

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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*

**MOTION TO STAY
ISSUANCE OF REMITTITUR**

INTRODUCTION

On November 23, 2016, this Court ruled, in a 3-2 decision, that Mr. Winkler had failed to establish that his trial counsel's performance was ineffective, as guaranteed by the Sixth and Fourteenth Amendments to the federal constitution. *Winkler v. State*, No. No. 2014-000904, slip op. (Nov. 23, 2016). On December 8, 2016, Mr. Winkler moved the Court for rehearing, a motion pending before the Court.

Should the Court deny Mr. Winkler's motion for rehearing, Mr. Winkler hereby moves this Court to stay its issuance of the remittitur while he seeks review from the United States Supreme Court. Doing so may prevent unnecessary delay and expenditure of resources by

prematurely returning the case to the PCR court below and will enable him to pursue federal review of the important federal question that split this Court. Mr. Winkler respectfully moves the Court to stay issuance of its remittitur pending resolution of Mr. Winkler's petition for writ of certiorari to the United States Supreme Court. *See* Rule 221(b), SCACR; Rule 240, SCACR.

ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION.

The Court granted review of the following two questions:

Did the PCR judge err in finding trial counsel were ineffective in failing to object when the trial judge declined to answer the jury's questions regarding the consequences of failure to reach a unanimous verdict in a capital murder sentencing proceeding in light of the trial judge's instruction to the jury that a recommendation of either death or life imprisonment must be unanimous?

In granting relief, did the PCR judge err in failing to remand for a new sentencing proceeding?

Order, *Winkler v. State*, No. 2014-00904 (July 23, 2015).

The first question, both before the PCR court below and this Court, was presented and resolved as a matter of federal law. In Mr. Winkler's final amended application, he alleged, *inter alia*, that he was "denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution . . . during the sentencing phase of his capital trial." App. 3958. The PCR court resolved the question in Mr. Winkler's favor, relying on federal law to conclude that trial counsel's performance failed to meet the demands of the Sixth Amendment.

In this Court, Mr. Winkler relied upon the Sixth and Fourteenth Amendments and repeatedly cited to the leading precedents interpreting those amendments. *See, e.g.*, Resp. Br. 13, *Winkler*, No. 2014-000904 (Feb. 9, 2016) (citing *Strickland v. Washington*, 466 U.S. 668

(1984)). The Court, in resolving this question, quoted and relied upon the same precedents. *See Winkler*, No. 2014-000904, slip op. at 5, 6 (relying on *Strickland*, 466 U.S. 668 to assess whether trial counsel’s performance was deficient). Moreover, the state court precedents relied upon by the Court also interpret and apply the federal standard for whether trial counsel met the representation required by the Sixth Amendment. *Id.* at 5 (citing *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)). This Court resolved the issue before it as a matter of federal law. As such, the Supreme Court has jurisdiction to hear the case. *See generally Michigan v. Long*, 463 U.S. 1032, 1037- (1983) (discussing scope of Supreme Court jurisdiction to review state court opinions).

Moreover, the question the court resolved was an important federal question. That is, the Court determined the scope of the right to counsel, a “bedrock” protection in our adversarial system of criminal justice. *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012). It is sufficiently important for the it to be 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.” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *see Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“[The defendant] requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”). This Court’s opinion addressing the scope of this entitlement addressed an important federal question.

II. THE COURT’S DECISION CONFLICTS WITH THE PRECEDENTS OF THE SUPREME COURT, THE FEDERAL CIRCUIT COURTS, AND STATE COURTS OF LAST RESORT.

The Court framed the question before it as whether trial counsel had a duty to “anticipate potential changes in the law which are not in existence at the time of the conviction” and concluded that 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). This framing, in addition to misconstruing the issue before the court, conflicts with the inquiry required by the Supreme Court, as recognized by the Federal Circuit Courts and other state courts of last resort.

