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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

CA No. 11-CP-01-110
Appellate Case No. 2014-000904

LOUIS MICHAEL WINKLER, JR. ..... *Respondent*,

v.

STATE OF SOUTH CAROLINA ..... *Petitioner*

RESPONDENT'S BRIEF

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether this Court should dismiss the writ as improvidently granted where: the PCR court granted relief on Winkler's claim that trial counsel was ineffective for failing to object to the trial court's improper and unduly coercive *Allen* charge; Petitioner appealed the PCR court's decision on that ground by raising it as the second Question Presented in its Petition for Writ of Certiorari; and, this Court denied certiorari on that question.

2. Whether, in the alternative, Winkler is entitled to a remand for additional PCR proceedings at which he will, for the first time, receive the opportunity to develop and present evidence of his brain damage where the PCR court found that neuroimaging and analysis were necessary steps for an adequate PCR investigation, but then denied Winkler's request for a continuance after it became impossible to complete the neuroimaging due to Winkler's previously undiagnosed diabetes.

STATEMENT OF THE CASE

Respondent, Louis Michael Winkler, Jr., was tried, convicted and sentenced to death in February 2008, for the murder of his estranged wife. In post-conviction, Winkler argued that trial counsel ineffectively "failed to object when the trial court: (a) repeatedly refused to answer the jurors' question about what would happen if they failed to reach a unanimous sentencing verdict; and, (b) issued improper instructions to the jury under unduly coercive circumstances." App. 3958, 4026. These arguments were asserted in a single ground for relief.[1] Following an evidentiary hearing, the PCR court granted relief on this ground in a written order, explaining "Winkler alleges that the trial court's refusal to charge the jury on what would happen if they could not reach a

[1] This claim was asserted as ground 10&11(b)(2) in Winkler's First Amended Application for Post-Conviction relief, filed on January 31, 2012, after the appointment of PCR counsel. App. 3958. The identical claim was asserted as ground 10&11(b)(3) in Winkler's Second (and Final) Amended Application for Post-Conviction relief, filed on May 1, 2012. App. 4026.

unanimous verdict and/or the court's jury instructions given under unduly coercive circumstances entitles him to post-conviction relief." App. 5213. The PCR Court concluded that Winkler was entitled to post-conviction relief and ordered that his death sentence be set aside and that Winkler be resentenced to life without parole. App. 5215.

The State appealed the PCR court's decision, raising the following three questions in its Petition for Writ of Certiorari:

> 1. Whether the PCR Court erred in granting relief upon Winkler's claim that trial counsel was ineffective for not objecting to the trial court's decision to not respond to the jury's questions regarding the law if a jury does not reach a unanimous verdict regarding sentencing when such an instruction is not required, trial counsel's decision not to object was based upon his understanding that case law indicated such an instruction was not required, and Winkler was not prejudiced by trial counsel's decision not to object?
>
> 2. Whether the PCR Court erred in granting relief upon Winkler's claim that trial counsel was ineffective for not objecting to the trial court's Allen charge when the charge given by the trial court was not coercive and did not mislead the jury regarding its responsibilities, and any objection by counsel would have been without merit?
>
> 3. Whether the PCR Court erred in vacating Winkler's sentence and imposing a life sentence when imposing a life sentence was an inappropriate remedy?

Petitioner-Respondent's Petition for Writ of Certiorari at 1.

In the Argument section of its Petition for Writ of Certiorari, the State asserted the following four arguments:

> [1.] The PCR Court erred in granting relief in this case. Trial counsel was not deficient in not objecting when the trial court decided not to answer the jurors' question about the law regarding the consequences of a jury not reaching a unanimous verdict. Counsel's decision to not object was reasonable under case law from this Court and under cases decided by the United States Supreme Court.

> [2.] The PCR Court erred in finding Winkler was prejudiced by counsel not objecting to the trial court's decision not to answer the jurors' question regarding the consequences of a non-unanimous decision on sentencing.
>
> [3.] The PCR Court erred in finding trial counsel was ineffective for not objecting to the *Allen* charge that was given; the charge given was not coercive and did not mislead the jury as to their responsibilities.
>
> [4.] The PCR Court improperly resentenced Winkler; the appropriate remedy would be to vacate the sentence and remand the case back to the Court of General Sessions for a new sentencing proceeding.

See id. at ii. Winkler responded to the State's questions presented and further asserted, as an additional sustaining ground, that the PCR court erred in dismissing Winkler's brain damage claim based on his failure to offer evidentiary support after the PCR court itself found that neuroimaging was "reasonable and necessary" for Winkler to investigate this claim, but then denied Winkler's request for a brief continuance to allow the neuroimaging to be completed. *See* Respondent-Petitioner's Return to Petition for Writ of Certiorari.

On July 23, 2015, this Court granted the State's petition for Arguments 1, 2, and 4, but denied certiorari for Argument 3. In a footnote, this Court explained:

> We refer to, and have numbered, the State's Arguments as presented on page ii of the State's petition. We grant certiorari on the following questions:
>
> > Did the PCR judge err in finding trial counsel were ineffective in failing to object when the trial judge declined to answer the jury's questions regarding the consequences of failure to reach a unanimous verdict in a capital murder sentencing proceeding in light of the trial judge's instruction to the jury that a recommendation of either death or life imprisonment must be unanimous?
> >
> > In granting relief, did the PCR judge err in failing to remand for a new sentencing proceeding?

