STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

CA No. 11-CP-26-3907
Appellate Case No. 2014-000904

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

v.

STATE OF SOUTH CAROLINA, ... *Petitioner*

PETITION FOR REHEARING

INTRODUCTION

In a 3-2 decision, this Court ruled that the post-conviction court erred when it held that Mr. Winkler's trial counsel was ineffective for failing to object to the trial court's repeated misleading answer to the jury's question: what would happen if they could not reach a unanimous verdict. The trial court's response was as misleading as it was non-responsive, erroneously informing the jurors that they must reach a unanimous verdict. The PCR Court held that trial counsel was obliged to request an accurate response: that the "sentence becomes a matter of law to be imposed by the court." App. 2325. This Court's reversal of sentencing relief takes the trial court's answers out of context and is premised on a misstatement of the issue

before it. The misleading and inaccurate responses triggered trial counsel's obligation to ensure the jury receives accurate and responsive information to its questions – not an obligation to anticipate changes in the law. For these reasons, Mr. Winkler respectfully moves for rehearing. *See* Rule 221(a), SCACR.

ARGUMENT

I. THE COURT'S CONCLUSION THAT THE INSTRUCTIONS WERE NEITHER MISLEADING NOR INACCURATE IGNORES THE CONTEXT IN WHICH THEY WERE GIVEN.

The Court held that "the answer to the jury's question[s] was [not] directly applicable to the jury's deliberations." *Winkler v. State*, No. 2014-000904, slip op. at 10. The court further concluded, "[W]e see little possibility that answering the jury's question could assist the jury in deliberations." *Id.* The Court implied that the PCR Court would have required the jurors to learn "what the sentence will be" if they do not reach a unanimous verdict. *Id.* Finally, the Court explained that informing the jurors that absent a unanimous verdict, the sentence will become "a matter of law to be imposed by the court" would "empower one juror to control the sentence." *Id.* at 13. Mr. Winkler respectfully requests this Court to reconsider these conclusions and its holding reversing the PCR Court's grant of sentencing relief.

The context in which the jury raised their questions made it clear that knowing the answer would help the jury reach a lawful outcome. The PCR court did not hold that the jurors should learn "what the sentence will be." *Id.* at 10. Instead, it held that the jurors should have learned that Mr. Winkler would still be punished even if the jury was unable to reach a verdict. App. 5215. With that holding in mind, it is clear that the PCR Court's holding would not "empower one juror to control the sentence." *Winkler*, slip op. at 13.

After over six hours of deliberation, at 8:00 p.m. on February 7, 2008, the trial court noted the jury was still deliberating and proposed offering the jurors sandwiches for dinner.

With the agreement of the parties, the court informed the jurors that they should let the clerk know if they wished to order dinner. Around 8:15 p.m., the jury indicated it had a question. The trial court instructed them to have the foreperson write down the question and send it to the court. App. 2919-20.

Sometime later that evening, the jury sent out its first question: "Could you please explain what happens if we're not able to reach a unanimous decision?" App. 2921. The trial court did not think the question indicated deadlock. He implored the jury to let him know if they have any other questions. App. 2922-23. A couple of hours later, the judge sent a note to the jurors, asking if they had another question. App. 2924.

In response, the jurors sent out their second question: "What is the law state [sic] when a jury does not reach any unanimous decision at this stage of the trial?" App. 2925. The trial court again concluded the jury did not indicate it was having any problems. App. 2925. The trial court informed the jurors that it could not "answer hypothetical questions" and requested that they ask "specific questions." App. 2925-26.

In response, the jury informed the court they "have one juror that is not participating in deliberations making it difficult to reach a final decision! We are currently at 11 to 1." App. 2926. The court believed this note indicated deadlock, and at 12:26 a.m. instructed them:

> Mr. Foreman, ladies and gentlemen of the jury, you stated that you've been unable to unanimously agree on the decision in this case. As I instructed you earlier, the decision of the jury must be unanimous.
>
> When a matter is in dispute, it isn't always easy for even two people to agree. So, when twelve people must agree, it's even more difficult. In most cases, absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous decision.

> In doing so, you should consult with one another, express your own views, listen to the opinions of your fellow jurors, tell each other how you feel, and why you feel that way. Discuss your differences with open minds. Although the decision of the jury must be unanimous, every one of you has a right to your own opinion. The verdict, the decision you agree to must be your own decision, the result of your own convictions, and you should not give up your firmly-held beliefs merely to be in agreement with a fellow juror.
>
> The majority should consider the minority's position, and the minority should consider the majority's position. You should carefully consider and respect the opinion of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and the evidence in this case.
>
> Now, ladies and gentlemen of the jury, I'm going to give you an option at this time. I'm going to ask you to return and continue deliberations with the hope that you can arrive at a decision, a unanimous decision within a reasonable time. If you wish to do so, to continue deliberations tonight to see if you can come to a unanimous decision within a reasonable time, then I'll be glad to let you do so. I'll let you make the decision. If you'd rather go back to the hotel room, come back tomorrow to see if you can reach a unanimous decision in a reasonable time, you can do that. I will let you make the decision.

