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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

LOUIS MICHAEL WINKLER, JR., #6027,

Respondent,

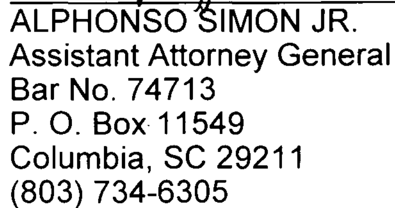
v.

STATE OF SOUTH CAROLINA,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order Granting Post-Conviction Relief submitted by the Honorable Benjamin H. Culbertson, dated and filed August 15, 2012. Counsel for the State received written notice of entry of the judgment by way of a file-stamped copy of the Order from the Horry County Clerk of Court on August 22, 2012. The State timely served a Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP. The Applicant has challenged the timeliness of the service of that Motion to Alter or Amend Judgment. As of the date of this Notice, the Motion to Alter or Amend Judgment is pending before Judge Culbertson.



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

September 14, 2012.

OTHER COUNSEL OF RECORD:
Emily C. Paavola, Esquire
John R. Mills, Esquire

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
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The Honorable Benjamin H. Culbertson, Circuit Court Judge

Court of Common Pleas Case No. 2011-CP-26-3907
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LOUIS MICHAEL WINKLER, JR., #6027,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

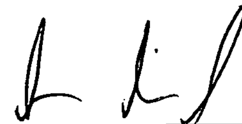
PROOF OF SERVICE

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

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

John R. Mills, Esq.
201 West Main St., Ste. #301
Durham, NC 27701

This 14th day of September, 2012.



ALPHONSO SIMON JR.
Assistant Attorney General
Bar No. 74713

COPY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NUMBER: 2011-CP-26-3907
Louis Michael Winkler, Jr.,)	
Applicant,)	
vs.)	ORDER GRANTING POST-CONVICTION RELIEF RE: DEATH SENTENCE
State of South Carolina,)	
Respondent.)	

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

TRIAL DATES........June 18 – 21, 2012
PRESIDING JUDGE........Benjamin H. Culbertson
APPLICANT'S ATTORNEYS........Emily C. Paavola
John R. Mills
RESPONDENT'S ATTORNEYS........Alphonzo Simon
Brendon McDonald
Anthony Mabry
COURT REPORTER........Brenda R. Babb (June 18, 19, 21, 2012)
Kay H. Richardson (June 20, 2012)

In this case, the Applicant, Louis Michael Winkler, Jr., ("Winkler") seeks post-conviction relief from his conviction and death sentence for murder. Winkler alleges that he received ineffective assistance of counsel. He also alleges that his constitutional and statutory rights were violated when the trial court refused to allow him to discharge his appointed counsel and proceed *pro se*, when the trial court refused to charge the jury on what would happen if they could not reach a unanimous verdict during the sentencing phase of his trial and when the trial court gave jury instructions under unduly coercive circumstances. The Respondent, State of South Carolina, ("State") denies that Winkler is entitled to post-conviction relief.

Based upon a preponderance of the evidence in this case and a review of the pertinent parts of the criminal trial transcript, I do hereby find the following salient facts:

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

LAW AND DISCUSSION

I. RIGHT TO SELF REPRESENTATION

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

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

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

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

trial. See S.C.Code Ann. § 16-3-20(B) (2003); see also *State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

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

II. FAILURE TO IMPEACH STATE'S EXPERT WITNESS

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

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

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

III. FAILURE TO IMPEACH OTHER STATE WITNESSES

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

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

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

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

As previously stated, the burden is on the petitioner to prove the allegations in a post-conviction relief application. *Smith v. State, ibid.* Therefore, since Winkler failed to present any evidence supporting his claim that he suffers from neurological and cognitive impairments and/or dysfunction, the State's motion for directed verdict on this ground for relief should be granted.

V. FAILURE TO PRESENT EVIDENCE OF MENTAL STATE

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

VI. PHYSICAL HARM AND INTIMIDATION OF JUROR

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

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

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

VII. FAILURE TO CHARGE JURY

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

Under Code of Laws of South Carolina 1976 §16-3-20, when aggravating circumstances are found to exist in a capital murder case tried before a jury, the jury decides whether the defendant should be sentenced to death or life in prison. A jury's decision to impose the death penalty must be unanimous. Code §16-3-20(C) states, in pertinent part, that "[i]f members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment…."

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

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

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

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

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

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

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

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

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

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

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

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

August 15, 2012
Conway, SC

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-26-3907

Louis Michael Winkler, Jr.
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$ N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: **Title abstractors and researchers should refer to the official court order for judgment details.**

[signature]
Benjamin H. Culbertson, Circuit Court Judge | 2148 **Judge Code** | August 15, 2012 **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 _to attorneys of record or to parties (when appearing pro se) as follows:

Emily C. Paavola	Alphonzo Simon
John R. Mills	Brendon McDonald
	Anthony Mabry
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

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

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	
Louis Michael Winkler, Jr., #6027, Applicant,	C/A No. 2011-CP-11-3907
v.	**RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e), SCRCP (Capital Case)**
The State of South Carolina, Respondent.	

Comes now Respondent, above-named, by and through the Office of the Attorney General, and hereby moves to alter or amend the Judgment issued by this Court on August 15, 2012. Respondent received written notice of the Order on Monday, August 20, 2012 from Judge Culbertson, and written notice of entry of the Order from the Horry County Clerk of Court on August 24, 2012. Respondent submits the judgment in this case should be amended to deny post-conviction relief, and Applicant's death sentence should be restored. In support of this Motion, Respondent asserts the following:

In the Order, this Court granted relief upon Ground 10(b)(3)(a), in which Applicant asserted that trial counsel was ineffective because counsel "failed to object when the trial court repeatedly refused to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict." In granting relief, this Court stated as follows:

> Although sentencing in non-capital cases is a matter of law to be decided by the court, sentencing in capital murder cases is made by the jury and, therefore, the jury is entitled to know the law on sentencing. Even if the jury is not entitled to an instruction that the defendant will

> receive a life sentence if they cannot reach a unanimous verdict of death, the jury is entitled to an instruction that the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict. During the Allen charge by the judge in this case, the jury was informed that their verdict must be unanimous. However, Code §16-3-20 does not require the jury to reach a unanimous verdict. It only requires a unanimous jury verdict if the death penalty is to be imposed.

Order at pg. 9. This Court further concluded:

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

Order at pg. 10.

This judgment should be altered and amended to deny relief and restore Applicant's death sentence. The current Order incorrectly finds that a jury must be advised what happens if the jury does not reach a unanimous verdict. The Order improperly finds trial counsel was deficient despite the fact that counsel's decision not to object was reasonable in light of the overwhelming case law that supports the trial court's decision to not respond to the jury's question. The Order relies upon an unsupportable assumption the trial judge would have given an instruction that explained sentencing becomes a matter of law if the jury deadlocked in its sentencing deliberations. The Order also fails to provide any basis for its finding that the outcome

in sentencing would have been different had such an instruction been granted (albeit improperly as set forth below). Respondent submits the remedy set forth by the Order is not appropriate. Finally, while this Order is correct in finding there was no merit to Applicant's freestanding claim that he was improperly denied his right to represent himself during the guilt phase of the trial, this Court should not have reached the merits of that issue because it was not a proper claim for review in post-conviction relief.

1. The Order is incorrect in asserting that, as a matter of law, a jury is entitled to know what happens if it does not reach a unanimous verdict under S.C. Code § 16-3-20. No such requirement exists under South Carolina law. As explained in State v. Adams,

> [t]he language of the statute[S.C. Code § 16-3-20(C)] provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. **The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.**

Adams, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981)(emphasis added), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In other words, S.C. Code § 16-3-20(C) prohibits a trial judge from explaining what occurs if the jury does not reach a unanimous verdict in sentencing. See State v. Copeland, 278 S.C. 572, 584-85, 300 S.E.2d 63, 70 (1982); State v. Spann, 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983)(finding harmless error when judge instructed jury that any sentence for life imprisonment must be unanimous because jury need not be instructed of legal effect of unalterable divided jury).