We deny certiorari as to the following question:

> Were trial counsel ineffective in failing to object to the *Allen* charges given during respondent-petitioner's sentencing proceeding?

Order dated July 23, 2015. In addition, the Court granted certiorari on an additional sustaining ground raised in Winkler's Return. The Court rephrased that ground as follows:

> Did the PCR judge abuse his discretion in denying respondent-petitioner's motion to alter the PCR scheduling order and therefore err in finding respondent-petitioner failed to carry his burden of proving trial counsel were ineffective in failing to investigate mitigating evidence of brain damage?

Id. The State filed the Brief of Petitioner on November 9, 2015. This Brief of Respondent follows.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE WRIT AS IMPROVIDENTLY GRANTED, WITH INSTRUCTIONS TO THE LOWER COURT THAT WINKLER IS ENTITLED TO A NEW SENTENCING PROCEEDING.

A. RELEVANT FACTS

"Eleven to one is [as] good as twelve [to] zero." App. 4575. This is how lead counsel, Ralph Wilson, described his goal for the penalty phase of Winkler's capital trial during his testimony at the PCR hearing. The only goal was, of course, to obtain a life verdict—whether by a unanimous vote for life or by a non-unanimous outcome, it would make no difference. Accordingly, there was no objectively reasonable strategic reason (and trial counsel offered none) for failing to object when the following transpired.

At 1:30 p.m. on Thursday, February 7, 2008, penalty phase jury deliberations began. App. 2917. Over six hours later, at approximately 8:00 p.m., the trial court noted that the jury was still deliberating and had not had dinner, so the court proposed to bring the jury out and offer to order sandwiches. The parties agreed. The court informed the jury that any order for dinner would take

over an hour to arrive, and then sent the jurors back to the jury room with instructions to have the foreperson let the clerk know if they would like to place an order. Shortly thereafter, the jury indicated that it had a question. At 8:15 p.m., the jury returned to the courtroom, and the trial court instructed them: "If you need to ask questions, just ask the foreperson to write it down and send it out to me. I'll be glad to see if I can answer the question about any evidence presented for you, or anything that's about the law or whatever. Just if you need to ask a question, just write it down. I'll see if I can answer it." App. 2919–20. At some unknown time thereafter, the jury sent out its first question:

> Could you please explain what happens if we're not able to reach a unanimous decision?

App. 2921.

The trial judge announced his belief that "this is not a communication that they're deadlocked. . . . I don't interpret this question as being an *Allen* – a deadlocked statement."[2] App. 2922. The judge stated his plan was to send back his own note, reading: "I cannot answer the question the way you phrased it. Please let me know if you have any other questions." App. 2923. Trial counsel raised no objection to this course of action.

Approximately two hours later, the trial court observed on the record that the jury had not responded to his note. The court stated that "[b]oth the state and defense wonders if, wonders if the jurors, whether they, whether they were seeking another question of the court, don't know how to phrase it, what." App. 2923. The parties agreed that the court would send in another note, asking: "Mr. Foreman and members of the jury, do you have any questions or messages for the court?" App. 2924. In response to this inquiry, the jury sent out its second question:

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[2] *Allen v. United States*, 164 U.S. 492 (1896) (defining charge used to encourage deadlocked jury to reach a unanimous verdict).

> What is the law state [*sic*] when a jury does not reach any unanimous decision at this stage of the trial?

App. 2925.

Once again, the trial judge said he felt that the jury was "asking a hypothetical legal question which doesn't directly state they have any problems." App. 2925. The judge again proposed to send back his own note indicating that he could not answer the question as it was currently written. Trial counsel did not object. The trial court sent another note, saying: "I cannot answer hypothetical questions. Do you have any specific questions to ask or comments that you would like to make about your jury?" App. 2925–26. Subsequently, the jury sent out its third question:

> We have one juror that is not participating in deliberations making it difficult to reach a final decision! We are currently at 11 to 1.

App. 2926; Court's Exhibit 25. The trial court stated his view that the third note indicated the jury was deadlocked. At 12:26 a.m., the jury returned to the courtroom, and the trial judge instructed them as follows:

> 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.

App. 2928–29.

The jury decided to return to the hotel, and exited the courtroom at 12:46 a.m. App. 2931. When court resumed the next morning at 9:00 a.m., the trial court invited the jury to let him know if they wanted to hear the *Allen* charge again, and two jurors responded that they did. App. 2932-34. Trial counsel initially objected, saying, "I don't want them to have it again," but later withdrew his objection. App. 2934, 2936. The trial court gave an essentially identical *Allen* charge, and the jury returned to deliberations at 9:18 a.m. App. 2937–38. They returned with a death verdict less than one hour later. App. 2939.

At the post-conviction relief hearing, trial counsel testified that when the jury's first note came out, he believed they were indicating a deadlock:

> Q: [B]acking up a bit, in response to the first note you suspected at least some of them were hung?
>
> A: Yes, sir.

Q: And, and if they deadlocked you expected the Court to give an *Allen* charge?

A: I expected they would before he would just declare a mistrial, yes.

Q: And again your goal is to obtain a life verdict, of course?

A: Sure.

Q: Whether it's by a unanimous vote for life or a non unanimous outcome?

A: Eleven to one is good as twelve zero.

Q: And you know that an *Allen* charge can generally only properly be given once?

A: Yes.

Q: And that if they deadlock after that *Allen* charge the result is [a] life verdict?

