

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. Supreme Court

Appellate Case No. 2012-212932
CAPITAL PCR CASE

Louis Michael Winkler Jr., Respondent-Petitioner
v.
State of South Carolina, Petitioner-Respondent

**RETURN TO PETITIONER-RESPONDENT'S MOTION TO STAY APPEAL AND
REMAND FOR CONSIDERATION OF POST-TRIAL MOTIONS**

On November 14, 2012, Petitioner-Respondent (hereinafter, "the State") filed a Motion to Stay Appeal and Remand for Consideration of Post-Trial Motions ("Motion"). The State requests that this Court stay the appeal and remand the case. The State wants the Circuit Court to consider the substance of its Motion for Reconsideration of Order Dismissing Respondent's Motion to Alter or Amend Judgment ("Motion to Reconsider") and its Motion to Alter or Amend Judgment pursuant to Rule 59(e) ("Motion to Alter or Amend").

There are no properly filed post-trial motions to consider. The State's Motion to Alter or Amend was untimely, and the Circuit Court properly dismissed it. The State's Motion to Reconsider is an improperly successive motion for reconsideration and does not need to be

addressed by the Circuit Court. Therefore, this Court should deny the State's Motion and allow the appellate process to proceed.

PROCEDURAL HISTORY

On August 15, 2012, the circuit below entered an order granting Mr. Winkler post-conviction relief. On the same day, both parties received notice that the order had been entered and a copy of the order via electronic mail. On Monday, August 20, both parties received a paper copy of the same order via U.S. mail.

By the State's own account, the State placed its Motion to Alter or Amend the order in the mail on August 28 with insufficient postage.¹ Ex. 1, at 2-4 (Reply to Applicant's Return to Respondent's Motion to Alter or Amend Judgment). The State is not sure who, but on August 31, 2012, someone placed adequate postage on the Motion to Alter or Amend and sent it counsel for Mr. Winkler. Ex. 1 at 2-3; Ex. 2 (envelopes from service of State's Motion to Alter or Amend).

On September 6, 2012, Mr. Winkler filed a Return to the Motion to Alter or Amend, noting, among other things, that the service of the Motion to Alter or Amend was late. Ex. 3. On September 12, 2012, Mr. Winkler filed a Supplemental Return. Ex. 4. Counsel for the State had informed undersigned counsel that insufficient postage was the reason the Motion to Alter or Amend was filed on August 31 instead of August 28. On September 12, the State filed a Reply to Mr. Winkler's Return to Respondent's Motion to Alter or Amend Judgment. Ex. 1.

¹ The State claims the Motion to Alter or Amend was mailed on August 28 and that it was returned for inadequate postage. However, 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. 2.

On September 14, the State filed its Notice of Appeal before this Court. On September 17, Mr. Winkler filed a Notice of Cross-Appeal. On October 1, 2012, the Circuit Court dismissed the State's Motion to Alter or Amend. Ex. 5. Ten days later, the State filed a Motion to Reconsider the Order dismissing the State's Motion to Alter or Amend. Ex. 6. That motion is pending before the Circuit Court.

On November 14, the State filed a Motion to Stay Appeal and Remand for Consideration of Post-Trial Motions. This Return follows.

ARGUMENT

Neither of the "post-trial" motions the State wishes to have heard was properly filed. Thus, a stay and remand delaying implementation of Mr. Winkler's relief is neither required nor appropriate.

"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." S.C. R. Civ. P. 59(e) (West 2012). 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).

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting *Budlinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988)). "[A] second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration." *Coward Hund Construciton Co., Inc. v. Ball Crop.*, 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999); *see also, Elam v South Carolina Dep't of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004) ("reaffirm[ing] the rationale and principles expressed in

Coward Hund’ that, among other things, a successive motion for reconsideration is improper “where the trial judge’s ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment.”)

Here, the State has asked this Court to stay the appellate process for consideration of two post-trial motions: (1) the State’s Motion to Alter or Amend the Judgment and; (2) the State’s subsequent Motion to Reconsider the Dismissal of the its Motion to Alter or Amend.

