STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

LOUIS MICHAEL WINKLER, JR.,

RESPONDENT- PETITIONER,

V.

STATE OF SOUTH CAROLINA

PETITIONER- RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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?

STATEMENT OF THE CASE

During the May 2006 Term of the Horry County Court of General Sessions, Respondent-Petitioner Louis Michael Winkler ("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. (App. 3458-60). The State filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (App. 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). (App. 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 and Assistant Public Defender Paul Elbert Rathbun represented Winkler. Solicitor J. Gregory Hembree, Deputy Solicitor Francis A. Humphries, Jr., and Assistant Solicitor Scott R. Hixson, all of the Office of the Fifteenth Judicial Circuit Solicitor, represented the State. On February 2, 2008, Winkler was convicted on all three charges. (App. 1903).

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

A timely notice of appeal was filed and served on Winkler's behalf on February 11, 2008. On appeal, Winkler 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 Carolina Commission on Indigent Defense, Division of Appellate Defense. On April 5,

[1] The State withdrew the Escape charge before trial. (See App. 130).

2010, Winkler 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 Jonathan 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?

(App. 3556-619). The State, through Assistant Attorney General Alphonso Simon Jr., filed its Final Brief of Respondent on April 14, 2010. (App. 3620-707). Winkler filed his Final Reply Brief of Appellant on April 4, 2010. (App. 3708-16).

This Court heard oral arguments in the appeal on June 24, 2010. This Court 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). (App. 3721-32). Winkler filed a timely petition for rehearing that was denied on September 22, 2010. (App. 3733-50). The Remittitur was also issued on September 22, 2010.

On October 20, 2010, this Court granted a stay of execution so that Winkler could pursue certiorari review before the United States Supreme Court. (App. 3767-68). Winkler, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated February 11, 2011. (App. 3769-726). The State filed its Brief in Opposition to the Petition for Writ of Certiorari on March 28, 2011. (App. 3827-48). Winkler filed a Reply Brief on April 12, 2011. (App. 3849-62). The United States Supreme Court denied the petition for writ of certiorari by order dated April 25, 2011. (App. 3863).

By Order filed May 25, 2011, this Court granted Winkler's second Petition for Stay of Execution. (App. 3885-86). In the Order, this Court appointed the Honorable Benjamin H. Culbertson, Circuit Court Judge, to hear this post-conviction relief action. Id. Winkler, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on May 2, 2011. (App. 3887-911). The State filed its Return to Application for Post-Conviction Relief on June 10, 2011. (App. 3912-56).

By Order filed June 24, 2011, the PCR Court appointed Emily Paavola and John R. Mills to represent Winkler. On February 2, 2012, Winkler filed his first amended Application for Post-Conviction Relief. (App. 3957-3967). The State served its Return to Amended Application for Post-Conviction Relief on March 1, 2012. (App. 3968-4016). Petitioner subsequently filed a Second Amended Application for Post-Conviction Relief on May 3, 2012. (App. 4024-28). In the second Amended Application, Winkler raised the following issues:

> 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-innocense 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 Jonathan Grainger 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; 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.

(App. 4025-26). The State filed its Return to the Second Amended Application for Post-Conviction Relief and Motion for More Definite Statement on June 1, 2012. (App. 4029-87).

An evidentiary hearing was heard in this action by the Honorable Benjamin H. Culbertson, Circuit Court Judge on June 18-21, 2012. (App. 4188-753). Petitioner was present and was represented by Emily Paavola and John Mills. Id. The State was represented by Assistant Attorneys General Anthony Mabry, Brendan McDonald, and

Alphonso Simon, Jr. By Order filed August 15, 2014, the PCR Court granted post-conviction relief based upon Winkler's claim in Ground 10 & 11(b)(3). In granting relief, the PCR Court stated as follows:

> 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.

(App. 5214). The PCR Court further concluded:

> 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.

(App. 5215). The PCR Court then set aside Winkler's death sentence and sentenced Winkler to life without parole. (App. 5215).

The State subsequently served and filed a Motion to Alter or Amend Judgment, challenging both the grant of post-conviction relief and the newly imposed life sentence. (App. 5219-29). The PCR Court denied the Motion to Alter or Amend Judgment. (App. 5488-90). In denying the motion, the PCR Court stated,

> However, the cases cited 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.

(App. 5488-89)(emphasis in original).