This Court's assessment that the jury must be advised what happens in the event the jury deadlocks on sentencing is also contrary to longstanding United States Supreme Court precedent. "[T]he Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381 (1999). As noted by the U.S. Supreme Court in Jones,

> We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." Allen v. United States, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896). We further have recognized that in a capital sentencing proceeding, the Government has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." Lowenfield v. Phelps, 484 U.S. 231, 238, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (citation and internal quotation marks omitted). We are of the view that a charge to the jury of the sort proposed by petitioner might well have the effect of undermining this strong governmental interest.[1]

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

2. This Court finds that the jury was entitled to an instruction that states, "the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict." This alternate instruction would create additional Eighth

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

> "In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release...."In the event you are unable to agree on [a sentence of] Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release."

Jones, 527 U.S. at 379.

Amendment concerns in that it would **minimize** the jury's sense of responsibility for determining the appropriate sentence because it would remove any responsibility for the sentence. See generally Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985) ("[I[t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").

3. In granting relief, this Court improperly assesses the reasonableness of trial counsel's decision not to object to how the trial judge handled responding to the jurors' questions. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Strickland v. Washington, 466 U.S. 668, 689 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Counsel's actions, consistent with state law, cannot be deemed deficient. See generally Patterson v. State, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004)(noting counsel's advice was not deficient when there was no statutory law or judicial precedent inconsistent with counsel's advice); see e.g. Harden v. State, 360 S.C. 405, 408, 602

S.E.2d 48, 49 (2004)(" An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.").

At the evidentiary hearing, Ralph Wilson, Applicant's lead counsel at trial, explained he did not object to Judge Lockemy's decision not to respond to the jurors' question regarding the consequences of a split verdict on sentencing. Wilson was well aware the case law did not require the trial judge to answer the question posed by the jury. Respondent submits that counsel's decision not to object was clearly reasonable under prevailing professional norms since there was overwhelming case law supporting his position that an objection was not warranted because the trial judge was not required to answer the question. The case law underlying counsel's decision is set forth in section 1 and section 5, including Jones, Adams, Spann, Copeland, and State v. Atkins, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990).

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

This Court's grant of relief is based upon two improper assumptions. First, this Court assumes the trial judge would have given an instruction "that the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict," if such an instruction was requested. Nothing in the record supports this assumption or the authority for such an instruction, which minimizes the

jury's responsibility. To the contrary, Judge Lockemy indicated he had concerns about responding, noting that it appeared the jury was potentially asking a hypothetical question. Judge Lockemy was not inclined to respond to the question because it was unclear whether the jury was deadlocked. (R. 2921-22, 2925-26). In light of Judge Lockemy's concerns, and in light of the lack of reference to any authority that would have required Judge Lockemy to give the charge this Court proposes, Respondent submits it is highly unlikely the proposed charge would have been given if requested. As already noted, the proposed charge is inconsistent with state and federal law.

Second, this Court asserts that there was a reasonable probability that the result at sentencing would have been different had the jury's question been answered. However, this Order makes no specific findings of fact that support the conclusion. It is not clear why this Court finds the result at trial would have been different where the deadlock ended after the proper instruction was given by Judge Lockemy. Understanding that none of the jurors' testimony could be considered by this Court in making a finding the result at trial would be different, Respondent submits there is no factual basis underlying the finding of prejudice. State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995)("As a general rule, juror testimony may not be the basis for impeaching a jury verdict. Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict."); see Rule 606(b), SCRE.[2]

[2] None of the jurors' testimony would have been admissible in addressing this claim because this claim is not about whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Rule 606(b), SCRE. Nor does this claim rely upon an allegation of internal misconduct. See Hunter, supra.

Furthermore, this Court's finding of prejudice does not account for the presumption that jurors follow the trial judge's instructions. State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct.App.2001), affirmed as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265 n .1, 335 S.C. 586, 518 S.E.2d 265, 267 n. 1 (1999))("A jury is presumed to [have followed the trial judge's] instructions."). An Allen charge would be warranted even if the jury was informed that the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict. Since an Allen charge instructs the jurors to reconsider their own positions, to consider the positions of other jurors, and to attempt to reach a consensus, Respondent submits a finding of Strickland prejudice is improper because there is no support for a finding the result at trial would have been different. Altogether, the Order's discussion regarding prejudice must be revised because there is no legal or factual basis for this Court's finding of prejudice.

5. This Order is incorrect to the extent it assumes the Allen charge did not correctly state the law in capital sentencing. This Order finds that a jury's verdict in capital sentencing does not have to be unanimous. This finding is contrary to South Carolina law. Otherwise, the South Carolina Supreme Court would have no reason to consistently find that an Allen charge is entirely appropriate in capital sentencing. See State v. Atkins, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990)(finding trial judge properly required jury to continue deliberating after jury indicated it was hung in a capital resentencing trial); State v. Hughes, 336 S.C. 585, 597-98, 521 S.E.2d 500, 506-07 (1999)(finding modified Allen charge given during sentencing deliberations was even-handed and proper); Tucker v. Catoe, 346 S.C. 483, 490-91, 552 S.E.2d 712, 716

(2001)("Neither the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding."); State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010)(finding use of Allen charge in sentencing appropriate); see generally Gill v. State, 346 S.C. 209, 219, 552 S.E.2d 26, 32 (2001)(noting that life sentence imposed in capital case after jury deadlock does not preclude the State from seeking death in a retrial if case reversed on appeal; jury deadlock does not imply finding that State did not prove its sentencing case beyond a reasonable doubt)("In the event of a jury deadlock, the trial judge exercises no discretion and merely imposes the sentence mandated by section 16-3-20(C).").

6. Respondent submits that the remedy set forth in the PCR Court's Order is improper. If this Court is to grant relief, Respondent submits the appropriate remedy would be to vacate the sentence and remand the case back to the Court of General Sessions for a new sentencing proceeding. See Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001)(habeas relief granted and case remanded for sentencing in light of faulty Allen charge).

7. While the Respondent agrees with this Court there was no merit to Applicant's freestanding claim that he should have been allowed to represent himself during the guilt phase, Respondent asserts the claim should not have been addressed on the merits because it is not a claim that can be properly raised in post-conviction relief. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517, 519 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975).

CONCLUSION

WHEREFORE, premises considered, for the reasons stated above Respondent respectfully requests that this Court grant its Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP, deny Applicant's Application for Post-Conviction Relief in full, and restore Applicant's death sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
(Counsel of Record)

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By:
ATTORNEYS FOR RESPONDENT

August 28, 2012.

CERTIFICATE OF SERVICE

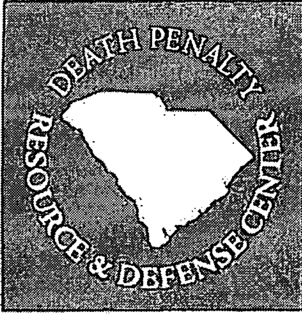
I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the **Respondent's Motion To Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP** via U.S. mail, first class, postage pre-paid, addressed to:

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

John R. Mills, Esq.
201 West Main St., Ste. #301
Durham, NC 27701

This 28th day of August, 2012.

ALPHONSO SIMON, JR.



September 6, 2012

Melanie Huggins-Ward
Horry County Clerk of Court
1301 Second Avenue
Conway, SC 29526

RE: *Louis Michael Winkler v. The State of South Carolina*
11-CP-26-03907

Dear Ms. Huggins-Ward:

Please find enclosed for filing, along with certificate of service, the original and one copy of the Applicant's Return to Respondent's Motion to Alter or Amend Judgment in the above captioned case. Please clock in and return the copy to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact me. Thank you in advance for your cooperation on this matter.

Sincerely,

Jill A. Rider
Paralegal

Enclosure

cc: Honorable Judge Benjamin H. Culbertson
Alphonso Simon, Jr. , Esq.
John Mills, Esq.

900 Elmwood Avenue, Suite 101 • Columbia, SC 29201 • (803) 765-1044 • www.deathpenaltyresource.org

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	Case No. 2011-CP 26-03907
Louis Michael Winkler Jr., Applicant,	**RETURN TO RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT**
v.	
State of South Carolina, Respondent.	

Applicant, Louis Michael Winkler Jr., files this Return to the arguments raised in Respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRP ("Motion"). Because Respondent's Motion is untimely, this Court lacks jurisdiction to alter or amend the judgment. *See, e.g., Ackerman v. 3-V Chemical*, 349 S.C. 212, 215, 562 S.E.2d 613, 615 (2002) (untimely service of a Rule 59, SCRCP, motion rendered "the trial judge without jurisdiction to act upon it."). Moreover, the Motion misconstrues the Court's order, ignores important facts about trial counsel's strategy, and, therefore, relies on argument and precedents irrelevant to the questions addressed by the Court.