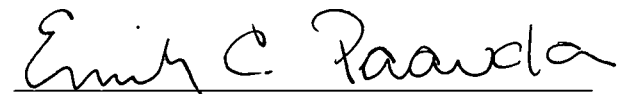
The State had until August 30, ten days after its receipt of notice of the judge’s order, to properly serve its Motion to Alter or Amend. S.C. R. Civ. P. 59(e). It failed to do so. On August 28, by its own account, the State placed inadequate postage on its attempted service by mail. Ex. 1. On August 31, however, someone placed the balance of the required postage on the parcel and posted it to counsel for Mr. Winkler. Ex. 2. Thus, the parcel was not properly served until August 31. *Lindsey*, 323 S.C. at 59. By that time, however, the State was out of time. S.C. R. Civ. P. 59(e). Because the State failed to properly serve its Motion to Alter or Amend within the required time, the trial court’s dismissal of the motion was proper. Thus a stay and remand for further consideration of the improperly filed Motion to Alter or Amend is unnecessary and unwarranted.

The State is also requesting that this Court halt the appellate process for consideration of its Motion to Reconsider. The court below properly dismissed the first Motion to Alter or Amend, so reconsideration of that motion would not serve any purpose. Moreover, because the court’s ruling on the first Rule 59(e) motion did not alter the court’s original judgment, the State’s Motion to Reconsider is improperly successive. *See Coward Hund Construciton Co., Inc.*, 336 S.C. at 3; *see also, Elam*, 361 S.C. at 20. Thus, no remand is required for consideration of this motion either.

CONCLUSION

Neither of the post-trial motions the State wishes to have heard was properly filed. Thus, a stay of the appellate proceedings and remand is neither required nor appropriate.

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

November 19, 2012

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), SCRCF; 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

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

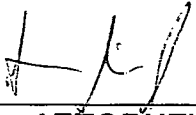
J. ANTHONY MABRY
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Post Office Box 11549

Columbia, South Carolina 29211
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By: 

ATTORNEYS FOR RESPONDENT

September 12, 2012.

EXHIBIT 2

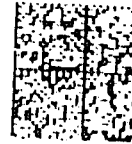


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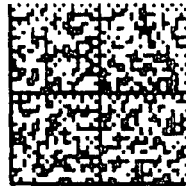


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John R. Mills, Esq.
201 West Main St., Ste. #301
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POST OFFICE BOX 11549
COLUMBIA, SOUTH CAROLINA 29211-1549



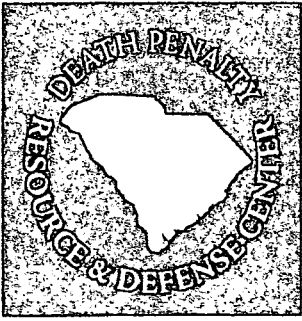
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08/31/2012
Mailed From 29201
US POSTAGE

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

EXHIBIT 3



September 6, 2012

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

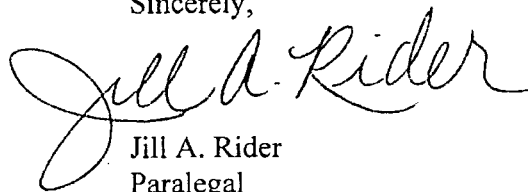
RE: *Louis Michael Winkler v. The State of South Carolina*
11-CP-26-03907

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.

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
Louis Michael Winkler Jr.)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP 26-03907

**RETURN TO RESPONDENT'S MOTION
TO ALTER OR AMEND JUDGMENT**

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, SCRCPP, 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 United 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 deadline² 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 different 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).

