THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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*.

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RESTATEMENT OF THE QUESTION PRESENTED

Whether there is any evidence to support the PCR Court's conclusion that trial counsel was ineffective in failing to object after the trial court: (1) repeatedly refused to answer the jurors' questions or take other appropriate action during sentencing deliberations; and, (b) issued improper instructions to the jury under unduly coercive circumstances.

ADDITIONAL SUSTAINING GROUNDS

1. Whether the PCR Court erred in granting a directed verdict on Winkler's mitigation claims based on a finding that Winkler "failed to present any evidence of neurological and cognitive impairments or dysfunction," where, prior to the PCR hearing, the PCR Court: (1) found that neuroimaging and analysis was "reasonable and necessary" for Winkler to adequately investigate and prepare his PCR claims; but then, (2) denied Winkler's request for a brief continuance of the PCR hearing to allow sufficient time for the neuroimaging analysis to be completed?

2. Whether, at a minimum, Winkler is entitled to a new PCR hearing at which he will, for the first time, receive an adequate opportunity to develop and present evidence of his brain damage and related impairments?

STATEMENT OF THE CASE

Respondent-Petitioner, Louis Michael Winkler, Jr., was tried in January of 2008, in the Horry County Court of General Sessions, for the murder of his estranged wife. The State sought a death sentence. Following the State's presentation of evidence in the guilt-or-innocence phase, Winkler's trial attorneys, Ralph J. Wilson and Paul Rathbun, called no witnesses and presented no evidence. The jury found Winkler guilty of murder and all related charges. Thus, as the case proceeded into the penalty phase, Wilson and Rathbun had one, and only one, goal – to convince at least one juror to vote for life.

They attempted to do that by offering three basic types of evidence: (1) Winkler's history of depression, anxiety and substance abuse; (2) descriptions of Winkler as a loving son and husband and a good employee; and, (3) Winkler's good behavior in jail. Trial counsel did not investigate (and therefore did not offer) any evidence of brain damage or other neurological dysfunction, nor did they offer any evidence to explain how that damage related to Winkler's behavior leading up to and at the time of the crime. Moreover, after the jury's sentencing deliberations began, trial counsel failed to object and request appropriate instructions from the trial court when the jury repeatedly indicated that it was not able to reach a unanimous sentencing verdict.

The PCR Court correctly held that trial counsel was ineffective in their handling of the jury deliberation issues, and this Court should deny the State's Petition for Writ of Certiorari and allow the PCR Court's decision on this issue to stand. However, the PCR Court erred in refusing to grant a continuance of the PCR hearing to allow Winkler an adequate opportunity to obtain and present evidence of his brain damage. For this additional reason, the grant of penalty phase relief should be sustained.

REASONS THE PETITION SHOULD BE DENIED

I. THE PCR COURT DID NOT ERR IN FINDING TRIAL COUNSEL INEFFECTIVE REGARDING THE JURY DELIBERATION ISSUES.

A. RELEVANT FACTS

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

At 1:30 p.m. on Thursday, February 7, 2008, penalty phase jury deliberations began. App. 2917. Several hours later, at approximately 8:00 p.m., the trial court noted that the jury was still deliberating and had not had dinner, so the court proposed to bring the jury out and offer to order sandwiches. The parties agreed. The court informed the jury that any order for dinner would take over an hour to arrive, and then sent the jurors back to the jury room with instructions to have the foreperson let the clerk know if they would like to place an order. Shortly thereafter, the jury indicated that it had a question. At 8:15 p.m., the jury returned to the courtroom, and the trial court instructed them: "If you need to ask questions, just ask the foreperson to write it down and send it out to me. I'll be glad to see if I can answer the question about any evidence presented for you, or anything that's about the law or whatever. Just if you need to ask a question, just write it down. I'll see if I can answer it." App. 2920. At some unknown time thereafter, the jury sent out its first question:

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

App. 2921.

The trial judge announced his belief that "this is not a communication that they're deadlocked. . . . I don't interpret this question as being an *Allen* – a deadlocked statement."[1] App. 2922. The judge stated his plan was to send back his own note, reading: "I cannot answer the question the way you have phrased it. Please let me know if you have any other questions." App. 2923. Trial counsel raised no objection to this course of action.

