

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

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SC Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas (PCR)
The Honorable Benjamin H. Culbertson, Circuit Court Judge

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

LOUIS MICHAEL WINKLER, JR., #6027,

Respondent,

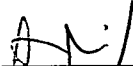
v.

STATE OF SOUTH CAROLINA,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order Granting Post-Conviction Relief submitted by the Honorable Benjamin H. Culbertson, dated and filed August 15, 2012, and the Order denying Respondent's Motion to Alter or Amend Judgment, filed April 2, 2014. Counsel for the State received written notice of entry of the judgment of the Order denying Respondent's Motion to Alter or Amend Judgment by way of a file-stamped copy of the Order from the Horry County Clerk of Court on April 11, 2014.



ALPHONSO SIMON JR.
Assistant Attorney General
Bar No. 74713
P. O. Box 11549
Columbia, SC 29211
(803) 734-6305

April 24, 2014.

OTHER COUNSEL OF RECORD:
Counsel for Louis Michael Winkler, Jr., #6027

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Death Penalty and Defense Center
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San Francisco, CA 94118

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

FORM 4

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

HORRY COUNTY
 12 AUG 15 PM 2:06
 MELANIE HUGGINS-WARD
 CLERK OF COURT

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:

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

August 15, 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

Brendon McDonald

Anthony Mabry

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

**Court Reporter: Brenda R. Babb
Kay H. Richardson**

FINDINGS OF FACT

In 2006, Winkler was indicted for the murder of his estranged wife, first degree burglary, and assault and battery of a high and aggravated nature. On March 12, 2007, the State filed its Notice of Intent to Seek the Death Penalty in which the State asserted the following statutory aggravating circumstances supporting the death penalty: 1) that the murder was committed during the commission of a burglary; and 2) that the murder was of a witness or potential witness committed for the purpose of impeding or deterring prosecution of a crime.¹

Attorneys Ralph J. Wilson and Paul Elbert Rathbun were appointed to represent Winkler. During the early stages of their representation, Winkler became dissatisfied with his attorneys and wanted new attorneys. All requests to relieve his attorneys and appoint new counsel were denied by the court. At no time prior to the start of the criminal trial did Winkler ever ask the court to relieve his attorneys and allow him to proceed *pro se*.

In preparing for trial, Winkler advised his attorneys that the victim was killed by her ex-husband, Jonathan Grainger ("Grainger"). Winkler told his attorneys that he and Grainger fought over a pistol and that Grainger gained control of the pistol and shot the victim. Winkler never disputed that the fatal shot was fired from the pistol. His only contention was that he did not shoot the victim; Grainger did.

During the guilt or innocence phase of Winkler's criminal trial, the State presented Vello Paavel as an expert witness in the field of firearm and tool mark identification. Mr. Paavel opined that the bullet killing the victim was fired from the Jennings Bryco pistol found in Winkler's possession. During cross examination of Mr. Paavel, Winkler's attorney challenged whether any evidence existed to indicate that Winkler fired the Jennings Bryco pistol but did not

¹ When this murder occurred, charges were already pending against Winkler for the kidnapping and rape of his estranged wife.

challenge whether the fatal shot was fired from that pistol. Ultimately, Winkler was found guilty of murder, first degree burglary and assault and battery of a high and aggravated nature.

During the sentencing phase of his criminal trial, Winkler asked the court to discharge his attorneys and allow him to represent himself. The court denied Winkler's request.

More than 6 ½ hours into deliberations during the sentencing phase of Winkler's trial, the jury asked the court what would happen if they could not reach a unanimous decision.² The judge advised the jury that he could not answer their question "as it [was] asked." Two hours later, the jury asked the court again what would happen if they could not reach a unanimous decision. The court advised the jury that their question was hypothetical and the court could not answer hypothetical questions. Winkler's attorneys never objected to the court's refusal to answer the jury's question.

More than 10 hours into deliberations, the jury informed the court that they were deadlocked on whether to impose the death penalty or life. The judge gave the jury an Allen charge in which he advised them that their decision must be unanimous without telling them the law if they could not reach a unanimous decision. The court then allowed the jury to cease deliberations for the night and return the following morning.

