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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

LOUIS MICHAEL WINKLER, JR.,

RESPONDENT- PETITIONER,

V.

STATE OF SOUTH CAROLINA

PETITIONER- RESPONDENT.

RETURN TO RESPONDENT-PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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.

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether certiorari should be denied when the PCR Court's denial of relief upon the claim that trial counsel was ineffective for not objecting to the trial court's refusal to allow Winkler to discharge counsel and proceed pro se is supported by the record?

2. Whether certiorari should be denied when the PCR Court's denial of relief upon the claim that trial counsel was ineffective in his cross-examination of the State's firearms and toolmarks examiner is supported by the record?

STATEMENT OF THE CASE

During the May 2006 Term of the Horry County Court of General Sessions, Respondent-Petitioner Louis Michael Winkler ("Winkler") was indicted by the Horry County Grand Jury for Murder, Burglary in the First Degree, Assault and Battery of a High and Aggravated Nature, and Escape. (App. 3458-60). The State filed its Notice of Intent to Seek the Death Penalty on March 12, 2007. (App. 1976). In the Notice, the statutory aggravating circumstances asserted were that the murder was committed during the commission of a burglary, S.C. Code Ann. Section 16-3-20(C)(a)(8); and that the murder was of a witness or potential witness committed at any time during the criminal

process for the purpose of impeding or deterring prosecution of any crime under S.C. Code Ann. Section 16-3-20(C)(a)(11). (App. 1977).

On January 28 – February 8, 2008, Winkler was tried by a jury for murder, first-degree burglary, and assault and battery of a high and aggravated nature.[1] He was tried in the Horry County Court of General Sessions before the Honorable James E. Lockemy, Circuit Court Judge. Ralph J. Wilson and Assistant Public Defender Paul Elbert Rathbun represented Winkler. Solicitor J. Gregory Hembree, Deputy Solicitor Francis A. Humphries, Jr., and Assistant Solicitor Scott R. Hixson, all of the Office of the Fifteenth Judicial Circuit Solicitor, represented the State. On February 2, 2008, Winkler was convicted on all three charges. (App. 1903).

On February 8, 2008, the jury found there was evidence of both asserted aggravating circumstances beyond a reasonable doubt. (App. 2940). The jury recommended that Winkler be sentenced to death. (App. 2940). Judge Lockemy sentenced Winkler to thirty years confinement on the burglary conviction, and ten years confinement on the ABHAN conviction, both to be served concurrently with a death sentence for the murder. (App. 2949).

A timely notice of appeal was filed and served on Winkler's behalf on February 11, 2008. On appeal, Winkler was represented by Robert M. Dudek, Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Elizabeth A. Franklin-Best, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. On April 5,

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

2010, Winkler perfected his direct appeal with the filing of a Final Brief of Appellant, in which they asserted the following issues:

1. Whether the trial court erred by admitting the audio tape recording as a prior consistent statement under Rule 801(b)(1)(B), SCRE, when defense counsel implicitly and explicitly asserted that Jonathan G. fabricated his testimony when he stated he told Officer Knochs that it was his stepfather who shot his mother?

2. Whether the trial court erred in allowing the jury to review the transcript of the 911 tape when the jury was only allowed to see the transcript in the courtroom with the defendant and counsel present and only when the audio tape was played as requested by the jury?

3. Whether the trial court correctly held that it was within the court's discretion to grant or deny Appellant's Motion to proceed pro se when the motion was not timely made?

4. Whether the trial court abused its discretion when it denied Appellant's Motion to proceed pro se when the court determined that granting the motion would cause undue delay, the court had concerns regarding Appellant's ability to represent himself as the result of his preparedness and his anxiety condition, and there was the potential of jury confusion caused by the change in Appellant's representation?

5. Whether the trial court erred in not conducting a full Faretta inquiry when Appellant's request to proceed pro se was not governed by Faretta?

6. Whether the trial court erred in allowing defense counsel to present mitigation evidence to which Appellant objected when no timely objection to the testimony was made, and no argument regarding the allegation was presented on the record?