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

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

App. 2925.

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

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

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

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

> Mr. Foreman, ladies and gentlemen of the jury, you stated that you've been unable to unanimously agree on the decision in this case. As I instructed you earlier, the decision of the jury must be unanimous.
>
> When a matter is in dispute, it isn't always easy for even two people to agree. So, when twelve people must agree, it's even more difficult. In most cases, absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous decision.
>
> In doing so, you should consult with one another, express your own views, listen to the opinions of your fellow jurors, tell each other how you feel, and why you feel that way. Discuss your differences with open minds. Although the decision of the jury must be unanimous, every one of you has a right to your own opinion. The verdict, the decision you agree to must be your own decision, the result of your own convictions, and you should not give up your firmly-held beliefs merely to be in agreement with a fellow juror.
>
> The majority should consider the minority's position, and the minority should consider the majority's position. You should carefully consider and respect the opinions of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the question before you based on the law and the evidence in this case.
>
> Now, ladies and gentlemen of the jury, I'm going to give you an option at this time. I'm going to ask you to return and continue deliberations with the hope that you can arrive at a decision, a unanimous decision within a reasonable time. If you wish to do so, to continue deliberations tonight to see if you can come to a unanimous decision within a reasonable time, then I'll be glad to let you do so. I'll let you make the decision. If you'd rather go back to the hotel room, come back tomorrow to see if you can reach a

> unanimous decision in a reasonable time, you can do that. I will let you make the decision.

App. 2928-29.

The jury decided to return to the hotel, and exited the courtroom at 12:46 a.m. App. 2931. When court resumed at 9:00 a.m. the following day, the trial court invited the jury to let him know if they wanted to hear the *Allen* charge again, and two jurors responded that they did. App. 2932-34. Trial counsel initially objected, saying, "I don't want them to have it again," but later withdrew his objection. App. 2834, 2936. The trial court gave an essentially identical *Allen* charge, and the jury returned to deliberations at 9:18 a.m. App. 2937-38. They returned with a death verdict less than one hour later. App. 2939.

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

> Q: [B]acking up a bit, in response to the first note you suspected at least some of them were hung?
>
> A: Yes, sir.
>
> Q: And, and if they deadlocked you expected the Court to give an *Allen* charge?
>
> A: I expected they would before he would just declare a mistrial, yes.
>
> Q: And again your goal is to obtain a life verdict, of course?
>
> A: Sure.
>
> Q: Whether it's by a unanimous vote for life or a non unanimous outcome?
>
> A: Eleven to one is good as twelve zero.
>
> Q: And you know that an *Allen* charge can generally only properly be given once?

A: Yes.

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

A: Okay.

Q: That's your understanding?

A: That's my understanding.

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

Former Juror Lauren Roughton testified in PCR that, initially, she and two other jurors were in favor of life.[2] App. 4408. They were confused, however, about what would happen if

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[2] Roughton testified under subpoena issued by the State. App. 4200. Prior to the PCR hearing, Winkler sought to introduce an affidavit from Roughton, which touched on this issue as well as a separate issue alleging that another juror changed his vote as a result of threats of physical harm and intimidation. The State objected to admission of Roughton's affidavit and subpoenaed her and other jurors to the PCR hearing, but moved *in limine* to preclude any jurors from testifying under Rule 606(b), SCRE. App. 4197. The PCR Court denied the motion *in limine*, but instructed the State to make contemporaneous objections during any juror testimony when the questions related to a topic that the State believed was inadmissible. App. 4200-01. The State indicated during Roughton's testimony that it had no specific objection regarding "things that she knew," but only objected to hearsay regarding what other jurors might have said. App. 4409. In fact, many of the most salient points of information on this topic were developed as a result of the State's own cross-examination of Roughton. Accordingly, the State's arguments that Roughton's testimony was inadmissible – now raised in its Petition for Writ of Certiorari – are not preserved for this Court's review. *See, e.g.*, *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998) (a motion *in limine* is preliminary, and is insufficient to preserve an issue for appellate review). To preserve an objection for appellate review, counsel must make a contemporaneous objection and obtain a final

they could not reach a unanimous decision. Roughton explained that it was frustrating and difficult because the jury sent out multiple notes asking for clarification that were never answered. App. 4409-10. She ultimately changed her vote to death – not because she believed it was the right outcome, but because she felt she was not "strong enough to stay with what I felt and, and not getting answers to questions that we needed answers or I needed answers to." App. 4410-11.

