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S.C. 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-Petitioner,*

v.

STATE OF SOUTH CAROLINA ..... *Petitoner-Respondent.*

PETITION FOR WRIT OF CERTIORARI

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1. Whether the PCR Court erred in failing to find trial counsel ineffective for not objecting to the trial court's pre-trial refusal to permit Applicant to discharge appointed counsel and proceed *pro se*. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Faretta v. California*, 422 U.S. 806 (1975).

2. Whether the PCR Court erred in failing to find trial counsel ineffective for not objecting to and/or adequately impeaching the State's ballistics evidence.

STATEMENT OF THE CASE

Two business days before Petitioner, Louis Winkler's capital trial began, Winkler's lead trial attorney, Ralph J. Wilson, "put his finger in [Winkler's] face," and called Winkler's sister "a f---ing liar." App. 3409. In response, Winkler explained, "I swatted his hand away from my face, officers came in, and they acted like it was my fault. But it was Mr. Wilson's. . . . He's, he's the one that lost his temper and stuck his finger in my face and used the F word concerning my sister, who's a teacher in Ohio." *Id.* The altercation was a culmination of tensions between Winkler and both trial attorneys – Wilson and second-chair, Paul Rathbun – over the course of their relationship.

I. PRETRIAL PROCEEDINGS: "THIS IS MY LIFE I'M TALKING ABOUT HERE."

Winkler was indicted for the murder of his estranged wife and related charges in May of 2006. App. 2984. He was originally represented by Chief Public Defender, Ms. Orrie West, but she passed the case off to Paul Rathbun, who had volunteered "to help and assist" because he had "some spare time that I can use to do research, that kind of thing." App. 2985. Rathbun was employed at the public defender's office; he had never tried a murder case and had "primarily been doing Family Court work." *Id.* At a hearing on June 15, 2006, Winkler objected to Rathbun's appointment, stating, "[w]ell, the Public Defender's Office I have found to be very inadequate. The day that I was at the hearing, the first hearing, Ms. West called me Dave." App. 2991. Regarding Rathbun specifically, Winkler expressed concern about his inexperience, explaining:

> when I first met with him he told me that he had never tried a murder trial before. He said, well, the first thing we are going to do is get you a bond, and I said, well, from what I understand . . . there is not a bond on – when the prosecution is going for the death penalty, and he said, oh, that's right. Now, that's a simple matter of a process, and if I knew that and he didn't, I can't see how he would be at all anywhere near being adequate for my counsel, I mean, I had to correct him on a simple point. This is my life I'm talking about here.

App. 2992. Winkler also objected that Rathbun had "argued with me more than anything so far." App. 2999. Judge James Lockemy took the matter under advisement and later appointed Rathbun as second chair. Because Rathbun was not qualified to serve as lead counsel, Judge Lockemy asked Ralph Wilson, a former solicitor, to fill that role. App. 2988. Wilson accepted and immediately consented to Rathbun's appointment, stating he was "extremely comfortable with that," and "that's more than satisfactory with me." App. 3000.

On February 16, 2007, Wilson informed Judge Lockemy that the defense team did not yet have a mitigation investigator for the trial anticipated for June. Wilson offered an affidavit from investigator Dale Davis, and represented that despite Ms. Davis's sworn testimony to the contrary, Wilson believed she could complete her necessary tasks without much alteration to the trial schedule:

THE COURT:	And that person can have everything done even if we have the trial in June?
MR. WILSON:	Yes, sir. She indicates to me that she can and – and has already started.
THE COURT:	This person says they could not begin until June, Ms. Davis.
MR. WILSON:	Well, she's actually begun. She came down and – and actually spent some time with Mr. Winkler. She came down and spent a whole day with me, going over his file. And I know she's had some other things going on. I do understand that. She made that –
THE COURT:	Her affidavit says: "It will take six to eight months, and I can't start till June." Mr. Wilson, that's determinative.
MR. WILSON:	Well – and I agree. And I think, to be honest with you, Judge, that we could – that she could do it in less time than that; but I know she indicated to me that there was no way she

could do it in June, that she could do it by June.