7. Whether the trial court erred in denying Appellant's motion for a directed verdict on the aggravating circumstance outlined in S.C. Code Ann. § 16-3-20(C)(a)(11) when there was substantial circumstantial evidence supporting the charge?

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

This Court heard oral arguments in the appeal on June 24, 2010. This Court subsequently issued its opinion affirming the convictions and sentence on August 16, 2010. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). (App. 3721-32). Winkler filed a timely petition for rehearing that was denied on September 22, 2010. (App. 3733-50). The Remittitur was also issued on September 22, 2010.

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

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

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

> 10 & 11(a) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 -- during the pre-trial and guilt-or-innocense phases of his capital trial – when trial counsel:
>
> (1) failed to object to the trial court's pre-trial refusal to permit Applicant to discharge appointed counsel and allow him to proceed pro se. See Strickland v. Washington, 466 U.S. 668 (1994); Faretta v. California, 422 U.S. 806 (1975);
>
> (2) failed to object to and/or adequately impeach the trial testimony of Mr. Vello Paavel, portions of which were improper, inaccurate, unreliable and inadmissible. See Strickland v. Washington, 466 U.S. 668 (1994); and,
>
> (3) failed to impeach the State's witnesses with evidence that Jonathan Grainger was not on the telephone with Elizabeth Craft at the time of the crime. See Strickland v. Washington, 466 U.S. 668 (1994).
>
> 10 & 11(b) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20 -- during the sentencing phase of his capital trial -- when trial counsel:
>
> (1) failed to investigate and present evidence of Applicant's neurological and cognitive impairments and/or dysfunction; and
>
> (2) failed to present mitigating evidence regarding applicant's change in demeanor and mental state before the crime and evidence that

the victim harassed and taunted applicant while he was on house arrest;

(3) failed to object when the trial court: (a) repeatedly refused to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict; and, (b) issued improper instructions to the jury under unduly coercive circumstances.

10 & 11(c) Applicant's right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 § 14 of the South Carolina Constitution, was violated by the trial court's refusal to permit him to discharge appointed counsel and proceed pro se.

10 & 11(d) Applicant's right to a fair and impartial jury determination of his sentence – free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3,14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated by the trial court's repeated refusal to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict and the court's improper instructions to the jury under unduly coercive circumstances.

10 & 11(e) Applicant's right to a fair and impartial jury determination of his sentence – free from the influence of passion, prejudice, or any other arbitrary factor – guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 3, 14 and 15 of the South Carolina Constitution, and S.C. Code § 16-3-25(C), was violated when Juror Jeron Wallingford was coerced into voting for a death sentence by threat of physical harm and intimidation by his fellow jurors.

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

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

Alphonso Simon, Jr. By Order filed August 15, 2014, the PCR Court granted post-conviction relief based upon Winkler's claim in Ground 10 & 11(b)(3). The PCR Court denied relief upon all of Winkler's other claims raised in the PCR action. The PCR Court set aside Winkler's death sentence and sentenced Winkler to life without parole. (App. 5215).

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

ARGUMENT

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

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984); Simpson v. Moore, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Id.

In order to prove deficient performance, the applicant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. '" Harrington v. Richter, 562 U.S. --, --, 131 S.Ct. 770, 787 (2011), quoting Strickland, 466 U.S. at 687. "The standard for judging

counsel's representation is a most deferential one." Id. at --, 131 S.Ct. at 788. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Butler v. State, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985), quoting Strickland, [466 U.S. at 690]. "An attorney is not required to anticipate potential changes in the law, which are not in existence at the time of the conviction." Patterson v. State, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004).

In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentence - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). Further, prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. Wong v. Belmontes, 558 U.S.15, 130 S.Ct 383 (2009). "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. at --, 131 S.Ct at 792, citing Strickland, 466 U.S. at 693.

