 New York.

24 Q Okay, can you explain in a little bit more
25 detail what the John Jay College of Criminal Justice?

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1 A Okay, the John Jay College of Criminal
2 Justice is distinctive in this country because it's the
3 only liberal arts college devoted to criminal justice so I
4 teach things you wouldn't ordinarily think of. I teach
5 evidence law for undergraduates, while we have a lot of
6 police officers who take it, forensic science major
7 students have to take it. We now a forensic accounting
8 program; they have to take it. For some bizarre reason our
9 economics majors have to take it.

10 We also go up into a masters program and I teach
11 in a masters program in forensic computing the required law
12 course. I also teach in the masters program in criminal
13 justice.

14 PHD programs at the City University of New York
15 are central to all campuses but the criminal justice PHD
16 program is located at John Jay College. I resigned, I
17 guess, about two years ago because it was becoming like a
18 standard criminology focus PHD program, which I don't agree
19 with, but their program has a forensic science track and I
20 guess three times in that track I taught a course in the
21 use of forensic science and the course, and it was open to
22 criminal, send a criminal justice PHD students but it's a
23 main constituency of some law students in that forensic
24 science track.

25 Q Okay, and you currently do teach at the

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1 John Jay College of Criminal Justice?

2 A That's correct.

3 Q And are you a tenured faculty member there?

4 A I'm a tenured full professor.

5 Q Okay, and can you briefly describe your
6 educational background?

7 A Okay, I have a BA that's going to tell you
8 how old I am from Oberland College in 1971. I have a PHD
9 in philosophy from the Rockefeller University in 1976, and
10 I have a JD from Yale Law School in 1985.

11 Q All right, and at John Jay do you have a
12 particular area of expertise?

13 A Well I'm sort of the go to law in science
14 or law and technology course and that affects when I teach
15 evidence law for undergraduates it's a course that gets
16 recommended, a section that gets recommended to forensic
17 science students. They needed somebody to learn enough
18 about computer forensic and cyber surveillance to teach
19 evidence law and distinct Fourth Amendment and cyber
20 surveillance law and that's me. I'm the only, I guess I'm
21 one of two non computer, non math and computer science
22 faculty who is a faculty member in the forensic, the
23 forensic computing program, and as I said I used to for
24 quite a while really be the go to more as person for
25 students in the forensic science track of the criminal

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1 justice PHD program.

2 Q Okay, I understand, and so in addition to
3 your teaching I understand you're also extremely conversant
4 in the literature in the field of firearms and tool mark
5 identification?

6 A That's correct.

7 Q Can you tell the Court what research and
8 publications you've produced in the field of firearms and
9 tool mark identification and more generally forensic
10 science identification?

11 A Well, the field of forensic science
12 identification really started in 1997 with an article in
13 the Harvard Journal of Law and Technology which explored
14 the relation between Frye and Daubert but really use
15 forensic DNA as sort of the test case, if you like to say
16 the area where the examples were from. I've published some
17 book reviews on forensic DNA since, since then and some
18 book reviews on fingerprint identification and if your kids
19 use Willbook you can go on line that entry is mine, but
20 the main scholarship with forensic identification testimony
21 is firearms and tool mark identification.

22 I guess I have an article that appeared in, I
23 think, 2005 in Columbia Science and Technology Law Review.
24 I had two versions of the chapter and a treatise
25 psychological and scientific evidence in court, something

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1 like that by Jane Moriarti, a firearms and tool mark
2 examiner as well as a STLR article and several other
3 articles in a journal of forensic sciences in 2007 and in
4 turn I published a reply in the Journal of Forensic
5 Sciences in 2007; and I guess 2005 or something I published
6 an article on it's called Encyclopedia of Law Enforcement
7 of Firearms and Tool Mark Identification. An Amicus Brief
8 that I wrote in a case was published in the Journal of
9 Philosophy Science and Law in, I believe, 2004 and I have
10 two articles in Champion in 2008 on firearms and tool mark
11 identification. Since 2009 the National Academy of
12 Sciences reports strengthening forensic science through the
13 United States has come out I have two policy pieces, one of
14 round table in a Champion. One of the other participants,
15 I'm very honored by that, was United States District Court
16 Jed Rakoff. Another was an article last summer with two
17 co-authors in a newsletter of the American Statistical
18 Association.

19 Q Okay, I would like to hand you what's been
20 marked as Petitioner's Exhibit 3 --

21 Ms. Paavola: Your Honor, may I approach the
22 witness, please?

23 The Court: Yes.

24 Ms. Paavola: (Continuing)

25 Q Professor Schwartz, do you recognize that

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1 document as a copy of your c.v.?

2 A Yes, I do.

3 Q And does that c.v. include the list of
4 publications that you've just discussed for us as well as
5 several others?

6 A Yes, it does.

7 Ms. Paavola: Your Honor, we would move to
8 exhibit, I'm sorry, to admit Exhibit 3?

9 The Court: Any objection?

10 Mr. Simon: No objection, Your Honor.

11 The Court: All right, Petitioner's Exhibit, or
12 Applicant's, Exhibit Number 3 admitted into evidence
13 without objection.

14 (Whereupon, Petitioner's Exhibit Number 3 entered
15 into evidence.)

16 Ms. Paavola: (Continuing)

17 Q Dr. Schwartz, could you briefly tell us how
18 you initially became familiar with the subject of firearms
19 and tool mark identification?

20 A Yes, as a result of my Harvard Journal of
21 Law and Technology article I was contacted by Susan Hack
22 who is a professor of philosophy at the University of Miami
23 and she contacted me because a case Ramirez v. State was
24 pending before the Florida Supreme Court and Florida is a
25 Frye state and the defense attorney had briefed the issue

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1 as Daubert and was very concerned and I'm one of the very
2 few people who believes on principal grounds that Frye if
3 properly interpreted is a workable standard. Anyway, Susan
4 asked in terms of my Frye standard what did I think about
5 the issues in Ramirez and I scarred reading and I realized
6 that in terms of good old fashion Frye there was a serious
7 dispute within the field mainly that the firearms and tool
8 mark examiners in Ramirez v. State testified that there was
9 no need for objective criteria for identification and
10 starting in the 1950's, probably in the 1930's there was
11 serious scholarship among firearms and tool mark examiners
12 saying an objective criterion was needed. There were also
13 people saying we know it when we see it, we don't need an
14 objective criterion. The examiners in Ramirez v. State had
15 also testified that it was impossible for a trained
16 examiner to make a false positive, very serious scholarship
17 not only among firearms and tool mark examiners but the
18 classic 1995 study on proficiency of forensic scientist but
19 Peterson and Marcum had said that, sure, there was records
20 showing there were false positives so I submitted this
21 brief. It was out of time. Also out of time was a letter
22 by a firearms and tool mark examiner objecting on very
23 similar grounds to mine to the testimony and when I was
24 given the letter by the firearms and tool mark examiner he
25 submitted it to the attorneys on both sides and wanted them

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1 to use it in Court. I wrote to him and he sent me this, a
2 fair amount of literature on the field and that's when my,
3 and I started reading and reading the stuff he'd sent me
4 and also reading other things.

5 Q All right, and since that time in the
6 course of your work in this area have you been called as an
7 expert witness in the field of firearms and tool mark
8 identification as an academic expert?

9 A Yes, I have.

10 Q How many times, if you know?

11 A I think twenty-one but I could be wrong, it
12 would be twenty, it could be twenty-two.

13 Q That's fine, and have you been qualified as
14 an expert in South Carolina as well?

15 A I was qualified to testify in South
16 Carolina v. Fireberger in the summer of 2009.

17 Q All right, and just to be clear you are not
18 a firearms and tool mark examiner, you don't fire the
19 bullets yourself and look at the weapon and that sort of
20 thing?

21 A That's correct.

22 Q Your area of expertise is in the science
23 and literature involving the reliability of tool mark
24 examination?

25 A That's correct.

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1 Ms. Paavola: Your Honor, at this time I move to
2 admit Dr. Schwartz as an academic expert in the field of
3 firearms and tool mark identification.

4 The Court: Any questioning?

5 Mr. Simon: Just briefly, Your Honor.

6 The Court: All right.

7 **Voir Dire**

8 **By Mr. Simon:**

9 Q Dr. Schwartz, when you say you were
10 qualified as an expert twenty-one times, are you saying
11 that you were in Court and qualified or are those cases
12 that you -- actually let me take a step back, those twenty-
13 one times did you testify all those twenty-one times?

14 A I testified twenty-one times; there's
15 probably about fifty, I don't know, times where I submitted
16 affidavits. Now let's just get clear on the qualification,
17 most of the testimony I've given has been in admissibility
18 hearings. There's also been issues about whether I was
19 qualified to testify at trial, so the only trial in which I
20 testified was in the death penalty case of Florida v.
21 Hilton last year, last January. I should say that I
22 testified by deposition because I was going to be in
23 England at the time of the case. It is a case that there
24 are to my knowledge through appendings in cases where I
25 testified at admissibility hearings holding that I was not

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1 qualified to testify at trial.

2 Q Just so I understand correctly, of those
3 twenty-one times only once did you testify before a jury;
4 is that correct?

5 A That's correct.

6 Q And all of the other times you've testified
7 at pretrial?

8 A Yes, we should make a distinction the other
9 times have all been admissibility hearings except South
10 Carolina v. Fireberger which like this case was a post
11 conviction proceeding.

12 Q And you're qualified as an expert in, I
13 guess, reviewing the literature regarding firearms and tool
14 mark examination?

15 A You could say, you could say an academic
16 expert because my expertise is based on a review of the
17 literature but also on the skills I've developed through
18 knowledge of broader issues of forensic identification, and
19 on the analytical abilities I have for analyzing the
20 literature and criticizing it and seeing if it in fact
21 bears out the claims of firearms and tool mark examiners
22 niche.

23 Q Okay, and in reviewing the literature can
24 you just give me an idea of what all you have reviewed?

25 A Okay, well most of the articles by firearms

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1 and tool mark examiners are published in the Association of
2 Firearms and Tool Mark Examiner Journal, AFT Journal. John
3 Jay College is one of the very few places in the world that
4 has that in hard cover. Only thirteen libraries in the
5 world have it. Being at John Jay College I have access to
6 and I have reviewed a substantial number, I should say,
7 let's make a distinction. There are articles by firearms
8 and tool mark examiners that say this is the scientific
9 basis of our discipline, this is why you can make a
10 identification, this is proof that we can make an
11 identification on I'd say that I've read upwards ninety
12 percent to those.

13 There are also articles of the ilk that are funny
14 such as I observed in wood work, what a catapult would look
15 like and what sort of marks might be made. I read very
16 little of that. I read it when I have an opposing firearms
17 and tool mark examiner who has published a set of
18 curiosity, okay. There were also articles in the Journal
19 of Forensic Sciences and I have read the pertinent articles
20 in Journal of Forensic Sciences. Again I can't say every
21 but I'd say upwards of ninety percent.

22 There are also articles in treatises. For
23 instances Fimenital has a treatise on modern science
24 evidence. The main article though it perceives why there
25 are articles on law by legal scholars and then they have

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1 articles by various forensic scientists. There's that
2 article in Firemarks and Tool Mark Examination that's
3 originally by two examiners, Biasotti and Murdock. In
4 later editions it's been by Biasotti, Murdock and Bruce
5 Moran who's a firearms examiner who I talked to after
6 Ramirez. His position was similar to mine. I've read the
7 Biasotta, Murdock and Moran and I've read and as it gets
8 updated I, you know, sometimes there comes a British
9 Journal of Forensic Sciences Science and Justice, I've read
10 the pertinent stuff.

11 There is also once in a very blue, not a very
12 blue moon, but once in a while firearms and tool mark
13 examiners not Americans but Europeans published in the
14 Journal of Forensic Sciences International. I read that,
15 and in the course of doing and in fact I've testified
16 that's similarity of the cases very often all that happens
17 is that I submit an affidavit maybe more frequently than
18 that. What happens is I talk to the attorneys. I read the
19 case files in all the cases so by now I'm familiar with
20 what firearms and tool mark examine'rs reports look like
21 and so I also know about that and by now I might say
22 forensic DNA with the s.o.p.'s, the standard operating
23 procedures, are uniform lab by lab. I have read s.o.p.'s
24 and aware of the number of the differences. I've read the
25 Virginia ones; I've read U.S. Army; I've read AFTA; I've

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1 read SLED; I have read, those are the ones that spring to
2 mine. I'm sure I've read other s.o.p.'s so that's what
3 I've reviewed.

4 Mr. Simon: Okay, no further questions, Your
5 Honor.

6 The Court: All right, any challenges?

7 Mr. Simon: We just request that her
8 qualification be limited to being an expert in, I guess,
9 literature on firearms and tool marks examination.

10 The Court: All right, as I understand that was
11 basically what you intended her for?

12 Ms. Paavola: That is correct.

13 The Court: All right, I find this witness to be
14 an expert in the field of firearms and tool mark
15 identification, it's academic?

16 Ms. Paavola: Yes.

17 The Court: Okay, give me the official term, an
18 academic expert?

19 Ms. Paavola: Academic expert in the field of
20 firearm and tool mark identification.

21 The Court: Correct, I so find that.

22 (Whereupon, Petitioner's Exhibits Numbers 4, 5, 6 marked
23 for identification.)

24 Ms. Paavola: (Continuing)

25 Q All right, Dr. Schwartz, could you, please,

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1 just list for us the items that you reviewed for this case?

2 A Okay, for this case I reviewed the s.o.p.
3 standard operating procedures, the SLED s.o.p.'s for 2005
4 and 2010 as pertaining to firearms and tool mark
5 identification. The s.o.p.'s we got had things like
6 trigger pull analysis, non firearms tool mark
7 identification, I didn't review those parts. I reviewed
8 what was given to you as the case file of the prosecution
9 expert. I reviewed the c.v.'s of both the prosecution
10 expert and the peer reviewer Mr. Whitener.

11 We request, you've requested, at actually my
12 suggestion, the proficiency test results for the examiner
13 and the peer reviewer, that was not given. That would be
14 information I need to make a full assessment because
15 accredita -- well first of all because even though I have,
16 they're the only tool for assessing proficiency. I have
17 seen in my review of cases cases where firearms and tool
18 mark examiners have failed the proficiency test. It's
19 crucial to know; it's crucial to know it about the peer
20 reviewer because the SLED s.o.p.'s themselves say peer
21 review can only be done by a proficient firearms and tool
22 mark examiner. It's crucial to know for ASCLD
23 accreditation. I asked the ASCLD, that's American Society
24 of Crime Lab Directors Accreditation of Labs; it's the main
25 accrediting agency. We did get certificates showing SLED

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1 was accredited. In my experience, though, I have seen a
2 lab being accredited even though the accreditation has been
3 there, has been a request for remediation because the, in
4 the case I saw in the U.S. District Court for the North
5 Mariana Islands both the examiner and his peer reviewer had
6 failed the 2000 CTS test so CTS tests are collaborate
7 testing services tests. It's they're important because for
8 ASCLD accreditation they demand that each examiner in the
9 lab pass a proficiency test on an annual basis. If each
10 examiner doesn't lab's accreditation is in question.

11 Now they give a choice of internal tests which
12 are designed by the lab itself, an external test but at
13 least one examiner in a lab has to pass the external test,
14 the CTS test, each year, and without knowing that we're
15 missing crucial information and although we asked, and the
16 response to the accreditation question just consisted of
17 providing the SLED certificates. That's not good enough
18 because in my experience reviewing cases not only the
19 Northern Mariana case where their accreditation was in
20 question because the proficiency test, a Virginia State
21 case where the lab's accreditation was called in question
22 because of the education of the firearms and tool mark
23 examiners. Someone really has to look at the record of the
24 site visits of the lab by ASCLD people to know what's going
25 on. We didn't get that information; I couldn't review it.

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1 Q Okay, but other than that you also, you
2 also reviewed the transcript testimony; is that right?

3 A Oh, I'm sorry, I forgot, I did review Mr.
4 Pavel's transcript.

5 Q All right, now I'd like to show you what's
6 been marked as Plaintiff's, or Applicant's, Exhibits 4, 5,
7 and 6, just one moment, please --

8 Ms. Paavola: May I approach the witness, Your
9 Honor?

10 The Court: Yes, ma'am.

11 Ms. Paavola: (Continuing)

12 Q Dr. Schwartz, if you could just take a look
13 at those three exhibits and tell me if you recognize
14 Exhibit Number 4 as the case file that you referred to?

15 A Yes, that's correct, including the envelope
16 that came.

17 Q So it's very thorough, and Exhibit 5 and 6
18 as the 2005 and 2010 SLED protocols or s.o.p.'s as you
19 refer to them?

20 A Right, that's correct.

21 Ms. Paavola: Your Honor, at this time we move
22 to admit Petitioner's Exhibits 4, 5, and 6.

23 The Court: Any objection?

24 Mr. Simon: No objection, Your Honor.

25 The Court: All right, Applicant's [sic] Exhibit

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1 Number 4, 5, and 6 admitted into evidence without
2 objection.

3 (Whereupon, Petitioner's Exhibits Numbers 4, 5,
4 and 6 entered into evidence.)

5 Ms. Paavola: (Continuing)

6 Q All right, now, Dr. Schwartz, just to begin
7 I understand that firearms identification is a sub-class of
8 tool mark identification generally?

9 A That's correct, I mean the theory behind
10 the field of tool mark identification is that each tool
11 leaves unique marks on objects and that an examiner can
12 identify the particular tool that's marked. So, for
13 instance, the first two cases I was involved with, Ramirez,
14 was the defendant's knife was the one and only one knife
15 that stabbed the victim case. In Pennsylvania Court the
16 defendant's bolt cutter was the only one that could have
17 cut the fence.