A: Okay.

Q: That's your understanding?

A: That's my understanding.

App. 4574–75. Trial counsel stated that his only reason for not objecting or requesting further instructions at the time of the first or second note was simply that he believed the law prohibited the trial judge from answering the jury's question about what would happen if they could not reach a unanimous decision. App. 4572. But, trial counsel added, "if I'm wrong then I'm wrong," and if the law did not prohibit the court from answering, then "absolutely, I would want [the court] to tell them that he's going to get life in prison because I think that that might help them, you know, come to a decision in our favor." App. 4572–73.

Former Juror Lauren Roughton testified in PCR that, initially, she and two other jurors were in favor of life.[3] App. 4408. They were confused, however, about what would happen if they could not reach a unanimous decision. Roughton explained that it was frustrating and difficult because the jury sent out multiple notes asking for clarification that were never answered. App. 4409–10. She ultimately changed her vote to death—not because she believed it was the right outcome, but because she felt she was not "strong enough to stay with what I felt and, and not getting answers to questions that we needed answers or I needed answers to." App. 4410–11.

On cross-examination, the State confronted Roughton with the trial court's *Allen* charge and unsuccessfully attempted to persuade her that it would have cleared up the jury's confusion:

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[3] Roughton testified under subpoena issued by the State. App. 4200. Prior to the PCR hearing, Winkler sought to introduce an affidavit from Roughton, which touched on this issue as well as a separate issue alleging that another juror changed his vote as a result of threats of physical harm and intimidation. The State objected to admission of Roughton's affidavit and subpoenaed her and other jurors to the PCR hearing, but moved *in limine* to preclude any jurors from testifying under Rule 606(b), SCRE. App. 4197. The PCR Court denied the motion *in limine*, but instructed the State to make contemporaneous objections during any juror testimony when the questions related to a topic that the State believed was inadmissible. App. 4200-01. The State indicated during Roughton's testimony that it had no specific objection regarding "things that she knew," but only objected to hearsay regarding what other jurors might have said. App. 4409. Many of the most salient facts about not answering the jurors' question were developed as a result of the State's own cross-examination of Roughton.

Accordingly, the State's arguments that Roughton's testimony was inadmissible—raised for the first time in its Petition for Writ of Certiorari—are not preserved for this Court's review. *See, e.g., State v. Hill*, 331 S.C. 94, 100 n.1 501 S.E.2d 122, 125 n.1 (1998) (a motion *in limine* is preliminary, and is insufficient to preserve an issue for appellate review). To preserve an objection for appellate review, counsel must make a contemporaneous objection and obtain a final ruling at that time. *See, e.g., State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[A] party must have a contemporaneous and specific objection to preserve an issue for appellate review."). It is disingenuous for the State to now complain that testimony from the very witness it subpoenaed, and attempted to use to its own advantage, should not have been admitted at trial. *See, e.g., State v. Beam*, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct. App. 1999) ("A party may not complain of error caused by his own conduct."); *State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008) ("A party cannot complain of prejudice from evidence to which he opened the door.").

Q: Okay, so he, am I right he charges you again the same thing he had told you the night before word for word, that you didn't have to violate your convictions, you should listen to the opinions of each other, and you shouldn't just agree to just agree, it should be your own decision?

A: It still doesn't answer the question. I remember at the time, though, we wanted to know if we didn't agree what were the ramifications if we didn't agree. He's telling us we have to, so someone has to change their convictions.

Q: Well he doesn't say you have to agree ---

A: Well he says it has to be unanimous.

App. 4420–21. The State then asked Roughton to explain again what caused her to change her vote from life to death, and she responded:

A: Well I can, I mean several things, one not having a clear it had to be unanimous; they were just talking between the jurors if we weren't unanimous they would have to ---

Q: Let me stop you right there, let me stop you right there?

A: --- they had, they had fear, okay, I got you.

Q: You can't get into what other jurors said?

A: Right.

Q: But can you tell me what ---

A: My, my fear ---

Q: --- your ---

A: My fear was the ramifications if we didn't, if we didn't reach a unanimous, that was my, my thing, and another thing I said because I didn't stick to what I thought was the right thing to do.

App. 4421–22. Finally, the State reviewed the evidence of the crime and the aggravating facts of the case and demanded, "are you still telling this Court that he did an evil deed but he's not an evil person?" App. 4425–26. Roughton explained:

> No, I didn't say that. I said he did an evil thing and I believe that there are evil people that are born evil and that's how they are. I don't believe that he was born evil. I think that he had, he did good things in his life, he did bad things, that's what I'm saying. I don't think that he was an evil person his whole life. He did an evil thing, an evil thing, and I, I do believe that in sometime in his life there was good in him from the testimony that I heard.

App. 4426.

B. TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN HANDLING THE JURY DELIBERATION ISSUES.

There were at least three actions that trial counsel could—and should—have taken, any one of which would have created a reasonable probability that at least one life-voting juror would have held out for a life verdict. First, trial counsel should have objected to the trial court's refusal to answer the jurors' questions about what would happen if they could not reach a unanimous sentencing verdict. When "a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946); *see also Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1037 (4th Cir. 1975) ("When a jury makes a specific difficulty known . . . [a]nd when the difficulty involved is an issue . . . central to the case . . . helpful response is mandatory."). This is true even where the jury is initially given proper instructions. *See, e.g., People v. Morris*, 401 N.E.2d 284, 291 (Ill. App. Ct. 1980) (holding although initial accountability instruction was proper, "once the jury had exhibited confusion concerning the applicability of accountability to this instruction, it was reversible error for the trial court to refuse to provide a proper answer to the jury's query.").