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

"This court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Marlar v. State, 373 S.C. 275, 279, 644 S.E.2d 769, 771 (Ct.App.2007) (citing Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Custodio v. State, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, an appellate court will not affirm the decision when it is not supported by any probative evidence. Edmond v. State, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

I. This Court should deny certiorari upon Winkler's first claim for relief; The PCR Court's denial of Winkler's claim that trial counsel was ineffective in not objecting to the trial court's alleged denial of Winkler's request to relieve counsel and proceed pro se before the beginning of trial is supported by the record.

How the issue arose at trial

At Winkler's first appearance, Ms. Orrie West, Esquire, a public defender for Horry County, was appointed to represent him. (App. 2984). One of Winkler's trial counsel, Mr. Thomas Rathbun, Esquire, also of the Horry County's Public Defender's Office, was assigned to help assist with the case. (App. 2985). At the appointment of counsel hearing on June 15, 2006, Ralph Wilson, Esquire, was appointed to serve as first chair in Winkler's defense. (App. 2993-94). At the hearing, Winkler indicated that he found the Public Defender's Office to be very inadequate. (App. 2991). He complained that Ms. West called him by the wrong first name. (App. 2991). Winkler also indicated that he had concerns about Mr. Rathbun because Rathbun told him he had not tried a

murder case before. (App. 2992). When asked if he had any objections to Rathbun being appointed as second chair, Winkler indicated that he had an objection. (App. 2999). He indicated that he and Rathbun had argued more than anything. (App. 2999).

At the July 3, 2007 hearing, Winkler's trial counsel put on the record that Winkler was dissatisfied with Mr. Rathbun as counsel because of disagreements they had. (App. 3260). Wilson noted that a couple of weeks before the hearing, Rathbun went to see Winkler, and they had a conversation. (App. 3260). Rathbun and Wilson had gone to see Winkler the Friday before, but they were not able to see Winkler because he had been taken to Charleston to meet with a psychiatrist. (App. 3260). Rathbun went to see Winkler the following Monday. (App. 3260). On Tuesday, Winkler was upset and irate. (App. 3260). Winkler told Wilson that Rathbun had said some things. (App. 3261). The Court indicated that Winkler needed to know that unless something regarding Rathbun reached the point of incompetence or something that would lead to a preliminary determination of ineffective assistance, it was improbable that the court would remove Rathbun unless it was something that would seriously prejudice Winkler's rights to receive a fair trial. (App. 3262). Wilson indicated that even when there have been disagreements between Rathbun and Winkler, Wilson has been able to sit down with Winkler and decide on the correct course of action with Winkler's consent. (App. 3262). Winkler was heard in this matter. (App. 3263-64). He informed the court that Rathbun was telling him to take a plea, plead guilty. (App. 3264). He told the court that when he sought counsel about the issue, Rathbun told him to plead guilty. (App. 3264). Winkler interpreted that to mean that Rathbun thought he was guilty. (App. 3264). Rathbun responded that he believed Winkler heard what he wanted to hear and didn't hear what

counsel was saying. (App. 3265). Rathbun affirmed to the court that he would do his utmost to represent Winkler in a trial. (App. 3265). At no point in time during the hearing did Winkler request to represent himself.

On December 13, 2007, a continuation of the Blair hearing was held in Winkler's case. (App. 3300-20). At that hearing, Dr. Frierson indicated Winkler was competent to stand trial, and that his opinion about Winkler's competence to stand trial had not changed since a prior hearing in which Dr. Dwyer testified regarding Winkler's competency. (App. 3302-12). Further, the parties discussed matters relating to scheduling and the juror questionnaire. (App. 3314-20). At no point during that hearing did Winkler speak with the trial court on the record, and the record reflects that there may have only been a brief ex parte conversation between the trial court and Mr. Wilson at the end of the hearing. (See App. 3319).