The following morning, prior to resuming deliberations, several jurors asked for the judge to give them the Allen charge again. The judge recharged the jury and, again, advised them that their decision had to be unanimous without advising them on the law of what would happen if they could not reach a unanimous decision. Winkler's attorneys objected to the judge recharging the Allen charge but never objected to the contents of his charge or his failure to advise the jury

² This court cannot determine exactly how long the jury had been deliberating on Winkler's sentence before submitting its question to the court. However, the trial transcript indicates that the jury began deliberations at 1:30 p.m. and submitted its question to the court after 8:15 p.m.

on the law of what would happen if they could not reach a unanimous decision. After resuming deliberations, the jury returned a decision to impose the death penalty.³

LAW AND DISCUSSION

I. RIGHT TO SELF REPRESENTATION

Winkler argues that his constitutional right to self-representation was violated by the trial court's refusal to allow him to discharge his attorneys and proceed in his criminal trial *pro se*.⁴ Winkler further argues that he was denied his right to effective assistance of counsel due to his attorneys' failure to object to the trial court's pre-trial refusal to permit him to discharge his appointed counsel and proceed in the criminal trial *pro se*. However, a preponderance of the evidence indicates that Winkler never requested to discharge his attorneys and proceed *pro se* until the sentencing phase of his trial. Prior to that time, Winkler only requested that he be appointed new attorneys; not that he be allowed to proceed *pro se*.

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.* (emphasis added). "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)). The sentencing phase of a capital trial does not constitute a separate

³ Winkler was also sentenced by the presiding judge to concurrent sentences of thirty years in prison for first degree burglary and ten years in prison for assault and battery of a high and aggravated nature.

⁴ The court's refusal to discharge Winkler's attorneys and allow Winkler to proceed *pro se* was addressed and affirmed by the South Carolina Supreme Court in Winkler's criminal appeal. See *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596, (S.C.2010).

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).

Because Winkler never “clearly asserted” that he wanted to represent himself prior to trial, the court’s refusal to discharge his attorneys and allow him to proceed *pro se* did not violate his constitutional rights. Further, his attorneys’ failure to object to the court’s “pre-trial” denial of his request to represent himself when no pre-trial request was made does not constitute ineffective assistance of counsel. Therefore, Winkler is not entitled to post-conviction relief because the trial court denied his request to represent himself, nor is he entitled to post-conviction relief due to his attorneys’ failure to object to the court’s denial.

II. FAILURE TO IMPEACH STATE’S EXPERT WITNESS

Next, Winkler argues that he was denied effective assistance of counsel when his attorneys failed to object to and/or adequately impeach the trial testimony of the State’s firearm and tool mark expert, Mr. Vello Paavel. Winkler argues that his attorneys should have challenged Mr. Paavel’s testimony that the bullet that killed the victim was fired from the Jennings Bryco pistol found in Winkler’s possession. However, until Winkler filed this action for post-conviction relief, he never disputed that the fatal shot was fired from the Jennings Bryco pistol. The defense trial strategy was that Grainger, not Winkler, fired the fatal shot.

Based upon Winkler’s pre-trial account to his attorneys that Grainger shot the victim with the Jennings Bryco pistol, his attorneys challenged the State’s failure to find Winkler’s fingerprints or DNA on the Jennings Bryco pistol. Challenging whether or not the bullet that killed the victim was fired from that pistol would serve no purpose since Winkler acknowledged to his attorneys while preparing for his criminal trial that the victim was shot by Grainger with the Jennings Bryco pistol. Therefore, his attorneys’ failure to challenge Mr. Paavel’s opinion

that the victim was shot with the Jennings Bryco pistol is not ineffective assistance of counsel and Winkler's request for post-conviction relief on this ground should be denied.

III. FAILURE TO IMPEACH OTHER STATE WITNESSES

Next, Winkler alleges that he was denied effective assistance of counsel because his attorneys failed to impeach the State's witnesses with evidence that Jonathan Grainger was not on the telephone with Elizabeth Craft at the time of the crime. However, in presenting his case for post-conviction relief, Winkler did not identify or present any evidence that his attorneys could have used to impeach the State's witnesses. At the conclusion of Winkler's case in chief, the State moved for a directed verdict on Winkler's request for post-conviction relief on this ground.

The burden is on the petitioner to prove the allegations in a post-conviction relief application. *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); citing *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). Therefore, since Winkler failed to present any evidence that his attorneys could have used to impeach the State's witnesses, the State's motion for directed verdict on this ground for relief should be granted.

IV. FAILURE TO PRESENT EVIDENCE OF NEUROLOGICAL AND COGNITIVE IMPAIRMENTS AND/OR DYSFUNCTION

Next, Winkler alleges that he was denied effective assistance of counsel because his attorneys failed to investigate and present evidence of Winkler's neurological and cognitive impairments and/or dysfunction. However, Winkler did not present any evidence that he suffered from neurological and cognitive impairments or dysfunction. Therefore, at the conclusion of Winkler's case in chief, the State moved for a directed verdict on Winkler's request for post-conviction relief on this ground.

As previously stated, the burden is on the petitioner to prove the allegations in a post-conviction relief application. *Smith v. State, ibid.* Therefore, since 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.