18 Now firearms identification comes in as a
19 subclass of tool mark identification because a gun is
20 conceived of as a variety of tools. Now for bullets it's
21 very simple the tool that creates the marks really. The
22 gun barrel out of the riflings within the gun barrel as a
23 bullet passes through the gun barrel and those are
24 considered tool marks, marks imparted. For if we had
25 cartridge cases in this case it would be more complicated

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1 because you really get a variety of tool marks from
2 different components of the gun. If you can think of tools
3 like you have breech face marks, for instance, firing pin
4 impression, ejector marks, extractor marks, chamber marks,
5 I guess those are the most common.

6 Q All right, and could you just very briefly
7 explain how, what the general theory of fire mark tool,
8 fire marks identification is?

9 A Okay, well the general theory, I guess, you
10 have to distinguish between three types of tool marks and
11 the first ---

12 Q What are those?

13 A The first way, well between class and
14 subclass and individual characteristics of tool marks.

15 Q Okay, so could you first explain what class
16 characteristics are, please?

17 A Okay, class characteristics are marks
18 imparted onto, let's just say firearms, because of the
19 deliberate manufacturer. So if we restrict our other tool,
20 our attention to bullets, to the rifling in the barrel,
21 well guns are designed, it's a matter of design with a
22 certain number of lands and grooves, and a bullet, the
23 visible class characteristics will reflect that number of
24 lands and grooves. Rifling in a bullet gives a bullet a
25 twist sometimes, you can think about a football and you can

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1 think about a right twist or a left twist, and again that's
2 a deliberately design characteristic. Caliber is another
3 deliberately design characteristic.

4 The fourth deliberately designed characteristic
5 and one way in which SLED just really very surprisingly
6 deviates from the national standards, is and how they
7 deviate is, the lands and grooves within certain
8 tolerances, certain guns are designed to have lands and
9 grooves of certain widths and with a weapon specification
10 this lab work chart doesn't ask for widths or lands and
11 grooves. It doesn't when comparing a bullet to a, to a
12 gun, and not to jump ahead of ourselves, but in doing that
13 comparison with regard to the Jennings-Bryco the examiner
14 disregarded the requirement and didn't measure the widths
15 of the lands and grooves, so those are the deliberately
16 designed characteristics. Those are class characteristics,
17 they're distinctive of types of guns and I should say many
18 makes and models of guns share the same class
19 characteristics.

20 Q Okay, great, so things like the number of
21 land and grooves, the direction of the twist of the groove,
22 the width of the land and grooves, these are things that
23 are intentionally designed, those are the class
24 characteristics?

25 A That's correct.

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1 Q Can you tell us what individual
2 characteristics are?

3 A Okay, individual characteristics, now this
4 is the real theory of firearms and tool mark identification
5 and there's a lot of scientific controversy about it so I'd
6 always put individual in scare quotes, but individual
7 characteristics are supposed to be unique to the particular
8 tool. Now a difficulty, and firearms and tool mark
9 examiners in my experience often don't appreciate the
10 ambiguity in their writing, the individual characteristic
11 these people call themselves pattern matches and that's
12 because an individual characteristics is a composite. It's
13 a pattern of what they call striations or individual lines
14 and it's the whole pattern that's supposed to be unique.

15 Now within the pattern the individual lines or
16 sub-parts of the pattern can be common to bullets fired
17 from different guns, so there can be a lot of resemblance
18 between bullets fired from this, from different guns. Now
19 the other thing that makes the measurement of individual
20 characteristic a difficult one to grasp is the individual
21 characteristics, the pattern, the component marks change as
22 a gun is fired. In fact the mantra among firearms and tool
23 mark examiners is no two bullets fired from the same gun
24 ever had exactly the same marks. So when they're talking
25 about an individual characteristic they're not talking

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1 about say your geno type, your nuclear DNA which is going
2 to change, stay the same throughout your lifetime. It's
3 not something like that. It's a distinctive pattern but it
4 has certain, it's going to vary.

5 Q Okay, but the idea is that the individual
6 marks are not intentionally designed in the tool, they
7 occur through use or ---

8 A Well two things, first of all there's a
9 theory and actually, we'll in a minute get to, it's a
10 theory that's been exploded that each tool comes off the
11 assembling line capable of producing unique individual tool
12 marks and then that's right, that by wear and tear also
13 changes the distinctive pattern.

14 Q Okay, now last thing can you tell us what
15 subclass characteristics are?

16 A Okay, that's what explodes that theory.
17 You will find, for instance you'll find in Mr. Pavel's
18 testimony he says each gun creates unique marks. Well at
19 least since the 1970's firearms and tool mark examiners
20 have known and discussed in their literature with great
21 concern the fact that some guns and other tools come off
22 the assembly line and there are batches and the batches
23 create microscopic marks like the individual
24 characteristics. They look like individual signature but
25 all tools in a batch have identical microscopic signatures

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1 and those are subclass characteristics and things get more
2 complicated because what happens as a gun is used sometimes
3 what persists are subclass characteristics. Sometimes the
4 subclass characteristics are completely replaced by
5 individual characteristics. Sometimes a subclass
6 characteristics persists along side individual
7 characteristics and I'm saying sometimes there's nothing
8 better in the literature. There are no statistics about
9 how rapidly change can be expected to be, about which types
10 the subclass characteristics will be replaced, about under
11 what conditions it sometimes.

12 Q Okay, so just so I understand the idea is
13 that it's a pattern that's common to a particular subclass
14 or batch of weapons?

15 A A batch of weapons, it's not intentionally
16 designed, it can produced, let's say there's wearing down,
17 there's a particular piece of metal that sticks out, that
18 kind of stuff and you get the batch, and I should also say
19 although others talk about a batch, the literature shows
20 that sometimes you get subclass characteristics that say
21 you get consecutively manufactured gun barrels and there's
22 a study by Melaroux who say, hey, there's subclass
23 characteristics are number one and number three and number
24 seven and number eight, okay, so it's not everything in a
25 batch and but so batch is kind of a fussy term, too, but

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1 basically there can be groups of guns that share a
2 microscopic pattern. It's not intentional and the
3 microscopic pattern that's seen under firearms and tool
4 mark examiners used what's called the comparison
5 microscopic which is really two quite low powered
6 microscopes, they don't go typically over forty times
7 together; and on a stage you put one evidence bullet say
8 fired from a gun, I'm sorry, test bullet fired from a gun,
9 the suspect gun, an evidence bullet fired from a crime
10 scene and you compare them and you look at the microscopic
11 characteristics; but the microscopic characteristics
12 observed could be subclass characteristics common to a
13 number of guns or they could be individual characteristics
14 and that's a theory again I'm putting individual in scare
15 quotes.

16 Q Okay, so the bottom line is it can be
17 difficult to distinguish between individual and subclass
18 characteristics in particular?

19 A Right, there are best ruffles of some but
20 there's nothing the literature says each examiner has to
21 rely on his or her own knowledge of surfaces of tools of
22 ways tool are manufactured. It really has to perform an
23 examination of the surface of the tool that we best
24 practice to rule out the possibility of subclass
25 characteristics.

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1 Q Okay, and you already started to tell us a
2 little bit about this but can you just briefly explain how
3 a comparison of test, test bullets and evidence bullets is
4 done to, to make an identification?

5 A Okay, well the first thing would be let's
6 say there's a suspect gun, this case is unusual, usually
7 the identification is made with examiner looks at one
8 suspect gun. That's all the examiner gets. He gets that
9 gun and he has ammunition, maybe one bullet, right, and so
10 the first question is, is that the type of gun that could
11 have fired the bullet so you look at class characteristics.
12 So let's say you had a bullet and there were five lands and
13 grooves with a left twist and you got a gun and there were
14 six lands and grooves, okay. That gun could not have fired
15 the bullet unless the bullet was damaged and then there's a
16 calculation where there really have been six lands and
17 grooves, but leaving that out if the lands, numbers of
18 lands and grooves are different, direction of twist is
19 different, width is different, you exclude. Okay, and
20 that's an examination sometimes they use something called
21 the stereo microscope, sometimes they just can eyeball or
22 they can just tell it with the naked eye.

23 Now if the class characteristics are the same
24 that's where the comparison microscope comes into play and
25 firearms as I said on one stage you would fire the gun,

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1 right, and then on the other stage you'd have the test, the
2 ammunition recovered from the crime scene. If you were
3 doing things according to best practices you'd fire the gun
4 with the same ammunition as recovered from the crime scene
5 because the marks that are made on ammunition by guns vary
6 not only with the type of ammunition, the brand he, but
7 actually vary with a lot of ammunition. Ideally you'd know
8 the lot, you'd know the type, you won't know that. Okay,
9 say you do that and then when you have test fired then you
10 mount them and then what happens is there's eyeballing.
11 What do I mean by that, although firearms examiners will
12 say in their publications, most recently in some by Murduc
13 in 2011 we could even measure these individual
14 characteristics if we wished. They don't measure them.
15 Why don't they measure them, their rationalization is,
16 well, when we see an identification we know it's an
17 identification so we don't have the measure the
18 characteristics and their standard is that they see enough
19 similarity between tests and evidence bullets they conclude
20 they came from the same gun and they do not look at any
21 other gun that type or compare the marks.

22 Q Okay, so that's the basics of how it works
23 and so for the remainder of your testimony I'd like to
24 cover three areas just to give you a road map. I'd like to
25 ask you a few more questions about the basic or fundamental

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1 premise underlying the theory of tool mark identification
2 and, second, I'd like to ask you some more questions about
3 the methodology used in fire mark and tool mark examiners
4 in making a classification, and then lastly I'd like to ask
5 you some more specific questions about the materials you
6 reviewed in this particular case. So to begin with item
7 number one, if I understood what you said earlier, there
8 are two basic premises, premises underlying the theory of
9 firearm and tool mark identification and that is every gun,
10 or firearms, produces a unique mark or pattern of marks
11 and, two, that's reproducible?

12 A Right, and by reproducibility remain and
13 this is actually what independent scientists now think is
14 the greatest problem with firearms and tool mark
15 identification the marks change, the so called individual
16 pattern changes over time and with all sorts of variables,
17 like filing of the gun, like weathering of the gun barrel,
18 like type of ammunition used, and what you're doing when
19 you suspect a gun has been used in a crime scene as you're
20 firing it at a later date than when the crime occurred and
21 the question is where the marks have changed so much that
22 they can't be traced back to each other, that it's, in
23 other words you have to make a distinction between there
24 will be differences in ammunition, right, and are they
25 attributable to changes in the gun or the conditions of

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1 firing or are they properly attributable to having been
2 made by different guns and the theory has to be that the
3 marks are reproducible you can show that they don't change
4 so much that you think "ah," that has to be a different
5 gun, meaning from a firearms and tool mark examiner.

6 Q Okay, so based on your research and writing
7 in this field and your knowledge of the broader scientific
8 literature in this area have these two fundamental premises
9 uniqueness and reproducibility been scientifically proven?

10 A No.

11 Q And why not?

12 A Well I mean for the most authority the
13 National of Sciences through one of the committees of the
14 National Research Counsel issued two reports that for
15 firearms the scientific status of firearms and tool mark
16 identification generally and these premises in particular
17 and the first one was a ballistics energy report in 2008
18 and the second was the strengthening forensic science in
19 the United States a path forward report in 2009. In 2008
20 in the ballistics energy report ---

21 Mr. Simon: Objection, Your Honor, relevance.

22 The Court: What's the relevance?

23 Ms. Paavola: This is the basis of her opinion
24 that broader scientific literature supports what she's
25 about to say and she's just explaining what these reports

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1 are.

2 The Court: All right, I'll allow it. Go ahead,
3 overruled.

4 Ms. Paavola: (Continuing)

5
6 Q Dr. Schwartz, could you, could you tell us
7 what these two reports are, maybe if you just start with
8 the ballistics imaging report and explain what that is?

9 A Okay, the ballistic energy report actually,
10 okay, the main thing there is no complete computerized
11 identification system for firearms evidence. There isn't
12 widespread use. In fact SLED was inputting into what's
13 called the IBIS system and IBIS consists of hardware and
14 software where examiners can input ammunition recovered
15 from crime scenes and if there's, let's say, a bullet
16 recovered from a crime scene they can query and say is
17 there anything in the database, are there bullets recovered
18 from other crime scenes or bullets recovered from guns
19 recovered shot from guns required from other crime scenes.
20 This also includes cartridge cases and under Federal
21 legislation the IBIS system can only consist of Federal
22 database of bullets for cartridge cases found at crime
23 scenes or shot from guns recovered at crime scenes which,
24 of course, limits the usability of the database because if
25 somebody if a gun has been used before it's been, before

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1 and the perp has managed to get away the gun hasn't been
2 recovered, etcetera, ammunition it's not going to be in the
3 database. So the question was could you have a national
4 reference ballistic imaging database and it would consist
5 of everything being imported into IBIS. Now all IBIS does
6 is spits out lists of candidate matches, so you input say a
7 bullet or a cartridge case, right, and it spits out a
8 number list. The examiner can say how long it is; it can
9 go into hundreds. It can stop at fifty. The question
10 became an examiner has to look at the list because it was
11 known at the top IBIS candidate would not necessarily be
12 the top candidate what the examiner, the trained examiner
13 under microscope would consider a match.

14 Now the controversy arose in how this there have
15 been, as you would imagine, proposals in Congress for a
16 national reference ballistic imaging database. Now the
17 problem was in the late 90's, I believe, maybe early 2000's
18 in California, there was a proposal state's can, I guess
19 they can have their own reference ballistic imaging system
20 and man named Toliners did a study, it's called the AB1717
21 study after the name of the bill, which said look at it, it
22 makes absolutely no sense to have a reference ballistic
23 imaging database in California because as we expand the
24 system, as we get more and more guns with certain class
25 characteristics it becomes less and less likely that the

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1 correct cartridge case, you can do an experiment, you fire
2 a gun with two cartridge cases, right, and you know, you
3 know, which the two are, right, and the match becomes less
4 and less likely to come up in the top ten candidates and
5 they become so unlikely that IBIS is really of no use to
6 examiners.

7 Now at that point the ATF did not like the study.
8 They disputed it. A man named Jan De Kinder in Belgium, a
9 very distinguished firearms examiner, was brought in, said
10 he agreed with Toliners' study and did his own study and
11 more brands of ammunition and got the same results, okay;
12 and so the ballis -- and this, of course, and there was a
13 set of observational report by someone named Joseph Marson
14 that said with bullets, my God, when we get the IBIS system
15 we see that more and more bullets look alike and when we
16 spit them out, when we take them out and we put them under
17 the comparison microscope we know they were fired from
18 different guns, that's how they were labeled, but we can't
19 tell them apart, okay, so this raised doubts. This was the
20 background and you can see that the background this raises
21 doubts about do guns create unique marks because if they
22 don't, right, you can't do firearms and tool mark
23 identification and so the committee was formed to review
24 the literature and the committee and it was the feasibility
25 of constructing a national ballistic imaging database so

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1 they had a lot of statisticians. They had metaligis. They
2 had people from Google because it was building a database
3 but what they also so looked at in Chapter 3 of the report
4 was traditional firearms and tool mark identification as in
5 this case; and I said, my God, there are problems because
6 the basic premises are that each tool produces unique marks
7 and that hasn't scientifically established and it said tool
8 marks are reproduced where it can be traced back to the
9 same gun and that hasn't been scientifically established
10 and you need studies. You need experts and experimental
11 design. You need statisticians; you need physicists; you
12 need metaligis. It would take really a massive project to
13 even prove this.

14 Q Okay, so that called into question these
15 underlying premises and then the forensic, strengthening
16 forensic science report came after?

17 A Right and ---

18 Q Can you just briefly tell us what the
19 conclusion of that report was?

20 A Well the conclusion of that report that's
21 most relevant here is that no forensics identification
22 discipline with the exception of nuclear DNA, nuclear as
23 opposed to mitochondrial DNA identification has been shown
24 to have the abilities, the scientific underpinnings for
25 making individualization claims for showing that certain

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1 crime scene evidence came from a particular source and the
2 report also had a specific section on firearms and tool
3 mark identification which reached the same conclusion. It
4 adopted the ballistics imaging reports findings about
5 uniqueness and reproducibility and said as actually said,
6 look, there's problem with the studies, firearms and tool
7 mark examiners have so called studies that are supposed to
8 show that guns produced unique and reproducibility marks
9 and they say as firearms, other firearms examiners have
10 been saying since '80 these studies don't work because it's
11 just a subjective report of someone who says, hey, I went
12 to a gun examiner. I got ten consecutively manufactured
13 barrels. I shot them and I saw that they produced unique
14 marks and there is no criterion offered for what counts as
15 a unique mark. There's no measurement so nobody else can
16 really tell what was examined and these are small studies
17 but since there's no measurement there's no way of putting
18 them together what you do and statistics would be a meta
19 analysis but you can't do a meta analysis if you don't have
20 numbers and there was the same criticism of the
21 reproducibility studies which basically consists of a
22 firearms examiner firing a gun barrel multiple times and
23 the same person who fires the gun barrel know he fires the
24 same one looks and says, ah, ha, I can match back the one
25 hundredth, the thousandth bullet to the first one and

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1 again, well how can you do it? How do you know that there
2 isn't enough, as much difference as you'd observe between
3 bullets fired from different guns. Again there's no
4 criterion of identification offered and there is no
5 measurement. Sometimes there are photomicrographs,
6 sometimes there aren't. Even when you get photos there are
7 of very little use because they're not scaled and also
8 because the practice among firearms examiners is only to
9 photograph the area they observe under comparison
10 microscope that supports their conclusion which means
11 nobody else can go in and say, but, ah, ha, I see such and
12 such and that would have been, that would have led me to
13 disagree with the conclusion.

14 Q Okay, now those two reports that you've
15 been talking about, the ballistics imaging report and the
16 strengthening forensic science in the United States report,
17 those are both produced by the National Research Council
18 which is the research arm of the National Academy of
19 Sciences; is that right?