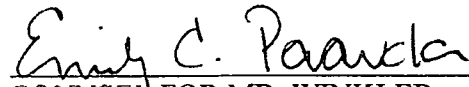
Respondent also fails to address trial counsel's testimony about the situation presented here: whether to accurately respond to the jurors' inquiry as to what would happen if they failed to reach a unanimous verdict. As Respondent, notes, trial counsel was aware of the case law prohibiting an instruction 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

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September 6, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF Horry)
)
LOUIS MICHAEL WINKLER, JR.)
 SK6027)
 Applicant,)
 vs.)
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 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

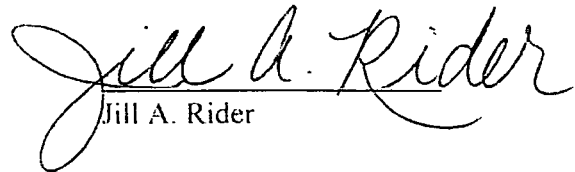

Jill A. Rider

EXHIBIT 4

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Horry)
)
 Louis Michael Winkler Jr.)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP 26-03907

**SUPPLEMENTAL RETURN TO
 RESPONDENT'S MOTION TO ALTER
 OR AMEND JUDGMENT**

FILED
 Horry County
 2012 SEP 12 PM 4:21
 MELANIE HUGHES-WARD
 CLERK OF COURT

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

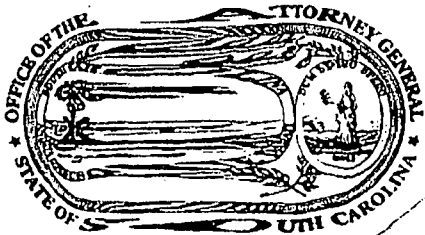
EMILY C. PAAVOLA

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

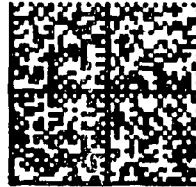
JOHN R. MILLS

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



neopost

049J82042234

\$00.400

08/31/2012

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

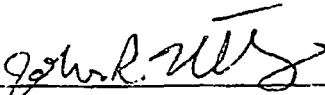
STATE OF SOUTH CAROLINA)
)
COUNTY OF Horry)
)
LOUIS MICHAEL WINKLER, JR.)
)
Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

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 2011 upon the following:

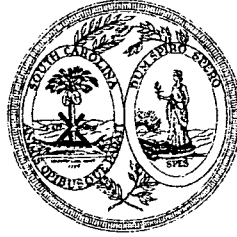
Mr. Al Simon
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211



John R. Mills
Law Offices of John R. Mills

FILED
Horry COUNTY
2012 SEP 12 PM 4:21
MELANIE HUGGINS-WARD
CLERK OF COURT

EXHIBIT 5



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

September 26, 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 Dismissing Respondent's Motion To Alter Or Amend Judgment 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

September 26, 2012
Page Two

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

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 : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; 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:

Respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRPC, is INVOLUNTARILY DISMISSED.

*This motion was decided without oral arguments.

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
 Benjamin H. Culbertson, Circuit Court Judge

2148
 Judge Code

September 26, 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

John R. Mills

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alphonzo Simon, Jr.

Brendon McDonald

Anthony Mabry

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: None

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2011-CP-26-3907

Louis Michael Winkler, Jr.,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

ORDER DISMISSING RESPONDENT'S
MOTION TO ALTER OR AMEND JUDGMENT

Before the court is the respondent's "Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRPC." This motion is involuntarily dismissed due to this court's lack of jurisdiction over the motion.¹

On 8/15/2012, this court issued its order ("PCR Order") denying the applicant's petition for post-conviction relief from his conviction for murder but granting the applicant's petition for post-conviction relief from his sentence of death. On 8/28/2012, the respondent mailed its motion to alter or amend the PCR Order pursuant to Rule 59(e), SCRPC, to the clerk of court, opposing counsel and the undersigned presiding judge. On 9/14/2012, the respondent filed its Notice of Appeal with the South Carolina Supreme Court appealing the PCR Order. On 9/17/2012, the applicant filed his Notice of Cross Appeal in this case with the South Carolina Supreme Court; likewise appealing the PCR Order. Both the respondent's Notice of Appeal and the applicant's Notice of Cross Appeal were filed prior to this court ruling on the respondent's motion to alter or amend the PCR Order.

¹ This motion is dismissed and this order issued without oral arguments.