THE COURT: Well, my concern is that we maybe thought about changing it a month or so, but it sounds to me she wants to change it till the following year.

MR. WILSON: Well, I don't – I mean, I'm sure she would love to have that, I would too, but we don't –

THE COURT: Well, she said that at least – she said that a least six to eight months.

MR. WILSON: Well, and she would like to have that time, I don't think there's any question about that, but I do believe that if – if the Court gave her 60 to 90 days that she would be able to do it. I do believe that.

App. 3043-44.

Judge Lockemy expressed frustration with trial counsel's delay in securing an investigator, stating, "Mr. Wilson, you know, we've been dealing with this thing for months now." App. 3049. If Davis was not available, he announced, trial counsel would simply need to find someone else to conduct the investigation. App. 3045. The trial date was rescheduled for July 16, 2007. App. 3079.

Two weeks before the now rescheduled trial, Wilson informed Lockemy that Winkler had "indicated to me on several occasions that he is dissatisfied [with] Mr. Rathbun and that they've had some disagreements, according to him, and he has been very concerned about it." App. 3260. The trial court responded:

THE COURT: Well, Mr. Winkler needs to know that unless anything regarding Mr. Rathbun reaches the point of incompetence or something that I would make a preliminary determination of ineffective assistance, it's improbable that I would remove Mr. Rathbun unless it's

something that would really seriously prejudice Mr. Winkler's rights to receive a fair trial. From what you've told me, Mr. Wilson, it sounds to me like disagreements among them. With you being chief counsel, I mean, you know, if ever there are disagreements between you and Mr. Rathbun, I'm sure Mr. Rathbun defaults to your leadership because of your experience and the fact you are lead counsel. Are there any problems there?

MR. WILSON: No, sir, I don't have any problems.

THE COURT: So, even though there might be disagreement between Mr. Winkler and Mr. Rathbun, you've always ended up basically deciding after talking to Mr. Winkler, with him, with his consent, the correct course to go, right?

MR. WILSON: Yes, sir.

THE COURT: Well, then, I really don't see any need to pursue it any further unless you know of something that would be such that would be to the level of ineffective assistance of counsel to this preliminary point.

App. 3262. But Winkler insisted "that's not the case," and continued to press for an opportunity to be heard. App. 3263. Lockemy was hesitant to allow Winkler to speak, insisting "I don't want to hear anything, sir, about the case. And if we get to talking about the case, we're going to have to stop it totally." *Id.* Winkler briefly explained that Ratbhun was "telling me to take a plea, to plead guilty and everybody knows there's no plea. Even if there was a plea --," before Judge Lockemy interrupted and ultimately concluded, "I do not believe this has reached the level of Mr. Rathbun being excused at all." App. 3264-65.

Nine days later, with one business day remaining before trial, Wilson notified Judge Lockemy via conference call that the defense team had no mitigation case prepared. App. 3549.

Trial counsel admitted that "they were having difficulty communicating with their mitigation investigator, Paige Munn Tarr, and had been having such trouble since late May of 2007." *Id.* Wilson further confessed that he had received no written reports from Tarr since contracting with her in February of 2007. *Id.* Lockemy authorized service of a subpoena on Tarr and required her to attend a hearing on the following day, July 13, 2007. This hearing was not recorded. According to Lockemy, Tarr confirmed Wilson's statements that: (1) she had gathered no records regarding Winkler's life history; (2) she had not provided any written reports to trial counsel; and, (3) the defense was not prepared to go forward with the trial "given the almost complete lack of preparation in mitigation on behalf of the defendant."[1] App. 3549.

The State was "compelled" by the circumstances to join in the defense's request for a continuance. App. 3551. Lockemy concluded that there was no other alternative but to continue the trial once again. Finally,

> [t]he Court noted that numerous hearings and conferences had been held in this matter since late May and never had the Court been advised by counsel for the defense that any problem existed in reference to the mitigation investigator or counsel's readiness to adequately represent the defendant in either the "trial phase" or the "sentencing phase" of the case until July 12, 2007, one business day from the start of the trial in this matter.