PROCEDURAL HISTORY

On August 15, 2012, this Court entered an order granting Applicant post-conviction relief. On the same day, both parties received notice of the order and a copy of the order via e-mail. On Monday, August 20, both parties received a paper copy of the same order. Respondent claims to have signed its Motion on August 28, 2012. However, Respondent did not mail the Motion to counsel for Applicant until August 31, 2012. *See Exhibit 1* (envelopes and motion received by both counsel for Applicant post-marked August 31, 2012).

ARGUMENT

A. BECAUSE RESPONDENT FAILED TO TIMELY SERVE THE MOTION, THIS COURT LACKS JURISDICTION TO ACT UPON IT.

A motion to alter or amend the judgment must be "served not later than 10 days after receipt of written notice of entry of the order." S.C. R. Civ. Proc. 59(e) (West 2012). If neither party serves a motion within the ten-day period, the trial court loses jurisdiction to alter or amend its judgment. *See, e.g., Ackerman v. 3-V Chemical, Inc.*, 349 S.C. 212, 215, 562 S.E.2d 613, 615 (2002); *Ness v. Eckerd, Corp.*, 350 S.C. 399, 402, 566 S.E.2d 193, 195 (Ct. App. 2002); *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999). A motion made pursuant to this rule is considered served when mailed. *See Curtis v. Blake*, 381 S.C. 189, 191-92, 672 S.E.2d 576, 577-78 (2009) (holding motions for new trial under Rule 59 are "made" when mailed). The date of service is when the date upon which the motion is deposited with the Untied States Postal Service, not, for example, the date a party deposits the Motion with a third party for mailing. *See Southbridge Properties, Inc. v. Jones,* 292 S.C. 198, 198, 355 S.E.3d 535,535 (1987).

Here, Respondent failed to timely serve its Motion, and the Motion should be dismissed because this Court no longer has jurisdiction to alter or amend the judgment. Respondent had until August 30, 2012, to file any Motion to Alter or Amend the Judgment. *See* S.C. R. Civ. Proc. 59(e) (ten days from the date of receipt of written notice). Although Respondent's Certificate of Service states that the Motion was mailed to Applicant on August 28, 2012, the envelope it arrived in is postmarked August 31.[1] Thus, the order was not actually served until

[1] Respondent appears to make a habit of this practice. In *Mercer v. South Carolina*, 2009-CP-32-5465, Respondent's Petition for Writ of Certiorari was due to be filed and served on January

August 31—the day it was mailed—, which is after the deadline[2] for serving the Motion. *See Curtis*, 381 S.C. at 191-92, 672 S.E.2d at 577-78.

Because Respondent failed to file its Motion within the prescribed time period, this Court lacks jurisdiction to alter or amend the judgment and should dismiss the motion. *See Ness*, 350 S.C. at 402, 566 S.E.2d at 195; *Ackerman*, 349 S.C. at 215, 562 S.E.2d at 615.

B. RESPONDENT'S MOTION MISCONSTRUES THE COURT'S ORDER, IGNORES IMPORTANT FACTS ABOUT TRIAL COUNSEL'S STRATEGY, AND, THEREFORE RELIES ON PRECEDENT IRRELEVANT TO THE QUESTION ADDRESSED BY THE COURT.

Even if this Court had jurisdiction to alter or amend its order, Respondent's arguments still fail. First, Respondent has disregarded the context for the Court's order and, therefore, misconstrued the basis for granting relief. The Court was addressing whether trial counsel was prejudicially ineffective for failing to ask the trial judge to answer the jurors' twice repeated question: what would happen if they could not reach a unanimous decision. *See* Order at 8 ("The judge refused to answer the question both times and Winkler's criminal trial attorney's never objected to the judge's refusal to answer."). It is in this context that this Court held that the jury was entitled to know that the "defendant's sentence becomes a matter of law to be imposed by the court, if they cannot reach a unanimous verdict." *Id.* Not only did trial counsel neglect to ensure the jury was informed of the truth—that the trial court would impose judgment—they failed to object to the affirmatively misleading instruction informing them that the jury *must*

3, 2012. Undersigned counsel did not receive service, however, until January 10, 2012, when the brief arrived with a certificate of service dated January 3rd, but contained in an envelope post-marked January 9, 2012. *See Exhibit 2*, Letter to the South Carolina Supreme Court.

[2] Missed deadlines have had serious consequences for death-sentenced inmates. *See, e.g.*, *Maples v. Thomas*, __ U.S. __, 132 S. Ct. 912 (2012) (reversing lower court decision dismissing petition for habeas corpus because capital habeas petitioner missed deadline when his attorneys had abandoned his case); *Judge Sued in Death Penalty*, CBS News May 7, 2009 available at http://www.cbsnews.com/2100-201_162-3471610.html (discussing how Michael Richard was executed because his lawyers missed a filing deadline by less than one hour).

reach a unanimous verdict. *Id.* It is in this context that this Court ruled that trial counsel's failure to object was prejudicially ineffective.

Because the cases Respondent relies on address a difference context, the initial jury charge, those precedents are inapposite. Specifically, those cases address whether a defendant is entitled, as an initial matter, to an instruction that should the jury fail to reach a unanimous verdict, a life sentence should be imposed. *See State v. Adams*, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981) ("The appellant argues the trial judge erred by failing to instruct the jury *initially* that if they failed to agree to the verdict, then the court would be required to sentence the him *to life imprisonment.*" (emphasis added)); *State v. Copeland*, 278 S.C. 572, 584, 300 S.E.2d 70-71 (1982) (same); *State v. Spann*, 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983) (same); *see also Jones v. United States*, 527 U.S. 373, 381 (1999) (same). Thus, the cases are different from the situation here in two respects: the instruction is required in response to the jury's questions, not as an initial matter; and the required instruction informs the jury that the Applicant would be sentenced and does not specify the sentence imposed. Moreover, as the Court noted, jurors are entitled to accurate information about the law. *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (a jury cannot be "affirmatively misled regarding its sentencing process."). And the law is clear that where a jury is unable to reach a unanimous verdict in a capital case, the sentence becomes a matter of law for the trial court to decide. S.C. Code § 16-2-20(C) (West 2012) ("[i]f members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment."). Failing to answer the jurors' question—and affirmatively misleading them instead—caused the jury to reach a

compromise verdict of death where they would have otherwise hung and Applicant would have received a sentence of life.

Finally, Respondent's Motion fails to address key aspects of trial counsel's testimony. Trial counsel testified that his goal in the penalty phase was to obtain a life verdict. He testified that if he had objected when the jury sent out the first note, then the trial judge would have imposed a life sentence when the second, and certainly the third, note was sent out. Thus, trial counsel had no reasonable strategic reason for failing to request that the trial court answer the jurors' questions. *See Wiggins v. Smith*, 539 U.S. 510, (2003); *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).

Respondent also fails to address trial counsel's testimony about the situation presented here: whether to accurately respond to the jurors' inquiry as to what would happen if they failed to reach a unanimous verdict. As Respondent, notes, trial counsel was aware of the case law prohibiting an instruction during the initial charge explaining that should the jury not reach a unanimous verdict, a life sentence would be imposed. However, trial counsel also admitted that if he was wrong about that prohibition applying to answering jurors' repeated questions, he would have no strategic reason for failing to request a jury instruction such as the one this Court found was appropriate. *See Wiggins*, 539 U.S. at 527 (declining to find counsel's decision reasonable because it was uninformed).

Therefore, the Court did not err in finding trial counsel prejudicially ineffective for failing to object to the misleading instruction and for failing to request that the jury receive accurate information responsive to their questions. The Court also did not err in imposing the life sentence that Applicant would have received but for trial counsel's deficient performance: a life sentence.

CONCLUSION

The Court's decision is supported by law and by the evidence presented at the hearing. Because the Respondent's Motion is untimely and unsupported by the law, the Court should dismiss or deny Respondent's Motion.