Rule 205, SCACR, states:

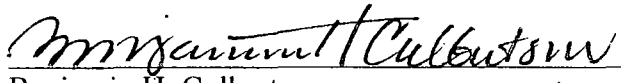
Upon the service of the notice of appeal, the appellate court shall have *exclusive jurisdiction* over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal. (emphasis added).

Both parties' appeals directly affect the respondent's pending motion to alter or amend and neither party has sought a writ of supersedeas. Therefore, pursuant to Rule 205, SCACR, the South Carolina Supreme Court has exclusive jurisdiction in this case and this court is without jurisdiction to rule on the respondent's motion to alter or amend.

NOW, THEREFORE, based upon the above, it is hereby

ORDERED, that the respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCR, dated 8/28/2012 is INVOLUNTARILY DISMISSED.

AND IT IS SO ORDERED



Benjamin H. Culbertson
Presiding Judge

September 26, 2012
Georgetown, SC

EXHIBIT 6



ALAN WILSON
ATTORNEY GENERAL

October 11, 2012

The Honorable Melanie Huggins-Ward
Clerk of Court
Horry Courthouse
1301 Second Avenue
Conway, SC 29526

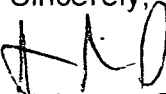
Re: *Louis Michael Winkler, Jr., #6027 vs. The State of South Carolina*
C/A No. 2011-CP-11-3907

Dear Ms. Huggins-Ward:

Enclosed please find an original and one (1) copy of Respondent's Motion for Reconsideration of Order Dismissing Respondent's Motion to Alter or Amend Judgment, 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.)
Robert M. Dudek, 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)
)
COUNTY OF HORRY)
)
Louis Michael Winkler, Jr., #6027,)
)
) Applicant,)
)
) v.)
)
)
)
The State of South Carolina,)
)
)
) Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

C/A No. 2011-CP-11-3907

**RESPONDENT'S MOTION FOR
RECONSIDERATION OF ORDER
DISMISSING RESPONDENT'S
MOTION TO ALTER OR AMEND
JUDGMENT
(Capital Case)**

Comes now Respondent, above-named, by and through the Office of the Attorney General, and pursuant to Rule 59(e), SCRCPP, and Elam v. S. Carolina Dept. of Transp., 361 S.C. 9, 20, 602 S.E.2d 772, 777 (2004), hereby moves this Court to reconsider its Order Dismissing Respondent's Motion to Alter or Amend Judgment, signed by this Court on September 26, 2012. Respondent received a copy of the signed Order on Monday, October 1, 2012 from Judge Culbertson. Respondent requested and received notice of entry of the Order from the Horry County Clerk of Court on October 11, 2012.¹ Respondent submits this Court did not have jurisdiction to enter the Order Dismissing Respondent's Motion to Alter or Amend Judgment. In support of this Motion, Respondent asserts the following:

In the Order, this Court determined that it did not have jurisdiction to rule upon Respondent's Motion to Alter or Amend Judgment under Rule 205, SCACR, because

¹ To date, Respondent has not received written notice of entry of the Order. On October 11, 2012, Respondent requested a copy of the file-stamped Order and Form 4 from the Horry County Clerk of Court. A copy of both the Order and the form were subsequently emailed to Respondent.

both parties had filed a notice of appeal. Based upon that finding, this Court ordered the Motion was involuntarily dismissed. Respondent submits this Court did not have jurisdiction to enter this Order. As noted by this Court, Rule 205, SCACR states,

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

See also Grosshuesch v. Cramer, 377 S.C. 12, 31 n.7, 659 S.E.2d 112, 122 n.7 (2008).