During an ex parte hearing held before jury selection on January 28, 2008, counsel indicated that during the telephonic conference on the Thursday before this hearing, Winkler started giving details about an incident that occurred between Winkler and Wilson. The Court allowed Winkler the opportunity to get the information on the record. Winkler told the court that he wanted Wilson to go forward as counsel. (App. 32). However, he no longer wanted Rathbun to continue as counsel. He noted that eight months prior, he had requested Rathbun be relieved, and he was turned down. (App. 32). He informed the court that Rathbun got in his face, put his finger in Winkler's face, and touched his face. (App. 33). He then told the court that he gave Wilson his sister's pictures, and told Wilson that Wilson was calling her a liar. (App. 33). The court noted that it did not think that was enough to warrant counsel be relieved. (App. 33). Winkler

asked, "how can I get a fair trial with guys that are against me? I mean, they've actually --" (App. 34). Winkler informed the court that he did not believe they would do their best to get him acquitted. (App. 34).

In response, Wilson informed the court that he had done everything he knew to do to represent Winkler in the best fashion he knew. (App. 34). He also indicated that Winkler is antagonistic, and has been so since the first day. (App. 34). Wilson further noted that they had made every effort to protect every right, hired every expert they could think to hire, and have tried to talk with every witness they could possibly find. (App. 34). He informed the court they were prepared for trial. (App. 34). The fact that Winkler's personality got on Wilson's last nerve would not affect him and his ability to represent him in the fashion he was entitled to. (App. 34-5). Rathbun also stated he was ready for trial. (App. 35). Winkler complained that his attorneys did not find a witness. (App. 35-6). Wilson told the court that they had made an exhaustive effort to find the witness requested, and according to the witness' family, they did not know where he was. Winkler indicated he thought the witness was still in Horry County. Winkler indicated that his question regarding that witness was answered. He then noted that he was not sure if counsel had done their best efforts to find what he needed because he was in lockup. (App. 37). He also complained that no one has gone out to the murder scene and measured couches and counters. (App. 39). Wilson noted that they could not because the unit belonged to the daughter of the victim, not the defendant. (App. 39).

Winkler continually complained that counsel was advising his family that Winkler was likely going to be convicted. (App. 41-2). The Court responded that it could not chastise counsel for giving him an honest opinion. (App. 42).

> Any event, we're going to proceed then. There's no request for you to represent yourself. You're requesting another attorney. Since that's the case, I will not grant your motion. Now, you always have that option to represent yourself, which would be very inadvisable at this stage, but we will continue on with the case.

(App. 42, ll 12-17).

Counsel later put on the record that it disagreed with Winkler's request to make a certain argument in the opening statement because counsel believed it would require Winkler testify in the guilt phase of trial. (App. 1376-81).

Evidence During the PCR Evidentiary Hearing

During the PCR evidentiary hearing, Winkler testified that he requested to dismiss his attorneys and represent himself on two or three occasions. (App. 4220). He specifically recalled making the requests at a July 3rd hearing and a December 13th hearing. (App. 4220). He noted that the trial judge had indicated to him that he could discuss it at a later date. (App. 4221). Winkler could not point to anywhere in the transcript of the July 3, 2007 hearing where he made a request to represent himself. (App. 4225). He further could not point to any such request in the transcript at the December 13, 2007 hearing. (App. 4226-27). In fact, Winkler's PCR counsel stipulated that no such request was recorded in the transcript. (App. 4226-27).

Ralph Wilson, lead counsel at Winker's trial, testified that Winkler never indicated that he wanted to represent himself. (App. 4462). He further stated,

> Mr. Winkler never wanted to represent himself. Even, even at the sentencing phase that was not what he wanted. He got, but at the sentencing phase during that portion, and I know we haven't gotten there yet in this discussion, his thing was he wanted me to conduct the trial in a certain way and when I didn't do it the way he wanted me to do it he became irate. He then wanted to do it himself but he wanted me and Mr. Rathbun to be there with him but he wanted to, to, to do it himself because he didn't like the way that I did it or if I cross examined someone he would

> say I want you to ask them this question and I would say, well, you know, we can't ask that cause that's not relevant or that's not germane.