Respectfully submitted,

COUNSEL FOR MR. WINKLER

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue
Suite 101
Columbia, SC 29201
(803) 765-1044

JOHN R. MILLS
Attorney at Law
201 W. Main Street
Suite 301
Durham, NC 27701
(919) 251-6259

September 6, 2012

Exhibit 1

OFFICE OF THE ATTORNEY GENERAL
STATE OF SOUTH CAROLINA

POST OFFICE BOX [illegible]
COLUMBIA, SOUTH CAROLINA [illegible]

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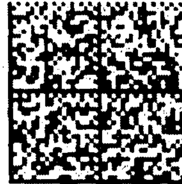
$ 00.40⁰
05/31/2012
Mailed From 29201
US POSTAGE

John R. Mills, Esq.
201 West Main St., Ste. #301
Durham, NC 27701

POST OFFICE BOX 11549
COLUMBIA, SOUTH CAROLINA 29211-1549



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08/31/2012
Mailed From 29201
US POSTAGE

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

ALAN WILSON
ATTORNEY GENERAL

August 28, 2012

The Honorable Melanie Huggins-Ward
Clerk of Court
PO Box 677
Conway, SC 29528-0677

RE: *Louis Michael Winkler, Jr., #6027 vs. The State of South Carolina*
C/A No. 2011-CP-11-3907

Dear Ms. Huggins-Ward:

Enclosed please find an original and one (1) copy of Respondent's Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP, and Certificate of Service regarding the above matter.

Kindly please file same in your office and return a copy marked accordingly to the undersigned in the self-addressed stamped envelope provided.

Thank you for your kind attention to this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures
cc: The Honorable Benjamin H. Culbertson (w/copy of encls.)
Emily Paavola, Esq. (w/copy of encls.)
John Mills, Esq. (w/copy of encls.)
The Honorable J. Gregory Hembree (w/copy of encls.)
Sandi Wofford, Victims Services (w/copy of encls.)

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
Louis Michael Winkler, Jr., #6027,	)	C/A No. 2011-CP-11-3907
Applicant,	)	
v.	)	**RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e), SCRCP (Capital Case)**
The State of South Carolina,	)	
Respondent.	)	

Comes now Respondent, above-named, by and through the Office of the Attorney General, and hereby moves to alter or amend the Judgment issued by this Court on August 15, 2012. Respondent received written notice of the Order on Monday, August 20, 2012 from Judge Culbertson, and written notice of entry of the Order from the Horry County Clerk of Court on August 24, 2012. Respondent submits the judgment in this case should be amended to deny post-conviction relief, and Applicant's death sentence should be restored. In support of this Motion, Respondent asserts the following:

In the Order, this Court granted relief upon Ground 10(b)(3)(a), in which Applicant asserted that trial counsel was ineffective because counsel "failed to object when the trial court repeatedly refused to answer the jurors' question about what would happen if they could not reach a unanimous sentencing verdict." In granting relief, this Court stated as follows:

> Although sentencing in non-capital cases is a matter of law to be decided by the court, sentencing in capital murder cases is made by the jury and, therefore, the jury is entitled to know the law on sentencing. Even if the jury is not entitled to an instruction that the defendant will

> receive a life sentence if they cannot reach a unanimous verdict of death, the jury is entitled to an instruction that the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict. During the Allen charge by the judge in this case, the jury was informed that their verdict must be unanimous. However, Code §16-3-20 does not require the jury to reach a unanimous verdict. It only requires a unanimous jury verdict if the death penalty is to be imposed.

Order at pg. 9. This Court further concluded:

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

Order at pg. 10.

This judgment should be altered and amended to deny relief and restore Applicant's death sentence. The current Order incorrectly finds that a jury must be advised what happens if the jury does not reach a unanimous verdict. The Order improperly finds trial counsel was deficient despite the fact that counsel's decision not to object was reasonable in light of the overwhelming case law that supports the trial court's decision to not respond to the jury's question. The Order relies upon an unsupportable assumption the trial judge would have given an instruction that explained sentencing becomes a matter of law if the jury deadlocked in its sentencing deliberations. The Order also fails to provide any basis for its finding that the outcome

in sentencing would have been different had such an instruction been granted (albeit improperly as set forth below). Respondent submits the remedy set forth by the Order is not appropriate. Finally, while this Order is correct in finding there was no merit to Applicant's freestanding claim that he was improperly denied his right to represent himself during the guilt phase of the trial, this Court should not have reached the merits of that issue because it was not a proper claim for review in post-conviction relief.

1. The Order is incorrect in asserting that, as a matter of law, a jury is entitled to know what happens if it does not reach a unanimous verdict under S.C. Code § 16-3-20. No such requirement exists under South Carolina law. As explained in State v. Adams,

> [t]he language of the statute[S.C. Code § 16-3-20(C)] provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. **The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.**

Adams, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981)(emphasis added), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In other words, S.C. Code § 16-3-20(C) prohibits a trial judge from explaining what occurs if the jury does not reach a unanimous verdict in sentencing. See State v. Copeland, 278 S.C. 572, 584-85, 300 S.E.2d 63, 70 (1982); State v. Spann, 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983)(finding harmless error when judge instructed jury that any sentence for life imprisonment must be unanimous because jury need not be instructed of legal effect of unalterable divided jury).

This Court's assessment that the jury must be advised what happens in the event the jury deadlocks on sentencing is also contrary to longstanding United States Supreme Court precedent. "[T]he Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381 (1999). As noted by the U.S. Supreme Court in Jones,

> We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." Allen v. United States, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896). We further have recognized that in a capital sentencing proceeding, the Government has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." Lowenfield v. Phelps, 484 U.S. 231, 238, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (citation and internal quotation marks omitted). We are of the view that a charge to the jury of the sort proposed by petitioner might well have the effect of undermining this strong governmental interest.[1]

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

2. This Court finds that the jury was entitled to an instruction that states, "the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict." This alternate instruction would create additional Eighth

---

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

> "In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release...."In the event you are unable to agree on [a sentence of] Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release."

Jones, 527 U.S. at 379.

Amendment concerns in that it would **minimize** the jury's sense of responsibility for determining the appropriate sentence because it would remove any responsibility for the sentence. See generally Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985) ("[I[t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").

3. In granting relief, this Court improperly assesses the reasonableness of trial counsel's decision not to object to how the trial judge handled responding to the jurors' questions. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Strickland v. Washington, 466 U.S. 668, 689 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Counsel's actions, consistent with state law, cannot be deemed deficient. See generally Patterson v. State, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004)(noting counsel's advice was not deficient when there was no statutory law or judicial precedent inconsistent with counsel's advice); see e.g. Harden v. State, 360 S.C. 405, 408, 602

S.E.2d 48, 49 (2004)(" An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.").

At the evidentiary hearing, Ralph Wilson, Applicant's lead counsel at trial, explained he did not object to Judge Lockemy's decision not to respond to the jurors' question regarding the consequences of a split verdict on sentencing. Wilson was well aware the case law did not require the trial judge to answer the question posed by the jury. Respondent submits that counsel's decision not to object was clearly reasonable under prevailing professional norms since there was overwhelming case law supporting his position that an objection was not warranted because the trial judge was not required to answer the question. The case law underlying counsel's decision is set forth in section 1 and section 5, including Jones, Adams, Spann, Copeland, and State v. Atkins, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990).

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

This Court's grant of relief is based upon two improper assumptions. First, this Court assumes the trial judge would have given an instruction "that the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict," if such an instruction was requested. Nothing in the record supports this assumption or the authority for such an instruction, which minimizes the

jury's responsibility. To the contrary, Judge Lockemy indicated he had concerns about responding, noting that it appeared the jury was potentially asking a hypothetical question. Judge Lockemy was not inclined to respond to the question because it was unclear whether the jury was deadlocked. (R. 2921-22, 2925-26). In light of Judge Lockemy's concerns, and in light of the lack of reference to any authority that would have required Judge Lockemy to give the charge this Court proposes, Respondent submits it is highly unlikely the proposed charge would have been given if requested. As already noted, the proposed charge is inconsistent with state and federal law.

Second, this Court asserts that there was a reasonable probability that the result at sentencing would have been different had the jury's question been answered. However, this Order makes no specific findings of fact that support the conclusion. It is not clear why this Court finds the result at trial would have been different where the deadlock ended after the proper instruction was given by Judge Lockemy. Understanding that none of the jurors' testimony could be considered by this Court in making a finding the result at trial would be different, Respondent submits there is no factual basis underlying the finding of prejudice. State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995)("As a general rule, juror testimony may not be the basis for impeaching a jury verdict. Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict."); see Rule 606(b), SCRE.[2]

---

[2] None of the jurors' testimony would have been admissible in addressing this claim because this claim is not about whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Rule 606(b), SCRE. Nor does this claim rely upon an allegation of internal misconduct. See Hunter, supra.