Respondent's Motion to Alter or Amend Judgment included matters affected by the appeal. Thus, this Court had no jurisdiction to take any action upon the Motion to Alter or Amend Judgment, including filing and entering the Order Dismissing the Motion to Alter or Amend Judgment. Respondent submits action on the Motion to Alter or Amend Judgment could only be taken by this Court if the South Carolina Supreme Court remands the case to this Court for consideration of the post-trial motions. See Otten v. Otten, 287 S.C. 166, 337 S.E.2d 207 (1985)(granting motion to remand and dismissing appeal without prejudice where Appellant filed motions under Rule 59(e) and Rule 60(a) to modify order and Appellant served and filed notice of appeal before trial court ruled on motions); see also Wicker v. Anderson County Council, 289 S.C. 479, 347 S.E.2d 96 (1986)(Supreme Court remanded case back to trial court for consideration of timely post-trial motion filed after filing of notice of appeal); but see Hudson v. Hudson, 290 S.C. 215, 215-16, 349 S.E.2d 341, 341-42 (1986)(holding service and filing of Notice of Appeal before filing of timely post-trial motion under Rule

59 does not deprive lower court of jurisdiction to consider the motion).² As a result, Respondent submits this Court should reconsider and withdraw its Order Dismissing Respondent's Motion to Alter or Amend Judgment.

² Respondent notes that even under the reasoning in Hudson, this Court's Order Dismissing Respondent's Motion to Alter or Amend Judgment would be improper. Under Hudson, this Court arguably had jurisdiction to rule upon Respondent's Motion to Alter or Amend Judgment; thus, the denial based upon a lack of jurisdiction would have been incorrect.

CONCLUSION

WHEREFORE, premises considered, for the reasons stated above Respondent respectfully requests that this Court reconsider its Order Dismissing Respondent's Motion to Alter or Amend Judgment.

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

October 11, 2012.

By: 

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
Louis Michael Winkler, Jr., #6027,)
)
Applicant,)
)
v.)
)
The State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

C/A No. 2011-CP-11-3907

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the **Respondent's Motion For Reconsideration of Order Dismissing Respondent's Motion to Alter or Amend Judgment**, via U.S. mail, first class, postage pre-paid, addressed to:

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

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

Robert M. Dudek, Esq.
SCCID/Division of Appellate Defense
1330 Lady St., Ste. #401
Columbia, SC 29201

This 11th day of October, 2012.



ALPHONSO SIMON, JR.

ATTORNEYS FOR RESPONDENT

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

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

v.

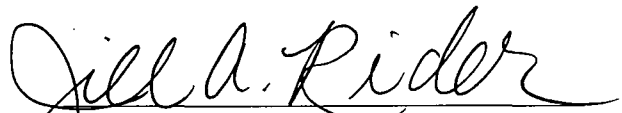
STATE OF SOUTH CAROLINA, *Petitioner/Respondent*

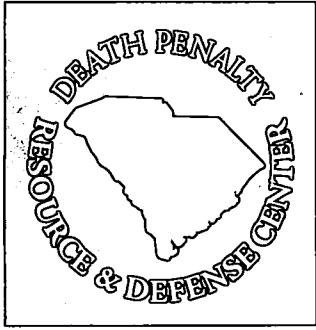
PROOF OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the Petitioner/Respondent one (1) copy respondent/petitioner's Motion to Stay Appeal and Remand for Consideration of Post-Trial Motions 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 19th day of November, 2012, in Columbia, South Carolina.


JILL RIDER



RECEIVED
NOV 21 2012
S.C. Supreme Court

November 19, 2012

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

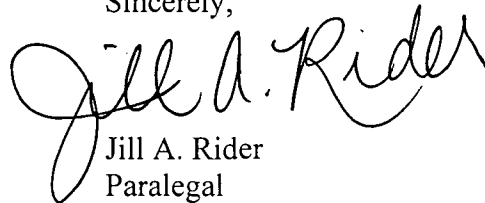
Re: *Louis M. Winkler v. State of South Carolina, 2011-CP-26-03907*

Dear Mr Shearouse:

Please find enclosed for filing, with proof of service, the original and seven copies of the Respondent/Petitioner's Motion to Stay Appeal and Remand for Consideration of Post-Trial Motions in the above-referenced case. Please clock in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact me.

Sincerely,


Jill A. Rider
Paralegal

cc: Alphonso Simon, Jr., Esquire
John R. Mills, Esquire
Robert Dudek, Esquire