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

> Q: Okay, so he, am I right he charges you again the same thing he had told you the night before word for word, that you didn't have to violate your convictions, you should listen to the opinions of each other, and you shouldn't just agree to just agree, it should be your own decision?
>
> A: It still doesn't answer the question. I remember at the time, though, we wanted to know if we didn't agree what were the ramifications if we didn't agree. He's telling us we have to, so someone has to change their convictions.
>
> Q: Well he doesn't say you have to agree . . .
>
> A: Well he says it has to be unanimous.

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

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

---

ruling at that time. *See, e.g., State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[A] party must have a contemporaneous and specific objection to preserve an issue for appellate review."). It is disingenuous for the State to now complain that testimony from the very witness it subpoenaed, and attempted to use to its own advantage, should not have been admitted at trial. *See, e.g., State v. Beam*, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct. App. 1999) ("A party may not complain of error caused by his own conduct."); *State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008) ("A party cannot complain of prejudice from evidence to which he opened the door.").

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

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

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

A: Right.

Q: But can you tell me what ---

A: My, my fear ---

Q: --- your ---

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

App. 4421-22. Finally, the State reviewed the evidence of the crime and the aggravating facts of the case and demanded, "are you still telling this Court that he did an evil deed but he's not an evil person?" App. 4426. Roughton explained:

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

App. 4426.

The PCR court concluded that trial counsel was ineffective in their handling of the jury deliberation issues, and Winkler was prejudiced by their failures because "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." App. 5215.

B. ARGUMENT

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

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

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

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

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

App. 2928 (emphasis added). This instruction did not answer the jury's question about what would happen if they could not reach a unanimous decision.[3] To the extent this confusion "pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing [Winkler] to death and [risking the possibility of a retrial or release]." *Simmons*, 512 U.S. at 161; *see also State v. Baby*, 946 A.2d 463, 489 (Md. 2008) (holding the trial court's reference to previously provided

[3] The United States Supreme Court has held that a death sentence is not "arbitrary within the meaning of the Eighth Amendment" simply because the jury is not instructed as to the consequences of their failure to agree as a routine matter in every case. *Jones v. United States*, 527 U.S. 373, 381 (1999). Winkler's argument here, however, is that, under the circumstances of this particular case, once the jury indicated confusion on this specific point and requested further instruction, it was a violation of Due Process, the Eighth Amendment, and South Carolina law for the trial court to refuse to provide a legally accurate answer.

instructions on the elements of rape was not sufficient to address the jury's confusion on the effect of withdrawal of consent because "the definition makes no reference to the issue . . . central to the jury's questions"). Trial counsel was ineffective in failing to object to the court's refusal to give "a straight answer" to the jury's question. *Simmons*, 512 U.S. at 165; *see also Strickland v. Washington*, 446 U.S. 668 (1984).

Second, trial counsel should have objected to the trial court's failure to give a proper *Allen* charge when the first note came out. Trial counsel admitted that he believed from the very first note that the jury was indicating a deadlock. App. 4574. Trial counsel also acknowledged that if the trial court had given an *Allen* instruction following the first note, any further indications of deadlock would likely have resulted in an automatically imposed life sentence. App. 4574-75; S.C. Code Ann. §§ 14-7-1330, 16-3-20(C). Further, a jury is not required to use any specific language such as "hopelessly deadlocked" or "gridlock" to convey that the jury is at an impasse. *See, e.g., United States v. Wecht*, 541 F.3d 493, 509 & n.7 (3d Cir. 2008); *United States v. Rodriguez*, 67 F.3d 1312, 1319 (7th Cir. 1995). Common sense dictates that the jury's question in this case, asking "what happens if *we're* not able to reach a unanimous decision?" (after more than six hours of sentencing deliberations) inferred that the jury was having difficulty reaching a verdict. Trial counsel was ineffective in failing to request further instructions upon receipt of the first jury note.