20 A Right, well actually there are three
21 levels. The National Research Council is the research arm.
22 What the National, the National Academy of Sciences is is a
23 voluntary association of sciences formed by the Federal
24 government in 1863 to advise Federal agencies on scientific
25 matters of national policy importance. What happens is

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1 when there's a request by Congress, say, by the President,
2 by a particular agency for National Academy of Science
3 report that goes to the National Research Council. The
4 National Research Council in turn forms committees and the
5 committees are multi-disciplinary approach and they're
6 supposed to represent everyone with know how that will bear
7 on it or representative know how every discipline and also
8 to represent oral legitimate diversion viewpoints, so these
9 are really reports issued, they're both National Academy of
10 Sciences reports but they're issued by two different
11 committees in terms of composition of the National Research
12 Council. I'm not sure whether I, if there's any overlap in
13 the membership it's very minor.

14 (Whereupon, Petitioner's Exhibits Numbers 7 and 8
15 marked for identification.)

16 Ms. Paavola: (Continuing)

17 Q Okay, I'd like to show you what's been
18 marked as Applicant's [sic] Exhibit 7 and Applicant's [sic]
19 Exhibit 8. --

20 Ms. Paavola: Your Honor, if I may?

21 The Court: All right.

22 The Witness: (Continuing)

23 A Okay, this is ---

24 Q Dr. Schwartz, hold on one second, please?

25 A I'm sorry.

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1 Q If, if you could just look at those and let
2 me know if you, if you recognize Exhibit 7 as the
3 introductory pages in Chapter 3 of the ballistics imaging
4 report?

5 A That's correct.

6 Q And Exhibit 8 as the future of forensic
7 science report?

8 A Distracting forensic science in the United
9 States report.

10 Ms. Paavola: Right, at this time we'd move to
11 admit Applicant's [sic] Exhibit 7 and 8.

12 Mr. Simon: Objection, Your Honor, relevance and
13 just if you'd allow me to explain. The issue before this
14 Court is whether trial counsel was ineffective and
15 challenging the firearms testimony at trial, these two
16 documents were produced after trial and, therefore, they
17 wouldn't have been available to counsel, therefore, we
18 assert that they are, they are irrelevant.

19 Ms. Paavola: That's correct, they were
20 produced, the trial was in February 2008 and the first
21 report was produced in March 2008, but I believe Dr.
22 Schwartz is prepared to explain how they are, they are
23 reviews of previous studies that existed prior to Mr.
24 Winkler's trial.

25 The Court: But I mean what is the relevance if

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1 they were not in existence at the time of his trial?

2 Ms. Paavola: The relevance is that they are a
3 summary of all of the literature that existed prior to Mr.
4 Winkler's trial and that information was known and
5 available but instead of offering a hundred exhibits we're
6 just offering these two documents produced by the Federal,
7 by the National Academy of Sciences.

8 The Court: So you're saying that they had
9 ineffective assistance of counsel, the Applicant, because
10 he didn't do the hundreds of publications that these
11 summarize?

12 Ms. Paavola: I'm saying he was, they were
13 ineffective for not retaining an expert or otherwise
14 becoming familiar with the science as it existed at the
15 time of Mr. Winkler's trial which is documented in these
16 two reports.

17 The Court: Okay, all right, I'm going to
18 sustain the objection. If these reports did not exist at
19 the time of trial then I don't see the relevancy in them,
20 so I'm going to sustain the objection.

21 Ms. Paavola: (Continuing)

22 Q All right, Dr. Schwartz, prior to February
23 2008, which is when Mr. Winkler's case was tried, were the
24 findings that are ultimately reported in those two
25 publications that you've just told us about known in the

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1 firearms and tool mark community before that time?

2 A There was debate within the firearms and
3 tool mark community, the best of the scholarship as I say.
4 One of the things that was known or, I believe, Dr. Jan
5 DeKinder believed, despite the ATF saying is that as you
6 expanded the IBIS, the IBIS database you got, you
7 discovered more and more similarity between cartridge cases
8 and bullets fired from different guns. Now the question is
9 was that because the IBIS imaging was bad or was that
10 because it was in fact more similarity than firearms and
11 tool mark examiners had believed there could exist when
12 they were limited to what they had encountered in their own
13 personal casework; and the partial answer to that question
14 was provided by this little article by Joseph Mason who was
15 a distinguished member of the AFT, who said, my God, we'd
16 better be training people to look at the IBIS database
17 because when we've been limited to our own experience
18 clearly we haven't understood how much similarity there
19 could be between bullets created by bullets marked by
20 different guns; and he said look at, we've discovered the
21 similarity in IBIS database and, my God, when we take the
22 bullets out it's not that the IBIS database is saying
23 making things look similar that aren't when you take them
24 out and we look them under the comparison microscope we
25 find that we can't tell them apart so that was one strain

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1 casting doubt on the individuality of tool marks.

2 A second strain came, of course, from that
3 discovery of subclass characteristics because in fact even
4 though firearms and tool mark examiners will continue to
5 exist say in the wake of the 2008 report has just got it
6 wrong, of course each tool creates unique marks, they say
7 each tool creates unique marks, give them the absence of
8 subclass characteristics, yes, but when are there subclass
9 characteristics and when aren't there and they don't have
10 any rules. They have sort of rules of thumb, you should be
11 nervous here but that's about all they have, okay, and I
12 created doubts, of course. That's a big caveat on saying
13 each gun creates individual marks.

14 The third thing that starting at least in 1984
15 with an article by Biasotti and Murdock called Criteria for
16 Identification or a State of Art there were severe
17 criticism of the studies I described before, the ten barrel
18 studies where examiners would shoot bullets from ten
19 consecutive barrels and say they were unique for precisely
20 the reasons I said. It's not that these were entirely
21 subjective studies and uninformative. These days firearms
22 and tool mark examiners may testify, someone named Ronald
23 Nichols said in U.S. v. Taylor that these uniqueness and
24 reproducibility studies show the premises of the field have
25 been established but Nichols testified at the same time in

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1 accord with his 1997 literature review article that, well,
2 but when but when I look at these studies I don't know what
3 criterion the examiner used to say that the marks were
4 unique or the remarks were reproducible. I just know that
5 he said they were and that establishes that the field is
6 well founded, well that's saying the field is founded on
7 faith.

8 Q Dr. Schwartz, so the second issue, let's
9 just move briefly through that because I think you've
10 already actually touched on pretty much all those topics
11 and under the methodology section assuming that the
12 underlying science, the underlying premises of the science
13 is valid, even if it were, the methodology as I understand
14 it involves a great amount of civic duty and there's not
15 really any established criterion; those are your main
16 criticisms?

17 A There is no, this is what Biasotti actually
18 kept since man named Al Biasotti in 1959 published a study
19 called the statistical study of the, I think, individual
20 characteristics of tool marks. I may be wrong about the
21 exact title of the study, but what Biasotti found was
22 exactly what I was talking about. He had only pulled 38
23 Smith & Wesson revolvers, it tells you how long ago it was,
24 those was the most common gun, and he found, he looked
25 under a comparison microscope, mostly methodological

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1 problems but it's the best study in my opinion firearms and
2 tool mark examiners have ever done. Anyway, he had Smith &
3 Wesson revolvers and he compared marks on lands and grooves
4 by, from bullets that he knew were fired from the same gun
5 and bullets that he knew were fired from different guns and
6 he found that even on bullets fired from the same gun on
7 average only twenty one to thirty eight percent of the
8 stria of the component marks matched. In other words,
9 there was less resemblance among bullets fired from the
10 same gun than difference in the so called individual marks
11 and then he looked at fired, bullets fired from different
12 guns and he found that fifteen to twenty percent of the
13 stria matched so you have a near complete overlap in the
14 amount of resemblance and basically he said, my God, we
15 need databases. We need a statistically established
16 objective criterion that's going to tell us when we're
17 entitled to make a determination. Now that led to
18 something that's not at issue here, what I would call a
19 pseudo objective criterion, CMS, most examiners don't
20 follow it. Most examiners, Biasotti was not a popular
21 figure in his day, say what's the need of this stuff, when
22 I look at the two bullets under a comparison microscope, it
23 was Ronald Nichols said in his report, based on my
24 experience when I'm training I know it when I see is a
25 scientifically valid concept.

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1 Now there's a problem, this is actually in
2 Nichols report and he said this is a reply that's supposed
3 to vindicate the profession and that's cited by firearms
4 and tool mark examiners since the two MAS reports is
5 showing that the reports are just wrong in their profession
6 thus not saying scientific basis, he said, well now, of
7 course, the cut off point from an identification is very
8 likely to be different between examiners educated in
9 California and examiners in the northeast because they've
10 looked at different materials during their training. That
11 means one person will think there's an identification and
12 one won't. Well think as I have done you go to different
13 places and you get a blood test you want your doctor in New
14 York not to be able to test trust the blood test you got
15 from your doctor in California because, hey, you know these
16 are different training materials but that's what Nichols is
17 saying is okay and the reason he says it's okay he says in
18 other reply to me he says that idiot Schwartz she thinks
19 it's a problem that people disagree, well, you know it
20 really doesn't matter. It's not at all unusual, he said,
21 for two examiners to differ about whether to reach an
22 inconclusive for an identification in a particular case
23 because different folks had different experience and
24 training but, guess what, it's not a problem the jury can
25 resolve. The dispute and the position essentially is

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1 Nichols says in the same article we don't have, and this
2 by the way was published, the two articles I'm referring to
3 2007 and 2006, in other words out and all over the left
4 because once I published my Columbia SCLR article, actually
5 my greatest publicist for the firearms and tool mark
6 community who were posting objections all over the web and
7 my article was really easily accessible because Columbia
8 SCLR's are open source journals so that was all over the
9 web. But anyway, Nichols said well the jury can decide
10 who's right and essentially his position and he did state
11 we don't have an objective criterion, so when firearms and
12 tool mark examiners disagree and two examiners differ about
13 when there should be an identification in a case we don't
14 know who's right; and he testified in a case United States
15 v. Diaz in 2006 and you can tell it from the Diaz opinion
16 that's why we can't give an error rate for the field cause
17 how can we give an error rate because we don't know who's
18 right and the notion that no objective error rate could be
19 calculated is in that 2003 article by Grezibowski, etal.,
20 that's referred to and probably very easily accessed by
21 SWWGUN database. It's a FBI scientific working group on
22 firearms and tool mark identification, has a web site with
23 references. The AFT have a web site with references. You
24 could have seen and you could have seen from reading the
25 case law that was out at the time that the position was we

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1 all know it when we see it, different ones of us know
2 different things when we see it but Nichols says based on
3 an experience and training we know when I see it is a
4 scientifically valid concept.

5 Now that's the same as saying we all disagree if
6 we had ten different flavors, brands of chocolate ice cream
7 we might disagree about which is the based on our
8 experience and training and we could all be right, right,
9 just a matter of taste, but if we ---

10 Q Okay, Dr. Schwartz, I don't mean to cut you
11 off.

12 A I'm sorry.

13 Q I want to move on now to some specific
14 questions about Mr. Winkler's case.

15 A I apologize.

16 Q That's okay, I think that point is well
17 established. In this particular case Agent Pavel, I
18 believe is his name, testified that he made an
19 identification one he described as absolute and there's no
20 question at all about that; do you recall reviewing that
21 testimony?

22 A Yes, I do.

23 Q Based on your knowledge of the broader
24 literature in this field has that type of testimony in
25 particular been subject to very grave concerns and scrutiny

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1 in the scientific community?

2 A Well the basic point, and actually you get
3 it in the s.o.p.'s, one of the references they gave is in
4 1935 text book by Gunther and Gunther where it says, of
5 course an identification is not absolute that they make the
6 analogy. They say, look, no two oak leaves may have
7 exactly the same pattern but there will be a large amount
8 of agreement in the pattern so the issue is what's the
9 likelihood that you'll see or what's the probability of
10 seeing all these component marks together in two oak leaves
11 and they said it's a proper ballistic claim and that was
12 actually wrote up, so there was a notion that
13 identification is a proper ballistic. In the AFTE theory
14 of identification which first came out in 1992 again there
15 was a claim they recognize that identification is a proper
16 ballistic. They say we can testify that it's practically
17 impossible that any other gun could have fired, could have
18 made that mark if we see a very great resemblance between
19 tests and evidence tool marks.

20 There was case law, Judge Kirkner in 2005, I
21 believe, in United State v. Green only allowed examiners to
22 testify as to differences in similarities because she
23 claimed they had not dealt with the statistical problems
24 that went to reach an identification or went to reach an
25 exclusion.

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1 Q In fact there are several published legal
2 opinions prior to 2008 that examiners may not testify in
3 absolute terms?

4 A That's right, there is, there's United
5 States v. Monteiro; there's Ramirez v. State, the knife
6 print identification case which excluded that testimony,
7 period. I should say Monteiro excluded the testimony after
8 saying examiners could only testify to a reasonable degree
9 of ballistic certainty not one hundred percent certainty
10 and then she said in my Columbia CLR article for the
11 proposition not to any degree of statistical certainty, and
12 in the United States v. Diaz, which wasn't a published
13 opinion, Northern District of California readily available
14 Lexus, Westlaw, etercera, FindLaw, again limited examiners
15 to testifying to a reasonable degree of ballistic certainty
16 and just to get back to Monteiro Judge Saris actually
17 excluded the identification on the case, period, because of
18 in absence of adequate documentation of the examiners
19 conclusion, so all that was out there.

20 Q Okay, and in addition to that, that item
21 with his testimony are there, were there other concerns
22 based on your review of the SLED file in comparing what
23 that file shows to what the general literature dictates
24 should be the consensus on how to go about these things,
25 were there other issues that you identified as potentially

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1 undermine the reliability of the identification?

2 A Okay, there are very grave issues both in
3 regard to the identification of the Bryco-Jennings and to
4 the exclusion of the Walther and so I'll start with the
5 identification of the Bryco-Jennings.

6 Q And just so we understand there are two
7 weapons tested in this case; is that correct?

8 A That's correct.

9 Q One is a Walther?

10 A One is a Walther.

11 Q And that was recovered from the victim's
12 house?

13 A That's correct, to my knowledge.

14 Q And there's a Jennings-Bryco which was
15 recovered from Mr. Winkler upon his arrest?

16 A That's correct.

17 Q Okay, and can you tell us what the, what
18 the issues are that you identified with that?

19 A Okay, let me start with the issues about
20 the identification. Okay, the first thing even as the
21 class characteristics, when you look at the determination
22 whether there was a type of gun one of the amazing things,
23 I think it's called the bullet work sheet, asked when he's
24 making the comparison of, which is supposed to record the
25 comparison of the microscopic comparison of the evidence

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1 bullet recovered from the crime scene with the test
2 bullets, test bullets actually from the Jennings Bryco,
3 four test bullets were fired presumed. One was used to
4 make the identification counter best practice, we don't
5 which, but basically before you even got to microscopic
6 characteristics the bullet work sheet asked him to record
7 the width of the lands and grooves and what he said was
8 consistent with bullet. Okay, that's the, that's the
9 ultimate conclusion but you're supposed to reach it by
10 making measurements and you make measurements, measurements
11 of the widths of the lands and grooves are standard.
12 They're part of what's called establishing the general
13 rifling characteristics that the FBI uses to, to determine
14 when a bullet is recovered, what types of guns could have
15 come from. You don't do the width of the lands and
16 grooves; you can use the the general rifling
17 characteristics. Okay ---

18 Q Okay, so just to stop you, he didn't, he
19 didn't measure the width of the lands and grooves for
20 either, for either weapon work sheet that he --

21 A No, he didn't measure for either, now ---

22 Q Based on your review of the SLED protocol
23 was he required to do that?

24 A As far as I remember this is one of the
25 changes, 2005, that don't say he's required to do it, 2010

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1 they do, they're coming up to speed with the rest of the
2 profession.

3 Q Okay, and he didn't label which lands and
4 grooves he's looking at in using for comparison purposes?

5 A No, and again 2005 they didn't require,
6 2010 they're very clear about when you get a bullet you
7 need to label the lands and grooves and that's because as a
8 bullet, as a gun, as a bullet goes down the barrel
9 different lands and grooves will connect with different
10 parts of the barrel. So to do it right you have to weigh
11 in the test fired bullet the same way as the evidence
12 bullet so you're measuring the corresponding lands that
13 contacted the barrel in the same way.

14 Now one of my concerns is why label lands and
15 grooves, okay, what you want to know when someone does an
16 identification is was a match found on which lands and
17 grooves. What you have here is he says match on lands and
18 grooves on his notes and then you get two photo
19 micrographs, photographs of what was seen under the
20 comparison microscope, and the standard procedure first is
21 to look you know which lands and grooves looking at, the
22 dittos and what you know, and then the standard procedure
23 they do on multiple of test fires from a gun because they
24 want to find out is the gun marking consistent, can you
25 trace back when it's fired from the gun, and if you had

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1 good work what you'd see is photo micrographs comparing the
2 test fires with each other and you don't have those here.
3 You have no reason to even think that he compared the test
4 fires cause he doesn't say he did it and then if they're
5 doing it right they're going to give each test fire a
6 number so it should say, this one says like "t" versus,
7 that's not what it should look like. It should be "t1"
8 versus or "t2", whatever. It's not doing it the way it
9 should be done.

10 Now more importantly when he says in a big big
11 change between the 2005 and 2010 SLED s.o.p.'s. There is
12 no mention in the 2005 s.o.p.'s about the need to rule out
13 the possibility of subclass characteristics in making an
14 identification. In other words if the microscopic
15 characteristics you observe on test and evidence bullets
16 are subclass characteristics that doesn't show they came
17 from the same gun, that just shows that come from the same
18 batch. You don't even know how many guns in this batch had
19 the same markings.