App. 2928-29.

The jury decide to return to the hotel, exiting at 12:46 a.m. App. 2931. When court resumed the next day, it asked the jurors whether they wanted to hear the above charge a second time. Trial counsel initially objected, but later withdrew the objection. App. 2934, 2936. The trial court then repeated the nonresponsive *Allen* charge, and the jury returned a death verdict less than one hour later.

In the context of the jurors' repeated inquiries, asking the court to for guidance about what would happen if they could not reach a decision, it should have been clear to the court that at least some of the jurors had concerns about whether Mr. Winkler would have been punished if

they could not reach a unanimous verdict. Instead of receiving reassurance, the trial court informed them that their decision "must be unanimous." That statement is inaccurate as a matter of state and federal law because the jury is not required to reach a unanimous verdict.[1] S.C. Code Ann. § 16-3-20(C); *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) (due process bars coercive jury instructions); *see also* U.S. Const. amend. XIV. It was misleading because it suggested that absent a unanimous verdict, Mr. Winkler would not be punished.

The jury's first note made it plain that they were both deadlocked and uncertain about the consequences of a deadlock. That uncertainty created the risk that absent proper instruction, the jury would conclude that Mr. Winkler would receive no punishment. That risk was realized after the court issued its *second* misleading and nonresponsive instruction that their verdict must be unanimous: they returned a death verdict shortly thereafter.

In this context, this Court's conclusion that answering the question was not "applicable to the jury deliberations" and that answering the question would not "assist in jury deliberations" is erroneous. Answering the jury's question would have clarified an important point that they had repeatedly sought guidance on. Instead, the jury was faced with the seemingly Hobbesian choice of no punishment and the death penalty. Instead of risking setting Mr. Winkler free, the jurors returned a death sentence. That was not the choice the jury was actually facing, and they should have been informed as much. The failure to inform them, in response to their repeated inquiries, forced the jury to make an uninformed decision based in part on the trial court's inaccurate instruction.

[1] The Court emphasizes that any verdict must be unanimous. That is true, but the jury need not reach a verdict in order for a defendant to be sentenced, the critical point here. S.C. Code Ann. § 16-3-20(C).

In this context, it is also clear that properly instructing the jury would not have "empower[ed] one juror to control the sentence. *Winkler*, slip op. at 13. Instead, it would have allowed each juror to abide by his or her firmly held beliefs without being concerned that the person they had already found guilty of murder would not be punished. Moreover, the PCR Court did not hold that the jurors were required to be told "what the sentence will be" absent a unanimous verdict. The PCR Court simply held that they should have been informed that Mr. Winkler would have been sentenced by the court. Providing the jury with responsive, accurate information would have empowered a lawful verdict. This Court's contrary conclusion is erroneous.

II. THE COURT'S INQUIRY INTO TRIAL COUNSEL'S DUTIES SHOULD HAVE BEEN WHETHER COUNSEL WAS OBLIGED TO ENSURE THE JURY RECEIVED ACCURATE RESPONSES

The Court misframed its inquiry into trial counsel's obligations. Trial counsel was obliged to ensure that the jury received an accurate response to its inquiries. Instead of addressing this obligation, the Court asked whether trial counsel had an obligation to "anticipate potential changes in the law which are not in existence at the time of the conviction" and erroneously concluded there was a lack of "any law to support" an objection from trial counsel. *Winkler*, slip op. at 8 quoting *State v. Harden*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). Any requirement to "anticipate changes in the law" is beside the point because well-established precedents establish that jurors – and capital jurors in particular – are entitled to accurate instructions.

Trial counsel has an obligation to provide objectively reasonable assistance. *See Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). That obligation is controlled by a duty to provide objectively reasonable representation. *Strickland v. Washington*, 466 U.S. 668, 687

(1984). The courts have consistently refused to impose "checklist" obligations in every case. *Id.* at 688; *compare* Hon. David Bazelon, *The Realities of* Gideon *and* Argesinger, 64 Geo. L.J. 811, 823, 836-38 (1976) (advocating for "prophylactic rules of conduct for defense counsel," including specific tasks that must be undertaken in each case, as part of the Sixth Amendment protection). Instead, counsel have a broader duty to exercise "independence . . . in making tactical decisions." *Strickland*, 466 U.S. at 689. Meeting this obligation ensures provision of a "bedrock" protection of our criminal justice system. *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). It is an "'obvious truth' . . . that 'any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.'" *Id.* quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