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

(1) whether, viewed as a whole, the charge was directed to the minority jurors;

(2) whether the trial court used "mandatory language";

(3) whether there was an inquiry into the jury's numerical division, which is generally coercive; and,

(4) the timing of the ultimate verdict.

Id. at 492-94, 552 S.E.2d at 716-18. This Court concluded that the *Allen* charge in *Tucker* was unconstitutionally coercive because: (1) viewed as a whole, the charge was directed to the minority juror since the trial judge knew, and the jury knew that he knew, that there was only one holdout juror after the jury *sua sponte* disclosed its division of 11 to 1; (2) the trial judge did not use any mandatory language, but did inform the jury that "it's important that jurors reach a unanimous verdict," (3) although the trial judge did not inquire into the jury's numerical division, he did fail to take any action to prevent the jury's self-reporting; and, (4) the jury returned a death sentence approximately an hour and a half after receiving the *Allen* charge. *Id.* at 493-94, 552 S.E.2d at 717-18. This Court concluded:

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

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

This case is on par with *Tucker*. As in *Tucker*, when the trial court gave the *Allen* instruction, everyone knew that there was only one holdout juror remaining because the jury note stated: "We have one juror that is not participating in deliberations making it difficult to reach a final decision! We are currently at 11 to 1." Trial Court Exhibit 25. In fact, the *Allen* charge given in Winkler's case was even more clearly coercive than the one this Court condemned in

Tucker because, here, the trial court not only knew the jury's numerical division (and the jury knew that he knew), but the trial court was also aware that the jury had repeatedly expressed confusion about the consequences of a non-unanimous verdict. Instead of answering this question directly, the trial court used mandatory language in his *Allen* charge that specifically mislead the jury on the very point of confusion central to their deliberations. The trial court instructed the jurors: "you stated that you've been unable to unanimously agree on the decision in this case. As I instructed you earlier, the decision of the jury must be unanimous." App. 2928. Throughout the short instruction, the trial court used the words "unanimous" and "unanimously" seven (7) times. App. 2928-29. Although the trial court did advise the jurors to carefully consider and respect the opinions of others, he also repeatedly stated that "the decision of the jury must be unanimous," or some variant thereof. *Id.*

Moreover, the trial court in Winkler's case never took any action to prevent the jury from self-reporting its numerical division, despite multiple opportunities including three notes that the trial court itself sent back to the jury, as well as several times in which the jury returned to the courtroom for additional instructions. When the trial court gave the *Allen* charge, it was 12:26 a.m.; the jurors had not had dinner; the trial court had repeatedly rebuffed the jurors' efforts to seek clarification on what would happen if they could not reach a unanimous sentencing verdict; and, the jurors had been deliberating for approximately eleven (11) hours. The jury deliberated less than one hour after receiving the *Allen* charge before returning a death verdict. As a result of the totality of these circumstances, the import of the *Allen* charge here was that the single remaining holdout juror "should not prevent the majority from imposing the death penalty." *Tucker*, 346 S.C. at 494, 552 S.E.2d at 718. Trial counsel was ineffective in failing to object to the *Allen* charge as unconstitutionally coercive.

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

II. WINKLER IS ALSO ENTITLED TO PENALTY PHASE RELIEF BECAUSE HE WAS DEPRIVED OF AN OPPORTUNITY TO DEVELOP AND PRESENT EVIDENCE OF BRAIN DAMAGE.

A. RELEVANT FACTS

Undersigned counsel were appointed to represent Winkler in his PCR proceedings on June 24, 2011. PCR counsel reviewed the trial record, obtained and reviewed trial counsel's files, and began interviewing Winkler and his family members and friends. Early in the PCR investigation, counsel suspected the possibility of brain damage, and asked the PCR Court to authorize funding for consultation with a neuropsycholgist. The PCR Court granted this request on September 9, 2011. Order Sept. 9, 2011. Kris Herfkens, a neuropsychologist from Atlanta, Georgia, recommended in a letter to PCR counsel that they continue their investigation of brain damage by obtaining brain images and quantitative analyses of those images. Specifically, Dr. Herfkens stated, "it would be very useful to have neuroimaging of Mr. Winkler," and noted that "[a] neurologist or neuropscyhiatrist would have to refer for and interpret that testing." Ex Parte Second Mot. For Authorizing Funds at Ex. 2 (Nov. 3, 2011). Such imaging and consultation would provide useful "information about Mr. Winkler's neurologic status." *Id.*