20 Now 2005 s.o.p.'s say nothing about it. 2010
21 say, you know, it's very important to rule out the
22 possibility of subclass characteristics, but they don't say
23 how to do it. They don't tell you how to do it because
24 there's very little guidance in the field about how to do
25 it. Okay, so but there's no attempt, and this is

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1 particularly worrying here, first of all he says he looked,
2 he relies in lands and grooves Bonfant and DeKinder cite in
3 1998 or 1999 forensic science international, I believe,
4 said, boy, you don't want to base your identification on
5 groove impressions because there's a really strong
6 likelihood that what you're going to be seeing are subclass
7 and not individual characteristics so if you're relying on
8 groove impressions I want to know how much reliance that he
9 placed on groove impressions. You can't tell from the
10 documentation; it's questionable, he didn't do anything
11 about subclass characteristics.

12 Okay, second thing ---

13 Q Dr. Schwartz, before you move on let me ask
14 you one more question about the sub-class characteristics,
15 the file, and I believe there was testimony at trial as
16 well, indicates there's no dispute that the Jennings-Bryco,
17 the gun recovered in Mr. Winkler's possession when he was
18 arrested, is a cheap gun, right? What, if anything, does
19 that tell you in terms of the sub-class characteristic
20 issue?

21 A Mass manufactured guns as gun production
22 becomes more and more mechanized, even folks who believe
23 there are individual characteristics which say their
24 likelihood of subclass characteristics increases. There's
25 a classic article 1997 by Rivera in AFT Journal, which in

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1 fact led the AFT to revise their theory of identification
2 in response in 2011 where Rivera talks about a discovery of
3 what looked like cartridge cases that could only have been
4 made by a particular gun until they discovered another gun
5 and then they compared the patterns of the two guns they
6 couldn't tell them apart; and Rivera said, my God, you
7 know, that's a real problem for saying you see sufficient
8 resemblance to declare an identification, which is
9 basically the AFT theory and the whole theory you have in
10 2005 s.o.p.'s to clear an identification when you see
11 sufficient resemblance. Well what does sufficient
12 resemblance mean they don't give any guidance and they
13 don't say, boy, that's sufficient resemblance, we got to
14 rule out sub-class characteristics.

15 There's a third reason for being worried about
16 subclass about the identification here which is that the
17 bullet's damaged and when you have a damaged bullet you're
18 probably going to have less of an area to look at and
19 you're going to have an area which is distorted, that the
20 lines are distorted because of damage, so then you get this
21 difficult issue. If you see a difference between the marks
22 on the damaged evidence bullet and the test bullet, which
23 won't be damaged because, how do they guarantee that, they
24 fire these things into water tanks so they won't be
25 damaged, and you have to ask how much is the difference due

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1 to the damage and how much is the difference due, in other
2 words it's the same gun that fired them but they differ
3 because of damage as opposed to, my God, no, no, no, no,
4 the difference, that degree of difference means they were
5 fired by different guns and there's no criterion that they
6 can look at. There's no objective basis on the likelihood
7 of differences and of the difficulty that you might
8 underestimate the significance of those differences goes up
9 as you have damage.

10 Q All right, Dr. Schwartz, let me ask you
11 just a couple of questions about one final area. In this
12 case based on your review of the SLED file, the Jennings-
13 Bryco and the Walther, do they have the same class
14 characteristics?

15 A Based on the review of the file they have
16 the same class characteristics. Again one of the
17 shortcomings is he should have measured the width of the
18 lands and grooves of each, he didn't. Based on his
19 testimony he made it very clear that he was excluding the
20 Walther on the basis of individual characteristics.

21 Q Okay, so they both have six lands and
22 grooves with a right twist?

23 A That's correct.

24 Q But Agent Pavel testified that he
25 absolutely excluded the Walther as the potential murder

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1 weapon?

2 A Right.

3 Q Based on the general consensus in this
4 field was that correct?

5 A No, there was very very great controversy.
6 There's an article by Thompson and DeKinder, don't have,
7 not later than 2003, well before this case, FBI policy
8 where Mr. Pavel had some training, is never to exclude,
9 never, never make an exclusion as opposed to an
10 inconclusive could be the gun on the basis of individual
11 characteristics. The reason again is because they don't
12 know. They don't have criteria for how much difference
13 between signatures is due to changes or damage to the gun,
14 or different ammunition, etcetera, etcetera, and how much
15 is due to their, to their being produced by different guns
16 or not, as I say the FBI lab policy and the policy of some
17 labs is never to exclude on the basis of class
18 characteristics.

19 Now the 2005 s.o.p.'s just say exclude when, when
20 they're sufficient difference or lack of similarity. Well
21 that's not much guidance. 2010 s.o.p.'s finally they're
22 moving up with the rest of the world and they say, well,
23 you know, exclude because of lack of guidance but be aware
24 and worry about this, you know, be aware that exclusions, I
25 forget what they say exactly, that exclusions based on

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1 individual characteristics are rare and then later they say
2 that one thing that should lead you not to exclude to reach
3 an inconclusive rather than exclusion is damage to the
4 ammunition, evidence ammunition as we had in this case.

5 Now notice is a contradiction, if you're saying
6 the consensus in the field was that exclusions on the basis
7 of individual characteristics are at best really dicey, we
8 don't know whether they can be made, if they can be made
9 Thompson and DeKinder went around and asked AFT members and
10 people said, well, you know, I've never made one in thirty
11 years of experience, etcetera. Anyway it's very dubious
12 whether you could have excluded that Walther. There wasn't
13 any consensus, at base the exclusion was well, yeah, maybe
14 it's an exclusion but if you say that's at best then how is
15 that consistent with Mr., Mr. Pavel reaching an absolute
16 identification because an absolute identification means
17 there's no possibility of any other weapon being the
18 source.

19 Now the other thing that's a problem here is the
20 absence of documentation. He implies he did a microscopic
21 examination. There's no bullet work sheet for the Walther
22 now so you don't know, right. There's no record; there's
23 no photo micrographs; there's nothing that shows you the
24 microscopic characteristics on the Walther.

25 Q Just to be clear there's no documentation

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1 of any comparison between the projectile and the Walther,
2 right?

3 A Right, I'm sorry, I misspoke myself, yeah.

4 Ms. Paavola: All right, thank you, Dr.
5 Schwartz, no further questions.

6 The Court: Let me see the attorneys for just a
7 second.

8 (Whereupon, a bench conference was held off the
9 record out of the hearing of the court reporter.)

10 The Court: In going over some scheduling
11 matters with the attorneys I think it's a good time with it
12 being 12 -- almost 12:30, it's a good time for us to go
13 ahead and break for lunch. Let's take about an hour lunch.
14 I'll take the bench at 1:30 and we'll resume our testimony,
15 the testimony of this witness at this point in time.

16 Dr. Schwartz, we're in the middle of your
17 testimony so procedure dictates that you cannot discuss
18 your testimony with anyone. even the attorneys whether it
19 be what you have testified to thus far or what you
20 anticipate testifying to in the future, okay? You just
21 can't discuss your testimony with anybody at this point in
22 time, okay.

23 Dr. Schwartz: I understand, Your Honor.

24 The Court: All right, let's go ahead and take
25 about an hour break for lunch and I'll, we'll be in recess

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1 until 1:30.

2 (Whereupon, court was recessed for lunch and the
3 following takes place on the record after the lunch
4 recess.)

5 The Court: Come back and take the stand,
6 please.

7 All right, Dr. Schwartz, you're under oath. Mr.
8 Simon, we're getting ready to start cross examination.

9 Mr. Simon: May it please the Court?

10 The Court: Yes, sir.

11 **Cross Examination**

12 **By Mr. Simon:**

13 Q Good afternoon, Dr. Schwartz.

14 A Good afternoon.

15 Q How are you doing?

16 A Fine.

17 Q First I have a few questions about your
18 background. Just to be clear for the record you're not a
19 trained firearms examiner, correct?

20 A That is correct.

21 Q And you haven't undergone any formal
22 training in firearms examination or identification,
23 correct?

24 A That's correct.

25 Q And you haven't had really any informal

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1 training, have you?

2 A You know I've some conversations with a
3 variety of people over the years. One of my colleagues
4 once made an effort to bring a gun, show me how the slides
5 operated. I've shifted cartridges casings in two occasions
6 under the microscope but you aren't really, you know, if
7 you want to say well that's not training that's the extent
8 of it.

9 Q Okay, and you have very limited
10 experiences, experience in examining cartridge cases under
11 a microscope, correct?

12 A That's correct.

13 Q And you also have very limited experience
14 in actually handling a gun, correct?

15 A That's correct, in fact no experience.

16 Q And, correct me if I'm wrong, you've never
17 attended a seminar hosted by a firearms manufacturer, have
18 you?

19 A No, I have not.

20 Q And you're not a member of the Association
21 of Firearms and Tool Marks Examiners, correct?

22 A Membership in the Association of Firearms
23 and Tool Mark Examiners is restricted to active firearms
24 and tool mark examiners who work for the prosecution or
25 have worked for the prosecution in the past. There are

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1 honorary memberships for people who have aided the
2 profession construed as aiding the association of people
3 who work for the prosecution. I do expect to be offered
4 one of those in the future.

5 Q Okay, just so I understand your response to
6 that, you're saying that the AFTE is only for those who
7 have either done work for the prosecution or are currently
8 working for the, for law enforcement; is that what you're
9 saying?

10 A And some student training memberships, yes.

11 Q Okay, now you also haven't done any direct
12 studies in firearms and tool mark examination, correct?

13 A What do you mean by direct study?

14 Q Have you conducted any studies in, let's
15 say proficiency testing?

16 A I have, I mean if you're saying have I
17 examined the proficiency tests and seen the questions that
18 are asked and considered the difficulty in the scoring of
19 proficiency tests, yes, I've done extensive review of
20 proficiency tests.

21 Q Well let me ask this, have you helped set
22 up any kind of studies like actual studies to check
23 proficiency in firearms examination?

24 A No, I have not.

25 Q Okay, and pretty much your knowledge about

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1 firearms and tool mark examination is based off your review
2 of articles and publications, correct?

3 A Not entirely correct, also since I've been
4 doing this stuff since, I guess, actively 2005 I have
5 reviewed numerous proficiency tests and I have reviewed
6 tons and tons of bench notes etcetera, which gives me a
7 familiarity with the documentation and I also have reviewed
8 numerous transcripts of testimony by firearms and tool mark
9 examiners.

10 Q Okay, I just have a few questions about
11 earlier in your direct testimony you talked about the
12 article you wrote for, for Columbia University's, the
13 Science and Technology Law Review; is that correct?

14 A That's correct. I didn't write it for, you
15 know, as you probably know when one writes a law review
16 article one doesn't write it for a specific journal, one
17 sends out multiple submissions and decides which one to
18 accept.

19 Q Okay, in that particular article would I be
20 correct in stating that you noted that there has been a
21 lack of successful challenges when you wrote the article to
22 the admission of firearms and tool mark identification?

23 A Well at the time there had been the Ramirez
24 challenge but basically what's important to take account
25 of, in my view, is that article instantly fueled challenges

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1 to firearms and tool mark identification. So even though
2 the article was published in 2005, by 2006 there were three
3 Federal cases United States v. Green, United States v.
4 Montero, and United States v. Diaz which relied on my
5 article, on my testimony, or on my affidavit, to cast, to
6 place severe restrictions on the admissibility of firearms
7 and tool mark identification. So yes, the article said
8 that but as I noted in my 2008 article in the Champion the
9 article had the effect of fueling challenges such that
10 there was numerous discussions. There were numerous among
11 the defense community and there was a voluminous literature
12 about the challenges by the time of the examination in this
13 case.

14 Q Okay, so just to get back to my original
15 question, yes or no, in your article you said there had not
16 been successful challenges when you printed the article,
17 correct?

18 A Not correct because there weren't
19 challenges in that report and I didn't talk about
20 challenges so much as judicial decisions at the time not
21 understanding the problems in tool mark identification. I
22 did not talk, I mean I wouldn't have talked about not many
23 successful challenges because not many challenges were
24 brought, period.

25 Q Okay, and I'm not going to go any, ask in

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1 any detail but there was a response by Ron Nichols to your
2 article, correct?

3 A There were two.

4 Q Okay.

5 A There was one which he originally Columbia
6 STLR accepted, they then rescinded the acceptance. He
7 published it in California Association of Criminal
8 Ballistics newsletter of which he was editor at the time.
9 The second response to which I responded, I didn't think a
10 response would be accepted in California Association of
11 Criminal Ballistics newsletter, was in Journal of Forensic
12 Sciences the CAC, California Association of Criminal
13 Ballistics article was in 2006. The reply in the Journal
14 of Forensic Sciences was in 2007 as was my reply and
15 there's also a reply of Nichols to my reply in Journal of
16 Forensic Sciences.

17 Q Okay, you mentioned three cases that you
18 say were, came as a result of your article, the first you
19 mentioned, I believe, was U.S. v. Green; is that correct?

20 A Well actually let me, that's in sense an
21 overstatement because I was not said from providing some
22 literature to one of the attorneys at United States v.
23 Green. I was not involved and my article was cited in the
24 United States v. Green to show that I believe, and my exact
25 quote isn't produced at the scholarly community, was

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1 extraordinarily critical of this type of testimony. As I
2 said United States v. Monteiro my article, my affidavit are
3 both quoted very extensively. United States v. Diaz I was
4 the expert witness in Diaz, and I guess I mentioned coming
5 into the field with Ramirez v. Florida and as I said my
6 amicus brief was out of time so it had no affect on the
7 decision of the case.

8 Q Okay, in U.S. v. Monteiro would I be
9 correct in stating that the, the trial court did admit the
10 firearms and identification testimony?

11 A No, you're incorrect. The trial court
12 excluded the identification testimony, period, because of
13 inadequate documentation. The judge said look, firearms
14 examiners can testify to only a reasonable degree of
15 ballistic certainty. Then she said this doesn't complete
16 the examination, the decision in this case because we have
17 to look at the particular application, and that's part of
18 Daubert, and she said the particular application because of
19 an absence of documentation of the conclusions and flawed
20 peer review she was excluding the identification in the
21 case she gave the ATF. This was done by the, either the
22 Boston Police Department or the Massachusetts State Police,
23 I'm not sure which the ATF, Judge -- Judge Saris said the
24 ATF had the responsibility, had the option of redoing the
25 examination and the ATF subsequently declined to review the

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1 examination so there was no firearms identification
2 testimony in the case.

3 Q Okay, well let me, let me take a step back
4 then, in the decision made by the District Court in
5 Monteiro would I be correct in stating that the Court
6 concluded that the methodology of firearms identification
7 is sufficiently reliable, correct?

8 A You have to place a very serious
9 qualification on that. The firearms examiner there like
10 the firearms examiner in this case wanted to testify to one
11 hundred percent certain absolute identification. Judge
12 Saris said that because of the absence of statistical
13 empirical foundations, and he, or she, relied on my
14 Columbia SCLR article, there is no degree the firearms
15 examiner cannot testify to one hundred percent certainty,
16 lacks the knowledge to testify to any degree of statistical
17 certainty and can only testify, reach an identification to
18 a reasonable, what's called a reasonable degree of
19 ballistics certainty, or reasonable degree of certainty
20 within the field of ballistics.

21 Q Okay, I just want to make sure, so you're
22 saying that the Court did not say that the methodology of
23 firearms identification is sufficiently reliable?

24 A As I say she said that the conclusions they
25 draw, the typical conclusion cannot be drawn. There's not

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1 the scientific basis for it, so she said she placed a
2 substantial restriction on the testimony on the degree of
3 certainty with which the testimony can be, can be admitted.
4 In particular she followed my article saying that even if
5 the marks were unique the methodology lacks an adequate
6 foundation, that you have to be able to say what is the
7 likelihood that another gun would produce as similar a mark
8 to the suspect gun to the evidence and that they haven't
9 got databases, they haven't done the necessary statistical
10 work, which by the way was in the conclusion three years
11 later the strengthening forensic science in the United
12 States.

13 Q Okay, in your direct testimony you
14 indicated there are three cases that you have not been,
15 you'd either not been qualified as an expert or your
16 opinion was, was, am I correct in stating that?

17 A Well there are three cases, okay,
18 Pennsylvania v. Colgrove, one page unpublished decision by
19 the Judge not allowing me to testify at trial 2009. 2009
20 People v. Anderson in Cleveland, again an unpublished case,
21 Ohio State Court, the Judge on the basis of my testimony
22 restricted the firearms and tool mark examiner to testify
23 and that his opinion was more likely than not. This was
24 the same restriction you got in United States v. Glynn on
25 the basis my testimony in Southern District in New York.

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1 After restricting the firearms and tool mark examiner the
2 issue came up of whether I'd be allowed to testify at
3 trial, the Judge said, no. This was never appealed because
4 the client who was facing, the defendant who was facing
5 life without parole was acquitted of all charges.

6 The third case is United States v. Taylor,
7 District Court of New Mexico in 2009. There are two Taylor
8 opinions. I testified as an expert. Mr. Nichols was the
9 prosecution expert and the Judge ruled on the admissibility
10 decision that Mr. Nichols could not testify that there was
11 any degree of scientific certainty to his conclusions,
12 could not testify that it was practically impossible that
13 any other tool could make the mark, could only testify to a
14 reasonable degree of ballistics certainty; and said that
15 the criticisms were serious enough that Nichols had felt
16 that he had to reply in print, but then there was
17 inadmissibility decision, most of it was devoted to saying
18 that academic experts could not testify. Some of it was
19 devoted on the basis of Mr. Nichols 2006 reply to me, the
20 one in his, in the newsletter that he edited, without
21 analyzing what Mr. Nichols said, the Judge said that I was
22 not, the word he used irrefutable scholar, that my
23 testimony would not be allowed even if an academic expert's
24 testimony would be allowed.

25 Q Okay, so just so I'm clear, in United

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1 States v. Donald Scott Taylor the Judge found that your
2 testimony was not reliable, correct?