Id.

II. TRIAL PROCEEDINGS: "HOW CAN I GET A FAIR TRIAL WITH GUYS THAT ARE AGAINST ME?"

When the case finally came to trial, tensions on the defense team were high. On Thursday, January 24, 2008, Winkler reported to Judge Lockemy during a conference call that he and Wilson

[1] Lead trial counsel has an obligation to "direct and supervise" the work of the defense team. *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 10.4(B) (2003).

had "an altercation at the jailhouse," the day before. App. 3408. According to Winkler, the clash stemmed from Wilson's claim that he told Winkler's family members that Winkler was going to be convicted at trial. *Id.* Winkler contacted his sister "and she said no to me he never said anything about you being convicted." So, Winkler showed Wilson a picture of his sister:

> I said to Mr. Wilson, I said did you see, do you see my sister here in this picture, and he said which one. I pointed it out to him. I said that's the one you called a liar. I said please do not ever call my sister or anyone in my family a liar again. He turned towards me, put his finger in my face, touched my face, and said she is a f'ing liar.

App. 3408-09.

Following the quarrel, Winkler was immediately removed from the meeting room and placed in solitary confinement at the jailhouse. App. 3422. Winkler wanted to press assault charges against Wilson, but employees at the jail told him he was not permitted to do so without a written statement from the judge. Lockemy brushed this request aside, stating "those matters can be addressed at a later date. There's no urgency about that." App. 3410. Winkler further implored the judge to address his previous requests that Wilson be "removed," stating: "I don't see how we can get along. . . . [T]here is no way we can get along. I've asked him to be, to be removed. . . . [T]here's no way that I can get along with him in order to, to get a fair trial out of this." App. 3413. Judge Lockemy again deferred the issue, saying "if your request is to have another attorney appointed, from what you've told me, the request is denied. . . .And if you wish to address this further, we can do it Monday morning when I'm there." *Id.*

Wilson did not deny that he lost his temper, that he stuck his finger in Winkler's face, or that he called Winkler's sister an "f'ing liar." He did, however, deny telling Winkler he would be convicted, making an attempt to explain his statements before Lockemy interrupted:

MR. WILSON: And, and judge, at, at no time, at no time did I ever, have I ever told him you will be convicted. But I have told him, and I'm gonna say this –

THE COURT: No, no, I don't want to hear anymore about that. I don't need to hear anymore about that.

App. 3411. Having been thwarted in his attempt to offer an explanation on the record before the trial court, Wilson appeared at the jailhouse on the Saturday before trial – with Rathbun, an investigator, and a court reporter in tow – to make sure his position was on the record:

MR. WILSON: [Y]ou have said repeatedly what we told you that you're going to be found guilty, and I want to make the record clear. That is not what I have said. What I have said is, to you, Mick, repeatedly –

MR. WINKLER: So you got a court reporter just to, just for this?

MR. WILSON: Repeatedly, I have said to you that the evidence against you is overwhelming, and that if we proceed in the way that you're having us to proceed, that there is a great likelihood that you're going to be convicted. I have said that. I stand by that. I believe that.

App. 3425-26.

Winkler was incensed over Wilson's actions, stating repeatedly, "[s]o you're just covering your butt by having the court reporter here. . . that's the only reason you have the court reporter here, is to cover your own butt, right?" App. 3431. He naturally viewed counsel's recording of the conversation as a betrayal, telling Wilson, "[y]ou're supposed to be on my side," and responding to Rathbun's statement ("I just want to concur with what Ralph said"), with:

> [w]hat kind of chance do I have when they're not working towards acquittal, all they're working for is, I don't know, you know, backing themselves. I ask questions. They dodge them. They lawyer me to death on it. But I have no support. All they're doing

> with the court reporter here is covering their own butts, and that's the only thing I can get out of this, and he just said, you know, Mr. Rathbun says that he concurs with, with Mr. Wilson. So, you know, that's both lawyers.

App. 3455-56.