ARGUMENT

This Court will not affirm a ruling that is "controlled by an error of law" or lacks factual support in the record. Brown v. State, 383 S.C. 506, 514-515, 680 S.E.2d 909, 914 (2009).

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for

counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984); Simpson v. Moore, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Id.

In order to prove deficient performance, the applicant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. '" Harrington v. Richter, 562 U.S. --, --, 131 S.Ct. 770, 787 (2011), quoting Strickland, 466 U.S. at 687. "The standard for judging counsel's representation is a most deferential one." Id. at --, 131 S.Ct. at 788. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Butler v. State, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985), quoting Strickland, [466 U.S. at 690]. "An attorney is not required to anticipate potential changes in the law, which are not in existence at the time of the conviction." Patterson v. State, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004).

In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentence - 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." Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). Further, prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. Wong v. Belmontes, 558

U.S.15, 130 S.Ct 383 (2009). "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. at --, 131 S.Ct at 792, citing Strickland, 466 U.S. at 693.

"[W]hile in some instances 'even an isolated error' can support an ineffective assistance claim if it is 'sufficiently egregious and prejudicial,' Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Harrington v. Richter, 562 U.S. at --, 131 S.Ct. at 791.

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.

How the issues arose at trial

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?" (App. 2921, ll 23-4). The trial judge then indicated that he had shared the question with both counsel for the State and Winkler's defense counsel. (App. 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. (App. 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." (App. 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. (App. 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?" (App. 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?" (App. 2925, ll 3-5).

The trial judge indicated that he believed the question was a hypothetical question. (App. 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?" (App. 2925 l 23- 2926 l 1). Shortly thereafter, the jury sent another note to the trial judge. (App. 2926, Ct. Exh. 25). Both sides agreed that the last message from the jury indicated they were deadlocked. (App. 2926).

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. (App. 2926-27). Both the attorneys for the State and trial counsel agreed with the suggestion. (App. 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.

(App. 2928, l 2 – 2929, l 23). No exceptions were taken to the instruction. (App. 2930). The jury subsequently decided to end deliberations for the evening and start again in the morning. (App. 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. (App. 2931-33, 2934-35). After discussion with counsel, 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.

(App. 2936, l 22 – 2938, l 19).

Testimony at the PCR evidentiary hearing

At the PCR evidentiary hearing, trial counsel Wilson testified that he made a reasoned decision to not object to the trial judge's refusal to answer the initial questions from the jury regarding the implications of a jury's inability to reach a unanimous verdict.

> Well I considered it but, but I mean he[the trial judge] can't tell them, he couldn't tell them what happens. That would not have been appropriate, that's my understanding of it, it would not have been appropriate for him to tell them at that point that, that if you deadlock then we, I'm going to declare a mistrial and the defendant will get a life sentence based on the law that existed at that time.

(App. 4583, l 23 – 4854, l 4).

Certiorari should be granted in this case because the PCR Court's grant of relief was based upon an incorrect assessment of South Carolina law as it relates to whether a jury is entitled to know what happens if it cannot reach a unanimous verdict during sentencing under S.C. Code § 16-3-20. The PCR Court's Order is based upon its belief that the jury is entitled to know what happens if it cannot reach a unanimous verdict. No such requirement exists under South Carolina law. As explained in State v. Adams,

> [t]he language of the statute[S.C. Code § 16-3-20(C)] 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.**

Adams, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981)(emphasis added), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In other words, S.C. Code § 16-3-20(C) prohibits a trial judge from explaining what occurs if the jury does not reach a unanimous verdict in sentencing. See State v. Copeland, 278 S.C. 572, 584-85, 300 S.E.2d 63, 70 (1982); 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).

The PCR Court's assessment that the jury must be advised what happens in the event the jury deadlocks on sentencing is also contrary to longstanding United States Supreme Court precedent. "[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). As noted by the U.S. Supreme Court in Jones,

> 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.[2]

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[2] In Jones, the jury instruction that was requested and denied was as follows:

> "In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release...."In the event you are unable to agree on [a

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

In light of the case law indicating that the jury does not need to be informed of the results of a non-unanimous jury verdict, the PCR Court erred in finding trial counsel was deficient in not objecting to the trial court's decision to not answer the jurors' hypothetical questions about the ramifications of a hung jury. In granting relief, the PCR Court improperly assessed the reasonableness of trial counsel's decision not to object to how the trial judge handled responding to the jurors' questions. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Strickland v. Washington, 466 U.S. 668, 689 (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). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Counsel's actions, consistent with state law, cannot be deemed deficient. See generally Patterson v. State, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004)(noting counsel's advice was not deficient when there was no

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> sentence of] Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release."