3 A Well, you know, it's a very funny thing
4 because there were two decisions, right, and I testified
5 alone in United States v. Taylor. You get an admissibility
6 opinion which refers to the criticisms of firearms and tool
7 mark examination being serious, the principal criticism is
8 the ones to which Mr. Nichols replied on mine an
9 admissibility decision on that basis rules let's let in
10 firearms and tool mark identification but subject to very
11 severe qualifications. As I said that they can't testify
12 absolute certainty, can't testify scientific certainty,
13 can't testify practical impossibility, and there's a second
14 opinion, and the second opinion is about whether I would be
15 allowed to testify in Court. Now I should say that even
16 though the standards of admissibility hearings is for the
17 proponent of evidence to testify first. In this case,
18 because of Mr. Nichols' schedule, I testified first so in
19 effect I had no opportunity to reply to the criticisms
20 which were used as a basis for excluding, for saying I
21 wasn't qualified to testify at trial. Again this became an
22 irrelevancy because a plea bargain was reached, the
23 defendant was facing the death penalty and a plea bargain
24 to life without parole was reached so there was no appeal.

25 Q In State v., State of Florida v. Gary

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1 Michael Hilton you testified, correct?

2 A That's correct, I testified both at a
3 hearing, a Fry hearing and at trial.

4 Q And in regards to a motion in limine that
5 was filed by the defense to exclude evidence of the tool
6 mark identification of an item in evidence, the trial judge
7 in that case found that you were a biased witness, correct?

8 A That's correct.

9 Q Now in, ask you a few questions about the
10 testimony of Agent Vello Pavel, you indicated you have
11 reviewed that testimony, correct?

12 A Oh, right, I'm sorry, I wasn't focusing on
13 the first name so at first I thought you were saying
14 Villanova or something, I have reviewed that testimony,
15 that's correct.

16 Q Okay, and did, in his testimony he
17 indicated that the, the Walther PPK there was lint in that
18 gun, correct?

19 A That's correct.

20 Q And that it appeared that that gun had not
21 been fired since the last time it was cleaned, correct?

22 A Correct, now I should say there are two
23 issues and this is a very very big concern. In the
24 criticisms of forensic sciences well before there's an
25 issue called observation bias or double counting. There is

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1 one issue, was there lint in a gun and what time, what does
2 it say about when the gun was fired, right. There's
3 another issue, can we identify this gun on the basis of
4 tool marks, can we exclude it rather with the Walther as
5 the gun that fired it. Now these are two separate issues.
6 If you say the tool mark identification the exclusion is
7 reliable because of the lint you're counting, you're double
8 counting. You're counting the lint in the gun twice. It's
9 the same thing as I you say, no, there was a confession in
10 the case, therefore, isn't the firearms identification
11 reliable, no, that's double counting. The confession may
12 show what it shows but the firearms identification has to
13 stand or fall on its own merits. That's why the lint in
14 the gun is irrelevant to the issue of whether he followed
15 (a) did he follow the protocols of firearms and tool mark
16 identification and if you followed Judge Saris' reason in
17 Monteiro that exclusion would have been excluded, his
18 exclusion of the Walther, period, because of no
19 documentation. She wouldn't have let it in, period,
20 because there's no documentation, which as she explained
21 and as Judge Gertner explained in Green gives the an
22 examiner the opportunity to make things up after the fact,
23 even with the best of motives he or she does not have a
24 record of what was observed at the time. So the lint, the
25 time of firing, and the whether you can make an exclusion

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1 are two separate issues. My expertise has nothing to do
2 with time of firing. My expertise is with the logic of
3 these identification claims and the logic we know from
4 forensic DNA identification what you have to do to place an
5 identification scientific certainty. We know the problems
6 with the exclusions which is the FBI scholars say, hey,
7 someone like Pavel is very good to testify and bolster his
8 credibility with the fact that he trained with the FBI but
9 then he reaches an exclusion where the FBI agents would
10 never reach an exclusion on the basis of individual
11 characteristics.

12 Q Okay, earlier in your testimony you
13 discussed what you believe were, well you acknowledged that
14 there were some changes between the 2005 s.o.p and the 2010
15 s.o.p., correct?

16 A That's correct.

17 Q And the, in terms of, I guess the, find the
18 exact wording here, in terms you noted that he didn't
19 measure the width of the lands and grooves?

20 A Right.

21 Q And under the 2005 s.o.p. that wasn't
22 required, correct?

23 A Oh, boy, I don't think it was but, my God,
24 lands and grooves, I mean it wasn't required except that in
25 the bibliography they are very happy to list, or they're

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1 happy, they list Hatcher which is a standard 1930's
2 textbook on firearms and tool mark identification and even
3 in the 1930's there was protocol to measure width of lands
4 and grooves, so maybe the s.o.p.'s didn't require it but
5 then their s.o.p.'s are inconsistent with the references
6 they cite starting in the 1930's.

7 Q And also you noted that the labeling of the
8 lands and grooves that wasn't required in the 2005 s.o.p.,
9 correct?

10 A The 2005 s.o.p.'s. Now I should say
11 another thing in response to the discovery requests I
12 instructed counsel and counsel on my instruction asked
13 specifically for all protocols in regard to documentation
14 and the basis of cross references, at least in the 2010
15 s.o.p.'s, we did not get the protocols in regard to
16 documentation. In my experience some laboratories, not
17 all, separate their protocols in regard to documentation
18 from the protocols in regard to firearms identification and
19 if you don't check the protocols on documentation even
20 though counsel makes a request three weeks before you can't
21 tell what was required and I needed to see those protocols
22 and documentation to be absolutely sure.

23 Q Okay, just a few more questions. To your
24 knowledge has there been a successful challenge of the
25 introduction of firearms and tool marks identification

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1 evidence in South Carolina?

2 A To my knowledge, no.

3 Q And the cases that you cite that have
4 happened before I guess Mr. Winker's trial occurred, those
5 were in U.S. District Court's, correct?

6 A No, that's incorrect, because the reasoning
7 in Ramirez v. State Florida Supreme Court exclusion of
8 knife identification as the s.o.p.'s. The 2005 and 2010
9 s.o.p.'s explicitly state that the principals in protocol
10 of non firearms and tool mark identification are the same
11 as the principals in protocol for firearms identification
12 so following SLED's own reasoning the fact that the Florida
13 Supreme Court excluded the knife identification is
14 relevant, is a relevant precedent and that again was in
15 2001.

16 Mr. Simon: Beg the Court's indulgence for just
17 one moment?

18 The Court: All right.

19 Mr. Simon: No further questions, Your Honor.

20 The Court: All right, redirect?

21 Ms. Paavola: Very briefly, Your Honor.

22 **Redirect Examination**

23 **By Ms. Paavola:**

24 Q Dr. Schwartz, at the very beginning of
25 cross examination Mr. Simon was asking you some questions

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1 about the article that you published in Columbia Science
2 and Technology Review?

3 A Law Review.

4 Q Your article that they ultimately published
5 and that publication was in 2005?

6 A That's correct, beginning in March 2005.

7 Q My question is, was that article actually
8 written in 2005?

9 A Oh, no, that article was written in, it
10 was, must have been written in summer, summer 2004.

11 Q All right, and I understand that frequently
12 your work has been at the level of admissibility challenges
13 but not always?

14 A That's correct.

15 Q For example in Fireberger your testimony
16 was not offered as an admissibility challenge?

17 A That's correct.

18 Q And in fact even if the science was
19 ultimately ruled admissible all the criticisms that you've
20 discussed here today existed and were known and could have
21 been used for impeachment purposes or credibility
22 determinations that the jury would be making and that sort
23 of thing?

24 A Yes, and actually in considering this it's
25 relevant to note the challenges the Court decisions that I

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1 talked about we also had North Carolina 2005 challenge a
2 death penalty case, post conviction case, to my knowledge
3 that's not yet resolved but that had been done. Also in
4 addition there was a challenge in Central District of
5 California in 2006. There was a challenge in Southern
6 District of New York. Actually in 2007 before I wrote my
7 article there was a challenge of Driscoll in Middle
8 District of Pennsylvania in 2003. There was actually a
9 very very lengthy opinion that you could have found, it's
10 unpublished but I did a challenge, rather I was an expert
11 in an admissibility challenge, Commonwealth v. Meeks in
12 Massachusetts in 2006 easily found on line and had the
13 attorney found it on line he in fact, well the judge later
14 said would have found exactly the criticisms in the
15 National Academy of Sciences report for 2009, so there was
16 plenty out there. There's plenty out there. People were
17 making challenges before I got in and the challenges
18 accelerated after my Columbia SCLR article which is in fact
19 spurred bringing the changes in expert, although I didn't
20 testify, bolt cutter identification case in Eastern
21 District of Pennsylvania in 2004 in a published opinion but
22 the judge recognized the seriousness of the criticisms,
23 told the prosecution they weren't prepared and gave them
24 the recess of two weeks to prepare during which there was a
25 plea bargain.

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1 Q Right, so the point is simply that even if,
2 for example, you were not to testify for some reason, the
3 science existed you or some other person could have advised
4 counsel, for example, on subject for class examination or
5 other types of impeachment of the testimony that was
6 ultimately done?

7 A Well I think the primary example, actually
8 most interesting example is a 1995 case in the Supreme
9 Court of California where it's clear that the attorney
10 himself had read Biasotti's articles and was using them as
11 a basis for cross examination. There's also a beautiful
12 cross examination that I noticed because Victor Barlow, an
13 attorney in San Francisco, posted it on line, a cross
14 examination of Mr. Nichols in 2004. So basically if you
15 had done at that point to bring to this trial if you'd
16 simply done a Google on tool mark you would have come up
17 with a wealth of stuff. Similarly if you put in tool mark
18 in either Westlaw or Lexus you would have come up at a
19 result of stuff. Ironically you would have gone to the web
20 site of SWGGUN, the scientific, FBI scientific working
21 group on firearms I.D., and they have a section called the
22 opposing and supporting viewpoints and I have scripts of
23 all the cases and by that time all my articles were posted
24 on the FBI web site, so, you know, it was out there.

25 Ms. Paavola: Thank you, Dr. Schwartz.

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1 The Court: All right, you may step down, thank
2 you.

3 Mr. Mills: Your Honor, the Court calls Mr. John
4 Burch; he's standing right outside.

5 The Court: Okay, that will be fine, thank you.

6 Mr. Mills: Mr. Burch, has some trouble with his
7 lower back so he's bringing a pillow with him to the stand.

8 The Court: That will be fine, all right, thank
9 you.

10 Mr. Mabry: Your Honor, this is the matter I
11 needed the exhibit.

12 The Court: Let her swear the witness in, hold
13 for a second.

14 **John Burch**

15 **being first duly sworn, testified as follows:**

16 Madam Clerk: Please be seated, please state
17 your name for the Court?

18 The Witness: John Burch.

19 **Direct Examination**

20 **By Mr. Mills:**

21 Q And could you spell that?

22 A J-o-h-n B-u-r-c-h.

23 Q Thank you, good afternoon, Mr. ---

24 The Court: Hold for a second, all right, yes,
25 sir, what do you need?

Mr. Burch - Direct Examination by Mr. Mills

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1 Mr. Mabry: I needed that Exhibit, State's
2 Exhibit 36 from the trial.

3 The Court: For?

4 Mr. Mabry: For this witness.

5 The Court: For the cross examination of this
6 witness?

7 Mr. Mabry: Yes, sir.

8 The Court: Okay.

9 Madam Clerk: Your Honor, I've checked with our
10 office and in order for him to be able to get that he has
11 to have a Court order because it was entered into evidence
12 in General Sessions Court and if it's for bringing it here
13 even though we're not going to enter it into evidence he
14 still has to have a Court order for them to allow it to
15 come into a civil trial.

16 The Court: Okay, well whatever, whatever we
17 need to do if he needs it we'll go ahead and --

18 Mr. Mabry: You know I would just ask the Court
19 to order that it be brought up here. I'm not going to
20 introduce it in this hearing. I'm going to keep it marked
21 separately as a trial exhibit from the trial but I'm going
22 to show it to this witness, that's when I need it, so I
23 just ask the Court, we'd ask the Court to order that it be
24 brought up.

25 The Court: Well, yeah, but she's saying you

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1 need a written order to put in the file.

2 Madam Clerk: Right.

3 The Court: So I'll order it but you've got to
4 give me a written order and I'll have it brought up, okay.

5 Mr. Mills: Shall we proceed?

6 The Court: Yes, go ahead.

7 Mr. Mills: Thank you.

8 Q (Continuing) So, Mr. Burch, let's start
9 with some basic background information.

10 A Okay.

11 Q How do you know Mr. Winkler?

12 A I met him in Lumberton, North Carolina
13 around 1990.

14 Q And do ya'll have, share a connection to
15 Lumberton?

16 A He lived there shortly after I moved away
17 and he and I became friends and visited one another.

18 Q Do you have family in Lumberton?

19 A I do.

20 Q And how about your wife?

21 A My wife does as well, we both have family
22 in Lumberton.

23 Q Very nice, and when you would visit Mr.
24 Winkler, excuse me, visit family did you have occasion to
25 see Mr. Winkler?

Mr. Burch - Direct Examination by Mr. Mills

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1 A We would choose to stay with Mr. Winkler as
2 opposed to family.

3 Q And he would, he would host you?

4 A Absolutely.

5 Q Could you describe Mr. Winkler as a host?

6 A Sure, he's generous and gracious, a good
7 cook, good chef, and we always enjoyed visiting with him.

8 Q Very nice, and when Mr. Winkler was living
9 in Lumberton what kind of work was he doing?

10 A He was in the construction business. I
11 think he relocated to this area shortly after Hugo came
12 through Charleston and was doing repair work up and down
13 the coastline.

14 Q And did you know him to be generous with
15 his friends from work?

16 A Yes, yes.

17 Q How did, how did you know that?

18 A Any time anybody might stop by if they, he
19 had anything they might want whether it be a cold beer or a
20 free meal he was, he was generous with anything he might
21 have to offer.

22 Q Very nice, and shortly after you knew, you
23 met Mr. Winkler did you have an occasion to take a trip
24 with him?

25 A Yes, we went to a Bruce Springsteen concert

Mr. Burch - Direct Examination by Mr. Mills

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1 at the Dean Dome in Chapel Hill of which, if I recall, he
2 paid for the tickets, picked us up, drove us over. One
3 time he rented a beach house oceanfront and invited us to
4 join him all at his expense and we went down and visited
5 for a week.

6 Q And in light of his job as a construction
7 worker would you characterize those as significant expenses
8 for him?

9 A I would say so, yes.

10 Q Did you have an occasion to be invited to
11 Mr. Winkler's wedding?

12 A We were invited and attended.

13 Q And to whom was he married?

14 A That was Denise.

15 Q And can you tell us a little bit about
16 that?

17 A We were invited and we came down. His
18 family had set open bar for the family members whom he was
19 kind enough to include our names on the family list.

20 Q Very nice, he treated you as family?

21 A Correct.

22 Q And did you have an occasion to spend
23 Thanksgiving with Mr. Winkler?

24 A We did as well.

25 Q When, can you tell us about that?

Mr. Burch - Direct Examination by Mr. Mills

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1 A He took care of all the preparation and
2 cooking and it was just like eating at Mom's.

3 Q Very nice, have you been involved with Mr.
4 Winkler in doing some construction?

5 A I built a garage at my home in Apex in the
6 early nineties and he was able to ride up with my father in
7 law and help work on that, help do the framing of it and
8 stayed until we finished the project that Sunday afternoon.

9 Q And what was his role in that project?

10 A He took the lead role and I was more the
11 financier. I'd measure and cut but he knew exactly how it
12 should be done.

13 Q Right, and this was a garage at your house?

14 A Yes.

15 Q And was there some question about whether
16 you wanted to finish the project?

17 A I'm sorry?

18 Q Was there some question about whether even
19 have time to finish the project?

20 A Right, my wife's father was ready to go
21 early on Sunday and we weren't finished with the job and
22 Mic said I'll be glad to stay if you can take me home later
23 or on the following day.

24 Q And so he volunteered to stay?

25 A Volunteered to stay and help finish it.

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1 Q And that was something you appreciated?

2 A Yes, absolutely.

3 Q Now fast forwarding to October of 2005, did
4 you have a chance to visit Mr. Winkler?

5 A We did.

6 Q And could you just explain what
7 participated that visit?

8 A My wife's father notified us that in the
9 Florence new's broadcast through Lumberton Robeson County
10 that he had made the news and so we came down to check on
11 him.

12 Q You had some concerns about him?

13 A Yes, we did.

14 Q And when you got down here what, what did
15 you find?

16 A Well just a little bit out of sorts, Mic,
17 you know, not, not, not the fun guy that we were accustomed
18 to visiting.

19 Q Had he been abandoned?

20 A I would say so.

21 Q And so there were some charges pending at
22 the time; is that correct?

23 A Yes.

24 Q And had he been provided with a video?

25 A He had.

Mr. Burch - Direct Examination by Mr. Mills

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1 Q In regard to that?

2 A Yes, he had.

3 Q What was that video of?

4 A It was ---

5 Mr. Mabry: Objection.

6 The Court: All right.

7 Mr. Mabry: I guess hearsay that's the basis of
8 my objection. I don't know how this witness would know
9 about a video that was provided to the defendant.

10 Mr. Mills: Your Honor, we'd be happy to provide
11 a basis for that knowledge.

12 The Court: All right, go ahead, lay the
13 foundation.

14 Mr. Mills: (Continuing)

15 Q Did you have an occasion to see a video?

16 A I witnessed a video in his living room that
17 was provided to him by his defense counsel.

18 Q And what was that video of?

19 A It was the deposition from Rebecca.

20 Q Okay, and what happened during, while that
21 video was being played?

22 A Well other than the questioning and answer
23 period Mickey kind of narrated along with the audio of the
24 video saying ---

25 Mr. Mabry: Objection, that is hearsay.

Mr. Burch - Direct Examination by Mr. Mills

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1 Mr. Mills: Your Honor, it's in part being
2 offered to show Mr. Winkler's state of mind as opposed to
3 the substance of what, what he said.