(App. 4462, l 18 – App. 4463, l 5).

Wilson also testified that every time Winkler indicated he wanted either Wilson or his co-counsel off of the case, he would bring the matter to the trial judge's attention at the next opportunity. (App. 4458). Wilson stated that the ex parte discussion he had with the trial court at the December 13, 2007 hearing had nothing to do with any complaints made by Winkler; instead, it was the trial court checking to make sure preparation was moving forward timely in light of matters that had resulted in a prior continuance being granted. (App. 4459-50).

PCR Court's Ruling

In its findings of fact, the PCR Court found as follows:

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

(App. 5207).

Further, in denying relief upon this claim, the PCR Court stated as follows:

> Winkler argues that his constitutional right to self-representation was violated by the trial court's refusal to allow him to discharge his attorneys and proceed in his criminal trial *pro se*.[2] Winkler further argues that he was denied his right to effective assistance of counsel due to his attorneys' failure to object to the trial court's pre-trial refusal to permit him to discharge his appointed counsel and proceed in the criminal trial *pro se*. However, a preponderance of the evidence indicates that Winkler

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

never requested to discharge his attorneys and proceed *pro se* until the sentencing phase of his trial. Prior to that time, Winkler only requested that he be appointed new attorneys; not that he be allowed to proceed *pro se*.

An accused may waive the right to counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed*pro se* must be ***clearly asserted*** by the defendant ***prior to trial***." *Id.* (emphasis added). "If the request to proceed*pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." *Id.* (citing *United States v. Singleton*, 107 F.3d 1091 (4th Cir.1997); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir.1979)). The sentencing phase of a capital trial does not constitute a separate trial. See S.C.Code Ann. § 16-3-20(B) (2003); see also *State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

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

(App. 5209-10).

Argument

This Court should deny certiorari upon this claim because the PCR Court's denial of relief is supported by the record.

The PCR Court correctly denied relief upon this claim. First, as noted by the PCR Court, Wilson and Rathbun were appointed to represent Winkler. (App. 2985, 2993-94). Winkler did become dissatisfied with his attorneys and requested that they be relieved and new attorneys appointed. (App. 33-4; see App. 41-2). As was noted by the trial court and by this Court in the opinion in Winkler's direct appeal, Winkler never made a

request to represent himself pre-trial. (See App. 42; see also Winkler, 388 S.C. at 586, 698 S.E.2d at 602). His assertions that he did want to represent himself were contradicted by the testimony of trial counsel. (App. 4462-63). Since a request was not made pretrial, and the trial court did not rule upon such a request pretrial, counsel had no opportunity to object to a denial of such a request. In each instance in the record that Winkler indicated he wanted a new attorney, counsel ensured the issue was heard by the trial court. (See App. 32-42, 3260-65). The trial court heard from Winkler and the attorneys at each instance, and the court denied the request to relieve counsel in both situations.

The PCR Court correctly found that trial counsel was not ineffective in this regard. It is well-established that an accused may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975). Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. at 834, 95 S.Ct. at 2541 (internal quotation omitted). A defendant's right to waive the assistance of counsel is not unlimited. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). The request to proceed pro se must be clearly asserted by the defendant prior to trial. Fuller, 337 S.C. at 241, 523 S.E.2d at 170 (citing State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998)); State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991), cert. denied, 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992). "If the request to proceed pro se is made after trial has begun, the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge." State v. Fuller, 337 S.C. at 241, 523 S.E.2d at

170 (citing U.S. v. Singleton, 107 F.3d 1091 (4th Cir. 1997); U.S. v. Lawrence, 605 F.2d 1321 (4th Cir.1979)).

Here, as found by the PCR Court (and as found by this Court in Winkler's direct appeal),[3] Winkler failed to show that he requested to represent himself prior to the start of his trial. Counsel could not be deficient for not preserving the issue where no such request was made. Thus, Petitioner could not show that counsel was deficient or that he was prejudiced. This Court should deny certiorari upon this claim.