V. FAILURE TO PRESENT EVIDENCE OF MENTAL STATE

Next, Winkler alleges that he was denied effective assistance of counsel because his attorneys failed to present mitigating evidence regarding Winkler's change in demeanor and mental state before the crime and evidence that the victim harassed and taunted Winkler while he was on home arrest. However, the preponderance of the evidence indicates that the victim did not taunt Winkler while he was on home arrest and, thus, Winkler did not have any change in demeanor or mental state due to the victim's conduct. Winkler's attorneys did not have any mitigating evidence to present to show a change in demeanor or mental state and, thus, any failure to present evidence of a change in demeanor or mental state does not constitute ineffective assistance of counsel. Therefore, Winkler's claim for post-conviction relief on this claim should be denied.

VI. PHYSICAL HARM AND INTIMIDATION OF JUROR

Winkler also alleges that he is entitled to post-conviction relief due to the physical harm and intimidation of a juror. However, Winkler did not present any evidence of physical harm and intimidation of a juror. At the conclusion of Winkler's case in chief, the State moved for a directed verdict on Winkler's request for post-conviction relief on this ground.

As stated before, the burden is on the petitioner to prove the allegations in a post-conviction relief application. *Smith v. State, ibid.* Therefore, since Winkler failed to present any

evidence of physical harm and intimidation of a juror, the State's motion for directed verdict on this ground for relief should be granted.

VII. FAILURE TO CHARGE JURY

Lastly, Winkler alleges that he is entitled to post-conviction relief because his attorneys failed to object to the court's refusal to answer the jury's question regarding what would happen if the jury failed to reach a unanimous verdict on Winkler's sentence. Winkler further alleges that his attorneys were ineffective for failing to object to the court's improper jury instructions under unduly coercive circumstances. Further, Winkler alleges that the trial court's refusal to charge the jury on what would happen if they could not reach a unanimous verdict and/or the court's jury instructions given under unduly coercive circumstances entitles him to post-conviction relief.

Under Code of Laws of South Carolina 1976 §16-3-20, when aggravating circumstances are found to exist in a capital murder case tried before a jury, the jury decides whether the defendant should be sentenced to death or life in prison. A jury's decision to impose the death penalty must be unanimous. Code §16-3-20(C) states, in pertinent part, that "[i]f 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...."

In the case at hand, more than 6 ½ hours into jury deliberations during the sentencing phase of the trial, the jury asked on two different occasions what would happen if they could not reach a unanimous verdict on Winkler's sentence. The judge refused to answer the question both times and Winkler's criminal trial attorneys never objected to the judge's refusal to answer the question.

Although sentencing in non-capital cases is a matter of law to be decided by the court, sentencing in capital murder cases is made by the jury and, therefore, the jury is entitled to know the law on sentencing. Even if the jury is not entitled to an instruction that the defendant will receive a life sentence if they cannot reach a unanimous verdict of death, the jury is entitled to an instruction that the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict. During the Allen charge by the judge in this case, the jury was informed that their verdict must be unanimous. However, Code §16-3-20 does not require the jury to reach a unanimous verdict. It only requires a unanimous jury verdict if the death penalty is to be imposed.

The burden is on the petitioner to prove the allegations in the PCR application. *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); citing *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). To establish a claim of ineffective assistance of counsel, the PCR applicant must prove: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624, (1989) - "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052.

To establish prejudice, the applicant is required "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010). Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *Rosemond v. Catoe*, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

In the case at hand, Winkler's criminal defense attorneys' performance not only fell below an objective standard of reasonableness when they failed to object to the trial judge's refusal to answer the jury's question on what would happen if the jury could not reach a unanimous verdict on Winkler's sentence, that deficient performance prejudiced the sentencing phase of Winkler's case. Had the jury's question been answered by the judge, a reasonable probability exists that the jury would not have reached a unanimous verdict and the court would have imposed a sentence of life in prison. Therefore, the results of the proceedings would have been different. Although overwhelming evidence of Winkler's guilt exists in the case at hand, the ineffective assistance of counsel did not occur during the guilt or innocence phase of the trial. It occurred during the sentencing phase of the trial. Therefore, Winkler is entitled to post-conviction relief as to the sentence imposed in this case.

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

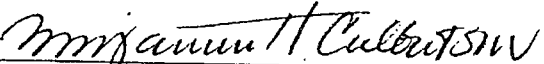
ORDERED, that the application for post-conviction relief by the applicant, Louis Michael Winkler, Jr., for his conviction for murder is DENIED; it is further

ORDERED, that the application for post-conviction relief by the applicant, Louis Michael Winkler, Jr., for his sentence of death for murder is GRANTED; it is further

ORDERED, that Louis Michael Winkler, Jr.'s sentence of death is set aside and he is sentenced to life in prison without parole for his conviction for murder; it is further

ORDERED, that the sentence imposed hereunder shall run concurrently with the sentences imposed for the applicant's convictions for first degree burglary and assault and battery of a high and aggravated nature.