4 The Court: I'll sustain it, that's hearsay.

5 Mr. Mills: (Continuing)

6 Q Mr. Burch, during the course of the, of
7 showing of the video and, yes or no, did Mr. Winkler
8 respond to the things being said during the video?

9 A Yes.

10 Q Did he narrate the video?

11 A Yes.

12 Q Did the responses that he made, whatever
13 they were, indicate to you that he had been watching the
14 video?

15 A Yes.

16 Q Watching the video a lot, a little?

17 A I would say a lot.

18 Q And did the video have an affect on him?

19 A Yes.

20 Q What was that affect?

21 A Negative.

22 Q He would seem pretty upset?

23 A Yes.

24 Q And was it similar to the Mic that you had
25 known previously?

Mr. Burch - Direct Examination by Mr. Mills

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1 A No.

2 Q Would you say he was different in his
3 demeanor?

4 A I would say, yes, out of sorts so to speak.

5 Q Out of sorts, now I'm kind of changing,
6 changing topics a little bit, while you were visiting did
7 you have an occasion to see a car drive by?

8 A Yes.

9 Q Can you tell us, tell us about that?

10 A I think Mic mentioned, asked if I had
11 noticed a car circle more than once and I had.

12 Q Okay, and did you have a conversation
13 about, about that?

14 A Yes, he had indicated ---

15 Mr. Mabry: Objection, hearsay.

16 The Court: Okay, sustained, no hearsay, sustain
17 the objection.

18 Mr. Mills: (Continuing)

19 Q And what was Mic's reaction to the car, to
20 the car driving by?

21 A He was a bit angry about it.

22 Q Did he, did it seem as though it was
23 something that had happened before?

24 Mr. Mabry: Objections, that calls for hearsay.
25 He's asking what the defendant told him. That's the same

Mr. Burch - Direct Examination by Mr. Mills

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1 thing he's trying to get in a different way.

2 The Court: Ask your question again.

3 Mr. Mills: Did it seem as though this was, this
4 was something that had happened before based on the conduct
5 of the defendant, based on -

6 The Court: Yeah, I'll sustain the objection.

7 Mr. Mills: (Continuing)

8 Q Well was, you said that this upset Mr.
9 Winkler?

10 A Yes.

11 Q You visited Mr. Winkler cause you were
12 concerned about him?

13 A Yes.

14 Q And after visiting him you were still
15 concerned about him?

16 A Yes.

17 Q He didn't seem like the same hard working
18 generous person you had always known?

19 A Correct.

20 Q He was out of sorts?

21 A Correct.

22 Q Now if members of Mr. Winkler's trial team
23 had asked you for this information would you have provided
24 it to them?

25 A Yes.

Mr. Burch - Cross Examination by Mr. Mabry

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1 Mr. Mills: All right, nothing further, Your
2 Honor.

3 The Court: All right, cross examination?

4 Mr. Mabry: Yes, sir.

5 **Cross Examination**

6 **By Mr. Mabry:**

7 Q Good afternoon, Mr. Burch.

8 A Good afternoon, sir.

9 Q Did, tell me when you first met Mr.
10 Winkler, what year?

11 A Around 1990.

12 Q Okay, and I believe Mr. Winkler was
13 drinking in 1990, wasn't he?

14 A Yes, sir.

15 Q He was also doing cocaine, wasn't he?

16 A I'm not aware of that.

17 Q He was also doing marijuana, wasn't he?

18 A I'm not aware of that.

19 Q But no question he was drinking, based on
20 your experience?

21 A Yes, sir.

22 Q All right, did you know he had physically
23 abused his first wife?

24 A I did not.

25 Q Did you know he physically abused Denise,

Mr. Burch - Cross Examination by Mr. Mabry

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1 his second wife?

2 A I did not.

3 Q Did you know he physically abused his third
4 wife, the victim in this case?

5 A No, sir.

6 Q Okay, he didn't tell you about any of those
7 things?

8 A No, sir.

9 Q Now tell me your wife's name?

10 A Tammy.

11 Q Tammy Burch?

12 A That's correct.

13 Q And what's her father's name?

14 A Charles.

15 Q Okay, and is, is Tammy Burch your wife, the
16 lady seated in here today?

17 A Yes, sir.

18 Q Okay, and I believe after this murder
19 occurred the victim in this case, the police came and
20 talked to your wife and your father in law; isn't that
21 correct?

22 A Yes, sir.

23 Q In fact your father in law had a gun that
24 was missing from his home, didn't he?

25 A Yes, sir.

Mr. Burch - Cross Examination by Mr. Mabry

135

1 Q And in fact that gun was stolen from his
2 home by the defendant Mr. Winkler?

3 Mr. Mills: Objection, Your Honor, calls for
4 hearsay as to what his father might have told him.

5 The Court: Sustained.

6 Mr. Mabry: (Continuing)

7 Q Did you ever have any discussions with the
8 trial attorneys in this case; did they ever come up and
9 talk to you?

10 A No, sir.

11 Q Did their investigator, any investigator
12 from their team come up and talk to you?

13 A A gentleman from the Solicitor's office
14 from South Carolina we met at Mr. Preston Charles house.

15 Q Okay, in the, in the presence of your
16 father in law ---

17 A My father in law ---

18 Q --- and your wife?

19 A --- my wife and myself.

20 Q Okay, and when you were there they informed
21 the Solicitor's office that the gun used in this case was
22 stolen by the defendant?

23 Mr. Mills: Objection, Your Honor, calls for
24 hearsay.

25 The Court: Sustained.

Mr. Burch - Cross Examination by Mr. Mabry

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1 Mr. Mabry: (Continuing)

2 Q What kind of gun was it that was missing
3 from your father's home?

4 Mr. Mills: Objection, Your Honor, calls for
5 hearsay based on what his father in law told him.

6 The Court: Unless he personally knows --

7 Mr. Mabry: I'm going to ask him that.

8 The Court: Okay, well lay the foundation then.

9 Mr. Mabry: (Continuing)

10 Q Had you ever seen your father in law's
11 pistol before it disappeared?

12 A I can't say for sure. He has a vast
13 collection, that was one of many.

14 Q Okay, the, so you don't know what gun was
15 missing from your father in law's house?

16 A No, sir.

17 Q Okay, and I believe you and the defendant
18 had a falling out over this missing gun from your father in
19 law's house; did you not?

20 A No, sir.

21 Q Do you remember ever telling the defense
22 attorney's investigators in this case that you had a
23 falling out with the defendant because of the gun that was
24 missing from your father in law's?

25 A No, sir.

Mr. Burch - Cross Examination by Mr. Mabry

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1 Q Did you ever tell them that the defendant
2 stole a gun from your father in law?

3 A I indicated that that may have been a
4 possibility; I have no idea.

5 Q Okay, and which, which defense attorney did
6 you tell that to?

7 A I did not speak to a defense attorney.

8 Q You told their mitigation investigator or
9 the private investigator?

10 A It was someone from the Solicitor's office.

11 Q Okay ---

12 A An investigator from the Solicitor's
13 office.

14 Q And your wife was upset with Mr. Winkler
15 about that, wasn't she?

16 Mr. Mills: Objection, Your Honor, calls for
17 hearsay.

18 The Court: If he personally observed it I'll
19 allow that. He can't get into what was said or anything
20 but if he personally observed her upset or anything I'll
21 allow that.

22 Mr. Mabry: (Continuing)

23 Q Was she upset about the gun being missing?

24 A She was upset about the fact that this was
25 all upsetting to her father.

Mr. Burch - Cross Examination by Mr. Mabry

138

1 Q The gun being missing from his house?

2 A Right, and this was never discovered until
3 after the crime was committed.

4 Q And how would the defendant Mr. Winkler had
5 been able to steal that gun? Did he have access to your
6 father in law's house?

7 Mr. Mills: Objection, Your Honor, calls for
8 speculation.

9 The Court: Lay the foundation as to how he
10 would know that.

11 Mr. Mabry: (Continuing)

12 Q Were you ever at your father in law's house
13 doing some work with Mr. Winkler?

14 A I was not.

15 Q Okay, were you ever over there with Mr.
16 Winkler?

17 A I was.

18 Q Okay, so he had access to your father in
19 law's house and his gun collection?

20 A I would say so.

21 Q Okay, and did the gun go missing sometime
22 after Mr. Winkler had access to your father in law's gun
23 collection?

24 A Sir, nobody realized the gun was missing
25 until it reappeared when the crime was --

Mr. Burch - Cross Examination by Mr. Mabry

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1 Q Okay, do you know if, did you ever try to
2 get your father in law's gun back?

3 A No, sir.

4 Q Do you remember what kind of car was in the
5 video that Mr. Winkler showed you?

6 A I did not see the video of a car.

7 Q You didn't see a car, the car that you said
8 you saw go by ---

9 Mr. Mills: Objection, Your Honor, misstates the
10 record.

11 Mr. Mabry: I apologize for that, I was thinking
12 he was shown the video. He was shown the video of the
13 deposition.

14 The Court: All right.

15 Mr. Mabry: (Continuing)

16 Q When the car went by the house do you
17 remember what kind of car it was?

18 A I don't.

19 Mr. Mabry: One moment, Your Honor.

20 The Court: All right.

21 Mr. Mills: Just a moment, Your Honor, I'm
22 sorry.

23 The Court: Wait a minute, let's see if he has
24 any more cross examination.

25 Mr. Mabry: Nothing further.

Ms. Bellamy - Direct Examination by Mr. Mills

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1 The Court: All right, redirect?

2 Mr. Mills: No, Your Honor.

3 The Court: All right, you may step down, thank
4 you very much.

5 The Witness: Thank you.

6 Mr. Mills: And, Your Honor, at this point we
7 need a moment to work out this I.T. issue.

8 The Court: All right, all right, let's take
9 about a five or ten minute break see if you can get it
10 going, just let me know when ya'll ready to go forward,
11 okay.

12 Mr. Mills: Thank you.

13 The Court: All right, thank you.

14 (Whereupon, a recess was taken and the following
15 takes place on the record after the recess.)

16 Mr. Mills: I just wanted to inform the Court of
17 a possible scheduling matter; is that right?

18 Mr. Winkler calls Ms. Denise Bellamy.

19 The Court: All right.

20 **Denise Bellamy**

21 **being first duly sworn, testified as follows:**

22 Madam Clerk: Please state your name for the
23 Court.

24 The Witness: Denise Bellamy

25 **Direct Examination**

Ms. Bellamy - Direct Examination by Mr. Mills

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1 By Mr. Mills:

2 Q Good afternoon, Ms. Bellamy?

3 A Hi.

4 Q Do you mind spelling your name for the
5 record?

6 A D-e-n-i-s-e B-e-l-l-a-m-y.

7 Q Great, thank you, and just for the sake of
8 the court reporter let's both try to keep a deliberate
9 pace, just try to slow down, all right?

10 A All right.

11 Q So let's start with some background
12 information, where do you currently live?

13 A [REDACTED].

14 Q And what town is that in?

15 A Little River.

16 Q Little River, South Carolina?

17 A Yes, sir.

18 Q And how long have you lived there?

19 A Ten years.

20 Q And did you have an occasion to meet Mr.
21 Winkler?

22 A Yes, I did.

23 Q How did you meet Mr. Winkler?

24 A He was my neighbor and one day when we
25 first moved there he came and asked me was there anything

Ms. Bellamy - Direct Examination by Mr. Mills

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1 that I needed because I was a single mother with two sons
2 and he scarred helping me with my yard.

3 Q Very nice, that's something he volunteered
4 to do?

5 A Yes, sir.

6 Q And did he do other things for you?

7 A Yes, there were several occasions that my
8 sons might have missed the bus he would voluntary to drop
9 them off at the schoolhouse. He put a basketball court up
10 outside for the kids to play basketball and he was just
11 really a nice man to me.

12 Q Very nice, and in the time that you knew
13 Mr. Winkler did you notice, notice a change?

14 A Really after what happened, yeah, I noticed
15 a change then.

16 Q Prior to what happened did, did he have
17 job?

18 A Yes, sir.

19 Q Was that something he was proud of?

20 A Yes, sir, he was doing like landscaping and
21 he would keep his yard, you could see him outside cutting
22 hedges. He had a big pretty rock outside that he made, had
23 put Winkler on it and I think that was awful cause it was
24 nice but he used to keep everything nice outside, just
25 constantly doing ---

Ms. Bellamy - Direct Examination by Mr. Mills

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1 Q He kept it clean?

2 A Yes, he did.

3 Q And when you noticed the change in Mr.
4 Winkler what was different?

5 A He was looking scrounge, he didn't really,
6 you know, was focused to me. That's when they had to put
7 that bracelet on his leg and, you know, he would just come
8 out to the porch, he would barely speak and the rest of us
9 like the neighbors was a little concerned about --

10 Q Now you said that he was scrounge, what,
11 what do you mean by that?

12 A He was usually clean cut before when I seen
13 him, you know, but this when we seen him he didn't look
14 like, you know, he was taking care of himself real good.

15 Q Okay, and what were the ways you could tell
16 that that was the case?

17 A Scrappy, scrappy looking, tee shirt.

18 Q For the record you're rubbing your face
19 like he wasn't shaved?

20 A You know, yeah, wasn't shaved, and he was
21 scrounge looking and he was usually neat and pressed but
22 then he wasn't.

23 Q Okay, and so that was a pretty big change?

24 A Yes.

25 Q And did you have reason to believe he was

Ms. Bellamy - Direct Examination by Mr. Mills

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1 depressed?

2 A Yes, sir.

3 Q What were, what were those reasons?

4 A Well he used to talk to us and then he
5 stopped. He wouldn't talk to you; he wouldn't say too
6 much, you know. He would look like he was sad a lot.

7 Q Did, did you have any other reason to
8 believe he might be depressed?

9 A Wouldn't you be?

10 Q And did you ever observe Mr. Winkler
11 crying?

12 A Yes, I did, tears came to his eyes a lot.
13 Me and my, cause I live like right directly across the
14 street from them and then we had another neighbor lived on
15 the corner and they would occasionally, you know, tell me
16 they need to go check on Mic because they didn't see him
17 today or they didn't hear from him, they would go knock on
18 the door to see how he was and she had offered, this is
19 hearsay, but she would say, you know, he wouldn't answer
20 the door and she used to, that's how I know he was from
21 Ohio.

22 Mr. Mabry: Objection, please.

23 The Court: Okay.

24 Mr. Mabry: She's testifying to what her
25 neighbor told her; she can't do that.

Ms. Bellamy - Direct Examination by Mr. Mills

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1 The Court: All right, sustained.

2 The Witness: (Continuing)

3 A Okay.

4 Q Now changing, changing subjects somewhat,
5 it sounds like you were still living at [REDACTED]
6 while Mr. Winkler was on home detention?

7 A Yes, I was.

8 Q And do you know if he was required to stay
9 within a certain distance of his home?

10 A Yes, sir.

11 Q He was?

12 A Yes, sir.

13 Q And was he permitted to have contact with
14 Ms. Rebecca Winkler?

15 A He wasn't.

16 Q To your knowledge prior to this incident in
17 March did he comply with those conditions?

18 A He was pretty much home.

19 Q Now while you were, while Mr. Winkler was
20 on home detention did you ever see Ms. Winkler driving
21 through the neighborhood?

22 A Yes, I did.

23 Q Can you tell us about that?

24 A My neighbor Cathy was sitting on the step
25 one day and I had came to the front door and I happened to

Ms. Bellamy - Direct Examination by Mr. Mills

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1 see the little white car she drove come by and I have to
2 walk across the street and I asked Cat about it and Cat was
3 like well she done, she don't came through here a couple of
4 times.

5 Mr. Mabry: Objection.

6 The Court: Sustained.

7 The Witness: (Continuing)

8 A Well I seen her the one time.

9 Q Great, so you did see Ms. Winkler go ---

10 A Yes, sir.

11 Q --- through the neighborhood?

12 A Yes, sir.

13 Q You, so you've lived in the neighborhood
14 for ten years?

15 A Yes, sir.

16 Q If we showed you a video from your
17 neighborhood would you be able to tell us whether or not it
18 was an accurate representation of your neighborhood?

19 A Yes, sir.

20 Mr. Mills: Your Honor, we'd like to
21 authenticate an exhibit. I understand you have an
22 objection?

23 Mr. Mabry: Yes, sir, we have an objection, this
24 witness did not, this video they're about to show is a
25 videotape this witness did not make. She can't tell what

Ms. Bellamy - Direct Examination by Mr. Mills

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1 day this video was made. She can't authenticate it any way
2 other than to say at some point in time, I assume she'll
3 look at it and say that looks my neighborhood.

4 The Court: Okay, has she viewed the video?

5 Mr. Mabry: I assumed that she has already one
6 time.

7 Mr. Mills: We've talked to her, we've talked,
8 talked about the substance of the video, Your Honor, and
9 she can say that the thing that is on the video is in fact
10 an accurate representation of her neighborhood. She cannot
11 say that she took the video but we would offer ---

12 The Court: Well I mean what is the video, what
13 is, does the video show somebody driving through ---

14 Mr. Mills: Yes, Your Honor.

15 The Court: --- or something like that?

16 Mr. Mills: Yes, Your Honor.

17 The Court: Okay, and she wasn't there when it
18 was taken?

19 Mr. Mills: She was not the person who took the
20 video.

21 The Court: Okay, and she can't identify it or I
22 mean how did she identify, I'm assuming you want to show
23 the victim driving through the neighborhood?

24 Mr. Mills: Yes, Your Honor.

25 The Court: Okay, but she didn't take the video?

Ms. Bellamy - Cross Examination by Mr. Mabry

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1 Mr. Mills: That's correct.