One day after receiving Dr. Herfkens's letter, undersigned counsel asked the PCR Court to authorize funding for an MRI, a PET scan, and quantitative analyses of both images.[4] Undersigned counsel explained:

> Quantitative analysis is by far the most accurate and reliable way in which to determine if an individual has brain abnormalities and minimizes the risk of subjectivity and error by a radiologist. . . . Additionally, quantitative analysis allows for the comparison of the MRI and PET data in Mr. Winkler's case with data gathered from other imaging studies in persons with both normal and abnormal brains.

Ex Parte Second Mot. For Authorizing Funds at 9 (Nov. 3, 2011). On November 21, 2011, the PCR Court found that the imaging and analysis were both "reasonable and necessary" for the competent representation of Winkler. Ex Parte Order Authorizing Funds at 3 (Nov. 21, 2011). The PCR Court ordered the "Commission on Indigent Defense provide Applicant with state funds to secure the services and assistances set forth below," including the PET, MRI, and analyses of them. *Id.* at 4.

Approximately five business days later, PCR counsel informed the PCR Court that they had begun the process of having the neuroimages taken at a local hospital, "but ha[d] been advised that it will take approximately 4 to 6 weeks before the initial testing can be completed and approximately 6 weeks after that before additional analysis can be conducted." Mot. to Alter PCR Scheduling Order at 2 (Nov. 30, 2011). The PCR Hearing was scheduled to take place on June

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[4] The request was based on investigation undertaken up to that point, including newly uncovered evidence of head injuries. Both the imaging and analysis, according to counsel's request, were "required for counsel to conduct an adequate investigation, particularly an investigation into any neurological deficits." Ex Parte Second Mot. For Authorizing Funds at 8 (Nov. 3, 2011). PCR counsel noted that there were several incidents that could have been the cause of brain damage for Mr. Winkler, and that the assistance of an appropriate expert "may be able to explain an etiology of Mr. Winkler's behaviors that trial counsel unreasonably failed to uncover." *Id.*

18, 2012.[5] Due to concerns about the time required for completion of the brain imaging and analysis, undersigned counsel moved the PCR Court to continue the hearing date by ninety (90) days. *Id.* at 4. The PCR Court denied this motion.

On February 7, 2012, the neurologist at MUSC who had planned to conduct the neuroimaging informed PCR counsel that he was unable to obtain a PET scan because of Winkler's likely undiagnosed diabetes. He explained:

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

Mot. to Alter Scheduling Order at Ex. 2 (April 10, 2012). The neurologist noted that the high blood sugar content was "very unlikely to be the result of not eating," both because it was such a "high concentration" and because "Mr. Winkler reported compliance with the dietary restrictions [necessary for a PET scan], including fasting." *Id.* The next week, undersigned counsel wrote the Department of Corrections and requested that "Mr. Winkler receive testing and treatment for his [elevated] blood sugar." Mot to Alter Scheduling Order at Ex. 3 (April 10, 2012). The Department of Corrections ultimately diagnosed and treated Winkler for diabetes. Supp. App. 64-71.

According to the neurologist, who reviewed Winkler's medical record from the Department of Corrections, even though Winkler had begun treatment for diabetes, his blood sugar remained "far enough outside of the normal range" that an accurate PET scan was not possible.

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[5] The PCR Court had previously selected this hearing date and issued an order on September 21, 2011, setting the hearing to begin on June 18, 2012. Order (Sept. 21, 2011).

Mot. to Alter Scheduling Order at Ex. 4 (April 10, 2012). The neurologist offered, "After Mr. Winkler's glucose has sufficiently improved, we would be happy to reschedule him for PET imaging." *Id.* On April 5, 2012, Dr. Ruben Gur's office informed counsel for Winkler that after it received the PET imaging, the analysis normally takes six to eight weeks to complete. *Id.* After the analysis was complete, it would take another week or two to schedule a meeting between Dr. Gur and counsel for Mr. Winkler to discuss the results. Under no circumstances would Winkler's imagining and analysis, and related investigation, pleadings, and discovery, be completed within the timeframe established in the PCR Court's scheduling order.