Furthermore, this Court's finding of prejudice does not account for the presumption that jurors follow the trial judge's instructions. State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct.App.2001), affirmed as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265 n .1, 335 S.C. 586, 518 S.E.2d 265, 267 n. 1 (1999))("A jury is presumed to [have followed the trial judge's] instructions."). An Allen charge would be warranted even if the jury was informed that the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict. Since an Allen charge instructs the jurors to reconsider their own positions, to consider the positions of other jurors, and to attempt to reach a consensus, Respondent submits a finding of Strickland prejudice is improper because there is no support for a finding the result at trial would have been different. Altogether, the Order's discussion regarding prejudice must be revised because there is no legal or factual basis for this Court's finding of prejudice.

5. This Order is incorrect to the extent it assumes the Allen charge did not correctly state the law in capital sentencing. This Order finds that a jury's verdict in capital sentencing does not have to be unanimous. This finding is contrary to South Carolina law. Otherwise, the South Carolina Supreme Court would have no reason to consistently find that an Allen charge is entirely appropriate in capital sentencing. See State v. Atkins, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990)(finding trial judge properly required jury to continue deliberating after jury indicated it was hung in a capital resentencing trial); State v. Hughes, 336 S.C. 585, 597-98, 521 S.E.2d 500, 506-07 (1999)(finding modified Allen charge given during sentencing deliberations was even-handed and proper); Tucker v. Catoe, 346 S.C. 483, 490-91, 552 S.E.2d 712, 716

(2001)("Neither the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding."); State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010)(finding use of Allen charge in sentencing appropriate); see generally Gill v. State, 346 S.C. 209, 219, 552 S.E.2d 26, 32 (2001)(noting that life sentence imposed in capital case after jury deadlock does not preclude the State from seeking death in a retrial if case reversed on appeal; jury deadlock does not imply finding that State did not prove its sentencing case beyond a reasonable doubt)("In the event of a jury deadlock, the trial judge exercises no discretion and merely imposes the sentence mandated by section 16-3-20(C).").

6. Respondent submits that the remedy set forth in the PCR Court's Order is improper. If this Court is to grant relief, Respondent submits the appropriate remedy would be to vacate the sentence and remand the case back to the Court of General Sessions for a new sentencing proceeding. See Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001)(habeas relief granted and case remanded for sentencing in light of faulty Allen charge).

7. While the Respondent agrees with this Court there was no merit to Applicant's freestanding claim that he should have been allowed to represent himself during the guilt phase, Respondent asserts the claim should not have been addressed on the merits because it is not a claim that can be properly raised in post-conviction relief. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517, 519 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975).

CONCLUSION

WHEREFORE, premises considered, for the reasons stated above Respondent respectfully requests that this Court grant its Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP, deny Applicant's Application for Post-Conviction Relief in full, and restore Applicant's death sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
(Counsel of Record)

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By:
ATTORNEYS FOR RESPONDENT

August 28, 2012.

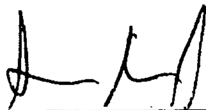
CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the **Respondent's Motion To Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP** via U.S. mail, first class, postage pre-paid, addressed to:

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

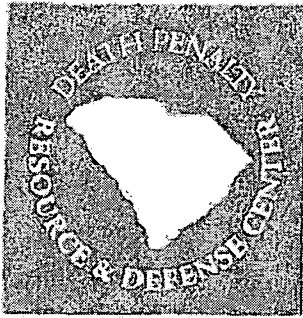
John R. Mills, Esq.
201 West Main St., Ste. #301
Durham, NC 27701

This 28th day of August, 2012.



ALPHONSO SIMON, JR.

Exhibit 2



February 1, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465
Capital PCR

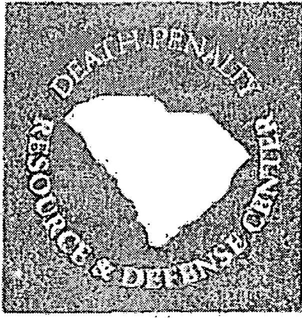
Dear Mr. Shearouse:

I am writing to request an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari on behalf of Petitioner/Respondent in the above referenced case. This request for a continuance is based on counsel's heavy caseload and the complexity of the issues involved. Although Respondent/Petitioner's Petition for Writ of Certiorari was due to be filed and served on January 3, 2012, undersigned counsel did not receive service until January 10, 2012, when the brief arrived in an envelope post-marked on January 9, 2012. Thus, I am requesting an extension of thirty (30) days calculated by the date of actual service, making the Return due on March 9, 2012.

Moreover, please note that my mailing address has recently changed. I have previously provided written notice to the Court and to opposing counsel regarding this change, and I have updated my Attorney Information System information. My new mailing address is:

Emily C. Paavola
Death Penalty Resource & Defense Center
900 Elmwood Ave., Suite 101
Columbia, SC 29201

I am informing opposing counsel of my request by copy of this letter. If you should have any questions, please do not hesitate to contact me.



Sincerely yours,

Emily C. Paavola

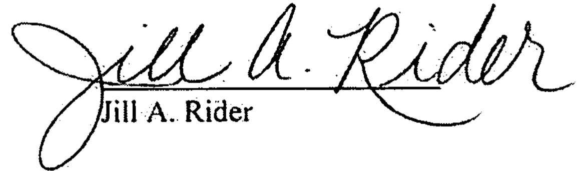
Emily C. Paavola

cc: Alphonso Simon, Esq.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	11-CP-26-03907
LOUIS MICHAEL WINKLER, JR. SK6027 Applicant,	)	
vs.	)	**CERTIFICATE OF SERVICE**
STATE OF SOUTH CAROLINA, Respondent.	)	

The undersigned certifies that a copy of the foregoing Applicant's Return to Respondent's Motion to Alter or Amend Judgment, was served by first class United States mail, postage prepaid, this 6th day of September, 2012, upon the following:

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



Jill A. Rider

John R. Mills

201 W. Main Street, Suite 301 • Durham, NC 27701
Phone: 919 251 6259 • Fax: 919 237 9254 • E-Mail: john@jrmillslaw.com
Web: jrmillslaw.com

Date: September 10, 2012

Hon. Melanie Huggins-Ward
Clerk of the Court
P.O. Box 677
Conway, SC 29528

Re: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

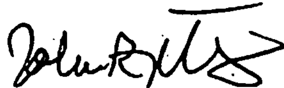
Dear Ms. Huggins-Ward:

Enclosed please find Mr. Winkler's Supplemental Return to Respondent's Motion to Alter or Amend Judgment.

I have also enclosed a conformed copy and a postage paid envelope. Please return the copy once they have been file stamped.

Do not hesitate to contact me if you have any questions or concerns.

Sincerely,



John R. Mills
Attorney

Enclosures

cc: Hon. Benjamin Culbertson
Ms. Emily Paavola, Counsel for Mr. Winkler
Al Simon, Counsel for Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	Case No. 2011-CP 26-03907
Louis Michael Winkler Jr. Applicant,	)	
v.	)	**SUPPLEMENTAL RETURN TO RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT**
State of South Carolina, Respondent.	)	

Counsel for Applicant submits this brief Supplemental Return in light of Respondent's counsel's recent response to the Return.

On Friday, September 7, counsel for Respondent informed counsel for Applicant that because of how the envelopes in Exhibit 1 were scanned, the exhibit was missing some postage that would indicate the envelope was mailed, albeit with insufficient postage, on August 28, 2012. After receiving this notice, Mr. Mills' paralegal retrieved the envelope from the trash and reassembled the envelope he had opened. The envelope is attached as Exhibit 3.

Counsel for Respondent claimed that this missing postage proves that their motion was timely mailed. To the contrary, the only postage on the envelope indicating that the parcel was mailed is dated August 31, 2012, and nothing indicates that the parcel was marked or returned for insufficient postage.[1] Ex. 3.

Moreover, for proper service by mail, the parcel must "be properly addressed with sufficient postage." *Lindsey v. South Carolina Tax Com'n*, 323 S.C. 57, 59, 448 S.E.2d 577, 578 (1994). Because, by their own account, counsel for Respondent failed to provide adequate postage, their motion was not timely filed. *Id.*

In short, the Attorney General's Office has not complied with the timeline for serving a Rule 59(e) motion, and their motion should be dismissed because this Court no longer has

[1] United States Postal Service Policy is to mark parcels with insufficient postage with the total "deficiency of postage and fees." USPS *Domestic Mail Manual*, 600 USPS Basic Standards for All Mailing Services § 8.1.1 *available at* http://pe.usps.com/text/dmm300/604.htm#1080945. There are no such markings on the envelope. Ex. 3.

jurisdiction to alter or amend the judgment. *See Ackerman v. 3-V Chemical, Inc.*, 349 S.C. 212, 215, 562 S.E.2d 613, 615 (2002).