The majority decision risks eroding this protection by finding that counsel would be ineffective only if counsel fails to lodge an objection in response to an identical factual scenario presented and ruled upon in controlling precedent. Such a rule is both over- and under-inclusive of counsel's duties and misconstrues the precedent on which the majority relies. It is over-inclusive of counsel's duties because an "informed, strategic decision" may lead counsel to forgo lodging an objection to an impermissible act that nonetheless provides a defense advantage. *See Council v. State*, 380 S.C. 159, 170, 670 S.E.2d 356, 361 (2009). It is under-inclusive because, as it does here, such a rule undermines the right to effective assistance by failing to require counsel to apply general legal principles – such as the due process requirement to accurate jury instructions – to new factual circumstances. This under-inclusive approach thus runs afoul of the federal Court's instruction that the standard for effectiveness is a "generalized standard rather than . . . a bright line rule." *Williams v. Taylor*, 529 U.S. 362, 382 (2000). It is a rule that "'of necessity requires a case-by-case examination of the evidence . . . designed for the specific

purpose of evaluating a myriad of factual contexts.'" *Id.* quoting *Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J.). The fact-bound approach taken by the majority is contrary to this approach and erodes this bedrock protection.

Although it is accurate to note that counsel is not required to anticipate changes in the law, that issue is beside the point. Trial counsel's obligation was to apply the law as it existed. The law then, as now, was that when "a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946); *see also Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1037 (4th Cir. 1975) ("When a jury makes a specific difficulty known . . . [a]nd when the difficulty involved is an issue . . . central to the case . . . helpful response is mandatory."). This is true even where the jury is initially given proper instructions. *See, e.g., People v. Morris*, 401 N.E.2d 284, 291 (Ill. App. Ct. 1980) (holding although initial accountability instruction was proper, "once the jury had exhibited confusion concerning the applicability of accountability to this instruction, it was reversible error for the trial court to refuse to provide a proper answer to the jury's query.").

Simmons v. South Carolina, 512 U.S. 154 (1994) and related cases clearly established that jurors are entitled accurate instructions. In *Simmons*, the trial court provided an accurate instruction, informing the jury that if the jury returns a life verdict, the defendant would be subjected to "life imprisonment." *Id.* at 160. Nonetheless, the high Court reversed out of concern that the jury would infer that the defendant might someday be released and pose a danger to society. *Id.* at 161-62.

Here, counsel had an obligation to ensure it was made clear that Mr. Winkler would, in fact, be punished if the jury did not return a unanimous verdict. Counsel's failure to do so created a risk that jurors would conclude that he would return to society, either unpunished or

after only a short time. That risk undermines the majority's suggestion that there was "little possibility that answering the jury's question could assist the jury in deliberations." *Winkler*, slip op. at 10. Answering the question, informing the jurors that the court would impose a sentence as a matter of law, would have empowered the jurors to stand by their firmly held beliefs without being concerned that a lack of unanimous verdict would result in Mr. Winkler receiving minimal or no punishment. *See Simmons*, 512 U.S. at 162. Trial counsel had a duty to ensure the jurors received this accurate and responsive information to ensure that the verdict was not coerced.

That obligation, premised on well-established law, distinguishes *Harden v. State*, 360 S.C. 405, 602 S.E.2d 48 (2004), the primary case relied upon by the majority. *Winkler*, slip op. at 6, 8. In *Harden*, the defendant had pled guilty to both conspiracy to traffic cocaine and distribution of cocaine. *See Harden*, 360 S.C. at 407, 602 S.E.2d at 49. This Court held that trial counsel was not ineffective for failing to advise the defendant that double jeopardy would prohibit imposition of a sentence for both the conspiracy and the distribution. *Id.* Counsel was not ineffective because no South Carolina court had addressed whether being sentenced for both conspiracy to traffic a controlled substance and actually distributing it violated double jeopardy. *Id.* The court ultimately held that sentences for the two did not violate double jeopardy. *Id.* at 410-11, 602 S.E.2d at 50. However, the Court noted that in light of the question being open at the time of the plea, counsel was not ineffective for failing to advise his client of the potential problem. *Id.*

Here, the law was clear. Juries, and capital juries in particular, are entitled to accurate instructions and accurate, responsive answers to their questions in this context. Trial counsel had an obligation to ensure they received such an instruction. Counsel did not have to anticipate any changes in the law. They just had to apply well-established precedents to the situation before

them. Instead, they stood by while the jury received inaccurate and misleading instructions rather than a legally accurate response to their question. Lacking this critical information, the jury returned a death sentence. Mr. Winkler respectfully requests this court to reconsider whether counsel was ineffective in light of the long-standing obligation to ensure jurors receive accurate and responsive answers to their questions.

CONCLUSION

For the forgoing reasons, this Mr. Winkler respectfully requests this Court for rehearing and that it order a resentencing proceeding.

Respectfully submitted,

John Mills
PHILLIPS BLACK PROJECT
836 Harrison Street
San Francisco, CA 94107

Emily Paavola
JUSTICE 360
900 Elmwood Ave.
Suite 200
Columbia, SC 29201

December 8, 2016

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CERTIFICATE OF SERVICE

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

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

This the 8th day of December, 2016, in Columbia, South Carolina.

Jill Abernethy

JILL ABERNETHY