Jones, 527 U.S. at 379.

statutory law or judicial precedent inconsistent with counsel's advice); see e.g. Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004)("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.").

At the evidentiary hearing, Ralph Wilson, Winkler's lead counsel at trial, explained he did not object to Judge Lockemy's decision not to respond to the jurors' question regarding the consequences of a split verdict on sentencing. Wilson was well aware the case law did not require the trial judge to answer the question posed by the jury. Counsel's decision not to object was clearly reasonable under prevailing professional norms since there was overwhelming case law supporting his position that an objection was not warranted because the trial judge was not required to answer the question. See Jones, supra, Adams, supra, Spann, supra, Copeland, supra, and State v. Atkins, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990).

The State would note that the PCR Court's determination that an instruction stating "the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict," is especially problematic. This alternate instruction would create additional Eighth Amendment concerns in that it would **minimize** the jury's sense of responsibility for determining the appropriate sentence because it would remove any responsibility for the sentence. See generally Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985) ("[I[t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").

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.

The PCR Court's Order also improperly assessed Strickland prejudice in this case. In order to show Strickland prejudice, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

The PCR Court's grant of relief was based upon several improper considerations. First, the PCR Court assumes the trial judge would have given 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," if such an instruction was requested. Nothing in the record supports this assumption or the authority for such an instruction, which minimizes the jury's responsibility. To the contrary, Judge Lockemy indicated he had concerns about responding, noting that it appeared the jury was potentially asking a hypothetical question. Judge Lockemy was not inclined to respond to the question because it was unclear whether the jury was deadlocked. (App. 2921-22, 2925-26). In light of Judge Lockemy's concerns, and in light of the lack of reference to any authority that would have required Judge Lockemy to give the charge the PCR Court proposed, it is highly unlikely the proposed charge would have been given if requested. As already noted, the proposed charge is inconsistent with state and federal law.

Second, the PCR Court's finding of prejudice does not account for the presumption that jurors follow the trial judge's instructions. State v. Dunlap, 346 S.C.

312, 550 S.E.2d 889 (Ct.App.2001), affirmed as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265 n .1, 335 S.C. 586, 518 S.E.2d 265, 267 n. 1 (1999))("A jury is presumed to [have followed the trial judge's] instructions."). An Allen charge would be warranted even if the jury was informed that the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict. Since an Allen charge instructs the jurors to reconsider their own positions, to consider the positions of other jurors, and to attempt to reach a consensus, a finding of Strickland prejudice is improper because there is no support for a finding the result at trial would have been different. Altogether, the Order's discussion regarding prejudice contains no legal or factual basis for the PCR Court's finding of prejudice.

The PCR Court's finding that there was a reasonable probability the result at sentencing would have been different had the jury's question been answered is not properly supported by the record. The PCR Court's Order made no specific findings of fact that support the conclusion. In the Order denying the Motion to Alter or Amend Judgment, the PCR Court indicated that it relied upon the testimony of a juror in finding prejudice. This finding by the PCR Court should be reversed for several reasons. First, the testimony of the juror was inadmissible and improperly admitted over the State's objections at the evidentiary hearing. "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. The State objected to the testimony regarding the deliberations from all of the juror witnesses. (App. 4147-49, 4197-98, 4368, 4407). The PCR Court improperly considered the testimony of the jurors in assessing whether the trial court's decision not to answer the jury's question affected the jury's deliberations. Understanding that none of the

jurors' testimony could be considered by the PCR Court in making a finding the result at trial would be different, the State submits there is no factual basis underlying the finding of prejudice. State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995)("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."); see Rule 606(b), SCRE. [3]

Furthermore, the PCR Court's reliance on the juror's testimony to support its finding of prejudice was misplaced. While the juror did indicate that it was one of the reasons she hesitated to remain steadfast as a vote for a life sentence, she never testified that she would not have voted for a death sentence had the trial court answered the question posed by the jury. In light of her reluctance to inform anyone involved in the trial of her reservations about her decision after the trial, and in light of her testimony indicating that she was not the last holdout, the State submits that the PCR Court's determination that Winkler was prejudiced is nothing more than mere speculation as opposed to a finding supported by the record. This Court should grant certiorari to review this finding.

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.