When the parties appeared for trial on Monday, January 28, 2008, Winkler requested an *ex parte* hearing. Judge Lockemy viewed this matter as already sufficiently addressed, saying "we discussed on the record. It's on the record; there's a record of it. . . . But if you want to go over something that we haven't discussed before, I'll be glad to." App. 31. Winkler renewed his request to press charges against Wilson and have both attorneys relieved, explaining "eight months ago I asked to relieve this man and I was turned down and now this happens. . . . How can I get a fair trial with guys that are against me?" App. 32-34. Lockemy stated that Winkler's ability to press charges was not "guaranteed" but could be addressed later, and then asked Wilson for a response to Winkler's position that trial counsel was "against" him. App. 32-34. Wilson admitted that Winkler "gets on my last nerve," but claimed their poor relationship would not affect counsel's ability to adequately handle the case.[2] App. 34. Lockemy denied Winkler's request to remove trial counsel, finding the altercation not "significant enough" to justify removal. App. 33. However, Lockemy instructed Winkler that he would "**always** have that option to represent yourself, which would be very inadvisable **for this stage**." App. 42 (emphasis added).

Winkler and trial counsel continued to struggle throughout the guilt-or-innocence phase of the trial. Prior to opening statements, Wilson requested another *ex parte* hearing in Judge

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[2] "Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 10.5 cmt. (2003).

Lockemy's chambers to explain on the record why he did not plan to make the opening statement that Winkler wanted him to give.[3] App. 1376. Winkler asked if he could make the opening statement himself, and Lockemy explained that he could not. App. 1381. The State offered testimony from the victim's teenaged son that Winkler broke down the door of the apartment where the victim was living and shot the victim once in the face with a pistol. On cross-examination, Officer Tom Knoch testified that when he first arrived on the scene, the victim's son told him "he's gone." When Knoch asked who, the son said, "my dad," meaning the victim's ex-husband, Rodger Grainger. 1541-42. The State also relied on expert testimony from Vello Paavel, who opined that the bullet that killed the victim was fired from the Jennings Bryco pistol found in Winkler's possession upon his arrest. App. 1787. The defense called no witnesses. Wilson argued in closing that the State failed to prove its case beyond a reasonable doubt because the victim's son told conflicting stories about the events of the crime. The jury returned guilty verdicts on all charges. App. 1903.

Prior to the beginning of the sentencing phase, Winkler requested permission to participate in cross-examination of the State's witnesses. App. 1915. Judge Lockemy explained that Winkler could not participate as long as he was represented by trial counsel, but "you **always** have the opportunity, sir, if you wish to represent yourself." App. 1917 (emphasis added). Winkler then requested, on the record, to dismiss his attorneys and proceed *pro se*. App. 1928. Lockemy expressed concern that Winkler was not equipped to handle such a task, asking "[h]ave you reviewed the rules of evidence for South Carolina? . . . Do you understand the various exceptions to hearsay?" App. 1933. Winkler held fast to his position that he wished represent himself. App.

[3] Winkler wanted to present a defense that the victim was killed by her ex-husband, Rodger Grainger.

1930, 1934-36. After a break to conduct additional research, the trial court ultimately denied Winkler's request. App. 1972. Wilson and Rathbun represented Winkler for the duration of the penalty phase. The jury sentenced Winkler to death.

III. APPELLATE AND POST-CONVICTION PROCEEDINGS.

On direct review, this Court held that Winkler's request to represent himself was untimely because "he did not make his request to proceed *pro se* at the beginning of trial." *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2011). In post-conviction, however, Winkler offered evidence that on at least three separate occasions prior to trial, he *did* make such a request, but he was rebuffed by the trial judge. He argued that Wilson and Rathbun were ineffective for failing to protect his Sixth Amendment right to self-representation. The PCR court denied relief on this claim, but granted penalty-phase relief on the ground that trial counsel were ineffective for failing to object to the trial court's refusal to answer the jurors' repeated question regarding what would happen if they failed to reach a unanimous sentencing verdict.