2 The Court: And she doesn't know when it was
3 taken or who took it?

4 Mr. Mills: That's correct.

5 The Court: Okay, I sustain the objection.

6 Mr. Mills: All right.

7 Q (Continuing) Ms. Bellamy, the Mic that you
8 know prior to the change was not depressed, was he?

9 A No, sir.

10 Q He was generous?

11 A Yes, sir.

12 Q He had a bright outlook?

13 A Yes, sir.

14 Q And prior to ---

15 Mr. Mabry: Leading.

16 The Court: Sustained, let's don't lead.

17 Mr. Mills: (Continuing)

18 Q And after the change was he different?

19 A Very.

20 Q How was he different?

21 A He just was to hisself more or less, you
22 could talk to him and it looked like, you know, he wasn't
23 really all there, you know. He was, I would guess, you
24 know, he was upset about what happened.

25 Mr. Mills: No further questions, Your Honor.

Ms. Bellamy - Cross Examination by Mr. Mabry

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1 The Court: All right, cross examination?

2 Mr. Mabry: Yes, sir.

3 Cross Examination

4 By Mr. Mabry:

5 Q Tell me your name again, please?

6 A Ms. Denise Bellamy.

7 Q Okay, Ms. Bellamy, is it Ms. Bellamy, Mrs.
8 Bellamy?

9 A Miss.

10 Q Okay, Ms. Bellamy, you were interviewed on
11 June the 13th, I believe, of 2007 by Vicki Childs, a
12 private investigator; is that correct?

13 A Vicki Childs?

14 Q Uh-huh?

15 A No, I don't know nothing about no Vicki
16 Childs.

17 Q Okay, let me show you the summary and read
18 over that for me and I'll ask you some questions about it

19 A Okay.

20 Q Okay ---

21 Mr. Mills: Your Honor, if we could have a
22 moment. I believe they're providing us a copy with what
23 the witness is reviewing.

24 The Witness: (Continuing)

25 A That's 2007, I thought you meant recent.

Ms. Bellamy - Cross Examination by Mr. Mabry

150

1 Q You are Denise Bellamy; is that correct?

2 A Correct.

3 Q And you live at [REDACTED],
4 Little River, South Carolina?

5 A Yes, sir.

6 Q Okay, and do you now remember Ms. Childs
7 coming and speaking with you on June 13 of 2007?

8 A Okay, okay.

9 Q Okay, is that okay, yes, she did come and
10 talk ---

11 A Yes.

12 Q --- to me?

13 A There was several people talked to me back
14 then.

15 Q Okay, so several people came ---

16 A Yes.

17 Q --- and talked to you back then?

18 A Uh-huh.

19 Q Okay, and there were people representing
20 the defendant ---

21 A No, they wanted to know what happened.

22 Q --- over here Mic Winkler? Okay, was some
23 of them people representing the defendant Mic Winkler?

24 A Okay.

25 Q Well I'm not asking you okay, you're asking

Ms. Bellamy - Cross Examination by Mr. Mabry

151

1 me a question or are you answering?

2 A No, I'm saying it could have been, I'm just
3 saying a ---

4 Q You don't ---

5 A --- lot of people came was asking me
6 questions back then.

7 Q Okay?

8 A I'm not sure who was representing him, all
9 I could tell them was what I knew.

10 Q All right, and you talked to them when they
11 came and ---

12 A Yes.

13 Q --- talked to you and you told them what
14 you knew?

15 A Yes.

16 Q Is that right, is there anywhere in this
17 interview summary that I showed you that says you saw Becky
18 Winkler driving through the neighborhood?

19 A They never asked me about that.

20 Q Okay, and you didn't tell them either, did
21 you?

22 A No.

23 Q In 2007, but you're telling us now in 2012?

24 A Okay.

25 Q Okay, in fact you didn't even see the

Ms. Bellamy - Cross Examination by Mr. Mabry

152

1 victim drive, you just saw a little white car, isn't that
2 right?

3 A I saw her; I know what she looked like.

4 Q You saw a little white car ---

5 A Right.

6 Q --- and asked your neighbor what you saw,
7 who was that; that's what you testified ---

8 A No, I did not.

9 Q --- to a while ago, didn't you?

10 A No, I did not, I asked my neighbor, I said
11 isn't that her and she said it was her, she had done, you
12 told me it wasn't no good so what you asking me about it
13 now.

14 Q So you weren't sure who it was so you had
15 to ask your neighbor who it was?

16 A No, I asked her ---

17 Q You don't ---

18 A --- I said ain't that Becky riding through
19 here Rebecca ---

20 Q Then why did you ask her who it was?

21 A She said that she already been around there
22 three, because she had a restraining order out for it, she
23 wasn't supposed to be over there.

24 Q Why did you ask your neighbor who it was if
25 you were sure who it was in the little white car?

Ms. Bellamy - Cross Examination by Mr. Mabry

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1 A I didn't ask her who it was, I was asking
2 her why was she over there, didn't they have a restraining
3 order, they wasn't supposed to be over there.

4 Q And you didn't tell his lawyers about that
5 back in 2007?

6 A Why should I have told anybody, they didn't
7 ask me.

8 Q Okay, and you ---

9 A When they asked me I told them.

10 Q A bunch of people came and talked to you
11 and, no, you didn't tell anybody that, did you?

12 A Nobody asked me.

13 Q Okay, what kind of little white car did the
14 victim drive?

15 A I don't remember.

16 Q These are some exhibits from the trial,
17 State's Exhibit 71?

18 A I don't know no license tags.

19 Q Okay, well State's Exhibit 67, that's a
20 Land Rover, white Land Rover SUV?

21 A Uh-huh.

22 Q Is that the victim's car?

23 A No.

24 Q It was a little white car?

25 A Yes.

Ms. Bellamy - Cross Examination by Mr. Mabry

154

1 Q Sixty-six; that's an SUV, isn't it?

2 A It was a white car, it wasn't a truck like
3 car, it was just a white car.

4 Q It wasn't a SUV?

5 A No.

6 Q All right, 57 that's a silver Isuzu Rodeo;
7 it wasn't that car either, was it?

8 A Uh-uh.

9 The Court: Is that a no? You need to give a
10 oral response.

11 The Witness: (Continuing)

12 A No.

13 Q State's Exhibit 54, it was not that car,
14 was it?

15 A No.

16 Q During the time that Mic was married did
17 you ever see him driving the little white car?

18 A No.

19 Q In fact Mic and Becky didn't have a little
20 white car, did they?

21 A I never said it was her car.

22 Q Okay, in fact they only had two cars that
23 white SUV -

24 A Well when he was on restriction he didn't
25 have no car so --

Ms. Bellamy - Redirect Examination by Mr. Mills

155

1 Q Well I'm asking?

2 A I'm saying.

3 Q They had two cars, the white SUV Land Rover
4 that I showed you?

5 A Uh-huh.

6 Q And a silver Isuzu?

7 A Uh-huh.

8 Q That's the only two cars they had, right?

9 A Okay.

10 Q There wasn't no little white car?

11 A There was a little white car.

12 Q Neither one of them owned a little white
13 car?

14 A I can't help it if she didn't own it. I
15 didn't say she owned it. I said she was driving it.

16 Mr. Mabry: Nothing further.

17 The Court: Redirect?

18 Mr. Mills: Briefly, Your Honor.

19 **Redirect Examination**

20 **By Mr. Mills:**

21 Q Two or three things, Ms. Bellamy, first
22 when you said ain't that Becky, were you pointing out that
23 it was Becky?

24 A Yes.

25 Q And, secondly, you recognize Ms. Winkler

Ms. Bellamy - Redirect Examination by Mr. Mills

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1 when you ---

2 A I know what she look -- right.

3 Q --- and you know what she looks like?

4 A Right.

5 Q And you saw her driving?

6 A Right.

7 Q Through the neighborhood?

8 A It wasn't the car that I was looking it; it
9 was a little white car, I didn't know it was her car or
10 not, but she was driving a white car through our
11 neighborhood cause when she came ---

12 Q Thank you ---

13 A --- down she came past my house.

14 Mr. Mabry: He's asked three leading questions
15 in a row.

16 The Court: Overruled, I'll allow that.

17 Mr. Mills: Nothing further, Your Honor.

18 The Court: All right, you may step down. All
19 right, you can call your next witness, ya'll have anybody?

20 Mr. Mills: No, Your Honor.

21 The Court: Okay, so we want to go ahead and
22 recess until 9:30 tomorrow morning?

23 Mr. Mills: That's good with us, yes, Your
24 Honor.

25 The Court: All right, anything the Applicant

1 wants to put on the record before we recess?

2 Mr. Mills: Just a moment.

3 The Court: All right.

4 Mr. Mills: Oh, Your Honor, there's some
5 question about whether there's a transport order to have
6 Mr. Winkler present for the rest of these proceedings. I
7 just want to make sure that there is?

8 Mr. Simon: Yes, I was looking back at the
9 request we made and it appears ---

10 The Court: Let's have some order, please. All
11 right, go ahead.

12 Mr. Simon: It appears that we may have made a
13 mistake and only not outlining in the request for SCDC to
14 transport, to transport him for the full week and they
15 indicated have today that they would need either an order
16 from this Court to make sure that the transportation
17 continues and also I haven't had a chance cause this wasn't
18 something that we talked about just before we came back
19 into session. I can make a call to talk with the person
20 that we normally talk to about making sure inmates are
21 transported.

22 The Court: All right, whatever we need to do,
23 I'll sign whatever we need, somebody needs to get me --

24 Mr. Mills: I mean it's something that their
25 office usually handles; I'm happy to do it but I suspect

1 they could do it more quickly.

2 The Court: Yeah, let's hold it down, please,
3 all right, who's going to get me an order?

4 Mr. Simon: We can get one to you in a few
5 minutes or if you, actually we'll get one to you, I guess,
6 the next five or ten minutes.

7 The Court: That will fine.

8 Mr. Simon: And also I'll call back the office
9 to get somebody to go ahead and talk with the folks there.

10 The Court: That will be good, sounds good, all
11 right.

12 Mr. Mills: Thank you, Your Honor.

13 The Court: Anything else from the Applicant
14 before we recess?

15 Mr. Mills: No, Your Honor.

16 The Court: Anything from the State before we
17 recess?

18 Mr. Simon: Nothing, Your Honor.

19 The Court: All right, we'll stand in recess
20 until 9:30 tomorrow morning.

21 Mr. Mills: Thank you.

22 The Court: All right, thank you.

23 (Whereupon, court was adjourned for the evening
24 and resumes on June 19, 2012 at 9:30 a.m.)

25 The Court: Good morning, everybody, anything

1 from the Applicant before we get started?

2 Ms. Paavola: Your Honor, we, if, we would like
3 to have a very brief scheduling discussion if that's
4 possible?

5 The Court: All right.

6 Ms. Paavola: We just want to note that we have
7 six witnesses for today. We have four of them scheduled to
8 be here before the lunch break and two starting at 1:30.

9 The Court: Okay.

10 Ms. Paavola: And then that will be all the
11 witnesses we have for today. The three witnesses who were
12 trying to fly in from Ohio yesterday were at the airport
13 all day yesterday and still were unable to resolve their
14 flight difficulty so they're now re-booked on a flight to
15 arrive here Wednesday morning at 10:40 a.m.

16 The Court: Okay.

17 Ms. Paavola: So I don't know if that means for
18 what the State may wish to do but those would be our three
19 final witnesses. They would be able to get here as soon as
20 possible after they arrive at the airport on Wednesday and
21 then that would complete our case.

22 The Court: So when do you expect to complete
23 your case?

24 Ms. Paavola: Would be Wednesday afternoon as
25 soon as those three witnesses are finished testifying.

1 The Court: All right, and do ya'll have, I'm
2 not going to hold you to it, but I'm just trying to find
3 out if we need to alert the Clerk of Court that we're going
4 to here Saturday and Sunday or not, so do you know about
5 how --

6 Mr. Simon: We won't be here that long, Your
7 Honor.

8 The Court: We'll still get it in by Friday?

9 Mr. Simon: Yes, Your Honor.

10 The Court: Okay, all right, sounds good.

11 Ms. Paavola: Thank you.

12 The Court: All right, thank you, that's good.
13 All right, the Clerk of Court has just given me an email
14 saying she just got an email, she doesn't know who it is,
15 it is, let me have ya'll come take a look at it, the email.

16 (Whereupon, a bench conference was held off the
17 record out of the hearing of the court reporter.)

18 The Court: All right, anything further from the
19 Applicant before we get started?

20 Mr. Mills: No, Your Honor.

21 The Court: All right, anything from the
22 Respondent before we get started?

23 Mr. Simon: Nothing, Your Honor.

24 The Court: All right, the Applicant can call
25 their next witness.

Mr. Patterson - Direct Examination by Mr. Mills 161

1 Mr. Mills: Thank you, Your Honor, the Applicant
2 calls Mr. Frank Patterson.

3 The Court: All right.

4 Frank Patterson

5 being first duly sworn, testified as follows:

6 Madam Clerk: Please state your name for the
7 Court.

8 The Witness: My name is, what they have here is
9 Frank Patterson, but my God given name is Franklin Dean
10 Patterson.

11 Direct Examination

12 By Mr. Mills:

13 Q Good morning, Mr. Patterson, would you
14 spell your name for the court reporter?

15 A F-r-a-n-k P-a-t-t-e-r-s-o-n.

16 Q Thank you, and, Mr. Patterson, we'll start
17 with a few background questions, are you related to Stephen
18 Fitzwater?

19 A Yes, it's my wife's, my wife's, let's see,
20 let me get this right, adopted brother.

21 Q Very nice, and in 2005 and 2006 where did
22 he live?

23 A He lived with us.

24 Q And where was that?

25 A Stones Edge.

Mr. Patterson - Direct Examination by Mr. Mills

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1 Q Stones Edge, and what, what was the address
2 at Stones Edge?

3 A [REDACTED]

4 Q Great, and how long did you live there?

5 A Until I think right around 2008, around
6 that time, in '07 my mom died and I had to sell my house to
7 move closer to my dad which lives at the beach so I could
8 keep an eye on him.

9 Q How long did you live there before you
10 left?

11 A I moved in in, I believe, it was 2003,
12 2000, between 2003 2004.

13 Q And while you were living there did you
14 have the occasion to meet Mr. Winkler?

15 A I sure did, yes, sir.

16 Q Did Mr. Winkler live in that neighborhood?

17 A He lived right across the street from me,
18 right across the road from me.

19 Q Did his side door back up to your house?

20 A Yeah, my front door and his side door was,
21 I could look right across the street.

22 Q And were there through streets in that
23 neighborhood?

24 A Yeah, well, yeah, I guess you'd call them
25 through streets, it would go, it was basically a circle

Mr. Patterson - Direct Examination by Mr. Mills

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1 you'd go around and then go out to, to the road.

2 Q In other words no streets, all the streets
3 in the neighborhood led to other streets in that same area?

4 A Yeah, yes.

5 Q And there were no businesses in that
6 neighborhood?

7 A No businesses.

8 Q How far would you say that your house and
9 Mr. Winkler's house was from the main road?

10 A I'd say anywhere from an eighth to a
11 quarter of mile from the road.

12 Q A little ways back?

13 A Yeah, a little ways back.

14 Q And while you were living there did you
15 meet Rebecca Winkler?

16 A Yes, sir.

17 Q Where did she live?

18 A She lived with Mic.

19 Q And how many occasions would you say that
20 you had to meet Ms. Winkler?

21 A We were neighbors, I seen them all the
22 time. Mic and them had a pool back there and they would
23 invite us over occasionally. They would have some people
24 over and have a little parties and he invited me and my
25 wife to come over quite a few times.

Mr. Patterson - Direct Examination by Mr. Mills

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1 Q And would you also invite he and Ms.
2 Winkler?

3 A Yeah, they were over, I think, maybe once
4 or twice but we had, we had house full of kids we, we
5 didn't, we didn't do many things like that, you know. We
6 had four kids, well actually five kids living with us.

7 Q Quite a few?

8 A Yeah.

9 Q Did Ms. Winkler move out at some point?

10 A Yes, sir, she did.

11 Q When was that?

12 A I can't remember the date; I know that she
13 moved out, but she was there and then she wasn't there and,
14 you know, but I remember the time, I remember when they got
15 separated but she was still back and forth.

16 Mr. Simon: Objection, on grounds of hearsay
17 unless the witness actually saw it with his own eyes.

18 The Court: Overruled, go ahead.

19 Mr. Mills: (Continuing)

20 Q And why did you think that they were
21 getting back together or working things out?

22 A Well they were, she was still coming over
23 and they were still, you know, talking so I just, I just
24 assumed that they were. I mean that was my, the way I took
25 it, you know.

Mr. Patterson - Direct Examination by Mr. Mills

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1 Q After the incident in October did you have
2 an occasion to see Mr. Winkler?

3 A Oh, yeah, every, every day I see him he
4 would be out in his yard walking around.

5 Q And what were Mr. Winkler's interactions
6 with his neighbors like after the incident?

7 A Most of them didn't speak to him and there
8 was still a few that did. I couldn't tell you their names;
9 I don't remember much of the people that, I didn't interact
10 with a lot of the people that lived in the neighborhood.

11 Q But you would, you did continue to check on
12 Mr. Winkler?

13 A Oh, yeah, yeah.

14 Q Why did you check on him?

15 A Well, you know, I, I, I knew what had
16 happened but, you know, Mic had never done anything, I knew
17 that he, she said that he had done that but I know Mic and
18 I had never seen with my own two eyes him doing anything
19 like that so I mean just me giving him the benefit of the
20 doubt a man is innocent until proven guilty so and he's
21 always good to me and good to my kids. I never had no --

22 Q Were you concerned about how he was doing?

23 A Yeah, I was concerned, you know, he, he was
24 wearing a leg brace and a lot of times you would tell he
25 just walking around the yard and just, you know, you could

Mr. Patterson - Direct Examination by Mr. Mills

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1 tell he, you could tell he was changing, you know.