Although there is no requirement that a court inform the jurors in its *initial* instructions of the consequences of their failure to agree, once the jurors specifically requested that information and indicated that it was a point of confusion central to their sentencing deliberations, the situation became akin to *Simmons v. South Carolina*, 512 U.S. 154 (1994). There, the United States Supreme Court held that due process requires that a capital sentencing jury be informed of the defendant's parole ineligibility when future dangerousness is at issue. The *Simmons* Court explained, "[t]he Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" *Id.* at 161 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

In Simmons' case, the trial court refused to answer the jurors' question about parole eligibility, and thereby "denied [them] a straight answer . . . even when it was requested." *Id.* at 165–66. Instead, when asked, the trial court responded that the jurors were not to consider parole or parole eligibility and that "[t]he terms life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning." *Id.* at 160. This violated due process by preventing Simmons "from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death." *Id.* at 165.

Here, Winkler's sentencing jurors were likewise denied a legally accurate answer despite their repeated requests indicating confusion about the consequence of a non-unanimous outcome (*i.e.*, "what happens if we're not able to reach a unanimous decision?" "What is the law state [*sic*] when a jury does not reach any unanimous decision at this stage of the trial?"). Instead of answering the repeated question, the trial court ultimately instructed them:

> 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*.

App. 2928 (emphasis added). This instruction did not answer the jury's question about what would happen if they could not reach a unanimous decision.[4] Because this confusion "pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing [Winkler] to death and [risking the possibility of a retrial or release]." *Simmons*, 512 U.S. at 161; *see also State v. Baby*, 946 A.2d 463, 489 (Md. 2008) (holding the trial court's reference to previously provided instructions on the elements of rape was not sufficient to address the jury's confusion on the effect of withdrawal of consent because "the definition makes no reference to the issue . . . central to the jury's questions"). Trial counsel was prejudicially ineffective for failing to object to the court's refusal to give "a straight answer" to the jury's question. *Simmons*, 512 U.S. at 165; *see also Strickland v. Washington*, 446 U.S. 668 (1984).

Second, trial counsel should have objected to the trial court's failure to give a proper, non-coercive *Allen* charge when the jury sent out its first note. Trial counsel admitted that he believed from the very first note that the jury was indicating a deadlock. App. 4574. Trial counsel also acknowledged that if the trial court had given an *Allen* instruction following the first note, any further indications of deadlock would likely have resulted in an automatically imposed life sentence. App. 4574–75; S.C. Code Ann. §§ 14-7-1330, 16-3-20(C). A jury is not required to use any specific language such as "hopelessly deadlocked" or "gridlock" to convey that the jury is at an impasse. *See, e.g., United States v. Wecht*, 541 F.3d 493, 509 & n.7 (3d Cir. 2008); *United*

[4] The United States Supreme Court has held that a death sentence is not "arbitrary within the meaning of the Eighth Amendment" simply because the jury is not instructed about the consequences of their failure to agree as a routine matter in every case. *See Jones v. United States*, 527 U.S. 373, 382 (1999). Winkler's argument here, however, is that, under the circumstances of this particular case, once the jury indicated confusion on this specific point and requested further instruction, it was a violation of Due Process, the Eighth Amendment, and South Carolina law for the trial court to refuse to provide a legally accurate answer to their repeated question.

States v. Rodriguez, 67 F.3d 1312, 1319 (7th Cir. 1995). The jury's question in this case, asking, after more than six hours of sentencing deliberations, "what happens if *we're* not able to reach a unanimous decision?" plainly implied that the jury was having difficulty reaching a verdict. Trial counsel was prejudicially ineffective in failing to request further, proper instructions upon receipt of the first jury note.

Finally, trial counsel should have objected to the ultimate *Allen* charge as being given under unduly coercive circumstances. Whether an *Allen* charge is unconstitutionally coercive must be judged "'in its context and under all the circumstances.'" *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) (quoting *Jenkins v. United States*, 380 U.S. 445, 446 (1965)). In *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001), this Court noted four factors for evaluating whether an *Allen* charge was coercive:

> (1) whether, viewed as a whole, the charge was directed to the minority jurors;
>
> (2) whether the trial court used "mandatory language";
>
> (3) whether there was an inquiry into the jury's numerical division, which is generally coercive; and,
>
> (4) the timing of the ultimate verdict.

Id. at 492–94, 552 S.E.2d at 716–18. This Court concluded that the *Allen* charge in *Tucker* was unconstitutionally coercive because: (1) viewed as a whole, the charge was directed to the minority juror since the trial judge knew, and the jury knew that he knew, that there was only one holdout juror after the jury *sua sponte* disclosed its division of 11 to 1; (2) the trial judge did not use any mandatory language, but did inform the jury that "it's important that jurors reach a unanimous verdict," (3) although the trial judge did not inquire into the jury's numerical division, he did fail to take any action to prevent the jury's self-reporting; and, (4) the jury returned a death sentence

approximately an hour and a half after receiving the *Allen* charge. *Id.* at 493–94, 552 S.E.2d at 717–18. This Court concluded:

> the import of the charge was that the single juror (whom every member of the jury knew was holding out) should not prevent the majority from imposing the death penalty and . . . the charge was therefore impermissibly coercive under the totality of the circumstances.