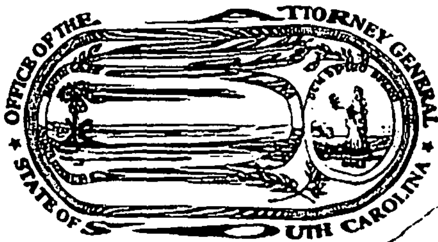
Respectfully submitted,

COUNSEL FOR MR. WINKLER

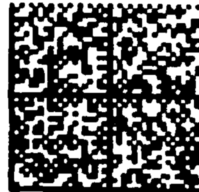
EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue
Suite 101
Columbia, SC 29201
(803) 765-1044

JOHN R. MILLS
Attorney at Law
201 W. Main Street
Suite 301
Durham, NC 27701
(919) 251-6259

Exhibit 3



POST OFFICE BOX 11549
COLUMBIA, SOUTH CAROLINA 29211-1549



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Mailed From 29201
US POSTAGE

U.S. POSTAGE
$.45
29201
Date of sale
08/28/12
06 2500
0828233

John R. Mills, Esq.
201 West Main St., Ste. #301
Durham, NC 27701

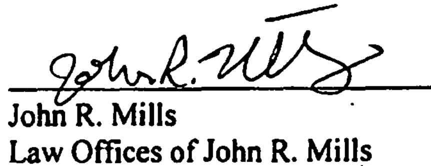
STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
LOUIS MICHAEL WINKLER, JR., Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA, Respondent.)

IN THE COURT OF COMMON PLEAS
11-CP-26-03907

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Applicant's Supplemental Return to Respondent's Motion to Alter or Amend the Judgment was served by first class United States mail, postage prepaid on this the 10th day of September 2010 upon the following:

Mr. Al Simon
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211



John R. Mills
Law Offices of John R. Mills

ALAN WILSON
ATTORNEY GENERAL

September 12, 2012

The Honorable Melanie Huggins-Ward
Clerk of Court
PO Box 677
Conway, SC 29528-0677

RE: *Louis Michael Winkler, Jr., #6027 vs. The State of South Carolina*
C/A No. 2011-CP-11-3907

Dear Ms. Huggins-Ward:

Enclosed please find an original and one (1) copy of Respondent's Reply to Applicant's Return to Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP, and Certificate of Service regarding the above matter.

Kindly please file same in your office and return a copy marked accordingly to the undersigned in the self-addressed stamped envelope provided.

Thank you for your kind attention to this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures
cc: The Honorable Benjamin H. Culbertson (w/copy of encls.)
Emily Paavola, Esq. (w/copy of encls.)
John Mills, Esq. (w/copy of encls.)
The Honorable J. Gregory Hembree (w/copy of encls.)
Sandi Wofford, Victims Services (w/copy of encls.)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
Louis Michael Winkler, Jr., #6027,	)	C/A No. 2011-CP-26-3907
Applicant,	)	
v.	)	**REPLY TO APPLICANT'S RETURN TO RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT**
The State of South Carolina,	)	**(Capital Case)**
Respondent.	)	

Respondent, above-named, by and through the Office of the Attorney General, hereby replies to the Return to Respondent's Motion to Alter or Amend Judgment. In reply, Respondent would show this Court the following:

1. Respondent's Motion to Alter or Amend Judgment was timely. Rule 59(e), SCRCP, states, "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." As noted in Respondent's Motion, counsel for Respondent received a copy of the signed Order from Judge Culbertson on August 20, 2012. The Order received on August 20, 2012 was a copy of the signed Order from Judge Culbertson with no indication that the Order had been entered by the Clerk's Office.[1] Counsel for Respondent did not receive notice of entry of judgment from the Horry County Clerk of Court's Office until August 22, 2012, when undersigned counsel received a file-stamped copy of the signed Order from the

[1] A copy of the Order received on August 20, 2012 is attached as Exhibit 1.

Clerk's Office.[2] The document received on August 22, 2012 was a file-stamped copy of the Order, which was first notice of entry of the judgment.[3] "An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case." Upchurch v. Upchurch, 367 S.C. 16, 22-23, 624 S.E.2d 643, 646 (2006) (disapproved of on other grounds by Miles v. Miles, 393 S.C. 111, 711 S.E.2d 880 (2011)); Bowman v. Richland Mem'l Hosp., 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct.App.1999) (citations omitted). However, "the moment ... [the order] is filed by the clerk of court, it becomes the judgment of the court, and fixes the rights of the parties." Archer v. Long, 46 S.C. 292, 295, 24 S.E. 83, 84 (1896). Since the copy of the Order received on August 22, 2012 was the first notice of entry of the judgment received by counsel for Respondent, the time for filing the Motion to Alter or Amend is based upon the receipt of the file-stamped Order on August 22, 2012. Rule 59(e), SCRCP; see generally S.C. Code § 17-27-80. Thus, the deadline for serving the Motion to Alter or Amend was September 1, 2012. As a result, Respondent's Motion to Alter or Amend Judgment was timely served.

2. Contrary to the Applicant's assertions, the Certificate of Service attached to Respondent's Motion to Alter or Amend Judgment was correct. At approximately 8 p.m. on August 28, 2012, undersigned counsel went to the post office in Columbia, SC located at 1601 Assembly Street (29201). Undersigned counsel utilized the automated

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[2] Counsel for Respondent would note that the Motion indicates our office received the file-stamped copy of the Order from the Clerk's Office on August 24, 2012. This was incorrect. The Civil Division of the Attorney General's Office initially received the file-stamped copy of the Order on August 22, 2012.

[3] A copy of the file-stamped Order counsel received from the Clerk's Office is attached as Exhibit 2.

postage machine at that location. Undersigned counsel weighed the envelope addressed to Ms. Paavola. The automated machine indicated that based upon the weight of the envelope and its contents, a forty-five cent stamp would be needed. The automated machine also indicated that to use a debit card to pay for the stamp, undersigned counsel would have to purchase at least two more forty-five cent stamps to meet a one dollar minimum purchase requirement for the machine. Undersigned counsel purchased the three stamps, and then undersigned counsel affixed one stamp on each of the envelopes addressed to Ms. Paavola, Mr. Mills, and Judge Culbertson. After that purchase was completed, undersigned counsel weighed the envelope that was being sent to the Horry County Clerk of Court. It was a larger envelope and contained a self-addressed stamp envelope and a second copy of the Motion to be returned after it had been time-stamped. The automated machine indicated that postage for the package would be one dollar and seventy cents. Undersigned counsel purchased the $1.70 stamp, and then affixed it to the envelope to the Clerk's Office. Undersigned counsel then placed all four envelopes into the large blue metal mail depository that was located next to the automated stamp machine. Attached hereto as Exhibit 3 are the receipts from the two stamp purchases. Respondent submits that placing the stamped envelopes with postage that the USPS automated machine indicated was sufficient in the mail depository constituted proper service.

Counsel for Respondent are unaware if, when, and/or why any of the envelopes mailed on August 28, 2012 were returned to our office. We only assume that the envelopes may have been returned because the account number on the $.40 postage appears to be consistent with the office's business hours postage meter. Counsel for

Respondent would further note that we were never advised by anyone in our office that the mailings of the Motion to Alter or Amend Judgment were returned. Our first and only notice that the copies of the Motion mailed on August 28, 2012 were possibly returned was Applicant's Return to the Motion to Alter or Amend Judgment on September 6, 2012. Counsel for Respondent did investigate to see if there was any record in our office indicating the copies of the Motions were returned. During the course of that investigation, counsel learned that returned mail is not logged, and there is no record either envelope being returned. Altogether, counsel is unable to ascertain what happened to the mailings after they were deposited in the post office on August 28, 2012. Based upon the $0.40 of metered postage on the copies of the envelopes submitted by Applicant's counsel, Respondent can only assume the mailings may have been returned to our office by the USPS for additional postage.