REASONS THE WRIT SHOULD BE GRANTED

I. TRIAL COUNSEL FAILED TO PROTECT WINKLER'S SIXTH AMENDMENT RIGHT TO SELF-REPRESENTATION.

Prior to trial, Winkler made three requests to represent himself. App. 4220. He made the requests on July 3, 2007, December 13, 2007, and on at least one other occasion. App. 4220. In light of his poor relationship with both his trial attorneys – culminating in a physical exchange on the eve of trial – it is not surprising that he sought to forgo their "advocacy" and represent himself. Nonetheless, at no point did his attorneys ensure that there was a ruling on or record of his requests.

In response to Winkler's July 3, 2007 request, the trial judge told Mr. Winkler that they would discuss the request at a later date. App. 4221. When Winkler later made the requests to dismiss his trial attorneys and represent himself, the Judge Lockemy told him, "I've already

thought about that, I've made my decision[.] [L]et's move on." App. 4221. This manner of handling Winkler's request was in keeping with how Judge Lockemy handled Winkler's other complaints. He would suggest putting the matter off, as he dealt with Winkler's concerns about Rathbun and Wilson: although he ruled against Winkler, Judge Lockemy would tell him he could "always" decide to represent himself later. App. 42, 1917.

There is no record of Winkler's pre-trial requests. In post-conviction, Wilson claimed that he and the trial court made a record of any issues that needed to be resolved. App. 4537. However, several significant issues are not part of the record. For example, there is likewise no record of the hearing in which Paige Tarr explained that, on the eve of the initial trial date, she had done no work to prepare the case in mitigation. App. 3549. Similarly, there is no record of Wilson and Rathbun discussing with Judge Lockemy whether cameras would be allowed to capture Winkler in "full uniform and shackles and chains," – something Winkler did not want. App. 3450. The parties discussed this issue during the recorded conversation at the jail on the Saturday before trial:

MR. WILSON: You're referring to ---

MR. WINKLER: And I told my lawyer that, and it was on the news, and my lawyer has still to bring that up to the judge. Now, I've said that also.

MR. WILSON: That's not true. In fact, we have brought it up to the judge and have talked with the judge about it.

MR. WINKLER: When?

MR. WILSON: At the hearing over at the Horry County court house. What was that hearing, Paul?

. . .

MR. RATHBUN: It was December the 11th.

App. 3450-51. There is no record of such a discussion on December 11, or on any other day. The trial record also lacks any discussion of an issue Winkler raised regarding the court clerk. Wilson testified that Winkler informed him of a concern about the clerk having a relationship with an interested party, possibly Ms. Becky Winkler: "[H]e also said that she was friends with somebody and I can't remember who it was that he thought she was friends with. App. 4539. Wilson testified that "if he raised it then I, I would have brought it up to the judge." App. 4539. There is no record before the trial court of any such discussion. Thus, it is unfortunate, but not surprising, that the record before the trial court also lacks reference to Winkler's requests to represent himself.

Winkler discussed his desire to represent himself with his siblings. Jody McDougall, Winkler's youngest sister testified that prior to trial she was aware of Winkler's request to represent himself. He told her "several times" that he wanted to represent himself. App. 4602. She was aware that Winkler's relationship with Wilson and Rathbun was "[n]ot very good at all." App. 4602. She did not think that Winkler trusted them. App. 4602. His older sister, Karen Reeves, believed that his attorneys "didn't really want to be there and represent him." App. 4613. Prior to his trial, Winkler told her "many times" that Winkler desired to represent himself. App. 4614. Winkler's older brother noted that Wilson and Rathbun themselves conveyed to him Winkler's interest in representing himself, "[T]hey said, well, that's probably not gonna happen." App. 4625.