2 Q When did you, did you have an occasion to
3 go to his house, inside his house?

4 A Yes, sir.

5 Q And was there ever an issue with food?

6 A Yes.

7 Q What was that issue?

8 A Sometimes his dad would send him checks to
9 help him get along, sometimes he would run out of money and
10 he wouldn't have no money for food and which, you know, we
11 always fixed a lot of food so we would fix him a plate.
12 One of the kids would normally take it over to him or
13 sometimes he would even come over and grab it.

14 Q Would there be times when he would go
15 without food for more than a day?

16 A I've known him where I hadn't seen him for
17 a couple of days where he set in his house and I, and I
18 know he hadn't eaten because I knew he didn't have enough
19 money so and I, and I always told him, I said, you know,
20 Mic you get hungry you can at least come, you know, and
21 we'll fix you a plate, that wasn't no big deal we fixed
22 plenty.

23 Q You had a big crowd?

24 A Yeah, I had a big crowd.

25 Q During those visits with Mr. Winkler did

Mr. Patterson - Direct Examination by Mr. Mills

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1 you have a reason to think he was depressed?

2 A Oh, yes, yeah.

3 Q What, what gave you a reason to think that?

4 A Well you could, you could tell just in the
5 way he acted and way he talked, just from knowing him
6 before and knowing him to that point you could tell he was
7 very depressed.

8 Q Did Mr. Winkler discuss killing himself?

9 A I heard him say it a couple of ---

10 Mr. Simon: Objection.

11 The Court: Sustained.

12 Mr. Mills: Your Honor, we'd be offering it not
13 for Mr. Winkler's actually having killed himself but just
14 to give evidence of his state of mind, talking about
15 committing suicide is, is evidence of depression.

16 The Court: All right, I'll allow it, go ahead.

17 The Witness: (Continuing)

18 A Yeah, he a couple of times and I told him I
19 said, Mic, you know just wait, I said, just see how this
20 plays out before you, you know, do anything like that. I
21 said, that's just rash, I said, you know, he, he would talk
22 about the case and everything and I said, well, you know,
23 if you're innocent then, you know, it will come out, so I
24 basically at that, it only happened a couple of times and
25 basically after that he didn't say it again not to me

Mr. Patterson - Direct Examination by Mr. Mills

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1 anyway.

2 Q Backing up a bit why, why was it that Mr.
3 Winkler had no money and no food?

4 A Well, one, he didn't have a job and his
5 father was supporting him so if the check didn't come from
6 his father and he ran out of money then he had, and a
7 couple of times I had to loan him the money because the
8 money was coming from his father to pay for his band on his
9 foot.

10 Q And would he pay you back when he could?

11 A Yeah, every time he got the money from his
12 father if we paid for the band he would pay us back and
13 even give us a little gas money for bringing him down here,
14 too.

15 Q And did he have a car during that time?

16 A He had a car to start with and then they
17 took it from him.

18 Q And did that make it harder for him to ---

19 A Oh, yeah, that made it a lot harder for
20 him. That's when he really started getting depressed when
21 he couldn't, you know, when he didn't have the car anymore.

22 Q And based on your observations he was very
23 depressed?

24 A Yeah.

25 Q And he was suicidal?

Mr. Paterson - Cross Examination by Mr. Mabry

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1 A I, I thought so, my honest opinion is I
2 thought that he would do it to himself before he, I mean
3 just watching him.

4 Mr. Mills: Just a moment, Your Honor.

5 The Court: All right.

6 Mr. Mills: Nothing further.

7 The Court: Cross examination?

8 Mr. Mabry: Yes, sir.

9 **Cross Examination**

10 **By Mr. Mabry:**

11 Q Mr. Patterson, you were talked to by Mr.
12 Winkler's attorneys or investigators; is that correct?

13 A Yes, sir.

14 Q In fact the first time you talked, talked
15 to, with Vicki Childs who was their private investigator on
16 June 13th of 2007; is that correct?

17 A Yes, sir.

18 Q Okay, and you discussed with her what you
19 knew about the case?

20 A Yeah.

21 Q Okay, and she also talked to your wife; is
22 that correct?

23 A Yes, sir.

24 Q And your wife's adopted brother?

25 A Yes, Stephen.

Mr. Paterson - Cross Examination by Mr. Mabry

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1 Q All right, and then you were talked to
2 again on, at a later time on, I believe, June 27th by Ms.
3 Childs; does that sound about right?

4 A Yeah, I, yes, sir, as far as my
5 recollection, I don't have the best memory as far as dates
6 and stuff.

7 Q Okay, well I may be wrong, she was trying
8 to, she left some messages at your home but you didn't call
9 her back; do you remember that?

10 A I sure don't.

11 Q Okay, and then in January of 2008 Ms.
12 Childs talked with you again about this case; do you
13 remember that?

14 A I remember talking to her but I don't,
15 really don't remember the dates and it's been a while back.

16 Q Okay, and do you remember informing Ms.
17 Childs at that time on January 28th, 2008, that you did not
18 want to be involved in this case?

19 A No, yes, sir, I remember that, yeah.

20 Q You do remember that?

21 A Yeah, I remember that, yes, sir.

22 Q And in fact you told her you were upset
23 that Mic had lied to you about several things?

24 A Yeah.

25 Q Okay, tell us what Mic had lied to you

Mr. Paterson - Cross Examination by Mr. Mabry

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1 about?

2 Mr. Mills: Objection, Your Honor, calls for
3 hearsay.

4 The Court: Overruled, go ahead.

5 The Witness: (Continuing)

6 A I never thought he had a weapon and he did
7 and I can't remember the other things. It's been, Lord,
8 I'm just drawing a blank. It's been so long since, since
9 that and since I talked to Ms. Childs I can't remember the
10 questions that she asked me and what I said or what I
11 didn't say. I mean if I heard them I would know what I
12 said.

13 Q Okay, well a moment ago you didn't have a
14 problem remembering when they were asking you questions
15 about what happened?

16 A Well ---

17 Q But now you can't remember what the lies
18 were that Mic told you that caused you not to want to be
19 involved in this case; is that right?

20 A Well exactly, well these people talked to
21 me in the past few months whatever and I'm coming off of
22 things that I remembered at the time, you know, they just
23 set down and talked with me and this has been three or four
24 years ago and in that time I've been through a divorce, my
25 mother has died, a lot of things has happened in between,

Mr. Paterson - Cross Examination by Mr. Mabry

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1 at the time Ms. Childs was asking me these questions I was
2 going through a lot of stuff.

3 Q Okay, what I want to know and the Court
4 wants to know is what did, what were the lies that Mic had
5 told you that caused you not to want to be involved in this
6 case?

7 Mr. Mills: Objection, Your Honor, asked and
8 answered, he doesn't have the memory.

9 The Court: I'll sustain that.

10 Mr. Mabry: (Continuing)

11 Q All right, well you told her, also told
12 her, did you not, that you couldn't resolve all the lies
13 that he had told you?

14 Mr. Mills: Objection, Your Honor.

15 The Court: Overruled.

16 The Witness: (Continuing)

17 A I probably did say that, yeah. Well, you
18 know, at the time she was asking me those questions I mean
19 I knew that Mic had did that and the whole time he had
20 talked me that he was ready to go to trial and, you know,
21 and then for him to go and do what he did it just really
22 disappointed me, you know, that I, I'd done all this for
23 him and believed him and just kind of felt like by what he
24 had done he had just kind of, you know, kind of just
25 stabbed me in the back, you know.

Mr. Paterson - Cross Examination by Mr. Mabry

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1 Q You talking about murdering his wife?

2 A Yeah.

3 Q Okay, and he had told you he didn't have a
4 gun but he did have a gun, didn't he?

5 A Yes, sir.

6 Q He had a pistol?

7 A Yes, sir.

8 Q Okay, and did he tell you where he got that
9 gun?

10 Mr. Mills: Objection, Your Honor ---

11 A No, I ---

12 Mr. Mills: --- calls for hearsay.

13 A Well see I ---

14 The Court: Hold for a second.

15 Mr. Mabry: That's from the defendant, Your
16 Honor.

17 The Court: No, he's, yeah, overruled, I'll
18 allow it, go ahead.

19 Mr. Mabry: (Continuing)

20 Q Where did he get the gun?

21 A I never seen the gun. I never, he never
22 talked to me about having a gun and I knew that when they
23 put that bracelet on his leg they checked his house for a
24 gun. I never thought he had a gun, you know.

25 Q But now you know he did have a gun?

Mr. Paterson - Cross Examination by Mr. Mabry

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1 A Yeah.

2 Q All right ---

3 A Well I mean after, after what happened I
4 knew he had a gun.

5 Q Okay, and when, he had already lost his job
6 before he was arrested for Becky's kidnaping and rape;
7 isn't that correct?

8 A I didn't know about that until afterwards.

9 Q But isn't that true?

10 A Yeah, it is true.

11 Q He lost his job before ---

12 A Yeah.

13 Q --- the kidnaping and rape of Becky?

14 A Yeah.

15 Q Okay, and the reason he lost his job, and
16 you know this, is because he was drinking heavily, using
17 cocaine, and using marijuana?

18 Mr. Mills: Objection, Your Honor, calls for
19 speculation.

20 The Court: If he knows, if he, I mean --

21 The Witness: (Continuing)

22 A I've seen him drink but I've never, I
23 didn't see him use marijuana or cocaine but I knew he
24 drank.

25 Q Was he drinking heavily before he lost his

Mr. Paterson - Cross Examination by Mr. Mabry

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1 job?

2 A I've seen him drinking some, you know,
3 which I wasn't around him before he lost his, I mean I was
4 around him but not daily, but I did see him drink.

5 Q Okay, and can you tell me why you told Ms.
6 Childs that you didn't think you had anything to offer in
7 this case?

8 A Well I mean as far, as far as the murder or
9 anything like that I mean other than his state of mind I, I
10 didn't know, I didn't know he had a gun. I didn't know he
11 was going to do what he did. I had no, you know, as far as
12 that I had no idea.

13 Q All right, and he was arrested in October
14 of that year before the murder for kidnaping and rape of
15 his wife; isn't that true?

16 A Yeah.

17 Q Okay, and that's why he was, he had already
18 lost his job before that, then he got arrested for the
19 kidnapping and rape and that's why he was on the home
20 detention with the ankle bracelet?

21 A Yes, sir.

22 Q Is that right?

23 A Yeah.

24 Q Okay, and he was facing serious criminal
25 charges when you've testified he began to be depressed?

Mr. Patterson - Redirect Examination by Mr. Mills

176

1 A Yeah.

2 Q Okay, but he told you he was innocent of
3 those charges?

4 A Yes, sir.

5 Q Okay, hang on just a moment.

6 A Okay.

7 Mr. Mabry: That's all I have, Your Honor.

8 The Court: All right, redirect?

9 Mr. Mills: Yes, Your Honor, thank you.

10 **Redirect Examination**

11 **By Mr. Mills:**

12 Q Mr. Patterson, you testified that you
13 didn't have a reason to think that Mr. Winkler had a gun
14 because he was on home detention; was there any other
15 reason you didn't think that Mr. Winkler had a gun?

16 A Well I mean this is just my observation of
17 him, I figured if he had had a gun that he would probably
18 shot himself long before he, you know --

19 Q Had his house been searched?

20 A Yes, sir.

21 Q And how many people conducted that search?

22 A Oh, my goodness, there was all kinds of
23 cars around there, I don't know exactly.

24 Q And to be clear his house was searched
25 prior to the March incident?

Mr. Patterson - Redirect Examination by Mr. Mills

177

1 A Yeah.

2 Q And was that another reason you didn't
3 think he had a gun?

4 A Yeah, you know, that many people searching
5 your house if he had one he hid it awful good.

6 Q Now you testified that you were pretty
7 familiar with Ms. Winkler, you had seen her a number of
8 times?

9 A Yes, sir.

10 Q After October ---

11 Mr. Mabry: Objection, I don't think that's
12 proper redirect where he's going, has nothing to do with my
13 cross examination.

14 The Court: Yeah, you can only address issues
15 that he addressed on cross, all right.

16 Mr. Mills: Your Honor, part of his testimony
17 will go to the mental state evidence they went into. They
18 went into about whether or not the timing of Mr. Winkler's
19 downward spiral and this would be relevant to part of what
20 exacerbated, his, his mental health problems.

21 The Court: I'll give you a little leeway but
22 your redirect is limited only to matters he brought up in
23 cross that you did not address in your direct, okay. If he
24 gets into any new materials raise your objection again, so
25 I'll give you a little leeway to tie it in to his cross

Mr. Patterson - Redirect Examination by Mr. Mills 178

1 examination but this doesn't give you the opportunity to go
2 back open new matters, okay.

3 Mr. Mills: Okay, thank you, Your Honor.

4 The Court: All right, go ahead.

5 Mr. Mills: (Continuing)

6 Q And during the time after, after October
7 did you see Ms. Winkler driving through the neighborhood?

8 Mr. Mabry: Objection, Your Honor, this is
9 completely new matter he didn't bring out on direct.

10 The Court: Yeah, I'll sustain that.

11 Mr. Mills: (Continuing)

12 Q Now there was some discussion about meeting
13 with Ms. Childs during your direct testimony and I believe
14 that you testified that you didn't know anything about the
15 murder?

16 A Well I knew about it but I mean I didn't
17 know, you know, I didn't know all the --

18 Q And is that the reason you didn't think you
19 had anything helpful?

20 A Well basically all I had, all I knew was
21 his mental, I mean I knew about his mental state and
22 everything but I had no idea until he wasn't there and they
23 come over and set off the sound bomb and all that stuff.
24 I, once he knew, once he took off like that I, I mean I
25 knew, I knew he was gone then I found out that he had

Mr. Patterson - Redirect Examination by Mr. Mills

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1 killed her.

2 Q So to the extent that you knew about his
3 mental state you would have been happy to provide that
4 information to trial counsel?

5 A Oh, yes.

6 Q And had they asked you you would have
7 testified about it?

8 A Yeah, I would have testified about his
9 mental state.

10 Q But they were asking you other questions?

11 A Yeah, you know, like I said at the time I
12 was talking to Ms. Childs going through a lot and it's been
13 so long ago that, you know, I talked to you guys a lot more
14 recent since, since all this has happened, but a lot of
15 that time in there I don't remember much because I was
16 going through some tough stuff.

17 Q Now did, in your interviews with Ms., Ms.
18 Childs did she ask you about Becky driving by?

19 A Yeah.

20 Q And what did you tell her?

21 A I don't remember exactly what I told her, I
22 mean I knew, she asked me if I had seen her in the
23 neighborhood and I told her that I do but that's, I don't
24 remember exactly what I told her but I do remember that
25 part of it.

Mr. Patterson - Redirect Examination by Mr. Mills 180

1 Q And it would have been after the October?

2 A Yeah, that's why he had his leg brace on.

3 Q And you would have been happy to provide
4 that information to her, she did ask you about it and you
5 would have been happy to provide ---

6 A Yeah.

7 Q --- information about Becky driving by?

8 A Yes, I can't remember what everything that
9 she asked me at that time, that was --

10 Q It was a little while ago?

11 A That's a long while ago.

12 Mr. Mills: Nothing further, Your Honor, thank
13 you.

14 The Court: All right, you may step down. All
15 right, you can call your next witness.

16 Mr. Mills: Thank you, Your Honor, he's outside,
17 just a moment.

18 The Court: All right.

19 Mr. Mills: The Applicant calls Mr. Jeron
20 Wallingford.

21 The Court: Who is this now?

22 Mr. Mills: He was a juror.

23 The Court: And what was his, his name again?

24 Mr. Mills: Jeron J., Jeron Wallingford.

25 The Court: Okay, all right, hold for a second,

Mr. Wallingford - Direct Examination by Mr. Mills 181

1 hold for a second.

2 Mr. Mabry: Your Honor, before he starts
3 testifying I just make sure the Court's aware he is one of
4 the jurors and so we again raise our objection based upon
5 the admission of juror testimony under Rule 606(b). We
6 believe that his testimony should only be, should be
7 limited to only matters that would go to the, what the
8 Supreme Court has outlined as issues that impugn
9 fundamental fairness.

10 The Court: Okay, what's the purpose of the
11 testimony?

12 Mr. Mills: There is testimony, there is going
13 to be testimony, Your Honor, that the Applicant believes
14 does go to the fundamental fairness of the deliberations.

15 The Court: All right, and I don't know, I don't
16 know what he's going to say but this is non jury so I'm
17 going to allow him to testify for what it's worth. As
18 certainly the fact finder and the sole Judge in the case I
19 can, you know, discern what's not admissible and what is; I
20 just don't know until I hear the testimony so I'm going to
21 allow him to testify.

22 Jeron Wallingford

23 being first duly sworn, testified as follows:

24 Madam Clerk: Please state your name for the
25 Court.

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1 The Witness: Jeron Wallingford.

2 The Court: All right, could you spell your
3 name, please?

4 The Witness: J-e-r-o-n, first name, last name
5 w-a-l-l-i-n-g-f-o-r-d.

6 The Court: Thank you, Mr. Wallingford.

7 Mr. Mills: She just wants you to use the
8 microphone, I think, and it will move up and down if you
9 need for it to.

10 The Court: All right, sir.

11 Direct Examination

12 By Mr. Mills:

13 Q Good morning, Mr. Wallingford?

14 A Good morning.

15 Q Mr. Wallingford, just so that we're clear
16 are you being reimbursed for your, your time?

17 A Yeah, I guess.

18 Q And at the, at the rate that you're, that
19 you receive at your job?

20 A Yes.

21 Q All right, Mr. Wallingford, what role did
22 you play in this case?

23 A I was a juror.

24 Q And have you previously signed a statement
25 about your juror service?