Id. at 494, 552 S.E.2d at 718 (internal quotation marks omitted).

This case is on par with *Tucker*. As in *Tucker*, when the trial court gave the *Allen* instruction, everyone knew that there was only one holdout juror remaining because the jury note stated: "We have one juror that is not participating in deliberations making it difficult to reach a final decision! We are currently at 11 to 1." Trial Court Exhibit 25. The *Allen* charge given in Winkler's case was even more coercive than the one this Court condemned in *Tucker* because, here, the trial court not only knew the jury's numerical division (and the jury knew that he knew), but the trial court was also aware that the jury had repeatedly expressed confusion about the consequences of a non-unanimous verdict. Instead of answering this question directly, the trial court used mandatory language in his *Allen* charge that specifically misled the jury on the very point of confusion central to their deliberations. The trial court instructed the jurors: "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." App. 2928. Throughout the short instruction, the trial court used the words "unanimous" or "unanimously" seven times. App. 2928–29. Although the trial court did advise the jurors to carefully consider and respect the opinions of others, he also repeatedly stated that "the decision of the jury *must* be unanimous," or some variant thereof. *Id.* (emphasis added). This mandatory language was misleading and coercive.

Moreover, the trial court in Winkler's case never took any action to prevent the jury from self-reporting its numerical division, despite multiple opportunities including three notes that the trial court itself sent back to the jury, as well as several times in which the jury returned to the courtroom for additional instructions.

When the trial court gave the *Allen* charge, it was 12:26 a.m.; the jurors had not had dinner; the trial court had repeatedly rebuffed the jurors' efforts to seek clarification on what would happen if they could not reach a unanimous sentencing verdict; and, the jurors had been deliberating for approximately eleven hours. The jury deliberated less than one hour after receiving the *Allen* charge before returning a death verdict. In these circumstances, the import of the *Allen* charge was that the single remaining holdout juror "should not prevent the majority from imposing the death penalty." *Tucker*, 346 S.C. at 494, 552 S.E.2d at 718 (citations omitted). Trial counsel was prejudicially ineffective in failing to object to the *Allen* charge as unconstitutionally coercive.

In sum, trial counsel committed multiple errors in their handling of the jury deliberation issues. Trial counsel offered no reasonable strategic reason for failing to take any of the above actions, any one of which would have created a reasonable probability that at least one of the initial three holdout jurors would have held on for life. Trial counsel's performance was deficient and prejudicial, and the PCR Court properly granted penalty phase relief. *See Strickland*, 446 U.S. 668.

C. THIS COURT SHOULD DISMISS THE WRIT, WITH INSTRUCTIONS FOR A NEW SENTENCING PROCEEDING.

This Court should dismiss the writ as improvidently granted because the PCR court granted relief on Winkler's claim that trial counsel was ineffective for failing to object to the trial court's improper and unduly coercive *Allen* charge. Petitioner appealed the PCR court's grant of relief on that basis to this Court. Petitioner-Respondent's Petition for Writ of Certiorari at 21–24. This

Court denied the State's request for certiorari on that question, thereby affirming an independent basis for the sentencing phase relief granted by the lower court.

Accordingly, the other questions before this Court regarding the trial judge's refusal to answer the jurors' specific questions during jury deliberations are moot and should be dismissed. *See, e.g., Fairway Ford, Inc. v. Cnty. of Greenville,* 324 S.C. 84, 86, 476 S.E.2d 490, 491 (1996) ("[I]t is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required."); *State v. Green*, 337 S.C. 67, 71, 522 S.E.2d 602, 604 (Ct. App. 1999) ("When judgment on an issue can have no practical effect upon an existing case or controversy, the issue is moot.")

Winkler concedes, however, that the appropriate remedy is not the automatic imposition of a life sentence. Rather, the appropriate remedy is to vacate the death sentence and remand the case back to the Court of General Sessions for a new sentencing proceeding. *See, e.g., Tucker*, 346 S.C. at 495, 552 S.E.2d at 718 (ordering a new sentencing proceeding after finding an *Allen* charge coercive). Thus, this Court should dismiss the writ as improvidently granted, and remand the case to the Court of General Sessions for a new sentencing proceeding. *Id.*; *see* S.C. Code Ann. § 18-9-270 ("The Supreme Court . . . may reverse, affirm, or modify the judgment, decree, or order appealed from in whole or in part and as to any or all of the parties, and the judgment shall be remitted to the court below to be enforced according to law.")

II. IN THE ALTERNATIVE, THIS COURT SHOULD REMAND TO THE PCR COURT FOR A NEW EVIDENTIARY HEARING AT WHICH WINKLER WILL HAVE A FAIR OPPORTUNITY TO DEVELOP AND PRESENT EVIDENCE OF HIS BRAIN DAMAGE.

The PCR court found that brain imaging and analysis were reasonable and necessary for the competent representation of Winkler. Winkler diligently sought to obtain the imaging and analysis, but because Winkler had undiagnosed and untreated diabetes, the imaging could not proceed until his blood glucose levels were in the normal range, a process that ultimately required

several months. Accordingly, Winkler moved for a continuance. The PCR court denied the motion for a continuance, proceeded with the evidentiary hearing, and then dismissed Winkler's brain damage claim because he failed to present "evidence supporting his claim that he suffers from neurological and cognitive impairments." App. 5212.