The right to proceed *pro se* is protected by state and federal law. *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3, 14. "[T]he Sixth Amendment implicitly provides an affirmative right to self-representation." *United States v. Singleton*, 107 F.3d 1091, 1095 (4th Cir. 1997). "[T]hat right must be preserved even if the court believes the defendant will benefit from the advice of counsel." *Id.* This is because the right to counsel is the right to the assistance of counsel. The

substantial power of counsel to bind a defendant to legal positions can "only be justified . . . by the defendant's consent. . . . Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed by the Constitution, for, in a very real sense, it is not his defense." *Faretta v. California*, 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Where, prior to trial, a defendant "clearly and unequivocally" requests to represent himself, it is reversible error to prevent the defendant from proceeding *pro se*. *Id.* at 35; *see State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) (reversible error where "request to proceed *pro se* [is] clearly asserted by the defendant prior to trial."). A court must honor a knowing and voluntary decision to proceed *pro se* "out of that respect for the individual which is the lifeblood of the law." *State v. Barnes*, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014) *quoting Faretta*, 422 U.S. at 834. Violation of the right to self-representation is structural error requiring a new trial. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of right to self-representation "is not amenable to 'harmless error' analysis."); *State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 706 (2013) (same). *Farretta* error, where present and preserved, requires the appellate court to grant a new trial.

Trial counsel have a duty to ensure that a defendant's right to represent himself is honored. Failing to meet that obligation is ineffective and violates the right to counsel. *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("the right to counsel is the right to the effective assistance of counsel."). "In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsels[']' performance was deficient; and (2) there is a reasonable probability that, but for counsels[']' errors, the result of the trial would have been different." *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2009); *see also Strickland v. Washington*, 466 U.S. 668, 694 (1984).

In all cases, but particularly in capital cases, trial counsel has a duty to raise objections to safeguard the rights of the accused. In light of the stakes at issue in capital cases, "counsel must be significantly more diligent about litigating all potential issues at all levels in a capital case than in any other case." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 10.8 cmt. 2003. This duty includes "ensur[ing] that a full record is made of all legal proceedings in connection with the claim." *Id.* It also means making the motions required to preserve errors for review.

For example, this Court has held that where a defendant was charged with armed robbery, his counsel was ineffective for failing to request a continuance to prevent his trial *in abstentia* and secure his ability to enter an agreed upon plea. *See Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006). In that case, the defendant, on the day his trial was scheduled to begin, signed a plea agreement, which was also signed by his counsel and the prosecutor. *Id.* at 280 n.1, 639 S.E.2d at 55 n.1. After signing the agreement, the defendant left the courthouse, believing his counsel was going to seek a continuance.

The defendant's counsel informed the trial court that she did not want to proceed in his absence, but did not request a continuance. *Id.* at 280-81, 639 S.E.2d at 55. Such a motion was necessary to preserve the issue for review. For that reason, this Court held trial counsel's failure to move for a continuance was deficient performance. *Id.* at 282-83, 639 S.E.2d at 55. The defendant was prejudiced because he was ultimately convicted of a crime more serious than the one to which he could have pled guilty. *Id.* Absent the proper objection, the issue was not

cognizable on appeal, and trial counsel's failure to make the proper objection was deficient. Thus, counsel have a clear duty to assert claims to protect a defendant's Sixth Amendment rights.[4]

Here, trial counsel prejudicially failed to preserve the denial of Mr. Winkler's right to represent himself. Counsels' failure to do so fell below the standard of competency required in capital cases. *See Morris*, 371 S.C. at 282-83, 639 S.E.2d at 55. Mr. Winkler made not one, but three off-the-record requests to represent himself. App. 4220. As trial counsel noted, "for the trial as a whole[, they] were interest[ed] in trying to preserve as many potential errors as possible." App. 4542. Counsel was also aware that the basis for any constitutional objections needed to be on the record to preserve it for appeal. App. 4542. Thus, trial counsel had an obligation to make a record of Mr. Winkler's requests, and counsel had no strategic reason for failing to do so.