II. This Court should deny certiorari upon Winkler's claim that trial counsel was ineffective in not properly challenging the ballistics evidence in this case; the PCR Court's denial of relief is supported by the record, and Winkler's argument for relief is without merit.

Vello Paavel is a firearms and toolmarks examiner with the State Law Enforcement Division. (App. 1757). He was qualified as an expert in firearms and toolmarks examination at Winkler's criminal trial. (App. 1760). Agent Paavel testified that he received a Walther PPK .380 caliber pistol with a magazine with 7 unfired cartridges; a Jennings Bryco .380 caliber pistol with a magazine five unfired .380 caliber cartridges; one fired projectile; and 18 unfired cartridges. (App. 1760-61). Paavel testified that his examination of the Walther PPK pistol indicated the firearm had not been fired since the last time it was cleaned, or the last time the barrel was oiled. (App. 1769). Paavel determined the Walther pistol had not fired the projectile he examined. (App. 1770). Paavel also testified that the magazine for the Walther pistol was full when he received the weapon. (App. 1773).

[3] State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010).

Paavel further testified that he examined the Bryco pistol, and it had been fired at some point in time. (App. 1775). Paavel noted the magazine for the Bryco held six cartridges, and there five in the magazine he examined. (App. 1777). Paavel concluded the fired projectile he was provided was fired by the Bryco pistol. (App. 1787).

During the cross-examination, Paavel noted the bullet was definitely dented and damaged. (App. 1788). He further noted that he did not see anything on the bullet before he decontaminated it for his examination. (App. 1789). Paavel testified that he test fired the Bryco pistol four times, and he did not have any misfires. (App. 1791-92). He also noted that the Walther pistol had dust, lint, and oil, and he could not say when the oil was put in the pistol or when the lent got into the pistol. (App. 1792-93). Paavel also testified about elemental bullet lead analysis, which at one point in time was used by the FBI as a means to determine whether bullets had a common origin. (App. 1794-95). He noted that it was later determined that the interpretation of the results in elemental bullet lead analyses was overstated. (App. 1795). During redirect, Paavel testified that no such elemental bullet lead analysis was performed in this case. (App. 1796).

During the sentencing phase of Winkler's trial, Winkler testified that he was at the condo when the victim was shot. (App. 2505-07). Winkler claimed that when he went inside the condo, he saw Roger Grainger, the victim's first ex-husband, standing behind Jonathan with a pistol in his hand. (App. 2508). Winkler asserted that it was Roger who shot the victim. (App. 2508-09). He further claimed that he knocked Roger down, and Roger dropped the gun. (App. 2509). Winkler then grabbed the gun and left the scene. (App. 2509-10).

During the PCR evidentiary hearing, trial counsel testified that during the course of the representation, Winkler's version of what occurred on the day of the shooting changed over time.

> [O]riginally his story was he didn't know what happened, that was the original story, okay. As it progressed the working story became Roger Grainger and him tussling over the gun. Now that, that transfigured itself over a period of time and kind of metamorphized into, to the, the, the, the, them having to struggle and stuff, but that was developed over a period of months. That was not the original story, no, sir, but in the end that was his story that Roger Grainger was there, that he and Roger Grainger struggled over the gun, that Roger Grainger got control of the gun, the gun went off and killed Becky.

(App. 4479, l 18 – App. 4480, l 4). Trial counsel further testified that in light of this story from Winkler, he was not concerned about the weapon. (App. 4480). Counsel noted that there was no question the gun retrieved from Winkler when he was arrested was the one that killed the victim; the issue was who was handling the gun when it was fired. Id.

Also, Vicki Childs, one of the fact investigators used by the defense in preparing for trial, testified that Winkler had accused Roger Grainger of being the one who shot the victim. (App. 4734).