A. WINKLER TWICE MOVED FOR A CONTINUANCE BASED ON CIRCUMSTANCES BEYOND HIS CONTROL

Undersigned counsel were appointed to represent Winkler in his PCR proceedings on June 24, 2011. Shortly thereafter, the PCR Court issued a scheduling order setting a date certain of June 18, 2012, for the post-conviction evidentiary hearing. Approximately two months into their investigation, counsel noted potential indicators of brain damage, including problems with memory, attention, focus and reasoning, and a history of multiple, significant head injuries. Counsel asked the PCR Court to grant funding for consultation with a neuropsychologist, and the PCR Court granted this request on September 9, 2011. Third Supp. App. 1–4. After reviewing social history records and conducting a preliminary clinical interview and testing, the neuropsychologist recommended brain imaging and quantitative analysis to further investigate Winkler's neurological status. Supp. App. 13. One day after receiving this recommendation, undersigned counsel asked the PCR court to authorize funding for an MRI, a PET scan, and quantitative analyses of the brain images. Third Supp. App. 6, 16, 21. On November 21, 2011, the PCR Court found that the imaging and analysis were both "reasonable and necessary" for the competent representation of Winkler and ordered the Commission on Indigent Defense to provide the necessary funding. Third Supp. App. 26–29.

Immediately after the Thanksgiving holiday, PCR counsel informed the PCR Court that they had begun the process of having the neuroimages taken at the Medical University of South Carolina ("MUSC"), "but ha[d] been advised that it will take approximately 4 to 6 weeks before

the initial testing can be completed and approximately 6 weeks after that before additional analysis can be conducted." Third Supp. App. 31–32. Counsel also retained the services of Dr. Ruben Gur, Director of the Brain Behavior Research Laboratory at the University of Pennsylvania School of Medicine, to analyze the images and potentially provide testimony about any brain dysfunction. Dr. Gur's office advised that it would require an additional six weeks to complete the quantitative analysis after the images were obtained. Third Supp. App. 32. Because of these potential delays, PCR counsel filed their first motion to alter the PCR scheduling order to provide for a continuance of ninety days. Third Supp. App. 31, 35. The PCR Court denied this motion. Third Supp. App. 38–39.

On January 26, 2012, Winkler was transported to MUSC for the imaging, but it could not be completed as planned because routine testing uncovered Winkler's unusually high blood glucose concentration. On February 7, 2012, the neurologist who had planned to conduct the imaging informed PCR counsel that Winkler likely had undiagnosed diabetes. He explained:

> Prior to performing PET scans, blood tests are performed to ensure that the patient's blood glucose concentration does not interfere with the flurodeoxyglucose used to produce the PET images. If the patient has an abnormal blood glucose concentration, then the imaging will not produce a reliable result.
>
> A test of Mr. Winkler's blood on the morning of the scan showed his blood glucose concentration to be 272 mg/dl. Normal blood glucose concentrations for fasting individuals are usually no more than 100 mg/dl. Mr. Winkler's glucose concentration strongly suggests that he has untreated diabetes and that he needs treatment.

Second Supp. App. 12. The neurologist advised that if Winkler were to immediately begin treatment for diabetes, it would require approximately six to eight weeks to return his blood glucose levels to a normal range, after which the PET imaging could be rescheduled. *Id.* Undersigned counsel immediately contacted the Department of Corrections and requested that

Winkler begin treatment, and the Department of Corrections ultimately diagnosed and treated him for diabetes. Supp. App. 64–72; Second Supp. App. 14.

On April 4, 2012, the neurologist informed PCR counsel that, based on a review of Winkler's most recent medical records, Winkler's blood sugar remained "far enough outside of the normal range" to "perform an accurate study." Second Supp. Appx. 17. Dr. Gur's office explained that it could not complete a quantitative analysis of any brain imaging until the PET was completed, and again emphasized that after Dr. Gur received the PET imaging, the analysis normally requires a minimum of six weeks to complete. Supp. App. 15; Second Supp. App. 20. Under no circumstances could Winkler's imagining and analysis, and related investigation, pleadings, and discovery, be completed within the timeframe established in the PCR Court's scheduling order.[5]

On April 10, 2012, Winkler moved again to alter the PCR scheduling order and to continue the hearing date. Second Supp. App. 1–8. The motion noted that, despite PCR counsel's best efforts and through no fault of Winkler's, the imagining and analysis would not be complete in advance of the hearing. Winkler further noted that depending on the results of the analysis, "counsel will most likely need to conduct additional investigation with lay witnesses, interview trial counsel, and consult with other experts." Second Supp. App. 4. The temporary impossibility of completing the imaging was the primary basis for the motion. In support of the motion, Winkler provided documentary evidence of his efforts to obtain brain imaging and analysis.