On April 10, 2012, Winkler moved again to continue the PCR hearing. The motion noted that, despite his counsel's best efforts and through no fault of Winkler's, the imagining and analysis would not be complete in advance of the hearing. Winkler further noted that depending on the results of the analysis, "counsel will most likely need to conduct additional investigation with lay witnesses, interview trial counsel, and consult with other experts." Mot. to Alter Scheduling Order at 3 (April 10, 2012). The temporary impossibility of completing the imaging was the primary basis for the motion.[6] In support of the motion, Winkler provided documentary evidence of his efforts to obtain brain imaging and analysis.

On April 20, 2012, ten months after counsel for Winkler had been appointed, the Motion to Alter or Amend the Scheduling Order was denied. Order at 3 (Aril 20, 2012). The PCR Court explained, "[T]he court feels that the applicant has had ample time to formulate his pleadings and

[6] In the motion, Mr. Winkler also noted the efforts to obtain "documentary evidence related to potential claims." Mot to Alter Scheduling Order at 3 (April 10, 2012). Despite having received informal requests for the evidence, some agencies were slow to respond. In response, Mr. Winkler eventually subpoenaed the records. These subpoenas were still pending and were offered as an additional reason for the continuance. Mr. Winkler also requested additional time to investigate "mental health disorders with an etiology originating on his father's side of the family." *Id.* at 4.

prepare for the trial of this case." *Id.* As scheduled, the PCR Court would hold a merits hearing from June 18 to 21, 2012.[7] Among other claims, the PCR Court would address whether Winkler's state and federal constitutional rights were violated when trial counsel, "failed to investigate and present evidence of applicant's neurological and cognitive impairments and/or dysfunction." App. 4026.

At the beginning of the merits hearing, Winkler made a proffer related to the brain imaging and the denial of the motion to alter the scheduling order. Before accepting the proffer, the PCR Court expanded on why the motion had been denied: "[Y]ou said you couldn't get subpoenaed witnesses but I notice[d] that you didn't subpoena the witnesses until like two days before you filed your motion for a continuance, that type of thing." App. 4205. The PCR Court did not mention the imaging. The PCR Court accepted the proffer, which was offered to illustrate "what [counsel] would have been able to do had the continuance been granted." App. 4203. The proffer again outlined the efforts, described above, regarding the "timing of the investigation . . . related to the PET scan" and Mr. Winkler's undiagnosed diabetes. App. 4205; Supp. App. 1-72.

On August 15, 2012, the PCR Court entered its order granting Winkler sentencing-phase relief. App. 5206-16. The court also reached the merits of Winkler's claims related to his neurological and cognitive impairments:

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

App. 5212. This appeal follows.

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

B. ARGUMENT

Mr. Winkler has not had a meaningful opportunity to develop and present evidence of his neurological and cognitive impairments or dysfunction. Through no fault of his own, Winkler was unable to complete the reasonable and necessary investigation into those impairments. Instead, his undiagnosed diabetes—and the denial of a short extension—prevented the imaging and analysis from being completed in advance of his hearing, fatally undermining the process that should have provided him with an opportunity to develop evidence of his claim of these impairments and dysfunction. Because Winkler lacked this opportunity, the PCR Court's decision denying relief on this claim was not the product of a full and fair hearing. Thus, even if this Court were to accept review and reverse Winkler's sentencing relief, it should also remand to provide Winkler with an opportunity to develop and present evidence of his brain damage.

Congress and the Supreme Court have expressed a clear preference for the state courts to act as the primary forum for the development and resolution of a state prisoner's federal constitutional claims. *See, e.g.*, 28 U.S.C. §§ 2254(b), 2254(d), 2254(e) (1996); *Martinez v. Ryan*, 132 S. Ct. 1309, 1317-18 (2012); *see also Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) ("Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions."); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1399 (2011) ("'The federal habeas scheme leaves primary responsibility with the state courts . . .'") (quoting *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002)). This preference is "premised upon recognition by Congress . . . that state judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings." *(Michael) Williams v. Taylor*, 529 U.S. 420, 436 (2000). Where a state court fairly and accurately decides a state prisoner's constitutional claims, further federal review may be

precluded. *See, e.g., (Terry) Williams v. Taylor*, 529 U.S. 362, 386 (2000) ("Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions . . ."); *id.* at 375 ("On the other hand, errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ.").