Had counsel made a record of Mr. Winkler's requests, this Court could have reviewed whether Mr. Winkler's right to self-representation had been honored. *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-14 (Ct. App. 2004) (noting general requirements for preservation). Because Mr. Winkler had thrice made requests to represent himself before trial, he was entitled to do so. The trial court's failure to honor those requests should have entitled him to

[4] *See also Pryor v. State*, 973 N.E.2d 629 (Ind. Ct. App. 2012) (counsel ineffective for failing to timely file demand for jury trial); *State v. Brown*, 873 N.E.2d 858 (Ohio 2007) (counsel ineffective in capital trial for failing to request a formal ruling on whether the defendant and the state's primary witness were actually married where martial privilege would be at issue); *People v. Owens*, 894 N.E.2d 187 (Ill. App. Ct. 2008) (counsel ineffective for failing to consult with the defendant concerning a motion to reconsider sentence required to perfect appeal); *Heckelsmiller v. State*, 687 N.W.2d 454 (N.D. 2004) (counsel ineffective for failing to preserve the record for appeal after two potential defense corroborating witnesses were excluded during the trial because counsel failed to ensure that they were sequestered as all other witnesses were; counsel's failure was to proffer the testimony the witnesses would have offered had they not been excluded).

a new trial. *Faretta*, 422 U.S. at 835. Thus, trial counsel's failure to make a proper record of Mr. Winkler's requests to represent himself prejudiced Mr. Winkler.[5]

Thus, this Court should grant Mr. Winkler's petition for a writ of certiorari to determine whether trial counsel was prejudicially ineffective for failing to preserve for appeal the denial of his right to represent himself.

II. TRIAL COUNSEL FAILED TO OBJECT TO AND/OR ADEQUATELY IMPEACH THE STATE'S BALLISTICS EVIDENCE.

At trial, the State called Vello Paavel, an employee of the State Law Enforcement Division ("SLED") to testify as an expert in the field of firearms and toolmark identification. Wilson raised no objections to Paavel's qualification, stating "[j]udge, he's eminently qualified." App. 1759. Paavel testified that he examined two firearms, a Walther PPK .380 pistol, which was recovered under a bed pillow in the victim's apartment after the shooting, and a Jennings Bryco .380 pistol, which was in Winkler's possession at the time of his arrest approximately two weeks after the crime. Paavel also received a damaged bullet which he compared to test firings from each weapon. App. 1764. Paavel told the jury that, through this comparison, he was able to make conclusive inclusion or exclusions because "no two bullets will be marked exactly the same from two different barrels. Each barrel has unique, individual characteristics. . . . [E]xaminers can compare bullets to each other and determine whether or not the bullets were fired by a particular firearm." App. 1772.

Regarding the Walther, Paavel concluded that "[t]his particular bullet was not fired by the Walther pistol." App. 1770. In response to the solicitor's next question – "any question about that

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[5] It is no answer that the trial court passed on and denied Mr. Winkler's request to represent himself, made in the midst of trial. The issue here is that trial counsel failed to ensure Mr. Winkler's right to self-representation was preserved for appellate review. *Heckelsmiller*, 687 N.W.2d at 460 ("the significant point [is not whether the defendant would have been acquitted, rather it] is that counsel's failure to make an offer of proof prevented a meaningful appeal.")

at all?" – Paavel responded, "no question, sir." *Id.* Regarding the second pistol, Paavel "concluded that the fired bullet, which is indicated as State's Exhibit Number 34, was fired by the Jennings Bryco pistol, which is State's Exhibit Number 36. . . . No question [about it.]" App. 1787. Wilson briefly cross-examined Paavel, focusing most of his examination on issues related to Wilson's claim that the bullet should have been sent for DNA testing prior to Paavel's examination. Trial counsel did not, however, seek to restrict Paavel from testifying that his results were absolutely certain, nor did counsel object to Paavel's improper claim of infallible test results. Moreover, trial counsel failed to effectively cross-examine Paavel about the inherent limits and unreliability of ballistics examination.