On April 20, 2012, ten months after counsel for Winkler had been appointed, the request for an extension was denied. Second Supp. Appx. 47–49. The PCR Court explained, "[T]he court

[5] The scheduling order required the parties to complete all discovery by June 1, 2012. Second Supp. App. 47.

feels that the applicant has had ample time to formulate his pleadings and prepare for the trial of this case." Second Supp. App. 48. On June 6, 2012, Winkler was again transported to MUSC for a second attempt at the PET scan, which was successfully completed. PCR Counsel received a copy of the raw data from the PET images on a disk on Friday, June 15, 2012. The PCR hearing began on Monday, June 18, 2012.[6]

At the beginning of the merits hearing, Winkler again objected to the PCR Court's refusal to grant a continuance and asked to submit a written proffer related to the brain imaging and the denial of the motion to alter the scheduling order. Before accepting the proffer, the PCR Court stated,

> I'm going to require you to say when you first started seeking this information and how you diligently sought it since that first time because I know one of the things is you said you couldn't get subpoenaed witnesses but I notice you didn't subpoena the witnesses until like two days before you filed your motion for a continuance, that type of thing, and so I'm not going to let you put anything in the record that gives the appearance that you were diligently seeking this information if in fact you were not, okay.[7]

App. 4205. Undersigned counsel then set forth again (as had already been stated in the April 10, 2012 motion to alter the PCR schedule) the general timing of the investigation and the explanation for why Winkler's previously undiagnosed diabetes made it impossible for the brain imaging and

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[6] Thus, the evidentiary hearing in this case was conducted slightly less than one year from appointment of PCR counsel. This is an unusually short period of time for a typical capital PCR in South Carolina.

[7] In the second motion to alter the PCR schedule, Winkler had noted his efforts to obtain "documentary evidence related to potential claims," in addition to the problems related to the PET scan. Second Supp. App. 4. Despite having received written requests for evidence regarding Winkler's case, some agencies were slow to respond. In response, Winkler eventually subpoenaed the records. These subpoenas were still pending and were offered as an additional reason for the continuance. Winkler also requested additional time to investigate "mental health disorders with an etiology originating on his father's side of the family." Second Supp. App. 5.

analyses to be completed prior to the June 18, 2012 hearing date. App. 4205–06. The PCR Court responded:

> The Court: Okay, so you're looking at . . . six months to do one and basically you didn't start it until November. So you're looking at even if there had not been a problem in November you're looking at November, December, January, February, March, April before you could have gotten the results anyway, correct?
>
> Mr. Mills: We would have had the results within the discovery deadline, yes, Your Honor.
>
> The Court: Yeah, okay, all right.

App. 4206.

The PCR court then accepted Winkler's written proffer, which likewise set forth the details of counsel's diligent efforts to investigate this issue, but the court stated that it was "not going to consider [the proffer] at all." App. 4208. Following the evidentiary hearing, the PCR Court entered an order granting Winkler sentencing-phase relief on other grounds, but denying his claims regarding neurological and cognitive impairments, as follows:

> Winkler did not present any evidence that he suffered from neurological and cognitive impairments or dysfunction. . . . [S]ince Winkler failed to present any evidence supporting his claim that he suffers from neurological and cognitive impairments and/or dysfunction, the State's motion for directed verdict on this ground for relief should be granted.

App. 5211–12. After the PCR Court's Order was entered, Dr. Gur reported to undersigned counsel that his analysis of Winkler's brain images indicated brain dysfunction consistent with traumatic brain injury.

B. THE DENIAL OF THE EXTENSION PREVENTED WINKLER FROM CONDUCTING INVESTIGATION THE PCR COURT FOUND WAS REASONABLE AND NECESSARY

Winkler was denied a meaningful opportunity to develop and present evidence of his neurological and cognitive impairments, and the PCR court abused its discretion by denying his

requests for a continuance. Through no fault of his own, Winkler was unable to complete the investigation the PCR court had specifically authorized as reasonable and necessary. Instead, his undiagnosed diabetes—and the denial of a short extension—prevented the imaging and analysis from being completed in advance of his hearing, fatally undermining the process that should have provided him with an opportunity to develop evidence of his claim of these impairments and dysfunction. Because Winkler lacked this opportunity, the PCR Court's decision denying relief on this claim was not the product of a full and fair hearing. Thus, if this Court reverses Winkler's sentencing relief, it should also remand to provide Winkler with an opportunity to develop and present evidence of his brain damage.

"[R]easonably necessary" funding is made available to capital post-conviction applicants. S.C. Code Ann. § 16-3-26(C)(1). Likewise, the law provides capital prisoners with an opportunity to present evidence at a hearing. S.C. Code Ann. § 17-27-160(C). Implicit in funding an investigation and providing for a hearing is the actual opportunity to *use the funding* to develop and present evidence at the hearing. These fundamental procedural protections, when followed, enable South Carolina trial courts to serve as the "main event" in capital post-conviction cases. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

This process was frustrated when the PCR court denied his request for an extension based on the secondary basis for the extension and without addressing the ground for which Winkler was wholly faultless. Because the PCR court failed to *address* the issue related to the diabetes, the state's argument that the *information* related to the issue was before the court, misses the mark. The court's reasons for denying the extension, as stated, were exclusively related to subpoenaing witnesses, something not raised in the extension. Moreover, Winkler demonstrated that the request for brain imaging and its analysis were "reasonably necessary" to competent investigation of his

case. Instead of receiving a short continuance to develop the evidence, Winkler was forced to go to a hearing lacking the opportunity to develop this "reasonably necessary" evidence.

The PCR Court found that Winkler "did not present any evidence that he suffered from neurological and cognitive impairments or dysfunction" and denied Winkler's claim on the merits for that reason. App. 5211. It was unfair to rule against Winkler for failing to present evidence that he had not been given the opportunity to develop.