The PCR Court denied relief upon this claim. In its findings of fact, the PCR Court found

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

(App. 5207-08). Further, the PCR Court denied relief upon this claim, stating,

> Next, Winkler argues that he was denied effective assistance of counsel when his attorneys failed to object to and/or adequately impeach the trial testimony of the State's firearm and toolmark expert, Mr. Vello Paavel. Winkler argues that his attorneys should have challenged Mr. Paavel's testimony that the bullet that killed the victim was fired from the Jennings Bryco pistol found in Winkler's possession. However, until Winkler filed this action for post-conviction relief, he never disputed that the fatal shot was fired from the Jennings Bryco pistol. The defense trial strategy was that Grainger, not Winkler, fired the fatal shot.
>
> Based upon Winkler's pre-trial account to his attorneys that Grainger shot the victim with the Jennings Bryco pistol, his attorneys challenged the State's failure to find Winkler's fingerprints or DNA on the Jennings Bryco pistol. Challenging whether or not the bullet that killed the victim was fired from that pistol would serve no purpose since Winkler acknowledged to his attorneys while preparing for his criminal trial that the victim was shot by Grainger with the Jennings Bryco pistol. Therefore, his attorneys' failure to challenge Mr. Paavel's opinion that the victim was shot with the Jennings Bryco pistol is not ineffective assistance of counsel and Winkler's request for post-conviction relief on this ground should be denied.

(App. 5210-11).

Argument

This Court should deny certiorari because the PCR Court's denial of relief is supported by the record. Counsel did testify that the defense strategy in dealing with the gun was strongly influenced by Winkler's assertions that he was present when the victim was shot, that Roger Grainger shot the victim, and that Winkler took the gun away from Grainger. (App. 4479-80). Both counsel's testimony and the investigator's testimony clearly reflected that Winkler had maintained the gun was shot by Grainger. (App. 4479-80, 4734). This is further supported by statements made by Winkler during his competency examination in which he again asserted Grainger fired the shot that killed the victim, and Winkler got the gun from Grainger after the shot was fired. (App. 5173).

Furthermore, Petitioner's testimony relayed this version of events during the sentencing phase of his trial. (App. 2508-09). In light of the counsel's testimony, the investigator's testimony, Winkler's testimony during the sentencing phase, and the other evidence in the record that showed Winkler's version of events reflected he was in possession of the weapon used to kill the victim when he was arrested, it was not unreasonable for counsel to not strongly challenge the identification of that gun as the gun that fired the projectile retrieved from the crime scene. Trial counsel gave a valid strategic reason for not attempting the challenge that Winkler says he should have done at trial, and that strategy was supported by the record.

"In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

Further, the reasonableness of counsel's actions must be viewed in the context of the time period they took place, and not in hindsight. See Butler v. State, 286 S .C. 441, 334 S.E.2d 813 (1985) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.") (quoting Strickland); Simpson v. Moore, 367 S.C.

587, 627 S.E.2d 701 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case."); see also Harden v. State, 360 S.C. 405, 602 S.E.2d 48 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."). As evidenced by the fact Winkler can only point to three district court rulings (two in Massachusetts and one in California) that were filed before Winkler's trial, the type of challenge Winkler asserts counsel should have made at trial just simply was not common practice of defense attorneys in South Carolina or elsewhere at the time of Winkler's trial.

Winkler offered no proof whatsoever that defense lawyers in South Carolina were routinely making such challenges as a matter of course, and counsel was deficient for not meeting this supposed minimum standard of competence. Simply because a couple of lawyers in Massachusetts and California had filed the motion does not mean that counsel here would be ineffective when such an attack was not commonly (or indeed - ever) done by criminal defense attorneys in South Carolina in early 2008. See, e.g. Gentry v. Sinclair, 576 F.Supp.2d 1130 (W.D. Wash. 2008) (counsel's decision to attack reliability of DNA science and not the results was reasonable, as reasonableness the decision must be considered at the time it took place, in 1991, when DNA was still "cutting edge"); McDonald v. State, 952 So.2d 484 (Fla. 2006) (holding counsel was not ineffective for failing to request a Frye hearing because there was general acceptance in the scientific community of the particular science at issue at the time of the defendant's 1995 trial).