The federal courts are equally concerned, however, with protecting the constitutional rights of individuals facing deprivation of liberty or life pursuant to the judgment of state courts. Thus, although state court proceedings are intended to be "the main event," state courts must nonetheless adjudicate federal claims in accordance with federal substantive and procedural law. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 950 (2007) (" . . . the state court failed to provide petitioner with the minimum process required . . ."); *id.* at 954 ("the factfinding procedures upon which the [state] court relied were 'not adequate for reaching reasonably correct results . . .'") (internal citation omitted). The presumption of state court competence does not always hold true. If a state court's adjudication of a federal claim suffers from one or more enumerated defects, the federal court may intervene.[8] 28 U.S.C § 2254(d).

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[8] Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Thus, a state court's resolution of the merits of a federal claim carries substantial consequences for a state court prisoner, depending on the quality of the process the state court uses to reach that decision. Where the process is robust, federal review may be entirely foreclosed. Where the review is fundamentally flawed, the review may be plenary.

The United States Supreme Court has held, in a number of contexts, that when a federal claim is asserted in state court, the state courts must also adhere to the applicable federal procedures if doing otherwise would frustrate, burden, or limit review of the federal claim. *See, e.g.*, *Felder v. Casey*, 487 U.S. 131, 150 (1988) ("Federal law takes state courts as it finds them only insofar as those courts employ rules that do not impose unnecessary burdens upon rights of recovery authorized by federal laws."); *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 296 (1950) ("This federal right cannot be defeated by forms of local practice."); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("[w]hatever springes (*sic*) the State may set for those endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made is not to be defeated under the name of local practice."). In *Felder*, for example, the Supreme Court held that a state court was prevented from applying a notice requirement to civil rights claims brought in state court under 42 U.S.C. § 1983 because it placed an undue burden on the asserted federal right. 487 U.S. at 141, 152. Similarly, in *St. Louis Southwestern Ry. Co. v. Dickerson*, the

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Under the plain language of the statute's opening sentence, the threshold question is whether the particular claim under federal habeas review "was adjudicated on the merits in State court proceedings." If so, a federal habeas court's authority to grant relief will be limited to certain conditions enumerated in broad terms by subdivisions (1) and (2). Subdivision (1) authorizes a federal court to remedy a constitutional violation where the state court's "adjudication of the claim . . . resulted in a decision that was contrary to . . . clearly established Federal law," or "involved an unreasonable application of[] clearly established Federal law." And subdivision (2) further authorizes a grant of relief where the state court's "adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Court found that a state court adjudicating a claim under the Federal Employer's Liability Act was required to instruct the jury regarding damages in accordance with federal, rather than state, law because the instructions affected the substance of the federal right itself. 470 U.S. 409, 412 (1985).

The Court recently reiterated this point in *Martinez*, in the context of collateral challenges to state court convictions. *See Martinez*, 131 S.Ct. at 1320 (holding that if a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review of a state prisoner's ineffective assistance of trial counsel claims, then further development and merits review in federal court will not be precluded). Federal claims raised on collateral review by state prisoners are especially susceptible to frustration by procedural limitations. *See Harris v. Nelson*, 394 U.S. 286, 291–92 (1969) ("And this Court has emphasized, taking into account the office of the writ and the fact that petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a 'procedural morass.'") (citing *Prince v. Johnston*, 334 U.S. 266, 269 (1948)). It is for this reason that certain procedures, mandated by federal law, must be utilized when state courts address the merits of well-pleaded federal claims in state post-conviction proceedings. *See, e.g.*, *Coleman v. Alabama*, 377 U.S. 129, 129–30 (1964) (if a petitioner has presented a well-pleaded federal claim for relief, he should be provided with an opportunity to obtain all evidence available to support his claims and to present that evidence to the court); *McNeal v. Culver*, 365 U.S. 109, 117 (1961) (if the petitioner's allegations give rise to a factual dispute, it is "incumbent" on the state court to "grant petitioner a hearing and to determine what the true facts are.") Because Winkler uncontestably presented well-pleaded federal claims for relief, the PCR Court was obligated to provide him with a full and fair opportunity to present those claims.