The United States Supreme Court has held, in a number of contexts, that the adjudication of a federal constitutional claim requires adherence to a number of basic fair procedures. *See, e.g.*, *Felder v. Casey*, 487 U.S. 131, 150 (1988) ("Federal law takes state courts as it finds them only insofar as those courts employ rules that do not impose unnecessary burdens upon rights of recovery authorized by federal laws.") (internal quotation marks omitted); *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 296 (1950) ("This federal right cannot be defeated by the forms of local practice."); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."). The Court recently reiterated this point in *Martinez v. Ryan,* 566 U.S. ___, 132 S.Ct. 1309 (2012), in the context of collateral challenges to state court convictions. *Id.* at 1320 (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). Federal claims raised on collateral review by state prisoners are especially susceptible to frustration by procedural limitations. *See Harris v. Nelson*, 394 U.S. 286, 291–92 (1969) ("And this Court has emphasized, taking into account the office of the writ and the fact that petitioner, being in custody, is usually

handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a 'procedural morass.'") (citing *Price v. Johnston*, 334 U.S. 266, 269 (1948)).

It is for this reason that certain procedures, mandated by federal law, must be utilized when state courts address the merits of well-pleaded federal claims in state post-conviction proceedings. *See, e.g.*, *Coleman v. Alabama*, 377 U.S. 129, 129–30 (1964) (if a petitioner has presented a well-pleaded federal claim for relief, he should be provided with an opportunity to obtain all evidence available to support his claims and to present that evidence to the court); *McNeal v. Culver*, 365 U.S. 109, 117 (1961) (if the petitioner's allegations give rise to a factual dispute, it is "incumbent" on the state court to "grant petitioner a hearing and to determine what the true facts are.") Because Winkler uncontestably presented well-pleaded federal claims for relief, the PCR Court was obligated to provide him with a full and fair opportunity to present those claims.

In *Coleman*, the petitioner moved for a new trial in state court claiming that, based on a long standing practice in the county where he was convicted, African-Americans were arbitrarily and systematically excluded from both the grand jury that true billed his indictment and the petit jury that convicted him. 377 U.S.at 129–30. The state court held a hearing on the motion, but sustained all objections to petitioner's counsel's questions regarding the jury discrimination claims. *Id.* at 130. Following the hearing, the court denied the petitioner's motion and the state supreme court affirmed the conviction, holding that the petitioner's federal jury discrimination claims were not supported by the evidence. *Id.* The United States Supreme Court granted certiorari, and held that the state adjudication process was defective because the state courts had not provided the petitioner an opportunity to obtain and present evidence to support his claim. *Id.* at 133 ("[T]his Court must reverse on the ground that the defendant offered to introduce witnesses,

to prove the allegations and the court declined to hear any evidence upon the subject.") (internal quotation marks and alterations omitted). Thus, *Coleman* establishes not only a right to a hearing, but a right to present evidence relevant to a petitioner's federal claims. To give effect to this right, a state court must provide a petitioner with an adequate opportunity to obtain and present available evidence to support his allegations.

Additionally, meaningful access to evidence and a fair opportunity to present all relevant evidence necessarily includes adequate funding for investigative and expert assistance. The Supreme Court has specifically acknowledged that adequate factual development may be impossible without access to expert assistance. *See Panetti v. Quarterman,* 551 U.S. 930, 952 (2007) (holding that petitioner, claiming incompetence to be executed in state post-conviction, was entitled to an "opportunity to make an adequate response to evidence solicited by the state court," including an opportunity to submit psychiatric evidence); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (Powell, J., concurring) (noting that basic due process requirements included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination"); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (holding that assistance of a psychiatrist was necessary to prepare an effective defense based on the defendant's mental condition).

In sum, Winkler received neither a fair opportunity to conduct adequate fact development nor a meaningful opportunity to present the facts in support of his claims. Thus, the PCR Court lacked the information that the court itself found necessary to fairly adjudicate the merits of Winkler's federal claims in an informed, objectively reasonable manner. The PCR court abused its discretion by refusing to grant a continuance and then dismissing this claim for a lack of evidence.

CONCLUSION

For all of the forgoing reasons, this Court should dismiss the writ as improvidently granted, with instructions that the Court of General Sessions should hold a new sentencing proceeding. In the alternative, this Court should remand for additional PCR proceedings at which Winkler will, for the first time, receive a fair opportunity to develop and present evidence of his brain damage and related impairments.

Respectfully submitted,

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February 8, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

CA No. 11-CP-26-3907
Appellate Case No. 2014-000904

LOUIS MICHAEL WINKLER, JR., SK 6027, ... *Respondent*

v.

STATE OF SOUTH CAROLINA, ... *Petitioner*

CERTIFICATE OF SERVICE

I, Jill Abernethy, hereby certify that I have served upon the attorney for the Petitioner one (1) copy Respondent's Brief in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

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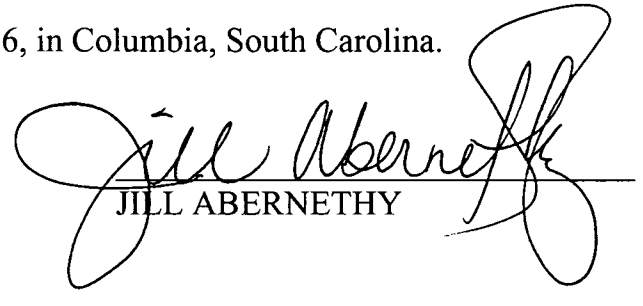
This the 8th day of February, 2016, in Columbia, South Carolina.



JILL ABERNETHY