The Court failed to recognize that the inquiry into whether trial counsel has provided effective assistance a “generalized standard rather than . . . a bright line rule.” *Williams v. Taylor*, 529 U.S. 362, 382 (2000). As with any generalized standard, it ““of necessity requires a case-by-case examination . . . [and is] 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.); *see also Bousley v. United States*, 523 U.S. 614, 619-20 (1998) (characterizing challenge to guilty plea based on being misinformed of the elements of the offense as controlled by existing precedent because “[t]he only constitutional claim made here is that petitioner’s guilty plea was not knowing and intelligent. There is surely nothing new about this principle[.]”). This Court adopted a bright line rule that unless the same factual scenario has occurred and been favorably ruled upon, counsel has no duty to ensure the jury receives responsive and accurate instructions that address questions salient to their decision. That wooden, overly fact-intensive rule, ignores the flexibility that the Sixth Amendment requires of counsel and the responsiveness that due process demands. There is “nothing new about [the] principle” that juries are entitled to responsive, accurate instructions, and trial counsel had a related duty to ensure they received such instruction. *Bousley*, 523 U.S. at 619-20; *see also Roe v. Flores-Ortega*, 528 U.S. 40 (2000) (rejecting *per se* rule imposing constitutional obligation on counsel in all cases to discuss the possibility of an appeal with the defendant).

In addition to contravening the high Court’s precedents, *supra*, the Court’s ruling is contrary to the decisions of the Supreme Court, the federal circuit courts, and other state courts

of last resort. *See, e.g., Dickerson v. Bagley*, 453 F.3d 690, 692 (6th Cir. 2006) (applying *Strickland* standard to fact-specific scenario and declining to impose bright line rule); *Crittenden v. Chappell*, 804 F.3d 998, 1008 (9th Cir. 2015) (noting *Strickland* mandates “circumstance-specific reasonableness inquiry”); *State v. Givens*, 783 S.E.2d 42, 48 (N.C. App. 2016) (“This Court and the North Carolina Supreme Court have both likewise rejected a bright-line rule in favor of a fact-specific approach that evaluates the prejudice to the defendant.”); *compare State v. Starks*, 833 N.W.2d 146, 167 (Wisc. 2013) (Bradley, J., dissenting) (“The new bright-line test adopted by the majority today is inconsistent with the *Strickland* test for deficient performance.”). The Court’s departure from the holding of the Supreme Court and the holdings of the federal circuits and state courts of last resort on the important question it addressed here provides a substantial basis on which to petition for writ of certiorari. *See* Rule 10(b), Sup. Ct. R.

III. RAISING AND RESOLVING THE IMPORTANT FEDERAL CONSTITUTIONAL QUESTION NOW MAY PREVENT UNNECESSARY EXPENDITURE OF TIME AND RESOURCES.

Allowing Mr. Winkler the short amount of time to seek review and resolve this question may prevent unnecessary expenditure of substantial time and resources by the parties and the courts. That is, Mr. Winkler will seek to vindicate his federal constitutional rights before the United States Supreme Court. If that Court grants review and reverses, it will fully obviate the need for further factual development and an evidentiary hearing before the PCR Court. If the remaining factual development, relating to Mr. Winkler’s brain imaging and related litigation, is fruitful – if it results in potentially meritorious claims – the PCR Court will again be required to hold an evidentiary hearing on those claims.

The few months it will take to seek and resolve Mr. Winkler’s petition for writ of certiorari could prevent the need to undertake that time consuming process. At worst, staying

this Court's remittitur pending resolution of the petition will delay the proceedings below by a few months. Rule 13(a), Sup. Ct. R. (providing for ninety days to petition for certiorari). In light of the important federal constitutional question at issue, the Court should stay issuing remittitur until the Supreme Court has decided whether to accept review.

CONCLUSION

For the forgoing reasons, Mr. Winkler respectfully requests that if this Court denies his motion for rehearing, that this Court stay issuing its remittitur until the United States Supreme Court resolves his petition for writ of certiorari.

Respectfully submitted,



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December 21, 2016

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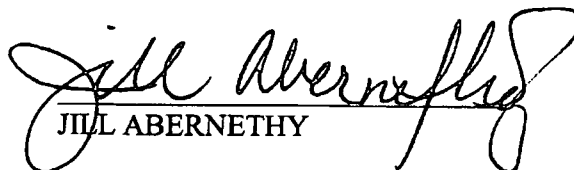
STATE OF SOUTH CAROLINA, *Petitioner*

CERTIFICATE OF SERVICE

I, Jill Abernethy, hereby certify that I have served upon the attorney for the Petitioner one (1) copy Respondent's Motion to Stay Issuance of Remittitur 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 21st day of December, 2016, in Columbia, South Carolina.


JILL ABERNETHY