3. Applicant's argument regarding the merits of the Motion to Alter or Amend Judgment underscores the primary problems with this Court's Order granting post-conviction relief. First, there is no precedent from this State's appellate courts or from the United States Supreme Court that requires a trial judge to inform a jury what happens if the jury does not reach a unanimous verdict in sentencing. To the contrary, the case law from this State and from the United States Supreme Court all indicates that the jury is not entitled to know. State v. Adams, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981)(emphasis added), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Copeland, 278 S.C. 572, 584-85, 300 S.E.2d 63, 70 (1982); State v. Spann, 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983)(finding harmless error when judge instructed jury that any sentence for life imprisonment must

be unanimous because jury need not be instructed of legal effect of unalterable divided jury); Jones v. United States, 527 U.S. 373, 381 (1999). The distinction Applicant attempts to make between the long line of cases that hold the jury is not entitled to know what happens if it does not reach a unanimous verdict is of no consequence. In Jones, the Supreme Court noted the "strong interest in having the jury express the conscience of the community on the ultimate question of life or death" would be undermined if the jury was advised of what occurs if the jury does not reach a unanimous verdict. See Jones, 527 U.S. at 382. Respondent submits this concern holds true if such an instruction is given in response to a question from the jury.

Second, Applicant is incorrect in his assessment that the trial court affirmatively misled the jury by not answering the question and by giving the Allen charge. The trial court's decision not to answer the juror's question was not affirmatively misleading. As was the case in Jones, "the proposed instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role-when deliberations break down and the jury is unable to produce a unanimous sentence recommendation." Jones, 527 U.S. at 382. Furthermore, the trial court's Allen charge was wholly consistent with similar charges that were approved in other capital sentencing proceedings. See State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66-67 (2010); Lowenfield v. Phelps, 484 U.S. 231, 237 (1988). Respondent submits that under Applicant's theory, an Allen charge could never be given during the sentencing phase of a capital trial because the charge necessarily instructs the jurors attempt to reach a unanimous verdict. The case law clearly does not support that position.

Finally, Respondent would note that trial counsel was not wrong about his understanding of the law regarding whether a trial judge is required to inform the jury of what occurs if the jury cannot reach a unanimous verdict in sentencing. The case law does not support a finding that any instruction must be given to address this issue. Thus, trial counsel was not deficient in not objecting to the trial court's decision not to answer the jurors' questions regarding what occurs if the jury could not reach a unanimous verdict.

WHEREFORE, premises considered, for the reasons stated above and in the Respondent's Motion to Alter or Amend Judgment, Respondent requests this Court grant its Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP, deny Applicant's Application for Post-Conviction Relief in full, and restore Applicant's death sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General

Post Office Box 11549

Columbia, South Carolina 29211
(803) 734-6305

By:
ATTORNEYS FOR RESPONDENT

September 12, 2012.

EXHIBIT 1

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

August 15, 2012

Via Email and U.S. Mail Delivery

Emily C. Paavola, Esquire
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201

Email: Emily@deathpenaltyresource.org

John R. Mills, Esquire
Attorney at Law
201 W. Main Street, Suite 301
Durham, NC 27701

Email: John@jrmillslaw.com

Alphonzo Simon, Jr., Asst. Attorney General
Brendon McDonald, Asst. Attorney General
Anthony Mabry, Asst. Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Email: asimon@scag.gov

J. Gregory Hembree, Solicitor
Office of the Solicitor, 15th Judicial Circuit
P.O. Box 1276
Conway, SC 29528

Email: hembree1@horrycounty.org
psnowden@horrycounty.org

RE: *Louis Michael Winkler, Jr. v. State of South Carolina*
Case Number: 2011-CP-26-03907

Dear Attorneys:

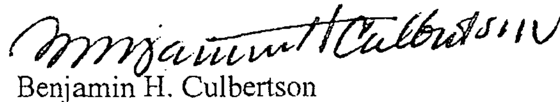
Please find enclosed a copy of the Form 4 and Order Granting Post-Conviction Relief in the above referenced case.

Emily C. Paavola, Esquire
John R. Mills, Esquire
Alphonzo Simon, Jr., Asst. Attorney General
Brendon McDonald, Asst. Attorney General
Anthony Mabry, Asst. Attorney General
J. Gregory Hembree, Solicitor

By copy of this letter and enclosure to the Clerk of Court, I am forwarding the original Form 4 and order for filing.

With kindest regards, I remain

Very truly yours,



Benjamin H. Culbertson

BHC/bhc
Enclosures (a/s)
pc: Melanie Huggins-Ward, Clerk of Court
(via hand delivery)

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-26-3907

Louis Michael Winkler, Jr.
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$ N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Benjamin H. Culbertson, Circuit Court Judge	2148 Judge Code	August 15, 2012 Date

For Clerk of Court Office Use Only

This judgment was entered on the ______ day of ______, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this ______ day of ______, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
Emily C. Paavola	Alphonzo Simon
John R. Mills	Brendon McDonald
	Anthony Mabry

____
CLERK OF COURT

Court Reporter: Brenda R. Babb
Kay H. Richardson

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2011-CP-26-3907
Louis Michael Winkler, Jr.,	)	
	)	
Applicant,	)	
	)	ORDER
vs.	)	GRANTING POST-CONVICTION RELIEF
	)	RE: DEATH SENTENCE
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

TRIAL DATES....................June 18 – 21, 2012
PRESIDING JUDGE....................Benjamin H. Culbertson
APPLICANT'S ATTORNEYS....................Emily C. Paavola
John R. Mills
RESPONDENT'S ATTORNEYS....................Alphonzo Simon
Brendon McDonald
Anthony Mabry
COURT REPORTER....................Brenda R. Babb (June 18, 19, 21, 2012)
Kay H. Richardson (June 20, 2012)

In this case, the Applicant, Louis Michael Winkler, Jr., ("Winkler") seeks post-conviction relief from his conviction and death sentence for murder. Winkler alleges that he received ineffective assistance of counsel. He also alleges that his constitutional and statutory rights were violated when the trial court refused to allow him to discharge his appointed counsel and proceed *pro se*, when the trial court refused to charge the jury on what would happen if they could not reach a unanimous verdict during the sentencing phase of his trial and when the trial court gave jury instructions under unduly coercive circumstances. The Respondent, State of South Carolina, ("State") denies that Winkler is entitled to post-conviction relief.

Based upon a preponderance of the evidence in this case and a review of the pertinent parts of the criminal trial transcript, I do hereby find the following salient facts:

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

---

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

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

LAW AND DISCUSSION

I. RIGHT TO SELF REPRESENTATION

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

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

[3] Winkler was also sentenced by the presiding judge to concurrent sentences of thirty years in prison for first degree burglary and ten years in prison for assault and battery of a high and aggravated nature.
[4] The court's refusal to discharge Winkler's attorneys and allow Winkler to proceed *pro se* was addressed and affirmed by the South Carolina Supreme Court in Winkler's criminal appeal. See *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596, (S.C.2010).

trial. See S.C.Code Ann. § 16-3-20(B) (2003); see also *State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

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

II. FAILURE TO IMPEACH STATE'S EXPERT WITNESS

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

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

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

III. FAILURE TO IMPEACH OTHER STATE WITNESSES

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

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

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

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

As previously stated, the burden is on the petitioner to prove the allegations in a post-conviction relief application. *Smith v. State, ibid.* Therefore, since Winkler failed to present any evidence supporting his claim that he suffers from neurological and cognitive impairments and/or dysfunction, the State's motion for directed verdict on this ground for relief should be granted.

V. FAILURE TO PRESENT EVIDENCE OF MENTAL STATE

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

VI. PHYSICAL HARM AND INTIMIDATION OF JUROR

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

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

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

VII. FAILURE TO CHARGE JURY

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

Under Code of Laws of South Carolina 1976 §16-3-20, when aggravating circumstances are found to exist in a capital murder case tried before a jury, the jury decides whether the defendant should be sentenced to death or life in prison. A jury's decision to impose the death penalty must be unanimous. Code §16-3-20(C) states, in pertinent part, that "[i]f members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment...."