At the time of Winkler's capital trial, several courts had identified serious questions surrounding the use and general reliability of expert ballistics testimony. *See United States v. Monteiro*, 407 F.Supp.2d 351, 372 (D. Mass. 2006) ("Because an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a "match" to an absolute certainty, or to an arbitrary degree of statistical certainty."); *United States v. Green*, 405 F.Supp.2d 104, 120-22 (D. Mass. 2005) (discussing ways in which ballistics evidence fails to meet *Daubert* criteria regarding, inter alia, testability, reliability, and error rates); *United States v. Diaz*, No. 05-167, 2007 WL 485967 at *11-12 (N.D. Cal. Feb. 12, 2007) (citing *Monteiro's* conclusion that no scientific methodology exists to support a finding of a match to an absolute certainty); *see also United States v. Willock*, 696 F.Supp.2d 536, 570 (N.D. M.D. Mar. 23, 2010) (ballistics testimony admissible only if "the examiner is prevent from making outlandish and unsupported pronouncements about the degree of certainty toolmark evidence of his or her identification."); *United States v. Taylor*, 663 F.Supp.2d 1170, 1180 (D. N.M. Oct. 9, 2009) (limiting forensic

examiner's conclusion to bullet coming from particular weapon to "reasonable degree of certainty in the firearms examination field.").

On cross-examination during the PCR hearing, Paavel conceded that the criticisms raised by these courts and others are valid. For example, Paavel admitted that the standard for declaring a "match" between a suspect bullet and a test-fired bullet is "subjective" and basically turns on whether each individual examiner, upon visual examination, believes there are sufficient similar markings to declare a match. App. 4692-94. In other words, the examiner looks at each object for comparison and decides whether there is "sufficient agreement" to declare a match. Paavel explained that "agreement is sufficient when it exceeds the agreement that you would expect to see in a known non-match and it is equal to what the agreement that you would normally see in a known match." App. 4668; *see also*, App. 4694 ("Q: Okay. And another way to say that is sufficient agreement is when you think there's enough agreement to call it a match? A: Right.").

Paavel further admitted that "there isn't a standard that's accepted by anybody or everybody rather." App. 4694. Instead, "[t]he criteria that is used is established literally by each examiner based on their experience." App. 4692. As a result, it is quite possible that another examiner – based on his own personal experience different from Paavel's experiences – might have a different subjective standard in mind for declaring a match or non-match. App. 4695-96. Paavel agreed that it is inappropriate for a ballistics examiner to testify about his or her results in terms of "absolute certainty." App. 4696. He claimed that he would not use terminology such as "absolutely" or "there is no question about that" to describe his findings. App. 4697.

In addition to criticisms about the assumptions and subjective methods underlying ballistics testimony in general, Paavel admitted to committing several questionable practices in this particular case, such as failing to photograph and document much of his work and reaching a

conclusive decision to exclude the Walther PPK even though it has the same "class characteristics" as the Jennings Bryco (i.e., both guns have the same number of lands and grooves, the same direction of twist, and the same form of rifling). App. 4683-84; 4685-4691; 4698-4701. Further, although Paavel's documentation was inadequate for his inclusion of the Jennings Bryco, it was wholly absent for his ultimate conclusion regarding the Walther. Paavel explained that there was no specific documentation, such as photographs, notes, documents or any kind of verification of his test results for the Walther. App. 4698-99. He stated that he would not normally include any information like that in his file "[b]ecause I'm saying that the bullet was fired by the Bryco." App. 4699. He also acknowledged that the FBI's policy is that it is improper to exclude a suspect firearm with the same general class characteristics as the bullet in question, but he felt his decision was justified in this case because "I'm making an elimination based on the fact that I make an identification on one." App. 4701.

> Q: So, the Walther is excluded because you think the Jennings [Bryco] is included?
>
> A: That's correct.

App. 4701.

Paavel's PCR admissions raise serious doubts about the State's reliance on his testimony at trial. Trial counsel failed to question Paavel about any of these issues and thereby failed to impeach his credibility and to point out weaknesses in the State's use of ballistics examination in general. Trial counsel's failure to adequately challenge this testimony was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

For the reasons stated above, this Court should grant *certiorari* and reverse for a new trial.

Respectfully submitted,

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September 30, 2014

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

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

v.

STATE OF SOUTH CAROLINA, ... *Petitioner/Respondent*

CERTIFICATE OF SERVICE

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

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 30th day of September, 2014, in Columbia, South Carolina.

Jill A. Rider
JILL RIDER