The three cases cited by Winkler where opinions were rendered before Winkler's trial would have only had a minimal, if any, impact on Agent Paavel's testimony. In

United States v. Monteiro, 407 F.Supp.2d 351 (D.Mass.2006), the United States District Court for the District of Massachusetts found the methodology of firearms identification is sufficiently reliable under Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167 (1999). Monteiro, 407 F.Supp.2d at 372. "[A] a qualified examiner who has documented and had a second qualified examiner verify her results may testify based on those results that a cartridge case matches a particular firearm to a reasonable degree of ballistic certainty." Monteiro, 407 F.Supp.2d at 372. The limitation the Court in Monteiro placed on an examiner's testimony was to the degree of statistical certainty that one could place on a match. Similarly, in United States v. Green, 405 F.Supp.2d 104 (D.Mass.2005), the District Court ultimately found the testimony of the firearms and toolmarks examiner to be admissible. Green, 405 F.Supp.2d at 124. The only limitation that was placed upon the examiner's testimony was that he would not be allowed to conclude that the match was to "the exclusion of all other guns." Id. The United States District Court for the Northern District of California reached similar conclusions in United States v. Diaz, No. CR 05-00167 WHA, 2007 WL 485967, at *14 (N.D. Cal. Feb. 12, 2007). In this case, Paavel did not assert that his conclusion was to the exclusion of all other guns. (See App. 1787-88). At most, Paavel's testimony regarding his conclusion would have only likely been limited to the degree of certainty. Counsel was not deficient in this regard.

Winkler also fails to show that he was prejudiced. The result at trial would not have been different had counsel engaged in the type of cross-examination that Winkler claims counsel should have used. Again, there was no dispute as to which gun fired the shot that killed the victim. In addition to Agent Paavel's testimony, the State presented

overwhelming evidence of Winkler's guilt. The victim's son witnessed Winkler's break-in into the condo and was present when the shooting occurred. (App. 1427-40). The son's account of what occurred was supported by the testimony of other witnesses and the physical evidence recovered from the scene. The victim's son's friend corroborated his testimony regarding his phone call just prior to Winkler breaking into the condo. (App. 1510-18). The officer that arrived shortly after the shooting noted he saw wood splinters in the door jamb. (App. 1530). He also noted that the victim's son told him about the weapon that was under the pillow in the bedroom. (App. 1533).

Andrew Cooper, a former crime scene technician for the Horry County Police Department, took a picture of the door jamb of the victim's condo door. (App. 1546, 1554). He testified that it appeared there had been a forced entry because the door jamb, the door frame, the lock mechanism, and other parts of the door had been busted. (App. 1554-55). He also testified that a reddish colored liquid was collected from the kitchen countertop. (App. 1559, 1570-71). Kimberly Hahn, a former SLED scientist, testified that she compared the blood swabs recovered from the counter of the victim's residence to Winkler's blood standard, and the blood from the counter matched Winkler's blood profile. (App. 1744, 1747). Cooper also photographed and collected a broken cordless phone. (App. 1562-63). Cooper also testified that a projectile was recovered from the baseboard of the wall behind the victim. (App. 1566-68). They did not locate a shell casing on the scene. (App. 1572). Petitioner absconded from the scene, and avoided police detection for several days. Flight from prosecution is admissible as guilt. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show

guilty knowledge, intent, and that defendant sought to avoid apprehension). There was no evidence that the gun recovered from the scene had bene fired, or that the victim's first ex-husband had been at the condo when she was killed. Altogether, the State submits that any additional cross-examination of Agent Paavel would not have led to a different result at trial. Winkler has not shown that he was prejudiced. This Court should therefore deny Winkler's petition for writ of certiorari as it relates to this claim.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court deny Winkler's petition for writ of certiorari.

Respectfully submitted,

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February 6, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

LOUIS MICHAEL WINKLER, JR.,

Respondent/Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

PROOF OF SERVICE

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

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

This 6th day of February, 2015.

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