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

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

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

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

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

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

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

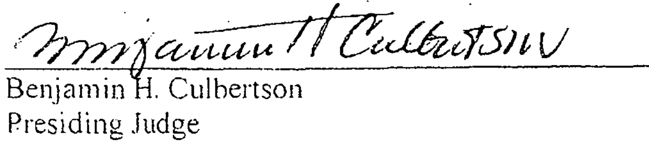
ORDERED, that the application for post-conviction relief by the applicant, Louis Michael Winkler, Jr., for his conviction for murder is DENIED; it is further

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

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

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

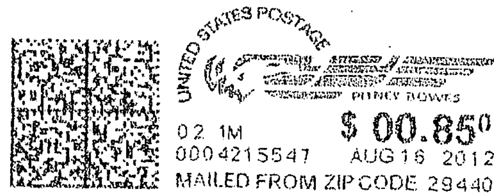
AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

August 15, 2012
Conway, SC

Benjamin H. Culbertson, Judge
The Circuit Court of the Fifteenth Judicial Circuit
Post Office Box 479
401 Cleland Street
Georgetown, SC 29442



Alphonzo Simon, Jr., Asst. Attorney General
Brenda McDonaid, Asst. Attorney General
Anthony Mabry, Assist. Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

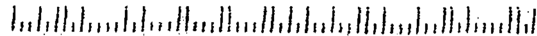
29211$1549 B099 

EXHIBIT 2

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NUMBER: 2011-CP-26-3907
Louis Michael Winkler, Jr.,	)	
	)	
Applicant,	)	
	)	ORDER
vs.	)	GRANTING POST-CONVICTION RELIEF
	)	RE: DEATH SENTENCE
State of South Carolina,	)	
	)	
Respondent.	)	

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

TRIAL DATES............June 18 – 21, 2012
PRESIDING JUDGE............Benjamin H. Culbertson
APPLICANT'S ATTORNEYS............Emily C. Paavola
John R. Mills
RESPONDENT'S ATTORNEYS............Alphonzo Simon
Brendon McDonald
Anthony Mabry
COURT REPORTER............Brenda R. Babb (June 18, 19, 21, 2012)
Kay H. Richardson (June 20, 2012)

In this case, the Applicant, Louis Michael Winkler, Jr., ("Winkler") seeks post-conviction relief from his conviction and death sentence for murder. Winkler alleges that he received ineffective assistance of counsel. He also alleges that his constitutional and statutory rights were violated when the trial court refused to allow him to discharge his appointed counsel and proceed *pro se*, when the trial court refused to charge the jury on what would happen if they could not reach a unanimous verdict during the sentencing phase of his trial and when the trial court gave jury instructions under unduly coercive circumstances. The Respondent, State of South Carolina, ("State") denies that Winkler is entitled to post-conviction relief.

Based upon a preponderance of the evidence in this case and a review of the pertinent parts of the criminal trial transcript, I do hereby find the following salient facts:

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

LAW AND DISCUSSION

I. RIGHT TO SELF REPRESENTATION

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

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

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

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

trial. See S.C.Code Ann. § 16-3-20(B) (2003); see also *State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

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

II. FAILURE TO IMPEACH STATE'S EXPERT WITNESS

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

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

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

III. FAILURE TO IMPEACH OTHER STATE WITNESSES

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

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

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

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

As previously stated, the burden is on the petitioner to prove the allegations in a post-conviction relief application. *Smith v. State, ibid.* Therefore, since Winkler failed to present any evidence supporting his claim that he suffers from neurological and cognitive impairments and/or dysfunction, the State's motion for directed verdict on this ground for relief should be granted.

V. FAILURE TO PRESENT EVIDENCE OF MENTAL STATE

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

VI. PHYSICAL HARM AND INTIMIDATION OF JUROR

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

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

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

VII. FAILURE TO CHARGE JURY

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

Under Code of Laws of South Carolina 1976 §16-3-20, when aggravating circumstances are found to exist in a capital murder case tried before a jury, the jury decides whether the defendant should be sentenced to death or life in prison. A jury's decision to impose the death penalty must be unanimous. Code §16-3-20(C) states, in pertinent part, that "[i]f members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment...."

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

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

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

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

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

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

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

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

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

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

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

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Presiding Judge

August 15, 2012
Conway, SC

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-26-3907

Louis Michael Winkler, Jr.
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

IT IS ORDERED AND ADJUDGED: ☑ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$ N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: **Title abstractors and researchers should refer to the official court order for judgment details.**

Benjamin H. Culbertson, Circuit Court Judge | 2148 Judge Code | August 15, 2012 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 _to attorneys of record or to parties (when appearing pro se) as follows:

Emily C. Paavola	Alphonzo Simon
John R. Mills	Brendon McDonald
	Anthony Mabry
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

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

After Five Days Return To
Melanie Huggins – Ward
Clerk of Court of Horry County
P.O Box 677
Conway, South Carolina 29528-0677

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ANTHONY MABRY
OFFICE OF THE ATTORNEY GENERAL
P.O 11549
COLUMBIA SC 29211

740230853 96 GL*JNMP 29211

EXHIBIT 3

COLUMBIA MPO APC 1
1601 ASSEMBLY ST
COLUMBIA, SC 29201-9998

08/28/2012 08:04:40 PM

Sales Receipt

Product Description	Sale Qty	Unit Price	Final Price
COLUMBIA, SC 29201 Zone-1 First-Class Mail® Letter 0 lb. 0.60 oz.			$.45
Issue Postage:			$.45
$.45 Stamps	2	$.45	$.90
Total:			$1.35

Paid by:
DebitCard $1.35
Account #: XXXXXXXXXXXX2528
Approval #: 152091
Transaction #: 092
23-901980128-99
Receipt #: 125448

APC Transaction #: 97
USPS® # 451804-9550

Thanks.
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ALL SALES FINAL ON STAMPS AND POSTAGE.
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1601 ASSEMBLY ST
COLUMBIA, SC 29201-9998

08/28/2012 08:06:36 PM

Sales Receipt

Product Description	Sale Qty	Unit Price	Final Price
CONWAY, SC 29528 Zone-2 First-Class Mail® Large Envelope 0 lb. 4.70 oz.			$1.70
Issue Postage:			$1.70
Total:			$1.70

Paid by:
DebitCard $1.70
Account #: XXXXXXXXXXXX2528
Approval #: 124376
Transaction #: 093
23-901980128-99
Receipt #: 125449

APC Transaction #: 98
USPS® # 451804-9550

Thanks.
It's a pleasure to serve you.

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REFUNDS FOR GUARANTEED SERVICES ONLY.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the ***Reply to Applicant's Return to Respondent's Motion to Alter or Amend Judgment,*** by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Emily C. Paavola, Esquire
Death Penalty Resource and Defense Ctr
900 Elmwood Ave., Ste. #101
Columbia, SC 29201

John R. Mills, Esq.
201 West Main St., Ste. # 301
Durham, NC 27701

This 12th day of September, 2012.

ALPHONSO SIMON, JR.

RECEIVED
SEP 17 2012
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

September 14, 2012

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

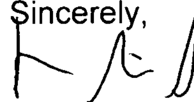
Re: Notice of Appeal
Louis Michael Winkler, Jr., #6027 v. State of South Carolina
2011-CP-26-3907
(Capital PCR Action)

Dear Mr. Shearouse:

Enclosed for filing please find an original and one copy of a notice of appeal and proof of service in the above-referenced case. Also, attached is a copy of the Order of the Honorable Benjamin H. Culbertson granting post-conviction relief and sentencing Mr. Winkler to life imprisonment, filed August 15, 2012. I have also attached a copy of the State's Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP; the Applicant's Return to Respondent's Motion to Alter or Amend Judgment; the Applicant's Supplemental Return to Respondent's Motion to Alter or Amend Judgment; and the State's Reply to Applicant's Return to Respondent's Motion to Alter or Amend Judgment. As indicated in the Notice of Appeal, the Applicant has challenged the timeliness of the service of the State's Motion to Alter or Amend Judgment. The Motion is currently pending before Judge Culbertson. Please forward the clocked-in copy of the Notice of Appeal and Proof of Service to the undersigned in the self-addressed stamped envelope provided.

By copy of this letter, we are serving opposing counsel with this Notice today as well as forwarding a copy to the Clerk of Court for Horry County for filing in their office.

Sincerely,



Alphonso Simon Jr.
Assistant Attorney General

AS/dmd
Enclosures
cc: Emily C. Paavola, Esquire
John R. Mills, Esquire
Melanie Huggins-Ward, Clerk of Court, Horry County
David M. Tatarsky, Esq., South Carolina Department of Corrections
Sandi Wofford, Victims Assistance

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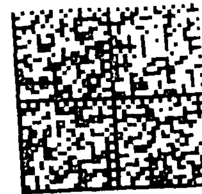

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The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
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