The PCR Court's grant of relief in this case was improper because it was based upon an assumption the Allen charge did not correctly state the law in capital sentencing.

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[3] None of the jurors' testimony would have been admissible in addressing this claim because this claim is not about 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. Rule 606(b), SCRE. Nor does this claim rely upon an allegation of internal misconduct. See Hunter, supra.

Specifically, the PCR Court found that a jury's verdict in capital sentencing does not have to be unanimous. This finding is contrary to South Carolina law. Otherwise, the South Carolina Supreme Court would have no reason to consistently find that an Allen charge is entirely appropriate in capital sentencing. See State v. Atkins, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990)(finding trial judge properly required jury to continue deliberating after jury indicated it was hung in a capital resentencing trial); State v. Hughes, 336 S.C. 585, 597-98, 521 S.E.2d 500, 506-07 (1999)(finding modified Allen charge given during sentencing deliberations was even-handed and proper); Tucker v. Catoe, 346 S.C. 483, 490-91, 552 S.E.2d 712, 716 (2001)("Neither the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding."); State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010)(finding use of Allen charge in sentencing appropriate); see generally Gill v. State, 346 S.C. 209, 219, 552 S.E.2d 26, 32 (2001)(noting that life sentence imposed in capital case after jury deadlock does not preclude the State from seeking death in a retrial if case reversed on appeal; jury deadlock does not imply finding that State did not prove its sentencing case beyond a reasonable doubt)("In the event of a jury deadlock, the trial judge exercises no discretion and merely imposes the sentence mandated by section 16-3-20(C).").

> 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).

The Allen charge given in Winkler's sentencing hearing was not coercive. The language utilized in the charge was similar to the language upheld in Lowenfield and to the charge upheld in Williams. 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. Further, the trial court did not mislead the jury into believing that it was required to reach a unanimous verdict. Indeed, the trial court's

instructions only requested the jury continue deliberating and attempt to reach a verdict. Since the Allen charge was not coercive and did not mislead the jury, counsel was not deficient in not objecting to the charge.

Winkler also failed to show he was prejudiced by counsel not objecting to the Allen charge. As already noted, such an objection would have been without merit because the charge was not coercive. Thus, any objection would have been without merit. Furthermore, as already discussed earlier, the PCR Court's findings regarding prejudice cannot be affirmed because they are based upon the PCR Court's consideration of improperly admitted testimony of a juror regarding her deliberative process. In all, this Court should grant certiorari to review the PCR Court's grant of relief because it is was the result of an unreasonable application of law.

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.

The State submits that the remedy set forth in the PCR Court's Order is improper. If the PCR Court is to grant relief, the State submits 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 Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001)(habeas relief granted and case remanded for sentencing in light of faulty Allen charge); see, e.g., Singleton v. State, 313 S.C. 75, 86, 437 S.E.2d 53, 59 (1993)(finding that vacation of death sentence and imposition of life sentence in PCR action regarding applicant's competency to be executed was improper); Gilstrap v. State, 252 S.C. 625, 168 S.E.2d 88 (1969) (assuming all allegations are true, the relief to be granted on PCR is remand); Demetrio L. Sears, South Carolina Post-Conviction Relief: Practical

Considerations and Procedures from A Prisoner's Perspective, 64 S.C. L. Rev. 1169, 1287 (2013). If this Court finds that the PCR Court did not err in granting relief, the State respectfully requests this Court vacate the sentence imposed by the PCR Court and remand the case back to the Horry County Court of General Sessions for a resentencing proceeding.

CONCLUSION

For the foregoing reasons, Petitioner-Respondent respectfully requests this Court grant this petition for writ of certiorari and reverse the grant of post-conviction relief and life sentence by the PCR Court.

Respectfully submitted,

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August 18, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

LOUIS MICHAEL WINKLER, JR.,

Respondent/Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

PROOF OF SERVICE

I, Alphonso Simon, Jr., of counsel for the Petitioner/Respondent, certify that I served two (2) copies of the Petition for Writ of Certiorari via U.S. mail to each of his attorneys of record, Emily C. Paavola, Esq., Death Penalty Resource and Defense Center, 900 Elmwood Avenue, Ste. #101, Columbia, South Carolina 29201, and John R. Mills, Esq., Law Offices of John R. Mills, 3145 Geary Blvd., #213, San Francisco, California 94118.

I further certify that all parties required by Rule to be served have been served.

This 18th day of August, 2014.

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