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

August 15, 2012
Conway, SC

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(d), 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 to Alter or Amend Judgment Pursuant to Rule 59(e), SCRPC, is DENIED.
 *This motion was decided on briefs 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 1, 2014
 Date

FILED
 HORRY COUNTY
 2014 APR -2 AM 8:07
 CLERK OF COURT

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.

Brendon McDonald

Anthony Mabry

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

FILED
HORRY COUNTY
2014 APR -2 AM 8:07
MRS. ANNE HUGHES GUNDEL
CLERK OF COURT

Louis Michael Winkler, Jr.,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

ORDER DENYING RESPONDENT'S
MOTION TO ALTER OR AMEND JUDGMENT¹

Before the court is the Respondent's Motion to Alter or Amend Judgment. By order dated 8/15/2012, this court denied the applicant's petition for post-conviction relief from his conviction for murder, first degree burglary and assault and battery of a high and aggravated nature. However, the court granted the Respondent's petition for post-conviction relief from his death sentence.

The Respondent argues that the prior order of this court should be amended to deny the relief granted to the applicant and restore the death sentence imposed at his criminal trial. The Respondent argues that, according to case law, the defendant is not entitled to a jury instruction of what happens if the jury is unable to reach a unanimous decision regarding whether or not to impose the death penalty. The Respondent argues that this court improperly found that the applicant's trial counsel was deficient for failing to object to the trial court's refusal to answer the jury's question of what would happen if they were unable to reach a unanimous decision regarding the sentence to be imposed in this case. However, the cases cited


¹ This motion is decided without oral arguments. It is decided on the *Respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRPC (Capital Case)* dated 8/28/2012 and filed with the Clerk of Court for Horry County, SC, on 9/4/2012 and the Applicant's *Return To Respondent's Motion to Alter or Amend Judgment* dated 9/6/2012 and filed with the Clerk of Court for Horry County, SC, on 9/10/2012.

MAC

by the Respondent address whether a defendant is entitled to an initial jury instruction that a life sentence will be imposed if the jury is unable to reach a unanimous decision regarding whether or not to impose a death sentence. In the case at hand, the applicant does not argue that he was entitled to an initial jury instruction of what would happen if the jury could not reach a unanimous decision on his sentence. To the contrary, the applicant argues that the jury should have been instructed on the law after their repeated requests of what the law was. The jury repeatedly asked the trial judge what would happen if they did not reach a unanimous decision of whether to impose a life sentence or the death penalty. The trial judge not only refused to answer the jury's question, the judge incorrectly instructed the jury that they must reach a unanimous decision on which sentence to impose; life in prison or death. Such is not the law. The law only requires a unanimous decision to impose a death sentence.

Next, the Respondent argues that this court improperly found that the outcome in sentencing would have been different had the jury been instructed on the law regarding their failure to reach a unanimous decision of whether or not to impose the death sentence. However, the testimony presented at this post-conviction relief trial clearly indicates that at least one juror who opposed the death sentence and desired a life sentence incorrectly thought that the applicant would be free from any sentence unless the jury reached a unanimous decision on sentencing. That juror was lead to believe that the applicant would be free to go or, at a minimum, would receive a new trial on his guilt or innocence unless the jury reached a unanimous decision of death or life in prison. The evidence indicates that the jury's unanimous decision to impose the death sentence in this case was not based upon a correct understanding of the law but, rather, on the incorrect thought that the applicant would go free or get a new trial.

NOW, THEREFORE, based upon the above, it is hereby
ORDERED, that the Respondent's Motion to Alter or Amend is DENIED.
AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

April 1, 2014
Conway, SC

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas (PCR)
The Honorable Benjamin H. Culbertson, Circuit Court Judge

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

LOUIS MICHAEL WINKLER, JR., #6027, Respondent,
v.
STATE OF SOUTH CAROLINA, Petitioner.

PROOF OF SERVICE

I, Alphonso Simon Jr., hereby certify that a true copy of the Notice of Appeal with Orders attached has been served upon opposing counsel by depositing copies in the United States mail, postage prepaid, to the following:

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

John R. Mills, Esq.
Law Offices of John R. Mills
3145 Geary Blvd # 213
San Francisco, CA 94118

This 24th day of April, 2014.



ALPHONSO SIMON JR.
Assistant Attorney General
Bar No. 74713