In *Coleman*, the petitioner moved for a new trial in state court claiming that, based on a long standing practice in the county where he was convicted, African-Americans were arbitrarily and systematically excluded from both the grand jury that true billed his indictment and the petit jury that convicted him. 377 U.S.at 129–30 (1964). The state court held a hearing on the motion, but sustained all objections to petitioner's counsel's questions regarding the jury discrimination claims. *Id.* at 130. Following the hearing, the court denied the petitioner's motion and the state supreme court affirmed the conviction, holding that the petitioner's federal jury discrimination claims were not supported by the evidence. *Id.* The Supreme Court granted certiorari, and held the state adjudication process was defective because the state courts had not provided the petitioner an opportunity to obtain and present evidence to support his claim. *Id.* at 133 ("[T]his Court must reverse on the ground that the defendant offered to introduce witnesses, to prove the allegations and the court declined to hear any evidence upon the subject.") (internal quotations and alterations omitted). Thus, *Coleman* establishes not only a right to a hearing, but the right to present evidence relevant to a petitioner's federal claims. To give effect to this right, a state court must provide a petitioner with an adequate opportunity to obtain and present available evidence to support his allegations.

Additionally, meaningful access to evidence and a fair opportunity to present all relevant evidence necessarily includes adequate funding for investigative and expert assistance. The Supreme Court has specifically acknowledged that adequate factual development may be impossible without access to expert assistance. *See Panetti*, 551 U.S. at 952 (petitioner, claiming incompetence to be executed in state post-conviction, was entitled to an "opportunity to make an adequate response to evidence solicited by the state court," including an opportunity to submit psychiatric evidence); *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (basic due process

requirements included an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination"); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (assistance of a psychiatrist was necessary to prepare an effective defense based on the defendant's mental condition).

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

Here, Winkler's case went off track when these state and federal procedural protections were not followed. As held by the PCR Court, Winkler demonstrated that the request for imaging and its analysis was "reasonably necessary" to competent investigation of his case. Yet, instead of receiving a short continuance to develop the evidence, Winkler was forced to go to a hearing lacking the opportunity to develop this "reasonably necessary" evidence.

The process went further off the rails when Winkler was blamed for the breakdown. His claim based on the evidence he was in the process of developing was denied on the merits, even though he had not been given an opportunity to finish developing the evidence. Specifically, the PCR Court found that Winkler "did not present any evidence that he suffered from neurological and cognitive impairments or dysfunction" and denied Winkler's claim on the merits for that reason. It was unfair to rule against Winkler for failing to present evidence that he had not been given the opportunity to develop.

In sum, Winkler did not receive adequate factual development, nor did he receive a meaningful opportunity to present the facts in support of his claims. Thus, the PCR Court below lacked the information that the court itself had found necessary to fairly adjudicate the merits of Winkler's federal claims in an informed, objectively reasonable manner. *See, e.g., Ex Parte Hawk*, 321 U.S. 114, 118 (1944) ("[W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised . . . a federal court should entertain his petition for habeas corpus, else he would be remediless."); *Moore v. Dempsy,* 261 U.S. 86, 92 (1923) (holding that the federal court should examine the facts and determine the truth of petitioners' allegations, given that "the [state court] corrective process afforded to the petitioners . . . does not seem sufficient").

CONCLUSION

For all of the forgoing reasons, this Court should deny Respondent's Petition for Writ of Certiorari and allow the PCR Court's grant of penalty phase relief to stand. In the alternative, this Court should remand for a new PCR hearing at which Winkler will, for the first time, receive an adequate opportunity to develop and present evidence of his brain damage and related impairments.

Respectfully submitted,

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December 17, 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
Appellate Case No. 2014-000904

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 **Return to 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:

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This the 17th day of December, 2014, in Columbia, South Carolina.

JILL RIDER